

No. 1-13-2367

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 11 CR 12184
)	
JAVIER SOTO,)	Honorable
)	Charles P. Burns,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE MASON delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held:* Two eyewitnesses' pre-trial identifications were reliable and sufficient to support the defendant's convictions. Prosecutor's remarks during closing arguments properly responded to the defense's theory and characterization of the case, reflected the evidence and recited relevant law. Defense counsel provided competent representation because counsel made strategic decisions that were based on the evidence and were in the defendant's best interests. Inquiry into the defendant's posttrial *pro se* claims of ineffective assistance of counsel revealed there was no "possible neglect" of his case. Improperly imposed fines and fees are vacated or modified.

¶ 2 Following a jury trial, defendant Javier Soto was convicted of aggravated battery with a firearm and attempted first-degree murder. Soto appeals challenging the sufficiency of the evidence. He asserts the unreliability of prior positive identifications of him as the shooter and

No. 1-13-2367

the trial testimony of witnesses who either equivocated or recanted their prior identifications. Soto also challenges the fairness of his trial based on prejudicial remarks the prosecutor made during closing arguments that he claims: (1) drew improper inferences; (2) misstated the evidence and law; (3) improperly shifted the burden of proof; and (4) improperly inflamed the jury's passion. Soto also claims that his counsel provided ineffective assistance because counsel failed to: (1) object to improper closing arguments; (2) present promised alibi witness testimony; (3) object to an allegedly inaccurate paraphrasing of the victim's statement; and (4) object to prejudicial testimony and photographs that allegedly inferred prior criminal acts. Alternatively, Soto contends his ineffective assistance of counsel claims should be remanded for a *Krankel* inquiry. Because we find no merit in any of Soto's claims of trial error, we affirm his convictions.

¶ 3

BACKGROUND

¶ 4

At approximately 10 p.m. on June 21, 2011, Jesus Salgado stood outside on a porch step with his friend Miguel Islas in front of Islas's house located at 6141 South Washtenaw in Chicago. Salgado belongs to the Satan Disciples gang and Islas's house was located in the southern edge of his gang's territory. The Ambrose, Latin Kings and Two Six are the rival gangs that the Satan Disciples worry about near Islas's neighborhood.

¶ 5

Islas went inside his house briefly while Salgado remained outside. While Islas was inside, Salgado saw a blue car drive slowly by traveling southbound and on the other side of the street from where he stood. Salgado then walked to the street as the blue car continued to drive by. He recognized Soto as the car's passenger and they "just looked at each other." Salgado also knew Soto by his nickname "Lil Joker." After the car drove by, Salgado walked back to the porch. Salgado had never seen the blue car before nor did he associate the car with a different

gang.

¶ 6 Islas came back outside and Salgado told him about the blue car that drove by. Islas asked Salgado if he wanted to go inside or stay outside and they remained outside. Within three or four minutes, someone—whom Salgado identified later that night as Soto—emerged from the gangway across the street one or two houses over and opened fire at Salgado, who heard three gunshots. The first bullet hit Salgado's left shoulder near his collarbone causing him to immediately fall hitting his back on the porch step. Salgado could not get up and run, so he had "no choice but to look around." When he did, he saw Soto run up to the middle of the street closer to Salgado and start shooting at him again.

¶ 7 An ambulance arrived at the scene within 10 minutes after the shooting to transport Salgado to the hospital. While the paramedics were providing care to Salgado at the scene, an officer asked Salgado "who did it" and he responded "the Ambrose." Salgado also told the officer that the shooter was a slim, white Hispanic wearing a black shirt and blue jeans.

¶ 8 Within an hour and a half of the shooting, detectives visited Salgado at the hospital and showed him a series of 15 photographs. Salgado viewed the photographs one by one and signed his name on Soto's photograph identifying him as the shooter and the person he knew as "Lil Joker." But Salgado later claimed he answered the detectives' questions just so they would leave him alone and he was worried about whether he was going to live or die. Medical staff treated Salgado and he was on a morphine drip the entire time he spoke to the detectives. The shot that hit Salgado paralyzed him.

¶ 9 At 2:30 a.m. on July 7—16 days after he was shot—Assistant State's Attorney Jennifer Hamelly and a detective asked Salgado more questions and took his statement. By this time, Salgado, who was still hospitalized, knew he was paralyzed and was still on morphine. A

No. 1-13-2367

breathing tube made it difficult for Salgado to speak, so he handwrote most of his statement.

Salgado clarified that in his written statement, he: (1) referred to Soto as "him" and "Lil Joker;" (2) saw Soto as the passenger in the blue car; and (3) saw Soto after he was shot. Salgado wrote "Lil Joker" and "Javier" on another photograph to identify Soto as the shooter. At the time Salgado wrote his statement, he told the ASA that his memory of the shooting was not affected and even though he was on medication, he could answer her questions. The ASA and Salgado's girlfriend also signed Salgado's handwritten statement to reflect that it was true and accurate.

¶ 10 During Soto's trial, Salgado testified that his written statement included things that were not accurate. In court, Salgado identified Soto as the person he knows as "Lil Joker." But Salgado testified he was not 100% sure if Soto was the shooter because he glanced fast at the shooter and focused more on the numbness in his legs. Salgado also said it was pretty dark outside and trees blocked the light from nearby streetlights. Salgado knew Soto to be an Ambrose on the day of the shooting.

¶ 11 Miguel Islas testified that on June 21, 2011, he was hanging out with Salgado in front of his house. Islas faced his house standing on the sidewalk with his back to the street and Salgado stood on a step facing the street when the gunfire started. Islas heard a gunshot and saw Salgado immediately fall to the ground on his back. Islas heard more gunshots coming from across the street and he started to run in a zigzag pattern to dodge the bullets. Islas saw someone across the street near a parked car firing the gunshots, but it was dark outside. Islas heard four or five gunshots and the shooting lasted approximately five seconds.

¶ 12 After the gunfire stopped, Islas ran to Salgado who told him that "Lil Joker" was the shooter. When the police arrived at the scene, Islas told the police what Salgado had told him. Islas knows a "Lil Joker" from the neighborhood, but at trial denied he saw that person or the

No. 1-13-2367

shooter in court. Islas testified that he did not know who shot Salgado.

¶ 13 On July 7 at approximately 1 a.m., Islas spoke with the police and ASA Hamelly at the police station and gave a statement. Islas, who was then 21 years old, identified himself as a member of the Satan Disciples since he was 14 or 15. Islas indicated that the Ambrose and Satan Disciples were rival gangs and had an ongoing dispute. Islas had known "Lil Joker" for approximately three or four years, but did not know his real name.

¶ 14 ASA Hamelly wrote Islas's statement by hand and showed him a photograph of Soto, whom he identified as the person he knew as "Lil Joker." During his trial testimony, Islas did not recall telling the ASA when she memorialized his statement that he: (1) recognized "Lil Joker" as the passenger in the blue car; (2) saw "Lil Joker" walk into the street after Salgado fell to the ground; (3) saw "Lil Joker" hold a gun pointing it toward him; (4) heard a clicking sound as if "Lil Joker" tried to shoot again but the gun slipped and did not fire; (5) looked at "Lil Joker" who shot the gun again; (6) saw a flash when "Lil Joker" fired the gun; (7) ran back and forth to avoid getting shot; (8) heard three gunshots in total and two or three "clicks;" and (9) could not see the gun that night but thought it was a revolver because he recognized the clicking sound. Islas also did not recall changing the word "Miguel" to "Lil Joker" regarding the shooter's identity in the written statement after ASA Hamelly read the statement out loud.

¶ 15 At approximately 10 p.m. on the night of the shooting, Detective Cullen Murphy of the Chicago police department arrived at the scene. Detective Murphy did not recover any shell casings at the scene. Based on his experience, the lack of shell casings indicated that a revolver was involved in the shooting because revolvers do not eject casings out of the weapon upon discharge. The only physical evidence that the police located was bullet holes in a Jeep on the driver's side near the rear of the vehicle. The bullets could not be removed because they were

No. 1-13-2367

embedded in the vehicle. The Jeep was located almost directly in front of Islas's house, and was essentially in Salgado's line of sight. The police canvassed the area, but it did not appear that the shooter touched anything, which explained why no fingerprint or DNA testing was performed.

¶ 16 Detective Murphy left the scene and arrived at the hospital at approximately 10:30 p.m. to talk to Salgado, who told him that "Lil Joker" shot him. Detective Murphy then went to the 8th District police station where he used "your" (the State's Attorney's) computer database to generate 15 photographs of known "Lil Jokers." After compiling the 15 photographs, Detective Murphy returned to the hospital at approximately 11:30 p.m. to show Salgado the photo array. The photographs did not include any identifying information. After viewing the 15 photographs, Salgado signed his name on Soto's photograph identifying him as the shooter. In court, Detective Murphy confirmed that Salgado identified Soto.

¶ 17 On July 6 at approximately 2:30 p.m., Soto was arrested on an investigative alert and Detective Murphy contacted Islas to go to the police station. Islas signed a line-up advisory form and at 11:23 p.m., he viewed a five-person physical line-up. According to Detective Murphy, Islas identified Soto in the line-up as the shooter without hesitation.

¶ 18 Detective Murphy was also present when Islas gave his statement to ASA Hamelly. Detective Murphy witnessed Islas change the name on page four of his statement from "Miguel" to "Lil Joker" because "Lil Joker" was the shooter.

¶ 19 ASA Hamelly testified that she arrived at the police station on July 7, and memorialized Islas's statement. Islas identified Soto as the shooter in a photograph, which ASA Hamelly attached to his statement.

¶ 20 From the police station, ASA Hamelly went to the hospital to talk with Salgado and take

No. 1-13-2367

his statement. Because Salgado had been intubated with a breathing tube, he had difficulty speaking and wrote portions of his statement. Salgado was on pain medications, but told ASA Hamelly that the medications had no effect on his thinking or his memory of the shooting. Attached to Salgado's statement was a photograph on which he wrote "Lil Joker" and "Javier" identifying Soto as the shooter.

¶ 21 The parties stipulated that Dr. Ellen Omi treated Salgado on June 22 for a gunshot wound to his left chest. According to Dr. Omi, Salgado sustained a clavicle fracture, two fractured ribs, a collapsed lung and fractured vertebrae that contained a lodged bullet.

¶ 22 The State rested and the defense rested without introducing any evidence. The parties then argued Soto's motion for judgment of acquittal asserting insufficient evidence, which the trial court denied because the witnesses' prior statements were substantive evidence of their previous identifications. The defense again informed the trial court that it was resting its case in chief. The trial court asked Soto questions regarding the decision to rest his case without presenting any evidence or witnesses, including his own testimony. Soto responded that he agreed with those decisions.

¶ 23 During closing arguments, both parties addressed the lack of physical evidence and focused on the eyewitnesses' prior identifications in comparison to their in-court testimony where they either equivocated or recanted their identifications of Soto as the shooter. While deliberating, the jury requested Salgado's and Islas's written statements. Both parties objected to providing the jury with Salgado's statement because only two lines of the statement were referenced during trial. Neither party objected to providing the jury with Islas's statement.

¶ 24 The jury found Soto guilty of aggravated battery with a firearm and attempted first-degree murder. Posttrial, Soto raised a *pro se* claim of ineffective assistance of counsel

No. 1-13-2367

asserting counsel: (1) opted for a jury trial when he wanted a bench trial; (2) failed to call any witnesses on his behalf; and (3) erred in not seeking to disqualify a juror. The trial court conducted a limited *Krankel* inquiry into Soto's claims and found that his attorneys were more than competent, commenting that their performance was "exemplary."

¶ 25 The trial court merged the aggravated battery with a firearm conviction into the attempted murder conviction and sentenced Soto to 34 years in prison. The trial court denied Soto's motion for a new trial and to reconsider his sentence. The trial court credited Soto with 737 days served and imposed fees and fines totaling \$770, which were comprised in part of the following: (1) \$15 state police operations fee; (2) \$50 court system fine; (3) \$100 VCVAF fine; (4) \$25 VCVAF fine; and (5) \$5 electronic citation fee. Soto timely appealed.

¶ 26

ANALYSIS

¶ 27

A. Sufficiency of Evidence

¶ 28

Soto claims that the State failed to prove him guilty beyond a reasonable doubt because the pre-trial eyewitness identifications were not reliable and the witnesses either equivocated or recanted their identification of Soto as the shooter at trial.

¶ 29

A defendant has a constitutional right not to be convicted of a crime " 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' " *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004) (quoting *In re Winship*, 397 U.S. 358, 364 (1970)). When a defendant challenges the sufficiency of the evidence, we must determine " 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

¶ 30 The State must prove beyond a reasonable doubt the offender's identity. *People v. Lewis*, 165 Ill. 2d 305, 356 (1995). When "the finding of guilt depends on eyewitness testimony, a reviewing court must decide whether, in light of the record, a fact finder could reasonably accept the testimony as true beyond a reasonable doubt." *Cunningham*, 212 Ill. 2d at 279. But we must not retry the defendant. *Id.* Although vague or doubtful identifications are insufficient to support a conviction, identification of the accused by just one eyewitness can support a conviction provided the witness viewed the accused under circumstances permitting a positive identification. *Lewis*, 165 Ill. 2d at 356.

¶ 31 Here, two eyewitnesses separately identified Soto as the shooter on multiple occasions. First, Salgado named "Lil Joker" as the shooter to Islas on the scene and to Detective Murphy at the hospital and also identified him in a 15-photograph array shortly after the shooting. Roughly two weeks later, Salgado gave his statement naming Soto as the shooter and again identified him in another photograph.

¶ 32 The second eyewitness, Islas, identified "Lil Joker" from a five-person line-up conducted approximately two weeks after the shooting. Also that same day, Islas gave a statement naming "Lil Joker" as the shooter and identified "Lil Joker" in a photograph.

¶ 33 Although at trial Salgado equivocated in his identification of Soto as the shooter and Islas recanted his identification, their prior positive identifications were admitted as substantive evidence for the jury to weigh. See *People v. Lewis*, 223 Ill. 2d 393, 402 (2010) (a third party's testimony about a declarant's out-of-court identification is admissible where the declarant testifies in court and is subject to cross-examination on the prior identification statement) (citing 725 ILCS 5/115-12 (West 2002)); *People v. Brown*, 2013 IL 114196, ¶ 48 (the trier of fact must

resolve conflicts in testimony, weigh the evidence and draw reasonable inferences from the facts).

¶ 34 But Soto claims that the eyewitnesses' prior identifications were unreliable. In assessing the reliability of a witness' identification, our courts have adopted the well-established factors set forth in *Neil v. Biggers*, 409 U.S. 188 (1972). *People v. Slim*, 127 Ill. 2d 302, 307 (1989). The *Biggers* factors include: (1) the witness' opportunity to view the accused at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the time of confrontation; and (5) the length of time between the crime and the identification. *Id.* at 308. Each of these factors supports a finding that the identifications were reliable.

¶ 35 1. Opportunity to View the Accused

¶ 36 When considering an eyewitness' opportunity to view the offender, courts determine "whether the witness was close enough to the accused for a sufficient period of time under conditions adequate for observation." *People v. Carlton*, 78 Ill. App. 3d 1098, 1105 (1979).

¶ 37 Although it was prior to the shooting, Salgado first had the opportunity to view Soto, a person known to him as "Lil Joker," when the car in which Soto was a passenger drove slowly past Islas's house. See *People v. Williams*, 2015 IL App (1st) 131103, ¶ 71 (a witness who saw the accused as a passenger in a vehicle that drove slowly down the street before he returned on foot and started shooting had ample opportunity to view the accused). Salgado again observed Soto when he emerged from the gangway across the street several minutes later and started shooting directly at Salgado not just once, but a second time after moving closer to Salgado. Likewise, Islas viewed Soto after Salgado fell to the ground after being shot. The short distance from Islas's porch to the middle of the street where Soto fired the gun provided an adequate

opportunity for both witnesses to view the shooter and recognize him as "Lil Joker."

¶ 38 Although at trial the witnesses testified for the first time that it was dark outside and trees blocked the light coming from nearby streetlights, the jury was entitled to consider their contradictory pretrial statements. Further, even according to Salgado's trial testimony, the lighting was bright enough for Salgado to see that the shooter wore a black shirt and blue jeans. Even though the incident was of short duration, viewing the perpetrator only for a few seconds is sufficient to support a reliable identification. *Williams*, 2015 IL App (1st) 131103, ¶ 74; *People v. Negron*, 297 Ill. App. 3d 519, 531 (1998).

¶ 39 2. Degree of Attention

¶ 40 Salgado's initial sighting of Soto as the passenger in a car driving slowly by Islas's house indicates that he was paying a high degree of attention. Salgado also stated that after he was shot, he heard more gunshots and saw Soto in the middle of the street. Salgado felt numbness in his legs and could not run away, so he "had no choice but to look around." Islas also stated that he saw Soto in the middle of the street and ran in a pattern to dodge bullets. Under these circumstances, it appears both witnesses were paying a sufficient degree of attention to enable them to identify Soto.

¶ 41 3. Accuracy of Prior Description

¶ 42 A witness's positive identification is considered sufficient even when a general description of the perpetrator is given. *Slim*, 127 Ill. 2d at 309. Likewise, any discrepancy or omission in a witness's description of the accused does not necessarily create a reasonable doubt provided the witness makes a positive identification. *Id.*

¶ 43 Salgado described the shooter to the police while still at the scene as a slim, white Hispanic wearing a black shirt and blue jeans. Both Salgado and Islas identified Soto by his

No. 1-13-2367

nickname, "Lil Joker," and his gang affiliation. No evidence in the record contradicts these identifying factors. Soto points out that Salgado's description of the shooter's body size did not match because he was not "slim" and Islas never provided a physical description of the shooter. Soto's contentions are not sufficient to raise doubt regarding the reliability of the witnesses' prior positive identifications. Because very few individuals are trained observers and given the circumstances under which crime victims form their impressions, discrepancies regarding the build of the accused are common. *Slim*, 127 Ill. 2d at 311. Any discrepancy in Salgado's description did not lead to a substantial likelihood of misidentification, *id.* at 311-12, particularly given both witnesses' prior familiarity with Soto and the nickname by which he was known.

¶ 44

4. Level of Certainty

¶ 45

Salgado identified Soto as the shooter in a 15-photograph array of known "Lil Jokers" and Islas identified Soto in a five-person line-up. Both witnesses also identified Soto as "Lil Joker" in a photograph. Moreover, both witnesses knew "Lil Joker" prior to the shooting. See *Williams*, 2015 IL App (1st) 131103, ¶ 74 (witness's identification found reliable where the witness knew the defendant by his nickname and had previously met him "on multiple occasions" over the previous three or four years); *People v. Mullen*, 313 Ill. App. 3d 718, 728-29 (2000) (the witnesses' identifications lacked neither accuracy nor certainty where the witnesses knew the defendant from the neighborhood for 10 years and saw the accused within hours of the crime). Nothing in the record suggests that either eyewitness was unable to identify the individual known as "Lil Joker" and the shooter, or that they were uncertain of their identifications. In fact, the witnesses' consistent post-event identifications demonstrate their certainty.

¶ 46 5. Length of Time that Elapsed

¶ 47 As noted, Salgado identified Soto as "Lil Joker" and the shooter both to Islas and the police shortly after the shooting. Also both Salgado and Islas identified Soto from a photograph and in a line-up (Islas) just over two weeks after the shooting. The elapse of two weeks was a sufficiently short period of time to render the identifications reliable. See *People v. Holmes*, 141 Ill. 2d 204, 242 (1990) (and cases cited therein) (finding greater lapses of time insignificant for identification purposes).

¶ 48 After considering each of the five *Biggers* factors and the totality of the circumstances in a light most favorable to the prosecution, a rational trier of fact could have found that Salgado and Islas observed Soto under circumstances permitting a reliable positive identification sufficient to support Soto's conviction of the charged offenses beyond a reasonable doubt.

¶ 49 B. Closing Arguments

¶ 50 Soto claims the prosecutor's closing and rebuttal arguments improperly: (1) inferred the witnesses were intimidated not to identify Soto at trial; (2) misstated the evidence and law; and (3) compromised the jury's nonpartisan role. We disagree.

¶ 51 Soto acknowledges that these claimed errors were not preserved for our review, but asserts the errors are reviewable for plain error. Under the plain error doctrine, a reviewing court may consider unpreserved claims of error (1) where the evidence was closely balanced or (2) a clear error occurred that was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). Soto asserts his claims are reviewable under the first prong. But the first step of a plain-error analysis requires us to determine whether any error occurred at all. *Id.*

¶ 52 A prosecutor is afforded wide latitude in making closing argument and may comment on

No. 1-13-2367

the evidence and any fair, reasonable inference it yields. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). But a prosecutor may not argue assumptions or facts that are not in the record. *Id.* A closing argument "must be viewed in its entirety, and the challenged remarks must be viewed in their context." *Id.* Statements provoked or invited by defense counsel's closing argument are not deemed improper. *Id.* Moreover, defense counsel's failure to object to the prosecutor's remarks made during closing argument may reflect counsel's belief that the matter was not of critical importance, and that any objection would likely have been overruled. *People v. McCarthy*, 213 Ill. App. 3d 873, 887 (1991).

¶ 53 Soto urges this court to apply a *de novo* standard of review regarding his claims of prosecutor error during closing argument. The State recognizes that our supreme court in *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007), applied a *de novo* standard, but asserts every other supreme court decision has applied an abuse of discretion standard. See *People v. Thompson*, 2013 IL App (1st) 113105, ¶ 76 (identifying supreme court cases applying an abuse of discretion standard). We need not resolve the inconsistency because under either standard, we reach the same conclusion. *Id.* at ¶ 78.

¶ 54 We have closely reviewed the parties' closing arguments keeping in mind each of Soto's claimed prejudicial remarks and find that the prosecutor's remarks properly recited the evidence or drew reasonable inferences therefrom, directly responded to defense counsel's arguments and did not compromise the jury's nonpartisan role. Consequently, a detailed analysis of each complained of remark on an individual basis is not warranted; instead, we summarily dispose of Soto's challenged remarks below.

¶ 55 1. Remarks Supported by the Evidence

¶ 56 Soto claims the evidence did not support the prosecutor's comments that: (1) the

No. 1-13-2367

witnesses previously identified Soto without hesitation and in "safe environments;" (2) the witnesses were intimidated not to identify Soto in court; and (3) the witnesses and Soto participated in gang activities and gang members "lie."

¶ 57 Contrary to Soto's claims, the prosecutor's remarks were based on the evidence and reasonable inferences therefrom because the record reveals that: (1) Salgado identified Soto as the shooter to Islas immediately after the shooting and later to the police; (2) the witnesses and Soto were members of rival gangs and there was an ongoing dispute between the gangs at the time of the shooting; (3) the witnesses' prior identifications were made in the presence of law enforcement and medical personnel; and (4) the witnesses' in-court testimony varied from their prior positive identifications—a fact that both parties used to imply that the witnesses were untruthful in their identifications either to the police (the defense's position) or in court (the State's position in response). Consequently, the prosecutor's argument properly remarked on the evidence and was not error.

¶ 58 2. Remarks Made in Rebuttal

¶ 59 Soto asserts that the prosecutor in rebuttal erroneously: (1) insinuated his fingerprints or DNA would be on the bullet lodged in Salgado's spine; (2) implied that the defense had the burden to prove the witnesses conspired to frame him for the offenses; and (3) misstated the law regarding the witnesses' level of certainty in identifying him as the shooter.

¶ 60 Viewing the closing arguments in their entirety, it is apparent that the challenged remarks responded to the defense's characterization of the evidence and theory of the case. Specifically, the defense criticized the State for failing to introduce physical evidence tying Soto to the crimes. The prosecutor directly responded that no forensic testing could be performed because the bullet that hit Salgado and the bullets embedded in the Jeep could not be retrieved for testing.

No. 1-13-2367

Similarly, defense counsel hypothesized that the rival gang members may have decided to target Soto as the shooter shortly after the shooting, but decided to tell the truth at trial when they either recanted or claimed uncertainty. The prosecutor responded that according to the defense's theory, the witnesses would have had to conspire to frame Soto immediately after the shooting, which was an unlikely scenario because the witnesses had no opportunity to collude and separately identified Soto as the shooter shortly after the shooting. The prosecutor's remark was responsive and one that did not shift the burden of proof to the defense to prove a conspiracy. Likewise, defense counsel emphasized that the relevant consideration regarding the witnesses' level of certainty was their identification of Soto (or lack thereof) in court, but the prosecutor later explained that the witnesses' level of certainty when first confronting the accused and not just in court was also a relevant consideration—an accurate statement of the law. See *Slim*, 127 Ill. 2d at 307; *People v. Rodriguez*, 387 Ill. App. 3d 812, 825-26.

¶ 61 Soto cannot complain when the prosecutor appropriately responded to defense counsel's remarks. Moreover, Soto suffered no prejudice based on his inability to respond to the challenged remarks made in rebuttal because the prosecutor's remarks were directly responsive to defense counsel's argument and warranted no response from Soto.

¶ 62 3. No Compromise to the Jury's Neutral Role

¶ 63 Soto contends the prosecutor's remarks improperly forged an "us-versus-them" argument and urged the jurors to "send a message," which compromised their nonpartisan role. Here, the prosecutor's comments when considered in their entirety and in context did not entreat the jury to abandon its nonpartisan role nor did the prosecutor engage in a long discourse targeted at denouncing the evils of society. Instead, the prosecutor's comments properly focused on the facts of the case, the evidence against Soto and the jury's role. The prosecutor's comments were

No. 1-13-2367

proper and did not inflame the passions of the jury without shedding light upon the specific issues of the case.

¶ 64 4. Cumulative Error

¶ 65 After considering each of Soto's complained of errors, we conclude none were, in fact, errors, but were within the realm of permissible argument. Because we find no error, there can be no plain error. Although Soto claims the cumulative effect of the asserted errors denied him a fair trial, we disagree and note that "the whole can be no greater than the sum of its parts." *People v. Albanese*, 102 Ill. 2d 54, 82-83 (1984), abrogated on other grounds, *People v. Albanese*, 102 Ill. 2d 54, 82-83 (1984). Moreover, because Soto's claim of ineffective assistance of counsel is based in part on counsel's failure to object to the foregoing arguments, our conclusion that those arguments were not improper forecloses a finding that counsel was ineffective on this basis.

¶ 66 C. Ineffective Assistance of Counsel

¶ 67 In addition to his claim of ineffective assistance based on defense counsel's failure to object during closing argument, Soto also claims he received ineffective assistance because counsel failed to present the alibi defense promised in opening statements and object to (1) the prosecutor's prejudicial paraphrasing of Salgado's statement and (2) prejudicial testimony and use of mug shots.

¶ 68 The United States and Illinois Constitutions provide a criminal defendant with the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685 (1984); *People v. Jackson*, 205 Ill. 2d 247, 258-59 (2001); U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. Ineffective assistance claims are judged by the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 685 (1984). *People v. Manning*, 241 Ill. 2d 319, 326 (2011). Under

No. 1-13-2367

the *Strickland* test, "the defendant must show that: (1) counsel's performance fell below an objective standard of reasonableness [deficiency]; and (2) there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different [prejudice]." *Id.* (citing *Strickland*, 466 U.S. at 694). Both prongs must be satisfied for a defendant to prevail on an ineffective assistance claim. *People v. Griffin*, 178 Ill. 2d 65, 74 (1997).

¶ 69 A defendant has the right "to a fair trial, not a perfect one" and is entitled to competent counsel, not perfect representation. *People v. Easley*, 192 Ill. 2d 307, 344 (2000). Matters of trial strategy such as what evidence to present, witnesses to call and defense theory to pursue are generally immune from claims of ineffective assistance of counsel. *People v. Morris*, 2013 IL App (1st) 110413, ¶ 74. A defendant must overcome a strong presumption that counsel's challenged action or inaction was a matter of trial strategy, which may be achieved only by establishing that counsel's decision was " 'so irrational and unreasonable that no reasonably effective defense attorney, facing similar circumstances, would pursue such a strategy.' " *Id.* (quoting *People v. Jones*, 2012 IL App (2d) 110346, ¶ 82). Having already addressed above Soto's ineffective assistance claim based on his lawyer's failure to object during closing arguments, we turn to the other aspects of this claim.

¶ 70 1. Alibi Defense and *Krankel* Hearing

¶ 71 Soto claims his counsel should have presented exculpatory evidence through his alibi witnesses that Soto was not the shooter. Specifically, Soto claims his trial counsel provided ineffective assistance by failing to present alibi testimony from his two friends promised in opening statements and by mentioning the broken promise during closing arguments.

¶ 72 At the outset, we must address whether Soto invited any error regarding counsel's

No. 1-13-2367

decision not to call witnesses. The doctrine of invited error provides that "an accused may not request to proceed in one manner and then later contend on appeal that the course of action was in error." *People v. Carter*, 208 Ill. 2d 309, 319 (2003). The doctrine applies where the defendant affirmatively requests or agrees to proceed in a certain way. *People v. Harvey*, 211 Ill. 2d 368, 385 (2004).

¶ 73 At trial, defense counsel informed the trial court that the defense was resting its case without presenting any evidence. The record shows that the trial court explicitly inquired whether Soto understood and agreed with the decision not to present any evidence, not to call any witnesses and whether he discussed with his attorney the decision not to call any witnesses. Soto answered affirmatively to all questions asked, thus demonstrating that he knew of and concurred with his counsel's strategy at trial.

¶ 74 Similarly, during the trial court's limited *Krankel* inquiry into Soto's claim that counsel was deficient for failing to call alibi witnesses, Soto conceded that the trial judge was correct in his recollection that he asked Soto during trial if he agreed with counsel's decision not to call any witnesses and that Soto answered affirmatively. Moreover, defense counsel explained that extensive conversations occurred about whether to present the alibi defense and it was decided, including by Soto, not to pursue the alibi theory. Consequently, the record demonstrates that Soto consented at trial to and invited any asserted error that he now raises. For this reason, Soto's claim is forfeited.

¶ 75 Likewise, we are unable to determine what Soto's claimed alibi witnesses would have testified to relating to the time of the actual shooting. It would be inappropriate for us to speculate on that subject as it would require an inquiry beyond the scope of the record. *People v. Winkfield*, 2015 IL App (1st) 130205, ¶ 38. Because Soto acquiesced in his lawyer's decision

not to call any witnesses and, in any event, the substance of the missing testimony is not in the record, we need not address this aspect of Soto's ineffective assistance claim further.

¶ 76 Moreover, we further find, contrary to Soto's related argument, that the trial court conducted an adequate preliminary *Krankel* inquiry into Soto's *pro se* posttrial claim of ineffective assistance based on counsel's failure to call alibi witnesses.

¶ 77 In *People v. Krankel*, 102 Ill. 2d 181, 187, 189 (1984), our supreme court held that a defendant raising a *pro se* posttrial claim of ineffective assistance should have counsel, other than the originally appointed counsel, to represent him at a hearing regarding his claim. *Id.* at 189. Later cases have articulated the following procedures for such claims:

"[W]hen a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel, the trial court should first examine the factual basis of the defendant's claim. If the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. However, if the allegations show possible neglect of the case, new counsel should be appointed." *People v. Jolly*, 2014 IL 117142, ¶¶ 28-29 (quoting *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003)).

¶ 78 As stated, the trial court conducted the required preliminary inquiry into the underlying factual basis of Soto's *pro se* posttrial claim of ineffective assistance, which revealed that Soto agreed with his counsel's strategic decision not to present alibi testimony. *Moore*, 207 Ill. 2d at 79. Soto not only failed to demonstrate "possible neglect" of his case and ineffective assistance on that basis, but the trial judge who presided over the trial observed that Soto's attorneys "*were exemplary.*" (Emphasis added.) Consequently, the trial court properly denied Soto's posttrial *pro se* motion and appointment of new counsel to further investigate his ineffective assistance

No. 1-13-2367

because the retrieved photographs were mug shots. But the detective's testimony clearly referred to the State's Attorney's database and not the police department's database. For this reason, Soto's reliance on *People v. Arman*, 131 Ill. 2d 115 (1989) and *People v. Moore*, 2012 IL App (1st) 100857, is misplaced.

¶ 85 In *Arman*, our supreme court held that a detective's reference to the police department's identification files to compile a photographic array improperly informed the jury about evidence of other crimes. 131 Ill. 2d at 123. In *Moore*, this court held that defense counsel erred in failing to object to an irrelevant and unfairly prejudicial interrogation video where police questioned the defendant about a prior incident of domestic violence that he pled guilty to, referred to the defendant's prior history of robberies, being a drug dealer and membership in a street gang. 2012 IL App (1st) 100857, ¶ 50-52.

¶ 86 In contrast to *Arman* and *Moore*, nothing in Detective Murphy's testimony tended to inform the jury that Soto committed other, unrelated criminal acts because he did not specifically refer to any prior offense, nor did he state that he retrieved the photographs from the police department's database. In fact, nothing in the detective's isolated reference to "your computer database" as the source of the photographs indicated that Soto had a criminal background; instead, the detective described how he compiled the photographic array of known "Lil Jokers." See *People v. Jackson*, 304 Ill. App. 3d 883, 894 (1999) ("A law enforcement officer's isolated and ambiguous statement that he obtained defendant's fingerprints from a state agency's database does not by itself indicate that defendant has a criminal background.") Likewise, nothing in the detective's testimony implied that Soto had a prior criminal record, and there was no further mention of the database used to generate the photographic array. Consequently, counsel's performance was not deficient for failure to object to this testimony.

¶ 87 Similarly, nothing in the compiled photographs used in the photographic array established Soto's involvement in a prior crime. Soto correctly describes the photographs as black and white frontal and profile views of individuals, but the photographs did not contain any identifying information nor did they depict the individuals standing in front of a height chart or with a sign around their necks typically seen in mug shots, from which the jury may have inferred Soto's prior involvement with the law. *People v. Hudson*, 7 Ill. App. 3d 333, 336-37 (1972). In any event, because the shooter's identity was a material issue at trial, mug shots may be introduced to show how a defendant was initially linked to the commission of an offense provided the mug shot evidence does not inform the jury of the defendant's commission of other, unrelated criminal offenses. *People v. Nelson*, 193 Ill. 2d 216, 224 (2000). Importantly, nothing in the record indicates that the photographs were specifically referred to as "mug shots." See *id* at 223-24 (testimony stating that "photographs that were shown [] were what we call mug shots" was admitted in error). Consequently, the challenged evidence failed to demonstrate that Soto committed an unrelated criminal act and counsel's performance was not deficient for failing to object to admission of that evidence.

¶ 88 4. Prejudice

¶ 89 Because Soto has not established that defense counsel's performance was deficient, it follows that Soto likewise fails to satisfy *Strickland's* prejudice prong. We therefore reject his ineffective assistance claim.

¶ 90 D. Fees and Fines

¶ 91 Finally, Soto claims, and the State concedes, that the following fees and fines imposed at trial must be vacated or modified: (1) \$15 for the state police operations fee; (2) \$50 for the court system fine; (3) \$25 and \$100 for the VCVAF fines; and (4) \$5 for the electronic citation fee.

¶ 92 Fines are subject to presentence credit; thus, we vacate the \$15 state police operations fee, *People v. Milsap*, 2012 IL App (4th) 110668, ¶ 31, and the \$50 court system fine, *People v. Wynn*, 2013 IL App (2d) 120575, ¶ 17. The currently imposed \$125 VCVAF fine must be vacated and corrected to reflect a total fine of \$8 (computed as \$4 for every \$40 or fraction thereof based on total fines of \$65 (725 ILCS 240/10(b) (West 2010)). We vacate the \$5 electronic citation fee because that fee does not apply to felony cases. *People v. Moore*, 2014 IL App (1st) 112593-B, ¶ 46.

¶ 93 Pursuant to Illinois Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999)), we direct the clerk of the circuit court to correct the order imposing fines and fees accordingly. The judgment of the trial court is affirmed in all other respects.

¶ 94 **CONCLUSION**

¶ 95 For the reasons stated, we affirm the trial court's judgment and modify as specified the order assessing fines.

¶ 96 Affirmed as modified.