2015 IL App (1st) 132522-U

FIFTH DIVISION
March 20, 2015

No. 1-13-2522

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County
Plaintiff-Appellee,	)	
v.	)	No. 09 CR 10295
ODILON PETATAN,	)	
Defendant-Appellant.	)	Honorable Thomas Gainer, Jr., Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Palmer and Justice Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: Following a jury trial, defendant was convicted of attempted murder and aggravated battery with a firearm. The appellate court affirmed, holding: (1) defendant did not receive ineffective assistance of counsel; (2) the defense was not prejudiced by the State's failure to tender a witness statement, where the State provided the defense with substantially identical statements from the witness; (3) defendant forfeited the claim that the trial court should have investigated whether jurors slept during the trial; and (4) the prosecutor's closing argument did not deny the defendant a fair trial.

¶ 2 Following a jury trial in the circuit court of Cook County, defendant Odilon Petatan was

convicted of two counts of attempted murder (720 ILCS 5/8-4(a), 9-1 (West 2008)) and two counts of aggravated battery with a firearm (720 ILCS 5/12-4.2(a) (West 2008)). The trial court merged the two counts of aggravated battery with a firearm into the two attempted murder counts and sentenced defendant to two concurrent 10-year sentences with 25-year enhancements for personally discharging a firearm that proximately caused great bodily harm to an individual (720 ILCS 5/8-4(c)(1)(D) (West 2008)). On appeal, defendant contends the trial court erred in: (1) denying his claims of ineffective assistance of trial counsel; (2) denying his claim that he was prejudiced by the State's failure to tender a witness statement prior to trial; (3) not investigating whether jurors were sleeping during the trial; and (4) denying his motion for a mistrial based on the State's improper comments during closing argument. For the reasons which follow, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 On June 18, 2009, defendant was charged in an eight-count indictment with the attempted first degree murder of Teresa Bucio (Bucio) and Noe Garcia (Garcia), aggravated battery against Bucio and Garcia with a firearm, and the aggravated unlawful use of a weapon. All of the charged offenses allegedly occurred on May 19, 2009. The State proceeded to trial on counts 2, 4, 5, and 6. Count 2 of the indictment alleged defendant committed attempted first degree murder by shooting Bucio with a firearm, causing her great bodily harm. Count 4 of the indictment similarly charged defendant with the attempted first degree murder of Garcia. Counts 5 and 6 similarly alleged defendant committed aggravated battery with a firearm against Bucio and Garcia, respectively.

¶ 5 Bucio testified that on May 19, 2009, she and her husband, Armando Bucio (Armando), were near the intersection of 21st Place and Wood Street in Chicago, passing out fliers for their

martial arts studio. There were few people in the area. At approximately 4 p.m., while Bucio and Armando were walking northward on Wood Street, Armando briefly stopped to provide fliers to two "boys" or "guys," while Bucio continued walking.

¶ 6 Bucio then heard four or five gunshots. She was shot in the back and fell to the ground, bleeding and in great pain. Armando and a female came to Bucio's assistance. Bucio was transported to Stroger Hospital, where she received treatment and was released later that day. The bullet which stuck Bucio was not removed because it would affect her spinal column. Since the shooting, Bucio has continued to suffer "a lot of pain." She displayed her scar from the shooting to the jury.

¶ 7 Armando also testified regarding circumstances prior to and during the shooting. According to Armando, the gunshots were fired from a green van. Armando was approximately 15 to 20 feet from the vehicle when he heard the gunshots. Armando observed the vehicle because he heard screaming and observed the female who would later assist Bucio throw a rock at the vehicle. Armando also observed two individuals inside the vehicle. After the shooting, he provided information to the police.

¶ 8 On May 20, 2009, Armando went to the Area 4 police station at the intersection of Harrison Street and Kedzie Avenue. Armando had a conversation with a detective and then viewed a lineup. He was able to identify the driver of the vehicle involved in the shooting, but was not able to identify the second person "because the shooter did not allow me to see the other person."

¶ 9 Chicago police officer Maria Higgs testified that she was patrolling on May 19, 2009, when she received a radio dispatch at approximately 4:01 p.m. regarding the shooting. She arrived at the scene of the shooting at approximately 4:03 p.m. Officer Higgs observed Bucio

lying on the sidewalk. She also observed Garcia bleeding from the leg.

¶ 10 Cindy Giron (Giron) testified that in 2009, she lived at 1724 West 21st Street. Giron also testified that she was not a member of a street gang, but she was aware the Ambrose street gang had a presence in the area at the time of the shooting.

¶ 11 On May 19, 2009, at approximately 4 p.m., Giron was walking home, proceeding westbound on 21st Place, when she stopped near the intersection of 21st Place and Wood Street to transmit a text message from her cell phone. She heard a vehicle stop at the intersection and noticed it was a green van. Giron was approximately eight feet away from the vehicle, but did not know how many individuals were inside the van.

¶ 12 Giron also testified she heard someone inside the vehicle scream, "There they go" in Spanish. Someone in the van pointed across the street. Giron looked in the direction the individual was pointing and observed Garcia, who was an old high school classmate of Giron. According to Giron, Garcia was standing with an older couple. She then looked back to the vehicle and observed a chrome handgun coming from inside the front passenger-side window.

¶ 13 Giron further testified her reaction was to attempt to frighten the individuals in the vehicle away from the intersection. She found a brick nearby and threw it at the vehicle, breaking the rear passenger-side window. Nevertheless, Giron observed the passenger shoot toward the group. She heard three or four gunshots. Giron identified defendant in court as the shooter.

¶ 14 After Giron heard the gunshots, she observed Bucio drop to the ground. Giron ran to Bucio and assisted her with the wound to her back. When the ambulance arrived, Giron also observed Garcia had been shot in the leg. Later on May 19, 2009, Giron went to the Area 4 police station and identified a green van as the vehicle that was involved in the shooting. On

May 20, 2009, Giron returned to the police station, where she identified defendant from an array of photographs as the shooter. On May 23, 2009, Giron again returned to the police station and identified defendant in a lineup.

¶ 15 On cross-examination, Giron acknowledged she initially informed the police she had not observed the shooter, due to fear of retaliation. The description Giron provided to officer Higgs was that the passenger was a male Hispanic. Giron subsequently informed Chicago police detective Jose Gomez that the passenger was 17 to 19 years old and wore a grey shirt and Mexican beads. She had provided the police with a signed statement that she had not observed the shooter because she was looking toward the corner where the people were standing. The signed statement also indicated Giron had not observed a weapon in anyone's hand, although she observed a "shiny object." On further cross-examination regarding the events immediately prior to the shooting, Giron testified that "everything was fast, everything went fast."

¶ 16 Chicago police officer Anthony Simulis testified that he learned of the shooting prior to commencing his patrol on May 19, 2009. At approximately 8 p.m., he observed a green van with a broken window and commenced following the vehicle. He activated the lights and siren on his police vehicle, but the green van did not immediately stop. While Officer Simulis followed the vehicle, it increased in speed and executed two turns before its route was cut off by a second police vehicle. Officer Simulis later learned Richard Calderon (Calderon) was the driver of the vehicle. Calderon was arrested and transported to the Area 4 police station.

¶ 17 Calderon testified that he was a member of the La Raza street gang, but since 2000, was no longer an active member. Calderon noted, however, that individuals never leave the gang due to fear of attacks on themselves or family members by rival gang members. He also testified he knew defendant from growing up in the neighborhood. According to Calderon, defendant

became a member of the La Raza street gang after the period during which Calderon was active.

¶ 18 On May 19, 2009, at approximately 4 p.m., Calderon was driving home from his job in the green van, which belonged to his father. Calderon observed defendant at the intersection of Loomis Street and Cullerton Street. According to Calderon, this intersection was associated with the La Raza street gang. Calderon double-parked and conversed with defendant through the passenger-side window regarding "what was going on with the LaRaza's [sic] in the area."

¶ 19 Defendant entered Calderon's vehicle. Calderon did not know the defendant was in possession of a weapon at this time. After driving for approximately 10 minutes, Calderon observed an individual approach the driver's side of his vehicle near the intersection of 21st Street and Wood Street. Calderon testified this area was affiliated with the Ambrose street gang, which was a rival of the La Raza street gang. He thought the individual approaching the van might be a member of the Ambrose street gang and was going to throw an object at the van. Calderon then heard a passenger-side window of his vehicle break, and also heard gunshots. Calderon pressed the vehicle's accelerator and fled the area.

¶ 20 As he fled, Calderon looked over to the passenger seat and observed defendant pulling a chrome .38 caliber revolver inside through the passenger-side window. Calderon had not noticed anyone else with firearms that day. While Calderon drove to his house, he inquired of defendant why he had fired the weapon, but defendant never responded.

¶ 21 Upon arriving at his house, Calderon checked the damage to the vehicle, and discovered a large brick inside the vehicle. Calderon did not observe any damage to the driver's side of the vehicle. According to Calderon, defendant emptied the shells out of his handgun, left the handgun on the driver's seat of the vehicle, and informed Calderon he was leaving. Although Calderon told defendant to take the handgun with him, defendant did not and departed on foot

eastward on 19th Street.

¶ 22 While Calderon cleaned the vehicle, his wife, Lorena Calderon (Lorena), came outside from the house and Calderon explained what had happened. According to Calderon, defendant was present at that time and remained at the vehicle for approximately five minutes before leaving. Calderon's children also came out of his house. Calderon retrieved the handgun from inside the vehicle and placed it inside a can on a shelf in the garage.

¶ 23 After cleaning the vehicle, Calderon drove the van to a repair shop to have the window repaired, but the shop was closed. He then decided to drive to a gas station, but was stopped by the police on the way to the gas station. Calderon acknowledged that he did not immediately stop his vehicle when he observed the police.

¶ 24 The police transported Calderon to the Area 4 police station. According to Calderon, he was "buzzing" at the police station from the six-pack of "tall boys" he had consumed after work. Calderon provided the police with defendant's first name and identified defendant from a photograph. He also informed the police that the handgun was located at his house. Calderon agreed to accompany the police to his house and consented to a search for the handgun. The handgun, however, could not be found in the garage.

¶ 25 Calderon inquired of Lorena regarding the handgun and learned she had brought the weapon to their next door neighbor's house. The police went next door, where they retrieved two firearms—the chrome .38 caliber revolver belonging to defendant, and a 9 millimeter Glock pistol belonging to Calderon.

¶ 26 Lorena testified that on May 19, 2009, at approximately 4 p.m., she observed defendant with Calderon outside her house. She knew defendant both from high school and from social occasions outside her job. Lorena observed Calderon's vehicle had a broken window. While

Lorena conversed with her husband regarding the condition of his vehicle, she observed defendant holding a handgun, which she testified "looked like a revolver." Defendant remained outside her house for several minutes before departing.

¶ 27 Lorena also testified that Calderon placed the handgun, which had been inside the vehicle, inside their garage. After Calderon departed in the vehicle, however, Lorena removed the handgun from the garage and requested that her neighbor take custody of the weapon for the day, stating that she would retrieve it the following day. According to Lorena, her neighbor (now deceased) agreed to take custody of the handgun without making any inquiry of her. Lorena further testified she had hidden Calderon's handgun with this neighbor six months earlier because she had children in her house. Lorena did not remember whether she informed the police on May 20, 2009, regarding her transfer of these weapons to her neighbor.

¶ 28 Detective Gomez testified regarding his investigation of the shooting. According to Detective Gomez, Giron described the shooter as a Hispanic male in his early twenties and wearing a rosary. Detective Gomez also learned Garcia was a member of the Ambrose street gang, but Garcia could not be located based on the information Garcia provided to the police.

¶ 29 Detective Gomez also examined Calderon's vehicle after it was brought to the Area 4 police station. He contacted an evidence technician for the purpose of performing a gunshot residue test on the front passenger area of the vehicle. Detective Gomez acknowledged he did not request a similar test of Calderon himself, and did not know whether the vehicle's front passenger door had been tested for fingerprints. He also acknowledged that Calderon appeared intoxicated at approximately 8:30 p.m. After conversing with Calderon, Detective Gomez issued an investigative alert for defendant.

¶ 30 Detective Gomez further learned the location of the handgun suspected of being used in

the shooting. He accompanied Calderon, as well as other police officers, to Calderon's house. He later obtained the consent of Calderon's neighbor to search the neighbor's house. According to Detective Gomez, the two handguns ultimately retrieved by the police were recovered from the neighbor's oven.

¶ 31 Chicago police officer Jon Mikuzis testified that on May 23, 2009, he received a photograph and information regarding a possible suspect in the shooting at issue. At approximately 11 a.m., he observed defendant near an abandoned three-story apartment building at 1403 West 19th Street. Officer Mikuzis approached defendant, but upon making eye contact, defendant fled into the building. Officer Mikuzis and his partner pursued and located defendant on the top floor of the building.

¶ 32 After Officer Mikuzis testified, defense counsel requested a sidebar. The trial judge instructed the jury against discussing the case in the jury room and recommended that jurors use the washroom if needed. During the sidebar, the following colloquy ensued:

> "[DEFENSE COUNSEL]: Judge, I did notice right during the last few minutes, I did see one or two of the jurors kind of closing their eyes, that's why I wanted to ask for the break. Maybe they didn't want to raise their hand [sic].
>
> THE COURT: I didn't notice that, I'm usually pretty attentive to that. If you're suggesting to me that you thought someone was sleeping –
>
> [DEFENSE COUNSEL]: I'm not saying I thought they were sleeping. It just looked like they were starting to get tired.
>
> THE COURT: I didn't notice that. I appreciate you bringing that to my attention, getting up and moving around is always a good thing. You're not making an allegation that somebody was sleeping?

[DEFENSE COUNSEL]: No, not at all."

The trial then resumed before the jury.

¶ 33 Chicago police detective Robert Goerlich testified without objection regarding tattoos on defendant's stomach and shoulder, identifying them as La Raza street gang tattoos.

¶ 34 Dr. Kimberly Nagy, a physician at Stroger Hospital, testified regarding her treatment of Bucio and Garcia. On May 19, 2009, Dr. Nagy was in charge of Stroger Hospital's trauma unit. Dr. Nagy testified that Bucio and Garcia received the highest priority of care because any gunshot wound is potentially life-threatening. According to Dr. Nagy, the bullet that struck Bucio was lodged in a bone at the bottom of her spinal column and was not removed. The bullet that struck Garcia, however, was immediately underlying the wound to his leg and was removed. The bullet that struck Garcia was placed in the chain of custody with a "Stroger Cook County police officer."

¶ 35 Mark Pomerance (Pomerance), a forensic scientist in the firearms and toolmark section of the Illinois State Police Crime Laboratory, testified that in June 2010, he received a revolver and a semiautomatic pistol for examination. He also received a fired bullet jacket from the Chicago police department inventory. Pomerance fired test shots from each weapon. After conducting a microscopic comparison of the test shots to the fired bullet jacket, Pomerance opined the fired bullet jacket he received was fired by the revolver, not the semiautomatic pistol.

¶ 36 Robert Berk (Berk), a trace evidence analyst with the Illinois State Police Crime Laboratory, testified that he received the gunshot residue test conducted on Calderon's vehicle. According to Berk, the front passenger-side door either had contact with an item that had gunshot residue, or was in the environment of a firearm when it was discharged.

¶ 37 Chicago police detective Eraclio Ruiz testified for the defense. He testified that in the

early morning hours of May 20, 2009, he had a conversation with Lorena. According to Detective Ruiz, Lorena stated that she removed the handguns in her garage and transferred them to her neighbor, but did not mention observing defendant. On cross-examination, he acknowledged that he only conversed with Lorena for a few minutes after the handguns were recovered from her neighbor's house. Detective Ruiz also testified that Lorena conversed with Detective Gomez about the shooting.

¶ 38 Following closing arguments, defense counsel moved for a mistrial, based on the State's suggestion that the jury could imagine why Garcia was absent from the trial. Defense counsel argued that in light of the testimony regarding street gangs, the comment suggested Garcia may be dead. The trial court determined defense counsel's suggested interpretation of the comment was not a reasonable inference to be drawn from the comment and denied defendant's request for a mistrial. Following jury instructions, the jury found defendant guilty of two counts of first degree murder and two counts of aggravated battery with a firearm.

¶ 39 On October 1, 2012, defendant filed a posttrial motion for a new trial. On January 9, 2013, defendant, through newly-retained counsel, filed an amended posttrial motion for a new trial. The amended posttrial motion incorporated all of the allegations of the original posttrial motion, while raising additional issues.

¶ 40 The amended motion alleged in part that the defense was never provided the State's felony review "defendant" statement of Calderon, dated May 20, 2009 (May 20 statement). The May 20 statement was not attached to the amended posttrial motion for a new trial, but the record on appeal discloses that the document summarized a number of Calderon's statements during the investigation.

¶ 41 The amended posttrial motion for a new trial also alleged defendant received ineffective

assistance of trial counsel, where trial counsel failed to: (1) present an alibi defense; (2) properly cross-examine Giron regarding her opportunity to observe and identify defendant, as well as her knowledge of street gangs; (3) cross-examine Calderon regarding his release without charges, despite evidence he was driving under the influence of alcohol and was eluding the police; (4) cross-examine Calderon whether defendant yelled "There they go" prior to the shooting and whether Calderon drove slowly through the intersection, points on which his testimony may have contradicted Giron's testimony; (5) cross-examine Berk regarding whether the results of the gunshot residue test were consistent with the testimony that the shooter's arm was extended from a moving vehicle; (6) impeach the testimony of Officer Mikuzis regarding his pursuit of defendant with evidence that the officer could not run and had surgical scars on his knee; and (7) cross-examine Dr. Nagy regarding Garcia's release from the hospital on the day of the shooting to argue the State failed to establish great bodily harm.

¶ 42 On February 5, 2013, the trial court commenced a hearing on defendant's amended motion for a new trial. During the hearing, posttrial counsel submitted the May 20 statement to the trial court. Posttrial counsel argued the May 20 statement did not refer to Calderon and defendant specifically conversing about the status of the La Raza and Ambrose street gangs and could have been used to impeach Calderon's trial testimony. Posttrial counsel also argued that the May 20 statement indicated that Lorena did not emerge from her house until after defendant departed.

¶ 43 The State represented that it also did not have the May 20 statement at the time of defendant's trial. Rather, the State obtained the May 20 statement at the request of defendant's posttrial counsel. The State also argued the defense was not prejudiced by the failure to tender the May 20 statement because: (1) the defense could have pursued the same cross-examination

based on other documents timely tendered to the defense (and submitted as exhibits during the hearing); and (2) Lorena testified at trial that she was outside her house when Calderon and defendant arrived following the shooting.

¶ 44 The trial court ruled that defendant failed to establish prejudice from the State's failure to tender the May 20 statement. The trial court found that in the May 20 statement, Calderon indicated Lorena came out of her house after defendant departed. The trial court observed that Calderon provided a written statement to the police approximately 4 hours and 25 minutes later, in which Calderon indicated Lorena emerged from the house before defendant emptied the handgun and departed. The trial court also found the defense was in possession of a supplementary report titled "Field Investigation Progress Violent Scene Report," in which Calderon's statement was largely consistent with the May 20 statement, including a statement from Calderon that defendant departed and Lorena observed the handgun in the garage, at which point Calderon informed Lorena of the incident. The trial court further found the defense was in possession of an August 2011 statement provided by Lorena to a defense investigator, in which Lorena indicated she observed defendant standing near Calderon's vehicle and leaving immediately, before Calderon informed Lorena about the incident and showed her the handgun. The trial court reasoned that had trial counsel believed the impeachment proposed by posttrial counsel was significant, trial counsel could have impeached Calderon and Lorena with the materials provided by the State during pretrial discovery. The trial judge thus concluded the State's failure to tender the May 20 statement, which was consistent with other police summaries, was insufficient to warrant a new trial.

¶ 45 The remainder of the hearing on the amended motion for a new trial was continued on a number of occasions, ultimately proceeding on June 28, 2013. Posttrial defense counsel argued

defendant received ineffective assistance of counsel when trial counsel failed to cross-examine Dr. Nagy as that testimony related to whether Bucio or Garcia suffered great bodily harm. At the conclusion of the hearing, the trial court denied the amended motion for a new trial.

¶ 46 On July 2, 2013, the trial court proceeded to a sentencing hearing. The trial judge, after hearing arguments in aggravation and mitigation of the offense, sentenced defendant to an enhanced 35-year sentence for the attempted first degree murder of Bucio, as well as a concurrent enhanced 35-year sentence for the attempted first degree murder of Garcia, with the convictions for aggravated battery with a firearm merging into the respective convictions for attempted first degree murder. On the same date, defendant filed a motion to reconsider his sentence, which the trial judge denied during the same hearing. On July 26, 2013, defendant filed a timely notice of appeal to this court.

¶ 47 ANALYSIS

¶ 48 On appeal, defendant contends the trial court erred in: (1) denying his claims of ineffective assistance of trial counsel; (2) denying his claim that he was prejudiced by the State's failure to tender the May 20 statement prior to trial; (3) not investigating whether jurors were sleeping during the trial; and (4) denying his motion for a mistrial based on the State's improper comments during closing argument. We address these arguments in turn.

¶ 49 Ineffective Assistance of Trial Counsel

¶ 50 Defendant argues the trial court erred in denying his claims of ineffective assistance of trial counsel. The State responds in part that defendant forfeited a number of these claims by failing to raise them in his amended posttrial motion for a new trial. Determining which issue or issues have been forfeited is one of the two most important tasks of an appellate court panel when beginning the review of a case. *People v. Smith*, 228 Ill. 2d 95, 106 (2008). By giving

careful attention to the issue of forfeiture, "a court can avoid the possibly unnecessary expenditure of judicial resources." *Id.*

¶ 51 In this case, defendant's posttrial motion contained allegations of ineffective assistance of counsel, but specific matters not raised in that motion, which was filed by counsel different from his trial counsel and thus could have been raised, are forfeited for consideration on appeal. *People v. Salgado*, 366 Ill. App. 3d 596, 607 (2006); *People v. Ramos*, 339 Ill. App. 3d 891, 899-900 (2003); see *People v. Perry*, 224 Ill. 2d 312, 341 (2007) (defendant's failure to preserve an issue in one of his *pro se* posttrial motions is not corrected by the efforts of the appellate defender to raise the issue before the appellate court). In addition, defendant forfeited any claim that the alleged ineffective assistance of counsel constitutes plain error because he did not argue for plain-error review in his opening or reply briefs. See *People v. Polk*, 2014 IL App (1st) 122017, ¶¶ 47-49 (supplemental opinion upon denial of rehearing Jun. 27, 2014) (and authorities cited therein). Accordingly, in considering the claims of ineffective assistance of counsel defendant has raised on appeal, we will consider those not raised in his amended posttrial motion for a new trial to be forfeited. See *Salgado*, 366 Ill. App. 3d at 607; *Ramos*, 339 Ill. App. 3d at 899-900; *Polk*, 2014 IL App (1st) 122017, ¶¶ 47-49.

¶ 52 Defendant's properly preserved claims of ineffective assistance of counsel will be judged according to the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Lawton*, 212 Ill. 2d 285, 302 (2004). Under *Strickland*, the defendant must establish both: (1) that his counsel's performance fell below an objective standard of reasonableness; and (2) that, but for this substandard performance, there is a reasonable probability that the outcome of the proceeding would have been different. *People v. Albanese*, 104 Ill. 2d 504, 525 (1984) (discussing *Strickland*). "Because [a] defendant must satisfy both

prongs of the test, the failure to satisfy either element precludes a finding of ineffective assistance of counsel under *Strickland*." *People v. Shaw*, 186 Ill. 2d 301, 332 (1998). In applying the *Strickland* test, a reviewing court examines the totality of counsel's representation in light of all the relevant circumstances. *People v. Buchanan*, 211 Ill. App. 3d 305, 317 (1991).

¶ 53 Counsel's Performance

¶ 54 As noted regarding the first prong of the *Strickland* test, defendant must demonstrate that his attorney's performance fell below an objective standard of reasonableness. *People v. Evans*, 209 Ill. 2d 194, 220 (2004). A "strong presumption" exists that the challenged action or inaction of counsel was a matter of sound trial strategy and a defendant can overcome that presumption only by establishing counsel's decision was "so irrational and unreasonable that no reasonably effective defense attorney, facing similar circumstances, would pursue such a strategy." *People v. Jones*, 2012 IL App (2d) 110346, ¶ 82. The fact that a trial strategy was ultimately unsuccessful is not a sufficient reason to deem the representation ineffective. *People v. Skillom*, 361 Ill. App. 3d 901, 913-14 (2005) (citing *People v. Palmer*, 162 Ill. 2d 465, 480 (1994)). Moreover, a defendant cannot use speculation or conjecture to justify a claim of incompetent representation. *People v. Clarke*, 391 Ill. App. 3d 596, 614 (2009) (and cases cited therein).

¶ 55 The Probability That the Result Would Have Differed

¶ 56 Regarding the second prong, "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Put another way, defendant must show that "counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair." *Evans*, 209 Ill. 2d at 220. "*Strickland* requires actual prejudice be shown, not mere speculation as to

prejudice." *People v. Bew*, 228 Ill. 2d 122, 135 (2008).

¶ 57 Defendant must satisfy both prongs of this test in order to prove ineffective assistance of counsel. *Strickland*, 466 U.S. at 687. When considering a claim of ineffective assistance, however, a court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Strickland*, 466 U.S. at 697; see *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). "If a reviewing court finds that the defendant did not suffer prejudice, it need not decide whether counsel's performance was constitutionally deficient." *People v. Buss*, 187 Ill. 2d 144, 213 (1999).

¶ 58 Defendant's Claims of Ineffectiveness

¶ 59 On appeal, defendant contends counsel was deficient in failing to impeach Giron on the basis that she did not indicate in her written statement to the police that she observed defendant with a handgun. Defendant failed to raise this issue in his amended posttrial motion for a new trial. Accordingly, defendant has forfeited this argument on appeal. *Salgado*, 366 Ill. App. 3d at 607; *Ramos*, 339 Ill. App. 3d at 899-900; *Polk*, 2014 IL App (1st) 122017, ¶¶ 47-49.

¶ 60 Defendant also contends counsel was deficient in failing to further question Giron regarding her opportunity to observe defendant, after Giron's testified that "everything was fast, everything went fast." "The manner in which to cross-examine a particular witness involves the exercise of professional judgment which is entitled to substantial deference from a reviewing court." *People v. Pecoraro*, 175 Ill. 2d 294, 326-27 (1997). The extent of cross-examination is a matter of trial strategy that will not ordinarily support a claim of ineffective assistance of counsel. *People v. Watson*, 2012 IL App (2d) 091328, ¶ 32 (citing *People v. Ramey*, 152 Ill. 2d 41, 54 (1992)).

¶ 61 Defendant observes "the complete failure to impeach the sole eyewitness when

significant impeachment is available is not trial strategy and, thus, may support an ineffective assistance claim. *People v. Salgado*, 263 Ill. App. 3d 238, 246-47 (1994). In this case, however, defendant was identified as the shooter by both Giron and Calderon. Moreover, defense counsel did not completely fail to impeach Giron regarding her ability to observe defendant. During cross-examination, defense counsel established Giron: (1) initially informed the police she had not observed the shooter; (2) provided the police with a signed statement that she had not observed the shooter because she was looking toward the corner where the people were standing; (3) had not observed a weapon in anyone's hand, although she observed a "shiny object"; and (4) acknowledged that "everything was fast, everything went fast." Contrary to defendant's argument, based on the record, defense counsel could effectively argue that Giron was mistaken in her identification, even if that argument was ultimately unsuccessful. See *Skillom*, 361 Ill. App. 3d at 913-14. Accordingly, defendant's argument on this point fails. See *Jones*, 2012 IL App (2d) 110346, ¶ 82.

¶ 62 Defendant asserts the related claim that his trial counsel was ineffective in failing to specifically mention Giron's testimony that "everything was fast, everything went fast" during closing argument. The transcript of proceedings, however, establishes that defense counsel attacked Giron's testimony at length, including her ability to observe the incident. In particular, defense counsel argued Giron was focused on the shiny object she observed and then looked for the brick she threw, adding, "It is not like this is something where she sat there for ten minutes having a conversation with him memorizing his details." Any failure to underscore the point with Giron's specific testimony does not create a sufficient probability to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. In any event, defendant failed to raise this claim in his amended posttrial motion for a new trial, thereby forfeiting the claim on appeal. *Salgado*,

366 Ill. App. 3d at 607; *Ramos*, 339 Ill. App. 3d at 899-900; *Polk*, 2014 IL App (1st) 122017, ¶¶ 47-49.

¶ 63 Defendant next contends his trial counsel should have elicited testimony from Calderon regarding statements Calderon provided on August 10, 2011, to an assistant public defender and a defense investigator,[1] indicating: (1) people at the intersection may have shot Bucio and defendant appeared to be shooting toward the people on the corner; and (2) he discovered bullet holes in the rear passenger area of his vehicle. Defendant claims these comments may have partially supported an affirmative defense of self-defense. Defendant further asserts Calderon's August 10, 2011, statements could have been used to impeach Calderon's testimony that defendant emptied the shells from his handgun in Lorena's presence before departing. Defendant additionally asserts comments from Lorena provided on August 10, 2011, to the assistant public defender and the defense investigator could have been used to impeach her trial testimony on the questions of whether defendant unloaded his handgun in her presence and whether she transferred her husband's handgun to her neighbor on the night of the shooting. Defendant failed to raise these points in his amended posttrial motion for a new trial. Thus, defendant has forfeited these arguments on appeal. *Salgado*, 366 Ill. App. 3d at 607; *Ramos*, 339 Ill. App. 3d at 899-900; *Polk*, 2014 IL App (1st) 122017, ¶¶ 47-49.

¶ 64 Defendant argues that his trial counsel was ineffective in failing to highlight the "simplicity of treatment provided by Dr. Nagy" in order to argue the State failed to establish that Bucio or Garcia suffered great bodily harm, which was an element of the 25-year sentencing

[1] These comments appear in interview notes, which are included in the common law record and were admitted into the record as one of the State's exhibits during the hearings on the amended posttrial motion for a new trial.

enhancement in this case. See 720 ILCS 5/8-4(c)(1)(D) (West 2008). Defense counsel did not cross-examine Dr. Nagy at trial.

¶ 65 " 'Trial strategy includes an attorney's choice of one theory of defense over another.' " *People v. Cunningham*, 376 Ill. App. 3d 298, 301-02 (2007) (quoting *People v. Campbell*, 264 Ill. App. 3d 712, 732 (1992)). In this case, the record establishes defense counsel's theory at trial was that Calderon was the shooter. Although there may have been no legal impediment to additionally arguing that Bucio and Garcia did not suffer great bodily harm, defense counsel was faced with the practical difficulty that the additional argument would suggest to the jury a lack of confidence in the primary defense theory. It was for defendant's trial counsel to decide whether the jurors, in whose selection he participated, and whose demeanor he was able to observe during the presentation of the evidence, would be receptive to the presentation of both arguments. Accordingly, defendant's argument on this point fails because it was defendant's trial strategy. See *Jones*, 2012 IL App (2d) 110346, ¶ 82.

¶ 66 Defendant contends his trial counsel was ineffective in failing to cross-examine Calderon regarding the fact that Calderon was not charged by the police, despite attempting to elude the police, arguably driving under the influence, and possessing an unregistered handgun. The point regarding the unregistered handgun was not raised in the amended posttrial motion for a new trial. Thus, defendant has forfeited that argument on appeal. *Salgado*, 366 Ill. App. 3d at 607; *Ramos*, 339 Ill. App. 3d at 899-900; *Polk*, 2014 IL App (1st) 122017, ¶¶ 47-49. Regarding Calderon's attempt to elude the police and possible driving under the influence, as previously noted, defense counsel's theory at trial was that Calderon was the shooter. A reasonably effective defense attorney could have decided that suggesting Calderon was motivated by the desire to avoid lesser charges, as opposed to the desire to avoid blame for the shooting, would

not further the defense propounded at trial. Thus, defendant's argument fails.

¶ 67 Defendant next argues trial counsel was ineffective in failing to cross-examine Calderon regarding whether defendant yelled, "There they go" in Spanish or pointed at Garcia immediately before the shooting. Defendant presumes that Calderon, seeking to avoid legal accountability, would have answered such questions in the negative, which would have been inconsistent with Giron's testimony regarding the circumstances immediately prior to the shooting. Defendant failed to refer to the pointing in his amended posttrial motion, thereby forfeiting the claim on appeal. *Salgado*, 366 Ill. App. 3d at 607; *Ramos*, 339 Ill. App. 3d at 899-900; *Polk*, 2014 IL App (1st) 122017, ¶¶ 47-49. More generally, defendant invites this court to speculate regarding Calderon's presumed testimony, which cannot satisfy either prong of the *Strickland* standard. See *Bew*, 228 Ill. 2d at 135; *Clarke*, 391 Ill. App. 3d at 614. Defendant's argument thus fails.

¶ 68 Defendant additionally contends his trial counsel was ineffective in failing to object (or timely object) to a lack of foundation for testimony that defendant and Garcia were members of rival street gangs. Again, defendant failed to raise this issue in his amended posttrial motion, thereby forfeiting the claim on appeal. *Salgado*, 366 Ill. App. 3d at 607; *Ramos*, 339 Ill. App. 3d at 899-900; *Polk*, 2014 IL App (1st) 122017, ¶¶ 47-49.

¶ 69 Defendant further contends his trial counsel was ineffective in failing to present an alibi defense after defendant brought facts and circumstances supporting the defense to counsel's attention. "Decisions concerning which witnesses to call at trial and what evidence to present on defendant's behalf ultimately rest with trial counsel." *People v. Reid*, 179 Ill. 2d 297, 310 (1997). "As matters of trial strategy, such decisions are generally immune from claims of ineffective assistance of counsel." *Id*. Nevertheless, the failure to adequately investigate and develop an available defense, or failure to present available witnesses who can corroborate a defense may

constitute ineffective assistance of counsel. *People v. Truly*, 230 Ill. App. 3d 948, 953 (1992). A counsel's decision may not be considered strategic where counsel fails to investigate matters relevant to an alibi defense that a defendant proffers to counsel. See *id*. at 954. Defendant relies upon *Truly*, in which the defendant "repeatedly told his defense counsel that the testimony of [] four witnesses would reveal (1) his whereabouts at the time of the robbery, 33 blocks away from the complaining witnesses' store; (2) that defendant was physically handicapped, walking with a cane at the time of the robbery, and not likely to have run out of the store as complainants testified; and (3) that the complainants had a revenge motive in identifying defendant as one of the robbers." *Id*. at 954. This court found counsel ineffective because counsel or his assistants never attempted to locate or subpoena these four potential witnesses who defendant repeatedly informed counsel could corroborate his defenses and whose names and addresses were provided to counsel by defendant. See *id*. at 955.

¶ 70 In this case, however, defendant alleged in his amended posttrial motion only that trial counsel "failed to present the affirmative defense of alibi after he brought facts and circumstances supporting said defense to their attention." Defendant's amended posttrial motion did not specifically raise the claim that trial counsel failed to investigate a possible alibi defense. Moreover, defendant did not elaborate upon this claim or submit evidence to support the claim during the hearing on his amended posttrial motion for a new trial. Defendant did not explain the nature of the purported alibi, *e.g.*, where defendant supposedly was located at the time of the offense. Defendant did not identify the names of any potential witnesses that he provided to trial counsel in support of the purported alibi defense. Defendant failed to identify any other evidence he provided to counsel in support of the purported, unexplained alibi defense. Defendant failed to support his claim by attaching a supporting affidavit to the amended posttrial motion.

¶ 71 In short, defendant has not identified any portion of the record on appeal that would support his purported alibi defense. Accordingly, this case is readily distinguishable from *Truly*, in which the record established the defendant had repeatedly informed counsel of four potential supporting witnesses and provided their names and addresses to counsel. See *id*. at 955. Defendant had the burden of overcoming the strong presumption that trial counsel's decision was a matter of sound trial strategy. See *Jones*, 2012 IL App (2d) 110346, ¶ 82. Defendant failed to satisfy that burden on this point. Moreover, in the absence of any information regarding the nature or particulars of the purported alibi defense, this court would be required to speculate regarding the merits of the claim, which would be contrary to our established case law. See *Clarke*, 391 Ill. App. 3d 596, 614 (2009) (and cases cited therein). For these reasons, defendant's argument fails.

¶ 72 Similarly, defendant argues his trial counsel was ineffective in failing to introduce evidence that defendant underwent knee surgery and was incapable of running away from Officer Mikuzis, but submitted no evidence in support of this argument. Thus, defendant fails to overcome the strong presumption such evidence was not introduced as a matter of sound trial strategy. Moreover, defendant must demonstrate "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The question of whether defendant was physically capable of running away from Officer Mikuzis is at best collateral to the issue of defendant's guilt or innocence. Thus, defendant's argument fails.

¶ 73 Lastly, defendant contends his trial counsel was ineffective in failing to fully inform the trial judge that jurors were sleeping during the trial. Defendant failed to raise this claim in his amended posttrial motion for a new trial. Thus, defendant has forfeited the argument on appeal.

Salgado, 366 Ill. App. 3d at 607; *Ramos*, 339 Ill. App. 3d at 899-900; *Polk*, 2014 IL App (1st) 122017, ¶¶ 47-49.

¶ 74 In sum, for all of the aforementioned reasons, defendant has failed to demonstrate he received ineffective assistance of trial counsel.

¶ 75 The Discovery Violation

¶ 76 Defendant next argues the trial court erred in denying his amended posttrial motion for a new trial based on the State's failure to tender the May 20 statement from Calderon. Defendant frames this argument as both a violation of his due process rights and as a violation of the rules of pretrial discovery. We address these arguments in turn.

¶ 77 In *Brady v. Maryland*, 373 U.S. 83 (1963), the United States Supreme Court held that the prosecution violates a defendant's constitutional right to due process of law by failing to produce evidence favorable to the accused and material to guilt or punishment. To succeed on a *Brady* claim, a defendant must demonstrate (1) that the evidence that was withheld is favorable to the defendant in that it is either exculpatory or impeaching, (2) that the evidence was either wilfully or inadvertently suppressed by the State, and (3) that prejudice to the defendant ensued. *People v. Buckner*, 376 Ill. App. 3d 251, 258 (2007); *People v. Williams*, 329 Ill. App. 3d 846, 857 (2002). In order to demonstrate prejudice, the suppressed evidence must be material to guilt or punishment on the sense that there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed. *People v. Beaman*, 229 Ill. 2d 56, 74 (2008). "To establish materiality, an accused must show ' "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." ' " *Id*. (quoting *People v. Coleman*, 183 Ill. 2d 366, 393 (1998)). Thus, evidence is not material under *Brady* where the evidence allegedly withheld was merely cumulative of other

evidence challenging the credibility of a witness at trial. See *People v. Harris*, 206 Ill. 2d 293, 312 (2002) (citing *People v. Cloutier*, 191 Ill. 2d 392, 400-01 (2000)). Moreover, the impact or strength of the undisclosed evidence can only be determined by also viewing the strength of the evidence presented against the defendant. See *Beaman*, 229 Ill. 2d at 77. Illinois has codified the requirements of *Brady* in Supreme Court Rule 412. Ill. S. Ct. R. 412(c) (eff. Mar. 1, 2001).

¶ 78 Generally, the applicable standard of review of an order addressing a violation of Rule 412 depends on the nature of the issue before the reviewing court. See *People v. Peterson*, 397 Ill. App. 3d 1048, 1054 (2010). "We review the trial court's legal conclusions *de novo*, but we will not upset the trial court's findings of fact unless they are clearly erroneous." *Id.*; see also *Beaman*, 229 Ill. 2d at 73 (reviewing the circuit court's decision regarding materiality for manifest error where court conducted an evidentiary hearing on a postconviction *Brady* claim).

¶ 79 In this case, the parties do not dispute that the State inadvertently failed to provide the May 20 statement to the defense prior to or during trial. The Sate also does not contend the May 20 statement was not favorable to the defense. Rather, the State argues the trial judge properly concluded the failure to provide the May 20 statement to the defense was not prejudicial.

¶ 80 Defendant asserts the May 20 statement could have been used to impeach Calderon's testimony regarding the circumstances under which defendant left his handgun in Calderon's possession. Defendant also asserts the statement could have been used to impeach Lorena's testimony that she observed defendant at her house after the shooting. Defendant argues prior access to the May 20 statement "would have helped discredit two witnesses on the critical issue of the [d]efendant handling the gun."

¶ 81 A review of the record on appeal, however, demonstrates the undisclosed May 20 statement could not reasonably be taken to place the whole case in such a different light as to

undermine confidence in the verdict. See *Beaman*, 229 Ill. 2d at 74. The trial judge found that the State had provided defendant's trial counsel with other substantially identical statements from Calderon, including a second statement from Calderon that defendant departed and Lorena observed the handgun in the garage, at which point Calderon informed Lorena of the incident. Defendant has not contended that this finding was manifestly erroneous. The exhibits submitted by the State during the hearing on the amended posttrial motion for a new trial, included in the record on appeal, contain the statements from Calderon upon which the trial judge relied.

¶ 82 The trial court reasoned that had trial counsel believed the impeachment proposed by posttrial counsel was significant, trial counsel could have impeached Calderon and Lorena with the substantially identical materials provided by the State during pretrial discovery, but trial counsel did not attempt that impeachment. The trial court thus did not err in concluding the outcome of the trial would not have differed had the State provided the May 20 statement to defendant's trial counsel.[2] See *Peterson*, 397 Ill. App. 3d at 1054. Accordingly, the trial court did not err in ruling that defendant failed to demonstrate his case was prejudiced by the State's

[2] Defendant asserts the trial judge's reasoning was flawed because it failed to account for the ineffective assistance provided by trial counsel. In assessing defendant's *Brady* claim, however, the issue is whether there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed. *Beaman*, 229 Ill. 2d at 74. Given that the State provided defendant's trial counsel with substantially identical statements from Calderon, the trial court did not err in concluding the trial would not have proceeded differently if the May 20 statement had been disclosed. Moreover, we observe that in the amended posttrial motion for a new trial, defendant did not assert that his trial counsel was ineffective in failing to impeach Calderon regarding when Lorena emerged from the house.

failure to disclose the May 20 statement.

¶ 83 In the alternative, defendant contends the trial court erred in not granting a new trial based on the State's violation of the rules of pretrial discovery. Illinois Supreme Court Rule 412(a) requires the State to disclose, upon written motion of defense counsel, written, recorded or summarized statements of individuals the State intends to call as witnesses at trial. See Ill. S. Ct. R. 412(a)(i) (eff. Mar. 1, 2001). "The failure to comply with discovery requirements does not in all instances necessitate a new trial." *People v. Blackman*, 359 Ill. App. 3d 1013, 1018 (2005). "Among the factors to be considered in determining whether a new trial is warranted are: (1) the strength of the undisclosed evidence; (2) the likelihood that prior notice could have helped the defense discredit the evidence; and (3) the willfulness of the State in failing to disclose." *Id.* "[A] new trial should only be granted if the defendant is prejudiced by the discovery violation and the trial court failed to eliminate the prejudice." *Id.* " 'A reviewing court will not reverse the trial court's exercise of its discretion in granting a particular sanction in the absence of a showing of surprise or prejudice to the defendant.' " *Id.* (quoting *People v. Loggins*, 134 Ill. App. 3d 684, 691 (1985)).

¶ 84 In this case, for the reasons already stated, defendant has failed to demonstrate prejudice. *Supra* ¶ 81. We additionally observe that the parties agree the State's failure to disclose the May 20 statement was not willful. Accordingly, the trial court did not abuse its discretion in denying the posttrial motion as a discovery sanction. *Blackman*, 359 Ill. App. 3d at 1018.

¶ 85 The Attentiveness of the Jurors

¶ 86 Defendant further contends the trial court erred in denying his amended motion for a new trial based the trial judge's failure to investigate whether jurors were sleeping during the trial. The State initially responds that defendant forfeited this issue by failing to object to the alleged

failure to investigate during the trial. "To preserve an issue for review, a defendant must both object at trial and raise the issue in a written posttrial motion." *People v. Lewis*, 223 Ill. 2d 393, 400 (2006) (citing *People v. Enoch*, 122 Ill. 2d 176, 186 (1988)). "*Both* a trial objection and a written post-trial motion raising the issue are required for alleged errors that could have been raised during trial." (Emphasis in original.) *Enoch*, 122 Ill. 2d at 186. If the defendant or his attorney observed a juror sleeping, there was a duty to call it to the attention of the court at that time; the failure to do so results in a forfeiture of the point. *People v. Silagy*, 101 Ill. 2d 147, 171 (1984). In this case, neither defendant nor trial counsel claimed during the trial that jurors were sleeping. Rather, counsel merely observed that "during the last few minutes, I did see one or two of the jurors kind of closing their eyes."

¶ 87 In addition, defendant forfeited any claim that the trial judge's failure to investigate the alleged sleeping jurors constitutes plain error because defendant did not argue for plain-error review in his opening or reply briefs. See *Polk*, 2014 IL App (1st) 122017, ¶¶ 47-49 (and authorities cited therein). Furthermore, "plain-error review is forfeited when the defendant invites the error." *People v. Harding*, 2012 IL App (2d) 101011, ¶ 17. " '[A] defendant's invitation or agreement to the procedure later challenged on appeal goes beyond mere waiver.' " (Internal quotation marks omitted.) *Id*. (quoting *People v. Harvey*, 211 Ill. 2d 368, 385 (2004)). Where the defendant has invited the error, our supreme court has declined to address any related plain-error claim. *Harding*, 2012 IL App (2d) 101011, ¶ 17 (citing *People v. Patrick*, 233 Ill. 2d 62, 76 (2009). In this case, defense counsel requested a sidebar in order to provide a break for the jurors and expressly declined to allege that any of jurors had been sleeping. Accordingly, defendant has forfeited the issue on appeal.[3]

[3] Although defendant has forfeited the issue, we observe in passing "there are no

¶ 88 Closing Arguments

¶ 89 Lastly, defendant asserts the trial court erred in failing to declare a mistrial. "A mistrial should be declared only where there is an occurrence of such character and magnitude as to deprive a party of a fair trial and the moving party demonstrates actual prejudice." *People v. Jackson*, 293 Ill. App. 3d 1009, 1018-19 (1997). "The decision whether to grant a mistrial is within the broad discretion of the trial court based on the particular circumstances of the case and should not be disturbed on review absent a clear abuse of discretion." *Id*. at 1019; see *People v. Nelson*, 235 Ill. 2d 386, 435 (2009). "Generally, a court abuses its discretion when its decision is fanciful, arbitrary, or unreasonable to the degree that no reasonable person would agree with it." *People v. Ortega*, 209 Ill. 2d 354, 359 (2004).

¶ 90 Defendant moved for a mistrial based on the State's comment during closing argument that the jury could "put two and two together" regarding Garcia's absence from the trial. It is well established that a prosecutor has wide latitude during closing argument. *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007); *People v. Blue*, 189 Ill. 2d 99, 127 (2000). It is improper, however, for a prosecutor to argue assumptions or facts not based on the evidence during closing argument. *People v. Terry*, 312 Ill. App. 3d 984, 993 (2000).

¶ 91 There is an apparent conflict in our supreme court's rulings regarding the proper standard of review for claims based upon allegedly improper closing arguments. In *Wheeler*, our supreme court applied a *de novo* standard of review. *Wheeler*, 226 Ill. 2d at 121. In *Blue*, however, the

---

decisions in Illinois on the affirmative duty of the court to ensure an attentive jury, [but] we do know that a juror who is inattentive for a *substantial portion of a trial* has been found to be unqualified to serve on the jury." *People v. Jones*, 369 Ill. App. 3d 452, 455 (2006). In this case, defense counsel referred to a few minutes of the trial.

court applied an abuse of discretion standard. *Blue*, 189 Ill. 2d at 128. In this case, however, we need not resolve this issue, as our conclusion is the same under either standard. See *People v. Crawford*, 2013 IL App (1st) 100310, ¶ 139; *People v. Hayes*, 409 Ill. App. 3d 612, 624 (2011).

¶ 92 In this case, defense counsel argued the prosecutor's comment necessarily implied that Garcia was dead and possibly as the result of gang violence. Detective Gomez testified that Garcia was a member of the Ambrose street gang, but Garcia could not be located based on the information Garcia provided to the police. The prosecutor's comment invited speculation, but did not necessarily imply that Garcia was dead, let alone dead as the result of gang violence.

¶ 93 Moreover, defendant's argument fails, even assuming for the sake of argument that the comment was improper. As our supreme court has frequently stated, "the prompt sustaining of an objection combined with a proper jury instruction usually is sufficient to cure any prejudice arising from an improper closing argument." *People v. Johnson*, 208 Ill. 2d 53, 116 (2003) (modified upon denial of rehearing Jan. 26, 2004). "The trial court may cure errors by giving the jury proper instructions on the law to be applied; informing the jury that arguments are not themselves evidence and must be disregarded if not supported by the evidence at trial; or sustaining the defendant's objections and instructing the jury to disregard the inappropriate remark." *People v. Simms*, 192 Ill. 2d 348, 396 (2000). Moreover, to constitute reversible error, the improper remarks must have resulted in substantial prejudice to the accused, such that absent those remarks the verdict would have been different. See, *e.g.*, *Hayes*, 409 Ill. App. 3d at 625. Improper comments do not deny a defendant a fair trial where the complained-of comments, when viewed in the context and totality of the closing arguments, were brief and isolated. See, *e.g.*, *People v. Gorosteata*, 374 Ill. App. 3d 203, 226 (2007).

¶ 94 In this case, the trial judge promptly sustained trial counsel's objection and subsequently

instructed the jury that closing arguments are not evidence. Thus, the trial judge cured any prejudice arising from the argument. In addition, the comments were brief and isolated in comparison to the totality of the State's extensive closing arguments. Accordingly, we conclude defendant was not denied a fair trial on this point. See *Simms*, 192 Ill. 2d at 396; *Gorosteata*, 374 Ill. App. 3d at 226. Thus, the trial judge did not abuse his discretion in denying defendant's motion for a mistrial. *Jackson*, 293 Ill. App. 3d at 1019.

¶ 95 CONCLUSION

¶ 96 For all of the aforementioned reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 97 Affirmed.