2015 IL App (2d) 130736-U
No. 2-13-0736
Order filed November 12, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOHNNY C. BORIZOV, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 10-CF-569 Honorable Daniel Guerin, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: Although the prosecution made four erroneous comments during its closing argument, the comments did not constitute a material factor in defendant's convictions, and the prosecution did not engage in a pervasive pattern of misconduct. We affirm.

¶ 2 Defendant, Johnny C. Borizov, was convicted by a jury of three counts of first-degree murder and one count of solicitation of murder. The State's theory was that defendant was accountable for the actions of Jacob Nodarse, who admitted killing three family members of defendant's former fiancé. In this direct appeal, defendant contends that the prosecution exhibited a pervasive pattern of misconduct, thereby diverting the jury from its proper role, and

improperly turning the case into a "trial of whether [defendant] was a bad person." We agree that some of the prosecution's statements were improper; however, we do not believe the prosecution engaged in a pervasive pattern of misconduct. The State properly presented overwhelming evidence that defendant was legally responsible for Nodarse's conduct.

¶ 3 I. BACKGROUND

¶ 4 Jeffrey Kramer, Lori Kramer, and their son, Michael Kramer, were shot and killed in their Darien home at approximately 3 a.m. on March 2, 2010. Jeffrey and Lori's daughter, Angela Kramer, was in the home at the time of the killings. Police arrested Jacob Nodarse in Florida two days later. Nodarse admitted killing the Kramers, but maintained that he had committed the crimes to protect himself and his family. He explained to investigators that he was expected to give testimony in a custody dispute between defendant and Angela involving their infant son. He further explained that Angela was threatening to expose members of defendant's criminal organization in an attempt to gain leverage against defendant in the custody dispute. Nodarse said defendant convinced him that he and his family would be harmed unless he killed the Kramers. Nodarse later pleaded guilty but mentally ill to the murder of Jeffrey Kramer. The State agreed to dismiss the murder charges involving Lori and Michael in exchange for Nodarse's testimony against defendant. The following testimony and evidence was introduced during defendant's jury trial.

¶ 5 A. Defendant and the Kramer Family

¶ 6 Angela testified that she began dating defendant during fall 2007. Defendant had been friends with her previous boyfriend, Steve Hetman, who had recently died in a motorcycle accident. Defendant was not employed, but he frequently went out at night, claiming he "had vending machines to go collect money from." On Halloween 2007, defendant and Angela went

to a casino. Defendant looked at a surveillance camera while the two were alone and said he had to make sure that he was being recorded because he had "people out there doing stuff" for him.

¶ 7 Defendant and Angela became engaged in April 2008. Angela became pregnant shortly thereafter. She moved into a Countryside home with defendant in January 2009. Their son, Nicholas, was born in February 2009. Tensions arose between defendant and the Kramer family during Angela's pregnancy. On one occasion, defendant would not allow Lori to attend a doctor visit where Angela and defendant were scheduled to learn the gender of their unborn child.

¶ 8 Lori's mother, Joyce Tamarrino, testified that Lori described an argument she had with defendant in March 2009. Lori said defendant told her, "I hate you, bitch. You'll never see your grandson again. I hope you die." Lori responded by calling defendant a sociopath. Joyce observed defendant on subsequent occasions stating that he hated Jeffrey and Lori and he hoped they would die.

¶ 9 In April 2009, defendant became angry because Jeffrey was towing a non-working car from defendant's Countryside home. Although Jeffrey had given the car to Angela, defendant took offense because he had spent money on the car. Angela testified that defendant shoved Jeffrey, pulled a switchblade, and said, "I am going to fucking kill you. I fucking hate you." The police arrived shortly thereafter and restrained defendant. No arrests were made.

¶ 10 In May 2009, Joyce held a party to celebrate Nicholas's three-month birthday. Angela testified that defendant insisted on going to the party and would not let her go alone. At one point, defendant saw Lori holding Nicholas and became upset. Defendant grabbed Nicholas, forcefully placed him in his baby carrier, and left the party. As defendant was leaving, he struggled over the baby carrier with Lori and Joyce, both of whom sustained bruises during the incident. The police were called to the party, but made no arrests.

¶ 11 B. Jacob Nodarse

¶ 12 Although he had never seen a psychologist or psychiatrist during his youth, Nodarse testified that he had been depressed since the fifth grade. He explained that his parents were strict Jehovah's Witnesses. As a child, Nodarse was not allowed to be involved in extra-curricular activities due to the bad influences from people of other faiths. His parents would throw away many of his possessions, such as CD's and DVD's. This led to friction between Nodarse and his parents, and "an abusive and hostile environment." He testified that his parents would beat him, which led him to begin cutting himself with a knife. He began smoking marijuana and drinking alcohol during his junior year in high school. He moved away from home during his senior year of high school, and his parents and younger sister subsequently moved to Fort Myers, Florida.

¶ 13 In fall 2005 Nodarse was working as a technician at a BMW dealership and taking classes at a community college. He moved into an apartment with his friends, Joe Jereb and Jake Guziec. Nodarse described the apartment as a "party house," with at least 20 people present on any given night. Nodarse began smoking marijuana "almost every day" and drinking alcohol "probably five out of seven days a week." He was prescribed Vicodin after suffering a bacterial infection and mononucleosis in 2007. After he recovered, he began purchasing Vicodin illegally, which had a "snowball effect" progressing to stronger medications. He began using Percocet, Oxycontin, methadone, hydromorphone, and eventually, heroin. At first, the drugs alleviated his severe depression and anxiety; they were "almost a magical solution."

¶ 14 Nodarse began seeing a psychiatrist for depression in late summer 2009. He had recently learned that his younger sister had been raped. Two of his close friends had recently died. His girlfriend of two years, Samantha Mercado, described Nodarse as being smart, but testified that

she thought he was depressed and he needed help. In fall 2009, Nodarse walked in on Mercado having sex with Jereb. It became common knowledge among Nodarse's friends that Jereb had slept with Mercado. Nodarse nevertheless continued living in the apartment.

¶ 15 C. Nodarse and Defendant

¶ 16 Nodarse met defendant in early summer 2009. He soon began purchasing drugs from defendant, including Vicodin, Oxycontin, and heroin. By fall 2009, Nodarse had become friends with defendant and frequently accompanied him to bars and restaurants. Defendant said he was part of a criminal organization and had connections to powerful criminals. He claimed his organization received payouts from casinos and committed crimes such as extortion and murder, in addition to dealing drugs. He said that members of the organization had to commit a murder before they could be initiated.

¶ 17 Nodarse testified that defendant introduced him to men named Mitch, Tony, Dino, and Frank, each of whom defendant claimed were part of his organization. Defendant described Mitch as his "right-hand man." Tony handled defendant's distribution of narcotics. Dino ran his own crew and had a similar rank as defendant. Frank was an older man who had a high rank and a lot of authority. Defendant made it clear that Nodarse was never to discuss any aspect of the criminal organization with any of these men.

¶ 18 Defendant also told Nodarse of people who had "put in a fair amount of work" for the organization, meaning that they had killed several people. These included men named John and Vito, as well as a bouncer at a bar named "Capri," where high-ranking members of the organization frequently met. These discussions always took place while defendant and Nodarse were alone in a car.

¶ 19 Soon after they met, Nodarse and defendant realized that they shared a mutual acquaintance: Michael Kramer. Michael was one of the regular attendees at the apartment that Nodarse shared with Jereb and Guziec. Nodarse had known Michael for approximately four years, describing him as a good friend. When defendant realized that Nodarse and Michael were friends, defendant explained to Nodarse that he was dating Angela and he did not get along with Michael. Nodarse was instructed not to tell Michael of his friendship with defendant. Michael eventually became suspicious regarding Nodarse's source of drugs and asked him whether he knew defendant. Nodarse lied and said he did not.

¶ 20 D. Thanksgiving 2009

¶ 21 The State presented extensive evidence and testimony that defendant and Michael had a heated argument the night before Thanksgiving 2009. Nodarse testified that he and Michael were drinking at Nodarse's apartment late Wednesday night and into Thursday morning. At one point, Nodarse confessed that he knew defendant and apologized for previously claiming otherwise. Michael went on a profanity-laced rant and claimed that defendant had abused Angela.

¶ 22 Defendant called Nodarse's phone later that night. Michael asked Nodarse who was calling and threatened to fight him if he did not hand over the phone. Nodarse gave the phone to Michael, who then cursed at defendant, threatened to shoot him in the head, and stated that he was going to help Angela raise Nicholas. Before ending the conversation, Michael told defendant, "[a]nd feel free to come over here. I'm going to kill your ass." Nodarse subsequently spoke with defendant on the phone, describing him as being "irate." Defendant told Nodarse that he was armed and speeding toward Nodarse's apartment, adding that he was going to kill

Michael. Nodarse estimated that he heard Michael and defendant both threaten to kill each other about 30 times that night.

¶ 23 Angela testified that she was at the Countryside home alone with Nicholas on the night before Thanksgiving 2009. She said Nicholas was "very sick" with a "103, 104 fever." Defendant was out and Angela did not know where he was. She was awakened early Thursday morning by a phone call from Michael, describing him as "upset" and "angry." Defendant called Angela between 5 and 10 minutes later. He told Angela that he was "heading to where Michael is right now" and "[Michael] better watch it." At around 5:00 a.m., defendant arrived at the Countryside home with Nodarse. Defendant instructed Nodarse to tell Angela about Michael's threats.

¶ 24 Nodarse testified that he was kicked out of his apartment with Jereb and Guziec after the Thanksgiving incident. Defendant arranged for Nodarse to rent a Countryside apartment from his uncle, Greg Georgevich. Defendant said that Georgevich knew of his illegal activities, but told Nodarse not to discuss the topic with him. Nodarse's roommate at the Countryside apartment was Graham Morenz, a fellow employee at the BMW dealership.

¶ 25 E. Defendant and Angela Separate

¶ 26 Tensions escalated between defendant and Angela during December 2009 and January 2010. Angela testified that defendant would not allow her to take Nicholas to the Kramer family's Darien home on Christmas day. Angela and defendant argued through the next day, as Angela threatened to move out of the Countryside home if defendant could not start getting along with her family. Defendant said he did not care if Angela left, but he was keeping Nicholas, adding that Angela would be seeing her family "in body bags." The two eventually

reached an informal agreement to split custody of Nicholas, and Angela moved into the Kramer family's Darien home.

¶ 27 Angela continued to live in the Darien home during the following weeks, despite defendant's repeated requests that she to move back to the Countryside home. On December 31, 2009, she and Lori met with attorney Anique Drouin for an initial consultation regarding legal custody of Nicholas. Angela was scheduled to pick Nicholas up from the Countryside home on January 13, 2010. The night before, defendant had called Angela and threatened to throw her things to the street if she did not move back to the Countryside home. Angela arrived at the Countryside home the next day to find many of her belongings outside in the driveway. She said defendant was being loud and profane, and he continued to throw her belongings out of the house. Angela began recording a video of the incident on her cell phone. The video was admitted and played for the jury. After leaving the Countryside home, Angela went directly to Drouin's office to file for sole legal custody of Nicholas.

¶ 28 On January 14, 2010, Lori Kramer spoke with Evelyn Hanley, the facilities manager at her place of employment. Hanley testified that Lori said Angela was involved in a custody dispute, and Lori was concerned for her safety because defendant knew where she sat at work and he "might come pay her a visit at the office." She said defendant had "been combative, and he would make her family miserable in the child custody process." Lori sent Hanley an email that same day detailing her concerns, with a picture of defendant attached. The email stated that defendant had made threats toward the Kramer family and requested that defendant not be allowed past security. Hanley forwarded the email to the company's security department. A copy of the email was admitted into evidence.

¶ 29 F. Evidence of Accountability and Solicitation

¶ 30 Nodarse testified that defendant began cultivating the motive for the killings as his relationship with Angela deteriorated. Defendant told Nodarse that Angela had given the police information about several of his criminal associates and their illegal activities. The members of defendant's organization were upset because Angela knew more than she was supposed to have known. They believed Angela acquired this information from Nodarse because of Nodarse's friendship with Michael. In addition, defendant explained that his associates had been questioning Nodarse's involvement with the criminal organization. Defendant had taken the liberty of vouching for Nodarse's initiation, meaning the members of the organization believed that Nodarse had committed a murder.

¶ 31 Defendant also claimed he had an "informant" who had been spending time at Nodarse's old apartment. According to the informant, Michael had been discussing his desire to kill Nodarse to prevent him from testifying during Angela's custody proceeding, as Nodarse would be a "key witness" regarding the Thanksgiving incident.

¶ 32 These conversations escalated through February 2010, as defendant claimed the members of his criminal organization were increasingly upset with Michael and Angela. Defendant supported his claim that Michael and Angela were giving the police information by showing Nodarse some papers relating to the custody dispute. Nodarse testified that the papers had an official heading and contained a list with several names. Nodarse recognized his name, as well as several of defendant's criminal associates. Defendant said Michael and Angela had already helped the police find drugs in a vehicle belonging to his associate, John. As a result, John's children were taken into foster care. Defendant had been ordered to either kill Angela and Michael himself, or have Nodarse do the job. Defendant explained, however, that he would not be able to get away with the murders because the custody dispute gave him an obvious motive.

¶ 33 Defendant said his criminal associates were also threatening to harm Nodarse's family if Angela and Michael were not killed. Defendant had a printout from Nodarse's sister's Facebook page. He said John had sent him the printout and commented that Nodarse's sister was "very pretty" and "he would be interested in her." Defendant knew that Nodarse's sister had previously been raped.

¶ 34 Defendant also repeatedly mentioned the threats from Michael, eventually claiming that Michael had gathered enough money to hire someone to kill Nodarse. On February 20, defendant called Nodarse and told him Michael had arranged to kill him that night. Nodarse armed himself with knives and spent the night waiting in his kitchen with the lights off and the blinds drawn. Defendant warned Nodarse that he would be killed if he went to the police, adding that he would find out because he had connections with several police officers.

¶ 35 On February 22, at defendant's urging, Nodarse purchased a handgun for his own protection. He picked up the handgun and some magazines on February 25, following a three-day waiting period. He quit his job at the BMW dealership that same day, telling co-workers that people were trying to kill him. He told defendant that he was going to Florida, where his family lived, so he could protect them. Defendant told Nodarse that this would be useless; John was a professional that would inevitably find Nodarse's family and rape his sister. Defendant said the only other option was to kill Michael and Angela.

¶ 36 Nodarse testified that defendant helped devise the plan to kill the Kramers. On the night of February 25, defendant took Nodarse to the back yard of the Kramers' Darien home. Defendant described the layout of the Kramer house. He told Nodarse to kick in a door or break a window to get into the house. Once Nodarse was in, he would be committed: he was to kill Angela, Michael, Jeffrey, and Lori, making sure to shoot each of them in the head. Defendant

told Nodarse to check the rooms upstairs and make sure that no one was hiding in the closets. He told Nodarse to wear latex gloves underneath a second pair of gloves, along with a mask and three layers of clothing. He gave Nodarse a pair of over-sized shoes that belonged to his associate Dion, which Dion had left in defendant's car. He told Nodarse to stuff tissue paper in the end of the shoes and wear them while he was in the Kramer home.

¶ 37 Nodarse would tell people that he was leaving for Florida on Sunday, February 28, at which point he would suspend all contact with defendant. He would delete all of his text messages and render his phone untraceable. He would stay somewhere in the area, unnoticed, until early Tuesday morning, March 2. He would kill the Kramers at precisely 3 a.m. Defendant would be in a bar with surveillance cameras while Nodarse was killing the Kramers. Defendant's associate, John, would be killing the social worker who had taken his children. At 4 a.m., defendant would kill the Kramers' cousins, who were gang-affiliated, to prevent them from striking back in retaliation. Nodarse would drive directly to Florida after killing the Kramers.

¶ 38 Nodarse could not sleep during the following days because he was paranoid and afraid. He wrote a suicide note to his family, which was admitted into evidence. He gave defendant a list of phone numbers for people whom defendant promised to protect in case anyone sought revenge. He went out to a bar with defendant on the evening of February 27. Defendant pulled him aside at one point during the night and told him that everything was "still on as planned."

¶ 39 G. March 2, 2010

¶ 40 Nodarse testified that he began taking a large amount of drugs on March 1. By the early hours of March 2, he had taken 10 Vicodin pills, 2 Adderall pills, Klonopin, and sleeping medication. He became disoriented and felt as though he was dreaming. As he left his apartment, dressed according to defendant's instructions, he could not distinguish between

reality and a dream. He mistakenly drove to his old apartment before proceeding to the Kramer house. Just before 3 a.m., he approached the house with his loaded gun and a hammer. He had visions of his sister being injured and he could hear her screaming. He testified, "it came in my mind that this is something I had to do to save my family. And I gathered up as much courage as I could and I broke the window."

¶ 41 As he entered the house, Nodarse first saw Michael on the couch watching television. He fired a stray shot at Michael, who ran into the kitchen. Nodarse turned to his right, saw Jeffrey, and shot him in the torso. He noticed Lori coming down the stairs and he shot her in the torso as well. Nodarse walked to Jeffrey and Lori and shot them each in the head, just as defendant had instructed. He then looked for Michael and found him holding a steak knife in the kitchen. He fired a shot into Michael's torso, and then shot him in the head. Nodarse checked upstairs for Angela, but he could not find her; he did not check the bedroom closets. He quickly left the Kramer home and went to his car, which he had left running.

¶ 42 Nodarse was driving south through Indiana when the sun started to rise. He became very nervous and started having flashbacks. He pulled over and vomited on the side of the road, still uncertain as to whether he had been dreaming. He realized that he had committed the murders after determining that he had spent rounds of ammunition. He drove to a restaurant in Terre Haute, Indiana, and parked near a dumpster. He put his handgun, ammunition, mask, shoes, gloves, and outer layers of clothing in a black garbage bag. He placed the bag into the dumpster and proceeded driving southbound toward Florida.

¶ 43 While in Georgia, Nodarse called 911 because he believed undercover police cars were harassing him. A recording of that conversation was admitted into evidence and played for the jury. Nodarse also attempted calling defendant, but defendant did not answer. He was able to

contact Guziec, who testified that Nodarse was "freaking out," and he thought "almost all the vehicles around him were cops." Guziec told Nodarse that something had happened, explaining that Michael and his parents might not be alive. Nodarse paused and responded that he and Guziec might not get another chance to talk. Nodarse also mentioned that he had written a letter for his sister and he was going to Florida to protect her. Guziec called the police after Nodarse hung up.

¶ 44 H. Aftermath

¶ 45 Nodarse made contact with his parents, who met him in Tampa Bay and drove him to Fort Myers. He fell asleep along the way. He woke up to the sound of a U.S. Marshal tapping his gun on the car window. Nodarse was taken into custody and interviewed twice on March 4. He was then flown back to Chicago and interviewed at the Darien police station on March 6. The videos of these interviews were admitted and played for the jury as prior consistent statements. While there were minor discrepancies between Nodarse's statements during the interviews and his trial testimony, he was generally consistent in his representations that defendant led him to believe he and his family members were in danger. He was also consistent in his statements that defendant was instrumental in devising the plan to kill the Kramers.

¶ 46 Defendant called 911 just before 7 a.m., on March 2, and asked to speak with a police officer. Willow Springs police officer Bobby Sims met with defendant. Sims testified that defendant said he did not feel safe because he recognized the Kramers' home on televised news reports and he feared his son's mother was dead. Defendant voluntarily accompanied officers to the Darien police station. On the way, defendant said he had been at a casino during the previous night and he had nothing to do with the murders. At trial, the State admitted surveillance videos showing that defendant was at a Joliet casino with his brother, Boris, from approximately 10:30

p.m. to 3:45 a.m. At approximately 3:26 a.m., defendant went out for a cigarette break and had a conversation with Guilia Wuttke, who testified that defendant appeared nervous and repeatedly checked his phone.

¶ 47 Defendant was later arrested and placed in a holding cell next to Nodarse. The two had several conversations on March 5 and 6. Recordings of those conversations were admitted and played for the jury. Defendant repeatedly asked Nodarse if he had spoken with police. He also asked if Nodarse wore gloves and disposed of the gun, claiming his lawyer told him the police had recovered finger prints and a gun.

¶ 48 I. Nodarse's Mental State

¶ 49 Clinical psychologist Dr. John Murray testified as an expert witness for the State. He conducted 10 interviews with Nodarse, in addition to reviewing Nodarse's interviews with law enforcement. He found Nodarse to be credible, stating that Nodarse's story was consistent with what he had said during the interviews in the days following the murders. Dr. Murray estimated Nodarse's intelligence to be "at least average, probably higher." He opined that Nodarse was fit to stand trial with medication, and that, although Nodarse was experiencing symptoms of a mental illness at the time of the murders, those symptoms were not so severe that Nodarse was not responsible for his actions. He diagnosed Nodarse with bi-polar disorder, a severe mood disorder, which was linked to major depressive episodes that he had experienced during his life.

¶ 50 Du Page County jail staff psychiatrist Dr. James Corcoran testified on behalf of defendant. He had interviewed Nodarse 48 times. On April 30, 2010, Nodarse told Dr. Corcoran that he sometimes heard voices. Dr. Corcoran had interpreted this as a possible auditory hallucination, and he was concerned at the time that Nodarse might be developing some psychotic symptoms. Dr. Corcoran admitted on cross-examination that he did not document the

incident as an auditory hallucination, due largely to the possibility that Nodarse could have been suffering residual symptoms from his prior substance abuse. Dr. Corcoran never diagnosed Nodarse as being psychotic.

¶ 51 Forensic psychiatrist Dr. Mark Mills also testified on behalf of defendant. In his opinion, Nodarse was intermittently psychotic in and around the time of the killings. This meant Nodarse "was manifesting significant symptoms of hallucinations, of delusions, of lack of contact with reality, of problems with thinking." Although Dr. Mills never interviewed Nodarse, he came to his conclusion by studying Nodarse's videotaped interviews with investigators, the audiotapes of Nodarse and defendant in the holding cells, and reports from several psychologists who had interviewed Nodarse. Dr. Mills did not think Nodarse had a broad period of psychosis until the weeks leading up to the killings.

¶ 52 J. Verdict

¶ 53 The jury found defendant guilty of the first-degree murders of Jeffrey Kramer, Lori Kramer, and Michael Kramer, as well as solicitation of the murder of Angela Kramer. Defendant was sentenced to three consecutive life terms on the first-degree murder counts, to be served consecutively to a 30-year term on the solicitation of murder count. He filed a timely notice of appeal.

¶ 54 II. ANALYSIS

¶ 55 Defendant's sole contention on appeal is that he was deprived of a fair trial due to a "pervasive pattern of prosecutorial misconduct." In support, he argues that the prosecutor introduced irrelevant and prejudicial evidence in certain instances for the purpose of showing the jury that he was a bad person. Defendant also points to numerous "objectionable comments" made by the prosecution during closing and rebuttal arguments. He argues that the prosecution

made comments ridiculing defense counsel, disparaging defendant, and misstating the law. Defendant asserts that the evidence was closely balanced, and it was likely the jury was improperly influenced by the numerous prosecutorial errors. We disagree, and therefore affirm defendant's convictions.

¶ 56 We note at the outset that several of the issues defendant raises on appeal were not properly preserved. Both a trial objection and a written post-trial motion raising the issue are required to preserve an issue for appellate review. *People v. Naylor*, 229 Ill. 2d 584, 592 (2008). However, the plain-error doctrine allows a reviewing court to reach a forfeited error affecting substantial rights in two circumstances: (1) where the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence, the reviewing court may consider the forfeited error to preclude an argument that an innocent person was wrongly convicted; and (2) where the error is so serious that the defendant was denied a substantial right and thus a fair trial, the reviewing court may consider the forfeited error to preserve the integrity of the judicial process. *People v. Cosby*, 231 Ill. 2d 262, 272 (2008) (citing *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005)).

¶ 57 A. Evidentiary Issues

¶ 58 Defendant argues that the trial court erred by allowing the State to introduce irrelevant and prejudicial evidence in three instances. Additionally, he raises two evidentiary challenges that were not properly preserved. As discussed, defendant's sole contention on appeal is that he was prejudiced by a pervasive pattern of prosecutorial misconduct. Hence, it is not clear whether defendant is challenging the trial court's admission of the evidence or the prosecution's use of the evidence. Regardless, we conclude that the evidence identified by defendant was not erroneously introduced or admitted.

¶ 59 A defendant's guilt may be proved only by "legal and competent" facts, and a jury must remain "uninfluenced by bias or prejudice raised by irrelevant evidence." *People v. Blue*, 189 Ill. 2d 99, 129 (2000). Evidence is relevant if it tends to make the existence of any fact of consequence more or less probable than without the evidence. *People v. Boand*, 362 Ill. App. 3d 106, 125 (2005); see also Ill. R. Evid. 401 (eff. Jan. 1, 2011). However, a trial court may reject relevant evidence if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *People v. Dabbs*, 239 Ill. 2d 277, 291 (2010). Evidentiary rulings are within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. *People v. Caffey*, 205 Ill. 2d 52, 89 (2001). "An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *Id.*

¶ 60 1. Preserved Issues

¶ 61 Angela's former boyfriend, Steve Hetman, was killed in a motorcycle accident shortly before Angela began dating defendant. As noted, defendant and Hetman had been friends. The prosecution discussed Hetman's death during opening statements, commenting, "[within] a few months [of Hetman's death], the defendant asked out his dead best friend's girlfriend." Defense counsel did not object at that point, but later objected when the prosecution questioned Angela about Hetman's death. The trial court stated, "I know openings are not evidence, but it was discussed. I don't want to emphasize this. Just for the time line of events, I will allow it." Defendant argues that the "true purpose this evidence" was revealed in the prosecutor's opening statement: to show that defendant was an immoral person.

¶ 62 We agree with defendant that the State could have established a timeline of events without discussing Hetman's death. However, we do not conclude that the trial court abused its

discretion. The relationship between Angela and defendant was at the center of this case. Before referencing Hetman's death, Angela testified that Hetman was her former boyfriend. There was no objection to this testimony. Under these circumstances, it was not unreasonable for the trial court to allow evidence regarding the timing of Hetman's death insofar as it pertained to the beginning of Angela's relationship with defendant. See *Caffey*, 205 Ill. 2d at 89. Moreover, the trial court limited the likelihood that the probative value of the evidence would be outweighed by the danger of unfair prejudice to defendant. See Ill. R. Evid. 403 (eff. Jan. 1, 2011). As the State points out, the prosecution heeded the trial court's admonition that the timing of Hetman's death not be emphasized. Accordingly, Hetman's death was discussed only briefly during Angela's testimony; it was not mentioned by any other witnesses and it was not referenced during closing arguments.

¶ 63 Defendant next challenges the trial court's admission of an out-of-court statement made by his uncle, Greg Georgevich. As discussed above, defendant arranged for Nodarse to rent an apartment from Georgevich after Thanksgiving 2009. Nodarse shared the apartment with Graham Morenz, a fellow employee at the BMW dealership. On direct, the prosecution asked Morenz if he had any conversations with Georgevich after the Kramers were killed. The trial court sustained defense counsel's hearsay objection. However, the trial court permitted Morenz to answer the same question on redirect. Morenz answered that Georgevich told him "not to let the police search the apartment without a search warrant."

¶ 64 Defendant argues that this ruling constituted an abuse of discretion for two reasons. First, the statement was inadmissible hearsay. Second, the statement was irrelevant and prejudicial, serving only to show the jury that defendant's family was hiding something. The State counters that the statement was not hearsay because it was not offered for the truth of the matter asserted.

The State asserts, rather, that the statement was offered to support the inference that defendant "had people doing favors for him." Namely, the inference to be drawn from Georgevich's statement to Morenz was that he was protecting defendant by ensuring that the police obtained a warrant before searching Nodarse's apartment. The State further argues that there was no abuse of discretion because defense counsel "opened the door" for Georgevich's statement by asking Morenz questions to establish that Georgevich was not doing favors for defendant.

¶ 65 Hearsay is an out-of-court statement offered to establish the truth of the matter asserted. *People v. Banks*, 237 Ill. 2d 154, 180 (2010); see also Ill. R. Evid. 801(c) (eff. Jan. 1, 2011). We agree with defendant that Georgevich's out-of-court statement was hearsay. As defendant notes in his reply brief, the State contradicts itself in its first argument: the only way the statement could have been relevant to show that Georgevich was doing defendant a favor was if the statement was offered to prove that Morenz should not allow police to search the apartment without a warrant. However, we agree with the State that the trial court did not abuse its discretion in allowing the statement.

¶ 66 The record reflects that, while cross-examining Morenz, defense counsel elicited testimony that Georgevich asked for Morenz's and Nodarse's credit information and told them he was going to require a security deposit. Georgevich also required that they both sign a written lease for $1,000 per month. During a lengthy sidebar, defense counsel acknowledged that the above-referenced testimony was elicited to show that defendant did not do any favors for Nodarse beyond arranging for him to rent the apartment. The trial court ruled that this opened the door for Georgevich's statement regarding the warrant. In so ruling, the trial court commented that defense counsel was drawing an inference that defendant was not the "master of Nodarse," while the State was attempting to draw the opposite inference. Although the

connection between Georgevich's statement and the State's purported inference is tenuous, at best, we do not conclude that the trial court's ruling was arbitrary, fanciful, or unreasonable. See *Caffey*, 205 Ill. 2d at 89.

¶ 67 A similar analysis applies to defendant's next challenge, which involves evidence that defendant obtained drugs from the Latin Kings street gang. Nodarse testified that he purchased his drugs from Henry Prucha before he began purchasing them from defendant. He also met defendant for the first time at Prucha's house. Prucha had earlier testified before a grand jury that the Latin Kings street gang was a primary source of defendant's drugs. The trial court allowed Prucha to testify that defendant's source of drugs was a street gang, but ruled that Prucha could not specifically mention the Latin Kings.

¶ 68 As noted, forensic psychiatrist Dr. Mark Mills subsequently testified that Nodarse was intermittently psychotic in and around the time of the killings. This meant that defendant was manifesting significant symptoms of hallucinations and delusions. Dr. Mills further opined, "Mr. Nodarse, out of his psychosis, misperceived what was going on. And that included misperceptions about what [defendant] was actually saying or telling him." The prosecution sought to discredit Dr. Mills's opinion, in part, by confronting him with Prucha's grand jury testimony, thereby attempting to show that Nodarse did not misperceive defendant's representations that he was involved with the Latin Kings. Defense counsel objected, arguing that the trial court had previously barred the reference. The trial court responded that defense counsel had since "agreed to play tapes in which the reference to Latin Kings came up about three separate times." On that basis, the trial court allowed the prosecution to ask Dr. Mills whether his opinion would change if he had reviewed Prucha's grand jury testimony that the

Latin Kings were a source of defendant's drugs. Dr. Mills answered that his opinion would remain the same.

¶ 69 Defendant argues that this was a thinly veiled attempt by the prosecution to "back door" evidence which had previously been excluded. We disagree. Nodarse was interviewed by investigators on March 4 and March 6, 2010, just days after the killings. The videotapes from these interviews were played for the jury prior to Dr. Mills's testimony. During the March 6 interview, Nodarse was asked to explain what he saw that made him believe defendant was part of an organized criminal enterprise. Nodarse said he was most convinced by the amount of respect shown to defendant by gang members, specifically referencing the Latin Kings. As the trial court noted, this was not the only time Nodarse referenced the Latin Kings. Hence, the door had been opened for Prucha's grand jury testimony regarding defendant's source of drugs.

¶ 70 Furthermore, the jury was presented with conflicting expert opinions regarding the credibility of Nodarse's testimony that defendant convinced him of the harm that would be inflicted if he did not kill the Kramers. Prucha's grand jury testimony that the Latin Kings were a source of defendant's drugs was relevant because it supported Nodarse's claim that he was convinced of defendant's criminal stature. See Ill. R. Evid. 401. Because the jury had previously heard Nodarse's multiple references to the Latin Kings, the probative value of Prucha's grand jury testimony outweighed the danger of any unfair prejudice to defendant. See Ill. R. Evid. 403. For these reasons, we find no abuse of discretion in the trial court's decision to allow the evidence.

¶ 71 2. Forfeited Issues

¶ 72 As noted, the prosecution elicited Angela's testimony that she was home alone with Nicholas on the night before Thanksgiving 2009. Nicholas was "very sick" with a "103, 104

fever." Defendant was out and she did not know where he was. Defense counsel raised no objections during this line of questioning. On cross-examination, defense counsel attempted to impeach Angela by establishing that she had not mentioned Nicholas's high fever prior to testifying at trial. Angela responded that she did not remember specifically mentioning Nicholas's fever, but she "believe[d] everybody knew that he was sick." Defense counsel then requested that the jury be instructed to disregard the testimony about the high fever because it was not disclosed prior to trial. The trial court denied defense counsel's request, ruling that it was a collateral issue and Angela had been successfully impeached. In his motion for a new trial, defendant argued that the trial court erred in allowing the State to question Angela about Nicholas's fever, and that her testimony caught defense counsel by "complete surprise." In denying defendant's motion for a new trial, the trial court noted that this issue was not properly preserved by a timely objection during the trial. Defendant acknowledges that the issue was forfeited in his reply brief, but nonetheless asserts that the prosecutor purposefully elicited Angela's testimony regarding Nicholas's high fever as part of its ongoing strategy to paint defendant as a bad person.

¶ 73 Defendant also challenges the State's introduction of exhibits showing that his cell phone contained contacts listed as: "Adam Cop," "Ed Cop," "Joe Cop," "Tony Cop," and "Pete Cop." Westmont police detective Anthony Rainaldi ("Tony Cop") and Chicago police officer Pete Szczurowski ("Pete Cop") testified that they knew defendant socially, but did not consider defendant a friend. Neither Rainaldi nor Szczurowski did any favors for defendant. The prosecution argued during its closing argument that the police contacts in defendant's phone corroborated Nodarse's testimony that defendant was connected with police officers. Defendant argues here that the police contacts in defendant's phone could not have affected Nodarse's state

of mind because there was no evidence that Nodarse ever saw defendant's phone. Thus, the prosecution's true reason for introducing the evidence was to infer that defendant was a bad person who had contacts for police officers whom he barely knew. Defendant asserts, "the fact that [defendant] had [the police officers'] numbers made it seem as if he were invading the officers' privacy or planning something nefarious."

¶ 74 Because defendant did not properly preserve these issues for appellate review, they are reviewable only as plain error. See *Cosby*, 231 Ill. 2d at 272. The first step of plain-error review is determining whether any error occurred. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). However, as will be discussed below, even if we were to conclude that errors occurred when the jury heard of Nicholas's high fever and the police contacts in defendant's phone, the evidence in this case was not closely balanced. Furthermore, the evidence in question did not undermine the integrity of defendant's trial. Thus, the issues are not reviewable under either prong of plain-error analysis. See *Herron*, 215 Ill. 2d 167 at 178-79.

¶ 75 B. Closing Argument

¶ 76 Defendant argues that, during its closing and rebuttal arguments, the prosecution made several improper comments ridiculing defense counsel and disparaging defendant, in addition to misstating the law three times. He asserts that reversal is necessary because the cumulative effect of these errors deprived him of a fair trial. See *People v. Beltran*, 2011 IL App (2d) 090856, ¶ 61 (considering the cumulative effect of an improper argument rather than assessing the prejudicial effect of every isolated comment); see also *People v. Davidson*, 235 Ill. App. 3d 605, 613 (1992) (holding that, while none of the prosecutorial errors standing alone mandated reversal of the jury's verdict, the cumulative effect of the errors deprived the defendant of his right to a fair trial).

¶ 77 The State properly notes that defendant failed to object to all but one of the comments in question. However, our Supreme Court has concluded, "the simple fact that defendant did not properly object to a statement does not render that statement as if it never existed. Indeed, all statements must be considered as part of the entirety of a prosecutor's closing argument, and even statements not properly objected to may add to the context of a remark properly objected to." *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007). Accordingly, comments made during a prosecutor's closing argument may be considered by a reviewing court notwithstanding the defendant's failure to raise proper objections during trial. *Beltran*, 2011 IL App (2d) 090856 at ¶¶ 59-60; see also *People v. Hunter*, 2014 IL App (3d) 120552, ¶ 15 (noting that forfeiture is a limitation on the parties, not on the reviewing court).

¶ 78 With the foregoing principles in mind, we will first consider whether errors resulted from the comments of which defendant complains. We will then consider whether the cumulative effect of the prosecution's errors deprived defendant of a fair trial.

¶ 79 Prosecutors are given wide latitude during closing argument and may comment on the evidence and fair and reasonable inferences arising from the evidence. *People v. Glasper*, 234 Ill.2d 173, 204 (2009). "Closing arguments must be reviewed in their entirety, and the challenged remarks must be viewed in context." *Caffey*, 205 Ill. 2d at 131. Comments made by the prosecution during closing argument will not be considered reversible error unless they result in substantial prejudice to the defendant such that it is impossible to determine whether the comments caused the jury's verdict. *People v. Emerson*, 189 Ill. 2d 436, 513 (2000). Thus, misconduct in closing argument warrants reversal and a new trial "if the improper remarks constituted a material factor in a defendant's conviction." *Wheeler*, 226 Ill. 2d at 123.

¶ 80 The parties here disagree as to the applicable standard of review. Defendant asserts that statements made by the prosecution during closing argument should be reviewed *de novo*. See *Wheeler*, 226 Ill. 2d at 121 ("Whether statements made by a prosecutor at closing argument were so egregious that they warrant a new trial is a legal issue this court reviews *de novo*."). The State maintains that such statements should be reviewed for an abuse of discretion. See *Simms*, 192 Ill. 2d at 396 ("Because the trial court is in a better position than a reviewing court to determine the prejudicial effect of any remarks made, the regulation of the substance and style of the argument is within the trial court's discretion."). This court has previously stated that, where the result would be the same under either standard, we would "refrain from discussing the applicable standard until our supreme court resolves the conflict." *People v. Burman*, 2013 IL App (2d) 110807, ¶ 25. Because we conclude that the result here would be the same under either standard, we again decline to take a position.

¶ 81 1. Comments Ridiculing Defense Counsel

¶ 82 As noted, investigators interviewed Nodarse twice on March 4, 2010, just two days after the murders, while he was still in Florida. Nodarse was then flown back to Chicago and interviewed a third time on March 6. The videos of these interviews were admitted and played for the jury as prior consistent statements. Nodarse's representations during the interviews were generally consistent with his trial testimony. During its closing argument, defense counsel argued that Nodarse's consistent repetition of his story "[did] not make it the truth." Rather, Nodarse was either delusional or he was lying. Nodarse idolized defendant and he wanted to hurt Michael for threatening defendant. He had a difficult childhood and suffered through several recent traumatic events. This made it impossible to know what was fact or fiction in

Nodarse's mind. Therefore, defense counsel argued, the State had not proved beyond a reasonable doubt that defendant was responsible for Jacob Nodarse's criminal acts.

¶ 83 The State began its rebuttal argument as follows:

> "It's impossible to know what happened in Jake Nodarse's mind? Really? Jake, you better kill the Kramers, or they are going to kill you. Jake, you better kill them, or my friends are going to kill you. They are going to kill us both. Repeating that over and over and over again. Jake, you better kill everybody or your sister is going to get raped. Your family is going to get killed. Jake, you better do this. They are coming after you. It's impossible to know what happened to his mind? That's a joke."

¶ 84 Continuing with this theme, the prosecution argued that defense counsel had asked the jury to focus on Nodarse and his mental illness and drug addiction, rather than focusing on defendant. The prosecution referred to this a "strategy" and a "tactic" and a "slick little trick" that was "ludicrous" and "laughable." The prosecution added that the jury should not be distracted or fooled by the defense's strategy. The prosecution encouraged the jury to put all of the distractions regarding Nodarse's mental illness and drug addiction in a box, and throw the box "in a giant dumpster because that's where it belongs because that – all that psychosis psychotic stuff, it doesn't mean anything in regard to whether or not this defendant said the things he did." The prosecution later asked the jury, "How gullible do they think you are? Do they think you are a zero on the gullibility scale?"

¶ 85 We first note our agreement with the State that the prosecution's comments were made in reference to defendant's theory of the case, and were not made to disparage defense counsel. See *People v. Gonzalez*, 388 Ill. App. 3d 566, 590-91 (2008). Moreover, "[w]hile a prosecutor may not claim that defense counsel has deliberately lied to the jury or fabricated a defense, a

prosecutor may challenge a defendant's credibility and the credibility of his defense theory [citation], as well as the persuasiveness of the defense [citation]. This includes referring to the defense theory as 'ridiculous.' " *People v. Robinson*, 391 Ill. App. 3d 822, 840-41 (2009). See also, *People v. Maldonado*, 240 Ill. App. 3d 470, 483-84 (1992) (no error for prosecutor to characterize defense theory as " 'ridiculous' "); *People v. Zoph*, 381 Ill. App. 3d 435, 454 (2008) (no error to call defendant's theory of the case " 'wacky' " or to describe the defendant's testimony as " 'preposterous, silly and ridiculous' ").

¶ 86 In *Robinson*, the reviewing court found no error where the prosecution referred to the defendant's argument about a lack of DNA and fingerprint evidence as being akin to a "fairy tale," stating that this was an "acceptable comment on the persuasiveness of the defense theory." 391 Ill. App. 3d at 841. Similarly here, we find no error in most of the comments detailed above.

¶ 87 However, criminal defendants are naturally inclined to present theories of their innocence that are contrary to the prosecution's evidence of their guilt. This does not allow prosecutors to imply that defendants are dependent on the gullibility of the jurors. In *People v. Abadia*, 328 Ill. App. 3d 669, 682-83 (2001), the prosecution commented several times that the defense was attempting to distract and confuse the jury, adding "[i]t defies common sense and it's an insult to your intelligence." The reviewing court found reversible error, concluding that the comments served no purpose but to draw the jury's attention away from the issues in the case and prejudice the jury against the defense. *Id*. at 683-84. In *People v. Herrero*, 324 Ill. App. 3d 876, 887 (2001), the reviewing court similarly held that it was error for the prosecution to argue that defense counsel was attempting to "sucker in," or dupe the jurors, because the comment tended to improperly shift the focus of the attention away from the actual evidence in the case.

¶ 88 The State argues that the prosecution's "gullibility scale" comment here is distinguishable from the comments considered in *Abadia* and *Herrero*, asserting that the prosecution here was merely responding to defense counsel's arguments; namely, that it was impossible to know what was going on in Nodarse's mind, and that the jury should believe everything about Nodarse's testimony except for the representations that he made regarding defendant. The State also maintains that the comment properly advanced its argument that Nodarse's mental health was irrelevant. We disagree.

¶ 89 The prosecution's comment regarding the "gullibility scale" added nothing to advance the evidence or the reasonable inferences to be drawn from the evidence. See *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 57. Rather, we believe the comment was aimed at accomplishing the same improper purposes discussed in *Abadia* and *Herrero*. Moreover, the prosecution's usage of the term was incorrect, that is, if a juror was considered a "zero on the gullibility scale," they would not be gullible at all. Thus, the prosecution botched its own ill-advised attempt at deriding defendant's theory of the case.

¶ 90 2. Comments Disparaging Defendant

¶ 91 Defendant argues that the prosecution made a series of improperly disparaging remarks that served no purpose other than to show that he was a bad person and a bad father who hated Angela. The State argues that the majority of these comments were proper because they related to defendant's "disintegrating relationship with Angela and her family," which was a significant issue at trial. The State further asserts that the prosecution was merely responding to defendant's opening statement, during which defense counsel argued that defendant lacked a motive to kill the Kramers because he loved Angela and was committed to working on the custody agreement

through the court system. Although we agree with the State that some of the prosecution's disparaging comments were invited, the same cannot be said for others.

¶ 92 The prosecution stated the following near the beginning of its closing argument:

> "This crime, this horrible loss of life of Jeff and Lori and Michael Kramer was borne and nurtured in hatred, his hatred, and his desire to prevent the Kramer family from ever having anything to do with raising his son, Nicholas, to prevent Angela from ever having anything to do with his son, Nicholas.
>
> Make no doubt about it, ladies and gentlemen. The evil heart that beats at the center of this plan, of this crime, beats over here in this man. His hate for his victims and Angie, the mother of his son, this hate was created in this area, the six inches between his ears, in his mind. And it fostered and was nurtured over there for a year, all the way back to when Angela was pregnant, all the way back to then. That's how long it goes back."

¶ 93 Shortly thereafter, the prosecution commented, "we learned how much [defendant] hated [Angela]," referencing testimony that defendant was loud and angry in a bar during February 2010. The bartender, Edita Cafi, had testified earlier that defendant stated, "fuck that bitch, she's trying to take me back to court."

¶ 94 The prosecution later discussed Angela's and defendant's failed attempt at mediation to resolve the child custody dispute. As discussed, Angela filed for sole custody of Nicholas after the January 13, 2010, incident in which defendant threw Angela's belongings to the driveway of the Countryside home. The prosecution argued that, following this breakdown, defendant "didn't even want [Angela] to go to the meeting the following week where you apply for aid for children." The State agrees that this comment referenced excluded evidence. Angela's family law attorney, Anique Drouin, testified that she was not present for the mediation, but she knew

that Angela and defendant were unable to agree about "even the smallest issue." However, the trial court sustained defense counsel's objection to the prosecution's question regarding defendant's refusal to agree on the issue of aid for Nicholas.

¶ 95 Toward the end of its closing argument, the prosecution discussed Nodarse's testimony that defendant directed him to drive by the Kramer home on the nights where Angela had custody of Nicholas to make sure that Angela was home. "But isn't that a joke," the prosecution commented, "because, all the times we heard that he was out when he had custody of Nicholas and he didn't even stay home?" The prosecution later noted that defendant had custody of Nicholas when he was at the casino on the night of the murders.

¶ 96 "During closing argument, the prosecutor may properly comment on the evidence presented or reasonable inferences drawn from that evidence, respond to comments made by defense counsel which clearly invite response, and comment on the credibility of witnesses." *Cosmano*, 2011 IL App (1st) 101196, ¶ 57. Here, it was reasonable for the prosecutor to draw an inference from the evidence that defendant hated Angela. Furthermore, during its opening statement, defense counsel claimed that defendant was a "great father" who "loved and still loved Angela Kramer to this day." Thus, we conclude that the prosecution did not err in referencing the statements that defendant made in the bar, or by commenting that defendant was not at home on certain nights when he had custody of Nicholas.

¶ 97 However, "[i]t is improper to characterize a defendant as 'evil' or to cast the decision of the jury as a choice between 'good and evil.' " *People v. Johnson*, 208 Ill. 2d 53, 80 (2003). We are not persuaded by the State's argument that the prosecution's "evil" comment here was a reference to defendant's plan to kill the Kramer family, rather than to defendant himself. Hence, it was error for the prosecution to comment, "[t]he evil heart that beats at the center of this plan,

of this crime, beats over here in this man." As the State concedes, it was also error for the prosecution to comment that defendant "didn't even want [Angela] to go to the meeting the following week where you apply for aid for children."

¶ 98 The other disparaging comment of which defendant complains was properly preserved. Shortly after beginning its rebuttal argument, the prosecution remarked as follows:

> "There is one issue in this case. There is only one thing you have to decide in this case. And that is did [defendant] say the things he said to get Jake Nodarse to do this thing. That's it. There is a bunch of instructions. You heard four weeks of trial. That's the only thing you have to decide. Because if he said these things, any of these things, he is guilty of everything. He is guilty of everything. He helped plan. He solicited. He did it all. He is guilty of everything. And if he didn't he is not guilty of anything, and he walks out the door and he can go fight some more for custody of Nicholas."

¶ 99 The trial court overruled defense counsel's objection without comment. In denying defendant's motion for a new trial, the trial court concluded that the statement was related to the issues in the case. The trial court further ruled that, if there was error, it did not prejudice defendant to the extent that it required a reversal.

¶ 100 Defendant argues here that the comment "raised the notion that the jury's verdict should take Nicholas' well-being into account and they should convict [defendant] to prevent him from obtaining custody of Nicholas." The State argues that the statement was proper because it related to defendant's motive for committing the crimes. We disagree with the State.

¶ 101 As defendant notes, the future custody of Nicholas had nothing to do with the jury's consideration of whether defendant was guilty of the charged crimes. It is also important to note that this statement was made during rebuttal, meaning the jury was sent to deliberate with the

impression that Nicholas's future custody was a factor that could rightly be considered in rendering a verdict. The trial court had an opportunity to cure the error by sustaining defense counsel's objection and instructing the jury to disregard the inappropriate remark. See *People v. Simms*, 192 Ill. 2d 348, 396 (2000). We therefore hold that the trial court erred by overruling the objection under either of the standards of review discussed above.

¶ 102 3. Comments Misstating the Law

¶ 103 Finally, defendant argues that the prosecution misstated the law on three occasions during its rebuttal argument. The first instance related to Nodarse's testimony that he may have kicked in the door to Angela's room on the night of the murders. Angela had previously testified that she did not recall her door being kicked. During its closing argument, defense counsel inferred that Nodarse's true motive on the night of the killings was to kill Michael because he was upset that Michael had threatened to kill defendant. Defense counsel's theory was that Nodarse never went upstairs to search for Angela, as shown by the lack of physical evidence that Nodarse kicked Angela's door. During its rebuttal, the State commented that defense counsel never asked forensic investigator Edward Sokasits whether Angela's door had been kicked.

¶ 104 Defendant argues that this impermissibly shifted the burden of proof, suggesting that defense counsel failed to elicit potentially exculpatory evidence. See *People v. Euell*, 2012 IL App (2d) 101130, ¶ 20. The State counters that defendant's closing argument invited a response. We agree with the State. Where defense counsel's closing argument provokes a response, "the defendant cannot complain that the State's reply in rebuttal argument denied him a fair trial." *People v. Swart*, 369 Ill.App.3d 614, 637 (2006). In *Robinson*, 391 Ill. App. 3d at 841, where the defense counsel discussed the State's lack of scientific evidence in its closing argument, the reviewing court held that it was not improper for the State to suggest that defendant could have

produced such evidence. Similarly here, defense counsel invited the prosecution's comment by arguing that a lack of evidence regarding Angela's door supported its theory of the case.

¶ 105 The prosecution's second purported misstatement of law concerns the pattern jury instruction on the testimony of an accomplice. At trial, the parties agreed that the following instruction should be given:

> "When a witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case." Illinois Pattern Jury Instructions, Criminal, No. 3.17 (4th ed. 2000).

¶ 106 The prosecution made the following comment during its rebuttal argument while discussing that instruction:

> "We don't have two guys that are arrested at the same time. Or they don't have to be arrested at the same time. But it's not that kind of case. And go ahead and analyze what Jake says. It's too late now. You have already analyzed it beyond belief. You have heard from him for three days testifying, and you have seen hours and hours of video. So you already accomplished that goal."

¶ 107 Defendant argues that that the prosecution was improperly advising the jury that the instruction could be disregarded due to the length of time that Nodarse spent testifying. Furthermore, defendant argues, this misstatement of the law constituted an attempt to eliminate the "greatest weakness" in the prosecution's case. The State argues that the prosecution did not misstate the law because it never explicitly told the jury to disregard the instruction. We conclude that, while the remark was undoubtedly careless, the prosecution did not tell the jury to disregard the instruction. Moreover, the trial court cured any possible error by subsequently

giving the proper instruction and admonitions. See *People v. Mims*, 403 Ill. App. 3d 884, 897 (2010).

¶ 108 The final comment in question was made as the prosecution concluded its rebuttal argument with the following:

> "[Defendant] doesn't think he is going to be held responsible for having Jeff Kramer shot to death and lying in his own pool of blood with his teeth out because the bullet shattered them. Poor Lori Kramer is dead on the steps. He thinks he is okay because he is at a casino pulling the slot machine. Mike Kramer with a bullet in his head, laying [sic] on the floor. He thinks he is going to escape this. He thinks he is going to outsmart us all. The law is not dumb. And neither are you.
>
> If you follow the law like you promised and you follow the evidence which you heard, there is only one choice that you have. And that is to find this defendant guilty of everything he is charged with. Thank you."

¶ 109 Our supreme court has held that a prosecutor may not instruct the jury that their oath required a guilty verdict. *People v. Nelson*, 193 Ill. 2d 216, 227 (2000). Error has likewise been found where the prosecutor suggested that it was the jury's "job" to find the defendant guilty. *People v. Peete*, 318 Ill. App. 3d 961, 970 (2001). We are perplexed as to why the prosecution would conclude its rebuttal argument by proclaiming that the jury could only render one appropriate verdict in accordance with its promise. This flew dangerously close to the line of impropriety, and we caution prosecutors against the use of similar statements in the future. For added measure, prosecutors would be wise to refrain from using the word "dumb" when discussing the law or a jury's collective intelligence.

¶ 110 The prosecution's "dumb" comment notwithstanding, when viewed in context, we do not conclude that the remarks in question constituted error. See *Caffey*, 205 Ill. 2d at 131. Defense counsel reminded the jury on several occasions during its closing argument that it had promised to hold the State to its burden of finding defendant guilty beyond a reasonable doubt. Thus, defense counsel opened the door for the prosecution's lone reference to the jury's promise.

¶ 111 C. Cumulative Error

¶ 112 As discussed, we have concluded that the prosecution committed four errors during its closing argument. First, the prosecution commented, "[t]he evil heart that beats at the center of this plan, of this crime, beats over here in this man." Second, the prosecution commented that defendant "didn't even want [Angela] to go to the meeting the following week where you apply for aid for children." Third, the prosecution commented, "[h]ow gullible do they think you are? Do they think you are a zero on the gullibility scale?" Finally, the prosecution commented that if the jury did not find defendant guilty, "he [would walk] out the door and he can go fight some more for custody of Nicholas." We conclude, however, that the improper remarks did not constitute a material factor in defendant's convictions. See *Wheeler*, 226 Ill. 2d at 123.

¶ 113 While neither party discussed the elements of the charged crimes in their briefs, we believe such discussion is helpful in rendering our determination. Defendant does not dispute that Nodarse committed the first-degree murders of Michael, Jeffrey, and Lori. As noted, the State's theory was that defendant was accountable for these crimes. A person is legally accountable for the conduct of another when, "either before or during the commission of an offense, and with the intent to promote or facilitate that commission, he or she solicits, aids, abets, agrees, or attempts to aid that other person in the planning or commission of the offense." 720 ILCS 5/5-2(c) (West 2010). The State also charged defendant with the solicitation of

Angela's murder. A person commits the offense of solicitation of murder when, with the intent that the offense of first-degree murder be committed, he or she "commands, encourages, or requests another to commit that offense." 720 ILCS 5/8-1(b) (West 2010). The jury was instructed accordingly regarding each of the charged crimes.

¶ 114 Nodarse testified that defendant convinced him of the need to kill the Kramers, in part, because of threats from members of his criminal organization. As Nodarse explained, it was known that he and Michael were friends, and he was being blamed because Angela and Michael "knew too much" about the organization. Defendant claimed that Angela and Michael had given the police information regarding several of his criminal associates. One of these associates was John, whom defendant described as a known killer. Angela and Michael had helped the police find drugs in John's vehicle, causing John's children to be taken into foster care. In addition, defendant led members of his organization to believe that Nodarse had been initiated, and had therefore committed a murder. Defendant subsequently did Nodarse a "little favor" by convincing his associate Vito to kill someone and let Nodarse take the credit. However, Vito became upset when defendant asked him to kill the Kramers. Vito said he had already done one favor for Nodarse, and he "saw it as [Nodarse's] and [defendant's] responsibility to take care of the issue." Defendant said he would not be able to escape prosecution for the murders because the custody dispute gave him an obvious motive. Futhermore, Vito was threatening to expose the truth about Nodarse that he had never killed anyone. Thus, the responsibility to kill the Kramers rested squarely on Nodarse. This predicament was made significantly worse because Michael had hired someone to kill Nodarse to prevent him from testifying during the custody hearing.

¶ 115 Nodarse also testified that defendant helped devise the plan to kill the Kramers on the night of February 25, 2010. Defendant took Nodarse to the Kramer home; described the layout of the house; told Nodarse how to break into the house; instructed Nodarse to make sure he shot each family member in the head; told Nodarse what to wear; and told Nodarse how to drive out of the Kramers' subdivision. Defendant also told Nodarse precisely when to commit the murders, explaining that he would be on surveillance video at the time, and a series of other killings would be orchestrated thereafter.

¶ 116 This story presents obvious cause for skepticism. Defendant argues that the State's case "hinged on Nodarse's credibility," and asserts that Nodarse had a motive to cooperate with the State and blame defendant because he was awaiting sentencing at the time he testified. However, Nodarse consistently recounted the same story when he was interviewed on three occasions during the days following the Kramer murders. These interviews occurred before Nodarse agreed to testify against defendant in exchange for a dismissal of the murder charges involving Lori and Michael. Moreover, as the State points out in its brief, the prosecution presented extensive testimony and evidence corroborating different parts of Nodarse's story, aside from the videotapes from Nodarse's interviews.

¶ 117 Early in the trial, Angela testified that she was at a casino with defendant on Halloween 2007 when defendant said he needed to be captured on surveillance video because he had "people out there doing stuff" for him. Nodarse later testified that he was instructed to kill the Kramers at precisely 3 a.m. on March 2, because defendant would be somewhere with surveillance cameras that could verify his alibi. Defendant was, in fact, captured on surveillance video at a casino while Nodarse killed the Kramers. Guilia Wuttke testified that she spoke with

defendant while the two smoked cigarettes at approximately 3:26 a.m. She said defendant appeared nervous and repeatedly checked his phone.

¶ 118 The State also presented testimony corroborating Nodarse's belief that defendant was dangerous, and that he was involved with powerful criminals. Henry Prucha testified that Nodarse told him not to "mess" with defendant because he was involved with a street gang, later identified as the Latin Kings. Nodarse's friend, Vincent Schmitz, testified that Nodarse arranged a meeting with defendant at a coffee shop. The three men spoke for about an hour, during which time defendant said he could use someone like Schmitz in his crew because of Schmitz's ability to hack into computers.

¶ 119 In addition, the State presented testimony corroborating Nodarse's belief that he was going to be killed on the night of February 20, 2010. Nodarse testified that defendant had an "informant" at his old apartment who had notified defendant that Michael Kramer was planning to kill Nodarse. Defendant urged Nodarse to call his friend, Austin Michalik, whom defendant's informant claimed could verify Michael's threat. Nodarse testified that he believed Michael wanted to kill him after he called Michalik. Michalik testified that he received an "unusual" phone call from Nodarse sometime after Thanksgiving 2009. He said Nodarse was asking questions about things "that he shouldn't have known about." When Michalik asked Nodarse how he knew about these "things," Nodarse responded that defendant had somebody watching over his old apartment. Nodarse's roommate, Graham Morenz, also testified that Nodarse said people were "out to get him" during February 2010, adding, "somehow it was mob-related." He recalled that Nodarse had blocked the door to their apartment with a chair and closed all of the blinds, which Morenz considered odd.

¶ 120 Nodarse's story was further corroborated in a lengthy suicide letter that he wrote to his sister and his family before he killed the Kramers. He identified the letter at trial, and the letter was given to the jury. In the letter, Nodarse wrote:

> "Through a long chain of freak events I got put into a situation where, although I truthfully did nothing to these people, they wanted to kill me and all of you. And trust me they would. I kept trying to distance myself and find some way to resolve the issue but nothing would make the situation stop (I tried everything). And yes I considered informing the police for a protection program but it would not work trust me. That option would get me killed and more of you killed faster, they know cops that are bad and help them find people!" (Emphasis in original).

¶ 121 Additionally, the State presented compelling evidence that defendant and Nodarse communicated frequently until two days before the killings. Nodarse testified that he was instructed not to call or text defendant after February 27, 2010. He said that he was at a bar on the evening of February 27 when defendant pulled him aside and told him that everything was "still on as planned." Between January 17 and February 27, defendant called Nodarse 179 times and Nodarse called defendant 171 times. At least one phone call was made every day during that period. Defendant and Nodarse also texted each other 80 times between February 6 and February 27. At least one text message was sent every day during that period. On February 28 and March 1, neither Nodarse nor defendant made any calls or sent any text messages to the other. Nodarse called defendant six times on March 2, the day of the murders. Nodarse testified that he called defendant after killing the Kramers, but defendant did not answer and he left a message. Defendant did not call Nodarse.

¶ 122 Finally, defendant made several statements to Nodarse while the two men were in the holding cells at the Darien police station following the murders. The audiotapes were admitted into evidence and played for the jury. Defendant told Nodarse that they were likely being recorded. He nonetheless asked Nodarse, "gloves on out there?" Nodarse responded, "Gloves for like winter football." Defendant replied, "Then why are these people telling me you left prints out there?" Defendant later asked Nodarse where he had left his gun and whether he had directed police to the gun.

¶ 123 As discussed, the jury was first tasked with determining whether defendant intentionally solicited, aided, abetted, agreed, or attempted to aid Nodarse in the planning or commission of the Kramer murders. See 720 ILCS 5/5-2(c). Regarding the solicitation of murder charge, the jury needed to determine whether defendant commanded, encouraged, or requested Nodarse to kill Angela. See 720 ILCS 5/8-1(b). In light of the evidence discussed above, we disagree with defendant's assertion that this was a closely balanced case.

¶ 124 In so holding, we acknowledge that reversal would nonetheless be appropriate if the prosecution's cumulative errors created a pervasive pattern of prosecutorial misconduct that resulted in unfair prejudice to defendant's case. See *Beltran*, 2011 IL App (2d) 090856, ¶ 61 (citing *Blue*, 189 Ill. 2d 99, 139-40). While we are disturbed by its erroneous comments, we do not believe the prosecution engaged in a pervasive pattern of misconduct.

¶ 125 III. CONCLUSION

¶ 126 For the reasons stated, we affirm the judgment of the circuit court of Du Page County.