2015 IL App (5th) 120258-U

NOS. 5-12-0258, 5-13-0200 cons.

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Madison County.
	)	
v.	)	No. 08-CF-2290
	)	
MARCUS POWELL,	)	Honorable
	)	James Hackett,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE SCHWARM delivered the judgment of the court.
Justices Cates and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant is unable to establish that his convictions should be reversed.

¶ 2 I. BACKGROUND

¶ 3 In February 2012, following a week-long trial with dozens of witnesses, a Madison County jury found the defendant, Marcus Powell, guilty of first-degree murder (720 ILCS 5/9-1(a)(2) (West 2008)) and aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2008)). Viewed in the light most favorable to the prosecution (*People v. Ehlert*, 211 Ill. 2d 192, 202 (2004)), the jury could have reasonably concluded the following from the evidence presented for its consideration.

¶ 4 The defendant and Kevin "Goose" Campbell were once friends, but their relationship soured in 2007, and they began feuding. Ostensibly, their differences either started or escalated when someone robbed and battered the mother of the defendant's child, and the defendant concluded that Campbell was responsible.

¶ 5 In April 2007, Campbell's wife, Sophia, was dropping a friend off at an apartment complex in Brooklyn, Illinois, when "a car pulled in behind [her] and blocked [her] in." Two men then approached Sophia's car; Sophia heard the defendant say, "Catch this for Goose"; shots rang out, and Sophia was shot 12 times. Sophia subsequently spent several weeks in the hospital and purchased a Glock .40 caliber pistol. When Campbell later saw the defendant at a nightclub that Campbell frequented, he punched the defendant in the face.

¶ 6 On the night of October 6, 2008, Campbell drove his silver Lincoln LS from his girlfriend's house in Madison to a strip club in Brooklyn, where he picked up his friend, Michael Ford. At approximately 11:40 p.m., as Campbell and Ford were driving back through Madison, the defendant, accompanied by Cortez Davis and Lester Smith, drove his purple Cadillac Escalade alongside Campbell's Lincoln and fired shots into the car with a 5.7 mm pistol. The defendant then sped off, and Campbell pulled over and parked at a nearby apartment complex. Campbell and Ford then started running towards Campbell's house on Skeen Street, which was approximately a mile away. Once they arrived at the house, Campbell put on a hooded sweatshirt and retrieved Sophia's Glock from the dresser where she kept it. Campbell and Ford then headed back to Market Street to retrieve Campbell's car.

¶ 7 Meanwhile, after dropping Smith off, the defendant and Davis drove to the defendant's aunt's house in East St. Louis. There, the defendant obtained a .223 caliber rifle from a man in a Dodge Magnum. The defendant also borrowed his aunt's maroon Ford Fusion, which had distinctive flying-eagle license plate frames on the front and back. At that point, Davis and the defendant "split up," and Davis assumed possession of the defendant's Escalade. The defendant then headed back to Madison in his aunt's Fusion and drove around looking for Campbell.

¶ 8 Shortly after midnight on October 7, 2008, as Campbell and Ford were walking back to Campbell's car, the defendant pulled up in the Fusion while they were traversing a parking lot near Sixth Street and McCambridge Avenue, less than two blocks from Campbell's house. After yelling something at Campbell, the defendant began shooting at him from out of the front-passenger's side window. From behind a parked car, Campbell shot back at the defendant with Sophia's Glock, and the two exchanged gunfire for approximately a minute. During the shootout, the defendant used the 5.7 mm pistol and the .223 rifle, and several 5.7 mm bullets struck a house on Sixth Street. As Campbell was subsequently running home, the defendant drove to Skeen Street and fired multiple .223 rounds into Campbell's house. Unbeknownst to the defendant, Sophia's 12-year-old son, DeLarrian, who was sitting by the front door doing homework at the time, was killed when a bullet struck him in the head.

¶ 9 When Campbell arrived home moments later, he found DeLarrian lying dead on the living room floor by the front door. Having left his cell phone in his car, Campbell ran to a neighbor's house and called Sophia, who was at work at the time. When Sophia

came home, Campbell went to a cousin's house in Collinsville, because he "felt guilty" and "couldn't deal with it." Meanwhile, Smith and the defendant had spoken on the phone, and the defendant had indicated that he was in "his auntie's car" and had just gotten into a shootout with Campbell. Several hours later, Campbell went to the Madison police department, told investigators what had happened, and was arrested on a weapons charge.

¶ 10 On the morning of October 7, 2008, the defendant called Smith and asked him to find out whether there was any truth to rumors that someone had been killed in Madison the night before. After inquiring into the matter, Smith called the defendant back, advising that "some 12-year-old kid [had] got[ten] killed over there." Smith also learned that there were rumors that he had somehow been involved in the shooting. When the police later contacted Smith, he went to the Madison police department, and told investigators what he knew.

¶ 11 On the afternoon of October 7, the police arrested Davis while he was still in possession of the defendant's Escalade. Investigators subsequently questioned him about what had occurred the night before, and eventually, he also told them what he knew.

¶ 12 During the course of their investigation, the police found numerous 5.7 mm and .223 caliber shell casings at the scene near Sixth and McCambridge. An empty .40 caliber magazine and 21 .40 caliber shell casings that had been fired from Sophia's Glock were also found. On the street in front of Campbell's house on Skeen, 11 .223 shell casings were collected. Fragments of 5.7 mm bullets were recovered from Campbell's Lincoln and the house on Sixth Street.

¶ 13 The police located the maroon Fusion at the Ellis Park Metrolink station, where the defendant's aunt parked it for her commute to work. On the outside of the car, a spent .223 shell casing was found lodged near the driver's side windshield wiper. On the inside, another .223 casing was found on the floorboard in front of the driver's seat. A box of Sellier & Bellot .223 ammunition was found underneath the driver's seat, and a Fabrique Nationale 5.7 mm ammunition box was found in the glove compartment. A fingerprint matched to the defendant was later identified on one of the .223 cartridges from the box of Sellier & Bellot ammunition.

¶ 14 Ballistics examinations revealed that all of the collected 5.7 mm bullet fragments and shell casings had been fired from the same weapon and that all of the casings had Fabrique Nationale headstamps. The examinations further revealed that all of the .223 shell casings had been fired from the same weapon and that all had Sellier & Bellot headstamps.

¶ 15 On October 9, 2008, at approximately 1 a.m., a patrol officer in St. Charles County, Missouri, observed a black Dodge Charger operating without a light illuminating its rear license plate. When the officer tried to stop the car, it sped away and briefly fled before turning into a hotel parking lot. "As soon as the vehicle made its complete stop, the left[-]rear door opened[,] and [the defendant] exited and ran on foot." The officer stayed with the Charger's two other occupants and did not give chase. When a license-plate check revealed that the Charger and the defendant were wanted in connection with DeLarrian's murder, the officer's dispatcher advised her that "several agencies [were] en route to cover [her]."

¶ 16 Additional officers soon arrived at the scene of the traffic stop, and a perimeter was set up to stop and check all vehicles coming in and out of the area. Shortly thereafter, the defendant "blew by" one of the checkpoints in a green Ford Explorer, almost hitting an officer in the process. The defendant then led police on a highway pursuit with speeds exceeding 100 miles per hour. The defendant eventually stopped along Interstate 70, scaled a fence along a frontage road, and "took off towards an industrial park area" where the police "lost him."

¶ 17 Later that day, the United States Marshal's Fugitive Task Force was called out to locate the defendant. The defendant was subsequently found hiding in a storage shed at a trailer park in St. Charles County and was taken into custody.

¶ 18 While incarcerated at the Madison County jail following his arrest, the defendant discussed his killing of DeLarrian with fellow inmates James Williams and James Nicholas. During those discussions, the defendant advised, among other things, that he had used his aunt's car and an automatic rifle with a "shell catcher on it." The defendant also indicated that he had shot up Campbell's house because "he thought [Campbell] was going home to get another gun." The defendant explained that DeLarrian "happened to be in the wrong place at the wrong time." Campbell testified that when he encountered the defendant in jail, the defendant had "basically [said that] he was sorry for what had happened and [to] tell Sophia that he[ ] [was] sorry for what had happened." The defendant exercised his right not to testify at trial.

¶ 19 II. DISCUSSION

¶ 20 On appeal, the defendant maintains that we should reverse his convictions and remand for a new trial. The defendant raises numerous arguments in support of this contention, only a few of which have been properly preserved for our review. See *People v. Davis*, 205 Ill. 2d 349, 361 (2002) ("Our case law clearly requires that to avoid procedural default, the defendant must make a contemporaneous objection and raise the issue in a post-trial motion."). Most of the defendant's arguments are presented as claims of plain error, ineffective assistance of counsel, or both. For the reasons that follow, we conclude that the defendant is unable to establish that his convictions should be reversed.

¶ 21 A. Plain Error

¶ 22 "The plain-error doctrine allows errors not previously challenged to be considered on appeal if either: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) the error was so fundamental and of such magnitude that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Wilmington*, 2013 IL 112938, ¶ 31. "Under both prongs of the plain-error doctrine, the burden of persuasion remains with [the] defendant." *People v. Walker*, 232 Ill. 2d 113, 124 (2009).

¶ 23 Errors recognized under the second prong of the plain-error doctrine are considered "structural" errors. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). "An error is typically designated as structural only if it necessarily renders a criminal trial fundamentally unfair or an unreliable means of determining guilt or innocence." *Id.* at 609. "The Supreme Court has recognized an error as structural only in a very limited

class of cases." *Id.* "Those cases include a complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction." *Id.*

¶ 24 "[A] reviewing court must undertake a commonsense analysis of all the evidence in context when reviewing a claim under the first prong of the plain[-]error doctrine." *People v. Belknap*, 2014 IL 117094, ¶ 50. That analysis must be a "qualitative, as opposed to a strictly quantitative," one and must take into account "the totality of the circumstances." *Id.* ¶¶ 53, 62. With respect to either prong, "[t]he initial step in conducting plain-error analysis is to determine whether error occurred at all." *Walker*, 232 Ill. 2d at 124. "Absent reversible error, there can be no plain error." *People v. Naylor*, 229 Ill. 2d 584, 602 (2008).

¶ 25 B. Ineffective Assistance of Counsel

¶ 26 A criminal defendant is guaranteed the right to the effective assistance of counsel under both the United States Constitution and the Illinois Constitution. *People v. Mata*, 217 Ill. 2d 535, 554 (2005). "Counsel is presumed to know the law" (*People v. Perkins*, 229 Ill. 2d 34, 51 (2008)), and courts "must indulge in a strong presumption that counsel's conduct fell into a wide range of reasonable representation" (*People v. Cloutier*, 191 Ill. 2d 392, 402 (2000)). "Neither mistakes in strategy nor the fact that another attorney with the benefit of hindsight would have proceeded differently is sufficient to establish ineffective assistance of counsel." *People v. Dobbs*, 353 Ill. App. 3d 817, 827 (2004).

"In fact, counsel's strategic choices are virtually unchallengeable." *People v. Palmer*, 162 Ill. 2d 465, 476 (1994).

¶ 27 To succeed on a claim of ineffective assistance of counsel, a defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), *i.e.*, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance resulted in prejudice. *People v. Shaw*, 186 Ill. 2d 301, 332 (1999). "Further, in order for a defendant to establish that he suffered prejudice, he must show a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different." *People v. Burt*, 205 Ill. 2d 28, 39 (2001). "Because a defendant must establish both a deficiency in counsel's performance and prejudice resulting from the alleged deficiency, failure to establish either proposition will be fatal to the claim." *People v. Sanchez*, 169 Ill. 2d 472, 487 (1996).

¶ 28 C. Strength of the State's Case

¶ 29 As noted, most of the defendant's arguments on appeal are presented as claims of plain error, ineffective assistance of counsel, or both. The defendant attendantly maintains that the evidence of his guilt was closely balanced and "not overwhelming." The defendant argues that much of the State's key evidence "came from inherently suspect jailhouse snitches and accomplices," and he emphasizes that defense witness Ellen Hecker "steadfastly believed" that the defendant had been wrongly identified as the man who shot up Campbell's house on Skeen Street. Considering the evidence as a

whole, however, we conclude that it was not closely balanced and overwhelmingly established the defendant's guilt beyond a reasonable doubt.

¶ 30 Hecker testified that she witnessed the shooting on Skeen Street while smoking a cigarette on her front porch. She stated that a small black two-door sports car had stopped in front of Campbell's house and that the driver had gotten out of the car and began shooting. Hecker indicated that the driver had a "puffy" deformity on the left side of his "square" face that reminded her of "warts." "After the first couple of shots," Hecker went back inside her house and called 911. She was later unable to pick the defendant out of a photographic line-up that the police showed her, and when she saw the defendant on the news following his arrest, she did not think that he was "the shooter" she had seen. Hecker testified that she had recently been shown a photograph of the defendant's aunt's Fusion, and she was positive that it was not the vehicle that she had seen. Hecker was extensively cross-examined regarding her stated observations, and she acknowledged, among other things, that she was "bad about makes and models" of cars and that she could not state with certainty that the shooter had not been depicted in the line-up that she had been shown. She further acknowledged that she had not previously reported that she believed that the police had arrested the wrong man.

¶ 31 Jim Self, another of Campbell's neighbors, testified that after hearing gunfire outside his home on Skeen Street, he grabbed his shotgun, looked out his kitchen window, and saw a car sitting in front of Campbell's house with its headlights on. Moments later, he heard a door shut, and the car sped away. Self testified that the car he had seen was "dark or maroon" and had "wings" on the front. Self identified the

defendant's aunt's Fusion as being "very familiar" to the car that he had seen, stating that the wings on the front license-plate frame looked like the wings he had observed on the night of the shooting. Self was extensively cross-examined regarding his stated observations, and he acknowledged, among other things, that in a videotaped interview with the police, he had not referenced the wings on the car he had seen. He indicated that he might have mentioned them in other interviews, however, and that there was no doubt in his mind that he had seen them.

¶ 32 On appeal, the defendant argues that Hecker's eyewitness testimony, "which was the crux of the defense's case," was credible while Self's was not. The defendant suggests, among other things, that Self "tailored his recollection to fit the State's account." The defendant further contends that even if Self's testimony is taken as true, it is "insignificant" because he never claimed to have seen who fired the shots at Campbell's house.

¶ 33 The defendant also challenges the testimony of Campbell, Davis, Smith, Williams, and Nicholas, all of whom provided incriminatory information regarding the defendant's involvement in DeLarrian's murder. All are convicted felons, and all were thoroughly impeached with their criminal records and their possible motives to testify falsely. On appeal, the defendant argues that none of them are credible and that their testimony should be disregarded as "inherently untrustworthy."

¶ 34 It was the function of the jury as the trier of fact to determine the credibility of the witnesses who testified at the defendant's trial. *People v. Lee*, 213 Ill. 2d 218, 225 (2004). Furthermore, although the testimony of an accomplice witness or jailhouse

informant should be viewed with caution, whether corroborated or not, such testimony is not to be viewed as inherently unreliable. See *Belknap*, 2014 IL 117094, ¶ 55; *People v. Tenney*, 205 Ill. 2d 411, 429 (2002). "It is well established that the trier of fact is in the best position to assess the credibility of witnesses, determine the weight to be accorded their testimony, decide what inferences to draw from the evidence, and resolve any factual disputes arising from conflicting or inconsistent testimony." *People v. Myles*, 257 Ill. App. 3d 872, 884 (1994). A jury's credibility determinations are thus entitled to great deference and will not be lightly set aside. *People v. Moss*, 205 Ill. 2d 139, 165 (2001); *People v. Ellis*, 53 Ill. 2d 390, 395 (1973).

¶ 35 Here, with respect to all of the aforementioned witnesses, the jury was fully aware of the factors that would allow it to adequately judge their credibility. See *People v. Manning*, 182 Ill. 2d 193, 210 (1998). Furthermore, the State corroborated much of what they collectively said through its ballistics evidence, the defendant's cell phone records, a surveillance video from the area where the defendant fired shots into Campbell's car, and the testimony of numerous other witnesses. In any event, it is not our function to retry the defendant, and "we cannot substitute our judgment for that of the jury." *Id*. at 210-11. Moreover, "[a] conviction will not be reversed simply because the defendant tells us that a witness was not credible." (Internal quotation marks omitted.) *Tenney*, 205 Ill. 2d at 428.

¶ 36 With respect to the defendant's contention that even if Self's testimony is taken as true, it is insignificant because he never claimed to have seen who actually fired the shots at Campbell's house, we disagree. The maroon Fusion that the defendant borrowed from

his aunt on the night of the murder had distinctive flying-eagle license-plate frames, and Self positively identified the car's front license-plate frame as being like the one he had seen. We note that there was no evidence suggesting that anyone other than the defendant had borrowed and driven his aunt's Fusion that night and that Campbell testified that the defendant had been alone in the car. We further note that despite the defendant's intimations to the contrary, Hecker's testimony did not render the evidence of his guilt closely balanced. *Cf. People v. Johnson*, 2012 IL App (1st) 091730, ¶¶ 48, 65 (finding that the evidence of the defendant's guilt was closely balanced where there was no physical evidence linking him to the crime and the jury was required to choose between conflicting eyewitness testimony). In fact, even in the absence of Self's testimony, the jury could have readily concluded that the defendant fired the shot that killed DeLarrian and that Hecker was simply mistaken about the car she had seen and the police having arrested the wrong person.

¶ 37 Williams, Nicholas, Davis, Smith, and Campbell all indicated that the defendant had used his aunt's car during the events in question, and there was no evidence suggesting that anyone other than the defendant had been in the car that night. Williams and Nicholas both testified that the defendant had indicated that he had shot up Campbell's house with a "chopper," which the jury learned was "street jargon" for an automatic weapon. Joseph Costello, who lived in the house on Sixth Street that was struck by bullets, testified that he had heard the sounds of "different guns" outside his home and that one of the guns was "an automatic weapon." Costello explained, "You could hear bursts, like brrr, and then you'd hear one single shot." Shelly Dollar testified

that as she was purchasing gasoline near Sixth and McCambridge, she heard numerous gunshots and saw a dark-colored car turn onto Skeen Street and drive in the direction of Campbell's house. She also saw a man in a hooded sweatshirt running the same direction. Moments later, Dollar heard more gunshots that "sounded like" they came from the car she had seen. Campbell testified that as he was running back home after the firefight, he had heard "[r]apid shots" sounding from the area of his house. He further stated that he had heard the same type of gunfire when the defendant had been shooting at him minutes before. As previously noted, the .223 shell casings found near Sixth and McCambridge, the .223 shell casings found in front of Campbell's house, and the .223 shell casings from the Fusion were all fired from the same weapon, and all had Sellier & Bellot headstamps. Additionally, a box of Sellier & Bellot .223 ammunition was found underneath the Fusion's driver's seat, and a fingerprint matched to the defendant was found on one of the cartridges in the box. The defendant's argument that the evidence of his guilt was closely balanced downplays that this evidence directly tied him to the Fusion, the .223 shell casings found on Skeen Street, and the .223 shell casings found near Sixth and McCambridge. We also note that Campbell's house was less than two blocks from Sixth and McCambridge, that the house was shot up moments after the defendant and Campbell had exchanged gunfire, and that the sound of an automatic weapon was associated with both events.

¶ 38 The defendant's argument also ignores the evidence of the extensive efforts that he took to avoid apprehension. At some point after confirming through Smith that "some 12-year-old kid [had] got[ten] killed," the defendant fled to Missouri, and later ran when

the car he had been a passenger in was stopped for an equipment violation. He subsequently drove through a police checkpoint in another vehicle and almost hit an officer as he sped past. He then led police on a high-speed chase and escaped arrest after climbing a fence near the interstate. When the defendant was finally apprehended by the United States Marshal's Fugitive Task Force, he was found hiding in a storage shed in a trailer park. "Evidence of flight may be considered as a factor tending to establish guilt" (*People v. Newborn*, 379 Ill. App. 3d 240, 247 (2008)), and here, that evidence was substantial.

¶ 39 Lastly, the defendant ignores the State's evidence establishing motive. "Although motive is not an element of the offense of murder, evidence of motive may be relevant as proof of the identity of the offender." *People v. Smith*, 141 Ill. 2d 40, 81 (1990). Here, the jury heard that the defendant and Campbell had been engaged in an ongoing feud, that the defendant had previously made an attempt on Sophia's life, and that on the night in question, the defendant had fired shots at Campbell on two separate occasions, one of which occurred moments before Campbell's house was shot up. Additionally, Sophia testified that the defendant was the only person she knew who "had a beef" with Campbell. As for how their feud ended, Campbell testified that when he encountered the defendant in jail, the defendant had "basically [said that] he was sorry for what had happened and [to] tell Sophia that he[ ] [was] sorry for what had happened." In addition to being akin to a confession, the defendant's sentiments were understandable given that he and Campbell were once friends and that DeLarrian was an unintended victim who "happened to be in the wrong place at the wrong time."

¶ 40 Under the circumstances, a commonsense analysis of all the evidence in context leads to the conclusion that the evidence of the defendant's guilt was overwhelming and not closely balanced. We also note that faced with a daunting task, trial counsel effectively challenged the State's case. That said, we will turn to the specific arguments that the defendant raises on appeal.

¶ 41 D. The Defendant's Claims

¶ 42 1. The Defendant's 2011 Booking Photo

¶ 43 Hecker testified that the shooter she had observed had a puffy deformity on the left side of his face that reminded her of warts. Hecker was unable to pick the defendant out of a photographic line-up that the police had shown her, and she testified that none of the faces in the line-up had the deformity she had seen. She acknowledged, however, that she could not state with certainty that the shooter had not been depicted in the line-up she had been shown. The undated "mug shot" photo of the defendant that was included in the line-up was admitted into evidence without objection and labeled People's Exhibit 84 (Exhibit 84).

¶ 44 Over defense counsel's objections, the State was later allowed to call Detective Carole Presson of the Madison County sheriff's office as a rebuttal witness in response to Hecker's testimony. The State indicated that it intended to use Presson to introduce booking photos that had been taken of the defendant following his arrest in October 2008. Arguing that the jury was entitled to see what the left side of the defendant's face looked like, the State indicated that the photos would show that the defendant had a large tattoo on the left side of his face that he did not have when Exhibit 84 was taken. Counsel

argued that presenting just one booking photo would be sufficient, and the court agreed that multiple booking photos could cause "confusion as to how many times [the defendant] was charged [or] how many times he was booked."

¶ 45 Presson testified that inmates held in the Madison County jail are photographed when they are processed into custody and are sometimes photographed again if they have remained in custody for over a year. She further testified that the defendant had been photographed when he was taken into custody in October 2008. She then identified a booking photo of the defendant that was labeled and admitted as People's Exhibit 101 (Exhibit 101). We note that a large bird tattoo on the left side of the defendant's neck is clearly visible in the photo. When asked to date Exhibit 101, Presson stated that it had been taken in November 2011. When the State started to ask her if the defendant's 2008 booking photo was similar to Exhibit 101, defense counsel objected, and an untranscribed sidebar followed. Thereafter, the State did not revisit the matter, and when cross-examined, Presson acknowledged that Exhibit 101 had been taken after the defendant had been in jail for three years.

¶ 46 During a subsequent recess, the trial court explained that it had anticipated that the State was going to introduce the defendant's 2008 booking photo because it had been taken "at the time closest to the alleged viewing by Miss Hecker." The court further explained that it had sustained defense counsel's objection because it did not believe that it was appropriate for the State to ask Presson whether Exhibit 101 looked like the 2008 photo. Memorializing that it had not clearly ruled "as to which [of the booking photos] should be admitted or [that] only one would be admitted," the court did not fault the State

or suggest that it had proceeded improperly. The court stated that there had been "some confusion as to how [the evidence] would be admitted" and that the "particular manner may have been misinterpreted." The court concluded, "[W]e will just stick with whatever was presented in 2011 for good or for ill for the State or the [d]efendant." The court acknowledged that although the situation might cause a "little bit of confusion," it did not "think it was all that significant." Without objection, Exhibits 84 and 101 were subsequently admitted into evidence.

¶ 47 In its rebuttal closing argument, the State noted that while Hecker had been shown Exhibit 84 when asked to identify the shooter she had seen, she had not been shown Exhibit 101. The State argued that the tattoo on the left side of the defendant's neck was what had caught Hecker's attention. Contending that Hecker was "the best person to see what happened," defense counsel countered that the police had ignored her failure to pick the defendant out of the line-up she had been shown.

¶ 48 During its deliberations, the jury asked to see, among other things, the defendant's 2008 and 2011 booking photos. The State noted that although it had wanted to introduce both photos, it had only been allowed to admit the latter. Acknowledging that it was "a bit of an awkward situation," the trial court provided the jury with Exhibit 101 and advised it that there was "no 2008 booking photo in evidence."

¶ 49 In his motion for a new trial and in his amended motion for a new trial, the defendant alleged that the State had deliberately used Exhibit 101 to improperly suggest that he had the "later-acquired tattoo" on the left side of his neck in October 2008. The motions specifically asserted that "[t]he bird tattoo on the left side of [the defendant's]

neck is not visible on the 2008 booking photo because it was not present. The tattoo was acquired after the fact." Notably, the motions did not include copies of the 2008 booking photo, and a copy is not included in the record on appeal.

¶ 50 At a subsequent hearing on the defendant's motions, recalling that there had been "a bit of a misunderstanding about the introduction of the photo," the trial court characterized Exhibit 101's admission as "a fairly complicated issue." The court also indicated that the record on the matter was "somewhat incomplete." Ostensibly referring to the defendant's claims that he had acquired his bird tattoo after his 2008 booking photo had been taken, the court further noted,

> "[T]here's some speculation here[.] [N]ot to say that the [d]efendant has any burden of proving anything, but some of the issues that are mentioned in this section I don't think came in as proof from either the [d]efendant−I should say as evidence either from the [d]efendant or the State."

¶ 51 On appeal, asserting that the State wanted the jury to see the defendant's 2011 booking photo so that it would "mistakenly think that [he] had the tattoo in 2008," the defendant argues that the State's introduction of Exhibit 101 was improper and highly prejudicial. The defendant specifically maintains, among other things,

> "What the prosecutor did here with the two photos is egregious. The prosecutor could tell from just looking at the 2008 booking photo that [the defendant] did not have a tattoo in the picture. She led the trial court to believe that she was going to display the 2008 photo and then, at the last minute, showed

the jury the 2011 photo instead. There is no tattoo in the 2008 photo because [the defendant] did not have one in 2008."

The defendant further maintains that "the trial court abused its discretion in endorsing the prosecutor's unprincipled and outrageous conduct, and a new trial is warranted."

¶ 52 "Rebuttal evidence is that which is offered in order to explain, repel, contradict or disprove evidence presented by the opposing party." *People v. Henney*, 334 Ill. App. 3d 175, 187 (2002). "It is left to the sound discretion of the trial court whether to allow rebuttal evidence, and absent a clear abuse of that discretion resulting in a manifest injustice to the defendant, the trial court's determination will stand." *Id.*

¶ 53 Here, although the defendant's large bird tattoo is on the left side of his neck, we cannot conclude that the trial court abused its discretion in allowing the State to introduce Exhibit 101 as evidence tending to explain Hecker's testimony regarding the deformity she had seen on the left side of the shooter's face. With respect to the defendant's assertions that the State deliberately deceived the jury into believing that he had the tattoo in 2008, his accusations are based on a fact which is not in evidence, *i.e.*, that the tattoo is not visible in his 2008 booking photo because it did not exist in 2008. As the State observes, "[a]s support for his claim that he did not have the tattoo as of the 2008 shootings, [the defendant] cites only his unsworn post-trial motion," which the trial court denied. "Unsworn allegations are not evidence" (*People ex rel. Walgenbach v. Chicago & North Western Ry. Co.*, 41 Ill. App. 3d 106, 109 (1976)), and a "[d]efendant's arguments cannot be substituted for an adequate record" (*People v. Morrow*, 269 Ill. App. 3d 1045, 1053-54 (1995)). It is well established that in an appeal from a criminal

conviction, the defendant has the burden of providing a complete record, and "any doubts arising from an incomplete record will be construed against the defendant." *People v. Smith*, 406 Ill. App. 3d 879, 886 (2010). Moreover, in light of the trial court's statements regarding the confusion surrounding its ruling, we will not "presume an improper motive on the part of the prosecutor absent more to suggest the same." *People v. Nelson*, 193 Ill. 2d 216, 226 (2000). While we might speculate that the defendant's bird tattoo was better depicted in Exhibit 101 than in his 2008 booking photo, we will not assume that he did not have the tattoo in 2008. We further note that the doctrine of invited error is arguably applicable under the circumstances.

¶ 54 "[A] defendant's invitation or agreement to the procedure later challenged on appeal 'goes beyond mere waiver.' " *People v. Harvey*, 211 Ill. 2d 368, 385 (2004) (quoting *People v. Villarreal*, 198 Ill. 2d 209, 227 (2001)).

> "Invited error is sometimes referred to as an issue of estoppel in that a defendant may not request to proceed in one manner and later contend on appeal that the course of action was in error. [Citation.] To allow a defendant to use the exact ruling or action procured in the trial court as a vehicle for reversal on appeal would offend notions of fair play, encourage defendants to become duplicitous [citation], and deprive the State of the opportunity to cure the alleged defect [citation]." *People v. Johnson*, 2013 IL App (2d) 110535, ¶ 77.

¶ 55 As noted, the defendant accuses the trial court of "endorsing the prosecutor's unprincipled and outrageous conduct." The record indicates, however, that after unsuccessfully objecting to the State's use of either booking photo, defense counsel

successfully objected to the State's use of both photos and successfully objected to the State's attempt to establish that both were similar. Counsel then emphasized that Exhibit 101 had been taken after the defendant had been in jail for three years, while the State argued that the defendant's tattoo was what had caught Hecker's attention in October 2008. Notably, counsel did not object when Exhibit 101 was admitted into evidence. The jury later asked to see both booking photos, as it was apparently left with questions with respect to what the 2008 booking photo actually showed. As State notes, however, "[i]f the jury was deprived of the best evidence of [the defendant's] appearance on the date of the offense, it was his own doing." Further, that the defendant bases his instant claim of error on unsworn assertions regarding a photograph that he successfully moved to exclude implicates the same concerns underlying the doctrine of invited error. *Cf. People v. Johnson*, 2013 IL App (2d) 110535, ¶ 78 (finding that the concerns underlying the doctrine were not present where the State was solely responsible for the error at issue and counsel's attempt to mitigate the resulting confusion was not duplicitous).

¶ 56 Lastly, even assuming that the trial court abused its discretion in allowing the State to introduce Exhibit 101, we would conclude that any resulting error was harmless in light of the overwhelming evidence of the defendant's guilt. See *People v. Arman*, 131 Ill. 2d 115, 124 (1989) (noting that "[w]hen the competent evidence in the record establishes the defendant's guilt beyond a reasonable doubt and it can be concluded that retrial without the erroneous admission of the challenged evidence would produce no different result, the conviction may be affirmed"). As previously stated, even in the absence of Self's testimony, the jury could have readily concluded that the defendant

fired the shot that killed DeLarrian and that Hecker was simply mistaken about the car she had seen and the police having arrested the wrong man.

¶ 57 2. The FS2000 Rifle

¶ 58 Neither of the guns that the defendant used on the night of DeLarrian's murder were discovered during the course of the investigation. As indicated, however, collected evidence revealed that one of the weapons was a .223 caliber rifle, and the other was a 5.7 mm handgun from which Fabrique Nationale ammunition had been fired. When interviewed by the police, Davis referred to the weapon that the defendant obtained at his aunt's house as a "chopper," and he identified and described it as a "space-age gun" when shown a picture of a Fabrique National model FS2000 rifle. We note that the picture Davis was shown was admitted into evidence at trial and is included in the record on appeal. We further note that the FS2000 is a .223 caliber rifle that can be fairly described as futuristic-looking or as something one might see in a science fiction movie.

¶ 59 At trial, over defense counsel's objections, the State was allowed to introduce as demonstrative evidence an FS2000 that it obtained from the manufacturer. The State anticipated that Davis would positively identify the rifle as being similar to the one the defendant had on the night of the murder. When Davis was shown the gun, which was marked People's Exhibit 75 (Exhibit 75), he testified that it was "probably" like the one he had seen but that he did not know. He further stated that he could not "remember exactly what it looked like, but it was a big gun like that." Davis acknowledged that he had previously described the weapon that the defendant had as a "space-age gun."

¶ 60 The State subsequently requested that the trial court allow one of its firearms experts to use Exhibit 75 as demonstrative evidence during his testimony. Noting that the FS2000 "operates in a very unusual manner," the State argued that allowing its expert to testify regarding the rifle's design and operation would corroborate Nicholas's anticipated testimony regarding what the defendant had told him about the gun, *i.e.*, that it had a "shell catcher" that caught ejecting shell casings. The State further maintained that the FS2000 was a "very unique" weapon that did not even "exist in the State Police reference library." The State also referenced Davis's testimony and noted that the FS2000 was a .223 caliber rifle. The State acknowledged, however, that the relevance of its expert's proposed testimony was dependent on Nicholas's anticipated testimony. Stating that the FS2000 "functions in a very unusual way, and there's really no way to have somebody explain it without showing somebody how it works," the State emphasized that its intent was to use Exhibit 75 for purely demonstrative purposes.

¶ 61 Defense counsel objected. Arguing that Davis had not sufficiently identified Exhibit 75 as being like "the weapon that was used in this case," counsel maintained that any testimony regarding the gun's operation would be irrelevant and prejudicial. Counsel further noted that by the State's own admission, Exhibit 75 was in no way connected to the defendant and could not have possibly been the murder weapon. Counsel accused the State of wanting to show "a large gun to the jury in order to sway [its] verdict against the [d]efendant."

¶ 62 The trial court ultimately ruled that it would permit the State's proposed use of Exhibit 75 provided that Nicholas testified as the State anticipated. At counsel's request,

the court agreed that if the State were allowed to introduce Exhibit 75, the jury would be given a contemporaneous limiting instructing regarding the gun's use as demonstrative evidence only. Noting that Davis acknowledged having previously described the weapon the defendant had as a "space-age gun," the trial court also indicated that although Davis's in-court identification of Exhibit 75 had been somewhat equivocal, it was sufficient.

¶ 63 Nicholas subsequently testified that the defendant had told him, among other things, that he had shot up Campbell's house using a "chopper" with a "shell catcher" that kept the shell casings from "popping out everywhere." The State then called Thomas Gamboe, a firearms expert with the Illinois State Police (ISP). Gamboe testified that he had fired approximately 70 to 75 .223 caliber rounds through Exhibit 75, and he demonstrated how the rifle functioned and operated. Gamboe explained that unlike most magazine-fed weapons, whose discharged shell casings "come flying out the side," the FS2000 has a tube along the barrel that was designed to hold four or five discharged casings. As a result, a "cartridge that [is] fired doesn't come out the side of the firearm immediately" but is rather held in the tube. Gamboe testified that when he fired Exhibit 75, he was able to get up to four shell casings to collect in the tube before the casing from the next fired round would force the tube's ejection-port gate open, at which point "the discharged cartridge cases [would] basically just fall out." Describing the FS2000's ejection system as "incredibly unique" and "particularly unique," Gamboe testified that he had examined thousands of firearms during his 27-year career and had never seen one like it.

¶ 64 When cross-examined, Gamboe repeatedly acknowledged that Exhibit 75 had been obtained from the manufacturer and was not a piece of evidence that had been connected to the defendant in any way. Gamboe further acknowledged that the limited purpose of his testimony was to merely illustrate a feature of the weapon.

¶ 65 After Gamboe was excused, the trial court instructed the jury as follows:

> "[Exhibit 75 was] offered as a demonstrative exhibit.
>
> What that means is this particular item is not or has not been identified as being involved in this case. It is offered by the State to demonstrate a type of weapon allegedly used and generally described in this case, or to better illustrate a particular feature of a weapon allegedly used in this case.
>
> So, it's going to be up to you to decide if a weapon was used and if this is similar to the weapon described and the weight, if any, to be given to the evidence that describes a weapon being used and whether this matches that description.
>
> So, I don't want you to be prejudiced by the fact that there was a−a weapon brought in and shown and just assume that that was a weapon used in this case.
>
> There's been no identification that that particular physical item has been used in this case, but there has been testimony about a type of weapon, a description of a weapon, and other evidence that may lead you to conclude that this demonstrates some of the weight or relevance of the description given, okay?"

Exhibit 75 was not admitted into evidence, and the jury was later instructed, "Any evidence that was received for a limited purpose should not be considered by you for any

other purpose." Illinois Pattern Jury Instructions, Criminal, No. 1.01 (4th ed. 2000) (hereinafter IPI Criminal 4th).

¶ 66 In his motion for a new trial and in his amended motion for a new trial, the defendant alleged that the trial court had erred in allowing the State to use Exhibit 75 as demonstrative evidence. At a subsequent hearing on the motions, the trial court defended its ruling, observing, among other things, that the circumstances surrounding the weapon's admission were distinguishable from the reported cases involving instances in which firearms had been admitted "for sensational purposes *** without any connection whatsoever."

¶ 67 On appeal, the defendant claims that the trial court abused its discretion in allowing the State to introduce Exhibit 75. The defendant suggests that the exhibit was irrelevant and was used by the State to "unfairly bolster its weak evidence." We disagree.

¶ 68 "The purpose of demonstrative evidence is to aid the trier of fact in interpreting, understanding, and weighing other evidence or testimony." *People v. Cook*, 279 Ill. App. 3d 718, 725 (1995). "Courts look favorably upon the use of demonstrative evidence, because it helps the jury understand the issues raised at trial." *People v. Burrows*, 148 Ill. 2d 196, 252 (1992). "The decision of whether to allow a witness to use a demonstrative aid is within the sound discretion of the trial court and will not be reversed upon review absent an abuse of that discretion which results in prejudice to the defendant." *Cook*, 279 Ill. App. 3d at 725. "A trial court abuses is discretion where its ruling is arbitrary, fanciful or where no reasonable person would take the view adopted by the court." *People v. Taylor*, 383 Ill. App. 3d 591, 594 (2008).

¶ 69 "A weapon may be admitted into evidence only where there is proof to connect it both to the crime and to the defendant." *People v. Tucker*, 317 Ill. App. 3d 233, 241 (2000). "In order to establish a connection there must be: (1) sufficient testimony to establish that a weapon was used, (2) substantial evidence the defendant participated in the crime, and (3) testimony that the weapon admitted was similar to the one used during the crime." *Id*. "[I]t is unnecessary to establish that the particular weapon was the one which was actually used" (*People v. Johnson*, 12 Ill. App. 3d 326, 330 (1973)), however, and "[a] connection exists if the weapon is suitable to commit the crime charged" (*People v. Jackson*, 299 Ill. App. 3d 323, 326 (1998)).

¶ 70 Here, we cannot conclude that the trial court abused its discretion in allowing the State to use Exhibit 75 as demonstrative evidence. Davis described the rifle the defendant had as "space-age weapon," and he indicated that it looked like and was "probably" like Exhibit 75. The defendant told Nicholas that the weapon had a "shell catcher" that kept the shell casings from "popping out everywhere." On appeal, the defendant asserts that the FS2000 is "just like a number of other guns that fire .223 bullets and have shell catchers." Describing the gun's ejection system as incredibly and particularly unique, however, Gamboe testified that he had examined thousands of firearms during his 27-year career and had never seen one like it. As an aside, we note that ISP firearms expert James Hall testified that 5.7 mm firearms are also "unusual" and that prior to this case, he had not previously examined 5.7 mm ballistic evidence during his 33-year career.

¶ 71 In any event, the State's evidence established that the defendant used a "space-age" .223 caliber rifle with a "shell catcher." The FS2000 is consistent with that description, and its appearance and operation were thus relevant and tended to corroborate the testimony of the State's witnesses. Moreover, as the State argued below, the FS2000 "functions in a very unusual way, and there's really no way to have somebody explain it without showing somebody how it works." Exhibit 75 was ultimately introduced for the sole purpose of demonstrating how its shell catcher operated, and the trial court gave the jury a specific limiting instruction regarding the exhibit's use, *i.e.*, "to better illustrate a particular feature of a weapon allegedly used in this case." We note that the trial court also correctly distinguished the present case from those in which firearms had been improperly admitted "for sensational purposes *** without any connection whatsoever." See, *e.g.*, *Tucker*, 317 Ill. App. 3d at 241 (holding that the State had engaged in "deliberate prosecutorial overkill" by improperly introducing two firearms knowing that "neither weapon was in any way relevant" to its case); *People v. Wade*, 51 Ill. App. 3d 721, 729-30 (1977) (holding that the State's improper introduction of a firearm that it "undoubtedly knew" had no connection to its case was "also objectionable as being evidence of other crimes admitted without justification"). Under the circumstances, we find no abuse of discretion. Lastly, even assuming that Exhibit 75 was erroneously admitted, we would find that any resulting prejudice was harmless in light of the overwhelming evidence of the defendant's guilt. See *Arman*, 131 Ill. 2d at 124.

¶ 72 3. The .223 Caliber Shell Casings and Ammunition from the Fusion

¶ 73 Sergeant Nicholas Novacich of the Granite City police department testified that after finding and collecting the spent .223 shell casing that had been lodged near the driver's side windshield wiper of the Fusion, he had turned it over to Lieutenant Christopher Burns of the Madison police department. Burns testified that after receiving the casing from Novacich, he had "secured it in a locker in [his] office" and then turned it over to ISP crime scene investigator Dennis Janis the following morning. Identifying the casing as People's Exhibit 66 (Exhibit 66), Janis testified that he had received it directly from Burns. In a report that was admitted into evidence as People's Exhibit 70 (Exhibit 70), Janis indicated that he had delivered Exhibit 66 to the ISP crime lab in Fairview Heights on October 9, 2008, where he submitted it to Hall as "[e]xhibit #75." Hall testified that he recognized Exhibit 66 and had compared it to the other .223 casings that had been collected during the course of the investigation.

¶ 74 With respect to the .223 shell casing that was found on the floorboard in front of the driver's seat and the box of .223 ammunition that was found underneath the driver's seat, Janis indicated that he had discovered and collected those items while processing the Fusion for evidence on October 8, 2008. The casing was identified and admitted as People's Exhibit 60 (Exhibit 60), and the box of ammunition was identified and admitted as People's Exhibit 61 (Exhibit 61). People's Exhibit 70 indicates that Janis delivered Exhibits 60 and 61 to the ISP crime lab in Fairview Heights on October 9, 2008, where he submitted the former to Hall as "[e]xhibit #79" and the latter to both Hall and fingerprint examiner Susan Bolen as "[e]xhibit #81." Hall testified that he recognized

Exhibit 60 and had compared it to the other .223 casings that had been collected during the course of the investigation. Hall and Bolen both testified that they recognized and had examined Exhibit 61. Notably, there was no evidence that Exhibit 60, 61, or 66 had ever been tampered with, misidentified, or otherwise compromised.

¶ 75 On appeal, the defendant suggests that the State failed to establish an adequate chain of custody for the admission of Exhibits 60, 61, and 66. He specifically maintains, among other things, that because the State failed to establish that safekeeping measures had been taken to ensure that the evidence would not be tampered with at the crime lab, the State failed to meet its burden of proving that it was improbable that the evidence had been compromised. Conceding that defense counsel did not object to the admission of the exhibits at trial, the defendant argues that we should address this issue as plain error or as an instance of ineffective assistance of counsel.

¶ 76 Because gun cartridges and shell casings are generally not readily identifiable or unique items, the State is required to establish a chain of custody to lay an adequate foundation for their admission into evidence. *People v. Smith*, 2014 IL App (1st) 103436, ¶ 46. "The State bears the burden to establish a custody chain that is sufficiently complete to make it improbable that the evidence has been subject to tampering or accidental substitution." *People v. Woods*, 214 Ill. 2d 455, 467 (2005). "Unless the defendant produces evidence of actual tampering, substitution or contamination, a sufficiently complete chain of custody does not require that every person in the chain testify, nor must the State exclude every possibility of tampering or contamination[.]" *Id*. "[T]he State must demonstrate, however, that reasonable measures were employed to

protect the evidence from the time that it was seized and that it was unlikely that the evidence has been altered." *Id.* " 'Once the State has established the probability that the evidence was not compromised, and unless the defendant shows actual evidence of tampering or substitution, deficiencies in the chain of custody go to the weight, not admissibility, of the evidence.' " *Id.* (quoting *People v. Bynam*, 257 Ill. App. 3d 502, 510 (1994)).

¶ 77 Because "a defendant's lack of a timely and specific objection deprives the State of the opportunity to correct any deficiency in the foundational proof at the trial level" (*id.*), our supreme court has "stressed that application of the forfeiture rule 'is particularly appropriate when a defendant argues that the State failed to lay the proper technical foundation for the admission of evidence' for the first time on appeal." *Smith*, 2014 IL App (1st) 103436, ¶ 48 (quoting *Woods*, 214 Ill. 2d at 470). Furthermore, "[a]n error in the chain of custody will only constitute plain error 'in those rare instances where a complete breakdown in the chain of custody occurs.' " *Id.*

¶ 78 Here, given that there was no evidence of actual tampering, the State established an adequate chain of custody for the admission of Exhibits 60, 61, and 66. See *id.* ¶ 49. Moreover, the limited and direct person-to-person transfers demonstrated that reasonable measures had been taken to protect the evidence and that it was unlikely that the evidence had been altered. On appeal, the defendant emphasizes that Novacich testified that he had placed Exhibit 66 in an "envelope," but Burns testified that he had received it from Novacich in a "box." This alleged deficiency in the chain went to the weight of the evidence, however, not its admissibility. We also note that the State would have had an

opportunity to address the discrepancy had the defendant raised a specific objection. See *id*. ¶ 53. Under the circumstances, we find no error, let alone plain error. Additionally, because nothing suggests that counsel had evidence to undermine the chain of custody that the State established, counsel cannot be deemed ineffective for failing to object to the exhibits' admission. *Id*. ¶ 64. We lastly note that the defendant's assertion that Exhibit 70 was not admitted into evidence is belied by the record.

¶ 79 4. The State's Cell Phone Evidence

¶ 80 The State used the defendant's cell phone records to establish a timeline of his communications and movements on the night of October 6, 2008, and the morning of October 7, 2008. The records were introduced through the testimony of Thomas Koch, a records custodian with Sprint Nextel, and included information regarding the cell towers or "cell sites" associated with each call.

¶ 81 Jacob Zipprich, a radio frequency engineer employed by Ericsson, was allowed to testify as an expert in the field of cell phone technology. Zipprich testified that he maintained and optimized Sprint's cell tower network for the metropolitan St. Louis area and had specialized training with respect to how the towers and network operate in conjunction with cell phones. Zipprich testified, among other things, that a cell phone's radio waves are transmitted through a cell tower to a "switching office" that routes the waves to the receiving phone. He explained that each cell tower covers three specific geographic areas or "sectors" around it and that the towers and sectors have unique identifiers that an automated system uses to log a cell phone's usage of the same for

billing purposes. Zipprich further explained that if a user moves throughout the network during a phone call, the towers and sectors employed will continuously change.

¶ 82 Zipprich testified that a cell tower closest in proximity to a cell phone will generally give the strongest signal but that coverage areas can sometimes overlap. Zipprich stated that the towers in the suburban areas of St. Louis typically have a range of two to three miles. Zipprich further stated that "radio waves react differently traveling through building material as opposed to being outside where there is nothing to prevent them from travelling" and that a phone will try to "pick the best possible path" to a tower. Zipprich acknowledged that determining a cell phone's exact location based on cell tower data is not a "precise science."

¶ 83 Using the defendant's cell phone records, Zipprich created a map displaying the cell towers and sectors that the defendant's phone had activated on the night of DeLarrian's murder. Zipprich used the map during his testimony and opined as to which of the calls had indicated movement. Although he pinpointed two specific addresses on the map as points of reference, Zipprich did not attempt to identify the exact locations or addresses from where the calls from the defendant's phone had been made. He rather made general references to the towers and sectors that had been used during the calls, as plotted on the map. Zipprich acknowledged that he had no idea who had used the defendant's cell phone on the night in question.

¶ 84 On appeal, the defendant maintains that trial counsel was ineffective for failing to request a *Frye* hearing (*Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)) on the State's use of Zipprich's testimony. The defendant further complains that trial counsel

was ineffective for not cross-examining Zipprich regarding the "unreliability of his methodology" and for not calling a defense expert to discredit his testimony. The defendant's claims are premised on his assertion that "under *United States v. Evans*, 892 F. Supp. 2d 949 (N.D. Ill. 2012), [Zipprich's] methodology is unreliable and not generally accepted within the scientific field."

¶ 85 In Illinois, the admission of scientific expert testimony is governed by the *Frye* standard. *In re Commitment of Simons*, 213 Ill. 2d 523, 529 (2004). "Commonly called the 'general acceptance' test, the *Frye* standard dictates that scientific evidence is admissible at trial only if the methodology or scientific principle upon which the opinion is based is 'sufficiently established to have gained general acceptance in the particular field in which it belongs.' " *Id*. at 529-30 (quoting *Frye*, 293 F. at 1014). On appeal, when determining whether a *Frye* hearing was warranted, a reviewing court is free to consider court opinions from other jurisdictions. *Id*. at 531.

¶ 86 In *Evans*, a cell site expert used a "granulization theory" to estimate the location from which several of the defendant's phone calls had originated. *Evans*, 892 F. Supp. 2d at 952-56. Observing that factors such as topography, physical obstructions, and the signal strength of another tower can impact whether a cell phone connects to the tower closest to it, the court noted, however, that the granulization theory did not fully account for the fact that a cell phone does not always use the closest tower. *Id*. at 953, 956-57. Further noting, among other things, that the granulization theory had not been generally accepted in the scientific community, the court held that the theory was unreliable and that the expert could not testify about it. *Id*. at 955-57.

¶ 87 Here, the defendant's reliance on *Evans* is misplaced because Zipprich did not use a granulization theory to estimate the locations from where the defendant's calls had been made, nor did he presume that a cell phone automatically connects to the closest tower. Zipprich rather used historical data from the defendant's cell phone records to demonstrate the towers and sectors that the defendant's phone had actually activated. This methodology has consistently been deemed reliable and has been widely accepted by numerous courts that have limited *Evans*' holding to its facts. See, *e.g.*, *United States v. Machado-Erazo*, 950 F. Supp. 2d 49, 55-57 (D.D.C. 2013) (and cases cited therein); *United States v. Jones*, 918 F. Supp. 2d 1, 5-6 (D.D.C. 2013) (and cases cited therein); *State v. White*, 2015 Ohio 3512, ¶¶ 27-29, 37 N.E.3d 1271 (Ohio Ct. App.) (and cases cited therein). These cases further demonstrate that Zipprich's methodology is generally accepted in the field of cell-site analysis. *Id.* "An attorney will not be deemed ineffective for a failure to file a futile motion" (*People v. Rucker*, 346 Ill. App. 3d 873, 886 (2003)), and we cannot find that counsel was ineffective for not requesting a *Frye* hearing.

¶ 88 The defendant's arguments that counsel should have cross-examined Zipprich about the "unreliability of his methodology" and should have called a defense expert to challenge Zipprich's testimony also fail, as both are also based on suggestions that Zipprich employed a method or theory that failed to consider that a cell phone will not always connect with the closest tower. As indicated, the methodology underlying Zipprich's testimony has consistently been deemed reliable, and he did not attempt to identify precise locations from where the defendant's calls had been made.

¶ 89 5. Evidence of Other Crimes

¶ 90 Officer Justin Barlow of the Columbia police department was called as a defense witness to testify as to his involvement in the investigation of DeLarrian's murder. Barlow testified that he had, among other things, shown Hecker the aforementioned photographic line-up. Barlow identified Defendant's Exhibit 7 (Exhibit 7) as including copies of the photos that Hecker had been shown, and he was questioned regarding how the line-up had been prepared and presented. When cross-examined, Barlow referred to the photos as "mug[ ]shots" and "police photos." We note that defense counsel first introduced Exhibit 7 during Hecker's testimony.

¶ 91 When Nicholas testified toward the end of the State's case-in-chief, the State asked him how he knew the defendant, and he replied, "Through a business relationship." When the State asked him what kind of business, he stated that he "[u]se[d] to sell drugs, I guess." Counsel objected, and an untranscribed sidebar ensued. When subsequently questioning Nicholas about what the defendant had told him, the State asked him if the defendant had ever mentioned "who was taking care of things for him while he was in jail." Nicholas stated that the defendant had said that his sister, Tiffany, was "handling his business for him." When the State asked Nicholas if the defendant had ever mentioned "anyone else who was giving a statement against him," Nicholas stated that the defendant had complained that a "guy named Duke" had made a proffer against him in a federal drug case. Nicholas also indicated that he knew Duke from federal prison.

¶ 92 When cross-examining Nicholas, defense counsel emphasized that he had numerous convictions for drug-related offenses and had cooperated with federal

authorities in the past. Counsel also questioned Nicholas about his conversations with Duke, which resulted in Nicholas stating that Duke had told him about the proffer he had made against the defendant in a federal drug case.

¶ 93 On appeal, referencing Nicholas's direct-examination testimony and Barlow's mug-shot references, the defendant accuses the State of deliberately injecting irrelevant other-crimes evidence into his trial. Acknowledging that this issue was not properly preserved for review, the defendant asks that we review it as plain error or by finding that "counsel was ineffective for not objecting to each error and for not including the issue in a motion for a new trial."

¶ 94 "In general, evidence of a defendant's other crimes is not admissible to show his propensity to commit the charged offense." *People v. Reeves*, 385 Ill. App. 3d 716, 731 (2008). Similarly, "[m]ug shot evidence tending to inform the jury of a defendant's commission of other, unrelated criminal acts should not be admitted." *People v. Lash*, 252 Ill. App. 3d 239, 248 (1993). Nevertheless, it is well settled that a defendant cannot be heard to complain where evidence of his past misconduct was invited by his own trial tactics. *Reeves*, 385 Ill. App. 3d at 731; see also *People v. Topps*, 293 Ill. App. 3d 39, 48 (1997) ("Illinois courts have long held that an accused cannot complain of the admission of testimony that was invited by the defendant's own tactics at trial."); *People v. Owens*, 46 Ill. App. 3d 978, 994 (1977) ("A defendant can neither complain of the admission of testimony which was invited by his own tactics at trial [citations], nor object to evidence of another crime where he himself has introduced evidence of that other crime."). "If a defendant procures, invites, or acquiesces in the admission of evidence, even though it be

improper, he cannot complain." *Owens*, 46 Ill. App. 3d at 994. "Additionally, when a defendant fails to object to testimony and then elicits the same or similar testimony on cross-examination, any error in admitting that testimony is waived." *People v. Murphy*, 322 Ill. App. 3d 271, 277 (2001).

¶ 95 Here, the defendant maintains that Nicholas's testimony suggesting that the defendant was a drug dealer facing federal charges who continued to run his business while in jail was irrelevant and prejudicial. We first note that it does not appear that the State deliberately elicited that information and that the State did not later reference it. When memorializing the aforementioned sidebar during a subsequent recess, the trial court stated that defense counsel had objected to Nicholas's drug reference to foreclose the State from delving into the defendant's "prior bad acts," that the prosecutor had "indicated that she wouldn't pursue that line of questioning," and that she had not pursued that line of questioning. We further note that although on direct examination, Nicholas testified that Duke had made a proffer against the defendant in a federal drug case, defense counsel did not object and elicited the same information on cross-examination. Most notable, however, is that the defendant's argument on appeal ignores that part of his apparent defense strategy was to suggest that Campbell had testified falsely against him because they had been rivals in the drug trade.

¶ 96 During *voir dire*, defense counsel asked prospective jurors questions referencing the credibility of someone with a "monetary interest in something." Early in the trial, when Campbell testified, he was impeached with his criminal record, and he acknowledged that he had "sold drugs from time to time." When cross-examining

Campbell, trial counsel emphasized that Campbell was a drug dealer and suggested that Campbell's problems with the defendant stemmed from the fact that Campbell believed that the defendant was "invading [Campbell's] territory," where Campbell sold "drugs" and "rock." When trial counsel cross-examined Sophia, she acknowledged that Campbell had been a drug dealer and that their house had been raided by federal authorities in 2007. Counsel then asked her if the incident at the nightclub had been about the defendant "being on [Campbell's] territory." When Burns was called as a witness for the defense, he testified that when he spoke with Sophia on the morning of DeLarrian's murder, he had asked her if Campbell had been involved in any illegal activities, and she had stated that she did not believe so. Burns further acknowledged that had Sophia disclosed that Campbell had been selling illegal drugs, that information might have proven helpful to the investigation. During closing arguments, defense counsel suggested that Sophia might have lied to protect Campbell's drug-dealing business "at the expense of solving her son's murder." Counsel further intimated that Campbell's motive to falsely implicate the defendant stemmed from the "competition," "tension," and "territory" inherent in the drug trade. We note that the jury was also aware that Campbell, Davis, Smith, and Nicholas had all been previously convicted on felony drug charges.

¶ 97 Although defense counsel never explicitly acknowledged or stated that the defendant had ever been involved in the illegal drug trade, throughout the course of the trial and as a matter of apparent strategy, counsel implied that he had been. Furthermore, when Nicholas advised that the defendant had stated that Duke had made a proffer against him in a federal drug case, counsel did not object and then elicited the same

testimony on cross-examination. As a result, the defendant cannot now be heard to complain that the jury's exposure to evidence suggesting his involvement in the drug trade denied him a fair trial. See *Murphy*, 322 Ill. App. 3d at 277; *Owens*, 46 Ill. App. 3d at 994. We also note that during closing arguments, the State did not reference any of counsel's implications other than stating, "[L]et's face it, [DeLarrian was killed] because [Campbell] was a drug[-]dealing felon who was involved with [the defendant]." The State otherwise argued that DeLarrian's murder was the result of a "clash" between the defendant and Campbell and that the defendant and Campbell did not "like each other."

¶ 98 The defendant's trial tactics also resulted in the mug shot references that he complains of on appeal. Defense counsel introduced Exhibit 7 for strategic purposes, and it was used to, among other things, emphasize Hecker's inability to identify the defendant. Although the defendant now complains that when cross-examined, defense witness Barlow referred to the photos as mug shots and police photos, the photos include height-lines, and Barlow's descriptions merely stated the obvious. See *People v. Smith*, 160 Ill. App. 3d 89, 95 (1987) ("A mug shot, with or without a legend, cannot help from being recognized by the average juror."); *People v. Wheeler*, 71 Ill. App. 3d 91, 97 (1979) ("Finally, we must observe that a police photograph or 'mug shot' cannot help from being recognized by the average juror.").

¶ 99 Lastly, even assuming that the defendant's trial tactics had not invited the implications that he complains of on appeal, we would find that any resulting error was harmless given the overwhelming evidence of his guilt. See *People v. Andrade*, 279 Ill. App. 3d 292, 303 (1996) ("If the State's other evidence establishes defendant's guilt

beyond a reasonable doubt, the erroneous introduction of other crimes evidence will be deemed harmless."). As an aside, we note that although the defendant suggests that he was prejudiced by Presson's references to his 2008 and 2011 booking photos, her testimony merely established that the defendant had been photographed following his arrest in October 2008 and had been photographed again in 2011 because he had been in the custody of the jail for longer than a year. We also note that the defendant does not allege that Exhibit 84 was improperly admitted.

¶ 100 6. Questions Regarding the Veracity of Witnesses

¶ 101 The defendant complains that the State improperly asked Burns, Hecker, and Detective Orlando Ward to judge the veracity of other witnesses. Acknowledging that he did not raise these complaints in his posttrial motions, the defendant again argues plain error and ineffective assistance of counsel. For the most part, however, the questions the defendant complains of on appeal were invited by defense counsel's questioning, and we find that none were unduly prejudicial under the circumstances.

¶ 102 Burns testified that when he interviewed Campbell on the morning of October 7, 2008, they had spoken "a couple of times," and Campbell's story had changed. Burns indicated that Campbell had not been entirely truthful during the interview process. When cross-examining Burns, defense counsel emphasized that Campbell had "lied" and that it is often difficult to determine when someone is lying. Counsel extensively questioned Burns about Campbell's lies and "false statements" and noted that it had taken Campbell four hours to "come up with the story that he presented." Counsel also suggested that the police had failed to adequately corroborate Campbell's claims before

acting on them. On redirect, when Burns was asked whether the police had sufficient evidence to conclude that Campbell had finally told them the truth, counsel's objection was sustained. When Burns was asked whether in his experience, "[t]hese guys ever tell *** the truth right away," counsel's objection was also sustained.

¶ 103 When Davis testified, he acknowledged that the police had interviewed him numerous times and that he had not immediately told them the truth. When cross-examining Davis about the interviews, counsel repeatedly characterized his statements as "lies," asked him to define the word "lie," and noted that it had taken him several days to "finally [tell the police] what they wanted to hear."

¶ 104 When Ward was called as a defense witness, he testified that Davis had been interviewed nine times over the course of four days. Ward was extensively questioned about the interviews and about Davis's various statements. Ward was also questioned about the tactics that he had employed during the interviews. Ward acknowledged that Davis was slow to provide information and that he did not believe that Davis had initially told him the truth. Ward further acknowledged that Davis had repeatedly been questioned because the police "wanted him to tell [them] what [they] believed to be the truth." Ward acknowledged that he had discussed specific facts of the investigation with Davis and had "supplied" him with certain information. Counsel suggested that Ward had improperly fed Davis facts until Davis gave the statement that Ward "wanted to hear." Counsel further suggested that the police had predetermined what the "truth" was and had then pressured Davis into giving a statement consistent with that determination. When Ward opined that Davis had told him the truth, counsel remarked, "Okay.

Whatever you want to call it." On cross-examination, when the State asked Ward if he believed that Davis had finally told him the truth, counsel's objection was sustained. Ward subsequently acknowledged that Davis had eventually "come[ ] clean" and had told the police "things that [they had] evidence to corroborate." During closing arguments, defense counsel compared the investigation of DeLarrian's murder to a "lynching," argued that the State's case was based in lies, argued that Campbell had given the police a self-serving version of events, and asserted that Ward had provided Davis with the details that the police had wanted him to say.

¶ 105 "Under Illinois law, it is generally improper to ask one witness to comment directly on the credibility of another witness [citations] as questions of credibility are to be resolved by the trier of fact." (Internal quotation marks omitted.) *People v. Becker*, 239 Ill. 2d 215, 236 (2010). Where as here, such questions are invited by the defendant's theory of the case, however, they are "not necessarily inappropriate." *People v. Kokoraleis*, 132 Ill. 2d 235, 264-65 (1989) (finding that asking the defendant whether certain State witnesses were lying was not inappropriate where the defendant's theory at trial was that the police had furnished him with information that he had merely repeated when making his oral and written statements). In any event, the latitude that a party is allowed on cross-examination is a matter within the trial court's discretion (*People v. Harris*, 231 Ill. 2d 582, 588 (2008)), and here, in its discretion, the trial court sustained defense counsel's objections to the questions posed to Burns and Ward that the defendant complains of on appeal. Additionally, during the course of the trial, the jury was twice instructed to disregard questions to which objections were sustained. See IPI Criminal

4th No. 1.01. Thus, even assuming that the questions were improper, any potential prejudice was prevented. See *Kokoraleis*, 132 Ill. 2d at 265.

¶ 106 The defendant also takes issue with two questions that the State asked Hecker on cross-examination, *i.e.*, "[W]ould it surprise you that someone that lives right next-door to you was looking out his window, and said that he saw a four[-]door maroon Ford Fusion shooting?," to which she responded, "Actually it would surprise me[.]," and "Would it surprise you *** to know that shell casings that matched the one outside of DeLarrian's house were found in a [maroon] four-door Ford[?]," to which she did not respond. We agree that these questions were improper because they were unprovoked and invited Hecker to comment on the credibility of other evidence that was before the jury. The trial court sustained defense counsel's objections to both questions, however, again preventing any potential prejudice. *Id*. Under the circumstances, the defendant is again unable to establish plain error or ineffective assistance of counsel.

¶ 107 7. *Voir Dire*

¶ 108 During *voir dire*, the State asked a panel of prospective jurors if any of them watched the television show "CSI." When prospective juror Green indicated that he did, the State asked him if he thought the show was "like real life," and he replied, "Somewhat." The State then explained that "in real life, police make mistakes[,] *** and everything doesn't go smoothly. And yet it doesn't affect what really happened and what the outcome is. Is that going to cause you any concern? Mr. Green, you're the one who watches it?" After the trial court overruled defense counsel's objection to the State's comments, Green stated, "No problem." Green was not subsequently selected as a juror.

¶ 109 In his motion for a new trial and in his amended motion for a new trial, the defendant maintained that the trial court erred in overruling his objection to the State's remarks regarding the police making mistakes. The defendant asserted that the comments misstated the law and undermined the jury's role as fact-finder. When denying the defendant's motions, the trial court disagreed, noting that the comments were not significant and "certainly didn't undermine the role of the [j]ury."

¶ 110 On appeal, the defendant argues that "the trial court abused its discretion in permitting the State to indoctrinate, pre-educate, and condition the prospective jurors." In addition to referencing the remarks the State made to Green about the police making mistakes, the defendant points to several other questions and comments that he characterizes as blatantly improper and prejudicial. Acknowledging that trial counsel did not object to the additional comments that he references, the defendant asks that we address them as plain error or by finding that counsel was ineffective for failing to properly preserve them for review.

¶ 111 The trial court is primarily responsible for both initiating and conducting the *voir dire* examination. *People v. Metcalfe*, 202 Ill. 2d 544, 552 (2002). "[T]he manner and scope of the examination rests within the discretion of the trial court, and we review such decisions for an abuse of discretion." *People v. Rinehart*, 2012 IL 111719, ¶ 16. "An abuse of discretion occurs when the conduct of the trial court thwarts the purpose of *voir dire* examination−namely, the selection of a jury free from bias or prejudice." *Id.*

> "Accordingly, *voir dire* questions, whether asked by the trial court or by the parties with the sanction of the court, must not be a means of indoctrinating a jury,

> or impaneling a jury with a particular predisposition. [Citation.] Rather than a bright-line rule, this is a continuum. Broad questions are generally permissible. For example, the State may ask potential jurors whether they would be disinclined to convict a defendant based on circumstantial evidence. [Citation.] Specific questions tailored to the facts of the case and intended to serve as preliminary final argument [citation] are generally impermissible." (Internal quotation marks omitted.). *Id.* ¶ 17.

¶ 112 On appeal, noting that during the course of its investigation, the State lost a witness's recorded statement and a set of fingerprints that had been lifted from the defendant's Escalade, the defendant contends that the State's comments to Green were designed to minimize those mistakes and bolster the credibility of the police witnesses. We disagree. While the State's remarks spoke to the fact that "police make mistakes," they were not fact-specific and were ostensibly directed at Green's potential misconceptions about police work. See *Rinehart*, 2012 IL 111719, ¶¶ 5, 19-21 (distinguishing impermissible juror questions such as "whether they believed that a person could carry out a plan to murder a family member as a solution to problems in that relationship" and "whether they believed that a woman who obtains an order of protection against a man, and then invites that man to her home, has given implied consent to a subsequent sex act with the man" from permissible questions such as "[c]an you think of some reasons why a sexual assault victim might not automatically come forward," noting that the former highlighted specific factual details while the latter were "less fact-driven" and "more focused on potential jurors' preconceptions"). Moreover, defense counsel

subsequently asked the panel numerous questions emphasizing that police officers are "human" and thus subject to the same "failings" and "mistakes" as "regular people," that the police can "jump to conclusions" and "conduct an investigation with blinders on," and that "[j]ust because somebody is wearing a badge doesn't mean that their testimony should be given more weight or more credibility than other witnesses." When the State eventually objected and accused counsel of "doctoring the jury," the trial court urged counsel to make reasonable inquiries and then "move along."

¶ 113 We find no abuse of discretion in how the trial court allowed the parties to proceed on these matters, and the record indicates that the purpose of *voir dire* was promoted rather than thwarted by the manner in which it was conducted. With respect to the complained-of comments and questions to which no objections were lodged by trial counsel, we find no error, let alone plain error. The defendant's ineffective-assistance-of-counsel claims also fail because "[d]efense counsel's failure to object to *voir dire* questions which the trial court did not abuse its discretion in allowing was not objectively unreasonable." *Rinehart*, 2012 IL 111719, ¶ 22. We note that the defendant takes much of what the State said out of context to support his arguments and that both parties effectively explored the prospective jurors' potential biases and prejudices. We lastly note that trial counsel had two peremptory challenges left at the end of *voir dire* and "did not object to the swearing of the jury, which indicates to us counsel believed the jury as impaneled could be fair and impartial." *People v. Trzeciak*, 2014 IL App (1st) 100259-B, ¶ 84.

¶ 114 8. Closing Arguments

¶ 115 "[I]t is well settled that a prosecutor is allowed a great deal of latitude in closing argument and has the right to comment upon the evidence presented and upon reasonable inferences arising therefrom, even if such inferences are unfavorable to the defendant." *People v. Alvidrez*, 2014 IL App (1st) 121740, ¶ 26. It is equally settled that a prosecutor may properly comment on the credibility of witnesses and respond to comments made by defense counsel which clearly invite a response. *People v. Sims*, 403 Ill. App. 3d 9, 20 (2010). A prosecutor is also free to attack the credibility of the defendant's proffered defense. See *People v. Anderson*, 407 Ill. App. 3d 662, 677 (2011); *People v. Harris*, 288 Ill. App. 3d 597, 607 (1997). "A prosecutor's comments must be considered in the context of the parties' arguments as a whole and their relationship to the evidence." *People v. Hall*, 194 Ill. 2d 305, 350 (2000). "Even if a prosecutor's closing remarks are improper, they do not constitute reversible error unless they result in substantial prejudice to the defendant such that absent those remarks the verdict would have been different." *People v. Hudson*, 157 Ill. 2d 401, 441 (1993).

¶ 116 Alleging prosecutorial misconduct, the defendant contends that the State made numerous improper and prejudicial remarks during closing arguments that denied him a fair trial and impugned the integrity of the judicial system. Acknowledging that none of his complaints were preserved for review, the defendant again argues plain error and ineffective assistance of counsel. We agree with the State, however, that when viewed in context, the complained-of remarks were either invited, harmless, or within the bounds of acceptable argument. "Moreover, the trial court properly instructed the jury that the

comments made by the attorneys during closing arguments should not be considered as evidence, thereby addressing any potential prejudice." *People v. Groel*, 2012 IL App (3d) 090595, ¶ 63.

¶ 117 9. Informant Jury Instruction

¶ 118 The instructions that the jury received included the following:

> "Only you are the judges of the believability of the witnesses and of the weight to be given to the testimony of each of them. In considering the testimony of any witness, you may take into account his ability and opportunity to observe, his memory, his manner while testifying, any interest, bias, or prejudice he may have, and the reasonableness of his testimony considered in the light of all the evidence in the case." IPI Criminal 4th No. 1.02.

¶ 119 On appeal, the defendant argues that trial counsel was ineffective for failing to request a non-IPI instruction that would have advised the jury to view the informant testimony of Williams and Nicholas with special caution. The defendant notes that some federal and state courts "require informant instructions, although Illinois currently does not."

¶ 120 As a general rule, where an applicable IPI instruction exists on a subject upon which the jury should be instructed, the IPI must be used. *People v. Pollock*, 202 Ill. 2d 189, 212 (2002). "Where there is no IPI jury instruction on a subject on which the court determines the jury should be instructed, the court has the discretion to give a non-IPI instruction." *People v. Hudson*, 222 Ill. 2d 392, 400 (2006). Giving additional non-IPI instructions on matters already encompassed should be avoided, however, "because such

a practice 'would defeat the goal that all instructions be simple, brief, impartial[,] and free from argument.' " *People v. Ramey*, 151 Ill. 2d 498, 535-36 (1992) (quoting *People v. Haywood*, 82 Ill. 2d 540, 545 (1980)).

¶ 121 At the outset, we note that although some jurisdictions might require that an informant instruction be given as a matter of course, as the State observes on appeal, that practice has been soundly called into question. See, *e.g.*, *United States v. Cook*, 102 F.3d 249, 250-54 (7th Cir. 1996). Moreover, while our supreme court has recognized that "the testimony of jailhouse informants must be viewed with caution" (*Belknap*, 2014 IL 117094, ¶ 55), the defendant concedes that the court has not promulgated an IPI instruction to that effect. In any event, we cannot conclude that trial counsel was ineffective for failing to tender an informant instruction in the present case, because the trial court would not have abused its discretion by refusing to give it.

¶ 122 "A trial court does not exceed its discretion by refusing to give a non-IPI instruction if there is an applicable IPI instruction or the essence of the refused instruction is covered by other instructions." *People v. Buck*, 361 Ill. App. 3d 923, 942-43 (2005). Moreover, "[t]he general policy in this State in instructing juries in criminal cases is not to comment on particular types of evidence" (*People v. Grabbe*, 148 Ill. App. 3d 678, 685 (1986)), other than the "certain exceptions" set forth in the IPIs (IPI Criminal 4th No. 3.00 (Introduction)).

¶ 123 Here, as previously noted, Williams and Nicholas were thoroughly impeached with their criminal records and their possible motives to testify falsely. During closing arguments, defense counsel argued that their testimony was fabricated, self-serving, and

should not be given any weight whatsoever. The jury was fully aware of the relevant factors that would allow it to adequately judge the credibility of Williams and Nicholas, and the credibility instruction that the jury received was sufficient under the circumstances. We lastly note that even assuming that the jury had been given a specific informant instruction, the defendant cannot demonstrate that the outcome of his trial would have been different. *Cf. People v. Campbell*, 275 Ill. App. 3d 993, 997-99 (1995) (holding that trial counsel's failure to tender IPI accomplice-witness instruction was not harmless where the evidence of the defendant's guilt was not overwhelming and the instruction's absence was not "rendered harmless in light of the other instructions, arguments of counsel, and a generally fair trial").

¶ 124 10. Polling the Jury

¶ 125 The defendant's final argument on appeal is that as a matter of plain error, his convictions are invalid because the trial court failed to poll the jury to confirm that its verdicts were unanimous. This claim is without merit.

¶ 126 The jury was instructed that its verdicts had to be unanimous, in writing, and signed by all members, including the foreperson. See IPI Criminal 4th No. 26.01. The jury ultimately returned written verdicts finding the defendant guilty on both of the charges against him. Those verdicts are included in the record on appeal, and both are signed by all members of the jury, including the foreperson. After announcing the jury's verdicts in open court, the trial court asked the parties if there was "anything else." Both stated, "No," and counsel did not ask that the jurors be polled. Thereafter, the court accepted the verdicts and entered judgment thereon.

¶ 127 "The purpose of polling the jury is to ensure that the verdict is in fact unanimous." *People v. McGhee*, 2012 IL App (1st) 093404, ¶ 15. "In every criminal trial, the defendant has the absolute right to poll the jury after it returns its verdict." *Id*. That right may be waived, however, and "[t]he waiver of the right to poll the jury does not constitute ineffective assistance of counsel." *People v. Hood*, 262 Ill. App. 3d 171, 178 (1994). Moreover, plain error will not be found solely on the basis that a jury was not polled. *McGhee*, 2012 IL App (1st) 093404, ¶¶ 19-20, 26. "The jury is presumed to follow the instructions that the court gives it" (*People v. Taylor*, 166 Ill. 2d 414, 438 (1995)), and absent evidence indicating that a jury's verdict was not unanimous, a written verdict signed by all jurors is sufficient evidence that it was unanimous (*McGhee*, 2012 IL App (1st) 093404, ¶ 26).

¶ 128 Noting that the jury in the present case submitted several questions during its deliberations, the defendant suggests that the unanimity of its verdicts should be doubted. There is no indication that the jury was ever deadlocked or had any difficulty reaching a consensus as to the defendant's guilt, however, and "[t]hat the jury asked for guidance during deliberations merely indicates that the jury took its job seriously and conscientiously worked to come to a just decision." *People v. Minniweather*, 301 Ill. App. 3d 574, 580 (1998). We lastly note that as the State observes, the defendant cites to no case holding that the trial court has a duty to poll a jury *sua sponte*.

¶ 129 III. CONCLUSION

¶ 130 For the foregoing reasons, the defendant's convictions for first-degree murder and aggravated discharge of a firearm are hereby affirmed.

¶ 131 Affirmed.