FIRST DIVISION
February 16, 2016

No. 1-12-1446

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 22079
	)	
LARRY AUSTIN,	)	Honorable
	)	Steven J. Goebel,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE LIU delivered the judgment of the court.
Justice Connors and Justice Harris concurred in the judgment

ORDER

¶ 1 *Held*: (1) Where defendant made an unequivocal request for counsel, the trial court erred in denying his motion to suppress his statements but the erroneous admission was harmless beyond a reasonable doubt and counsel was not ineffective for allegedly failing to adequately argue his motion to suppress; (2) Where defendant could not show that the evidence at trial was closely balanced or that submission of an entire grand jury testimony transcript to the trial jury during deliberations was an error that was so serious it affected the integrity of the judicial system, defendant could not show that the court sending the entire transcript back to the jury amounted to plain error and defense counsel was not ineffective for failing to object to the alleged error; (3) Where the prosecutor misstated the law in closing argument, but the trial court sustained defendant's objection and gave several clarifying jury instructions, any such error was harmless; and (4) Mittimus is corrected to reflect the proper amount of presentence custody credit.

¶ 2 After a jury trial, defendant Larry Austin was convicted of first degree murder and sentenced to 45 years in prison. On appeal, defendant contends that: (1) the trial court erred in denying his motion to suppress his false alibi statements because they were obtained in violation of defendant's right to counsel; (2) the court erred in permitting the entire transcript of a witness's grand jury testimony, which referenced inadmissible other crimes evidence, to be sent back with the jury during deliberations; (3) the State misstated the law during closing argument; and (4) defendant's mittimus should be corrected to reflect the proper amount of presentence custody credit. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 The evidence at trial showed that, at around 5:00 a.m. on October 25, 2008, defendant shot Ranus Hall outside of the Kings and Queens Social Club located at 5th Avenue and Pulaski Road (the club), in Chicago, Illinois. The shooting was recorded by a nearby "Portable Observation Device" (POD) camera, and the video depicts a man in a white jacket shooting a man in a dark jacket. Defendant did not deny shooting the victim, but asserted that he did so in self-defense.

¶ 5 Three of the witnesses who testified at trial, Devell Riley, Nyreele Tate, and Terrance Conner, identified defendant as the shooter and testified about their recollections of the incident. Cassandra Austin and Catherine Austin, who were at the club prior to and during the shooting, testified that defendant was also at the club around the same time. Defendant testified that he shot the victim in self-defense because he thought the victim was pulling out a gun. Various law enforcement officers, detectives, and Assistant States Attorneys (ASAs) testified about their respective investigations and/or interviews with defendant and the witnesses. The State also presented testimony from various medical, forensics, and ballistics experts, and introduced

evidence recovered from the crime scene and nearby areas—including bullets and spent cartridges, and from defendant's apparel.

¶ 6 A. The Shooting Incident

¶ 7 Devell Riley, a cousin of the victim, testified that he was at the club with Ranus and other friends around 2:00 a.m. on October 25, 2008. Devell was smoking a cigar outside the front door of the club when Nyreele, Terrance, and Ranus exited the club and stood with him as he smoked. Defendant, who was not familiar to anyone in the group, approached him and asked for a "hit" of his cigar. After Devell offered him the cigar, defendant "took two puffs off of it and then dropped it" as he walked away. According to Devell, after Nyreele picked up the cigar and offered it back to defendant, defendant turned around and asked Ranus, who stood about a foot away, "what he was on." When Ranus said that "he wasn't on nothing," defendant took out a chrome-colored gun from his pocket, pointed it at Ranus—who put his hands in the air—and "started shooting." Devell ran, but later saw Ranus "lying face down in the street."

¶ 8 Devell acknowledged on cross-examination that, during his interview at the police station, he did not mention the cigar altercation that occurred just before the shooting. He also admitted that he heard shots being fired from another gun within seconds after defendant shot the victim. On redirect, Devell maintained that he did report the cigar altercation to a detective who was at the hospital when he went there to check on Ranus. Devell denied that he had a gun on him, or that any of his friends had one, at the time of the shooting.

¶ 9 Nyreele Tate, a "close friend" of victim, testified that he was outside the club with Ranus and Devell at about 4:50 a.m. on October 25, 2008, when defendant first approached them. Nyreele asked defendant if he was "okay." Defendant retorted " 'Who the f*** is you?' " and asked for a "hit" of Devell's cigar. After defendant smoked the cigar a bit, he dropped it on the ground and walked away. As Nyreele left his friends to go talk to a young woman, he heard

gunfire. He looked back and saw Ranus running toward him, trying to get away from defendant. Nyreele testified that defendant was the only person he saw with a gun during the incident.

¶ 10 During cross-examination, Nyreele admitted that he had not mentioned the cigar incident to the ASA who wrote down his statement. He also admitted that, contrary to his grand jury testimony, he did not hear shots being fired from another gun. Moreover, he acknowledged his prior felony convictions. On redirect, Nyreele recalled testifying to the grand jury that he thought defendant was " 'intoxicated and *** wasn't sounding right. It was like he was on something, making trouble, starting trouble.' "

¶ 11 Terrance Conner, also a cousin of the victim, testified that he was at the club on October 25, 2008 until it closed. He was standing outside the club when defendant approached Devell and took "a hit off" of his cigar before dropping it on the ground. After Nyreele picked up the cigar, defendant reacted by saying "Where did my black go?" Terrance recalled defendant saying something that prompted Ranus to respond, "we're not on that, we're tired, we just came from the club." Defendant then pulled out his gun and started shooting. According to Terrance, Ranus "tried to like pat the gun down" or knock it down, and then started running away from defendant. Defendant ran after him and continued to shoot. After the shooting stopped, Ranus was "laying on the curb" of the street. Terrance testified that he saw defendant get into a white, four-door vehicle in the club's parking lot, and that he heard more shots, but they did not come from defendant. Terrance did not know where the additional gunfire came from.

¶ 12 On cross-examination, Terrance conceded that he had not told the police or the ASA who took his statement that Ranus had tried to knock the gun out of defendant's hand. Nonetheless, Terrance claimed that he did tell the police that Ranus had put his arms up and backed away from defendant. The parties entered a stipulation that: (1) the grand jury hearing transcript did

not reflect testimony by Terrance that the victim had put his arms up and (2) Terrance had been convicted five times for possession of a controlled substance.

¶ 13 Cassandra Austin, defendant's cousin, testified that she had gone to the club with her aunt, Catherine, and Catherine's friend, Marcus Grant. Marcus drove them to the club in his white, four-door vehicle. On their way into the club, Cassandra saw defendant leaving the club. Later, Cassandra heard gunshots but did not see who was firing the gun. Upon hearing the shots, she ran to Marcus's car and saw Catherine and Marcus running toward her. Catherine was "hollering and screaming like 'Come on, let's go, they shooting.' " After the three of them reached the car, her aunt yelled at defendant to get inside the car, "saying that was him had a gun." In response, Cassandra said to her aunt, " 'If he got a gun and he's shooting, what he getting in the car with us for?' " When she saw defendant getting near the car, Cassandra jumped out of the car and "ran home" because she was afraid of him. She did not see him again that night.

¶ 14 At trial, Cassandra was presented with her statement, which had been prepared by ASA Robert Holland during her interview at the police station on October 26, 2008, the day after the shooting. According to the statement, Cassandra reported that prior to getting out of Marcus's car, she had seen defendant standing over a young black male with a gun pointed at him, yelling " 'I'll shoot you in the head if you don't shut the f*** up.' " However, Cassandra testified that she did not give a statement to any ASA and denied ever reporting that she saw defendant standing over a male threatening to shoot him in the head. While she acknowledged that the signature and initials contained in the statement were hers, she explained that she "was kind of tired" during the interview and "initial[ed] like a lot of stuff without going over it because it was like frustrating."

¶ 15 ASA Robert Holland testified that he memorialized Cassandra's statement in writing at the police station on October 26, after speaking with Sergeant Daniel Gallagher about the latter's earlier interview with Cassandra. After ASA Holland and Cassandra talked for approximately 15

minutes, she agreed to let him write down her statement. Cassandra told him that as Marcus pulled his car out of the club parking lot a bit, she could see the front of the club, and she saw defendant "standing over a boy pointing a handgun at the boy who had his hands over his head." Defendant was yelling " 'I'll shoot you in the head if you don't shut the f*** up.' " At trial, ASA Holland testified that those were Cassandra's "exact words." He stated that after completing the statement, he and Cassandra "went through the statement line by line" before they signed the bottom of the page and initialed all changes in the statement.

¶ 16 Sergeant Daniel Gallagher of the Chicago Police Department testified that during his interview of Cassandra at the police station, Cassandra said she saw defendant standing over a black man, threatening to shoot him in the head if he didn't " 'shut the f*** up.' " Following the interview, he asked ASA Holland to meet with Cassandra to put her account into a written statement. Sergeant Gallagher testified that he was in the interview room with Cassandra when she repeated her account to ASA Holland.

¶ 17 Catherine Austin, defendant's aunt, testified that she saw defendant leaving the club when she arrived. They spoke briefly before Catherine entered the club. Later, as she was leaving, she "started hearing shots." She and Marcus got into his car and, upon noticing defendant, yelled at him to get in the car. As defendant got in, Cassandra "jumped out" of the car. Catherine heard more gunshots after defendant was inside the car. After arriving at her house, Catherine called the police and met the officers on the street as they were approaching her house. She then directed them to defendant, who was outside on her porch. She stated during the trial that she "thought that they [were] just going to let him go sleep the liquor off."

¶ 18 When asked if she had told the police that defendant had been involved in a shooting, Catherine said, "I don't know. They said I said that but, like I said, I was drunk. I really don't recall *** I could have, I could not. I don't quite remember everything." The State then

confronted Catherine with her prior grand jury testimony that she told the 9-1-1 dispatcher "that [defendant] may have been in a shooting on 5th and Pulaski." Catherine responded, "I don't remember like everything they asked and everything I said. I don't remember."

¶ 19 Chicago Police Department Officers Nicholas Garcia and Victor Perez each testified that on the morning of October 25, 2008, they were driving to 1523 South Spaulding Avenue in response to a dispatch and were waved down by Catherine as they arrived near the house. According to Officer Perez, Catherine told them that defendant "had a gun and that he was the person shooting at the club after an altercation." Afterward, Catherine directed the officers to her front porch, where they found defendant. At the time the officers arrested him, defendant had no weapons on him. Later, however, Officer Garcia recovered a "live bullet" from defendant's "rear pants pocket" during a search at the police station.

¶ 20 B. Medical and Forensic Evidence

¶ 21 The State presented testimony from various medical and forensics experts. Dr. Hilary McElligot, from the Cook County Office of the Medical Examiner, testified that the victim had sustained two gunshot wounds: one entering through his right abdomen and another entering through his buttocks. In her opinion as a forensic pathology expert, Dr. McElligot concluded, the victim's death was caused by multiple gunshot wounds and was determined to be a homicide.

¶ 22 Officer Victor Rivera, a forensic investigator, testified that he found three .38-caliber cartridge cases and one fired bullet near the front of the club. Several .40-caliber cartridge cases were also recovered from nearby areas. Officer Rivera admitted that, as far as he knew, no one had recovered a cigar from the crime scene.

¶ 23 Deborah McGarry, an latent fingerprint expert, testified that she had examined "eight discharged cartridge cases" but did not find any latent impressions suitable for comparison. She explained that "[d]ischarged cartridge cases are very difficult to find impressions on."

¶ 24 Marc Pomerance, an expert in firearms identification, testified that he examined two fired .38-caliber bullets—one from the victim's body and the other from the crime scene—and three .38-caliber cartridge cases. He concluded that both bullets had been fired from the same weapon.

¶ 25 Robert Berk, an expert in trace evidence and gunshot residue testing, testified that after sampling defendant's jacket "for the presence of primer gunshot residue," he found that the right cuff of the jacket tested positively. This meant that the right cuff "either contacted an item that had gunshot residue on it or *** was present in the environment when a firearm was discharged."

¶ 26 C. Lineup and Interview of Defendant

¶ 27 Gregory Jacobsen, a homicide detective with the Chicago Police Department, testified that he and his partner, Detective Kevin Bor, were investigating the shooting at the Area 4 station when defendant arrived at around 11:00 a.m. on October 25, 2008, wearing a "white and red Rocawear jacket." Detective Jacobsen removed the jacket from defendant and arranged for it to be photographed and tested for gunshot residue because the jacket was "similar to the one that the offender was wearing at the time of the shooting" that they had observed earlier when viewing the POD video.

¶ 28 Detective Jacobsen testified that defendant was asked to participate in a lineup at the station. Following the lineup, defendant was placed in an interview room with a video recording device. Detective Bor started interviewing defendant, while Detective Jacobsen monitored the conversation through a closed circuit TV system. A little later, Detective Jacobsen joined his partner to continue the interview. Detective Jacobsen testified that he had reviewed the video recording of this interview and agreed that it was "an accurate recording of the conversation" that the detectives had with defendant. Detective Jacobsen stated that defendant insisted he was "at home" during the time of the incident and that "he had a point blank alibi." The State then moved to publish the video recording of the interview to the jury.

¶ 29 After the video was shown to the jury, Detective Jacobsen agreed that it was only a "portion of the conversation" that he and Detective Bor had with defendant. Detective Jacobsen testified that during the entirety of the interview, defendant insisted he was at home at the time of the incident and that his electronic monitoring bracelet would show that he was at home. Defendant maintained this account of events even after the detectives informed defendant that the electronic monitoring records showed he was not at home when the shooting occurred. During their questioning, defendant mentioned his girlfriend, Alexis Butler. At some point during the interview, at approximately 3:15 p.m., defendant was allowed to be escorted out of the room to call Alexis. He was then brought back into the room.

¶ 30 D. Trial Motion to Suppress

¶ 31 During trial and outside the presence of the jury, defense counsel brought a motion to suppress certain statements made by defendant during his video-recorded interview. Explaining that the State sought to present evidence of defendants' statements involving an "alibi" during his interview, counsel argued that such evidence should be suppressed because his client's Fifth Amendment right to counsel had been invoked and violated prior to making the alibi statements.

¶ 32 Neither of the parties disputed the fact that, during the interview, defendant had asked the detectives, " 'Can I call my girl, tell her to send my lawyer up here?' " Defense counsel argued that any statement made by defendant after that request should be suppressed. Conversely, the State argued that defendant's request to call his girlfriend was not "a clear and unequivocal request for an attorney" and, therefore, suppression of later statements was not warranted.

¶ 33 After considering the parties' arguments, the trial court ruled that defendant did not make an unequivocal request for an attorney, explaining:

> "There's numerous cases on point and the defendant would have to say outright that he wants an attorney, not that he wants to call his girlfriend

> and tell her to send an attorney up here. The case law is very clear on that and the case law is very unequivocal and that is not a sufficient request under the law to invoke his 5th Amendment rights to counsel. And portions of the statement will be allowed and that's what we're going to deal with next."

¶ 34 Defense counsel next requested that certain portions of defendant's recorded statement be suppressed as inadmissible uncharged other crimes evidence. Counsel sought to exclude references made by defendant to his electronic home monitoring, the Illinois Department of Corrections (IDOC), and uncharged offenses of domestic battery involving an altercation with Catherine and criminal damage to property involving Marcus's vehicle. The State objected, asserting that defendant's statements regarding his electronic monitoring device were admissible because defendant had made them in support of his alibi claim.

¶ 35 The trial court concluded that defendant's statements about being on electronic home monitoring were "very relevant *** to get to the truth of this matter" in light of his argument that he acted in self-defense, and, therefore, the probative value outweighed the prejudicial effect. The court explained the probative value of "defendant's own statements where he says that he was *** on electronic monitoring at the residence and not at the night club." However, the court agreed that any reference to the IDOC and/or other crimes evidence would be excluded.

¶ 36 At the close of the State's case, defendant moved for a directed finding. The trial court denied the motion.

¶ 37 E. Defendant's Testimony Regarding Self-Defense

¶ 38 Defendant testified on his own behalf. While admitting that he did shoot the victim on October 25, 2008, defendant insisted that he did so because he "was scared for [his] life" and the victim "had a gun." The day before the shooting, defendant was at home, where he lived with

Catherine and her three kids. He and his girlfriend, Alexis, had spent the day together at the house and drank some alcohol. Sometime at around 12:00 a.m. on October 25, Alexis left the house to go to the club, indicating she would return two hours later. After Alexis did not return home around the time she said she would, defendant called her but was unable to convince her to come home from the club. Alexis's stepfather, Leroy, gave defendant a ride to the club "with the understanding" that he would wait until defendant found Alexis to "bring her home."

¶ 39 Defendant brought a gun with him to the club and kept it in his right jacket pocket. He testified that because the club was in a different neighborhood than the one in which he lived, he had concerns about going into it "[b]ecause of the gangs and the violence that was associated" with that neighborhood. According to defendant, if a person is "considered a stranger [in the neighborhood], *** they could convey you as an enemy." Therefore, he brought the gun as protection. After arriving at the club with Leroy, defendant looked for Alexis inside and outside of the club. He stayed inside for about 45 minutes and at closing time, having still not found Alexis, defendant went outside and stood in front of the club, hoping to catch her as she left the club.

¶ 40 Defendant testified that as he was standing outside, he looked up and saw "four, five guys standing by [him]." One of them asked him "what's up and where was [he] from." Defendant explained that, from past experience, he understood that to mean "a person was getting hostile." Previously, in 1996, during a visit to his grandmother, a group of males had "walked up" on him and "asked [him] the same question." During that incident, after defendant told them where he was from, they jumped him, "putting [him] in the hospital for two weeks." Here, defendant was nervous about having an exchange with a group of strangers, but told the group he was from "the village."

¶ 41 According to defendant, when he "turned back around, the guy in the black hoodie, which was the victim, was reaching out with his left hand to grab [him]." Defendant testified that as the victim reached out with his left hand at defendant, the victim "was upping up a black handgun out of his right pocket." The victim made contact with him, and defendant thought the victim "was fittin' to hurt" him. Defendant explained that as he tried to push the victim off with his left hand, he "upped the gun out of [his] right pocket *** and fired one shot" at the victim.

¶ 42 After defendant fired the one shot, the victim "walked off like at a fast pace." When the victim turned back toward defendant, defendant "fired at him approximately two to three more times" because he thought the victim was "fittin' to turn back on me and fire back at me." After that, defendant saw the victim run down the block.

¶ 43 At this point, defendant just stopped and stood on the street for awhile. He could not see Alexis or Leroy and he did not know how he was going to get out of the neighborhood. As he stood there, "two of the guys that was right there in that circle they started walking towards" him. Defendant did not want them approaching him "because I didn't want to fire the gun again," but then defendant heard Catherine call him. He ran toward her and got inside the car. More shots were fired, coming from behind the club, as he was getting into the car with Catherine. However, defendant did not see who was firing. Defendant testified that he did not plan on shooting the victim when he took the gun with him to the club. He did not know the victim before the shooting and did not have any "beef" with the victim. In addition, defendant denied smoking or dropping anyone's cigar in front of the club.

¶ 44 Defendant testified that while he was at the police station, he lied to the police because he did not "want to go to jail for something [he] feel[s] that [he] didn't initiate." Therefore, he told the police he was home all evening and had not gone out.

¶ 45 On cross-examination, defendant said the gun he brought to the club was not his gun; rather, he took it from Catherine's back yard. The gun was already loaded, but defendant put an additional bullet in his pocket. He testified that he did not get rid of the gun after the shooting. As far as he knew, it was in his jacket pocket when he dropped the jacket on the ground at the house and when the police arrested him. The police put the jacket on defendant right before he got into the police car. The last time he saw the gun, it was in the right front pocket of the jacket.

¶ 46 Defendant admitted that he did not tell the police he shot the victim in self-defense. After he participated in the lineups, the police brought him into a separate room. He spoke to Detectives Bor and Jacobson and told them he had an alibi because he was at home on electronic monitoring. At some point, Detective Bor left defendant alone in the room, then later returned and told defendant that they had checked out his alibi and knew it was false because the electronic bracelet's record showed that defendant had been away from his home base. Defendant conceded at trial that "[t]he whole thing was a lie that I told them," but he had maintained to the detectives that he was at home and that something was wrong with the electronic monitor. When speaking to the detectives, defendant insisted on this version of events even after they told him that the monitoring records showed defendant had been away from home all night, Catherine had placed him at the club between 2:00 and 5:00 a.m., and eyewitnesses had identified him in the lineups at the station.

¶ 47 F. Motion for Mistrial

¶ 48 At the close of defendant's case, defense counsel made a motion for mistrial, arguing that defendant's right to a fair trial had been tainted by the evidence regarding defendant's electronic monitoring and evidence of other crimes. The trial court denied the motion but the judge indicated that he would give a limiting instruction to the jury if defense counsel wanted.

¶ 49 G. Closing Arguments

¶ 50 In closing, the State discussed the eyewitness testimony of Devell, Terrance, and Nyreele, arguing that they had "nothing to gain" by lying about what occurred the night of the shooting. Then, the State addressed defendant's theory that he acted in self-defense, characterizing it as "a bunch of baloney and nonsense," and remarked on defendant's retreat from his previous alibi:

> "You know it is not self defense, because when he had the opportunity to tell his side of the story, you saw the video. He said I wasn't even there. I don't know where the social club is. And now, self defense is going to be thrown at you."

¶ 51 The State explained the elements it had to prove to establish first degree murder, and added the following:

> "THE STATE: That, ladies and gentlemen, is first degree murder. Unfortunately, after you consider that, you are not done deliberating. Because the defense wants you to believe that there is self defense in this case. And the self defense, their words. That's their burden to prove, by a preponderance of the evidence.
>
> DEFENSE COUNSEL: Objection, Judge. Objection.
>
> THE COURT: Overruled.
>
> THE STATE: By a preponderance of the evidence, it is their burden. And during your deliberations, when you go back there to consider whether this is self defense or not, you remember a fact. Had he not had a gun, Ranus Hall would still be alive."

¶ 52 At the conclusion of the State's closing argument, defense counsel moved for a mistrial, arguing that the prosecutor had "misstated the burden in her closing argument, shifted the

burden, and improperly informed the jury about whose burden self defense is." The State responded that it had presented a correct statement of law. In denying the motion, the trial court explained that the jury could not consider "whether the Defendant is guilty of the lesser offense of second degree murder until and unless [it had] first determined that the State has proved beyond a reasonable doubt" each of the elements of first degree murder. The court further explained that defendant's burden of proving the mitigating factor (i.e., self-defense) to justify the lesser offense was by a preponderance of the evidence.

¶ 53 In his closing argument, defense counsel stated that the State's witnesses lied in the case about why the shooting occurred and what happened leading up to the shooting. Defense counsel argued that defendant shot the victim because he was "fearful for his own life." Counsel said the jury could not find defendant guilty of first degree murder if it found that his belief that he acted in self-defense was reasonable. However, if the jury believed defendant's belief was unreasonable, it could convict him of second degree murder.

¶ 54 Following closing arguments, the trial court gave instructions to the jury. The jury deliberated and found defendant guilty of first degree murder. The trial court denied defendant's motion for new trial and entered judgment on the verdict. Defendant was subsequently sentenced to 45 years in prison.

¶ 55 ANALYSIS

¶ 56 A. Motion to Suppress

¶ 57 Defendant first contends that the court erred in denying his motion to suppress his false alibi statements because the police obtained the statements in violation of his right to counsel. Specifically, defendant argues that his question, "Can I call my girl, tell her to send my lawyer up here?" was an unequivocal request for counsel that should have stopped the interrogation and that, therefore, all statements given after the request for counsel should have been suppressed.

¶ 58 Initially, the State contends that defendant has forfeited the issue for review, at least in part. The failure to object to an issue at trial or raise it in a posttrial motion will forfeit review of the issue on appeal. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988); see also *People v. Gales*, 248 Ill. App. 3d 204, 229 (1993) ("An objection based upon a specified ground waives all grounds not specified, and a ground of objection not presented at trial will not be considered on review.").

¶ 59 Defendant filed his motion to suppress his false alibi statements exclusively based on the request, "Can I call my girl, tell her to send my lawyer up here?" and the State concedes this point. Similarly, in his motion for new trial, defendant argued only that "[t]he court erred in failing to grant the defendant's motion to suppress statements," without further specifics. However, on appeal, defendant has raised other requests made during interrogation, stating that he "asked to make a phone call at least seven more times and specifically stated that he wanted to contact a lawyer three more times." In response, the State argues that because defendant "made no such objection to the trial court" based on these additional phone calls and attorney requests, he should be barred from raising those particular arguments on appeal.

¶ 60 By objecting to the admission of his false alibi statements at trial on the ground that he invoked his right to counsel, defendant properly preserved the issue for review on appeal, and this court is not precluded from considering the additional arguments he offers in support of his objection. See *Brunton v. Kruger*, 2015 IL 117663, ¶76 ("We require parties to preserve issues or claims for appeal; we do not require them to limit their arguments here to the same arguments that were made below."). This court, however, need not consider the additional arguments regarding subsequent requests, because we find that defendant's initial request to "call [his] girl, tell her to send [his] lawyer up here" is an unequivocal request for counsel. Based off that request alone, this court ultimately finds that the trial court erred by denying defendant's motion to suppress.

¶ 61 In reviewing a trial court's ruling on a motion to suppress, the trial court's factual findings will be upheld unless they are against the manifest weight of the evidence. *People v. Gaytan*, 2015 IL 116223, ¶ 18. The trial court's legal conclusion as to whether suppression is warranted is then reviewed *de novo*. *Id*. The parties do not dispute the words defendant said; the sole issue is whether the words constitute an unequivocal request for counsel. Therefore, we need only review the trial court's legal conclusion.

¶ 62 An individual who is subject to custodial interrogation must be informed of his "right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Furthermore, if the individual requests counsel "at any time during the interview," that individual cannot be subjected to further questioning "until a lawyer has been made available or the individual reinitiates conversation." *Davis v. United States*, 512 U.S. 452, 458 (1994); *People v. Harris*, 2012 IL App (1st) 100678, ¶ 69 (citing *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981)); see also *In re Christopher K.*, 217 Ill. 2d 348, 376 (2005).

¶ 63 To determine whether a defendant invoked his right to counsel, courts must use an objective inquiry, "which at minimum requires some statement that reasonably can be construed as an expression of a desire for counsel." *Harris*, 2012 IL App (1st) 100678, ¶ 69 (citing *Davis*, 512 U.S. at 459). If the defendant's reference to his attorney is "ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel," the interrogation does not need to stop. *Davis*, 512 U.S. at 459 (emphasis in original). In making his request for counsel, however, "[t]he defendant need not articulate his desire in the manner of a Harvard linguist, but he must articulate his desire in a clear enough manner that a reasonable officer in the circumstances would understand the

statement to be a request for an attorney." *People v. Schuning*, 399 Ill. App. 3d 1073, 1082 (2010) (citing *Davis*, 512 U.S. at 459).

¶ 64 Defendant unequivocally invoked his right to counsel. Approximately thirty minutes into the interview and after having been read his *Miranda* rights, defendant asked if he could call his brother. When Detective Bor declined his request, defendant then said, "Well, can I call my girl and tell her to send my lawyer up here?" at which point the detective raised his hand. We find defendant's reference to his lawyer is unambiguous and unequivocal; defendant specifically asked for the ability to have his lawyer present, using his girlfriend as an intermediary to facilitate this. A reasonable officer under those circumstances "would have understood the [inquiry] to be a request for an attorney." *In re Christopher K.*, 217 Ill. 2d at 381. As the statement met the "requisite level of clarity," defendant "is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates the conversation." *Davis*, 512 U.S. at 458-59. This second layer of protection is " 'designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights.' " *Id.* at 458 (quoting *Michigan v. Harvey*, 494 U.S. 344, 350 (1990)).

¶ 65 The State's brief succinctly exhibits how this procedural safeguard was violated by Detective Bor's actions. Immediately after defendant asked to call "his girl" to "send his lawyer," "Detective Bor inquired further," resulting in defendant saying "Yeah, I'll still talk to you." This is precisely the type of interaction the United States Supreme Court has identified as improper when a defendant has previously asserted his *Miranda* rights. Regardless of whether defendant made subsequent requests for a lawyer, this single unequivocal request is sufficient to require Detective Bor to stop questioning defendant until *defendant* reinitiated the conversation. The State notes how Detective Bor was "not comfortable with defendant calling his girlfriend before 'checking [defendant's] story,' " and although this court is sympathetic to Detective Bor's desire

to capture defendant's unaltered testimony, defendant's *Miranda* protections are unaffected. Thus, the trial court erred in denying defendant's motion to suppress his statements to police.

¶ 66 The requirement that a suspect must reinitiate contact once his right to counsel is invoked is demonstrated in *Schuning*, 399 Ill. App. 3d 1073. In *Schuning*, the defendant was read his *Miranda* rights then questioned by police about a double murder while in a hospital's intensive care unit (ICU). *Schuning*, 399 Ill. App. 3d at 1075-77. Later that day, the defendant asked an officer for a phone to call his attorney, but was informed by a nurse that phones could not be used in the ICU, and the defendant fell asleep without making the call. *Id.* at 1075. The next day, the police returned to the hospital, re-administered the *Miranda* warnings, and the defendant answered more questions about the double murder. *Id.* at 1077.

¶ 67 On the defendant's motion to suppress, the trial court found that the defendant had unequivocally invoked his right to counsel when he asked to call his attorney and, therefore, "he was not to be subjected to further interrogation until counsel had been made available to him unless he validly waived his earlier request by initiating contact." *Id*. at 1080-81. As the defendant "asked unequivocally to call his lawyer—a request that was unequivocally ignored," the statements that the defendant made during the interviews after he asked to call his attorney were inadmissible. *Id*. at 1081, 1086.

¶ 68 Similarly, in *People v. Howerton*, 335 Ill. App. 3d 1023 (2003), the defendant was charged with murder and attempted murder, and filed a motion to suppress statements. *Howerton*, 335 Ill. App. 3d at 1023-24. Before beginning the interview, the defendant was read his *Miranda* rights, and the defendant said that "if he was under arrest, he wanted a lawyer." *Id.* at 1024. Though the officer testified that he did not initially believe the defendant was under arrest, he conceded that about 30 minutes into the interview, the officer told the defendant he was arrested, and the defendant said he wanted a lawyer. *Id.* The trial court granted the defendant's

motion, finding that the defendant had been subject to a custodial interrogation and that, when the defendant first said he wanted a lawyer if he was under arrest, the officers "reasonably should have believed that defendant was requesting counsel." *Id*. at 1025. The appellate court confirmed, noting that five separate times during the interrogation, the defendant had "clearly and unequivocally" invoked his right to counsel, all of which were ignored. *Id.* at 1026.

¶ 69 Furthermore, *People v. Eichwedel*, 247 Ill App. 3d 393 (1993), demonstrates that a request for counsel may be framed in the form of a question. In *Eichwedel*, while being interviewed, the defendant asked the investigator if he could call "Jeff Williams;" the request was ignored and the interview continued shortly thereafter. *Eichwedel*, 247 Ill. App. 3d at 395. Despite conflicting testimony on this point, the trial court found that the defendant had identified Jeff Williams as an attorney. *Id.* at 395-98. However, the trial court denied the defendant's motion because it was "not convinced that [the defendant] persisted in [his inquiry for an attorney] or made it perfectly clear that he didn't want to talk anymore unless he could talk to Jeff Williams." *Id.* at 396-98. The appellate court reversed, finding that "the defendant's request as to whether he could call his attorney was a sufficient invocation of his right to counsel," despite being presented as an inquiry rather than a statement. *Id*. at 398-99.

¶ 70 The defendants in *Schuning*, *Howerton*, and *Eichwedel* either specifically asked to call a lawyer or requested a lawyer be present; this case presents a similarly unequivocal request for counsel. We find it inconsequential that the individual whom defendant asked to call was his "girl," because defendant unambiguously established that the purpose of the call was for her to "send his lawyer." In so doing, defendant "articulate[d] his desire in a clear enough manner that a reasonable officer in the circumstances would understand the statement to be a request for an attorney." *Schuning*, 399 Ill. App. 3d at 1082.

¶ 71 The State compares this case to *People v. Evans*, 125 Ill. 2d 50 (1988). In *Evans*, after an ASA read the defendant his *Miranda* rights, the ASA asked him, "do you wish to talk to us now?" *Evans*, 125 Ill. 2d at 74. The defendant replied with, "We can take time for you to get a [public defender], right?" *Id*. In response, the ASA said, "It will take a little while. I'll stop the questioning, and we will call for a public defender," to which the defendant said "No, go ahead." *Id.* Reviewing this exchange, our supreme court found that the "defendant never invoked his right to counsel—equivocally, ambiguously or otherwise." *Id.* at 75.

¶ 72 The present case is distinguishable from *Evans*. In *Evans*, our supreme court noted that the defendant never explicitly indicated that he wanted a lawyer present; rather, he only asked whether it is possible to "take time" to get one, to which the ASA answered in the affirmative. Furthermore, after being told it was possible to have a lawyer present, the defendant immediately signaled for the interview to continue rather than requesting the ASA call a public defender. Conversely, in this case defendant's request to call his "girl" to get his lawyer is reasonably seen as a request to have a lawyer present rather than an inquiry into whether it was possible, and the request was improperly met with further inquiry until defendant agreed to continue talking.

¶ 73 This case is also distinguishable from *People v. Sommerville*, 193 Ill. App. 3d 161 (1990). There, at a hearing on defendant's motion to suppress his confession, the defendant testified that he asked his girlfriend to " 'call [his] attorney,' " in front of the police, after he was placed under arrest. *Id*. at 169. The appellate court found that, even assuming the defendant had in fact told his girlfriend to call his attorney, "that request in no way communicated to the police officers that he wanted an attorney present before any questioning could take place. *** [S]uch a statement could reasonably be interpreted as merely a way to find out if the attorney would be available to handle the case." *Id*. at 169-70. In this case, however, defendant's request to call his

"girl" so that she would "send [his] lawyer up here" is clearly a request for his attorney to be present, as compared to the ambiguous demand interpreted by the *Sommerville* court.

¶ 74 Defendant also encourages this court to consider whether the statement was unequivocal under the Illinois Constitution, citing *People v. McCauley*, 163 Ill. 2d 414 (1994). However, having determined that suppression of defendant's statements is supportable on federal grounds, this court need not consider defendant's protections under the Illinois Constitution.

¶ 75 A constitutional error does not automatically require reversal of a conviction. *People v. Patterson*, 217 Ill. 2d 407, 423 (2005). Most constitutional errors are " 'trial errors,' " which are errors which " ' occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.' " *Id.* at 424 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 307-08 (1991)). We find that the constitutional error in this case was a "trial error" and that the error is subject to harmless-error analysis.

¶ 76 In applying harmless-error analysis, "the test to be applied is whether it appears beyond a reasonable doubt that the error at issue did not contribute to the verdict obtained." *Id.* at 428. The Illinois Supreme Court has listed three different approaches to measure the error caused by a constitutional violation under the harmless-error test:

> "(1) focusing on the error to determine whether it might have contributed to the conviction, (2) examining the other evidence in the case to see if overwhelming evidence supports the conviction, and (3) determining whether the improperly admitted evidence is merely cumulative or duplicates properly admitted evidence." *Id.*

¶ 77 Using these approaches, this court finds the error in this case to be considered harmless. The evidence defendant sought to be suppressed was his interview with Detective Bor in which

defendant provided a false alibi, at the time claiming he was at home on the night of the incident, not at the club where the victim was shot. A video recording of the interview was played for the jury, and was used to attack defendant's credibility as defendant later recanted this story and admitted it was a lie. This interview does not include any exculpatory statements and not contain any evidentiary probative value—during this interview, defendant did not discuss self-defense or what happened at the scene at all. The video of the interview that defendant sought to suppress was used solely for impeachment purposes.

¶ 78 This court finds that while the interview may have somewhat diminished defendant's credibility in the eyes of the jury, the evidence in favor of defendant's conviction is so overwhelming in relation to his defense that even had the interview been properly suppressed, it is beyond a reasonable doubt that the result would have been the same. The State presented three witnesses to the incident, each of whom provided accounts that defendant shot the victim unprovoked and not in self-defense, and each identified defendant in a lineup conducted the same day as the shooting. In addition, all three witnesses testified that the victim did not have a gun on him, and no gun was recovered from the victim or the scene. The State also presented evidence of defendant's cousin Cassandra who, despite testifying that she did not see the shooting, was impeached with a written statement she made stating that she saw defendant standing over a young black male, yelling and pointing a gun at him. Catherine also placed defendant at the club, but did not see the shooting. Finally, when defendant was arrested, the police recovered a .38 caliber bullet from the pocket of his white and red jacket, the same caliber of the shell casings recovered from near the victim's body and of the bullet recovered from the victim's body. Devell and Cassandra identified that same jacket as the one defendant wore during the shooting and defendant's jacket testified positive for gunshot residue.

¶ 79 The only evidence for the defense was defendant's own testimony, which is that on the day of the incident he had been drinking, went to his aunt's house to grab a gun from her backyard, got his stepfather to bring him to the club in the middle of his night to bring his girlfriend back home, then stood outside the club and waited for her while carrying a loaded weapon with an extra round of ammunition in his pocket, and defendant did all of this despite the fact that he was wearing a electronic monitoring bracelet. Furthermore, what defendant did not say is just as revealing as what he did say. Defendant never stated that anyone, the victim or anyone else at the club that night, raised a handgun or brandished any other weapon against him. In defendant's account of his interaction with the victim, there is no testimony of any overtly threatening remarks or behavior by the victim. Additionally, there is no testimony from anyone, including his aunt, cousin, or stepfather, that defendant ever stated that he felt threatened or put in danger by the victim that night. The only evidence presented by defendant in support of his version of what happened during defendant's interaction with the victim is defendant's own self-serving testimony.

¶ 80 Even ignoring the false alibi statements and removing that attack on defendant's credibility, the evidence was not closely balanced. It is clear to this court that the verdict reached by the jury would not have been affected by granting defendant's motion to suppress. Accordingly, under the harmless-error test used for a constitutional violation, we find that the erroneous admission of defendant's interview with Detective Bor to be harmless beyond a reasonable doubt.

¶ 81 Defendant argues, alternatively, that if we do not find any error in the trial court's denial of his motion to suppress, we should find his counsel was ineffective for failing to adequately argue the motion. According to defendant, defense counsel "failed to adequately develop the

record" for the trial court to rule on the motion "in the full context of [defendant's] repeated requests to call an attorney."

¶ 82 Ineffective assistance of counsel claims are resolved under the two-part test established in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, a defendant must demonstrate that counsel's performance was deficient, which requires showing that " 'counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.' " *People v. Coleman*, 183 Ill. 2d 366, 397 (1998) (quoting *Strickland*, 466 U.S. at 687). To prevail, the defendant "must overcome the strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not of incompetence." *Coleman*, 183 Ill. 2d at 397. Second, the defendant must also show there is a "reasonable probability" that, but for defense counsel's deficient performance, the result of the proceeding would have been different. *People v. Griffin*, 178 Ill. 2d 65, 74 (1997). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

¶ 83 First, we find that counsel's performance was not deficient. As discussed above, defendant made an unequivocal request for counsel when he initially asked to call his girlfriend to bring his attorney, and defense counsel used this request as the basis for defendant's motion to suppress. The trial court's erroneous finding that this request was insufficient to invoke defendant's right to counsel does not necessarily mean counsel erred by not bolstering his motion with additional arguments. This court finds that counsel's decision to not argue about each separate request for a phone call or mention of a lawyer does not overcome the presumption that counsel's decision was the product of sound trial strategy.

¶ 84 Even if defense counsel's actions had been deficient, defendant could not show he was prejudiced by the decision. For reasons discussed above, the evidence was not closely balanced. Even if statements about defendant's false alibi had been suppressed and defendant's credibility

not tarnished in this manner, this court does not find it likely that the jury would have found defendant not guilty of murder or guilty of the lesser charge of second degree murder. The evidence of defendant's guilt at trial was overwhelming and, under these circumstances, we cannot say that but for defense counsel's allegedly deficient performance in arguing the motion to suppress defendant's false alibi statements, there is a reasonable probability that the trial result would have been different. Accordingly, we find that defendant did not receive ineffective assistance of counsel.

¶ 85 B. Catherine Austin's Grand Jury Testimony

¶ 86 Defendant next challenges the trial court's decision to allow the transcript of Catherine's grand jury testimony to be sent back to the jury. He argues that the transcript contained "inadmissible prior consistent statements" and "irrelevant and prejudicial testimony" regarding the fact he was "on parole at the time of the shooting and that, after the shooting, he pulled Cathy's hair, hit her in the face, and broke the windshield of Marcus's car—all evidence that the court had ruled inadmissible."

¶ 87 Initially, defendant concedes that he did not properly preserve this issue for review as he did not object to the submission of Catherine's grand jury transcript and did not raise the issue in his posttrial motion. *Enoch*, 122 Ill. 2d at 186. However, defendant urges us to review the issue as plain error. The plain error doctrine allows a reviewing court to consider a forfeited issue if a clear and obvious error occurred and either: (1) the evidence was so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) the error was so serious that it affected the fairness of the trial and undermined the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Defendant has the burden of persuasion under either prong, and if he fails to satisfy the burden, the " 'procedural default must

be honored.' " *People v. Walker*, 232 Ill. 2d 113, 124 (2009) (quoting *People v. Keene*, 169 Ill. 2d 1, 17 (1995)).

¶ 88 Section 115-10.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10.1 (West 2008)) permits the admission of prior inconsistent statements as substantive evidence if: (1) the statement is inconsistent with the witness's testimony at trial; (2) the witness is subject to cross-examination about the statement; and (3) the statement was made under oath. However, when admissible prior inconsistent statements are contained in a document that also contains inadmissible, irrelevant, or prejudicial statements, in certain instances courts have found submission of the entire document to the jury to be reversible error. See, *e.g.*, *People v. Radovick*, 275 Ill. App. 3d 809, 820-22 (1995) (finding an abuse of discretion where the trial court sent four entire grand jury testimony transcripts back to the jury because "[m]ost of the testimony" contained in the transcripts was consistent with or contained evidence that the witnesses did not testify to at trial and included inadmissible hearsay, statements about other crimes, or prejudicial portions).

¶ 89 Catherine Austin's grand jury testimony transcript included 17 pages and 393 lines of testimony. Defendant takes issue with the contents of approximately 10 of those 393 lines, including the following exchanges:

> "[ASA GROEBNER] Q. And when [defendant] came to live at your house, was he on parole?
>
> [CATHERINE] A. Yes.
>
> * * *
>
> Q. Did you guys start fighting?
>
> A. Yes.
>
> Q. What happened during the fight?

A. *** He was pulling my hair and he hit me in my face.

* * *

Q. Did he do anything to Marcus?

A. *** We fitting to leave. And then as we fitting to leave, [defendant] climbed on top of his car and stomped his car.

Q. Did he break the windshield?

A. Yes."

Defendant contends that these comments consist of inadmissible other crimes evidence that " 'has too much' " probative value and therefore " 'overpersuades a jury, which might convict the defendant only because it feels that defendant is a bad person who deserves punishment.' " (citing *People v. Manning*, 182 Ill. 2d 193, 213-14 (1998)).

¶ 90 However, here we need not reach the question of whether the court erred in sending Catherine's entire grand jury transcript back to the jury because, even if it was an error, defendant cannot show that it rose to the level of plain error. First, as we discussed above in greater detail, the evidence presented at trial was not closely balanced. Defendant's self-defense theory was supported by only his own testimony and was flatly contradicted by the testimony of at least four other witnesses, who recalled defendant—not the victim—acting in an agitated, provocative, and/or threatening manner. The evidence against defendant at trial was overwhelming, and even if we find it was an error, we cannot say that the submission of Catherine's entire grand jury transcript to the jury during deliberation tipped the scales of justice against him.

¶ 91 Defendant also argues that the trial court's alleged error was "so fundamental and of such magnitude that it affected the fairness of the trial and challenged the integrity of the judicial process." Citing *People v. Glasper*, 234 Ill. 2d 173, 198 (2009), the State responds that defendant cannot meet the second prong of plain error review because success under the second prong is

recognized in only a limited class of cases recognized by the United States Supreme Court, including "complete denial of counsel, a biased judge; racial discrimination in selection of grand jury; denial of right of self-representation at trial; denial of a public trial; and, defective reasonable doubt instruction."

¶ 92 In *Glasper*, our supreme court "equated the second prong of plain-error review with structural error, asserting that automatic reversal is only required where an error is deemed structural, *i.e.*, a systemic error which serves to erode the integrity of the judicial process and undermine the fairness of the defendant's trial." *People v. Thompson*, 238 Ill. 2d 598, 613-14 (2010) (internal quotation marks omitted). In *Glasper* as well as in *Thompson*, our supreme court used plain-error review to consider whether a trial court's violation of Rule 431(b) required automatic reversal, and on both occasions the court found that no reversal was proper, noting in *Glasper* that the error "did not rise to the level of structural error" and therefore did not require automatic reversal, and in *Thompson* that insufficient evidence had been presented to conclude that the appellant's right to fair trial had been undermined. *Thompson*, 238 Ill. 2d at 614; *Glasper*, 234 Ill. 2d at 198-99.

¶ 93 More recently, this district found that *Gasper* and *Thompson* do not "strictly limit the application of second-prong plain error" to the "six types of structural error that have been recognized by the United States Supreme Court." *People v. Clark*, 2014 IL App (1st) 123494, ¶40, *appeal allowed*, No. 118845 (Ill. Mar. 25, 2015) (citing cases in which "the Illinois Supreme Court has held that second-prong plain error applies to errors other than those six errors"). We agree with the reasoning in *Clark* and find that the second prong of plain error is not limited to the structural errors specifically recognized by the United States Supreme Court. See also *People v. Booker*, 2015 IL App (1st) 131872, ¶¶64-65; *People v. Getter*, 2014 IL App (1st) 121307, ¶59.

¶ 94 Although we have determined that we can consider defendant's claim of error under the second prong of plain error, we find that defendant has failed to adequately argue why the error was so fundamental and of such magnitude that it meets the standard under the second prong. Beyond his initial conclusory statement, defendant's argument consists of a single sentence: "Courts have found the specific type of inadmissible evidence within the transcript to be plain error under this prong" followed by a citation to two cases, *People v. Jackson*, 399 Ill. App. 3d 314 (2010) and *People v. Norwood*, 362 Ill. App. 3d 1121 (2005). Both *Jackson* and *Norwood* are distinguishable.

¶ 95 In *Jackson*, the defendant was convicted of first-degree murder. *Jackson*, 399 Ill. App. 3d at 316. On appeal, he argued that he was denied a fair trial because, among other reasons, the State introduced "portions of his custodial statements" made to police and prosecutors in which he "recounted several instances of drug use" the night before and the day of the homicide, which were presented to the jury in their entirety. *Id.* at 320. Determining the error merited substantive review under the first prong of the plain error doctrine because the evidence was closely balanced, the court also found that the plain error doctrine was "properly invoked" under the second prong "because of the significance of the admission of evidence of Jackson's drug use." *Id*. at 320-21. The court found that the State's commentary in rebuttal which highlighted the defendant's drug use "was precisely the bad-character accusation prohibited by the rule against admission of other crimes to show criminal propensity." *Id.* at 321-22.

¶ 96 Unlike *Jackson*, the State here did not use the alleged inadmissible other crimes evidence referred to in Catherine's transcript to argue that defendant was a bad person with a propensity to commit the murder. At trial, the State did not refer to the other crimes evidence in Catherine's grand jury testimony at all. We are not persuaded by defendant's comparison to *Jackson*.

¶ 97 Furthermore, *Norwood* does not invoke the plain error doctrine at all. In fact, although the *Norwood* court did consider whether certain other crimes evidence was admissible, the court ultimately held that the defendant's right to a fair trial was not violated because "the record established that the [trial] court acted within its discretion in admitting the evidence and gave the jury a limiting instruction." *Id.* at 1128. Therefore, *Norwood* is completely inapplicable to defendant's contention that his claim is reviewable under the second prong of plain error.

¶ 98 As stated above, defendant has the burden of persuasion under the plain error doctrine. *Walker*, 232 Ill. 2d at 124. Because defendant fails to argue or provide any authority that the admission of Catherine's grand jury transcript impacted his right to a fair trial, we cannot find that the admission of the grand jury transcript amounted to plain error under the second prong. Moreover, we note that other courts have rejected similar claims that improperly admitted other crimes evidence amounts to plain error under the second prong. See, *e.g.*, *People v. Strawbridge*, 404 Ill. App. 3d 460, 469 (2010) (finding that because "an error concerning the admission of other-crimes evidence may be deemed harmless in appropriate circumstances, we cannot say that such an error is so fundamental that it necessarily satisfies the second prong of the plain-error doctrine").

¶ 99 Defendant alternatively claims that his counsel provided ineffective assistance by failing to object to the trial court submitting Catherine's grand jury transcript to the jury during deliberations. As discussed above, in order to show he received ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that, but for counsel's deficient performance, the result of the proceeding would have been different. *Coleman*, 183 Ill. 2d at 397. We have already found that the evidence against defendant at trial was overwhelming. Considering the trial evidence, we cannot say that but for counsel's alleged deficiency there is a reasonable probability that the trial result would have been different. Therefore, we conclude that

defendant did not suffer prejudice from counsel's alleged error and did not receive ineffective assistance of counsel. See *Coleman*, 183 Ill. 2d at 397-98 (holding that a "lack of prejudice render's counsel's performance irrelevant").

¶ 100 C. Prosecutor's Statements During Closing and Rebuttal Arguments

¶ 101 Defendant's next contention is that the State deprived him of a fair jury trial by misstating the law and engaging in improper burden-shifting during closing and rebuttal arguments.

¶ 102 Generally, the State has wide latitude in the content of its closing and rebuttal argument. *People v. Perry*, 224 Ill. 2d 312, 347 (2007). "When reviewing a challenge to remarks made by the prosecution during closing arguments, the comments must be considered in context of the entire closing arguments made by both parties." *People v. Gonzalez*, 388 Ill. App. 3d 566 (2008) (citing *People v. Wiley*, 165 Ill. 2d 259, 295 (1995)). Prosecutorial misconduct in closing arguments will only warrant reversal and a new trial "if the improper remarks constituted a material factor in a defendant's conviction." *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007).

¶ 103 As defendant points out, the standard of review for this issue is "unclear, as the Illinois Supreme Court has applied both *de novo* and abuse of discretion standards to prosecutorial misconduct cases." See *Wheeler*, 226 Ill. 2d at 121 (applying a *de novo* standard of review); *People v. Blue*, 189 Ill. 2d 99, 128 (2000) (applying an abuse of discretion standard). However, here we need not resolve the issue of the appropriate standard of review, as our determination would be the same under either standard.

¶ 104 Defendant first argues that the State improperly shifted the burden when, in closing, the prosecutor said: "That, ladies and gentlemen, is first degree murder. Unfortunately, after you consider that, you are not done deliberating. Because the defense wants you to believe that there is self-defense in this case. And the self-defense, their words. That's their burden to prove, by the preponderance of the evidence." After the court overruled the defendant's objection, the

prosecutor said, "By a preponderance of the evidence, it is their burden." In the context of the State's closing argument as a whole, these remarks were not improper.

¶ 105 Self-defense is an affirmative defense that, once raised, requires the State to disprove it beyond a reasonable doubt. *People v. Lee*, 213 Ill. 2d 218, 224 (2004). In contrast, a person commits second degree murder when he commits the offense of first degree murder and, at the time of the murder, he has an unreasonable belief that he is acting in self-defense. 720 ILCS 5/9-2(a)(2); *People v. Luckett*, 339 Ill. App. 3d 93, 99 (2003). Pursuant to section 9-2(c) of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/9-2(c) (West 2008)), in order to establish second degree murder, the defendant has the burden of proving a mitigating factor, such as an unreasonable belief he acted in self-defense, by a preponderance of the evidence.

¶ 106 The record shows that, prior to the State's alleged improper comment, the prosecutor discussed defendant's theory of self-defense and explained when self-defense is justified according to the law, saying: "a person is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself." After providing the definition of self-defense to the jury, the prosecutor properly argued why she believed the evidence showed defendant did not act in self-defense: "There was no reasonable belief, there was no unreasonable belief. He had no reason to believe he had a right to kill Ranus like he did." She then made clear that the State was required to prove three propositions in order to sustain a charge of first or second degree murder, including "that the defendant was not justified in using the force he used." Only after arguing how the State had met its burden for first degree murder did the prosecutor say, "after you consider that, you are not done deliberating. Because the defense wants you to believe that there is self-defense in this case. And the self-defense, their words. That's their burden to prove, by the preponderance of the evidence."

¶ 107 Defendant also asserts that the State made an improper comment in rebuttal argument when she said, "Now, there is no question that we have that burden of proof to prove him guilty of first degree murder. Just like my partner told you. But if he wants you to buy his claim of self defense or try second degree, that's his burden." The trial court correctly and immediately sustained defendant's objection. The prosecutor then continued, "It is preponderance of the evidence. Which is different from our burden. Which is beyond a reasonable doubt."

¶ 108 We agree with defendant that the prosecutor misstated the law when she said "if [defendant] wants you to buy *his claim of self defense* or try second degree, *that's his burden*." (Emphasis added.) However, we first note that in light of the overwhelming evidence at trial, this single misstatement of the law is not sufficient to have constituted a material factor in defendant's conviction.

¶ 109 A trial court "may cure errors by giving the jury proper instructions on the law to be applied; informing the jury that arguments are not themselves evidence and must be disregarded if not supported by the evidence at trial; or sustaining the defendant's objections and instructing the jury to disregard the inappropriate remark." *People v. Simms*, 192 Ill. 2d 348, 396-97 (2000). Here, not only did the court inform the jury that closing arguments are not evidence and any statement not based on the evidence should be disregarded, but the court also immediately sustained defendant's objection and said that the jury was "going to get the exact instruction from the Court. I will instruct you and you will get an instruction back there with you."

¶ 110 In its instructions to the jury, the court provided a correct statement of law regarding the prosecution's burden. The jury received the following instruction, labeled People's Instruction No. 8, which is identical to Illinois Pattern Criminal Jury Instructions No. 2.03A:

> "The defendant is presumed to be innocent of the charge against him of first degree murder. This presumption remains with him throughout every stage of

> the trial and during your deliberations on the verdict and is not overcome unless from all the evidence in this case you are convinced beyond a reasonable doubt that the defendant is guilty.
>
> The State has the burden is proving that the defendant is guilty of first degree murder, and this burden remains on the State throughout the case. The defendant is not required to prove his innocence.
>
> If the State proves beyond a reasonable doubt that the defendant is guilty of first degree murder, the defendant then has the burden of proving by a preponderance of the evidence that a mitigating factor is present so that he is guilty of the lesser offense of second degree murder, and not guilty of first degree murder. In deciding whether a mitigating factor is present, you should consider all of the evidence bearing on this question."

Further, in People's Instruction No. 16, which also models Illinois Pattern Criminal Jury Instructions No. 7.06, the jury was provided a more detailed breakdown of the "propositions" that "the State must prove" in order to sustain a charge of first degree murder, including "*Third Proposition*: That the defendant was not justified in using the force which he used." Additionally, this instruction directs the jury to "not consider whether the defendant is guilty of the lesser offense of second degree murder until and unless you have first determined that the State has proved beyond a reasonable doubt each of the previously stated propositions." The jury is presumed to follow the instructions from the court. *People v. Taylor*, 166 Ill. 2d 414, 438 (1995). The statements of the trial court both before and after the parties' closing arguments cured any error resulting from the prosecutor's misstatement.

¶ 111 Defendant cites two cases in support of his argument that the prosecutor's statements were reversible error, but we find both cases to be distinguishable. See *People v. Yonker*, 256 Ill.

App. 3d 795 (1993); *People v. Wilson*, 199 Ill. App. 3d 792 (1990). In *Yonker*, the court found reversible error where the prosecutor "told the jury that it need only consider the defendant's testimony to determine whether he was guilty of first degree murder and that if it did not believe the defendant's testimony, it should find him guilty." *Yonker*, 256 Ill. App. 3d at 801. The court observed that the prosecutor's comments were "a flagrant misstatement of the law because it shifted the burden of proof to the defendant to establish that he was not guilty of the offense." *Id*. The *Wilson* court similarly found reversible error where, instead of arguing about a witness's credibility based on the evidence, "the prosecutor reminded the jury of his duties and obligations as a representative of the State and officer of the court, and his personal knowledge of the court call, then flatly declared that [the witness] had lied." *Wilson*, 199 Ill. App. 3d at 796. Unlike in *Yonker* and *Wilson*, the State here did not shift the burden to defendant to prove his innocence; in fact, the prosecutors specifically stated that the State was required to prove defendant guilty of first degree or second degree murder. Moreover, in rebuttal, the prosecutor said that "there is no question that *we have that burden of proof* to prove him guilty of first degree murder." Accordingly, we find *Yonker* and *Wilson* to be inapplicable in the present case.

¶ 112 D. Correction of the Mittimus

¶ 113 Last, defendant contends that the mittimus must be corrected to reflect 1,258 days of presentence custody credit rather than the 1,252 days it currently reflects. The State agrees that the mittimus must be corrected, but contends that the proper number of days is 1,257.

¶ 114 A defendant is entitled to receive custodial credit against his sentence for the time spent in custody prior to his being sentenced. 730 ILCS 5-4.5-100(b) (West 2012). This calculation includes the day of his arrest and runs up to, but not including, the date he is sentenced and transferred to the custody of the Illinois Department of Corrections. *People v. Williams*, 239 Ill. 2d 503, 510 (2011). Defendant was arrested on October 25, 2008 and remained in custody until

he was sentenced on April 25, 2012. According to our calculations, he is entitled to 1,258 days of presentence custody credit rather than 1,252.[1] We have the authority to correct a defendant's mittimus without remanding the cause to the trial court. Ill. S. Ct. R. 615(b) (eff. Jan. 1, 1967); *People v. Pryor*, 372 Ill. App. 3d 422, 438 (2007). Therefore, we order that the mittimus be corrected to reflect the proper amount of presentence custody credit, 1,258 days.

¶ 115 CONCLUSION

¶ 116 For the foregoing reasons, we affirm the judgment of the trial court and correct the mittimus to reflect 1,258 days of presentence custody credit.

¶ 117 Affirmed; mittimus corrected.

[1] As defendant avers in his reply brief, the discrepancy between his calculation and the State's calculation may be due to the fact that 2012 was a leap year, with February containing 29 days that year.