FIRST DIVISION
March 23, 2015

No. 1-13-0344
2015 IL App (1st) 130344-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 10 CR 14512
SANTOS CALAFF,	)	
Defendant-Appellant.	)	The Honorable Nicholas Ford, Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Delort and Justice Harris concurred in the judgment.

ORDER

Held: Trial court properly denied defendant's motion to suppress identification evidence that was made in a group showup; trial court did not err by barring expert testimony on memory and identifications where it would not have assisted the jury; defendant was not denied a fair trial by the prosecutor's closing argument remarks that defendant was evil; the attempted first degree murder instruction did not misstate the law where the verdict forms named the victims; the judge did not abdicate his role as a neutral arbiter by asking a defense witness several questions; the court relied on facts outside the

record in making its sentencing findings; and the mittimus must be corrected on remand.

¶ 1 Following a jury trial, defendant Santos Calaff was convicted of first degree murder, two counts of attempted first degree murder, and aggravated discharge of a firearm in connection with the shooting death of the victim, Emanuel Leeks. Defendant was sentenced to natural life in prison, with three additional determinate prison terms to run consecutively to that term. Defendant appeals his convictions, arguing that (1) the court should have suppressed the show-up identifications of defendant as "grossly suggestive," (2) the court's denial of defendant's motion to call an expert in psychology to testify about memory and identifications was an abuse of discretion, (3) the State violated defendant's right to a fair trial by arguing that defendant had "evilness in his soul" and that the State's witnesses feared him, (4) it was error for the jury to have received the instruction that it could find defendant guilty of attempted first degree murder if it found he had an intent to kill "an individual," (5) the trial court judge assumed an improper adversarial role during the posttrial hearing, (6) the court erred by relying on defendant's gang affiliation to impose a sentence of natural life, and (7) defendant's conviction for aggravated discharge of a firearm, and one of his two convictions for murder, violate the one-act, one-crime rule. For the following reasons, we affirm the judgment of the trial court, but remand for a new sentencing hearing and to correct the mittimus.

¶ 2 I. BACKGROUND

¶ 3 Defendant was charged with multiple counts of first degree murder, attempted first degree murder, and aggravated discharge of a firearm in connection with the shooting death of the victim. Prior to trial, defendant filed a motion to suppress in which he stated that certain witnesses were improperly allowed to view him in a "one-on-one" show-up. Defendant alleged that police officers brought defendant, who was handcuffed, in a police car to the scene of the

crime, where they displayed him to all of the eyewitnesses simultaneously. Defendant argued that the conduct of the officers improperly suggested the identification of defendant as the perpetrator. Defendant further contended that the emotional and physical condition of the witnesses impaired their ability to make a fair, rational, and reasoned identification of the offender. A hearing was held on defendant's motion on September 15, 2011.

¶ 4 Officer Steven Rivera testified first at the hearing, stating that on the night in question he was working with his partner, Officer Hernandez. They were in an unmarked car, monitoring the radio when they heard a call about a shooting. They immediately went to the location and saw a vehicle on the curb. There were two people inside the car, one black female and one black male with a gunshot wound to his stomach. There was another black woman nearby. One of the witnesses gave Officer Rivera a description of the shooter, which was a "male Hispanic with long hair wearing a blue shirt." Officer Rivera testified that he used his radio to give that description over the air and then remained at the scene.

¶ 5 Officer Rivera testified that the two women at the scene were upset and that one of the women had been "grazed" by a bullet on her leg. Two other officers came over the air stating that they had a "possible" suspect and attempted to get Officer Rivera and his partner to bring the witnesses to the location where they had stopped the possible suspect. However, because of another gunshot call, there were not enough cars to transport the witnesses, so Officer Rivera told the other officers to bring the suspect to the scene.

¶ 6 Officer Rivera testified that the officers arrived at the scene in a marked police vehicle. They parked "maybe a quarter of a block" away from the crime scene, and Officer Rivera was able to bring one witness over to them. Officer Rivera could not recall which witness he brought

over, but he testified that it was one of the two women. The woman immediately identified defendant as the shooter.

¶ 7 Officer Rivera testified that he "believed [defendant] was handcuffed" and that he was in the back of the police vehicle. Officer Rivera then retrieved the second woman and brought her over to the police vehicle. He testified that he "believed" she made a positive identification, but could not recall what she said.

¶ 8 On cross-examination, Officer Rivera testified that one of the descriptions given out over the radio was that the suspect was wearing his hair in a ponytail. Officer Rivera testified that his partner gave a description that the suspect was wearing shorts, and that he believed his partner also stated that the suspect was "heavy-set."

¶ 9 Officer Rivera further testified that neither of the women he spoke to at the scene mentioned any tattoos on the suspect.

¶ 10 Officer Michael Tews testified next, stating that on the night in question he heard a call over the radio about a shooting. A description of the subject was given over the radio by Officer Rivera. Officer Tews described that description as "male Hispanic, long hair, blue t-shirt." Officer Tews testified that "a few minutes" later, Officer Hernandez came over the radio and stated "male Hispanic, ponytail, heavy-set," and that the suspect wore a blue t-shirt. Officer Tews further testified that he believed the dispatcher also gave a description over the radio of the suspect as a male Hispanic, with black hair, blue t-shirt, and white gym shoes. Officer Tews testified that the dispatcher stated that an anonymous citizen had called and said the shooter got into a gray Cadillac and went westbound on Dickens.

¶ 11 Officer Tews testified that he and his partner then toured the area, and after about 10 minutes, they noticed a person, defendant, fitting the description of the suspect. Officer Tews

testified that defendant looked in the direction of the officers and then began jogging and entered a vestibule. The officers followed him into the vestibule and did a pat-down of defendant. They did not find any weapons on him. Officer Tews testified that defendant was sweating, seemed nervous, and was slightly out of breath.

¶ 12 Officer Tews testified that he handcuffed defendant despite not having a warrant for his arrest. Officer Tews testified that he brought defendant to the scene and that two women approached the police vehicle, one at a time, and identified defendant as the shooter.

¶ 13 Officer Tews testified that when he first saw defendant, defendant was about two and a half blocks away from the scene of the crime.

¶ 14 Officer George Moussa's testimony was substantially the same as Officer Tews' testimony. He testified that as defendant was stepping out of the vehicle at the crime scene, a woman positively identified him as the shooter. Officer Moussa testified that the second woman also positively identified defendant as the shooter. He stated that the witnesses at no point had any occasion to speak to each other while they were being brought to the back of the car.

¶ 15 After hearing all the testimony, the court stated that the testimony of the officers was "some of the better testimony that I've heard." The court stated that that the officers were "firmly accurate, and honest, and forthright in their portrayal of the events on [the night in question]." The court noted that 10 minutes had passed from when the original call of shots fired came in until when defendant was apprehended. The court further noted that defendant was apprehended less than two and a half blocks away from the crime scene. The court also stated that defendant had unique characteristics that fit the description given by the witnesses. The court stated that from the distance it was from the defendant, his facial tattoos were less visible than when he was closer to the court. And while the court agreed it raised a question of why the

tattoos were not a part of any information brought forth by the witnesses, "its absence do [*sic*] not fail on that, especially when compared with all the other information that was brought forth that Officer Tews and Moussa had at the time of their encounter with defendant." The court denied defendant's motion to suppress the evidence.

¶ 16 Also prior to trial, defense counsel filed a motion to introduce the expert testimony of Daniel Wright. Defense counsel stated in the motion that Wright, an expert in the field of eyewitness identification, would testify on the issues of stress, suggestive identification procedures, and cross-racial status of the defendant, and would also explain to the jurors the effects of these particular issues. A hearing was held on the motion, and arguments were made by both parties. At the conclusion of the arguments, the trial court noted that the question before him was whether Wright's expert testimony would "shed some unique light on what is generally an issue regarding eyewitness identification." The trial court stated that "issues regarding how long you saw the victim and cross-racial identification and identification under stressful circumstances, I don't see any of it as being beyond the ken of an average citizen, not one." The court went on to state:

> "And what I do see, what I do feel is the case in certain circumstances, and in this sense, I'm only creating dictum perhaps on my own personal view of this, is a desire on the part of the people in the psychological and psychiatric professions, mostly the psychological profession, to professionalize their area of study so as to increase their degree of remuneration. That's a way of saying I think they're in it for the money. I don't know if that's the case of Mr. Wright. And I believe I have to follow *Aguilar* and *Allen* in this case and only allow this testimony where it's

appropriate and where I think it enhances the jury's ability to understand the evidence."

¶ 17 The judge then noted that in this case there were several people who identified defendant, and that at least one of them had no affiliation with any of the parties concerned in the case. He further stated that he believed the defense was going to be able to bring to the attention of the jury any issues regarding identification of defendant without the use of an expert witness. Defense counsel's motion to introduce expert testimony was denied.

¶ 18 The following evidence was adduced at trial. Stephanie Campbell and Ashley Stewart picked the victim up in Stephanie's car a little after midnight on July 17, 2010, outside of the Save-A-Lot grocery store where the victim worked. Ronnie Jordan was driving a separate van carrying Joe Miller and Rakim Clay. The entire group, with the victim driving Stephanie's car, proceeded to the victim's house so he could change clothes.

¶ 19 The victim parked Stephanie's car on Springfield. The van driven by Jordan was already parked on the street when they got there. Stephanie testified that she then saw defendant, who she identified in open court, walking towards the car with a girl. They came out of the gangway of a house located near the corner. The girl remained on the sidewalk while defendant crossed the street and approached Stephanie's car with his hand behind his back. Defendant then pulled what looked like a .9 millimeter semi-automatic gun out from behind his back and tapped it on the passenger side window. Defendant stated, "fuck y'all doing over here?" Stephanie testified that no one answered, and that after 10 seconds the victim put the car in reverse and drove backwards. Defendant started shooting.

¶ 20 Stephanie testified that defendant shot at her car three times before aiming his gun at the men in the van and shooting at them two or three times. Defendant then chased her car while

shooting at it. Bullets came through the passenger side of the car and the windshield. The victim told Stephanie that he had been hit by a bullet before passing out with his foot on the gas pedal. The car jumped over a curb and then hit a tree. When the car stopped, a different male came up and asked, "[i]s he hit; is he hit?" Stephanie thought this man was there to help, but he just looked inside the car, made a hand motion, and then ran away towards Springfield. Stephanie looked out the back window and saw defendant run past the car toward Pulaski and Dickens.

¶ 21 Stephanie further testified that she called 9-1-1 and that police arrived within five minutes. She described defendant as a heavy-set Hispanic male with his hair pulled back in a ponytail, wearing a blue shirt with a white shirt under it, white shorts, and white tennis shoes, and that he had tattoos on his face. The ambulance arrived and she stood with Ronnie, Rakim, Ashley, and Joe as the paramedics worked on the victim. After about 10 minutes, police officers drove up and asked her if she could identify the shooter if she saw him. The officers parked their vehicle about a half block away and asked her to look at someone. The whole group saw defendant at the same time when the police took him out of the car in handcuffs. Stephanie identified defendant as the shooter.

¶ 22 Ashley Stewart testified to substantially the same events as Stephanie. She stated that she was in Stephanie's car when she noticed defendant, who she identified in open court, walking near the victim's house with a woman. Defendant approached them with his hand behind his back. She noticed his devil horn tattoos. Defendant approached the passenger side window and knocked on it with a gun. The victim looked at defendant, then put his hands up "like no we not on that." The victim then put the car in reverse, but defendant shot through the window. Defendant shot at the car three times. He also shot at Ronnie's van, and at Stephanie's tires as the car drove away. The victim drove the car into a tree and then passed out. Another man

approached the car and confirmed that the victim had been hit by giving a signal to a group of people standing on the corner, including defendant. Defendant then ran past Ashley's group.

¶ 23 Ashley testified that she described the shooter to police officers and told them he had devil horn tattoos on his face. Shortly after that, a police officer approached her and Stephanie and asked if they could identify the shooter. Ashley was standing with Stephanie, Ronnie, Joe, and Rakim when she made the identification. Defendant was dressed in the same clothes except that the blue shirt he had been wearing was around his neck.

¶ 24 Ronnie, Joe, and Rakim all testified that they were previously convicted of felony offenses. They were in Ronnie's van parked at the intersection of Springfield and Shakespeare when they saw defendant, who they all identified in open court, walk towards Stephanie's car with his hand behind his back. Defendant tapped on the passenger side window with his gun and they heard defendant ask the victim why he was there, or what he was doing there, and then saw the victim gesturing with his hands. Defendant then shot into the car as the victim pulled away. Defendant next turned the gun on the van. None of the men saw what defendant did after that. The men each identified defendant as the shooter when police officers brought him to the scene. They also each identified defendant as the shooter the next day when they viewed separate lineups.

¶ 25 Mary Turner testified that on the date in question she lived across the street from where the victim had parked. She testified that she knew defendant from when she stayed near Cortland and Keystone. On the night of the incident, Turner was sitting on her porch when she saw the victim pull up. She testified that she also saw defendant and a "young lady" leave a nearby gangway. The young lady gave defendant something and defendant then approached the victim's car with his hand behind his back. He knocked on the car window and when the car

began to move, he started shooting. Turner testified that defendant shot at the car five or six times, and that defendant was wearing a white shirt and blue jean shorts.

¶ 26 Turner further testified that she did not call the police because she was scared of "the gang bangers over there." During the police investigation the next day, she spoke to the canvassing police officers, and eventually identified defendant in a lineup.

¶ 27 Officer Rivera's testimony and Officers Moussa's testimony were substantially the same as their testimony at the suppression hearing before trial.

¶ 28 Officer Lisa Decker, an evidence technician, testified that she recovered four shell .9 millimeter shell casings on Springfield and opined that a semiautomatic weapon was used to shoot the victim. Stephanie's car had a bullet hole in the passenger-side door and a bullet hole in the passenger side window.

¶ 29 Mary Wong, a forensic scientist, testified that the samples taken from defendant to determine if there was gunshot residue on either of his hands resulted in the conclusion that he "may not have discharged a firearm with either hand. If he did, then the particles were not deposited, removed by activity, or not detected by the procedure."

¶ 30 It was stipulated that Diana Pratt, an expert in firearms identification, would testify that the four shell casings recovered from the scene were all fired from the same firearm.

¶ 31 After the State rested, Gina Piemonte, an assistant public defender, testified on defendant's behalf. She testified that she was present when defense counsel had a conversation with Ashley. There, Ashley provided a description of the shooter but said nothing about tattoos. Ashley also stated that the shooter left the area of the shooting in a black Cadillac. Piemonte testified that she did not take notes of the conversation but she reviewed the notes taken by

defense counsel and there was nothing in the notes about Ashley's comments regarding tattoos in the notes.

¶ 32 Stephen Ramsey, an investigator employed by the public defender, testified that he interviewed Mary Turner on January 7, 2011, and that she said she had been drinking on the night of the shooting. There were no notes or reports generated during that interview.

¶ 33 After closing arguments, the jury found defendant guilty of first degree murder of the victim, guilty of attempted first degree murder of Stephanie Campbell, guilty of attempted first degree murder of Ashley Stewart, and guilty of aggravated discharge of a firearm.

¶ 34 Defendant then filed a posttrial motion asking for a new trial. The defense called Richard Lopez as a witness, who testified that he was in custody in Cook County jail awaiting trial for shooting at a car. Lopez testified that he was previously convicted of possession of a controlled substance and aggravated battery of a police officer. He testified that he is a member of the Maniac Latin Disciple street gang. Lopez testified that he knows defendant from the neighborhood and knows him to be a member of the Young Latin Organization Disciple street gang.

¶ 35 Lopez testified that on July 17, 2010, he was with friends in the backyard of a home on the block near where the incident occurred. He saw a Cadillac pull into the alley. Lopez then went to the front of the house and saw a man Lopez knew as Javoney or Garfield come out of the gangway. Lopez described Javoney as Hispanic, about 5 feet, 9 inches tall, weighing about 200 pounds, with long hair. Lopez stated that Javoney was alone. Lopez further testified that Javoney approached the victim's car, shot from about eight feet away, and then ran back into the gangway toward the Cadillac. Lopez saw the Cadillac driving the wrong way down Springfield, with a van chasing and shooting at the Cadillac. Lopez testified that he told police officers at the

scene that the shooter was Javoney, but the officer told him to "shut up." Lopez claimed that he did not know defendant was charged with murder until he saw him in Cook County Jail. They were on the same "deck" in September 2012 after defendant was convicted.

¶ 36 The trial court questioned Lopez about when he first interacted with defendant, what they talked about, when he spoke to defendant's attorney, and the gang affiliations of both Lopez and defendant. Detective Sheamus Fergus interviewed Lopez prior to the hearing, where Lopez told him that he was severely injured in a motor vehicle accident and that he had been on crutches at the time of the shooting. Officers Plovanich, Hernandez, Rivera, Moussa, Tews, and Detectives John Graham and Sheamus Fergus each testified that they never saw a person on crutches near the scene of the shooting, and that they were never approached by Lopez and told that someone other than defendant committed the shooting.

¶ 37 Detective Fergus testified that he and several other detectives went to the porch where Lopez claimed to have viewed the shooting, and concluded that Lopez could not clearly see what took place because there was no clear line of sight from the porch to the location of the shooting.

¶ 38 The trial court concluded that Lopez provided "pure perjurious testimony" and denied defendant's motion for a new trial. The trial court then sentenced defendant to natural life in prison for first degree murder, two consecutive sentences of 40 years in prison for each count of attempted murder, and a consecutive 15 year sentence for aggravated discharge of a firearm. Defendant's motion to reconsider his sentence was denied, and he now appeals.

¶ 39 II. ANALYSIS

¶ 40 On appeal, defendant contends that (1) the court should have suppressed the show-up identifications of defendant as "grossly suggestive;" (2) the court's denial of defendant's motion to call an expert in psychology to testify about memory and identifications was an abuse of

discretion; (3) the State violated defendant's right to a fair trial by arguing that defendant had "evilness in his soul" and that the State's witnesses feared him; (4) it was error for the jury to have received the instruction that it could find defendant guilty of attempted first degree murder if it found he had intent to kill "an individual;" (5) the court assumed an improper adversarial role during the posttrial hearing; (6) the court erred by relying on defendant's gang affiliation to impose a sentence of natural life; and (7) defendant's conviction for aggravated discharge of a firearm and one of his two convictions for murder violate the one-act, one-crime rule.

¶ 41 A. Suppression Hearing

¶ 42 Defendant's first contention is that the trial court erred when it failed to grant his motion to suppress the show-up identification evidence due to the overly suggestive nature of the show-up. Defendant relies on evidence produced at trial to assert that police used suggestive identification procedures. Defendant argues that while the police officers testified at the hearing on the motion to suppress that Stephanie Campbell and Ashley Stewart were brought separately to the police vehicle to identify defendant one at a time, the witnesses' accounts at trial were different. Defendant states that at trial, the witnesses stated that the officers showed defendant to all five witnesses at the same time.

¶ 43 Defendant argues that, in ruling on the trial court's decision on a motion to suppress, the reviewing court can consider evidence introduced at trial as well as the suppression hearing. Defendant cites *People v. Alfaro*, 386 Ill. App. 3d 271, 290 (2008), and *People v. Slater*, 228 Ill. 2d 137, 149 (2008) for this proposition. However, in *Alfaro*, the same evidence that was used at the motion to suppress was also used in overturning the trial court's denial of the motion to suppress. The question was whether the motion to suppress should have been granted based on the recorded interviews of defendant in a police interrogation room. These same interviews were

used to overturn the trial court's finding on appeal. Similarly in *Slater*, the issue was whether the defendant had voluntarily given a statement to police prior to trial, and the same evidence was used to analyze the issue on appeal as was used in the pretrial hearing. Unlike *Alfaro* and *Slater*, defendant in this case attempts to use new evidence which was presented at trial to overturn the trial court's finding on his motion to suppress. In other words, defendant is asking us to overturn the trial court's ruling on the motion to suppress based on evidence that came out at trial. *People v. Brooks*, 187 Ill. 2d 91, 108-09 (1999) (the analysis is different in this situation, where a defendant is asking the reviewing court to use trial testimony to overturn the decision on a motion to suppress).

¶ 44 When a reviewing court affirms a trial court's suppression ruling based on evidence that came out at trial, "it is akin to a harmless error analysis." *Id*. at 109. "The reviewing court is essentially saying that whether the court's decision was supported by sufficient evidence at the suppression hearing becomes irrelevant when evidence to support the trial court's decision is introduced at trial. One reason this is so is that the pretrial ruling on a motion to suppress is not final and may be changed or reversed at any time prior to final judgment." *Id*. Our supreme court has found that this reasoning does not apply equally when a defendant asks us to rely upon trial evidence to *reverse* a trial court's decision on a pretrial suppression ruling, "particularly when the defendant fails to object when the relevant evidence is introduced" at trial. *Id*. See also *People v. Ramos*, 339 Ill. App. 3d 891, 898 (2003) (a defendant cannot challenge the propriety of the trial court's denial of the defendant's pretrial motion to suppress by citing subsequent trial testimony where the defendant failed to renew his objection at trial).

¶ 45 At the suppression hearing, three officers testified that two women were taken to the police vehicle one at a time to identify defendant. At trial, evidence was introduced through

several of the witnesses that defendant was brought out and presented to a group of witnesses. When such trial testimony was introduced, defense counsel "should have asked the court to reconsider its decision on the motion to suppress." *Id*. As stated, that decision was subject to change until final judgment, but by not asking the court to reconsider its ruling when that evidence was introduced at trial, "defendant has waived his right to argue it on appeal." *Id*.

¶ 46 Accordingly, we can only look to the evidence presented at the hearing on the motion to suppress in assessing whether the show-up was overly suggestive. Illinois courts have long held that an immediate show-up identification near the scene of the crime is proper police procedure. *People v. Thorne*, 352 Ill. App. 3d 1062, 1076 (2004); *People v. Lippert*, 89 Ill. 2d 171, 188 (1982);.

> "Although one man show-ups are generally condemned, they have been consistently upheld when they are justified by the circumstances. One of the circumstances in which a show-up has been justified by the court is when it is necessary to facilitate a police search for the real offender, and the Supreme Court has consistently upheld prompt identification of a suspect by a witness or victim near the scene of the crime where [it fosters] the desirable objectives of a fresh, accurate, identification, which may lead to the immediate release of an innocent subject and at the same time enable the police to resume the search for the fleeing offender while the trail is still fresh." *People v. Hicks*, 134 Ill. App. 3d 1031, 1036 (1985).

¶ 47 The weight to be given identification evidence is presumptively a question for the trier of fact. *People v. Moore*, 266 Ill. App. 3d 791, 796 (1994). Only where a pretrial encounter resulting in an identification is "unnecessarily suggestive" or "impermissibly suggestive" so as to

produce "a very substantial likelihood of irreparable misidentification" is evidence of that and any subsequent identifications excluded by operation of law under the due process clause of the fourteenth amendment. *Moore*, 266 Ill. App. 3d at 796-97 (citing *Neil v. Biggers*, 409 U.S. 188, 196-97 (1972)).

¶ 48 The due process analysis has two steps. First, defendant must prove that the confrontation was so unnecessarily suggestive and conducive to irreparable misidentification that he was denied due process of law. If the defendant meets this burden, the burden falls to the State to establish that the identification is independently reliable. *Moore*, 266 Ill. App. 3d at 797. The factors to be weighed in determining the independent reliability of the identification include the opportunity of the witnesses to view the criminal at the time of the crime, the witnesses' degree of attention, the accuracy of their prior description of the criminal, the level of certainty demonstrated by the witnesses at the confrontation, and the length of time between the crime and the confrontation. *Id*. The standard of review of a trial court's denial of a motion to suppress a show-up identification is whether the trial court's decision was "manifestly erroneous." *Id*. at 796.

¶ 49 We agree with the trial court that defendant did not meet his burden of showing that the show-up procedure was so unnecessarily suggestive and conducive to irreparable misidentification that defendant was denied due process of law. At the suppression hearing, Officer Rivera testified that one of the two women at the crime scene gave him a description of the shooter as "male Hispanic with long hair wearing a blue shirt." A few minutes later, Officer Hernandez indicated on the police radio that the shooter was "male Hispanic, ponytail, heavy-set," and was wearing a blue t-shirt. Officer Tews testified that he heard both descriptions over the radio, and that after touring the area for under 10 minutes, they saw defendant about two

blocks away from the crime scene. When defendant noticed the officers, in a marked police vehicle, he jogged into an apartment vestibule. When he was apprehended, he seemed nervous and was sweating. Officers Rivera, Tews, and Moussa all testified that the two female witnesses who were originally at the crime scene when Officer Rivera arrived were individually brought to the police vehicle to view defendant. Officer Rivera testified that the first woman positively identified defendant as the shooter, but he could not recall if the second woman identified defendant as the shooter. Officers Tews and Moussa both testified that each of the two women separately identified defendant as the shooter, outside of the presence of each other.

¶ 50 Based on the evidence at the suppression hearing, we determine that the trial court's decision to deny defendant's motion to suppress the identification evidence as unnecessarily suggestive was not manifestly erroneous.

¶ 51 B. Expert Testimony

¶ 52 Defendant's second issue on appeal is that the trial court abused its discretion when it barred defendant's introduction of expert testimony on memory and identifications. Defendant contends that the expert testimony had a logical connection to the facts of the case, and would have assisted the jury in deciding the case.

¶ 53 In Illinois, an individual will generally be permitted to testify as an expert if his experience and qualifications afford him knowledge which is not common to lay persons and where such testimony will aid the trier of fact in reaching its conclusion. *People v. Enis*, 139 Ill. 2d 264, 288 (1990). Trial courts are given broad discretion when the determining the admissibility of an expert witness. *Id*. at 290. When considering the reliability of expert testimony, the court should balance its probative value against its unfairly prejudicial effect. *Id*. In the exercise of his discretion, the trial judge should also carefully consider the necessity and

relevance of the expert testimony in light of the facts in the case before him prior to admitting it for the jury's consideration. *Id*.

¶ 54 In this case, the defense sought to introduce the testimony of Daniel Wright, a professor in psychology, about "the effects of stress, divided attention, suggestive identification procedures, *** cross-racial status of perpetrator and witness *** [and] the dangerous and pervasive misconception that witness certainty and witness accuracy are positively correlated." Our supreme court cautioned against using this exact type of expert testimony when it stated:

> "We caution against the overuse of expert testimony. Such testimony, in this case concerning the unreliability of eyewitness testimony, could well lead to the use of expert testimony concerning the unreliability of other types of testimony and, eventually, to the use of experts to testify as to the unreliability of expert testimony. So-called experts can usually be obtained to support most any position. The determination of a lawsuit should not depend upon which side can present the most or the most convincing expert witnesses. We are concerned with the reliability of eyewitness expert testimony [citations], whether and to what degree it can aid the jury, and if it is necessary in light of defendant's ability to cross-examine eyewitnesses. An expert's opinion concerning the unreliability of eyewitness testimony is based on statistical averages. The eyewitness in a particular case may well not fit within the spectrum of these averages. It would be inappropriate for a jury to conclude, based on expert testimony, that all eyewitness testimony is unreliable." *Enis*, at 289-90.

¶ 55 Subsequent Illinois cases have held that a trial court may exclude expert testimony on eyewitness identification if the court finds that the testimony is not relevant or would not aid the

trier of fact. In *People v. Tisdel*, 338 Ill. App. 3d 465, 468 (2003) (*Tisdel II*), this court held that a trial court "should carefully scrutinize the proffered testimony to determine its relevance – that is, whether there is a logical connection between the testimony and the facts of the case." In *People v. Allen*, 376 Ill. App. 3d 511, 526 (2007), this court found that the trial court did not carefully scrutinize the probative value and relevance of the testimony before concluding with "no considered basis," that the proposed testimony would confuse the jury. And in *People v. Aguilar*, 396 Ill. App. 3d 43, 54 (2009), this court held that the trial court gave the requisite consideration to the proposed expert testimony before concluding that it was not relevant and would not help the jury.

¶ 56 Defendant asserts that based on this court's holding in *Allen*, the trial court should have permitted the eyewitness expert to testify. We disagree. In this case, unlike in *Allen*, the trial court adhered to the holdings in *Enis*, *Tisdel II*, and *Aguilar* requiring careful scrutiny of the proposed expert testimony on eyewitness identification. The trial court heard defense counsel's motion before trial and based on the proffered testimony and appropriate case law, specifically referencing *Allen* and *Aguilar*, concluded that the expert testimony would not enhance the jury's ability to understand the evidence. The trial court further found that the defense would be able to bring to the attention of the jury any issues regarding identification of defendant without the use of an expert witness. We therefore conclude that it was not an abuse of discretion for the trial judge to exclude the expert testimony.

¶ 57 C. Closing Argument

¶ 58 Defendant's next argument on appeal is that he was denied a fair trial by certain comments the prosecutor made during closing arguments. Specifically, defendant contends that during rebuttal closing argument, the prosecution repeatedly stated that defendant was "evil" and

that the State's witnesses feared him. The State responds that the prosecution's arguments were properly based on the evidence and reasonable inferences therefrom, and that that they were responsive to comments made by the defense.

¶ 59 We start by noting that it is not clear whether this issue is reviewed *de novo* or for an abuse of discretion. See *People v. Raymond*, 404 Ill. App. 3d 1028, 1059 (2010) (citing *People v. Phillips*, 392 Ill. App. 3d 243, 274-75 (2009), and *People v. Johnson*, 385 Ill. App. 3d 585, 603 (2008)). The confusion stems from an apparent conflict between two supreme court cases: *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007) (whether statements made by a prosecutor in closing arguments were so egregious as to warrant a new trial is a legal issue the court reviews *de novo*), and *People v. Blue*, 189 Ill. 2d 99, 128 (2000) (abuse of discretion standard applied to issue of prosecutorial comments in closing argument). However, we do not need to resolve the issue of the appropriate standard of review at this time, because our holding in this case would be the same under either standard. *People v. Hayes*, 409 Ill. App. 3d 612, 624 (2011) (citing *Raymond*, 404 Ill. App. 3d at 1060)).

¶ 60 In making a closing argument, a prosecutor is allowed a great amount of latitude. *Wheeler*, 226 Ill. 2d at 123. Prosecutors may comment on the evidence and draw reasonable inferences therefrom, as well as dwell on the " 'evil results of crime' " and urging the " 'fearless administration of the law.' " *People v. Liner*, 356 Ill. App. 3d 284, 295-96 (2005) (quoting *People v. Harris*, 129 Ill. 2d 123, 159 (1989)). In reviewing a prosecutor's argument, we consider whether the statements made "engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilty resulted from them." *Wheeler*, 226 Ill. 2d at 123. We must consider closing argument as a whole rather than focusing on select phrases or remarks. *People v. Runge*, 234 Ill. 2d 68, 142 (2009). Substantial prejudice occurs "if

the improper remarks constituted a material factor in a defendant's conviction." *Wheeler*, 226 Ill. 2d at 123.

¶ 61 Here, defendant contends that the prosecutor repeatedly stated that defendant was "evil." Defendant specifically takes issue with the prosecutor's comment in rebuttal that the State's witnesses would have to be "the biggest boobs in the world to identify a criminal, an evil-minded cold-blooded killer *** knowing that he would be arrested." The prosecution also stated that the police officers' main concern was trying to find the "killer with devil horns above his eyebrows, the evilness seeping out of his very system." Defense counsel's objection to this statement was sustained. The prosecution stated that defendant's devil horn tattoos were a sign of evilness. Defense counsel's objection was again sustained and the trial court reminded the jury that "the tattoos in and of themselves are not evidence of guilt or innocence. ** * [T]hey don't mean anything." The court then told the prosecutor to "argue the evidence." The prosecution then argued that the witnesses were afraid to testify and that you could tell from their demeanor that they were afraid. Defense counsel's objections to this line of questioning were overruled.

¶ 62 Defendant first contends that a prosecutor cannot call a defendant "evil" in closing argument. We agree. Our supreme court has stated that while a prosecutor may comment unfavorably on the evil effects of the crime and urge the jury to administer the law without fear, a prosecutor may not characterize the defendant as an "evil" person. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005); *People v. Johnson*, 208 Ill. 2d 52, 80 (2003). However, we also note that "[t]he trial court may cure errors by giving the jury proper instructions on the law to be applied; informing the jury that arguments are not themselves evidence and must be disregarded if not supported by the evidence at trial; or sustaining the defendant's objections and instructing the jury to disregard the inappropriate remark." *People v. Simms*, 192 Ill. 2d 348, 396 (2000). We

find that the prompt action by the trial court in sustaining defense counsel's objections cured the prejudicial impact of any improper comments made. See *People v. Goins*, 2013 IL App (1st) 113201, ¶ 89 (prompt action by trial court in sustaining objections cured prejudicial impact of improper comments). The jury was also told repeatedly that closing arguments were mere argument, and the prosecutor was told to "argue the evidence." Additionally, the jury was instructed that neither opening nor closing arguments were to be considered evidence and that any statement made by the attorneys that was not based on the evidence should be disregarded. *Id*. Because jurors are presumed to follow the trial court's instructions, we find that the prosecutor's comments regarding defendant's "evilness" were not prejudicial. *People v. Taylor*, 166 Ill. 2d 414, 438 (1995).

¶ 63 Defendant also takes issue with the prosecution's remarks that all of the eyewitnesses were afraid as they sat on the witness stand, and that she could tell "from their demeanor, their nervousness that they were afraid." The prosecutor continued: "And why wouldn't they be when a cold-blooded killer *** is sitting right there looking at them." Defendant claims, relying on *People v. Mullen*, 141 Ill. 2d 394 (1990), that these remarks were improper because a prosecutor cannot argue that the defendant intimidated the witnesses absent evidence in the record of intimidation. However, our supreme court in *Mullen* also stated: "Prosecutorial comments which suggest that witnesses were afraid to testify because defendant had threatened or intimidated them, when not based upon any evidence in the record *** are highly prejudicial and inflammatory." *Mullen*, 141 Ill. 2d at 405. We cannot say that the prosecutor's remarks about the witnesses being afraid to testify in front of defendant amounted to a suggestion that defendant threatened or intimidated the witnesses.

¶ 64 The State contends that the prosecution's remarks were invited by defense counsel's closing argument in which he questioned the credibility of the State's witnesses when he stated: "You saw [Mary Turner's] demeanor. You saw how she testified, and you heard the description of the shooter that she gave that matched nobody else's description." The prosecutor's rebuttal argument pertaining to Mary's testimony, was as follows:

> "[Mary Turner] said the first night she didn't say anything because she was afraid. She didn't say that she wasn't afraid the next day. She said she came forward the next day because she realized that if someone had killed someone in her family she would want someone to come forward ***. It doesn't mean she's not still afraid. And I submit to you every single eyewitness that testified as they sat there [was] still afraid. And why wouldn't they be when a cold-blooded killer *** is sitting right there looking at them."

¶ 65 We find that the prosecution's comments regarding Mary Turner were in response to defense counsel's comments about the manner in which she testified, her demeanor, and her description of the shooter. *People v. Kirchner*, 194 Ill. 2d 502, 553 (2000) (this court has held that otherwise improper argument by the State will not be considered error when invited by defense counsel's argument). However, the prosecution's comments regarding the other eyewitnesses were improper as they were not invited by defense counsel, and were not based on evidence in the record. "It is improper for the prosecutor to argue assumptions or facts not based on the evidence or to present to the jury what amounts to his own testimony." *People v. Rivera*, 277 Ill. App. 3d 811, 821 (1996).

¶ 66 Nonetheless, we find that these two limited remarks suggesting that the witnesses were afraid of defendant did not result in substantial prejudice to defendant, such that absent those

remarks the verdict would have been different. *Simms*, 192 Ill. 2d at 397. The evidence shows that five eyewitnesses identified defendant as the shooter on the night in question, that three of those eyewitnesses again identified defendant in separate lineups the next day, and that Mary Turner also identified defendant in a lineup. We cannot say that the verdict would have been different had the prosecution not stated that the witnesses were afraid of defendant.

¶ 67 D. Jury Instructions

¶ 68 Defendant next contends that the jury instruction on attempted first degree murder that the jury received misstated the law. However, defendant failed to object to this jury instruction at trial, and failed to include this issue in a posttrial motion. Illinois Supreme Court Rule 366(b)(2)(i) (eff. Feb. 1, 1994) provides that "[n]o party may raise on appeal the failure to give an instruction unless the party shall have tendered it." In addition, our supreme court has held that a defendant will be deemed to have procedurally defaulted his right to obtain review of any supposed jury instruction error if he failed to object to the instruction or offer an alternative at trial, and did not raise the issue in a posttrial motion. *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007).

¶ 69 Limited relief from this principle is provided by Illinois Supreme Court Rule 451(c) (eff. Apr. 8, 2013), which states that "substantial defects" in criminal jury instructions "are not waived by failure to make timely objections thereto if the interests of justice require." The purpose of Rule 451(c) is "to permit correction of grave errors and errors in cases so factually close that fundamental fairness requires that the jury be properly instructed." *People v. Sargent*, 239 Ill. 2d 166, 189 (2010). The rule is coextensive with the plain-error clause of Illinois Supreme Court Rule 615(a) (eff. Oct. 1, 2014), which provides:

> "An error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court."

¶ 70 The plain error doctrine permits a reviewing court to considered unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *Piatkowski*, 225 Ill. 2d at 565. A reviewing court first must determine whether error occurred at all. If error is found, the court then proceeds to consider whether either of the two prongs of plain error has been satisfied. *Sargent*, 239 Ill. 2d at 189. Under both prongs, the burden of persuasion lies with the defendant. *Id.*

¶ 71 In this case, defendant contends that the jury instruction given for attempted first degree murder was erroneous because it did not specify the victims. However, this court has held that an attempted first degree murder instruction need not include the name of the intended victim. *People v. Valadovinos*, 2014 IL App (1st) 130076, ¶ 28; *People v. Malone*, 37 Ill. App. 3d 185, 191 (1976). In *Malone*, the court noted that the name of the victim was not an element of attempted first degree murder, nor is there a place for the victim's name in the Illinois Pattern Jury Instruction. *Malone*, 37 Ill. App. 3d at 191.

¶ 72 Defendant nevertheless claims that the jury should have been instructed that it had to find that defendant specifically intended to kill the victim named in each count. Accordingly, because the jury was only given one instruction for both counts, indicating that the jury could find him guilty of attempt if he had "the intent to kill an individual" and made a substantial step

towards killing "an individual," the jury could have found defendant guilty on both counts based on his intent to kill any individual, including the deceased victim. Defendant relies on *People v. Anderson*, 2012 IL App (1st) 103288, for this proposition.

¶ 73 In *Anderson*, the court found that the inclusion in the jury instructions of an attempted first degree murder victim's name was necessary because the jury could have rendered a guilty verdict for the attempted first degree murder by finding that defendant attempted to murder any "individual," including the deceased victim. *Id*. at ¶ 59. The court found that it was probable that the ordinary person in the jury would not understand that the subject of the attempted first degree murder charge was only the attempted murder victim, and not the murder victim as well. *Id*. at ¶ 61. The trial court in *Anderson* noted that at the beginning of trial the court read to the jury the charges of indictment, which stated that the defendant committed the offense of attempted first degree murder in that he shot at the attempted first degree murder victim. The State also informed the jury at the conclusion of trial during its closing arguments that the subject of the attempted first degree murder charge was the attempted first degree murder victim. However, this court found that because the jury was instructed before deliberation that the indictment and closing arguments were not to be considered as evidence against defendant, the failure to specify the subject of the attempted murder charge rendered the instruction erroneous under the "narrow set of facts of this case." *Id*. at ¶ 64.

¶ 74 While the facts of *Anderson* are similar to the facts of this case, we reach a different conclusion. In the case at bar, in addition to the jury hearing in *voir dire* and in closing arguments that the subjects of the attempted first degree murder charges were Stephanie Campbell and Ashley Stewart, the jury also received verdict forms that each juror had to sign. Two of those verdict forms read:

"We the jury find the defendant, Santos Calaff, Guilty of Attempt First Degree Murder of Ashley Stewart;" and

"We the jury find the defendant, Santos Calaff, Guilty of Attempt First Degree Murder of Stephanie Campbell."

¶ 75 In this case, we do not find that the ordinary juror would be confused as to which individual each of the attempted murder charges pertained to, and thus we find that no error occurred in rendering the jury instruction for attempted first degree murder. Because we find no error here, we accordingly find that defendant did not meet his burden of persuasion in showing plain error. *Sargent*, 239 Ill. 2d at 189

¶ 76 E. Questioning by Trial Judge

¶ 77 Defendant's next contention is that during the hearing on his posttrial motion, the trial judge assumed the role of a prosecutor when he asked a witness "dozens" of questions and guided the prosecutor in her questioning. At the hearing, the defense called Richard Lopez, a newly discovered witness, who testified that he saw a man named Jovany (Garfield) commit the shooting in question. Defendant contends that the trial judge showed a predisposition against Lopez, which was inconsistent with his judicial role. Specifically, defendant takes issue with the fact that the trial judge asked Lopez where he and defendant were housed in Cook County jail, and when each one was there. After the prosecution tried to rest its case, the trial judge asked the prosecutor if she was sure she was done with questioning. When questioning resumed, the trial judge asked several questions of Lopez. After both parties rested, the trial judge asked several more questions. His questions included the contents of what defendant and Lopez talked about, the location of the conversation within the jail, the contact that Lopez had with defendant before jail, the gang alliances of both Lopez and defendant, and Lopez's contact with defense counsel

before trial. The trial judge stated he "felt [he] was duty bound to look at it closely and try [to] ascertain who this person was, whether he came from, and what his association with the defendant was."

¶ 78 It is generally never improper for a trial judge to aid in bringing out the truth in a fair and impartial manner. *People v. Kuntz*, 239 Ill. App. 3d 587, 591 (1993). See Evid. Rule 614 (eff. Feb. 1, 2015) (the court may interrogate witnesses).

> "It is the judge's duty to see that justice is done, and where justice is liable to fail because a certain fact has not been developed or a certain line of inquiry has not been pursued, it is his duty to interpose and either by suggestions to counsel or an examination conducted by himself avoid the miscarriage of justice, but in so doing he must not forget the function of the judge and assume that of the advocate." *People v. Lurie*, 276 Ill. 630, 641 (1917).

¶ 79 It is an abuse of discretion for a trial judge to assume the role of an advocate. *People v. Smith*, 299 Ill. App. 3d 1056, 1064 (1998). See also *Kuntz*, 239 Ill. App. 3d at 592 (abuse of discretion for trial judge to prompt the State to seek a continuance in order to rebut the defendant's case with additional evidence); *In re R.S.*, 117 Ill. App. 3d 698, 704-05 (1983) (abuse of discretion for trial judge to call witness to testify).

¶ 80 In the case at bar, we find that it was not an abuse of discretion for the trial judge to question Lopez. Lopez claimed at the posttrial hearing that a different man had been the shooter on the night in question. Accordingly, in order to avoid a miscarriage of justice, it was the trial court's duty to either question Lopez himself or to suggest that the prosecution question Lopez on several aspects of Lopez's testimony. The trial judge's questions were posed to elicit the truth or to bring enlightenment on material issues, and were not argumentative or hostile. See *People v.*

Jackson, 409 Ill. App. 3d 631, 649 (2011). The trial judge did not rely on evidence outside the record when he questioned Lopez on the layout of Cook County jail and the affiliations of Chicago gangs. Rather, the trial judge's questions related to the relationship between defendant and Lopez, which was a central issue to Lopez's testimony at the posttrial hearing.

¶ 81 F. Sentencing

¶ 82 Defendant's next contention on appeal is that the trial court relied on a fact not in evidence in imposing defendant's life sentence. Specifically, defendant contends that the trial court mistakenly relied on the fact that defendant was a "lifelong gang member" and that the shooting was "related to gangs," and that therefore the case should be sent back for a new sentencing hearing. Defendant concedes that he did not preserve this issue for appeal, but nevertheless urges us to review this issue under the plain error doctrine, as set forth above. Because "an allegation that a trial court relied upon an improper factor in sentencing implicates a defendant's fundamental right," we will reach such allegations notwithstanding waiver. *People v. Ross*, 303 Ill. App. 3d 966, 984 (1999).

¶ 83 The Illinois Constitution requires that all penalties be determined "both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. A sentence within the statutory limits for the offense will not be disturbed unless the trial court has abused its discretion. *People v. Coleman*, 166 Ill. 2d 247, 258 (1995). It is well established that a trial court has wide latitude in sentencing a defendant so long as it neither ignores relevant mitigating factors nor considers improper factors in aggravation. *People v. Roberts*, 338 Ill. App. 3d 245, 251 (2003).

¶ 84 In making its sentencing findings, the trial court noted that it was doing so in consideration of the evidence presented at trial, the pre-investigation report, the evidence offered

in aggravation and mitigation, the financial impact of defendant's incarceration, the arguments of the attorneys and the treatment alternatives, the victim's impact statement, and the statements from defendant. The trial court then stated that defendant "is a lifelong gang member," and that he lied to the probation officer that interviewed him for the presentence investigation. The trial court stated that defendant told the officer that he was not affiliated with a gang and then Lopez, defendant's witness, indicated that defendant was an active gang member. The trial court stated that he had no doubt in his mind that defendant was a member of a gang and that "[o]ne need[s] to look no further than his current choice of facial art to understand completely by way of the many tattoos on his face and his neck." The judge then stated, "[t]hat certainly doesn't have anything to do with sentencing." The trial court further stated that defendant shot at passengers in the car "solely because they had failed to recognize his gang signal when it was made."

¶ 85 We agree with defendant that the court's statements that defendant was a lifelong gang member, and that defendant shot at the victims because they failed to recognize his gang signal, were contrary to the evidence. There was no evidence presented at trial that defendant was a gang member, or that the hand gesture he made was a gang signal. The only testimony regarding defendant's supposed gang affiliation was made by Lopez, and the trial court specifically found Lopez's testimony to be "perjurious."

¶ 86 A sentence based on improper facts will not be affirmed unless the reviewing court can determine from the record that the weight placed on the improperly considered aggravating factor was so insignificant that it did not lead to a greater sentence. *People v. Heider*, 231 Ill. 2d 1, 21 (2008). Here, based on the record, we cannot say that the trial court's belief that defendant was a gang member played an insignificant role in the trial court's calculation of defendant's sentence. As defendant notes, of the two pages of transcript in which the trial court made its

sentencing findings, a majority of the discussion was regarding defendant's gang affiliation, gang signals, and tattoos. Accordingly, we remand for the sole purpose of a new sentencing hearing, based only on those facts in evidence. See *Ross*, 303 Ill. App. 3d at 985.

¶ 87 G. Mittimus

¶ 88 Defendant's final contention on appeal is that his convictions violate the one-act, one-crime doctrine. Under the one-act, one-crime doctrine, a defendant may be convicted of only one crime resulting from a single act, and, accordingly, where two convictions arise from the same physical act, sentence should be imposed on the more serious offense and the less serious offense should be vacated. *People v. Artis*, 232 Ill. 2d 156, 170 (2009). As such, defendant's most serious offense to each victim – the first degree murder of the victim, the attempted first degree murder of Ashley Stewart, and the attempted first degree murder of Stephanie Campbell – will be permitted to stand. The remaining conviction of aggravated discharge of a firearm should be vacated. Additionally, as defendant notes, the mittimus reflects that defendant was convicted of two first degree murder charges. The State admits that defendant's mittimus reflects that defendant was convicted of two counts of first degree murder: intentional and strong probability. Only the most serious version of the offense, intentional murder, should have survived. *People v. Fuller*, 205 Ill. 2d 308, 346 (2002). Accordingly, defendant's first degree murder conviction based on strong probability should be vacated. The new mittimus issued after the new sentencing hearing should reflect these changes.

¶ 89 III. CONCLUSION

¶ 90 For the foregoing reasons, we affirm the judgment of the Circuit Court of Cook County, but remand for a new sentencing hearing.

¶ 91 Affirmed in part, remanded in part.