SIXTH DIVISION
March 4, 2016

No. 1-13-2307

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 18047 (02)
WALLACE SIMMONS,	)	
	)	Honorable
Defendant-Appellant.	)	Brian Flaherty,
	)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hall and Delort concurred in the judgment.

ORDER

Held: We affirmed defendant's convictions of armed robbery, finding there was no error in the giving of the jury instructions or in admitting evidence of prior crimes or in the closing argument, and he was not prejudiced by the alleged discovery violations.

¶ 1 A jury convicted defendant of two counts of armed robbery and the trial court sentenced him to two concurrent terms of 30 years' imprisonment. On appeal, defendant contends: the trial court erred by refusing to instruct the jury on simple robbery; the trial court erred by giving the jury Illinois Pattern Jury Instructions, Criminal, No. 3.13 (4th ed. 2000) (IPI 3.13), over his objection and admitting evidence of his five prior convictions for robbery offenses; he was denied his right to a fair trial when the State committed discovery violations; the prosecutor

made improper remarks during closing arguments; and the cumulative effect of all the errors denied him a fair trial. We affirm.

¶ 2 At trial, Salem Hijazin testified he owned ABC Wireless, a cellular phone store, with his father, Ghazi Hijazin. On August 19, 2008, Salem arrived at the store in the early afternoon. Ghazi and a family friend, Jamil Zumot, were there. Defendant and codefendant Everett West entered the store and asked Salem about some phones. Salem reached down behind a counter to pick up a phone, and as he stood back up, codefendant held a gun to his chin and said: "Don't move, or I will kill you."

¶ 3 Keeping the gun to Salem's chin, codefendant brought him to where Ghazi and Jamil were behind the counter. Defendant then jumped over the counter and loudly told them to go in the back room. They complied.

¶ 4 Defendant and codefendant forced Salem, Ghazi and Jamil to lay face down on the floor, side by side. Defendant reached into Salem's pockets and took out his wallet, money, some receipts from Walmart and Boston Market, a pack of gum and lip balm. Defendant also took a wallet from Ghazi. Salem could not remember what defendant took from Jamil.

¶ 5 Codefendant stood Salem up. While keeping the gun to his head, codefendant brought Salem to his office and demanded to see the safe. Salem stated they did not have a safe inside the store. Defendant came into the office, removed a videotape that was inside a surveillance camera system, and placed it into a plastic bag.

¶ 6 Defendant left, then returned to the office and said there was a police officer "in the front." Defendant and codefendant started panicking, and they brought Ghazi and Jamil, who had been lying on the floor this whole time, into the office with Salem.

¶ 7 The office contained a one-way mirror which allowed them to view the front of the store. Salem and codefendant looked at the mirror and saw a female, uniformed police officer whom Salem recognized as Officer Flinchum. Codefendant pointed the gun toward Salem's temple and told him to stay quiet.

¶ 8 Salem punched codefendant in the face, gained control of the gun and threw it on the ground. Ghazi picked up the gun and used it to strike codefendant in the head. Meanwhile, defendant struck Jamil in the back of the neck.

¶ 9 Defendant ultimately ran out the front of the store, pushed Officer Flinchum to the floor, and ran east on 147th Street. Salem chased after defendant with the gun in his hand, but Officer Flinchum ran after Salem and told him to give her the gun, which he did. Salem flagged down another officer, Detective Delaney, and told him defendant was running on 147th Street.

¶ 10 Detective Delaney subsequently captured defendant "minutes" later and brought him back to the store in a car, where he was identified by Salem.

¶ 11 Ghazi testified at trial and gave a substantially similar account of defendant's and codefendant's armed robbery, including how codefendant forced them to lie face-down at gunpoint while defendant searched their pockets and took Ghazi's wallet and $484. Ghazi also identified defendant when he was driven back to the store following the armed robbery.

¶ 12 Officer Flinchum testified that on August 19, 2008, she was in full uniform and conducting patrol in a marked squad car. At approximately 1:30 p.m., she walked into ABC Wireless to have a phone repaired. She had been to ABC Wireless before, and knew the owners.

¶ 13 When she walked in, Officer Flinchum noticed that nobody was behind the counter, which was unusual. Suspecting that something was wrong, Officer Flinchum moved closer to

the front counter and heard a muffled argument coming from the back room. Officer Flinchum radioed dispatch and told them of the disturbance.

¶ 14 Officer Flinchum began to advance to the back room to investigate, when suddenly defendant came running out of the back room towards her with a black bag in his hand. Defendant knocked her to the ground and ran past her. Salem followed behind defendant, with a gun in his hand. Salem told Officer Flinchum that defendant and codefendant were robbing them and had threatened to kill him. Officer Flinchum again radioed dispatch, giving them a description of defendant, and took the gun from Salem.

¶ 15 Detective Zamiar testified that at approximately 1:30 p.m. on August 19, 2008, he heard a dispatch of a disturbance at ABC Wireless. Detective Zamiar drove to the store and saw defendant running away from ABC Wireless in a southeasterly direction.

¶ 16 Detective Zamiar left his vehicle and chased after defendant on foot along with some other officers who had joined the pursuit. Defendant eventually ran into a Walgreen's parking lot located at 147th Street and Kedzie Avenue, where Detective Zamiar tackled him and he was placed in custody.

¶ 17 Sergeant Peterson patted defendant down and recovered rubber gloves, $310, Salem's ID, lip balm, two receipts from Walmart and Boston Market, and a pack of gum. Defendant was transported to ABC Wireless for a showup, where Salem, Ghazi and Jamil all identified him.

¶ 18 Meanwhile, Salem flagged down Detective Delaney and told him there was a second offender who had fled eastbound in an alley behind the store. Detective Delaney went to the alley and was redirected by Ghazi, who indicated the subject was now running northbound through a residential yard. Detective Delaney exited his car and went to the residential yard,

which was about a 30-second walk from the store. In the yard, Detective Delaney found Ghazi's wallet and its contents, including Ghazi's ID, insurance card, and photographs.

¶ 19 Detective Delaney discovered codefendant hiding behind the garage, and he was placed in custody and walked back to the store for a show-up. Salem, Ghazi, and Jamil all identified codefendant as the person who had been holding the gun during the armed robbery. Officers recovered from codefendant his keys to a Ford Crown Victoria, as well as $492.

¶ 20 Detective Zamiar searched the Ford Crown Victoria and observed the butt of a revolver sticking out from under the driver's seat. Ownership papers in the glove compartment showed codefendant to be the owner of the vehicle.

¶ 21 Lauren Wicevic, a latent print examiner with the Illinois State Police, testified she did not develop any ridge detail or latent prints from codefendant's firearm.

¶ 22 The State presented other-crimes evidence through the testimony of Todd Bullaro, which was admitted to show intent, identity, lack of mistake and motive. Mr. Bullaro testified that on January 6, 2005, he was working at a Game Stop located at 79th Street and Cicero Avenue. Shortly before closing, defendant, codefendant, and a third person entered the store. Codefendant asked for help looking for a game, then pointed a gun at Mr. Bullaro's face while defendant locked the door. The third person stood next to codefendant. Codefendant led Mr. Bullaro and the other two employees to the back room and had them lie down on the floor.

¶ 23 Defendant entered the room, held a knife to the back of Mr. Bullaro's neck, and led him to the front of the store to open the cash registers and the safe. Codefendant remained in the back.

¶ 24 Defendant continued to hold the knife to Mr. Bullaro's neck while he removed money from the safe and cash register. Defendant took Mr. Bullaro to the back room, and then defendant, codefendant, and the third person fled the store. Mr. Bullaro called 9-1-1.

¶ 25 On cross-examination, Mr. Bullaro testified that on January 7, 2005, he viewed a line-up at the police station and identified defendant and codefendant. Mr. Bullaro denied that his identification of defendant was "tentative," and denied telling the police officer that he was unsure if defendant was in the store at the time of the robbery.

¶ 26 After the State rested, defendant testified that on August 19, 2008, he and codefendant, his nephew, drove to a mall to purchase a birthday gift for defendant's wife. Codefendant, who was driving a 2002 Crown Victoria, never showed defendant a gun or asked him to participate in an armed robbery.

¶ 27 On the way to the mall, codefendant said he needed to make a quick stop at ABC Wireless. They both entered the store and saw Ghazi and Jamil. Codefendant asked whether Salem was in, and Ghazi shook his head no, so they left.

¶ 28 Defendant and codefendant went to the mall, where defendant bought the gift for his wife. Codefendant then drove them back to ABC Wireless, and they entered the store. Salem was standing behind the counter and the other two employees were sitting down. Codefendant approached Salem and they greeted each other and had a brief conversation. Codefendant asked Salem if he had "the rest of the money for the phone," and then the two of them went to the back room.

¶ 29 Defendant remained in the front of the store, looking at cell phone cases. After about two or three minutes, defendant heard loud, aggressive cursing coming from the back room. Jamil went to the back room and defendant followed. Defendant saw Salem and codefendant

"engulfed" against a wall. Jamil separated them and defendant asked codefendant what was happening. Codefendant screamed at Salem that he wanted the rest of his money or his phone back.

¶ 30 Defendant tried to push codefendant towards the exit. At some point, defendant stepped on codefendant's cell phone. Defendant bent down, retrieved the cell phone "and his other items off the ground" and placed them in his pockets. Defendant did not look through those items prior to picking them up.

¶ 31 Codefendant screamed and defendant saw that Salem had a gun in his hand. Codefendant shoved defendant into Salem and fled the store. Defendant grabbed Salem and tried to calm him down. Defendant eventually pushed Salem aside and ran from the store. Salem still had the gun in his hand.

¶ 32 As he ran out the store, defendant heard Salem yell: "I am going to kill you." Defendant eventually ran into a Walgreen's parking lot, where he saw the police. An officer tackled him from behind and he was handcuffed and tasered.

¶ 33 Defendant denied making Salem, Ghazi and Jamil lie on the floor. Defendant also denied striking any of them, searching through their pockets, possessing a large plastic bag, taking a tape out of the VCR, or knocking down an officer when fleeing the store.

¶ 34 Defendant admitted pleading guilty to the January 6, 2005, armed robbery of Mr. Bullaro.

¶ 35 In rebuttal, the State presented five certified copies of defendant's prior convictions of robbery, armed robbery, and three aggravated robberies to impeach his credibility. Those five offenses occurred on September 1, 2006, and October 12, 2005.

¶ 36 Following all the evidence, the trial court gave the jury its instructions. In pertinent part, the court gave the jury IPI Nos. 3.13 and 3.14 over defendant's objections.

¶ 37 IPI 3.13 was given so the jury would know how to consider the evidence of the five certified copies of his prior convictions of robbery, armed robbery, and three aggravated robberies on September 1, 2006, and October 12, 2005, which were admitted in the State's rebuttal case to impeach his credibility.

IPI 3.13 states that "[e]vidence of a defendant's previous conviction of an offense may be considered by you only as it may affect his believability as a witness and must not be considered by you as evidence of his guilt of the offense with which he is charged." IPI 3.13 (4th ed. 2000).

¶ 38 IPI 3.14 was given so the jury would know how to consider Mr. Bullaro's testimony regarding defendant's armed robbery of his Game Stop store on January 6, 2005. The version of IPI 3.14 given by the trial court states:

> "Evidence has been received that the defendant has been involved in an offense other than those charged in the indictment. This evidence has been received on the issues of defendant's intent, identity, lack of mistake and motive, and may be considered by you only for that limited purpose. It is for you to determine whether the defendant was involved in that offense, and, if so, what weight should be given to this evidence on the issues of intent, identity, lack of mistake and motive." IPI 3.14 (4th ed. 2000).

¶ 39 Defendant asked that an instruction on simple robbery be given in addition to the armed robbery instructions. The trial court denied the request, stating that defendant "denied having any involvement at all in this crime. So it is armed robbery or nothing."

¶ 40 The jury convicted defendant of two counts of armed robbery. The trial court sentenced defendant to two concurrent terms of 30 years' imprisonment. Defendant appeals.

¶ 41 First, defendant contends the trial court erred by failing to instruct the jury on simple robbery. Generally, a defendant may not be convicted of an offense for which he has not been

charged; however, in some instances he may be entitled to an instruction on an uncharged lesser-included offense. *People v. Stewart*, 406 Ill. App. 3d 518, 536 (2010). Once a lesser-included offense is identified, defendant is entitled to an instruction on that lesser offense if there is "some" evidence at trial, even if only slight, by which the jury rationally could find him guilty of the lesser offense, yet acquit him of the greater. *People v. Roberts*, 299 Ill. App. 3d 926, 933 (1998). The trial court's decision regarding whether to give the lesser included offense instruction is reviewed for an abuse of discretion. *People v. Cardamone*, 381 Ill. App. 3d 462, 507-08 (2008).

¶ 42 In the present case, neither party disputes that robbery is a lesser included offense of armed robbery. The issue is whether there is some evidence by which the jury rationally could convict defendant of robbery while acquitting him of armed robbery.

¶ 43 We consider the evidence.

¶ 44 The State's witnesses, Salem and Ghazi, testified to defendant's participation in the armed robbery, specifically, that defendant and codefendant entered the store, codefendant brandished a gun and forced the men to the back of the store and had them lie face-down, at which point defendant went through their pockets and took their wallets and money. Sergeant Peterson testified that Salem's ID, money, and items taken from his pocket were found on defendant after his arrest, and Detective Delaney testified that items taken from Ghazi were found in a residential yard near where codefendant was arrested. If believed by the jury, the testimony of the State's witnesses established defendant's accountability for armed robbery.

¶ 45 By contrast, defendant's testimony was that he had no prior knowledge of, or intent to commit a robbery of the store. Defendant testified that after codefendant drove them to the store, codefendant went in back with Salem to discuss money owed for a phone, while defendant

remained in front until he heard a loud argument between Salem and codefendant. Defendant went to the back to find out what was happening, tried to push codefendant away from Salem, and in the process stepped on codefendant's cell phone. Defendant bent down, picked up the cell phone and other items that had fallen to the ground, and without looking at them he innocently placed them in his pocket because he thought they all belonged to codefendant. Salem brandished a weapon, and defendant ran away. If believed by the jury, defendant's testimony established his complete innocence of any crime.

¶ 46 Thus, a rational jury could have convicted defendant of armed robbery if it believed (as it did here) the testimony of the State's witnesses regarding his participation in a robbery at gunpoint; a rational jury also could have acquitted defendant if it believed defendant's testimony that absolutely no robbery was committed by him. However, there was no evidence by which the jury could have convicted defendant of simple robbery; the evidence was that either a robbery was committed with a firearm (armed robbery) or no robbery was committed.

¶ 47 As a rational jury could not have acquitted defendant of armed robbery and convicted him of simple robbery, the trial court committed no abuse of discretion in refusing to give a robbery instruction.

¶ 48 Next, defendant contends the trial court erred by admitting the five certified copies of his prior convictions of robbery, armed robbery, and three aggravated robberies, which were admitted in the State's rebuttal case to impeach his credibility.

¶ 49 The use of a prior conviction for impeachment purposes is governed by *People v. Montgomery*, 47 Ill. 2d 510 (1971), which held that evidence of a prior conviction may be admitted for impeachment purposes if: (1) it was punishable by death or imprisonment in excess of one year or involved dishonesty or false statement; (2) either the conviction or release from

confinement occurred less than 10 years from the date of trial; and (3) the danger of unfair prejudice does not substantially outweigh the probative value of the conviction. *Id*. at 516; *People v. Cox*, 195 Ill. 2d 378, 383 (2001).

¶ 50 This final factor involves a balancing test, probative value versus prejudicial effect. *Id*. "In determining whether a conviction's prejudicial effect substantially outweighs its probative value, the trial court must consider four factors set forth in *Montgomery*: (1) the nature of the crime, *i.e*., whether the prior conviction is veracity-related; (2) the nearness or remoteness in time of the conviction to the present trial, as it relates to the degree of defendant's rehabilitation; (3) the subsequent career of the defendant, as it also relates to the degree of defendant's rehabilitation; and (4) the similarity of the prior conviction to the present charge because such similarity often invites an improper inference of guilt rather than directing attention to the defendant's credibility." *People v. Blair*, 102 Ill. App. 3d 1018, 1026 (1981). Another factor to consider is the length of defendant's criminal record. *People v. Mullins*, 242 Ill. 2d 1, 14 (2011). The determination of whether defendant's prior convictions are admissible for purposes of impeachment is within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *People v. Atkinson*, 186 Ill. 2d 450, 463 (1999).

¶ 51 In the present case, the five prior convictions for robbery, armed robbery and aggravated robbery involved dishonesty (see *People v. Smith*, 105 Ill. App. 3d 84, 91 (1982) ("Robbery, being a species of theft, is an offense which involves dishonesty.")), and they occurred in 2005 and 2006, less than 10 years from the date of trial in 2013 and thus satisfied the first two components of the *Montgomery* test. The third component is the balancing test to determine whether the danger of unfair prejudice substantially outweighs the probative value of the convictions. Applying the balancing test, we note the robbery convictions were veracity-related

and relatively near in time to the trial, and that defendant has a lengthy criminal record dating to 2001 and no employment since 2005, thereby supporting the trial court's finding that the probative value of the convictions outweighed their prejudicial effect.

¶ 52 Defendant argues, though, that the prior offenses were of the same type of crime for which he was on trial. Although the trial court should be cautious when admitting prior convictions for the same crime as the crime charged, " 'similarity alone does not mandate exclusion of the prior conviction' "(*Mullins*, 242 Ill. 2d at 16 (quoting *People v. Atkinson*, 186 Ill. 2d at 463)), especially where, as here, defendant's testimony made up his entire defense and, therefore, his credibility was a central issue. *Id.*

¶ 53 Defendant also argues the trial court erred by admitting all five prior convictions, as the admission of so many convictions likely caused the jury to consider them for propensity purposes rather than credibility purposes.

¶ 54 *People v. Hall*, 95 Ill. App. 3d 1057 (1981), is informative. In *Hall*, the defendant there argued that the trial court abused its discretion when it allowed his veracity to be impeached by 11 prior convictions including 5 convictions similar to the offense charged. *Id*. at 1058. The appellate court affirmed, noting that 10 of the 11 convictions were "veracity related" crimes bearing a reasonable relationship to the possibility of testimonial deceit and that his 11 prior convictions demonstrated, by their frequency and recency, the likelihood of defendant's continuing potential for testimonial deceit. *Id*. at 1060. Moreover, the appellate court noted that evidence of prior multiple convictions for impeachment had long been admitted over the objection of potential undue prejudice. *Id*. The appellate court concluded that the probative value of the 11 convictions outweighed the risk of prejudice. *Id*.

¶ 55 Similarly, in the present case, all five of the prior convictions were veracity-related crimes, whose frequency and recency demonstrated the likelihood of defendant's continuing potential for testimonial deceit. We find no abuse of discretion in the trial court's determination that the probative value of the five convictions outweighed the risk of prejudice.

¶ 56 Next, defendant contends the trial court erred by giving IPI 3.13 over his objection so the jury would know how to consider the evidence of the five certified copies of defendant's prior convictions of robbery, armed robbery, and three aggravated robberies.

¶ 57 As discussed earlier in this order, IPI 3.13 states that evidence of defendant's previous conviction of an offense may only be considered as it may affect his believability as a witness and must not be considered as evidence of his guilt of the offense with which he is charged. IPI 3.13 (4th ed. 2000).

¶ 58 The committee note to IPI 3.13 states that "[t]his instruction should be given *only at the request of the defendant* when there has been impeachment of the defendant by proof of a prior conviction." (Emphasis added.) IPI 3.13, Committee Note, at 100.

¶ 59 This court has noted that IPI 3.13 "does not necessarily benefit a defendant by limiting the purposes for which the jury may consider the prior conviction; rather, the instruction can also serve to highlight to the jury that the defendant has a prior conviction, and *that*, presumably, is the reason why the committee comments specify that the instruction may be given only at the defendant's request." (Emphasis in original.) *People v. Fultz*, 2012 IL App (2d) 101101, ¶ 68. Accordingly, we held that it is error to give IPI 3.13 over defendant's objection. *Id.* ¶ 69.

¶ 60 However, the giving of IPI 3.13 over defendant's objection is harmless if the trial would not have had a different result if the instruction had not been given. Id. ¶ 73.

¶ 61 Here, the evidence against defendant, discussed earlier in this order, was so overwhelming that the result of the trial would not have been different even if IPI 3.13 had not been given. Such evidence includes the testimony of two eyewitnesses identifying defendant's participation in the armed robbery with codefendant, corroborative police testimony regarding defendant's fleeing from the scene and knocking over an officer and his identification at the showup, the recovery of stolen items from defendant's person and from near where codefendant was arrested, and the other-crimes evidence. Accordingly, the error in giving IPI 3.13 over defendant's objection was harmless.

¶ 62 Next, defendant argues that the trial court erred by failing to specify to the jury which offenses were covered in IPI 3.13 and which offenses were covered in IPI 3.14. The five certified copies of defendant's prior convictions of robbery, armed robbery, and aggravated robbery admitted into evidence on rebuttal were meant to be covered under IPI 3.13, while the evidence of defendant's robbery of Mr. Bullaro's Game Stop was meant to be covered under IPI 3.14. Defendant argues that the jury may have been confused as to which instruction covered which offense.

¶ 63 Defendant forfeited review by failing to make this objection at trial. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Even if the issue had not been forfeited, any error in the giving of both IPI 3.13 and IPI 3.14 without specifying which offenses were covered under which instruction was harmless given the overwhelming evidence of defendant's guilt discussed earlier in this order.

¶ 64 Next, defendant contends he was denied a fair trial when the State waited until the first day of trial to disclose the name of Mr. Bullaro as the witness who would be testifying about the January 6, 2005, armed robbery of the Game Stop, and when the State waited until the third day

of trial before turning over a police report indicating that Mr. Bullaro's identification of defendant had been "tentative." Defendant argues that the State violated Illinois Supreme Court Rule 412 (Ill. S. Ct. R. 412 (eff. Mar. 1, 2001)), and Rule 415 (Ill. S. Ct. R. 415 (eff. Oct. 1, 1971)), by failing to more promptly disclose Mr. Bullaro, by failing to use diligent good-faith efforts to discover the police report, and by failing to promptly disclose the police report.

¶ 65 The purpose of discovery is to eliminate surprise and unfairness and to afford an opportunity to investigate. *People v. Strobel*, 2014 IL App (1st) 130300, ¶ 9. Although compliance with the discovery rules is mandatory, failure to comply with the rules does not require reversal unless prejudice is shown. *People v. Taylor*, 409 Ill. App. 3d 881, 908 (2011). "The burden of showing surprise or prejudice is upon the defendant, and the failure to request a continuance is a relevant factor in determining whether the testimony actually surprised or unduly prejudiced the defendant." *Id*. "Our standard of review evaluating a discovery violation is whether the trial court abused its discretion." *Id*.

¶ 66 We begin our analysis by setting forth the relevant facts related to the alleged discovery violations.

¶ 67 On November 5, 2008, defendant requested a list of State witnesses and their written or recorded statements. On March 9, 2011, the State filed a motion to admit evidence of five other armed robberies committed by defendant on December 24, 2004; January 2, 2005; January 6, 2005, at 11 a.m. and another at 9 p.m.; and on January 7, 2005. The State's motion did not disclose the names of any potential witnesses. On June 29, 2011, the trial court held a hearing on the State's motion and ruled that four of the five other crimes were admissible; the only one inadmissible was the 11 a.m. robbery committed on January 6, 2005, as it was the only one that did not also involve codefendant.

¶ 68 At a hearing on November 20, 2012, the State indicated that it would present evidence of two of the other-crimes cases, but again did not disclose for the record the names of any potential witnesses. The trial court ordered the State to let defense counsel know which two cases it would be introducing, and set a trial date of February 19, 2013.

¶ 69 On February 19, 2013, prior to jury selection, the State indicated it would introduce evidence of only one of the other crimes, the January 6, 2005, armed robbery occurring at 9 p.m. The following colloquy then ensued:

> "[The Court]: Is the victim in that one Todd Bullaro?
>
> [Assistant State's Attorney]: Yes, Judge. He'd be the only witness and evidence we would be introducing at trial.
>
> [The Court]: Ok. I assume [defense counsel is] objecting?
>
> [Defense Counsel]: Yes, we would.
>
> [The Court]: Over your objection previously stated[1] reasons, it will be allowed in."

¶ 70 On February 21, 2013, Mr. Bullaro testified regarding the January 6, 2005, armed robbery of his Game Stop at 9 p.m. During cross-examination, defense counsel questioned Mr. Bullaro as to whether his identification of defendant was "tentative" and whether he told police he was not sure if defendant had been in his store on the day of the armed robbery. Mr. Bullaro responded "no" to both questions.

¶ 71 Following Mr. Bullaro's testimony, the State rested. Defense counsel then indicated to the court that he had only received the police report involving the armed robbery of Mr. Bullaro's store that morning. Counsel indicated that the report stated Mr. Bullaro only made a "tentative

[1] At the June 29, 2011, hearing on the State's motion, defendant argued the other crimes evidence was overly prejudicial.

identification" of defendant to the police. Defense counsel explained that because the police report contradicted Mr. Bullaro's testimony of having made a firm identification of defendant, he would "need to call the officer who conducted this interview to corroborate." The trial court gave defense counsel until 10:30 the next morning to secure his witness.

¶ 72 The next day, February 22, 2013, defense counsel informed the trial court that the two officers he was seeking to call with regard to Mr. Bullaro's identification of defendant were retired and no longer employed with the Chicago police department. Defense counsel then made an offer of proof as to the officers' report, indicating that Mr. Bullaro only made a "tentative" identification of defendant in a lineup.

¶ 73 On appeal, defendant first argues the State violated the discovery rules by failing to disclose Mr. Bullaro's name and any relevant written or recorded statements by him until the first day of trial. See Ill. S. Ct. R. 412 (eff. Mar. 1, 2001) (requiring the State, upon written motion of defense counsel, to disclose the names and addresses of persons whom it intends to call as witnesses, together with their relevant written or recorded statements); Ill. S. Ct. R. 415 (eff. Oct. 1, 1971) (providing a continuing duty for a party to notify the other side of additional material subject to disclosure).

¶ 74 As discussed, the record shows that on March 9, 2011, the State filed a motion to admit evidence of five other armed robberies committed by defendant, including one at 9 p.m. on January 6, 2005. On the first day of trial, February 19, 2013, the State disclosed for the record that it was going to introduce evidence of that January 6 armed robbery, and the trial court questioned whether the victim in that case was Mr. Bullaro. The State responded affirmatively and indicated that he would be the only witness to testify about that armed robbery. Defense counsel did not claim he was unaware of Mr. Bullaro, that the State had failed to previously

inform him that it would be calling Mr. Bullaro as a witness, or that a violation of Rule 412 or 415 had been committed. Nor did defense counsel seek a continuance, despite the fact that *voir dire* had not yet begun. On these facts, defendant has failed to show any prejudice and therefore his argument for reversal based on the alleged discovery violation related to the disclosure of Mr. Bullaro fails.

¶ 75 With respect to the alleged discovery violation related to the State's failure to earlier disclose the police report indicating that Mr. Bullaro's identification of defendant had been tentative, defendant has failed to show any prejudice given that he admitted to the armed robbery of Mr. Bullaro and pleaded guilty thereto. Nor was there any prejudice given all the other evidence against defendant in this case. Accordingly, defendant's argument for reversal fails.

¶ 76 Defendant argues his defense counsel was ineffective to the extent that he failed to investigate the other-crimes evidence and failed to seek a continuance after the disclosure of Mr. Bullaro on the first day of trial. To prevail on a claim of ineffective assistance, defendant must show his counsel's performance was objectively unreasonable and that he was prejudiced thereby, such that a reasonable probability exists that but for counsel's errors, the result of the trial would have been different. *People v. Johnson*, 2014 IL App (2d) 121004, ¶ 75. As discussed, defendant was not prejudiced given all the admissible evidence against him, and therefore his claim of ineffective assistance fails.

¶ 77 Next, defendant contends the State made improper remarks during closing arguments. Prosecutors are given wide latitude when making their closing arguments. *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007). During closing arguments, the State may comment on the evidence presented and draw reasonable inferences therefrom. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005).

¶ 78 On review, we consider the challenged remarks in the context of the entire record as a whole, in particular the closing arguments of both sides. *People v. Williams*, 313 Ill. App. 3d 849, 863 (2000). Reversal based on closing argument is warranted only if the prosecutor made improper remarks that engendered "substantial prejudice," that is, if the remarks constituted a material factor in defendant's conviction. *Wheeler*, 226 Ill. 2d at 123.

¶ 79 The appropriate standard of review for closing arguments is unclear. In *Wheeler*, our supreme court applied a *de novo* standard of review to the issue of prosecutorial statements during closing arguments. *Id*. at 121. However, in *Wheeler*, the supreme court also cited with favor its decision in *People v. Blue*, 189 Ill. 2d 99 (2000), which applied an abuse of discretion standard. We need not resolve the issue of the proper standard of review in the present case, as our holding would be the same under either standard.

¶ 80 Initially, we note defendant forfeited review of several of the comments made by the prosecutor during closing arguments by failing to object to them at trial. *Enoch*, 122 Ill. 2d at 186. Defendant argues for plain-error review. The plain-error doctrine allows the reviewing court to consider unpreserved errors under two circumstances. *People v. Herron*, 215 Ill. 2d 167, 178 (2005). First, when the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence, a reviewing court may consider the error to preclude an argument that an innocent person was wrongly convicted. *Id*. Second, where the error is so serious that defendant was denied a substantial right, and thus a fair trial, a reviewing court may consider the error to preserve the integrity of the judicial process. *Id*. at 179.

¶ 81 Defendant here argues for plain-error review only under the closely-balanced prong. As discussed earlier in this order, the evidence in this case was overwhelming, *not* closely-balanced. Accordingly, defendant has not demonstrated plain error.

¶ 82 We proceed to address the one prosecutorial comment during closing argument that was objected to and preserved for review.

¶ 83 The prosecutor stated:

> "Now, even after all this that you heard, even after everything that we talked about, how do you know even more what the defendant's intention was? How do you know what his motivation was when he walked into that ABC Wireless store, because he did the same exact-this-he did this the exact same way with the exact same person in 2005."

¶ 84 Defendant contends on appeal that his 2005 armed robbery of Mr. Bullaro's Game Stop was only relevant and admissible to show his intent and lack of mistake at the time of the charged crime here, but that the prosecutor's remark improperly informed the jury that it could consider his 2005 crime as proof of his propensity to commit the charged crime as well as his motivation for committing the charged crime.

¶ 85 Review of the record shows that after the comment at issue, the prosecutor stated:

> "When Todd Bullaro told you about what happened to him at Game Stop in January of 2005, that testimony told you for certain what this defendant's intent was. That testimony told you for certain when the defendant walked into that ABC Wireless store it wasn't to look for a phone. It wasn't to have a conversation. It wasn't to accompany his nephew. It was to steal at gunpoint from the store owners."

¶ 86 Viewing the closing arguments as a whole, the prosecutor correctly informed the jury that it was to consider Mr. Bullaro's testimony when determining defendant's intent upon entering the ABC Wireless store. We find no error.

¶ 87 Further, even if there *was* error, it was harmless given all the evidence against defendant.

¶ 88 Finally, defendant contends the cumulative effect of the foregoing errors denied him a fair trial. For all the reasons discussed earlier in this order, none of the errors raised by defendant either individually or cumulatively denied him a fair trial.

¶ 89 We note that in his appellant's brief, defendant raised an alleged violation of *People v. Krankel*, 102 Ill. 2d 181 (1984). Subsequently, in his reply brief, defendant withdrew the issue and, therefore, we do not consider it further.

¶ 90 For the foregoing reasons, we affirm the circuit court. As a result of our disposition of this case, we need not address the other arguments on appeal.

¶ 91 Affirmed.