2016 IL App (1st) 133184-U

FIRST DISTRICT
JANUARY 11, 2016

No. 1-13-3184

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. 11 CR 15848
	)	
CHARLES RICHARD,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant was not entitled to a reduction of his first degree murder conviction to second degree murder, as a rational jury could find that the defendant failed to prove the existence of a mitigating factor by a preponderance of the evidence. In addition, the defendant was not entitled to a new trial either on the basis of the admission of testimony suggesting a prior arrest, or due to the prosecutor's purportedly improper comments in closing argument.

¶ 2 Defendant-appellant Charles Richard appeals from his conviction for first degree murder following a jury trial. He asserts that his conviction should be reduced to second degree murder because he established a mitigating factor of self-defense or serious provocation. Alternatively, he seeks a new trial based upon the admission of testimony indicating a prior arrest, and

separately asserts that a new trial is warranted due to improper remarks by the State's attorney in closing arguments. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 On August 23, 2011, the defendant, who was 21 years old, killed Ricky Randolph (Randolph), a 48-year old man, by beating him with a hammer in Randolph's apartment. The defendant was arrested after he was found in possession of Randolph's vehicle. The defendant was charged with two counts of first degree murder (intentional murder and felony murder), armed robbery, and possession of a stolen motor vehicle.

¶ 5 The defendant's trial commenced on April 1, 2013. The State first called Sylvester Randolph III (Sylvester), a nephew of Randolph. Sylvester testified that at the time of his death, Randolph resided in the basement apartment at 1450 South Kenneth in Chicago.

¶ 6 On August 25, 2011, Sylvester went to Randolph's apartment after he failed to return a phone call. Sylvester testified that in the bedroom area, he saw Randolph's body lying face up on the floor next to his bed, dressed only in underwear. A comforter covered the body from the waist up, and Sylvester observed the head of a hammer next to Randolph's body. He left and asked a relative to call police. Sylvester later informed police that Randolph's car, a Chevy Cruze, was missing.

¶ 7 The State next called Eddie Meeks III, who testified that Randolph was his best friend. Meeks testified that he visited Randolph's apartment on August 25, 2011, after being informed of Randolph's death. At the scene, Meeks spoke to Detective Patrick Thelen of the Chicago police.

¶ 8 The detective subsequently drove with Meeks in a police car to a neighborhood a few miles from Randolph's apartment. Near the 3500 block of Polk Street, Meeks informed

Detective Thelen that he saw Randolph's parked Chevy Cruze. Meeks recalled seeing three males crossing the street from the car, including the defendant.

¶ 9 Detective Thelen stopped and approached the individuals. At that point, Meeks observed the defendant give something to one of the other individuals. Meeks later saw Detective Thelen recover the keys to Randolph's car from that individual. Meeks also testified that the defendant was wearing one of Randolph's hats and a pair of Randolph's shoes. On cross-examination, he acknowledged that he had told Detective Thelen about "the people who [Randolph] hung around" and had directed the detective to the area of the arrest.

¶ 10 The State next called Detective Thelen. He testified that he observed four males, including the defendant, exiting the vehicle. Detective Thelen was informed by Meeks that after exiting the vehicle, the defendant transferred something to another individual, who was later identified as Anton Davison. Detective Thelen recovered the key to Randolph's car from Davison. The four individuals, including the defendant, were taken into custody.

¶ 11 The State next called Davison, who testified that he was 16 years old in August 2011. Davison stated that the defendant was a cousin of Davison's oldest brother, Marquis Stampley. At the time, Stampley and Davison lived in the same home.

¶ 12 Davison testified that on the morning of August 24, 2011, the defendant came to his house, showed him a phone and a camera, and asked if Davison knew anyone that wanted to purchase them. Davison told the defendant that he did not know of any purchasers.

¶ 13 Davison testified that the defendant left the house through the back door. He saw the defendant remove his pants, a shirt, and a pair of shoes and put them in a garbage bag, and then walk with the bag down an alley. The defendant put on new clothes and returned to the house.

When Davison asked him about the old clothes, the defendant told Davison that he "threw them in the garbage," because they "had something on them."

¶ 14 Davison stated that the defendant then proceeded to Stampley's room. According to Davison, he overheard the defendant tell Stampley that the defendant "had beat someone up and took their stuff." The defendant and Stampley then left the house. Later on the same day, Davison again saw the defendant, who drove him to a store in a car that Davison had never seen before. The defendant told Davison that it was his girlfriend's car.

¶ 15 The following day, August 25, 2011, Davison again met the defendant, who drove them to a park, where they played basketball. Later that day, Davison and the defendant were approached by Detective Thelen. Davison testified that the defendant handed him the keys to the car and "told me to grab the keys and run," but that he surrendered the key to the detective.

¶ 16 The State next called Stampley, who was 20 years old at time of trial. Stampley stated that the defendant was his cousin. Stampley testified that in August 2011 he lived in the same home as Davison.

¶ 17 Stampley recalled that the defendant came to his house on the morning of August 24, 2011 and asked Stampley to "sell some stuff" for him. The defendant showed Stampley a car that he claimed belonged to his girlfriend, as well as a "lap top and a Bose radio" that he wanted to sell. Stampley and the defendant proceeded to the Cash for America pawn shop, which purchased the lap top but declined to buy the Bose stereo. The defendant and Stampley later sold the stereo at another store, Big Pawn. After the sales, Stampley testified that he and the defendant "partied" with Davison and two of Stampley's cousins.

¶ 18 At trial, Stampley positively identified photographs of the laptop, Bose stereo and the Chevy Cruze, as well as receipts from the pawn shops that he had signed. Stampley also

identified himself and the defendant in security camera video footage from the Cash for America and Big Pawn stores.

¶ 19 Dr. Loren Moser Woertz of the Cook County medical examiner's office testified that she had performed an autopsy on Randolph's body. Dr. Woertz testified that Randolph had suffered numerous skull, facial and jaw fractures caused by blunt force injury. She also described lacerations, abrasions, and bruises on Randolph's head, face and neck, and upper chest.

¶ 20 Dr. Woertz additionally testified that the bruising on Randolph's neck and upper chest was consistent with strangulation. Dr. Woertz also noted that Randolph's thyroid cartilage had been fractured. Dr. Woertz determined that the cause of death was blunt head trauma from an assault, and that strangulation was a contributing factor.

¶ 21 The State next called Stephen Wooten, who was 15 years old at the time of Randolph's death. Wooten testified that late on the night of August 23, 2011, he was walking from his brother's house when the defendant called out to him. Wooten went over to the defendant, who proceeded to tell Wooten that he had killed someone that day. Wooten testified that he got into a car with the defendant, which the defendant told him was a rental car. At some point, Wooten testified that another individual that he knew only as "D Boy" (later identified as Donnell Holmes) arrived and also entered the car.

¶ 22 Wooten testified that while they were in the car, the defendant described how he had killed someone. Wooten testified that the defendant said the deceased "was on the phone when [the defendant] went in, he hit him, choked him until he went to sleep and beat him with a hammer." According to Wooten, the defendant had recalled that the victim could not see the defendant at first, "but then hopped up and saw [the defendant]." Wooton testified that: "That's

when he hit him. He choked him until he went pass [sic] asleep and then he beat him with a hammer, the hammer broke, and then got another one."

¶ 23 According to Wooten, the defendant asked Wooten and Holmes if they wanted to see the body, and they agreed. The defendant then drove Wooten and Holmes to Randolph's apartment.

¶ 24 Wooten testified that when he entered the apartment he "saw blood going to the drain to like the sewage" and saw a body that was unclothed except for "his boxers." He could not see the body's face as it was covered. Wooten said that after seeing the body, he left the apartment because the sight was "disgusting." He testified that the defendant and Holmes emerged from the apartment carrying clothes, shoes and liquor. Wooten testified the defendant was acting like there was "nothing wrong."

¶ 25 On cross-examination, Wooten testified that the defendant had told him and Holmes that there were a lot of clothes in the apartment, and that it was Holmes who asked to go to the apartment to retrieve the clothes. Wooten also testified that the defendant "never told me why he did what he did."

¶ 26 The State next called Nancy De Cook, an investigator with the forensic services section of the Chicago police department, who had examined and photographed Randolph's apartment. She testified that Randolph's body was located in a portion of the apartment that was set up as a bedroom area. She stated that the body was lying in pool of blood, and that the head of a hammer was found near Randolph's head. De Cook described blood throughout the bedroom area. De Cook testified that Randolph's dresser drawers and closets were open, and that clothing and shoes were strewn on the floor.

¶ 27 In the kitchen area of the apartment, De Cook testified that she recovered a black garbage bag that contained a bloody, bent handle of a hammer, as well as a second, fully intact hammer.

The garbage bag also contained a used condom. Separately, a second used condom was found on the floor in the bedroom.

¶ 28 On cross-examination, De Cook acknowledged photographs showing bottles of alcohol found in the kitchen. She also testified regarding photographs showing that a "box of sex toys," packages of condoms, and containers of lubricant were found on the floor in the bedroom.

¶ 29 The State next called Donnel Holmes (also known as D Boy), who was 20 years old in August 2011. Holmes testified that he and the defendant had been good friends. Holmes also testified that he knew Randolph from the neighborhood.

¶ 30 Holmes testified that the defendant had visited his home late on the night of August 23 or the early morning hours of August 24, 2011. Holmes testified that as he and the defendant were watching television together, the defendant described killing Randolph. According to Holmes, the defendant told him that he had knocked on Randolph's door and that Randolph had let him in to the apartment. Holmes testified:

> "[The defendant] sa[id] they was talking or chilling whatever in Rickey's room. That's when [the defendant] proceeded to the bathroom, as he proceeded to the bathroom, in the bathroom he said was a tool box, and in the tool box that's when he pulled out a hammer, and put it in his pants like in his pants like as using it as a holster or something in his pants when he proceeded back to the room where Rickey was."

¶ 31 The defendant told Holmes that, after coming out of the bathroom, he "asked [Randolph] for a cigarette" while the hammer was "still in his waist." The defendant told Holmes that when

Randolph reached for the cigarettes, the defendant struck him in the head with the hammer, and then "stood over [Randolph] and hit him in the head with a hammer repeatedly."

¶ 32 Holmes testified that the defendant did not respond when Holmes asked why he had attacked Randolph. After Holmes told the defendant that he did not believe him, the defendant responded "I will show you." The defendant and Holmes went outside the house, where Holmes got into a vehicle with the defendant. At some point, Wooten also arrived and entered the vehicle.

¶ 33 Holmes recalled that the defendant drove them to Randolph's apartment. Inside, the defendant directed him to the bedroom area, where Holmes saw a body whose head was covered. Holmes testified that he and Wooton immediately walked out of the house and waited outside by the car. According to Holmes, the defendant later came out of the apartment carrying a bag containing clothes. Holmes denied that either he or Wooten took anything from the apartment.

¶ 34 The State's next witness was Detective Donald Hill of the Chicago police department. Hill testified that he and his partner conducted a videotaped interview with the defendant on the afternoon of August 26, 2011. The State then moved into evidence video of the police interview with the defendant, which was played before the jury at the conclusion of Hill's direct examination.

¶ 35 At the outset of the interview, the police gave the defendant his Miranda rights and he agreed to speak to them. During the interview the defendant first claimed that he had been given the Chevy Cruze by someone named "James," and that "James" told him that it was a rental car. The defendant also initially told police that he was at his cousin's house for the entire day of August 23, 2011.

¶ 36 After the police indicated that they had spoken to Stampley, the defendant admitted to selling a camera, laptop and a "radio" at a pawn shop. The defendant insisted that he found the items in the car, and claimed not to know the original owner of the items.

¶ 37 When the police informed the defendant that the owner was dead, he responded "I swear I had nothing to do with it." The defendant continued to deny his involvement, even after police told him that fingerprint and DNA evidence had been collected from the deceased's apartment.

¶ 38 After the police told the defendant that the deceased owner's name was "Ricky," the defendant initially claimed not to know anyone by that name, but eventually volunteered that he knew someone named "Rick." The defendant told police that "Rick" is "cool," but that he has "enemies" because he is gay.

¶ 39 After the police informed the defendant that Randolph was the deceased, the defendant claimed that he was "shocked." Upon further questioning, the defendant stated that he had been to Randolph's home four or five times but again denied that he was there on August 23, 2011.

¶ 40 After the police told the defendant that they were aware that he brought others to see Randolph's body, the defendant asked: "What if I told you that I didn't do it, but I know who did?" The defendant proceeded to tell police that he "helped set it up." The defendant stated that someone named "Little Tim" asked for his help in a plan to kill Randolph, and that "Little Tim" offered to give the defendant "half of everything" for his help. The defendant then told police that he was in the defendant's bedroom when "Little Tim" arrived at the apartment, and that "Little Tim" killed Randolph with a hammer.

¶ 41 After further questioning by police regarding "Little Tim," the defendant again changed his story. Toward the end of the interview, the defendant told police that he had a "blackout," and that when he recovered from the blackout he saw "blood coming out of [Randolph's] mouth."

¶ 42 Following Detective Harris' testimony and the videotaped interview, the parties stipulated to testimony regarding the collection of DNA samples from: (1) the hammer head found near the body; (2) the broken hammer handle; (3) the second intact hammer; (4) the condom found in the kitchen trash bag; and (5) the second condom found in the bedroom. The parties also stipulated to the testimony of Ruben Ramos, a forensic scientist in the Illinois State Police Forensic Sciences Command, regarding DNA analysis. The parties stipulated that Ramos would testify that Randolph's DNA was contained in swabs of blood from the hammer head and handle from the broken hammer, as well as from the second, intact hammer. In addition, on the broken handle, a minor DNA profile was identified from which the defendant could not be excluded.

¶ 43 Ramos' stipulated testimony also provided that the analysis of a swab from the outside of the condom found in the bedroom indicated a mixture of human DNA from two people. According to the stipulated testimony: "A major human male DNA profile was identified in the mixed fraction which matched the profile of Ricky Randolph. A minor human DNA profile was also identified in the mixed fraction from which [the defendant] cannot be excluded. Approximately, one in 77 million black *** unrelated individuals cannot be excluded from having contributed to this minor DNA profile." In addition, Ramos' testimony stated that a swab from the inside of the condom found on the bedroom floor matched Randolph's DNA. The State rested after the stipulated testimony.

¶ 44 The defendant elected to testify on his own behalf, and stated that he was 21 years old in August 2011. At that time he was living with Stampley, his cousin. He also testified that he sometimes stayed with another cousin named Kenneth.

¶ 45 The defendant testified that he had known Randolph for about a month and a half before his death. He claimed that Randolph "provided liquor for people in the neighborhood" and that

he had purchased alcohol from Randolph on two occasions before August 23, 2011. The defendant also stated that he had been to Randolph's apartment on "two or three" prior occasions to "Just hang out, smoke. Sometimes I took a shower." The defendant testified that he and Randolph "had a good relationship, like father/son." The defendant testified that he was straight, and that he knew that Randolph was gay.

¶ 46 The defendant claimed that on the evening of August 23, 2011, was at his cousin Kenneth's house. The defendant called Randolph because he wanted to purchase a bottle of tequila and because he "needed a ride to the neighborhood." He testified that when Randolph picked the defendant up in his car, Randolph "said he didn't have the bottle of liquor [the defendant] wanted with him and that we had to go to his house and get it." The defendant testified that he and Randolph proceeded to Randolph's apartment. Inside, Randolph poured himself a drink and offered a drink to the defendant as he was seated on a couch in the living room area. He stated that Randolph's back was turned toward the defendant as he poured the defendant's drink.

¶ 47 As the two were drinking, the defendant testified, Randolph went to the bedroom, telling the defendant that he wanted to change his clothes and would be "ready in a minute." The defendant remained on the couch and sipped his drink, after which he began "feeling dizzy" and "dehydrated."

¶ 48 When Randolph returned to the living room, the defendant testified, he was not wearing a shirt, and his blue jeans were unbuttoned. According to the defendant, Randolph approached him "and asked me was I okay while running his hands through my hair in a sexual way." The defendant testified that he "told [Randolph] get the f*** off me and pushed him away from me." According to the defendant, Randolph then "put me in a choke hold."

¶ 49 The defendant testified that the next thing he remembered was waking up in Randolph's bed, wearing "[j]ust my tank top and my boxers and socks." The defendant was not wearing his shorts but did not remember removing them. The defendant also recalled seeing a used condom next to the bed, which made him feel "scared." The defendant testified that he "panicked" and "knew something bad had happened because of the feeling I had on my anal area."

¶ 50 The defendant stated that he got up and attempted to leave the apartment when he was met by Randolph. According to the defendant, Randolph told the defendant: "You passed out so I put you in my bed." The defendant testified that he responded by calling Randolph "a lying bitch." According to the defendant, Randolph then "hit me in the jaw" and they began to fight.

¶ 51 The defendant testified that the fistfight escalated: "[a]s we w[ere] fighting, we ended upon on the floor, and I ended up choking him. As I was choking him, he reached towards the bed and pulled out a hammer" which had been next to the bed. The defendant testified that Randolph hit him in the back with the hammer, after which the defendant crawled away and "searched for a weapon." The defendant testified that he found a second hammer on a computer stand in the bedroom area.

¶ 52 According to the defendant, Randolph "said that he was going to kill me, and he rushed me" with the hammer "fitting to swing." The defendant testified that he swung at Randolph with his own hammer because he "felt threatened for my life." He testified that did not remember how many times he struck Randolph, but stated that he stopped swinging only when his hammer "broke off at the top and bent."

¶ 53 The defendant testified that he placed the hammers in a black garbage bag, washed blood off himself, and changed into different clothes. The defendant then "picked up [Randolph's] cell

phone and his car keys, and I left." The defendant testified that he proceeded to his cousin Kenneth's house to dispose of the bloody clothes.

¶ 54 Afterward, the defendant stated that he went to Holmes' house. The defendant testified that he found Holmes sitting on the couch, and that he sat down and watched a basketball game with him. The defendant acknowledged that he "told [Holmes] I killed Rick," but stated that he did not tell Holmes why he had done so.

¶ 55 According to the defendant, Holmes requested that they return to Randolph's apartment to take some of Randolph's clothes. The defendant recalled that as they walked outside, they saw Wooten, who joined them. The defendant acknowledged driving Holmes and Wooten to Randolph's apartment. The defendant testified that Holmes filled up a large bag with Randolph's clothes, and that Wooten took a number of hats. The defendant admitted that he took liquor from the apartment but claimed he took nothing else.

¶ 56 The defendant testified that he later returned to Stampley's house because "there was a radio and a laptop that was in the car, and I needed [Stampley] to sell it for me." He admitted that he and Stampley subsequently sold the laptop and the Bose radio.

¶ 57 The defendant stated that he had not told Holmes or Wooten any further details about the events leading to Randolph's death, because he was "embarrassed." Similarly, he testified that he had not told the detectives what really happened because he was "embarrassed" that he had been "raped." He also testified that he had not called police because he was afraid of "going to jail."

¶ 58 On cross-examination, the defendant agreed that he had been "very close" to Randolph and thought of him as a "father figure." The defendant acknowledged that he knew Randolph was gay, but denied that Randolph had previously tried to touch him or to date him. However, the defendant stated that on one occasion Randolph had offered to pay him to perform oral sex

on Randolph, but that the defendant "turned it down." The defendant could not recall when that incident had occurred.

¶ 59 The defendant also acknowledged on cross-examination that he had told Holmes that he had killed Randolph with a hammer. The defendant admitted that he had never told anyone that Randolph had drugged him or raped him, and that he had not told anyone that Randolph had attacked him. The defendant admitted that he had lied to police repeatedly, including when he had claimed that he received the car from someone named James and when he claimed that "Little Tim" had killed Randolph. The defense rested after the defendant's testimony.

¶ 60 Prior to closing arguments, the trial court agreed to defense counsel's request to instruct the jury that it could find the defendant guilty of second degree murder if it found that the defendant had acted under either of two mitigating factors: serious provocation by Randolph, or that the defendant believed that his actions were in self-defense.

¶ 61 In closing arguments, the State first showed the jury a photograph of Randolph as he appeared alive, and then showed a photograph of him in death. The State's attorney told the jury: "Look at the injuries. He is unrecognizable, unrecognizable. An individual could not be recognized from this photo." In describing the injuries, the State additionally argued: "you heard the medical examiner tell you, and she described countless injuries, orbital fractures, fractures to the jaw, fractures to his face, his thyroid was ripped out."

¶ 62 The State's closing argument referenced several of the jury instructions in the case. The State first described instructions for "Type A" intentional first degree murder, and discussed the potential mitigating factors based on serious provocation or if the defendant unreasonably believed that his actions were necessary for self-defense.

¶ 63 The State proceeded to argue "there is no self-defense" in this case, referring to Wooten's testimony that the defendant had deliberately attacked Randolph. The State also argued that the DNA analysis of the condom found in the bedroom indicated that the defendant had worn the condom while having sex with Randolph, and that this evidence refuted the defendant's claim of sexual assault: "He didn't get raped. It was consensual sex." The State argued this was not a case of "serious provocation" or self-defense because the defendant "acted deliberately." The State additionally argued that it had proved "Type B murder" under the "felony murder rule" because the defendant was committing the offense of armed robbery when he killed Randolph and took his property.

¶ 64 The defense counsel's closing argument relied on the defendant's testimony that he was raped by Randolph and had to "fight for his life" after Randolph attacked him. The defense argued that there was no armed robbery, and thus no "Type B" felony murder, because the defendant had no intent to take Randolph's property until after Randolph was deceased. The defense argued for acquittal on all charges because the defendant's actions were "absolutely justified."

¶ 65 In rebuttal argument, the State argued that the jury could find armed robbery, and thus "Type B" first degree murder, even if Randolph was already dead when his items were taken. The State concluded:

> "This was clearly armed robbery, and, because of that, it is first degree murder, Type B. Those instructions, these verdict forms, guilty of second degree murder, not guilty of armed robbery and theft, guilty of theft, that is not what this case is about. You can put those to the side. You will get a lot of instructions. It will

> seem overwhelming. Put that to the side because the evidence doesn't support any of that. Just disregard it and concentrate on that first degree murder, Type A and Type B, and when you do, you will see that this defendant is clearly guilty in this case."

¶ 66 The jury subsequently returned guilty verdicts with respect to each of the four charges: both "Type A" and "Type B" first degree murder, armed robbery, and possession of a stolen motor vehicle. On September 4, 2013, the court sentenced the defendant to a 54-year prison term.

¶ 67 The defendant filed a notice of appeal on September 12, 2013. Thus we have jurisdiction pursuant to Illinois Supreme Court Rule 606(a) (eff. Feb. 6, 2013).

¶ 68 ANALYSIS

¶ 69 The defendant's primary argument on appeal is that his conviction for first degree murder should be reduced to second degree murder because he established a mitigating factor pursuant to the Criminal Code of 2012 (Code). Pursuant to section 9-2 of the Code, if the State has proved the elements of first-degree murder beyond a reasonable doubt, the offense may be reduced to second degree murder if the defendant demonstrates a "mitigating factor" by the preponderance of the evidence. 720 ILCS 5/9-2 (West 2012).

¶ 70 The Code defines the mitigating factors as follows:

> "A person commits the offense of second degree murder when he or she commits the offense of first degree murder *** and either of the following mitigating factors are present:

> (1) at the time of the killing he or she is acting under a sudden and intense passion resulting from serious provocation by the individual killed ***; or
>
> (2) at the time of the killing he or she believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code [including self-defense], but his or her belief is unreasonable." 720 ILCS 5/9-2 (a)(1), (a)(2) (West 2012).

The Code defines "serious provocation" as "conduct sufficient to excite an intense passion in a reasonable person." 720 ILCS 5/9-2(b) (West 2012). Although the State bears the initial burden to first prove the elements of first degree murder beyond a reasonable doubt, in order to reduce the conviction to second degree murder, "the burden of proof is on the defendant to prove either mitigating factor by a preponderance of the evidence." 720 ILCS 5/9-2(c) (West 2012). "Thus, the second degree murder statute requires the State to prove, beyond a reasonable doubt, each element of first degree murder before the burden shifts to the defendant to prove, by preponderance of the evidence, any of the factors in mitigation that must be present to reduce the offense from first degree to second degree murder." *People v. Thompson*, 354 Ill. App. 3d 579, 586 (2004).

¶ 71 In *People v. Blackwell*, 171 Ill. 2d 338 (1996) our supreme court articulated the standard of review where, as in this case, a defendant argues that his first degree murder conviction should be reduced to second degree murder based on a mitigating factor. *Blackwell* held that when the "defendant argues that *he* presented sufficient evidence to prove one of the mitigating factors,"

the reviewing court should "consider whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the mitigating factors were not present." *Id.* at 357-58.

¶ 72 We thus examine whether, viewing the evidence in the light most favorable to the State, any rational jury could find that the defendant had *failed* to demonstrate either self-defense or serious provocation. Relying on his trial testimony, the defendant's appeal asserts that he can meet this standard. As set forth below, we disagree.

¶ 73 First, we consider the mitigating factor of self-defense. The Code provides that this factor is present if at the time of the killing the defendant "believes the circumstance to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code, but his or her belief is unreasonable." 720 ILCS 5/9-2(a)(2) (West 2012). In turn, section 7-1 provides that:

> "A person is justified in the use of force against another when *** he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony." 720 ILCS 5/7-1(a) (West 2012).

¶ 74 The defendant's briefs, relying virtually entirely on his own trial testimony, argue that "the evidence established that he acted with the belief that he needed to use deadly force to defend himself against Randolph, even if that belief was unreasonable." The defendant claims

that his "testimony was credible and believable," and he established that he "subjectively believed that he needed to hit Randolph with a hammer in self-defense." He argues that "no State's witness testified to different facts concerning the fight" and claims "there was no evidence impeaching the defense version of the events." He thus asserts that his trial testimony established this mitigating factor.

¶ 75 We reject the defendant's contention. The defendant essentially argues that the jury was *required* to accept as true his version of events, since there were no other eyewitnesses to Randolph's death. This is certainly not the law. "Whether a killing is justified under the law of self-defense is a question of fact [citations] and the fact finder is not required to accept as true the defendant's evidence in support of that defense. [Citations.] Instead, the trier of fact is obliged to consider the probability or improbability of the evidence, the circumstances surrounding the event, and all of the witnesses' testimony." *People v. Huddleston*, 243 Ill. App. 3d 102, 1018-19 (1993). The "reasonableness of defendant's belief that the circumstances warranted the use of deadly force" "involve[s] credibility determinations made by the jury. It is the function of the jury as the trier of fact to assess the credibility of the witnesses ***. [Citation.]" *People v. Lee*, 213 Ill. 2d 218, 225 (2004).

¶ 76 Although the defendant urges that his trial testimony was "credible and believable," that was the jury's decision to make. Especially reviewing the evidence in the light most favorable to the State, the jury could readily have concluded that the defendant was lying when he testified that he had been drugged, raped, and attacked by Randolph. Such a conclusion would hardly be surprising, considering that the defendant had admittedly lied to police about the circumstances of Randolph's death.

¶ 77 Moreover, contrary to the defendant's argument that there was no conflicting evidence, the State *did* elicit evidence that contradicted a claim of self-defense. Specifically, Holmes and Wooten testified that the defendant had described a deliberate, surprise attack on Randolph. Further casting doubt on the claim of self-defense, the defendant admitted that prior to his trial testimony he had never told anyone that Randolph had attacked him.

¶ 78 Further, we note that the physical evidence from the condom found in the bedroom did not necessarily support the self-defense theory, as the presence of Randolph and the defendant's DNA does not prove that the defendant was raped. Viewing the evidence in the light most favorable to the State, the jury could have concluded (as argued by the State in its closing argument) that there had been consensual sex between the two men.

¶ 79 The defendant attempts to rely on cases in which the defendant's testimony was plausible and unrefuted, citing *People v. Ellis*, 107 Ill. App. 3d 603, 610-12 (1982) and *People v. Hawkins*, 296 Ill. App. 3d 830, 837 (1998). Neither of those cases supports the defendant's position in this case. In *Ellis*, the Second District of our Appellate Court reduced a verdict from murder to voluntary manslaughter (the predecessor to second degree murder) where "the evidence presented by *both* the State and the defendant established that the decedent made a 'lunge' at defendant." (Emphasis added.) *Id.* at 611. The *Ellis* court noted that the defendant's trial testimony "was consistent with his statements given to police officers after the shooting" and "[t]he defendant's version *** was not improbable nor was it impeached by the State's evidence." *Id.* at 610-11. In contrast, in this case, the State presented ample evidence contradicting the defendant's claim of self-defense.

¶ 80 *Hawkins* is similarly inapposite. In *Hawkins*, "There was evidence that [victim] had pulled a knife on defendant three days before the stabbing, that [victim] had fought with

defendant earlier that summer, that [victim] had previously struck him with a brick," and the "defendant presented the only testimony about the events on the porch just prior to the stabbing." *Id.* at 837-38. Thus, we found that the defendant proved "that he believed that the circumstances justified using self-defense." *Id.* at 838.

¶ 81 Unlike *Hawkins*, the State presented ample evidence weighing *against* self-defense in this case, including Wooten and Holmes' testimony of a deliberate attack. It was certainly "within the province of the jury to find the testimony of the above witnesses more credible than the testimony of defendant." *People v. Romero*, 387 Ill. App. 3d 954, 969 (2008). Further undermining his claim of self-defense, the defendant lied to police in claiming that "Little Tim" was responsible for Randolph's death. "A false exculpatory statement is probative of a defendant's consciousness of guilt." *People v. Milka*, 211 Ill. 2d 10, 181 (2004) (internal quotation marks omitted).

¶ 82 Given the conflicting evidence, a rational trier of fact could certainly have found that the defendant failed to prove that he believed he was acting in self-defense. Thus, his first degree murder conviction cannot be reduced on this first mitigating factor.

¶ 83 Similarly, we decline to find that a reduction to second degree murder is warranted based on the mitigating factor of serious provocation. "To constitute adequate provocation," to reduce first degree to second degree murder, "the defendant must show that the provocation fit within certain recognized categories, such as substantial physical injury, substantial physical assault, or mutual quarrel or combat." *People v. Thompson*, 354 Ill. App. 3d 579, 588 (2004). In this case, the defendant's brief argues that he established both the "substantial physical assault" and "mutual combat" categories of provocation. We reject both assertions.

¶ 84 First, the defendant's brief urges that "[b]eing drugged and raped constitutes a serious physical assault. Thus, Richard had sufficient provocation to hit Randolph as he did." However, as explained above, the jury was not required to believe any part of the defendant's testimony that he had been drugged, sexually assaulted, or otherwise attacked by Randolph. The jury could quite reasonably and apparently did determine that the defendant's account of the events was fabricated.

¶ 85 For the same reasons, we reject the defendant's argument that no rational jury could fail to find that he demonstrated provocation by mutual quarrel or combat. Our supreme court has defined mutual combat as "a fight or struggle which both parties enter willingly or where two persons, upon a sudden quarrel and in hot blood, mutually fight upon equal terms and where death results from the combat." *Thompson*, 354 Ill. App. 3d at 588 (quoting *Austin*, 133 Ill. 2d 118, 125 (1989)).

¶ 86 The defendant argues that in this case the evidence showed that "[w]hile engaged in a brawl with Randolph and after being hit by Randolph's hammer, [the defendant] swung his own hammer." As with his self-defense claim, the purported evidence of mutual combat consists entirely of the defendant's trial testimony. Yet, the jury was entitled to disregard the defendant's trial testimony as incredible. Especially reviewing evidence in the light most favorable to the State, the jury was entitled to conclude that—rather than engaging in *mutual* combat willingly entered by both men—the defendant had initiated a deliberate attack on Randolph. In short, based on all of the facts a rational jury could easily have determined that the defendant had concocted his trial testimony, and had not acted due to any serious provocation. It is clear that the jury in this case reached such a conclusion, and that conclusion is supported by the evidence.

Thus, we reject the defendant's arguments for mitigation seeking to reduce his conviction to second degree murder.

¶ 87 Apart from his arguments that his conviction should be reduced to second degree murder, the defendant asserts that he is entitled to a new trial on two separate bases. First, the defendant asserts that he was prejudiced by improper testimony during Detective Thelen's direct examination that suggested the defendant's prior arrest in an unrelated case. Specifically, after being shown the defendant's arrest report, Detective Thelen testified as follows:

> "Q: What was the defendant's date of birth?
>
> A: 27 April 1990.
>
> Q: Did you also at that point or during the course of the investigation assign a unique of [sic] IR number?
>
> A: No, a CB number would be for each arrest. Your IR number is the first time you are arrested you are given an IR number and then every time after that you would be given a subsequent CB number. Everything would reflect back to your one true IR number.
>
> Q: Let me ask you. Did he have an IR number 1639517?
>
> [Defense counsel]: Objection.
>
> THE COURT: 163.
>
> [State's attorney]: 9517.
>
> THE COURT: Overruled.
>
> A: I'd have to look at his arrest report again, sir. Sorry.
>
> Q: I am going to show you again [the arrest report]?

A: Thank you. Yes."

On appeal, the defendant argues that this testimony was prejudicial because it informed the jury of his prior arrest in another case. The defendant argues that "this testimony likely contributed to [his] conviction, suggesting that he was a bad person prone to criminal behavior, and denied him a fair trial."

¶ 88 The defendant relies on the principle that "[e]vidence of crimes for which a defendant is not on trial is inadmissible if relevant merely to establish his propensity to commit crime. [Citation.] *People v. Richardson*, 123 Ill. 2d 322, 338 (1988). The defendant argues that "although the jury was not explicitly told that [the defendant] had committed crimes collateral to the charged offense that message was clear," and that the IR number testimony "was relevant only to show [the defendant's] propensity to commit crimes." He claims that the testimony "gave the jury an improper motive to convict."

¶ 89 The defendant relies largely on *People v. Lindgren*, 79 Ill. 2d 129 (1980). In *Lindgren*, our supreme court remanded for a new trial based on the erroneous admission of an "extensive discussion of the collateral crime of arson [that] could have influenced the jury to convict him only out of a belief that he deserves punishment." *Id.* at 141. The court held that "[i]n such cases, a conviction will be upheld only if the properly admitted evidence is so overwhelming that no fair-minded jury could have voted for acquittal [citations] or, to put it another way, only if the record affirmatively shows that the error was not prejudicial [citations]". *Id.* Finding "evidentiary ambiguities" under the facts of that case, the *Lindgren* court held that a new trial was warranted. *Id.*

¶ 90 However, the supreme court distinguished *Lindgren*'s holding in *People v. Richardson*, 123 Ill. 2d 322 (1988) which concluded that "limited" evidence of a collateral crime did *not* warrant new trial if it was not likely to "contaminate" the jury. Our supreme court explained:

> "The error in admitting evidence of the [collateral crime] does not require reversal. Although we noted in *People v. Lindgren* that 'erroneous admission of evidence of other crimes carries a high risk of prejudice and ordinarily calls for reversal' [citation], our Supreme Court Rule 615(a) [citation] states: 'Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.' This doctrine may apply when the error itself was unlikely to have contaminated the jury. [Citation.] In *Lindgren*, the jury had heard an 'extensive discussion' of the collateral crime of arson, and we stated that 'in such cases' the conviction could be affirmed 'only if the record affirmatively shows that the error was not prejudicial.' [Citation.] The record before us confirms that the testimony relating to defendant's 1982 arrest, albeit irrelevant, disclosed only the fact that police had apprehended defendant as a person matching the description of a suspect ***. There was no 'extensive discussion' of the collateral crime, and the strict result of *Lindgren* should not obtain here." *Id.* at 343.

¶ 91 The supreme court in *Richardson* further noted that "the evidentiary ambiguities present in *Lindgren* [citation] are not present in this case." *Id.* (noting "positive and credible

identification evidence from several witnesses implicating defendant in the murder"). Our supreme court concluded: "Where it does not appear that justice has been denied or that a finding of guilt resulted from an error, we will not reverse a defendant's conviction. [Citation.] Therefore *** the admission of limited evidence of the [collateral crime] does not require a reversal of the defendant's conviction." *Id.* at 343-44.

¶ 92 Given the very limited and ambiguous testimony regarding the defendant's IR number in this case, the result reached in *Richardson* applies, and reversal is not warranted. As noted by *Richardson*, Supreme Court Rule 615(a) provides that errors that do not "affect substantial rights shall be disregarded." Ill. S. Ct. R. 615(a). This rule applies "when the error itself was unlikely to have contaminated the jury." *Richardson*, 123 Ill. 2d at 343. In this case, even assuming that its admission was erroneous, we find it extremely unlikely that the brief discussion of the IR number could have "contaminated" the jury or caused prejudice to the defendant. Notably, there was no explicit statement that the defendant had any prior arrest for any particular offense. Detective Thelen merely testified that "the first time you are arrested you are given an IR number" and confirmed that the defendant had a particular IR number. Detective Thelen's testimony is less than clear on the point that the defendant now attempts to ascribe to it. Further, the State did not elicit any testimony about the nature of any prior arrest, and certainly never suggested a propensity to commit crimes based on the IR number. In fact, the State made no mention of an IR number or any prior arrest during the remainder of the trial. We conclude that the reference to the IR number was "unlikely to have contaminated the jury" or to have contributed to its conviction. *Richardson*, 123 Ill. 2d at 343-44.

¶ 93 The defendant's reply brief argues that *Richardson* is distinguishable because that court noted the strong evidence against the *Richardson* defendant and the lack of "evidentiary

ambiguities" that were noted in *Lindgren*. 123 Ill. 2d at 343-44. The defendant claims that in his case, the State's evidence of his guilt was "not overwhelming" and "the evidence supported [the defendant's] version that he acted in response to being raped and attacked." We disagree. As set forth above with respect to the defendant's mitigating factor arguments, the State produced ample evidence refuting the defendant's version of events. Accordingly, we reject the defendant's claim that a new trial is warranted on this basis.

¶ 94 We next address the defendant's separate contention that a new trial is warranted due to improper remarks by the State's attorney during closing argument. The defendant's appeal identifies three particular instances of purportedly improper comments.

¶ 95 Before we address the substance of the remarks, we note that the defendant did not object to the comments to preserve them for our review. "To preserve claimed improper statements during closing argument for review, a defendant must object to the offending statements both at trial and in a written posttrial motion." *People v. Wheeler*, 226 Ill. 2d 92, 122 (2007). However, even if unpreserved, a prosecutor's remarks may be reviewed under the plain error doctrine. See *People v. Romero*, 387 Ill. App. 3d 954, 971 (2008). "[T]he plain-error doctrine allows a reviewing court to consider 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 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." *Id.* (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 96 "The first step of the inquiry under the plain error doctrine is to determine if the challenged comment constituted error. [Citation.] If so, then we proceed to determine whether

either of the two prongs is satisfied: whether the error affected the fairness of the trial process or whether the evidence was closely balanced." *Id.* (quoting *Piatkowski*, 225 Ill. 2d at 565).

¶ 97 Thus, we review whether each of the comments amounted to error, keeping in mind that a "verdict will not be disturbed on review unless it is shown that the comments substantially prejudiced defendant to the extent that absent the comments, the jury would have returned a different verdict." *People v. Jackson*, 293 Ill. App. 3d 1009, 1016 (1997).

¶ 98 Furthermore, we are mindful that "closing arguments must be viewed in their entirety, and the challenged remarks must be viewed in context." *Wheeler*, 226 Ill. 2d at 122. "Prosecutors are afforded wide latitude in closing argument. [Citation]. In reviewing comments made at closing arguments, this court asks whether or not the comments engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from them. [Citation.] Misconduct in closing argument is substantial and warrants reversal and a new trial if the improper remarks constituted a material factor in a defendant's conviction**.** [Citation.] *Id.* at 123.

¶ 99 We proceed to review each of the three alleged improper comments. First, the defendant contends that during rebuttal closing argument, "the prosecutor told the jury they could disregard the instruction concerning second degree murder." The defendant refers to the following portion of the State's rebuttal argument:

> "This was clearly armed robbery, and, because of that, it is first degree murder, Type B. Those instructions, these verdict forms, guilty of second degree murder, not guilty of armed robbery and theft, guilty of theft, that is not what this case is about. You can put those to the side. You will get a lot of instructions. It will

> seem overwhelming. Put that to the side because the evidence doesn't support any of that. Just disregard it and concentrate on that first degree murder, Type A and Type B, and when you do, you will see that this defendant is clearly guilty in this case."

The defendant argues that it was error for the prosecutor to argue to "put aside" any instruction "[b]ecause the law does not allow jurors to disregard certain instructions."

¶ 100 The defendant's argument suggests that the prosecutor advised the jury to completely ignore any instructions about the possibility of finding second degree murder. However, when viewed in context of the entirety of the State's closing arguments, it is clear that the prosecutor was not advising jurors to literally ignore instructions pertaining to other offenses. To the contrary, earlier in closing arguments, the State's attorney had specifically discussed the jury instructions on the mitigating factors of second degree murder, and had explicitly argued to the jury why the defendant had failed to establish either mitigating factor.

¶ 101 Thus, viewed in context of the entirety of the State's argument, the prosecutor's statements to "disregard" or to "put to the side" offenses other than first degree murder were clearly part of its argument to the jury as to why, *based on the evidence*, they should convict the defendant of first degree murder rather than second degree murder. Such argument was proper.

¶ 102 Moreover, we note that the court also explicitly instructed the jury of its "duty to follow all" instructions, and that it "should not single out certain instructions and disregard others." Thus, to the extent the prosecutor's comments could be interpreted as directing the jury to ignore certain instructions, such error was mitigated by the court. See *Jackson*, 293 Ill. App. 3d at 1016. ("Improper prosecutorial comments can be cured by instruction to the jury to disregard argument not based on the evidence and to consider instead only the evidence presented to it.").

¶ 103 Further, we note that there was substantial, if not overwhelming, evidence of the defendant's guilt of first degree murder. Thus, we decline to find that the prosecutor's comments to "put aside" any instructions as to other offenses "engender[ed] substantial prejudice against [the] defendant such that it is impossible to say whether or not a verdict of guilt resulted from them." *Wheeler*, 226 Ill. 2d at 123.

¶ 104 As a second purportedly improper comment, the defendant claims that the prosecutor improperly inflamed the jury by holding up a photograph of the deceased victim and stating: "Look at the injuries. He is unrecognizable, unrecognizable. An individual could not be recognized from this photo." The defendant argues that showing the photograph "was gratuitous and did not serve any purpose in arguing the key issues for the jury." He argues that there was no need to show the photograph as the defendant "did not dispute that he had to resort to using a hammer to defend himself" and thus "one would fully expect that the injuries would be severe."

¶ 105 We decline to find that the prosecutor's comment on the severity of Randolph's injuries is reversible error. It is well-settled that "prosecutors are allowed wide latitude in closing argument and may comment upon the evidence and all legitimate inferences therefrom." *People v. Edgecombe*, 317 Ill. App. 3d 615, 620 (2000). Notably, as conceded in defendant's reply brief, the defendant "never argued *** that the admission of the photograph was improper." The defendant also did not object to the use of numerous additional photographs of Randolph's injuries that were shown during the testimony of the medical examiner, which described the injuries in graphic detail. Thus, the defendant does not take issue with the photograph itself, but asserts that the prosecutor's "unrecognizable" comment improperly inflamed the jury.

¶ 106 We decline to find that the comment, even if improper, was sufficiently prejudicial to warrant reversal. Regardless of the "unrecognizable" comment, the jury was already well aware

of the severity of Randolph's injuries by the evidence that had been already introduced. We reiterate that "[m]isconduct in closing arguments is substantial and warrants reversal and a new trial if the improper remarks constituted a material factor in a defendant's conviction." *Wheeler*, 226 Ill. 2d at 123. Given the jury's prior exposure to the severity of the injuries suffered, not to mention the ample additional evidence of the defendant's guilt, we cannot conclude that the prosecutor's mere use of the word "unrecognizable" constituted a material factor in the jury's decision to convict.

¶ 107 Similarly, we decline to find any prejudicial impact with respect to the last of the challenged comments by the State's attorney. Specifically, the defendant asserts that the prosecutor misstated the evidence when, in describing the medical examiner's testimony, he said that Randolph's "thyroid was ripped out." The defendant argues that the comment "made the injury seem worse than it was" because the medical examiner had actually testified that the thyroid cartilage was fractured.

¶ 108 As a factual matter, the defendant is correct that the medical examiner did not state that the thyroid was "ripped out." Nonetheless, given the ample photographic and testimonial evidence of the severity of Randolph's injuries, we find it implausible that this particular misstatement could have been a material factor in the defendant's conviction. Regardless of whether Randolph's thyroid was "ripped out" or fractured, the evidence established the brutal nature of Randolph's injuries. In fact, Randolph died as a result of those injuries. Indeed, the defendant testified that he hit Randolph with a hammer to the point that the hammer broke. Thus, given the evidence, we decline the find that the "ripped out" comment could have caused prejudice sufficient to warrant a new trial.

¶ 109 Taken either individually or cumulatively, we decline to find that the challenged comments prejudiced the defendant. Thus we find no error, let alone plain error, with respect to the comments by the State's attorney. Finally, as we have determined that the prosecutor's comments did not amount to error, we need not address the defendant's additional argument that his trial counsel's "failure to preserve the prosecutorial misconduct errors constituted ineffective assistance."

¶ 110 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 111 Affirmed.