2016 IL App (1st) 133349-UB

FIRST DIVISION
August 8, 2016

No. 1-13-3349

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. 07 CR 21923
	)	
LEVAR WELLS,	)	Honorable
	)	Brian Flaherty,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE MIKVA delivered the judgment of the court.[1]
Presiding Justice Cunningham and Justice Harris concurred in the judgment.

O R D E R

¶ 1 *HELD*: Judgment entered on defendant's conviction of first degree murder affirmed over his claims that the State failed to disprove his claim of self-defense beyond a reasonable doubt, that his conviction should be reduced to second degree murder, and that the State's misstatements of law in closing argument denied him a fair trial and amounted to plain error; mittimus corrected.

¶ 2 Following a jury trial, defendant Levar Wells was found guilty of first degree murder and was sentenced to an aggregate term of 60 years' imprisonment, which included a 25-year firearm

[1] The late Justice Liu wrote the original decision in this case, which has been adopted in significant part in this decision. Justice Mikva is participating in the disposition following the supreme court's supervisory order.

enhancement. On appeal, defendant contends that: (1) the State failed to disprove his self-defense claim beyond a reasonable doubt and, alternatively, his conviction should be reduced to second degree murder where he acted upon an unreasonable belief in the need for self-defense; (2) he was denied a fair trial because during the closing argument, the prosecutor misstated the law regarding defendant's burden to establish self-defense; and (3) his mittimus should be corrected to reflect additional presentence credit.

¶ 3 We filed our original decision in this matter on September 28, 2015. Following our decision, on May 25, 2016, the Illinois Supreme Court entered a supervisory order directing us to vacate our judgment and reconsider this matter in light of its decision in *People v. Clark*, 2016 IL 118845. Having done so, we conclude that no different result is warranted. Accordingly, for the following reasons, we affirm the judgment of the circuit court and order the mittimus corrected.

¶ 4 BACKGROUND

¶ 5 On June 14, 2006, defendant shot and killed Jeremy Jenkins while Jenkins and his friend, Christopher Branch, sat in a car at the Marathon gas station on Lincoln Highway and 14th Street in Chicago Heights, Illinois (the Marathon station). Defendant claimed that Branch had a gun and was raising it, causing him to fear for his safety. The State charged him with eight counts of first degree murder, attempted first degree murder, and aggravated discharge of a firearm. Prior to trial, the State *nolle prosequied* all but two of the first degree murder charges. The State also informed the trial court and defense counsel that it did not intend to call Branch as a witness at trial. After the shooting, Branch identified someone by the name of Charles Perkins as the individual who shot Jenkins on the night in question. The police later determined that Perkins was in custody at the time of the incident. When they confronted Branch with this information,

Branch admitted that he had lied because of a prior altercation with Perkins. He then identified defendant as the shooter.

¶ 6 A. Testimony of Detective Meder

¶ 7 At trial, Chicago Heights Police Detective Meder testified that about 4 a.m. on June 14, 2006, he received a call of shots fired at the Marathon station. He was the first officer to arrive on the scene. He observed a few individuals "having a commotion" and three shell casings on the ground; he did not see the victim of the shooting or the offender. Detective Meder interviewed the gas station attendant, but the attendant had not seen anything and advised the detective that the video surveillance was not working. Detective Meder interviewed a few additional witnesses. They had seen a light blue car with several people around it, heard several shots fired, and then saw the car speed off westbound down 14th Street. On redirect, Detective Meder clarified that he only saw one shell casing on the ground. He testified that he also saw several shards of glass.

¶ 8 B. Testimony of Rayonna Harper

¶ 9 Rayonna Harper testified that she has prior convictions for felony retail theft and deceptive practices. She has known defendant since childhood, having grown up in Chicago Heights. About 11 p.m. on June 14, 2006, Rayonna picked up her cousin, Brandy Harper, in Ford Heights. She then picked up defendant and Oshay Wells, defendant's cousin. The four of them then drove around the neighborhood. Rayonna testified that she "might have had a sip" of alcohol, but was not drunk; she was not sure if defendant had been drinking.

¶ 10 Rayonna and her friends eventually stopped at the Marathon station. While Oshay and Brandy were "at the window" getting cigarettes, a white car pulled up next to Oshay's car, which was parked near the gas station window. Rayonna did not recognize the occupants in the white car at the time. She later learned that the driver was Christopher Branch and that the passenger

was Jeremy Jenkins. Branch told Rayonna that he knew her "from [her] deceased baby's father," and the two of them had a brief conversation. At some point, defendant exited Oshay's car, walked up close to Branch's car, and fired two to three shots into the car before returning to Oshay's car. Rayonna and Brandy subsequently got into the car belonging to Orison Collins, who had pulled into the gas station after the shooting stopped. Defendant drove away in Oshay's car. Rayonna recalled that she had seen defendant's gun earlier in the evening, because defendant had it with him in the back seat of the car. Rayonna testified that she and Brandy had told defendant to put it away because "somebody [was] going to get hurt." Rayonna did not see anyone, other than defendant, point a gun at another person that evening.

¶ 11 On cross-examination, Rayonna stated that she was cautious when speaking with Branch because her baby's father had just passed away, and the decedent's mother thought he had been poisoned. Rayonna was under the impression that the decedent's family was "looking for [her] in revenge of his death." During her conversation with Branch, Rayonna was able to see his head and shoulder and his one hand that was on the steering wheel. She testified that, right before the shooting, defendant was talking to either Branch or Jenkins, but she did not hear them arguing. After the shooting, she fled in her "baby's father's car." On redirect, Rayonna testified that Branch had spoken to her in a polite tone.

¶ 12 C. Testimony of Brandy Harper

¶ 13 Brandy Harper testified that at 2 or 3 a.m. on June 14, 2006, Rayonna picked her up at her house in Ford Heights. Rayonna was driving Oshay's rental car, and proceeded to drive them to "some projects in Chicago Heights" where they picked up Oshay and defendant. The group then drove around for a bit and eventually went to the Marathon station, where Brandy and Oshay got out of the car to purchase some items. Brandy recalled that Rayonna remained in the

car, and defendant got out and stood at the front of the car. Brandy testified that a white car pulled up to the gas pump. The driver, Branch, got out of the car and "hollered out" to Rayonna, as the passenger, Jenkins, went to the gas station window. When Jenkins returned to the white car, Rayonna and Branch were still talking. Brandy stated that while she was sitting in the back seat of Oshay's car, she heard defendant, Oshay, and Branch "having words." When Branch returned to his car, defendant walked toward the passenger side and fired two to three shots into the car's window. Brandy testified that she saw Jenkins slumped forward in his seat, as Branch sped off towards St. James Hospital. Orison Collins, "Rayonna's baby's daddy," was pulling into the gas station at this time, and Brandy and Rayonna got into his car.

¶ 14 Brandy testified that she had seen defendant's gun about 10 to 15 minutes before the shooting. Defendant had it in the car and was "[m]essing around with it." She testified that "[w]e both told him, he needs to get—put that up or whatever," *i.e.*, get rid of it. Defendant put the gun in his pocket.

¶ 15 On cross-examination, Brandy acknowledged that she "might have had a drink or two" that night. She did not recall defendant talking to Jenkins. She also did not hear any arguments that night. On redirect, Brandy testified that she did not see either Branch or Jenkins with a gun. She testified that defendant did not try to duck or run away when he was standing by Branch's car. On recross, Brandy acknowledged that she could not see Branch or Jenkins' laps from where she was sitting.

¶ 16 D. Testimony of Sergeant Hansen

¶ 17 Sergeant Heather Hansen, a crime scene investigator for the Illinois State Police, testified that, on the date of the shooting, she was called to the Marathon station to process a death investigation. She arrived at the crime scene around 6:15 a.m. and conducted a walkthrough, at

which time she recovered a .25 caliber shell casing and broken glass from a vehicle, and observed skid marks. Sergeant Hansen later received a call that the victim's vehicle had been transported from St. James Hospital to the Chicago Heights police station. She went to the station and examined the car, a white Crown Victoria with a blue top. According to Sergeant Hansen, there was a baby's car seat in the rear passenger seat, and in the seat was broken glass from the shattered rear passenger window and a "projectile," *i.e.*, a bullet. She also noticed that the front passenger seat was reclined back far enough that it was touching the front of the baby's car seat.

¶ 18 The next morning, Sergeant Hansen went to the Cook County medical examiner's office to observe the victim's autopsy and to take receipt of any evidence. During the autopsy, she recovered a bullet that was lodged inside Jenkins' body. A few days later, she delivered the two recovered bullets and the shell casing recovered from the crime scene to the Joliet Forensic Laboratory for further analysis. On cross-examination, Sergeant Hansen stated that she also conducted a gunshot residue test on Branch.

¶ 19 E. Testimony of Jeffrey Parise

¶ 20 Jeffery Parise, a forensic scientist for the Illinois State Police, testified as an expert in the area of firearms and firearms identification. Parise investigated the .25 caliber shell casing that was recovered from the Marathon station and the bullets recovered from Branch's car. He determined that the bullets were both .25 caliber and fired from the same firearm. He could not determine whether the .25 caliber shell casing came from the same weapon as the bullets, however. He testified that to do so, he would need the firearm, which, in this case, he did not have.

¶ 21 F. Testimony of Detective Robles

¶ 22 Detective Robles, of the Chicago Heights Police Department, testified that he was an "on call detective" on the date in question. After receiving a call of a homicide, he responded to the Marathon station and spoke with his supervisor and two patrol officers. He learned that there had been a shooting in the parking lot, that the victim had been driven to St. James Hospital, and that the offender had fled the area. His supervisor sent him to St. James Hospital where the vehicle that the victim had arrived in had been located. Detective Robles observed that the rear passenger window of the vehicle was shattered and that a bullet fragment was in the back seat. An officer advised him that there was a potential witness at the hospital; Detective Robles instructed the officer to bring that person to the police station. He returned to the crime scene for a bit. However, he was then instructed to go to the police station to interview witnesses.

¶ 23 At the station, Detective Robles spoke with Branch in an interview room. Afterwards, he located Rayonna and Brandy and asked them to come to the Chicago Heights police station. At some point, he spoke with Oshay in the detective room. After that conversation, the police began searching for defendant. Their efforts were fruitless, however, and they eventually obtained an arrest warrant for defendant after learning that he might be out of state. Detective Robles eventually forwarded defendant's arrest warrant to the United States Marshals Service.

¶ 24 In late July 2007, Detective Robles received a phone call from the Hillsborough County Sheriff's Department. He faxed them a copy of defendant's arrest warrant, picture, and identifiers. He then travelled to Tampa, Florida with his partner, another detective, and an assistant State's Attorney (ASA). They went to the Hillsborough County Sheriff's Department and met with defendant, then transported him back to Illinois. On cross-examination, Detective

Robles stated that when he executed a search warrant on the home of defendant's mother, he did not recover a .25 caliber handgun.

¶ 25 G. Testimony of Dr. Arangelovich

¶ 26 The parties stipulated to the testimony of Dr. Valerie Arangelovich, a pathologist with the office of the Cook County medical examiner. Dr. Arangelovich would testify that she performed an autopsy on Jenkins. Her examination revealed one gunshot wound to the chest and one gunshot wound to the back. Dr. Arangelovich recovered a small caliber bullet from the left side of Jenkins' back. She opined that the cause of death was a gunshot wound to the chest and that the manner of death was homicide.

¶ 27 The State rested, and defendant's motion for a directed verdict was denied.

¶ 28 H. Testimony of Officer Droba

¶ 29 The defense called Chicago Heights police officer Kevin Droba. Officer Droba testified that, on June 14, 2006, he was assigned to go to St. James Hospital in connection with the shooting of Jenkins. He and his partner drove to the hospital, and Officer Droba located Branch. Officer Droba searched a bathroom that Branch had been in for contraband; he did not recall searching Branch. On cross-examination, Officer Droba stated that he did not find any contraband in the bathroom.

¶ 30 I. Defendant's Testimony

¶ 31 Defendant testified during his trial. He said that he and his cousin, Oshay, met up with Rayonna at 2 a.m. on the day of the incident. According to defendant, he, Oshay and Rayonna were standing in front of his aunt's house. At one point, Rayonna asked for Oshay's car keys and drove off; she later returned with Brandy. Oshay suggested that they "just all go hang out." Defendant testified that he did not have a firearm at this time. The four of them drove around for

about an hour and went to a liquor store, where defendant purchased cigarettes and a half-pint of Hennessey cognac. They all drank some of the cognac, and drove to the Marathon station to buy more cigarettes. Rayonna was driving the car and pulled in front of the attendant window. Defendant got out of the car to buy the cigarettes, and then gave some to Rayonna. Oshay got out of the car, and he and defendant stood around talking. About that time, a white car pulled up to the gas pump, and a man got out and went to the attendant window to buy some items. The man, who defendant later learned was Jenkins, asked defendant where he was from as if he was "looking for some type of altercation." When defendant told him, "I'm from here," Jenkins said, "you goofy ass ni**ers out here." Defendant then responded, "what you mean by that." Jenkins replied, "exactly what I said." Oshay walked over and told Jenkins that they "ain't looking for trouble. Just trying to have good times with these ladies." Oshay then shook Jenkins' hand and walked away. Jenkins then returned to the passenger seat of the white car.

¶ 32 According to defendant, he noticed that Jenkins' passenger seat was reclined all the way. At some point, the white car pulled up "fast" towards defendant and came up "[r]eal close," almost "as if they were trying to run [him] over or something." Branch called Rayonna by name, and she seemed nervous about him. Defendant did nothing until Branch said, "what you dogs out here with these guys from the Heights." At that point, he looked in the car and saw that Branch had one hand on the steering wheel and the other hand on his lap holding an automatic "revolver-looking black gun." Defendant testified that Branch attempted to raise the gun, which prompted defendant, who was in between Branch and Rayonna, to pull a gun out of his pocket and fire shots "out of fear." Defendant stated that he fired the gun without aiming and while covering his face. The white car immediately pulled away.

¶ 33 Defendant testified that he did not know Branch or Jenkins at the time of the incident and never had any intention of starting an altercation with them. He denied walking over to their car or initiating a conversation with Jenkins. He stated that he "didn't intend *** to hurt anyone," but was "scared for [his] life." In fact, the reason he was carrying a loaded gun that night was "for protection;" one week before, defendant had witnessed Oshay being shot, and he was "afraid" because "a lot of things [were] going on in Chicago Heights at that time of night."

¶ 34 Defendant also testified that, on June 14, 2006, he was employed selling magazines door-to-door. He worked "state to state"—that is, "[e]very so often they will call [him] and tell [him] to come to a different state." Two or three days after the incident, defendant went to Florida for a "prearranged assignment" to sell magazines door-to-door. He was later apprehended in that state.

¶ 35 On cross-examination, defendant acknowledged using a number of different names when he was in Florida, including: Kevin Wells, Brian Wells, and Courtney Wells. He admitted that, on the night of the shooting, Branch was not threatening anybody. Defendant also stated that the gun he had was a semiautomatic "silver .25 gun," which ejects shell casings when it fires. Defendant did not hear glass shatter when he shot, and he stated that Branch never fired his weapon that night. After the shooting, Oshay drove defendant away "normally."

¶ 36 J. Stipulation to Mary Wong's Testimony

¶ 37 Following defendant's testimony, the defense rested. In rebuttal, the parties stipulated that Mary Wong was an expert in the field of forensic science of trace chemistry and that she would testify about her examination of the gunshot residue lifts from both of Branch's hands. She would testify that Branch "may not *** have discharged a firearm with either hand. If the subject did discharge a firearm, then the particles were not positive or [were] removed by activity or were not detected by the procedure."

¶ 38 The jury returned a verdict finding defendant guilty of first degree murder. The jury also found that during the commission of the offense, defendant personally discharged a firearm that proximately caused the death of another. Defendant filed a combined motion for a new trial and judgment notwithstanding the verdict; however, the court denied the motion. At sentencing, the court merged defendant's convictions and sentenced him to 35 years' imprisonment for first degree murder, with a 25-year firearm enhancement for an aggregate term of 60 years. Defendant was given 2,064 days of presentence credit. We have jurisdiction over this appeal pursuant to Illinois Supreme Court Rules 603 (eff. Feb. 6, 2013) and 606 (eff. Feb. 6, 2013).

ANALYSIS

¶ 39 Defendant contends that the State failed to disprove his self-defense claim beyond a reasonable doubt. Alternatively, he contends that his conviction should be reduced to second degree murder because he acted upon an unreasonable belief in the need for self-defense. He also contends that he was denied a fair trial where the State misstated the law in closing argument. Finally, he argues that his mittimus should be corrected to reflect additional presentence credit. We address each of these arguments in turn.

¶ 40 A. Self Defense and Second Degree Murder

¶ 41 Defendant claims that the State failed to disprove his claim of self-defense. He argues that he "credibly" testified that he only shot into Branch's car because Branch had a gun and was about to shoot him. He maintains that none of the occurrence witnesses contradicted his testimony about this particular fact. He also argues that this court should draw a negative inference from the fact that the State did not call Branch to testify.

¶ 42 The State argues that it disproved every element of defendant's self-defense claim. According to the State, defendant is merely inviting this court to reweigh the evidence and to

substitute its judgment for that of the jury. The State argues that the jury properly rejected defendant's "unbelievable" claim of self-defense, including his "incredible" testimony.

¶ 43 There is no dispute that the State established beyond a reasonable doubt that defendant intentionally or knowingly shot and killed Jeremy Jenkins. The only question is whether defendant was lawfully justified in his actions.

¶ 44 A person is justified in the use of deadly force against another "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 2006). Once a defendant raises self-defense, it is the State's burden to prove beyond a reasonable doubt that defendant did not act in self-defense. *People v. Lee*, 213 Ill. 2d 218, 224 (2004). The elements of self-defense are: (1) a threat of unlawful force directed against a person; (2) the person threatened was not the aggressor; (3) an imminent danger of harm; (4) the use of force was necessary; (5) the threatened person actually and subjectively believed that the existing danger required the use of the force applied; and (6) the threatened person's beliefs were objectively reasonable. *Id.* at 225. The State's negation of any one of these elements will defeat a defendant's claim of self-defense. *Id.*

¶ 45 In this case, defendant's self-defense claim rested entirely on his credibility and his account of the events. Defendant was the only witness at trial who testified that Branch had a gun and was about to shoot him. All of the other occurrence witnesses testified that there was no confrontation involving threats and that defendant approached Branch's car and started shooting into it without provocation. None of the witnesses other than defendant recalled seeing Branch with a gun or raising a gun. There was also a lack of any testimony or evidence to corroborate defendant's claim that Branch drove the white car in a manner that was threatening to defendant.

¶ 46 It is the responsibility of the trier of fact to determine the credibility of the witnesses and the weight to be given their testimony, to resolve conflicts in the evidence and to draw reasonable inferences therefrom. *People v. Williams*, 193 Ill. 2d 306, 338 (2000). The relevant inquiry is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt that defendant did not act in self-defense. *Lee*, 213 Ill. 2d at 225. We will only reverse a conviction where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt. *People v. Campbell*, 146 Ill. 2d 363, 375 (1992).

¶ 47 Here, the testimony of Rayonna and Brandy undermined much of defendant's testimony regarding the events on the night in question. For starters, their testimony called into question defendant's claim that he was carrying a gun only "for protection." Rayonna and Brandy testified that defendant had his gun out while they were driving around earlier in the evening. Brandy testified that defendant was "[m]essing around with it," and both ladies had to tell him to put it away. Their testimony seemed to indicate that defendant was treating his gun more as a toy on the night in question than as a weapon for protection. The testimony of Rayonna and Brandy also called into question defendant's claim that Branch had pointed a gun at him with the intent to shoot. Neither of them saw Branch point a gun at defendant, nor did they hear Branch arguing with defendant. All they saw, prior to the shooting, was defendant having a conversation with either Branch or Jenkins. According to Rayonna and Brandy, defendant walked up to the white car and started shooting. Brandy testified that defendant did not duck or try to run away as he stood by Branch's car. To the jury, this could have reasonably suggested that defendant never truly perceived any threat of force. Indeed, no gun was ever recovered from Branch, and Branch did not test positive for gunshot residue after the incident.

¶ 48 Defendant urges us to find his testimony credible, but we find his version of the events highly improbable. Defendant claims that Branch had a gun and was raising it at him on the night in question; however, if Branch was getting ready to shoot defendant, it seems likely he would have been able to do so within the time it took defendant to recognize the threat, reach into his pocket, pull out his gun, cover his face, point the gun at the car, and finally shoot. Furthermore, if Branch had his gun out and ready, one would expect that he would have fired shots in self-defense; defendant, however, testified that Branch did not fire a single shot. Moreover, it would have been reasonable for the jury to infer, from defendant's trip to Florida after the shooting, that defendant was attempting to flee from an investigation. Defendant claims that, before the incident, he was scheduled by his employer to go to Florida to sell magazines door-to-door. According to defendant, he did not even know after the incident that anyone had been shot. Yet, he acknowledged using several false names after he left Illinois. It was not improper for the jury to construe defendant's departure from the state, within days after the shooting, as further evidence of his guilt. *People v. Lewis*, 165 Ill. 2d 305, 349 (1995).

¶ 49 "When a defendant elects to explain the circumstances of what has occurred he is bound to tell a reasonable story or be judged by its improbabilities." *People v. Williams*, 209 Ill. App. 3d 709, 721 (1991). Here, defendant's version of the events defies common sense. The jury was not required to accept it over the competing version of events offered by the State. *People v. Ortiz*, 196 Ill. 2d 236, 267 (2001). While defendant notes that the jury could have drawn a negative inference from the fact that the State did not call Branch to testify, the jury chose not to draw such an inference here. We will not now question its decision, as our function is not to retry defendant. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). Because the State's witnesses

undermined defendant's credibility, and defendant's testimony was inherently improbable, we find that the State disproved defendant's claim of self defense beyond a reasonable doubt.

¶ 50 Defendant's reliance on *People v. Harling*, 29 Ill. App. 3d 1053 (1975), is misplaced. In *Harling*, this court reversed the defendant's conviction of voluntary manslaughter, finding that the defendant's own testimony "presented strong proof of self-defense." *Harling*, 29 Ill. App. 3d at 1060. There, the defendant testified that the victim struck him without provocation as he was leaving a tavern and had his back turned. *Id.* at 1058. Significantly, his testimony was corroborated by a bartender. *Id.* We found that the defendant's testimony was "neither incredible nor even improbable" and that it was "corroborated in important particulars." *Id.* at 1059. Here, unlike *Harling*, defendant's version of events borders on the preposterous and is inconsistent with the accounts of the other occurrence witnesses.

¶ 51 We also reject defendant's reliance on *People v. Honey*, 69 Ill. App. 2d 429 (1966). In *Honey*, the court reversed the defendant's voluntary manslaughter conviction. The defendant had testified that he had struck the victim, who had harbored a grudge against him, with a bed rail only after the victim threatened him by rushing at him, saying " 'I told you I was going to kill you.' " *Id.* at 431. The defendant stated that he had picked up a bed rail and jabbed the victim in the jaw with it in an effort to defend himself. *Id.* The defendant explained that he had tried to revive the victim with water after the victim fell to the ground. The State's occurrence witness testified that he saw defendant strike the deceased with the bed rail, but also corroborated defendant's account about his efforts to revive him with water. The State's witness also testified that he had not seen what had occurred between defendant and the victim prior to the incident. After citing the applicable statute governing self-defense, the *Honey* court simply concluded, without substantive legal analysis, that reversal of the conviction was warranted because "[t]he

defendant had introduced sufficient evidence to establish a plea of self-defense" and "[c]onsidering the record as a whole, it is apparent that the State did not prove the defendant guilty beyond a reasonable doubt." *Id.* at 433. *Honey* is not instructive in our review of defendant's self-defense claim. First, *Honey* contains no analysis that explains the court's reasoning for concluding that the defendant acted in self-defense. Second, the only occurrence witness in that case also testified that he had not seen what had occurred between the defendant and the victim prior to the incident that killed the victim. In contrast, here, the State's occurrence witnesses, Rayonna and Brandy Harper, both testified that they did not see Branch or Jenkins with a gun, nor did they recall either of the men arguing with defendant prior to the shooting.

¶ 52 Defendant argues, alternatively, that we should reduce his conviction to second degree murder. He claims that he established, by a preponderance of the evidence, that he had a subjective, but unreasonable, belief in the need for deadly force because Branch had a gun and was about to shoot him. A person commits second degree murder when he commits first degree murder and, at the time of the killing, he believes circumstances existed that would justify or exonerate the killing under self-defense principles, but his belief is unreasonable. 720 ILCS 5/9-2(a)(2) (West 2006). It is defendant's burden to prove, by a preponderance of the evidence, that this mitigating factor is present. 720 ILCS 5/9-2(c) (West 2006). The question for us is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found that the mitigating factor was not present. *People v. Blackwell*, 171 Ill. 2d 338, 358 (1996).

¶ 53 Here, the only evidence supporting a second degree murder conviction was defendant's own highly improbable testimony that Branch had a gun on the night in question. As we have already observed, no other witness saw Branch with a gun or testified that he posed any real

threat of danger at the time of the incident. We find that a reasonable jury could have rejected defendant's claim that he subjectively believed deadly force was warranted. As noted above, defendant's credibility was severely undermined by the version of events he gave, which defied common sense. We will not second-guess the jury's credibility determination on appeal. *People v. Murray*, 194 Ill. App. 3d 653, 656 (1990). We therefore decline to reduce defendant's conviction to second degree murder.

¶ 54 We have considered *People v. Ellis*, 107 Ill. App. 3d 603 (1982), and *People v. Hamilton*, 48 Ill. App. 3d 456 (1977), cited by defendant, and find both cases distinguishable. In *Ellis*, the court found that the defendant's version of the events was not improbable. *Ellis*, 107 Ill. App. 3d at 611. Similarly, in *Hamilton*, the court found that the State had not introduced sufficient evidence to overcome defendant's explanation of the shooting. *Hamilton*, 48 Ill. App. 3d at 458. Here, as noted, defendant version of the events was improbable. Also, the State presented sufficient evidence that defendant acted without justification. Both Rayonna and Brandy testified that the shooting was not preceded by any argument and that defendant, rather than acting out of fear, walked over to the car and started shooting into it. We thus find defendant's reliance on *Ellis* and *Hamilton* misplaced.

¶ 55 B. The State's Closing Remarks

¶ 56 Defendant next contends that he was denied a fair trial due to certain improper closing remarks made by the State. While defendant acknowledges that he has forfeited review of this issue by failing to object to the comments *and* raise them in a posttrial motion (*People v. Enoch*, 122 Ill. 2d 176, 186 (1988)), he requests that we review his claim for plain error. The plain error rule is a narrow and limited exception to the general rule of procedural default. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008). To obtain plain error relief, defendant must show a clear or obvious

error. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). He must then show that the evidence was so closely balanced that the error threatened to tip the scales of justice against him, or that the error was so serious as to affect the fairness of his trial and challenge the integrity of the judicial process. *Naylor*, 229 Ill. 2d at 593. Under both prongs, defendant bears the burden of persuasion. *Id.* If he fails to establish plain error, his procedural default must be honored. *Id.*

¶ 57 Defendant claims that the State made several misstatements of the law in closing argument. Specifically, he claims that the State incorrectly argued: (1) that it was his burden to prove that he acted in self-defense; (2) that it was his burden to establish the mitigating factor of second degree murder beyond a reasonable doubt; and (3) that he had a duty to retreat in order to claim self-defense. We find no plain error.[2]

¶ 58 " 'The purpose of closing arguments is to give the parties a final opportunity to review with the jury the admitted evidence, discuss what it means, apply the applicable law to that evidence, and argue why the evidence and law compel a favorable verdict.' " *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005) (quoting T. Mauet & W. Wolfson, Trial Evidence 439 (2d ed. 2001). The State generally has wide latitude in the content of its closing arguments (*People v. Evans*, 209 Ill. 2d 194, 225 (2004)), but it may not misstate the law (*People v. Ramsey*, 239 Ill. 2d 342, 441 (2010)). We will only find reversible error where the State's remarks were improper and so prejudicial that real justice was denied or the verdict of the jury may have resulted from the error. *Evans*, 209 Ill. 2d at 225.

¶ 59 Defendant first challenges comments made by the State regarding the credibility of defendant's testimony. During the State's rebuttal argument, the following exchange was had:

[2] The parties spend a portion of their briefs discussing which standard of review should be applied in reviewing the propriety of closing remarks: an abuse of discretion or *de novo* standard. This discussion is unnecessary. The proper standard of review for a forfeited claim of error is the plain error standard.

> "[The ASA]: *** So let's talk about that story that [defendant] fed you yesterday and ask yourselves if it's reasonable. Because remember, it's proof beyond a reasonable doubt, not any doubt, not any conceivable scenario that somebody might—
>
> [Defense Counsel]: Objection.
>
> THE COURT: Overruled.
>
> [The ASA]:
>
> —somebody might come up with. Reasonable doubt."

Defendant claims that the State, with this remark, "misled" the jury into believing that he had to prove his claim of self-defense beyond a reasonable doubt. We disagree. The State never argued that defendant had to prove his self-defense claim beyond a reasonable doubt; rather, the State argued that defendant's story did not create a reasonable doubt of his guilt with respect to the charge of first degree murder. This argument is commonly made to juries and is entirely proper. In his brief, defendant relies on selective quotation of individual words and phrases in order to give the State's comment new meaning; we do not find his argument persuasive. To the extent there was any confusion as to the respective burdens of the State and defendant, of which we are doubtful, the court sufficiently cured the confusion with a jury instruction that stated: "The State has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden remains on the State throughout the case. The defendant is not required to prove his innocence." See *People v. Williams*, 192 Ill. 2d 548, 587 (2000) (finding that any confusion resulting from the State's closing argument was sufficiently cured by a jury instruction). Accordingly, we find no error.

¶ 60 Defendant next challenges remarks made by the State regarding whether defendant had met his burden of proving second degree murder. The State argued in rebuttal:

> "Remember, it is their burden. If you find that we have proven beyond a reasonable doubt this first-degree murder, it's their burden then to show you that it's second-degree.
>
> * * *
>
> Once you come to the inevitable conclusion that we have proven first-degree murder beyond a reasonable doubt, it's not a give me compromise, let's just in case. That is a burden that they have that they came nowhere near meeting."

Defendant claims that, with this remark, the State "insinuated" that he had to prove the mitigating factor of second-degree murder beyond a reasonable doubt. Again, we disagree. As before, defendant has deconstructed the State's comment and selectively quoted it so that it has a meaning other than what the State plainly said. This is ultimately a very straightforward remark. The State argued that it had to prove defendant guilty of first degree murder beyond a reasonable doubt; it then argued that the burden shifted to defendant to prove second-degree murder. Nothing about this is incorrect. The mere fact that the State used the term "reasonable doubt" in referring to its burden does not "insinuate" that all other burdens, such as defendant's, were the same. The State was simply *arguing* its position; it was not instructing the jury on the law. If there was any confusion, it was cured by the court's instruction that "[t]he defendant has the burden of proving *by a preponderance of the evidence* that a mitigating factor is present so that he is guilty of the lesser offense of second-degree murder instead of first-degree murder." (Emphasis added.) See *id.* Under the circumstances, we find no error in the State's comment.

¶ 61 Defendant compares the instant case to *People v. Buckley*, 282 Ill. App. 3d 81 (1996). In *Buckley*, the State, in their closing argument of a prosecution for involuntary manslaughter, equated the mental state of recklessness with " 'being careless.'" *Id.* at 87. On appeal, we concluded that this misstatement of law amounted to plain error under the closely balanced prong of the plain error rule. *Id.* at 89-90. Here, unlike *Buckley*, there was no misstatement of the law and thus no error. As such, we find *Buckley* distinguishable.

¶ 62 Finally, defendant challenges a comment the State made in rebuttal suggesting that he had a duty to retreat. The State argued:

> "And at this point, he says that the cars are parked up against each other and he somehow—they came up hard on him. And he is somehow pinned and he can't go because, you know, to have self defense or even a second-degree, you have to have exhausted all options.
>
> You can't just think, oh, I am kind of afraid so I am going to gun this person down. It has to be imminent, and there has to be no other option for you, that I can't run away."

Defendant claims that the State incorrectly argued that he had a duty to retreat. To the extent that the prosecutor suggested that defendant, if attacked, had a duty to retreat in order to properly claim self-defense or second-degree murder, we agree that such a comment would be a misstatement of the law. A non-aggressor has no duty to retreat if he is in a place where he has a right to be. *People v. Willis*, 210 Ill. App. 3d 379, 382 (1991). Even if, however, the State's comment was improper and could constitute an error, we do not find the evidence so closely balanced that the error would have affected the jury's verdict. As we have repeatedly noted,

defendant's account of the events that purportedly led him to believe that Branch or Jenkins had a gun and had threatened defendant by driving the car at him or picking up the gun was not corroborated by any of the other witnesses, nor was there any forensic evidence or testimony from the police officers and detectives that would support defendant's account. In addition, defendant's explanation as to why he left for Florida within days after firing his gun into the car, purportedly to work on door-to-door sales in another state, lacks credibility. The evidence presented to the jury during the trial was not closely balanced. The State established that defendant had a conversation with either Branch or Jenkins at the gas station and then at one point, walked over to their car and shot into it. Rayonna and Harper, who were both near the car when the shooting occurred, both indicated that defendant fired his gun at Branch's car in the absence of any threat of force. No one other than defendant testified that Branch or Jenkins had a gun or threatened to use one against defendant. Brandy also testified that defendant did not try to duck or run away. Significantly, the police never recovered a gun from Branch, and the undisputed evidence shows that he never fired a shot. Under the circumstances, the question of whether defendant retreated from a threatening situation ultimately bears very little relevance here, as the evidence overwhelmingly established that there was never an imminent threat of force directed by Branch or Jenkins against defendant prior to the shooting. We therefore find no plain error under the first prong.

¶ 63 Defendant has failed to establish plain error under the second prong as well. He argues that the "cumulative effect" of the State's misstatements of the law amounted to plain error in that they affected the fairness of his trial and challenged the integrity of the judicial process. In order to qualify as second-prong plain error, there must be " 'a clear or obvious error *** 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.' " *People v. Thompson*, 238 Ill. 2d 598, 613 (2010) (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)). An error of the magnitude to satisfy second-prong plain error is considered a "structural error." *Id.* We recognize that in *People v. Clark*, 2016 IL 118845, our supreme court clarified that under Illinois law, structural errors are not limited to the six specific types of structural error identified by the United States Supreme Court. *Clark*, 2016 IL 118845, ¶ 46.

¶ 64 As explained above, the first two statements from the State's closing argument identified by defendant were not errors and thus could not constitute structural errors for the purpose of second-prong plain error analysis. Nor do we find that the third statement to rises to that level. To the extent it constitutes a misstatement of the law, we do not find it to be a "clear or obvious" error or so serious that it affected the fairness of defendant's trial or challenged the integrity of the judicial process. Furthermore, because defendant has identified only one potential misstatement of the law, we do not find "cumulative error [or] a pervasive pattern of unfair prejudice" (*People v. Johnson*, 208 Ill. 2d 53, 84 (2003)) that, in the aggregate, may be considered structural error. Under the circumstances, defendant has failed to meet his burden of establishing plain error.

¶ 65 Defendant's reliance on *People v. Estes*, 127 Ill. App. 3d 642 (1984), is unavailing. While in that case the court found that the State misstated the law in suggesting that the defendant had a duty to retreat, it was the cumulative effect of several errors that the court found to be substantially prejudicial. *Id.* at 649-50. Here, we have only found one error in closing argument, and it is not enough to rise to the level of plain error given the overwhelming evidence against defendant. *Estes* is therefore inapposite.

¶ 66 Defendant argues, alternatively, that his trial counsel was ineffective for failing to object to the foregoing comments. To establish ineffective assistance of counsel, defendant must demonstrate: (1) that counsel's performance was objectively unreasonable, and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Ramsey*, 239 Ill. 2d at 433 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). "Plain-error review under the closely-balanced-evidence prong of plain error is similar to an analysis for ineffective assistance of counsel based on evidentiary error insofar as a defendant in either case must show he was prejudiced." *People v. White*, 2011 IL 109689, ¶ 133. We have already found that defendant did not establish plain error under the closely balanced evidence prong, and the outcome under an ineffective assistance analysis is similar: "the evidence against defendant is such that he cannot show prejudice for purposes of either analysis." *Id.* ¶¶ 132-34. We therefore find no merit to defendant's ineffective assistance of counsel claim.

¶ 67 C. Presentence Credit

¶ 68 Defendant lastly contends that he is entitled to an additional day of presentence credit. The State concedes that such a correction is warranted. The record shows that defendant was arrested on September 20, 2007, and sentenced on May 16, 2013. Excluding the day of sentencing (*People v. Williams*, 239 Ill. 2d 503, 510 (2011)), he spent 2,065 days in presentence custody. However, he was only credited with 2,064 days of presentence credit. Under the circumstances, we agree that defendant is entitled to an additional day of credit. 730 ILCS 5/5-4.5-100(b) (West 2012). Therefore, pursuant to our authority under Illinois Supreme Court Rule 615(b), we direct the clerk to modify his mittimus to reflect 2,065 days of presentence credit.

¶ 69 CONCLUSION

¶ 70 For the reasons stated, we order the clerk to modify defendant's mittimus as indicated and affirm the judgment in all other respects.

¶ 71 Affirmed; mittimus modified.