THIRD DIVISION
November 22, 2017

2017 IL App (1st) 134012-UB

No. 1-13-4012

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 19547
	)	
MATTHEW GRAY,	)	The Honorable
	)	Nicholas Ford
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Pucinski and Mason concurred in the judgment.

ORDER

¶ 1 *Held*: Officers' testimony regarding the statements of defendant's girlfriend did not violate the confrontation clause. Defendant also failed to show prosecutorial misconduct. Defendant's conviction for aggravated battery was vacated under the one-act, one-crime doctrine.

¶ 2 Following a jury trial, defendant Matthew Gray was found guilty of aggravated battery and two counts of aggravated domestic battery. Defendant appealed, asserting, among other things, that the victim's state of intoxication and memory lapses rendered the evidence of the altercation insufficient to sustain defendant's conviction. Defendant also asserted that his aggravated domestic battery convictions must be vacated because the statute defining "family or

household members" (725 ILCS 5/112A-3(3) (West 2010)) was unconstitutional as applied to his relationship with the victim. Although we rejected defendant's challenge to the sufficiency of the evidence, we agreed that the statute was unconstitutional as applied and reversed and remanded for further proceedings on aggravated battery.

¶ 3 Our supreme court subsequently agreed that the evidence was sufficient to sustain defendant's conviction but reversed our determination that the statute violated defendant's right to due process and remanded for this court to consider defendant's remaining contentions. *People v. Gray*, 2017 IL 120958. Accordingly, we now address defendant's assertions that (1) the admission of out-of-court statements violated the confrontation clause; (2) the State committed prosecutorial misconduct during closing arguments; and (3) the trial court erroneously sentenced him for multiple convictions, in violation of the one-act, one-crime doctrine. We vacate defendant's conviction for aggravated battery, order the mittimus to be corrected and affirm the judgment in all other respects.

¶ 4 I. Background

¶ 5 We recite only those facts necessary to resolve the issues remaining on remand from the supreme court. Defendant and former paramour Tina Carthron spent the night of November 1, 2011, drinking at defendant's apartment. By morning, Carthron had sustained knife wounds to her chest and back. Defendant sustained a bite wound to his chest. Carthron claimed that defendant, without provocation, stabbed her and choked her. In contrast, defendant acknowledged cutting Carthron's back but claimed it was done in self-defense.

¶ 6 The State charged defendant with aggravated battery, aggravated domestic battery and attempted first-degree murder. Before trial, the State moved to admit proof of other crimes committed against defendant's girlfriend Laura Moore, as evidence of his motive, state of mind

and intent, as well as his propensity to commit domestic violence (725 ILCS 5/115-7.4 (West 2010)). The State also filed a motion *in limine* to present Moore's out-of-court statements to police officers in lieu of her live testimony regarding the prior incidents of domestic violence. Specifically, the State argued that the prior incidents were admissible under the excited utterance exception to the rule against hearsay. Defendant argued, however, that Moore's out-of-court statements were testimonial and would violate his right to confront the witnesses against him. The trial court ultimately ruled in favor of the State.

¶ 7 A. The Incident

¶ 8 At trial, the State's evidence of Carthron's encounter with defendant generally showed that on the night in question, Moore called while Carthron was at defendant's apartment. Carthron was upset but testified that she and defendant had sex. When defendant went to bed, Carthron kept drinking. In the morning, she was still drunk and she argued with defendant about the phone call from Moore. Carthron testified that defendant then choked her and she passed out. When she regained consciousness, she saw defendant holding a knife. He told her to leave because he had called the police.

¶ 9 As she grabbed her coat, she saw that her chest was bleeding and said, "oh, no, you didn't stab me." She did not remember defendant stabbing her, however. After taking the bus to her daughter's home, Carthron unzipped her coat. She testified that "blood start [*sic*] shooting out" of her chest. Her daughter saw that Carthron had also been stabbed in the back.

¶ 10 In contrast, defendant claimed that he acted in self-defense. He testified on his own behalf that no sexual conduct occurred and he awoke to Carthron biting his chest. He tried to push her off but she would not let go. He looked for something to hit her with and saw only a knife. When he touched the knife to her back, she continued biting him. He touched the knife to

her back again, cutting her in the process. Once she released him, he pushed her off the bed. It was also possible that the knife made additional contact with her chest when he pushed her.

¶ 11 B. Other Crimes Evidence

¶ 12 The jury heard additional evidence of the aforementioned incidents involving Moore. Officer Terry Murray testified that about 1 p.m. on September 2, 2010, he and his partner Officer Kim Williams responded to a domestic battery call at 5750 South Lafayette, where he saw defendant and his mother on the porch. When Moore eventually came outside and approached the two officers, she was agitated and holding her leg but was not bleeding. About 20 minutes had passed since the incident occurred. Without being asked any questions, she said that defendant, her boyfriend, had kicked her down the stairs and hit her in the left eye. Officer Murray observed a minor bruise under her eye and a cut lip. Officer Murray also learned that they had fought about money. Both defendant and Moore were highly intoxicated.

¶ 13 Officer Murray testified that he eventually asked Moore questions and learned more about what happened that day. The record sheds no light, however, on what questions were asked or when such additional questions were asked. Moore did not want to sign a complaint but Officer Murray arrested defendant based on her answers to his questions. Although no one asked Officer Murray for help, Moore went to the hospital for seemingly minor injuries. The trial court denied defendant's motion to bar evidence of Moore's out-of-court testimonial statements.

¶ 14 Officer Ochoa testified that in February 2011, he and Officer Gonzalez responded to a domestic disturbance call at 7425 South Harvard Avenue, where they encountered Moore and defendant. Both appeared to be intoxicated that evening and Moore's neck was red. The officers spoke to defendant and Moore individually. When Officer Ochoa asked Moore what happened, she said she was watching the Super Bowl with defendant when he became irate, called her

names and grabbed her neck. This occurred 5 to 10 minutes before the officers arrived. Moore declined to have an ambulance called. Following Officer Ochoa's testimony, the trial court again overruled defendant's objection to the admission of such testimony.

¶ 15 During defendant's testimony, he acknowledged that Moore had previously reported him to the police. Defendant also acknowledged pushing Moore during one argument. On September 2, 2010, they were drinking and she slipped on the stairs but defendant denied punching her in the face or kicking her down the stairs. When the police, who happened to be passing by, asked what was going on, the intoxicated Moore said that defendant pushed her down the stairs.

¶ 16 The jury found defendant guilty of aggravated battery and two counts of aggravated domestic battery based on him strangling and stabbing Carthron, but acquitted him of attempted murder. Defendant moved for a new trial, arguing, among other things, that the court erroneously admitted proof of other crimes into evidence and violated his right to confront witnesses against him. The trial court denied defendant's motion and sentenced him to concurrent five-year prison terms for the two counts of aggravated domestic battery and a concurrent three-year prison term for aggravated battery.

¶ 17 II. Analysis

¶ 18 A. Confrontation Clause

¶ 19 On appeal, defendant asserts that the trial court denied his constitutional right to confront his accuser when it permitted the State to present the testimonial statements of Moore through two responding police officers. In response, the State disputes that Moore's statements were testimonial. We review *de novo* whether a statement is testimonial. *People v. Sutton*, 233 Ill. 2d 89, 112 (2009).

¶ 20 Under the confrontation clause, testimonial statements of a witness who did not testify at trial are inadmissible unless (1) the witness is unavailable to testify at trial, and (2) the defendant previously had an opportunity to cross-examine the witness. *People v. Stechly*, 225 Ill. 2d 246, 279 (2007) (citing *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004)). That being said, the confrontation clause does not apply to nontestimonial statements. *Stechly*, 225 Ill. 2d at 279 (citing *Davis v. Washington*, 547 U.S. 813, 821 (2006)). The threshold question under confrontation analysis is often whether the statement is testimonial. *People v. Cleary*, 2013 IL App (3d) 110610, ¶ 37.

¶ 21 In order to be testimonial, a statement must (1) be made in a solemn fashion, and (2) be intended to establish a particular fact. *Stechly*, 225 Ill. 2d at 281-82; see also *Cleary*, 2013 IL App (3d) 110610, ¶ 37 (observing that our supreme court has adopted the two-part analysis found in *Stechly*'s plurality opinion). A statement is solemn if formally made, such as under oath or to a police officer, or if the statement is made under some threat of consequences for dishonesty. *Cleary*, 2013 IL App (3d) 110610, ¶ 56. As to the second requirement, courts consider whether the witness, when making the statement, was acting analogously to a trial witness, providing information about events that already occurred. *Stechly*, 225 Ill. 2d at 282.

¶ 22 When statements result from police questioning, courts focus on the questioner's intent in eliciting the statement in light of objective circumstances. *Id*. at 284-85. A statement made to law enforcement is nontestimonial where the circumstances objectively indicate that the primary purpose of interrogation was "to gather information to meet an ongoing emergency." *Sutton*, 233 Ill. 2d at 110. Conversely, statements are testimonial where circumstances indicate there is no ongoing emergency and the interrogation's primary purpose is to prove past events possibly relevant to a later prosecution. *Davis*, 547 U.S. at 822.

¶ 23 We find that Moore's statements to Officer Murray were not testimonial. Officer Murray was responding to a domestic battery call. Although defendant argues that Officer Murray did not see anyone injured or asking for help upon his arrival, injured victims needing medical care are not always in plain sight. In addition, the passage of 20 minutes since the alleged battery did not foreclose the possibility that Moore was in need of medical care. Thus, there was every reason to question Moore for her safety. Stated differently, Officer Murray was entitled to question Moore to assess the situation and neutralize any ongoing emergency.

¶ 24 That being said, Officer Murray did not initially question Moore. Instead, Moore volunteered that defendant had kicked her down the stairs and hit her in the left eye. Although Officer Murray continued to question Moore after she refused to sign a complaint, Moore's initial statements are what the jury heard and what defendant now challenges. Even if Officer Murray's primary purpose for questioning Moore eventually became to investigate a past crime in order to make an arrest, the record nonetheless shows that the primary purpose of the officer's initial interaction with Moore was to assess the situation and neutralize any ongoing emergency.

¶ 25 To the extent that Officer Murray arrested defendant based on Moore's initial statements as well, we note that confrontation analysis does not turn on how the statement was ultimately used. Instead, we look to Officer Murray's intent in requesting the information. The record does not support defendant's assertion that Moore's initial statements were elicited or made for the primary purpose of establishing that a crime had occurred.

¶ 26 We also find Moore's statements to Officer Ochoa were nontestimonial. Officer Ochoa testified that he and Officer Gonzalez were responding to a domestic disturbance when Officer Ochoa saw that Moore's neck was red. Thus, he had reason to ascertain whether an emergency was in progress. Although Moore and defendant were sitting outside the house when the police

arrived, and Moore ultimately declined to have an ambulance called, asking Moore what happened was entirely consistent with determining whether Moore required medical assistance. Once again, the record does not support defendant's assertion that Moore's statements were elicited and made with the primary purpose of establishing that a crime had occurred.

¶ 27 The United States Supreme Court's decision in *Hammon*, the companion case to *Davis*, does not change the result. There, the police responded to a domestic disturbance at the Hammon home. Upon the officers' arrival, they found Amy Hammon alone on the porch. *Davis*, 547 U.S. at 819. She appeared to be "somewhat frightened" but said that "nothing was the matter." *Id*. She allowed the officers to enter the home where an officer saw flames emerging from a gas heating unit and glass on the ground in front of it. *Id*. Hershel Hammon told the officers that he and his wife had argued but everything was fine. *Id*. He said the argument was not physical. *Id*.

¶ 28 Notwithstanding Amy's assertion that nothing was the matter, one officer then spoke to Amy alone in the living room. *Id*. She gave an oral account of what happened, which she subsequently memorialized in a handwritten affidavit. *Id*. at 820. According to the affidavit, her husband broke the furnace, shoved her down into the broken glass, hit her in the chest, broke lamps and a phone, damaged her van so that she could not leave and attacked her daughter. *Id*. Amy failed to appear at Hershel's bench trial for domestic battery and the court admitted the affidavit into evidence. *Id*. The officer also testified regarding his conversation with Amy. *Id*.

¶ 29 The supreme court stated, "[i]t is entirely clear from the circumstances that the interrogation was part of an investigation into possible criminal past conduct-as, indeed, the testifying officer expressly acknowledged." *Id*. at 829. The court also found that (1) no emergency was in progress; (2) the officer observed no arguing or throwing of objects; (3) Herschel posed no immediate threat to Amy's person; and (4) Amy told the officers that things

were fine. *Id*. at 829-30. Thus, upon speaking to Amy a second time, the officer was attempting to determine what had already happened, not what was presently happening. *Id*. at 830. Moving Amy to another room sufficiently established the formality of the interrogation. *Id*.

¶ 30 The supreme court clarified that responding officers need to know whom they are interacting with to assess the situation and potential threat to their safety or that of a potential victim. *Id*. at 832. "Such exigencies may often mean that 'initial inquiries' produce nontestimonial statements." *Id*. Yet, "in cases like this one, where Amy's statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation, the fact that they were given at an alleged crime scene and were 'initial inquiries' is immaterial." *Id*.

¶ 31 In contrast, here, Moore did not indicate to either officer that everything was fine. Additionally, her physical state on both occasions suggested she was not fine. Officer Murray observed her holding her leg and Officer Ochoa saw that her neck was red. Neither Officer Murray nor Officer Ochoa acknowledged that they initially set out to interrogate Moore as part of an investigation into possible criminal conduct. Unlike *Hammon*, the officers' actions were consistent with assessing the situation to remedy any ongoing emergency. Because Moore's statements to the officers were nontestimonial, we find no confrontation clause violation.

¶ 32 B. Closing Argument

¶ 33 Next, defendant asserts that during closing arguments, the prosecutor improperly (1) misinformed the jury of other crimes not in evidence, (2) told the jury that defendant was responsible for the absence of Moore's testimony and (3) misstated the law of self-defense. While some confusion exists as to whether courts review this contention *de novo* or for an abuse

of discretion (*People v. Phillips*, 392 Ill. App. 3d 243, 274 (2009)), we reach the same result under either standard of review.

¶ 34 Initially, defendant acknowledges that he failed to preserve these issues. See *People v. Donahue*, 2014 IL App (1st) 120163, ¶ 109 (stating that to preserve an alleged error for review, the defendant must specifically object at trial and again in a posttrial motion). He nonetheless asks this court to review these contentions for plain error.

¶ 35 Forfeited errors may be reviewed as plain error where (1) the evidence is so closely balanced that the error threatened to tip the scales of justice against the defendant or (2) the error is so serious that it impacted the fairness of the trial and the integrity of the judicial process. *People v. Belknap*, 2014 IL 117094, ¶ 48. In order to find plain error, however, there must be error. *People v. Wright*, 2017 IL 119561, ¶ 109. We find none.

¶ 36 When reviewing closing arguments, courts consider the arguments of both the prosecutor and the defense attorney in their entirety so that the remarks are placed in context. *Donahue*, 2014 IL App (1st) 120163, ¶ 115. The prosecutor has wide latitude in closing arguments and may comment on the evidence and any reasonable inferences therefrom. *Id*. Additionally, "[a] prosecutor may respond to comments made by defense counsel in closing argument that clearly invite a response." *People v. Munson*, 206 Ill. 2d 104, 145 (2003); but see *People v. Gorosteata*, 374 Ill. App. 3d 203, 221 (2007) (citing *United States v. Young*, 470 U.S. 1, 12-13 (1985)) (stating that "[t]he invited response doctrine allows a party who is provoked by his opponent's *improper argument* to right the scale by fighting fire with fire (emphasis added)).[1] The prosecutor may not, however, misstate the law or misrepresent the facts. *People v. Carbajal*, 2013 IL App (2d) 111018, ¶ 29.

[1] Defendant has cited no Illinois Supreme Court authority narrowing the application of Illinois' invited response doctrine to instances where defense counsel's arguments were improper. Accordingly, we decline to narrow the rule as a matter of Illinois procedure.

¶ 37 1. Misinforming the Jury of Other Crimes

¶ 38 Defendant asserts that the prosecutor misinformed the jury that defendant had committed other crimes with a knife when the prosecutor argued that knives were defendant's "weapon of choice" and that he "used knives, a weapon he is familiar with." See *People v. Terry*, 312 Ill. App. 3d 984, 992 (2000) (stating that a prosecutor's argument that a defendant participated in other crimes is highly prejudicial because it is likely to indicate that the defendant was a bad person). We disagree.

¶ 39 The prosecutor argued as follows:

> "And this wasn't a situation where he just grabbed a knife to defend himself. This is his weapon of choice. You will see them all as they are laying around his apartment. He could have been in any corner of that room and turned around and grabbed a knife. They are everywhere. What he uses wasn't protecting himself. He was mad. He was angry. And he used knives, a weapon he is familiar with."

¶ 40 This argument reflects evidence that knives were found throughout defendant's apartment. Defendant testified that he kept several knives in his home, including a knife with a protective sheath over it so he could carry it with him. He further testified that he kept a knife by his bed for security. Consequently, the evidence supports the prosecutor's statement that defendant's weapon of choice, at least for protective purposes, was a knife and that he was familiar with knives. While the prosecutor argued that defendant was using a knife offensively in this instance, she did not suggest that defendant had previously used knives in an offensive manner. The prosecutor's comment also responded to defense counsel's argument that he used a knife in this instance to protect himself from Carthron.

¶ 41 Yet, defendant contends that the prosecutor linked the aforementioned comments about knives to the other crimes evidence admitted into evidence because the prosecutor discussed the incidents involving Moore immediately after the challenged comments. Defendant argues that the jury must have inferred from this that defendant committed other crimes against Moore with a knife. We are not persuaded.

¶ 42 As defendant acknowledges, the prosecutor discussed the evidence involving Moore only *after* discussing defendant's fondness for knives. The prosecutor did not interweave comments about knives into his discussion of other crimes. Additionally, the evidence at trial did not show that defendant at any time used knives against Moore and the jury was instructed to disregard arguments not based on the evidence. See *People v. Gonzalez*, 388 Ill. App. 3d 566, 598 (2008) (stating that a trial court may cure errors in closing argument by informing the jury that arguments are not evidence and must be disregarded if not supported by the evidence or by granting an objection and admonishing jurors to disregard the improper comments). Considering the evidence presented and the context of the challenged statements, we find no error, let alone reversible error.

¶ 43 2. Defendant's Failure to Present Witnesses

¶ 44 Defendant also asserts that the prosecutor improperly remarked on his failure to present Moore's testimony. Generally, the prosecutor may not comment on a defendant's failure to present witnesses when those witnesses are equally accessible to the defendant and the State. *People v. Eddington*, 129 Ill. App. 3d 745, 777 (1984). Additionally, prosecutors may not suggest to the jury that the witnesses were afraid to testify due to a defendant's threats or intimidation unless those suggestions are supported by the evidence. *People v. Mullen*, 141 Ill. 2d 394, 405 (1990). Notwithstanding the foregoing principles, we find no error.

¶ 45 Defense counsel argued as follows:

"The State has also presented evidence of some other incidents. These are incidents that allegedly involved Laura Moore. Did you hear from Laura Moore yesterday? Did you hear from [her] at all during this trial? Why wasn't she here?

What was the evidence you heard? You heard evidence from some police officers and you heard evidence from a doctor. Everything you heard was hearsay. You didn't hear these words out of Laura Moore's mouth herself. And because of that you have to consider how much weight to give to this. I would argue that you can't give it much weight because if this really happened you would be hearing from Laura Moore herself."

Thus, defense counsel urged the jurors to disregard the State's evidence of other crimes as false because Moore did not testify.

¶ 46 In rebuttal, the prosecutor argued the officers' testimony regarding prior incidents with Moore were relevant to defendant's intent. The following colloquy then ensued:

"MS. PETERSON [Assistant State's Attorney]: Why didn't we hear from Laura Moore? I think you know why we didn't hear from Laura Moore, because the defendant talked about his long relationship with her and how she is his common law wife. The defendant doesn't have to call any witnesses.

MR. DUNNE [Defense Counsel]: Objection.

THE COURT: Overruled.

MS. PETERSON: He doesn't have to call any witnesses, but he did. He took the stand. He didn't call Laura Moore.

MR. DUNNE: Objection.

THE COURT: Sustained.

MR. DUNNE: I ask it be stricken.

THE COURT: It will be stricken.

MS. PETERSON: The defendant has the same ability to call a witness as the State does. He doesn't have to, but he can."

¶ 47 The challenged comments were invited by defense counsel's argument that the State's evidence of other crimes was not credible in the absence of Moore's testimony. Our supreme court has found similar rebuttal argument to have been invited in like circumstances. See *People v. Kliner*, 185 Ill. 2d 81, 155 (1998) (finding the State's rebuttal argument regarding the defendant's ability to subpoena a witness was invited by defense counsel's argument that the prosecutor failed to call the witness); *People v. Brown*, 172 Ill. 2d 1, 43 (1996). Additionally, the prosecutor repeatedly told the jury that defendant had no obligation to call witnesses. See *Kliner*, 185 Ill. 2d at 155 (observing that the prosecutor acknowledged in closing that the burden was on the State). The challenged comments do not otherwise suggest that Moore was afraid to testify due to defendant's threats or intimidation. Moreover, the prosecutor's comment that Moore was defendant's common law wife suggested only that she was available to him.

¶ 48 When considered in context, a jury would have understood the prosecutor's remarks to mean that the absence of Moore's testimony did not render the evidence of other crimes unbelievable. Even if the prosecutor's argument had been improper, the court ultimately sustained defendant's objection to her remark on defendant's failure to present Moore and ordered that the comment be stricken. As stated, the court also instructed the jurors to disregard arguments not based on the evidence. See *Gonzalez*, 388 Ill. App. 3d at 598. This cured any error.

¶ 49 3. Misstating the Law of Self-Defense

¶ 50 Defendant further contends the prosecutor misstated the law of self-defense. Specifically, defendant argues the prosecutor suggested that the jury needed to find the bite mark constituted great bodily harm in order to find defendant acted in self-defense; in contrast, self-defense requires only that defendant *reasonably believed* force was necessary to prevent great bodily harm.

¶ 51 In closing, defense counsel argued that physical evidence corroborated defendant's assertion that he was acting in self-defense:

> "You saw the photographs of his injury. And you see exactly where he said it was, there is an oval mark in his lower chest, and it is still red the next day and there are bumps in it. There are teeth marks in it. Now, that matches what Matthew said.*** This is a photograph Matthew testified was taken three months after this alleged incident happened. This is a photograph that is still showing bruising from the bite when Miss Carthron was latched onto his chest. This is a significant injury. It is an injury that is still there three months later and supports Matthew's story."

Defense counsel later argued:

> "Matthew's actions were justified because he was acting in self-defense. He reasonably believed that he was in danger of receiving bodily harm, and as a result he touched her in the back with the knife. And he was in danger of receiving that bodily harm because Tina was biting him and left these marks."

In summary, counsel argued that Carthron's act of biting defendant, as evidenced by his wound, showed defendant reasonably believed it was necessary to touch the knife to Carthron's back in order to defend himself against the imminent use of unlawful force.

¶ 52 The prosecutor remarked as follows:

"[Defendant] is justified in the use of force when he *reasonably believes* that such conduct is necessary to defend himself against the imminent use of unlawful force.

Again, that word reasonably. *** There is nothing reasonable about what the defendant told you.

And when you are considering that instruction, please look at the picture of the red oval and ask yourself if he was *reasonable to believe* that he needed to stab a woman because of this red mark. ***

The second paragraph, a person is justified in the use of force which is intended or likely to cause death or great bodily harm only if he *reasonably believes* that such force is necessary to prevent imminent death or great bodily harm to himself.

So *** you have to say that he *believed reasonably* that this red oval was placing him at risk of imminent death or great bodily harm. There is no way.

They are telling you the stab wounds aren't even great bodily harm. They don't want you to even think that's great bodily harm, but they want you to think that the oval on his stomach is great bodily harm, and that's what you have to believe if you find he was justified in that stabbing." (Emphases added.)

¶ 53 Taken as a whole, the prosecutor's comments did not misstate the law. First, she focused on the requirement that defendant's belief be reasonable. The prosecutor urged the jury to find it was unreasonable for defendant to believe that the force Carthron used in biting him posed risk of imminent death or great bodily harm such that defendant needed to touch her with a knife. No juror would understand the prosecutor's comments to suggest that self-defense required evidence of actual bodily harm. Moreover, defense counsel's arguments that the bite marks corroborated his self-defense claim invited the prosecutor to argue the opposite. That being said, defendant

argues in his reply brief that the prosecutor's comments were not a proper response to defense counsel's remarks because the challenged comments were based on a different form of self defense.

¶ 54 The jury was instructed as to two forms of self-defense: (1) the use of force, and (2) the use of force which is intended or likely to cause death or great bodily harm. The jury was instructed that the first form required a reasonable belief that such conduct was necessary to defend against the *imminent use of unlawful force*. The jury was also instructed, however, that the second form required a reasonable belief that such force was necessary to prevent *imminent death or great bodily harm*. See 720 ILCS 5/7-1(a) (West 2010). Defendant contends that while defense counsel urged the jury to find defendant acted in self-defense based on the first form, the prosecutor's purported response pertained to the second form. Thus, defendant maintains that an argument based on one form of self-defense could not have invited the prosecutor to respond with an argument based on the other.

¶ 55 The prosecutor was free to argue that evidence of a bite wound did not support a reasonable belief that defendant needed to use force against Carthron. More importantly, the prosecutor was entitled to argue, in contrast to defense counsel's theory, that defendant used force likely to cause great bodily harm and that the evidence showed defendant could not have reasonably believed that Carthron threatened the same level of force and injury. Accordingly, defense counsel invited the prosecutor's remarks, notwithstanding the attorneys' different theories.

¶ 56 Even if the prosecutor's comments were not invited, we would reach the same result. The prosecutor repeatedly referred to the reasonableness of defendant's belief. Thus, a jury considering her comments in context would not think she was suggesting self-defense was

unavailable unless the actual injury cause by Carthron amounted to great bodily harm. Furthermore, as defendant acknowledges, the court instructed the jury on self-defense. See *People v. Wilmington*, 2013 IL 112938, ¶ 49 (absent some suggestion to the contrary, we presume jurors follow the law set forth in the jury instructions). We find no error, let alone reversible error or plain error. *Cf. People v. Estes*, 127 Ill. App. 3d 642, 649 (1984) (finding error where the prosecutor suggested to the jury in closing argument and during cross-examination of the defendant that the defendant had a duty to retreat, a clear misstatement of law that could have substantially influenced the jury's determination).

¶ 57 C. One-Act, One-Crime

¶ 58 Finally, defendant asserts and the State agrees that his conviction for aggravated battery should be vacated under the one-act, one-crime doctrine. Specifically, his aggravated domestic battery and aggravated battery convictions are based on the same act of stabbing Carthron and the State did not treat separate stab wounds as resulting from separate acts. *People v. Crespo*, 203 Ill. 2d 335, 340-45 (2003). Accordingly, we vacate the aggravated battery conviction and order the mittimus to be corrected.

¶ 59 III. CONCLUSION

¶ 60 The trial court properly allowed the officers to testify to the nontestimonial statements of defendant's girlfriend. Additionally, the prosecutor's closing arguments were not improper. Defendant's aggravated battery conviction, however, must be vacated as violative of the one-act, one-crime doctrine.

¶ 61 For the foregoing reasons, we vacate defendant's aggravated battery conviction, order the mittimus to be corrected and affirm the judgment in all other respects.

¶ 62 Affirmed in part; vacated in part; mittimus corrected.