

FOURTH DIVISION  
Order filed March 31, 2015  
Modified upon denial of rehearing May 14, 2015

1-13-1107

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 9943
	)	
DEONTA WALLACE,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE HOWSE delivered the judgment of the court.  
Presiding Justice Fitzgerald Smith and Justice Cobbs concurred in the judgment.

**ORDER**

¶ 1 *Held:* The circuit court of Cook County's judgment convicting defendant of first degree murder is affirmed. The trial court did not commit reversible error in excluding defendant's prior statement; the trial court did not err in instructing the jury to re-read one instruction and continue to deliberate in response to a question from the jury; the State did not commit error during closing argument; and defendant did not receive ineffective assistance of counsel.

¶ 2 The State charged defendant, Deonta Wallace, with six counts of first degree murder based on the shooting death of Samuel Isaiah Thomas. At trial, defendant did not deny shooting Thomas but claimed he acted in self-defense. Following trial a jury found defendant guilty of first degree murder. The circuit court of Cook County entered judgment on one count of first degree murder and sentenced defendant to 55 years' imprisonment. Defendant appeals arguing (1) the trial court erroneously excluded his prior statement, (2) the court failed to properly respond to a question from the jury during deliberations, (3) the State committed reversible error during closing argument, and (4) he received ineffective assistance of counsel because his trial lawyer failed to preserve these and other issues.

¶ 3 For the following reasons, we affirm.

¶ 4 BACKGROUND

¶ 5 Defendant admits to shooting Thomas but claims he acted in self-defense. The following evidence adduced at defendant's trial is pertinent to the issues on appeal. Antonia Rogers, Anton Champ, and Patrick Hawkins were with Thomas at the time of the shooting. Kyle Gholston and defendant approached the victim and his companions before the shooting. Gholston and defendant went to Thomas because Gholston's girlfriend, Starnicia Woodley, told Gholston that earlier that day Thomas called her an offensive name.

¶ 6 Rogers testified that she had been on a street corner with Thomas and several others for approximately 45 minutes when Gholston and defendant approached Thomas. Rogers recognized Gholston but did not recognize defendant. Rogers testified that Gholston and Thomas were exchanging angry words but Champ diffused the situation and Thomas was walking away. Then, according to Rogers, Gholston said words to Thomas to the effect that

defendant had a gun in his possession. In response, Thomas turned to face Gholston, and, according to Rogers, as soon as Thomas turned defendant shot Thomas twice. Rogers testified Thomas did not have anything in his hands.

¶ 7 Patrick Hawkins was with Thomas's group when Gholston and defendant arrived. Hawkins did not know defendant at the time. Hawkins testified that after Gholston and Thomas exchanged words, Gholston said words to the effect that defendant had a gun, after which, Hawkins testified, two shots were fired. Hawkins did not hear Thomas say anything about getting a gun. According to Hawkins, as soon as Champ put his hand up to calm Thomas the shots were fired.

¶ 8 Champ testified that Gholston asked Thomas about accosting Woodley and Champ tried to diffuse the situation. Champ and Thomas started to walk away and Champ turned back when Gholston intimated defendant was armed with a gun. When they turned back defendant shot Thomas. Champ testified he did not see anything in Thomas's hand and did not hear Thomas say anything about a gun.

¶ 9 Woodley saw the shooting. Woodley heard Thomas mention guns three times during the verbal confrontation between Gholston and Thomas. Woodley testified that she heard Thomas tell Gholston that he and his companions were preparing to retrieve their guns. Defendant was the only person she saw with a gun.

¶ 10 Gholston testified he only knew defendant by a nickname before the shooting from hanging out at his brother's barber shop. Defendant stood a few feet from Gholston as he spoke to Thomas. Gholston also heard Thomas say that he was going to get his gun. Gholston testified that as Thomas and Champ turned to leave he heard gunshots. After the

second shot Gholston looked up to see defendant firing. Gholston testified that he did not see a gun or anything else in Thomas's hands and that no one in Thomas's group had a gun.

¶ 11 Police recovered a black and silver cellular telephone from the scene that belonged to Thomas.

¶ 12 Defendant testified that he had been left traumatized by being shot in the legs years earlier. Defendant testified that during their exchange, Gholston asked Thomas if Thomas wanted to fight. Thomas unzipped his jacket and his friends came forward to try to stop the confrontation. Thomas resisted and, according to defendant, Thomas then told his friends to go get their guns. While Gholston and Thomas argued, defendant retrieved his gun from his waistband and held it up his sleeve. Then two men took off running. Defendant testified that Thomas then threatened to shoot defendant. Defendant said he did not want any problems but Thomas continued to threaten defendant. Defendant testified Thomas threatened to shoot and kill defendant. Defendant showed Thomas his gun in an attempt to diffuse the situation, but Thomas told defendant they also had guns. Defendant testified he asked Gholston if they could leave. Someone yelled that others were coming and defendant testified he saw Thomas motion for the approaching men to attack defendant. When Thomas motioned for the attack defendant saw a black object in his hand. Defendant testified that he thought Thomas had a gun and was going to shoot him. Defendant then shot Thomas twice. Defendant testified he felt threatened when Thomas "rushed" him with hands extended.

¶ 13 Defendant admitted fleeing the scene. He agreed he did not wait to tell police he acted in self-defense. When defendant first spoke to police, defendant stated he heard gun shots and ran. Defendant testified he initially told police he was one-half block away when he heard

gunshots. Initially defendant did not mention a black object in Thomas's hand. Defendant testified he never told police about the object because they never asked. Defendant disposed of the gun after the shooting. Defendant testified that he told police later in the interview that he shot Thomas in self-defense but the State objected to the defense's question as to whether defendant eventually told police that he acted in self-defense. The trial court sustained that objection.

¶ 14 Following closing arguments the jury began deliberations. The jury sent the trial court three notes during its deliberations. The first note requested transcripts and to view video footage from a Police Observation Device (POD) in the area. The jury's second note stated that all jurors agreed that the State had met the three criteria to sustain the charge of first or second degree murder. The jury indicated it was split on whether defendant was guilty of first or second degree murder and asked if their verdict would default to second degree murder if they did not reach a consensus on first degree murder. The jury asked that if not, what guidance could be given. The court instructed the jury to re-read the instruction on the issues when the jury is instructed on both first degree murder and second degree murder (Illinois Pattern Jury Instruction, Criminal, No. 7.06 (4th ed. Supp. 2009) (hereinafter, IPI Criminal 4th No. 7.06 (Supp. 2009))). The court also instructed the jury that its verdict must be unanimous. The jury's third note asked for a definition of imminent use of unlawful force. The court instructed the jury that it had received all of the instructions and to continue deliberating. The jury returned a verdict of guilty of first degree murder.

¶ 15 The trial court sentenced defendant to 55 years' imprisonment which included a 25-year sentence enhancement for using a firearm.

¶ 16 This appeal followed.

¶ 17 ANALYSIS

¶ 18 The trial court instructed the jury on first degree murder and second degree murder. “The elements of first and second degree murder are identical. [Citation.] Second degree murder differs from first degree murder only in the presence of a mitigating factor, such as an alleged provocation or an unreasonable belief in justification.” *People v. Johnson*, 2013 IL App (1st) 103361, ¶ 25. In this case, the issue was whether defendant either reasonably or unreasonably believed he was justified in shooting Thomas. Defendant challenges his conviction for first degree murder on multiple grounds, each of which we address in turn.

¶ 19 1. Admissibility of Defendant’s Prior Statement

¶ 20 Defendant’s first argument on appeal is that the trial court committed reversible error in not permitting defense counsel to elicit a prior consistent statement from defendant under the recent-fabrication exception. During cross-examination Wallace admitted that he lied to police when he initially claimed that he walked away from the scene prior to the shooting. On redirect examination, defense counsel asked defendant: “Detective Matias asked you why did you shoot him? Answer: Because I felt threatened for myself. You said that to Detective Matias?” Defendant answered “Yes.” The assistant state’s attorney objected and the trial court sustained the objection.

“The decision to admit or exclude evidence largely lies within the discretion of the trial court and we will not reverse absent a clear showing of abuse of discretion resulting in prejudice to the defendant. [Citation.] An abuse of discretion occurs where the

trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court. [Citation.]” (Internal quotation marks omitted.) *People v. Jackson*, 2014 IL App (1st) 123258, ¶ 39.

¶ 21 Generally, a witness’s testimony cannot be corroborated by proof of prior statements consistent with his or her trial testimony. *People v. Short*, 2014 IL App (1st) 121262, ¶ 102.

¶ 22 Defendant concedes failing to properly preserve this error for review but asks this court to review the claim under the plain error doctrine. “[T]he plain-error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence.” (Internal quotation marks omitted.) *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007). Defendant argues the evidence in this case was closely-balanced because the theory of self-defense rested largely on defendant’s credibility, and physical evidence--the recovery of Thomas’s black and silver cellular telephone--corroborated defendant’s testimony Thomas was holding a black object in his hand. Defendant also argues that the jury’s questions during deliberations evince the closely balanced nature of the evidence.

¶ 23 “The first step of plain-error review is determining whether any error occurred. [Citation.]” (Internal quotation marks omitted.) *People v. Clark*, 2014 IL App (1st) 123494, ¶ 24. Thus, we will consider whether the trial court erred in sustaining the State’s objection to defense counsel’s question about defendant’s prior statement to police that he shot Thomas in self-defense.

¶ 24 Under Illinois Rule of Evidence 613 (Ill. R. Evid. 613 (eff. Jan. 1, 2011)), a prior statement that is consistent with the declarant-witness's testimony is admissible for rehabilitative purposes only when the statement is offered to rebut an express or implied charge that:

“(i) the witness acted from an improper influence or motive to testify falsely, if that influence or motive did not exist when the statement was made; or

(ii) the witness's testimony was recently fabricated, if the statement was made before the alleged fabrication occurred.” Ill.

R. Evid. 613 (eff. Jan. 1, 2011).

¶ 25 In this case defendant's admission on cross-examination that he lied to police after his arrest goes to the issue of defendant's credibility, and there is no accusation of recent fabrication. Also, the motive to make a false statement about defendant's involvement in the shooting existed when defendant made the statement about self-defense to the detective. Therefore, the statement at issue is not admissible as a prior consistent statement for rehabilitation purposes. Our analysis does not end here, however. Defendant's initial silence on the subject of self-defense was admissible under Illinois Rule of Evidence 801(d)(1)(A)(2)(b) (Ill. R. Evid. 801(d)(1)(A)(2)(b) (eff. Jan. 1, 2011)).<sup>1</sup> See also *People v. Hernandez*, 319 Ill. App.

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<sup>1</sup> A statement is not hearsay if, in a criminal case, “the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony at the trial or hearing, and (2) narrates, describes, or explains an event or condition of which the declarant had personal knowledge, and (b) the declarant acknowledged under oath the making of the

3d 520, 532 (2001) (“Inconsistency is not limited to direct contradictions but may be found in evasive answers, silence, or changes in position”). “Generally, when a witness has been impeached by a prior inconsistent statement, the witness is entitled to an opportunity to explain or qualify the statement and show why it was made.” *People v. Cowper*, 145 Ill. App. 3d 1074, 1081 (1986). “One such explanation could be testimony to the effect that, ‘I said nothing to [A] but I did report it to [B].’ ” *Id.* at 1082 (quoting *People v. Morrow*, 104 Ill. App. 3d 995, 1002 (1982)). In *Cowper*, the State charged the defendant with residential burglary. *Cowper*, 145 Ill. App. 3d at 1076. The defendant testified that he entered the dwelling at the request of a man named Omar Taylor for the purpose of retrieving Taylor’s property after Taylor was asked to move out of the dwelling. *Id.* at 1077. On cross-examination, the defendant acknowledged that he did not tell the arresting officers about Taylor at the scene. *Id.* at 1078. Defense counsel attempted to ask the defendant on re-direct examination if, later at the police station, the defendant had told a detective about Taylor. *Id.* The trial court sustained the State’s objection on the grounds admission of the defendant’s statement to the detective would constitute improper admission of a prior consistent statement. *Id.* The *Cowper* court found that the defendant’s statement to the detective was a prior consistent statement (*id.* at 1079), but that the trial court should have admitted the statement under the rules relating to impeachment by a prior inconsistent statement (*id.* at 1081).

¶ 26 The facts of this case are remarkably similar to the facts of *Cowper*, and we reach the same conclusion. Thus, separately from the question of whether defendant’s prior consistent

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statement either in the declarant’s testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought.”

statement was admissible under Illinois Rule of Evidence 613, we find that defendant's prior consistent statement was admissible as a corollary to Illinois Rule of Evidence 801.<sup>2</sup> In this case, the State impeached defendant with his silence to police regarding his reason for shooting Thomas. The trial court should have given defendant an opportunity to explain his silence with evidence that he did mention self-defense to Detective Matias. See *Cowper*, 145 Ill. App. 3d at 1081. Accordingly, we hold that the trial court erred in excluding defendant's testimony.

¶ 27 Our next inquiry is whether the evidentiary error is reversible error. "Evidentiary error is ultimately deemed harmless where there is no reasonable probability that the jury would have acquitted the defendant absent the error. [Citation.]" (Internal quotation marks omitted.) *People v. James*, 2013 IL App (1st) 112110, ¶ 44. "[W]here admission is allowed, a prior consistent statement is permitted solely for rehabilitative purposes and not as substantive evidence." *People v. Lambert*, 288 Ill. App. 3d 450, 457 (1997). "A judgment of conviction will not be reversed merely because error was committed at trial unless it appears that the finding of guilt may have resulted from such error." *Cowper*, 145 Ill. App. 3d at 1083.

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<sup>2</sup> This distinction can be found in our supreme court's decision in *People v. Williams*, 147 Ill. 2d 173 (1991), where the court held: "when a witness is impeached by means of a prior inconsistent statement, if a consistent statement does not disprove or explain the making of the inconsistent statement, it is not admissible. [Citation.] However, prior consistent statements are admissible to rebut a charge or an inference that the witness is motivated to testify falsely or that his testimony is of recent fabrication, and such evidence is admissible to show that he told the same story before the motive came into existence or before the time of the alleged fabrication." (Emphasis added.) *Williams*, 147 Ill. 2d at 227.

¶ 28 In this case, there is no reasonable probability that the jury would have acquitted defendant of first degree murder had the trial court allowed defense counsel to rehabilitate defendant with his testimony he told Detective Matias that he shot Thomas in self-defense. Therefore, there is also no reasonable probability that the jury would have found defendant guilty of second-degree murder absent the trial court's error. *People v. Brown*, 2014 IL App (4th) 120887, ¶ 24 ("A defendant is guilty of second degree murder if the elements of first degree murder are established but a statutory mitigating factor also exists."). Considering the totality of the evidence, we believe the jury's rejection of defendant's claim he thought Thomas was in possession of a gun causing defendant to fear for his life, and its verdict of guilty on the charge of first degree murder, was not the result of the trial court's error. *Cowper*, 145 Ill. App. 3d at 1083. Defendant testified he feared for his life when he shot Thomas because "I thought he had a gun and I thought he was going to fire upon me." Defendant's prior consistent statement to Detective Matias would not have been substantive evidence. No other witness testified to seeing anything in Thomas's hands which was what allegedly caused defendant to fear for his life. Defendant also eluded police for months and denied he shot Thomas before ever stating he acted in self-defense. There is no reasonable probability that absent the trial court's error the jury would have found that defendant reasonably or unreasonably feared for his life because Thomas had a gun. Accordingly, we hold the trial court did not commit reversible error when it excluded defendant's prior statement. Having found that no reversible error occurred, we have no need to reach the question of whether there was plain error. *People v. Naylor*, 229 Ill. 2d 584, 602 (2008) ("Absent reversible error, there can be no plain error.").

¶ 29

## 2. Closing Argument

¶ 30 Defendant argues the State mischaracterized evidence and misstated the law during closing argument such that defendant's conviction must be reversed and the cause remanded for a new trial. Defendant argues the State erroneously told the jury that defendant told police he (defendant) knew Thomas did not have a gun when he shot Thomas.

“It is well established that a prosecutor has wide latitude in making a closing argument and may comment on the evidence and any fair, reasonable inferences it yields. [Citation.]

Although prosecutors are accorded wide latitude in closing argument, they may not argue assumptions or facts not based on the evidence. [Citation.] When reviewing challenges to remarks made during closing argument, the remarks are viewed in context and a closing argument is viewed in its entirety.

[Citation.] Prosecutors are entitled to respond to comments the defense makes during closing that clearly invite a response.”

*People v. Johnson*, 2015 IL App (1st) 123249, ¶ 38.

¶ 31 We are aware of the “confusion regarding the appropriate standard of review regarding alleged errors occurring during closing arguments” (*Johnson*, 2015 IL App (1st) 123249, ¶ 39) but we will not attempt to resolve it here because “under either standard, we reach the same conclusion (*Johnson*, 2015 IL App (1st) 123249, ¶ 39).

¶ 32 During rebuttal argument the State said: “He admits he knew it wasn't a gun.” The trial court overruled defense counsel's objection. Later in the rebuttal the State said: “He

knows it wasn't a gun. He told you he knew it wasn't a gun." Defendant argues the "contention that Wallace 'knew it wasn't a gun' is wholly without basis in the evidence and mislead the jury concerning one of the single most important aspects of Wallace's defense."

The State responds the statements in the rebuttal argument were "absolutely proper based on defendant's testimony during cross-examination." We agree.

¶ 33 On direct examination, defendant testified that when Thomas motioned to "rush" defendant, he saw a "black object" in his hand and that he "thought [Thomas] had a gun and I thought he was going to fire upon me." On cross-examination, the State asked defendant: "You never saw a gun in the victim's hand, right?" Defendant responded as follows: "I just seen [*sic*] a black object in his hand. I didn't know whether it was a gun or what it was. I just knew it was a black object and he was rushing me, so I acted in self-defense." We find that the foregoing testimony does not give rise to a reasonable inference that defendant knew Thomas did not have a gun. Defendant's testimony that he did not know what the object was does not mean that he knew what the object was not.

¶ 34 However, the State later asked defendant if he told a detective during his interview about seeing a black object in Thomas's hand. Defendant responded the detective did not ask what defendant saw in Thomas's hand and defendant did not volunteer that information. The State then asked: "In fact, the detective asked you if he had a gun in his hand and you said no? You knew he didn't have a gun, right?" After the trial court overruled defense counsel's objection, defendant answered: "He didn't have a gun." Then, on re-direct examination by defense counsel, the following exchange occurred:

“Q. Ms. Longo [Assistant State’s Attorney] asked you when Detective Matias asked you, okay, he didn’t have a gun on him and you said no, did he ask you any other details other than that one question about what he had on him or what Sam did after you said that?

A. No, sir.

Q. Did he ask you any details about how this shooting occurred when you said you didn’t see a gun? Did he ask you what you did see?

A. No, sir.

Q. He stopped asking about it right when you said no, I didn’t see a gun--I mean, he--you didn’t say--

THE COURT: Start again, would you Mr. Federman [Defense Counsel], please?

\* \* \*

Q. When he asked, okay, but he didn’t have a gun on him and you answered no, he dropped it and he didn’t go back to that anymore; isn’t that true?

A. Yes, sir.”

¶ 35 The assistant state’s attorney performed a re-cross-examination during which the following exchange occurred:

“Q. Mr. Wallace, there was no gun in the victim’s hand, right?

A. No.

Q. *And you told Detective Matias that there was no gun in the victim's hand, right?*

A. *That's what I told him.*

MR. FEDERMAN: Same objection.

THE COURT: He just said that's what he told him.

Overruled." (Emphasis added.)

¶ 36 The question, "you told Detective Matias that there was no gun in the victim's hand, right?" and the answer "That's what I told him." and the other testimony cited above is sufficient to permit the assistant state's attorney to argue to the jury that defendant admitted he knew Thomas did not have a gun. Defendant argues that on cross-examination and re-cross-examination he "simply confirmed what he later learned--*i.e.*, Thomas was not holding a gun." but that he "never testified that--at the time of the shooting--he knew Thomas was unarmed." Defendant argues there is a distinction between what the State told the jury Wallace admitted and what may arguably be inferred from the evidence. Defendant's argument suggests he would agree that the State could have argued to the jury that it could reasonably infer that defendant knew Thomas did not have a gun but it could not say that was his actual testimony.

¶ 37 The State may characterize the evidence based on proper inferences drawn from the testimony. *People v. Pasch*, 152 Ill. 2d 133, 213 (1992). It is for the trier of fact to resolve any ambiguities in the evidence. *People v. Campbell*, 146 Ill. 2d 363, 380 (1992) ("where the evidence presented is capable of producing conflicting inferences, the matter is best left to the

trier of fact for proper resolution.”). In *Pasch*, the defendant argued that the prosecutor misstated the evidence presented through a police lieutenant’s testimony concerning various bombs which were found in the defendant’s apartment. *Pasch*, 152 Ill. 2d at 212. The prosecutor argued that the lieutenant testified they found bombs in the defendant’s apartment. *Pasch*, 152 Ill. 2d at 213. The court overruled an objection to the argument. Our supreme court held that the argument, “based on the testimony provided by Lieutenant Kennedy at trial, was proper commentary.” *Pasch*, 152 Ill. 2d at 213. The court found that the lieutenant had testified that he spoke with another detective on the scene who showed the lieutenant “a jar, an empty mason jar where a hole was put in the lid of it and a fire [cracker] had been inserted and some fusing attached.” *Id.* The lieutenant also testified that the defendant told him that he (the defendant) had a bomb. Our supreme court concluded that “the prosecution’s characterizations were proper inferences to be drawn from Kennedy’s testimony.” *Pasch*, 152 Ill. 2d at 213.

¶ 38 In *People v. Walker*, 230 Ill. App. 3d 377 (1992), the defendant argued the State misstated the facts with the following argument: “[Defendant] testified that he shared in the proceeds of the armed robbery, which makes him accountable for the armed robbery and the felony murder. If you believe his statements, he is guilty.” *Walker*, 230 Ill. App. 3d at 397. The defendant had actually testified that after another party “beat the victim and dragged him away” the defendant started walking away, noticed \$10 on the ground, and picked it up. *Id.* The defendant testified that the money could have belonged to anyone but “he also testified that it was found at the precise spot where the victim had fallen after being beaten to death.” *Id.* The court held the State’s argument was not improper. *Walker*, 230 Ill. App. 3d at 397.

¶ 39 We hold that the State’s arguments, that defendant admitted he knew Thomas was not holding a gun and that defendant told the jury he knew it was not a gun, are proper inferences from the testimony and, therefore, were not improper.

¶ 40 Defendant also argues the state misstated the law and implied to the jury that a bright-line rule exists that the jury could not consider Thomas’s words when deciding whether defendant felt in imminent danger of death or great bodily harm thus precluding defendant from acting in self-defense in response to Thomas’s verbal threats. The State argued the meaning of Illinois Pattern Jury Instruction, Criminal, No. 24-25.06 (4th ed. Supp. 2009) (hereinafter IPI Criminal 4th No. 24-25.06 (Supp. 2009)) to the jury. The instruction states when a person is justified in the use of force which is intended or likely to cause death or great bodily harm: only if he or she reasonably believes that such force is necessary to prevent his or her imminent death or great bodily harm. IPI Criminal 4th No. 24-25.06 (Supp. 2009). The State argued the instruction contains a lot of “legal jargon” but means that “You cannot bring a gun to a word fight.”

¶ 41 On appeal, defendant argues that the State’s argument “erroneously diminished the importance that words, such as the [threats] to kill referenced in Wallace’s testimony, can have on whether a person reasonably believed that such force is necessary to prevent imminent death.” (Internal quotation marks and citation omitted.) Defendant asks this court to review this claim as plain error.

¶ 42 “While a prosecutor has wide latitude in closing argument, he must not make comments which misstate the law in the case. [Citation.]” *People v. Miller*, 259 Ill. App. 3d 257, 267 (1994). Even a prosecutor’s misstatement of the law does not constitute error where

the circuit court properly instructs the jury on the law. *Miller*, 259 Ill. App. 3d at 267. In this case, defendant does not contend the trial court did not properly instruct the jury on the law. Any misstatement of the law by the prosecutor was cured by the trial court's proper instructions to the jury. *Miller*, 259 Ill. App. 3d at 267.

¶ 43 Regardless, the State responds the arguments at trial "were entirely proper when viewed in their entirety," and we agree. "In reviewing closing arguments, we must consider the whole argument as opposed to focusing on selected remarks or phrases." *People v. Hensley*, 2014 IL App (1st) 120802, ¶ 72. After the statement that the instruction means "You cannot bring a gun to a word fight" the argument continued as follows:

"When people are saying words and you shoot to kill, it is not justified. Period. The words, we're going to get the guns, go get the guns, those are words. There is not an imminent, imminent means right now, it's going to happen immediately. Somebody says I'm going to go get my guns, I got to travel, I got to go space in time, distances, that is not imminent. That is not going to happen right now so you cannot shoot to kill. It has to be imminent that you are going to be killed. That is not the facts of this case.

No one out there had a weapon of any kind except for the defendant. There's no way to think from the evidence before you that deadly force was about to happen to Deonta Wallace."

¶ 44 Defendant complains that “[t]he prosecutor’s erroneous statement suggests that words are irrelevant to the surrounding circumstances necessary to determine whether a defendant acted in self-defense or committed second degree murder.” The State did not ask jurors to ignore Thomas’s words. On the contrary, the State specifically asked the jury to consider Thomas’s alleged words and what they reasonably meant. When the statement “You cannot bring a gun to a word fight.” is read in the context of the remainder of the argument, it is clear that the State actually argued that the words that defendant said Thomas used did not create a reasonable belief that defendant was in imminent danger of unlawful force.

¶ 45 We find that taken as a whole the State’s argument was not misleading as to what the jury could consider to determine if defendant was justified in his use of force. Defendant does not contend that the jury received inaccurate instructions on the law or inaccurate instructions on the purpose of closing arguments. In light of the foregoing, we hold that nothing in the State’s arguments constitutes reversible error or, therefore, plain error.

¶ 46 3. Jury Question

¶ 47 Next, we address defendant’s argument the trial court erred in its response to the jury’s note regarding first degree murder and second degree murder and that this error prejudiced defendant.

“Determining the propriety of the trial court’s response to a jury question \*\*\* requires a two-step analysis. First, we must determine whether the trial court should have answered the jury’s question. We review the trial court’s decision on this point for abuse of discretion. [Citation.] Second, we must

determine whether the trial court's response to the question was correct. Because this is a question of law, we review this issue *de novo*. [Citations.]” (Internal quotation marks omitted.) *People v. McSwain*, 2012 IL App (4th) 100619, ¶ 27.

¶ 48 Defendant argues the trial court failed to ascertain the nature of the jury's confusion as required by *People v. Childs*, 159 Ill. 2d 217 (1994). Defendant argues that because the evidence was closely balanced and the response to the jury's question could have made the difference between first degree murder and second degree murder the error prejudiced defendant. Defendant argues the jury's note suggested it was not unanimous in finding that the State proved defendant guilty of first degree murder, as they said they were, because the jury asked if the verdict would be second degree murder if they could not reach a unanimous verdict on first degree murder. The trial court could not have determined the nature of the legal confusion from the note and the precise source of the jury's confusion was unclear; therefore, the trial court could not properly alleviate the jury's confusion. Defendant argues the jury's third note asking about imminent unlawful use of force proves the trial court did not clarify the jury's confusion on their first degree murder and second degree murder question. Further, by referring the jury to one instruction without knowing exactly what they were confused about, defendant argues, the trial court may have caused the jury to ignore other instructions.

¶ 49 The State responds the jury's question “clearly begs the response to re-read I.P.I. 7.06” because that instruction contains all the language the jury needed to consider to decide if defendant was guilty of first degree murder or second degree murder. The State argues the

trial court gave the proper response and did not prejudice defendant. Moreover, the State argues, even if the trial court's response to the jury's second note was found to be error such error would be harmless in light of the overwhelming evidence of defendant's guilt of first degree murder. Defendant replies the error was not harmless because the evidence was closely balanced.

¶ 50 The crux of defendant's argument is that the trial court failed to meet its obligation under *Childs* to ascertain the nature of the jury's confusion. We disagree and hold that, under *Childs*, the trial court in this case acted appropriately in responding to the jury's question.

“A trial court may exercise its discretion and properly decline to answer a jury's inquiries where the instructions are readily understandable and sufficiently explain the relevant law, where further instructions would serve no useful purpose or would potentially mislead the jury, when the jury's inquiry involves a question of fact, or if the giving of an answer would cause the court to express an opinion which would likely direct a verdict one way or another. [Citation.] However, jurors are entitled to have their inquiries answered. Thus, the general rule is that the trial court has a duty to provide instruction to the jury where it has posed an explicit question or requested clarification on a point of law arising from facts about which there is doubt or confusion. [Citation.] This is true even though the jury was properly instructed originally. [Citation.] When a jury makes

explicit its difficulties, the court should resolve them with specificity and accuracy. [Citations.] If the question asked by the jury is unclear, it is the court's duty to seek clarification of it. [Citations.] The failure to answer or the giving of a response which provides no answer to the particular question of law posed has been held to be prejudicial error." *Childs*, 159 Ill. 2d at 228-29.

¶ 51 In *Childs*, when the trial court received a question from the jury, the trial court responded by informing the jury: "You have received your instructions as to the law, read them and continue to deliberate." *Childs*, 159 Ill. 2d at 225. The court did not consult with either party before responding to the jury. When defense counsel was informed and objected, the trial court stated, in part: "It was very difficult because I didn't quite know exactly what they were asking. I didn't want to mislead anyone, so my response to the jury was you have received your instructions as to the law, read them and continue to deliberate. \*\*\* I figured as long as I was not responding to that question it wasn't necessary for me to contact \*\*\*." *Childs*, 159 Ill. 2d at 226. Our supreme court held that it was because of "the judge's perception of the jury's question as difficult, his uncertainty as to the information they sought, and the jury's confusion regarding the possible combination of verdicts it could render that the judge had the obligation to inform all parties of the question, seek clarification of it, allow counsel the opportunity to suggest an appropriate response, and then attempt to dispel the jury's confusion with a clear and specific answer." *Childs*, 159 Ill. 2d at 232. That was done in this case.

¶ 52 In this case the trial court did state at one point during the parties' lengthy discussion of the jury's question that it did not understand the question. The parties agreed the jury's note seemed contradictory. The court did not ask the jury for clarification of the nature of the jury's confusion. But the court did discuss the jury's question with the parties. Defense counsel objected to singling out one instruction and suggested the jury should be told to re-read all of the instructions. The court rejected that suggestion as not telling the jury anything and stated that everything necessary for the jury to reach a verdict could be found in instruction 7.06 after defense counsel requested the jury also be directed to instructions on mitigation and preponderance of the evidence. The court noted that instruction 7.06 includes "mitigating factor" and "preponderance of the evidence" language. The court agreed to admonish the jury that its verdict must be unanimous.

¶ 53 We find that the trial court's response to the jury's question was proper. The jury's note suggests no more than confusion as to the effect of failure to reach a unanimous decision on the existence of mitigating factors where the jury inquired if the verdict would default to second degree murder. The jury's note suggests--and during discussion the parties also surmised--the jurors were unanimous on findings of fact proving defendant's guilt and that the lack of unanimity was on the decision as to whether those facts proved first or second degree murder based on mitigating circumstances where the note states "the State has met the three criteria to sustain a charge of first or second degree murder" but the jury was split on "whether it is first or second degree."

¶ 54 The trial court correctly answered the question posed by referring the jury to IPI Criminal 4th No. 7.06 (Supp. 2009) and admonishing the jury its decision must be unanimous.

IPI Criminal 4th No. 7.06 (Supp. 2009) explains what the State must prove to sustain the charge of first degree murder or second degree murder. The trial court does not err in responding to a jury's specific question by referring the jury to the instructions tendered when the instructions are readily understandable and sufficiently explain the relevant law. *People v. Nash*, 2012 IL App (1st) 093233, ¶ 40 (holding trial court did not abuse its discretion). Defendant does not contend that IPI 7.06 is an incomplete or inaccurate statement of the law. See *Nash*, 2012 IL App (1st) 093233, ¶ 40 (distinguishing *People v. Falls*, 387 Ill. App. 3d 533, 538 (2008) ("This court in *Falls* concluded that the trial court erred 'when it refused to answer the jury's questions about a critical point of law not covered by the instruction which they were given.' [Citation.] Unlike in *Falls*, the instructions tendered to the jury in the case at bar were clear and accurately stated the applicable law.")).

¶ 55 We conclude that the trial court did not err in its response to the jury's question. Therefore, we decline defendant's request to engage in a plain error analysis as no error exists for our review. *Nash*, 2012 IL App (1st) 093233, ¶ 41.

¶ 56 Defendant also argues the trial court should have responded to the jury's question requesting a definition of "imminent use of unlawful force" and defense counsel's failure to so argue constitutes ineffective assistance of counsel. The trial court did not abuse its discretion in responding to the jury by telling it to continue to deliberate. *Childs*, 159 Ill. 2d at 228.

"When words in a jury instruction have a commonly understood meaning, the court need not define them with additional instructions. [Citation.] This is especially true where the pattern jury instructions do not provide that an additional

definition is necessary. [Citation.] \*\*\* Consequently, we cannot say that counsel was ineffective for failing to request or offer clarification of these terms.” *People v. Sanchez*, 388 Ill. App. 3d 467, 477-78 (2009).

¶ 57 Because the trial court did not provide an unresponsive answer to the jury’s second question and because the court adequately addressed the jury’s third question (by declining to answer it) we need not address whether defense counsel provided ineffective assistance for failing to object to the trial court’s responses. *Nash*, 2012 IL App (1st) 093233, ¶ 42.

¶ 58 4. Ineffective Assistance of Counsel

¶ 59 Finally, defendant argues he received ineffective assistance of trial counsel where his attorney failed to preserve certain issues for this court’s review and failed to insist the trial court determine the source of the jury’s confusion before responding to its question. The State responds defendant was not prejudiced because the issues are meritless and defense counsel could not have done more to ascertain the source of the jury’s confusion during deliberations. Based on the foregoing findings, defendant’s claim of ineffective assistance of counsel lacks merit. Our supreme court’s judgment in *People v. Coleman*, 158 Ill. 2d 319, 349-50 (1994), is dispositive. There, the court wrote as follows:

“Defendant next argues that he was denied the effective assistance of counsel where trial counsel failed to preserve various issues for review through his failure to object or include issues in a post-trial motion. Defendant’s argument is without merit. Under *Strickland v. Washington*, 466 U.S. 668 (1984), defense counsel is

ineffective only if: (1) counsel's performance fell below an objective standard of reasonableness; and (2) counsel's error prejudiced the defendant. A court need not decide the first prong of this test, whether counsel's performance was deficient, before analyzing the prejudice component. [Citation.] As we have already determined in this opinion \*\*\* the issues defense counsel failed to preserve are, for the most part, without merit, and did not prejudice defendant. We also note that on a claim of ineffective assistance of counsel for failing to properly preserve issues for review, defendant's rights are protected by Supreme Court Rule 615(a), which allows a court to review unpreserved claims of plain error that could reasonably have affected the verdict. [Citation.] Thus, defendant's argument is without merit." *Coleman*, 158 Ill. 2d at 349-50.

¶ 60 We similarly hold that defendant did not receive ineffective assistance of counsel.

¶ 61 CONCLUSION

¶ 62 For the foregoing reasons, the circuit court of Cook County is affirmed.

¶ 63 Affirmed.