SECOND DIVISION
February 22, 2011

No. 1-09-1144

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 522
	)	
FREDERICK PIGRAM,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE KARNEZIS delivered the judgment of the court.
Presiding Justice Cunningham and Justice Connors concurred in the judgement.

HELD: Defendant convicted of first degree murder was not entitled to a new trial. Defendant forfeited his claims that the trial court violated Supreme Court Rule 431(b). He did not receive ineffective assistance of counsel despite counsel's raising evidence of defendant's gang membership. The State did not misstate the facts or shift the burden of proof in rebuttal. Defendant forfeited his claim that the State improperly attacked defense counsel in rebuttal. Defendant is due an additional day of credit against his sentence for the day of his arrest. He is not due an additional credit for the day of sentencing where the mittimus was issued the same day as sentencing. The mittimus is ordered corrected to reflect 869 days sentence credit.

ORDER

Defendant Frederick Pigram appeals his conviction of first degree murder. He

argues that he was denied a fair trial because (1) the court (a) violated Supreme Court Rule 431(b) (Official Reports Advance Sheet No. 9 (April 11, 2007), R. 431(b), eff. May 1, 2007) when it failed to ask each juror whether they understood and accepted the four principles required by *People v. Zehr*, 103 Ill. 2d 472 (1984) (*Zehr* principles) and (b) made statements to the jury that precluded the jurors from being candid about their potential biases; (2) he received ineffective assistance of counsel when his defense counsel elicited evidence that defendant was a gang member; and (3) the State misstated the evidence, shifted the burden of proof and improperly attacked defense counsel during rebuttal argument. He also appeals his sentence, arguing he is entitled to an additional two days sentence credit for time spent in custody prior to sentencing. We affirm and order the mittimus be corrected to reflect 869 days credit.

Background

Raydale Davenport was shot to death on June 30, 2006. Defendant was arrested for Davenport's murder. He was tried by jury on two counts of first degree murder and charged with personally discharging the firearm that caused Davenport's death. The jury heard testimony from police officers regarding their response to and investigation of the shooting; forensic pathologist Dr. Cunliffe, who testified Davenport died as a result of multiple gunshot wounds; and Rico Hargrove, Terrence Bridges and Ricardo Hargrove, who witnessed the shooting.

Rico, Davenport's cousin, testified he was visiting Davenport the morning of the shooting. He and Davenport went to talk to Bridges, Ricardo and Derrick Smith, who

were sitting nearby. They decided to go to a community breakfast in a nearby building. He and Davenport were ahead of the others and paused on the stairs to the back door of the building to speak to a friend. The door opened and defendant came out. Rico and Davenport had known defendant all their lives. He heard defendant tell Davenport "I heard you were looking for me" then saw defendant remove a chrome gun from his waistband and shoot at Davenport. Davenport pushed Rico out of the way and ran down the stairs. Defendant continued shooting and Davenport fell to the ground. Defendant then ran back into the building.

Bridges, Davenport's brother, testified he went to visit Davenport and was told Davenport had just left with Rico to get breakfast. He, Ricardo and Smith went to catch up with Davenport and Rico. As they approached the building where the breakfast was being held, he saw Davenport standing with Rico, talking to some other people. When Bridges was about 30 feet away, he saw defendant come out of the back door. He had know defendant his whole life and there was a disagreement between their families. He heard defendant ask Davenport "what was that shit you was saying" and saw him pull a "chromish gray" gun and start shooting at Davenport. He saw Davenport fall back, defendant step over him and keep shooting. Davenport fired about 10 or 11 shots and then ran back into the building.

Ricardo, Davenport's cousin and Rico's brother, testified he was outside with Bridges and Smith when Rico and Davenport walked by on their way to breakfast. Ricardo and his group decided to get breakfast as well and got up to walk to the

building where the breakfast was being served. Rico and Davenport were already on the steps to the building. He saw defendant fire his gun at Davenport, Davenport try to run and leave the steps and defendant continue to fire. He saw Davenport fall to the ground. Defendant continued shooting and then ran back into the building.

The jury returned a guilty verdict and found defendant personally discharged the firearm that caused Davenport's death. The court sentenced defendant to 50 years' imprisonment and gave him credit for 868 days served.

Analysis

Defendant asserts we should reverse his conviction and grant him a new trial because he was denied a fair trial. He asserts he was denied a fair trial because (1) the court (a) violated Supreme Court Rule 431(b) by failing to ask the jurors whether they understood and accepted the *Zehr* principles and (b) discouraged the jurors from being candid in revealing their potential biases; (2) he received ineffective assistance of counsel because his counsel elicited improper evidence that defendant was a gang member; and (3) the State acted improperly during rebuttal when it (a) misstated the evidence and shifted the burden of proof and (b) improperly attacked defense counsel. He also asserts he is due 870 days of presentencing credit rather than the 868 days he was awarded.

1. Misconduct by Court

Defendant admits that he neither objected at trial to the alleged errors by the court nor raised the errors in his posttrial motion for a new trial. A defendant's failure to

both object at trial to an alleged error and raise the issue in a written post-trial motion results in forfeiture of that issue on appeal. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defendant requests, however, that we review the non-preserved allegations of error under the plain error doctrine. Under the plain error doctrine, we may consider a non-preserved error "where the evidence is closely balanced or the error was so fundamental and of such magnitude as to deny the defendant a fair trial." *People v. Macri*, 185 Ill. 2d 1, 40 (1998). Or, put another way, when "(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." *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). Before considering plain error, we must first determine whether error occurred at all. *People v. Harris*, 225 Ill. 2d 1, 31 (2007). The defendant bears the burden of persuasion in plain error review. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

(a) Court's Violation of Supreme Court Rule 431(b)

Defendant's first assertion of error by the court is that the court violated Rule 431(b) and denied him a fair trial. Rule 431(b) codified the *voir dire* principles established in *People v. Zehr*, 103 Ill. 2d 472 (1984). 177 Ill. 2d R. 431(b). In *Zehr*, our supreme court held that "essential to the qualification of jurors in a criminal case" is that they know : (1) a defendant is presumed innocent, (2) he is not required to present evidence on his own behalf, (3) the State must prove him guilty beyond a reasonable doubt, and (4) his decision not to testify may not be held against him. *Zehr*, 103 Ill. 2d at 477. Rule 431(b), as amended in 2007, requires questioning on whether the

potential jurors both understand and accept each of the principles in the rule. *Thompson*, 238 Ill. 2d at 607. It provides:

> "The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her behalf; and (4) that the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects.
>
> The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." Official Reports Advance Sheet No. 8 (April 11, 2007), R. 431(b), eff. May 1, 2007.

Rule 431(b) "mandates a specific question and response process." *Thompson*, 238 Ill. 2d at 607.

In this case, the trial court first instructed the venire that defendant was presumed innocent, the State had the burden of proving guilt beyond a reasonable doubt, defendant need not prove his innocence and defendant need not call witnesses on his own behalf. It then restated the principle of innocence until proven guilty and asked the jury "does anybody have difficulty with the principle that an accused person is

innocent of a charge against him and the State must prove him guilty beyond a reasonable doubt?" The court next reiterated that the State had the burden of proving guilt beyond a reasonable doubt, that burden remained with the State throughout the trial and defendant need not prove his innocence. It asked the jury "does anyone have any problem with the principle that the State must prove guilty [*sic*] beyond a reasonable doubt and the defense must prove nothing to you?" Lastly, the court explained that defendant had the absolute right to remain silent, not testify and rely on the presumption of innocence and the jurors were not to draw any inferences for or against defendant if he chose to remain silent. It asked the jury "does anyone have difficulty with the principle that an accused person has the right to remain silent and not testify?"

In *People v. Thompson*, 238 Ill. 2d 598 (2010), our supreme court examined Rule 431(b). In *Thompson*, the trial court failed to question the prospective jurors on whether they understood and accepted the principle that the defendant was not required to produce any evidence on his own behalf. The supreme court held the court's failure to address the third principle, by itself, constituted noncompliance with Rule 431(b). *Thompson*, 238 Ill. 2d at 607. In addition, although the trial court in *Thompson* had asked whether the jurors understood the presumption of innocence, it did not ask the jurors whether they accepted the principle. Because Rule 431(b) requires the court to ask potential jurors whether they both understand and accept the enumerated principles, the supreme court found the trial court violated Rule 431(b) in

that regard too. *Thompson*, 238 Ill. 2d at 607.

The trial court similarly violated Rule 431(b) here. The court did not ask the venire, either individually or as a whole, whether they understood and accepted the principle that a defendant need not present any evidence or witnesses. It's failure to ask the jury about this principle is, by itself, a violation of Rule 431(b). *Thompson*, 238 Ill. 2d at 607. Further, although the court asked the jury about the other three principles, it asked them whether they had "difficulty" or "any problem" with those principles. Although this might be considered the equivalent of asking the jurors whether they understood the three principles, it certainly was not the equivalent of asking them whether they accepted the principles. The court's failure to ascertain whether the jurors both understood and accepted all four *Zehr* principles was a violation of Rule 431(b) and was, therefore, error. *Thompson*, 238 Ill. 2d at 607.

Having determined that an error occurred, we now turn to whether we may consider defendant's unpreserved claims of error under either of the prongs of the plain error doctrine.

Under the first prong of the doctrine, "the defendant must prove 'prejudicial error.' That is, the defendant must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him." *Herron*, 215 Ill. 2d at 187. The evidence here was not closely balanced. Rico, Ricardo and Bridges testified that they saw defendant shoot Davenport and nothing in the record contradicts their testimony. A defendant may be convicted on

the testimony of even a single eyewitness, if such testimony is positive and credible and the witness viewed the accused under conditions permitting a positive identification to be made. *People v. Homes*, 274 Ill. App. 3d 612, 621 (1995); *People v. Slim*, 127 Ill. 2d 302, 307 (1989). Here we have three such witnesses. All were in a good position to see the shooter, Rico being next to Davenport when the shooting occurred and Ricardo and Bridges only thirty feet away. All three had known defendant since childhood and clearly identified him as the man who intentionally shot Davenport multiple times.

Granted, as defendant points out, Rico, Ricardo and Bridges were all felons and relatives of the victim, there was apparently a feud between their family and defendant's family and there existed some contradictions between their versions of what happened before and during the shooting. But credibility of witnesses and assessment of their testimony is for the trier of fact to determine and we will not substitute our judgment for that of the trier of fact on those issues unless the evidence is so improbable as to justify reasonable doubt as to the defendant's guilt. *People v. Mullen*, 313 Ill. App. 3d 718, 724 (2000). Rico's, Ricardo's and Bridges's testimony was not so improbable that the jury could not have believed it. The contradictions between their versions of events were minor and all three witnesses were very clear that they saw defendant shoot Davenport. With three credible eyewitnesses identifying defendant as the shooter and no evidence to rebut that testimony, the evidence of defendant's guilt was overwhelming. Defendant's claim of error with regard to the court's violation of Rule 431(d) is, therefore, not reviewable under the first prong of the plain error doctrine.

Under the second prong of the plain error doctrine, "the defendant must prove there was plain error and that the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Herron*, 215 Ill. 2d at 187. Defendant must be able to show that the trial court's error in failing to comply with Rule 431(b) was so serious that it "affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). A defendant can satisfy the second prong of plain error review if he is able to establish that he was tried by a biased jury. *Thompson*, 238 Ill. 2d at 614. However, a violation of Rule 431(b) does not implicate a fundamental right or constitutional protection and, therefore, a failure to conduct a proper Rule 431(b) questioning does not make it inevitable that the jury was biased. *Thompson*, 238 Ill. 2d at 609-10. The defendant must prove such bias. *Thompson*, 238 Ill. 2d at 614.

In *Thompson*, the supreme court held that the defendant failed to meet his burden to establish that the trial court's violation of Rule 431(b) affected the fairness and integrity of his trial because the defendant failed to provide evidence showing the jury in his case was biased as a result of the violation. *Thompson*, 238 Ill. 2d at 614-15. As a result, the defendant's procedural default was not excused by the second prong of plain error review. *Thompson*, 238 Ill. 2d at 615. Similarly here, we find no basis for a second prong plain error review of defendant's assertion that the court violated Rule 431(b) because there is no evidence in the record that would lend support to a possible claim of a biased jury. Defendant's claim that the court violated Rule 431(b) is not

saved from forfeiture by the second prong of plain error review.

(b) Court's Impeding Juror Disclosure of Bias

Defendant asserts the court denied him a fair and impartial jury by making comments that discouraged the prospective jurors from being candid about their biases. It is the trial court's responsibility, through conducting *voire dire*, to ensure that each defendant receives the benefit of an impartial panel of jurors free from prejudice or bias and the court must take care to avoid influencing the jurors through its remarks. *People v. Metcalfe*, 202 Ill. 2d 544, 553 (2002); *People v. Vargas*, 174 Ill. 2d 355, 365 (1996). Defendant complains the court improperly told the jurors that it hoped they would not make real or imagined excuses about why they could not serve on the jury and they better not bet the house that an excuse would get them off the jury. He also asserts the court inhibited the jurors when it asked them how they could complain about serving on a jury when there were Americans like triple amputee Brian Anderson who made a sacrifice for the country without complaint. The court also told the venire that, once they were selected, they could not approach the judge or sheriff's deputy to reveal any matter not revealed during *voir dire.*

Defendant asserts the court told the prospective jurors on multiple occasions that those who had biases were most likely imagining them; if they did reveal that they could not be fair, they were also revealing they were not good citizens; and that in any event, most excuses, real or imagined would not result in removal. Defendant argues the risk of suppressing honest answers was great because, having heard the court's comments,

jurors with potential biases would be persuaded to keep such facts to themselves. He argues that, even though the court subsequently stated "if you have an excuse, you'll tell me," this statement would not have mitigated the thrust of what the court had already said, which was that those jurors who did frankly reveal any excuse would be viewed with disfavor. Defendant asserts the court intimidated the prospective jurors into concealing facts that may have legitimately disqualified them from service and prevented the defense from making informed challenges to the jurors, with the result that defendant's conviction was secured by jurors harboring biases against him.

Having read the entirely of the court's admonishments to the prospective jurors and its questioning of them, we are hard pressed to find the court acted improperly in admonishing and questioning the jurors. In no way can the court's comments be seen as inhibiting the jurors from disclosing their biases or prejudices, whether intentionally or as an unfortunate side effect of the court's comments. The entirely of the court's dealings with the prospective jurors was clearly designed to foster a sense of civic responsibility in the jurors and pride in their service to their country and to encourage them to be open with the court.

The court gave its standard "eight minute speech," which it hoped would not bore the jurors, about "two guys named Brian." It used a situation involving football player Brain Urlacher to illustrate that it recognized that serving on a jury was not the jurors' top priority but that it should not be their least priority. It stated jury service was akin to serving in a volunteer army for a few days and a small price to pay for to luxury of living

in a free country. It then used a situation involving Sergeant Brian Anderson, who lost two arms and one leg in Iraq, to illustrate that there are more horrific ways of giving back to your country than a few days of jury service. Anderson did not complain about his injuries when he returned to the United States. Instead he stated "life is good." The court asked the jurors how they could complain about serving on a jury for a few days "compared to that" and stated that, "for everyone out there, for some extent of the other, life is pretty good."

The court told the jurors that "[jury service is] giving a little bit back for the luxury of living in a free country, something we take for granted most of the time it seems to me," and that "it takes a very special person to serve on a jury." The court told the jurors that they could beg off jury service with an excuse only the juror would know was imagined but he hoped none of the jurors would do that because, as he previously stated, "serving on a jury takes a very special person," and the court was sure there were at least 14 very special people in the jury pool that day.

Reading the court's comments as a whole, we no not find the court's comments could have inhibited the jurors from being forthright about their biases and prejudices. The court's remarks were clearly intended to encourage the jurors to see the positive aspects of their jury service and to feel pride in their participation in the judicial process. Contrary to defendant's assertion, the overarching theme of the court's comments was not that any juror who reveals a bias is not a good citizen but rather that the jurors should put their personal comfort aside for a few days for the greater good. The court

stated several times that the jurors should not base their verdict in any way on sympathy, bias or prejudice and told them not to be "bashful" in telling the court "something." It encouraged full disclosure.

Defendant argues the court expressly forbad the chosen jurors from ever revealing their prejudices when it told them:

> "Once you're chosen, you're chosen. If you want to say something to me before I go off the bench, say it then. If you say it afterwards, it won't count for anything at that point. I'm not trying to encourage excuses. I'm merely telling you if you want to say something to me, say it when I'm out here. And don't approach the sheriffs like that either; I forgot to tell the judge something, that doesn't work either."

A sitting juror can be discharged during trial and replaced with an alternate if the juror revealed some bias rendering him incapable of being fair and impartial. *People v. Campbell*, 126 Ill. App. 3d 1028, 1039 (1984). Defendant, therefore, asserts the court violated the law and encouraged secrecy over disclosure when it told the prospective jurors that they could not inform the judge or the deputy of bias after being selected, even if such bias actually manifested.

The court made these comments to the prospective jurors during its introductory admonishments, before questioning. Read in context, it is clear that the court made the statements in order to encourage the jury to be completely open about any possible prejudices and biases during questioning. The court explained to the jury that it and the

lawyers would ask them a series of questions; asked that they be "frank and complete in all your answers, that way ensuring a fair trial to both sides"; and stated it would leave the courtroom with lawyers after questioning the potential jurors. The comments challenged by defendant were immediately preceded by the following remarks by the court:

> "When I leave the bench to walk back into chambers with the lawyers, nobody can walk up to me and say, I forgot to tell you something [ ]. When you're in the jury box, don't be bashful. Judge, you didn't ask me about this, but I want to tell you this. Once I step off the bench, you can't say, Judge, I forgot to tell you this, but. It doesn't work like that.
>
> Some people for some reason think that even though they will be fair and impartial to both sides, they won't be chosen for some reason, or hoping they won't be chosen. So when we announce to the jurors we'll see you back here at 11:00 o'clock tomorrow and say oh, my goodness, I can't come back tomorrow. That doesn't work either. Once you're chose, you're chosen..."

It is clear the court intended its comments to encourage the jurors to be forthright in answering the questions put to them when they were asked, prior to the court and the lawyers going back to chambers to pick the jury, in order that the jury selection could be accomplished in one sitting rather than having to redo the selection based on new information volunteered later. We do not find the complained-of remarks to be an indication that the court would not remove a sitting juror for cause. There was no error

in the court's dealings with the prospective jurors.

Defendant asserts the removal for cause of juror Fregetto illustrates that the jury was intimidated by the court's comments. Fregetto initially told the court that there was no reason why she could not be a fair and impartial juror. Then, during questioning by the State, she stated she worked with a Catholic organization seeking to abolish the death penalty and did not know whether she would have a problem signing a guilty verdict. She told the court in chambers that she struggled with the possibility that a guilty verdict might be rendered in error because of the impact it would have on people's lives. Fregetto was removed for cause after she told the court she could sign a guilty verdict only if the evidence was "overwhelming in my mind," if the evidence was more than the law required. Defendant argues that, despite the fact that Fregetto was found so biased she could not serve on the jury, this bias had not come to light during the court's initial questioning because of the court's comments inhibited her from disclosing them.

As discussed above, we do not find the court's comments inhibiting to the jury. Further, Fregetto clearly struggled with the concept of reasonable doubt and the possibility that an innocent person might be found guilty. Her failure to talk about this struggle during initial questioning can be seen as a symptom of her own confusion and concern about the workings of the judicial system more than it can be seen as a reaction to the court's admonishments. It is true that, as defendant asserts, a judge's conduct can create an atmosphere that taints the jury selecton process and thereby

deprives the defendant of a fair trial, but that did not happen here. There being no error, we need not consider whether the plain error doctrine saves this argument for review.

Defendant argues that, in addition to the above actions by the court, we should take into consideration the fact that the court treated the jury arbitrarily by playing a game of chance when selecting the jurors who would deliberate the case. At the close of evidence, 12 jurors and one alternate juror remained to deliberate. Instead of dismissing the alternate juror and sending the 12 sitting jurors back to deliberate, the court told the jury:

> "since a jury trial is comprised of 12 actual jurors who go back to decide the case and we have 13 here, one juror will be excused. And the way you will be excused is the same way that you were chosen.
>
> As you recall from the other day, I took the jury cards, I shuffled the cards like a deck of cards and at that point picked out 14 names over two rounds of jury selection. In this case I have the jury cards also, 13. We will shuffle the cards briefly. I will put them to my left. I will not look at them. I will pick out one card. When that person hears his or her name, they could step back to get their property."

The court then asked "who is Ms. Abrego?" and Ms. Abrego left the room. having been dismissed.

Defendant acknowledges that Ms. Abrego was actually the alternate juror and

there was, therefore, no prejudice resulting from the court's "arbitrary" selection of the Ms. Abrego as the juror who would not be deliberating. He argues, however, that the court's action shows the court followed its own rules rather than the law and urges us to consider how the cumulative effect of the court's conduct prejudiced defendant.

There being no prejudice from the court's action, we need not review this argument. Further, even had the court erred in its picking of the final jurors, we do not find the cumulative effect of the court's errors to be so severe as to warrant review of defendant's unpreserved claims of error. The evidence of defendant's guilt was overwhelming and, assuming arguendo that the court did err in how it selected the final jurors, there has been no showing that the court's errors biased the jury or called into question the validity of the verdict or the integrity of the judicial system. Defendant forfeited his claims of error and the plain error doctrine could not revive them.

2. Ineffective Assistance of Counsel

Defendant asserts he was denied his Sixth Amendment right to effective assistance of counsel because his counsel elicited prejudicial evidence that defendant was a gang member and shot Davenport because Davenport wanted to leave the gang. Evidence of gang membership may engender a negative bias in a jury. *People v. Cruzado*, 299 Ill. App. 3d 131, 142 (1998). However, even assuming, *arguendo*, that defense counsel did err in raising the suggestion that defendant was a gang member, defendant cannot establish a claim for ineffective assistance of counsel.

In order to demonstrate ineffective assistance of counsel, defendant must prove

that (1) his counsel's performance was deficient and (2) he was prejudiced by that deficiency. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); *People v. Albanese*, 104 Ill. 2d 504, 525-26 (1984) (adopting the *Strickland* standard for use in Illinois). An ineffective assistance claim may be disposed of on the prejudice grounds alone, without an examination of whether counsel was deficient. *People v. Munson*, 171 Ill. 2d 158, 184-85 (1996). To demonstrate prejudice, defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Munson*, 171 Ill. 2d at 184-85. A "reasonable probability" exists if that probability sufficiently undermines confidence in the outcome of the trial. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

Defendant cannot show that, but for defense counsel's introduction of gang evidence, the outcome of the trial would have been any different. Rico, Ricardo and Bridges clearly identified defendant as the shooter. Again, even a single witness' testimony is sufficient to sustain a conviction if the witness viewed the accused under conditions permitting a positive identification to be made. *Slim*, 127 Ill. 2d at 307. Here, with three such witnesses, there was overwhelming evidence of defendant's guilt. There was little probability, let alone a reasonable one, that the jury would have found defendant not guilty had counsel not suggested defendant was a gang member. Accordingly, defendant failed to show he suffered ineffective assistance of counsel.

3. Misconduct by State in Rebuttal

Defendant asserts he was denied a fair trial when, during rebuttal, the State (a)

told the jury that defendant was responsible for the lack of corroborative evidence of defendant's guilt and (b) accused defense counsel of attempting to trick the jury by suggesting that the State should have presented such evidence. At trial, defendant only objected to the State's alleged attack on counsel, not to the other two issues. He raised none of the issues in his posttrial motion. They are, therefore, forfeited on appeal and may only be reviewed under the plain error doctrine. *Macri*, 185 Ill. 2d at 40. We must first determine whether an error occurred in the State's rebuttal.

(a) Misstatement of Facts and Shift of Burden of Proof

Defendant first complains the State improperly blamed defendant for the State's failure to present corroborative evidence of guilt and put the burden on defendant to present that proof when the State argued the following in rebuttal:

> "The only person who was deciding what physical evidence was there, was used, was taken, was [defendant]; * * * It would be great if he had chosen at the time to slash his wrist and bleed all over the ground so we could have lots of DNA samples. And CSI writers on that show would write that in so we could wrap this case up in an hour. But this is reality. Not a TV show. We don't have writers writing in the facts in this case. We have people like [defendant] dictating the circumstances."

The State continued that, since defendant took the gun with him when he ran, rather than tossing it into the bushes as happens on TV, defendant was the reason why there was no evidence to corroborate his guilt. Defendant asserts these arguments were

improper because they misstated the facts and shifted the burden of proof to defendant because the lack of corroborative physical evidence fell entirely on the State.

"Arguments of counsel must be evaluated in the context in which they were made and the parties are allowed a wide latitude during closing argument." *People v. Terrell*, 185 Ill. 2d 467, 512 (1998). The State may argue to the jury facts and reasonable inferences drawn from the evidence. *People v. Kliner,* 185 Ill.2d 81, 151 (1998). It may respond to a defendant's arguments if such arguments invite or provoke a response. *Kliner,* 185 Ill.2d at 154. It may not, however, argue assumptions or facts not based upon the evidence in the record. *Kliner,* 185 Ill.2d at 151. "In order for a remark to be deemed reversible error, the complained-of remark must have resulted in substantial prejudice to the accused, such that the verdict would have been different had it not been made." *People v. Morgan*, 142 Ill. 2d 410, 453 (1991), *rev'd on other grounds*, 504 U.S. 719, 112 S.Ct. 2222 (1992).

Read in context with the entire closing arguments, it is clear that the State's comments neither shifted the burden of proof nor misstated the facts. The State made the complained-of statements in response to defense counsel's closing argument that it was the State's fault that there was no physical evidence to corroborate defendant's guilt and questioning why the State did not do more to test the evidence that it did have. Defense counsel had pointed out to the jury that, although the police collected one fired bullet and four shell casings from the scene of the shooting, this evidence was never sent for ballistics analysis or tested for fingerprints. He asserted there was, therefore,

no way to know whether this evidence came from a single gun or multiple guns or whether defendant had touched the bullet or casings. Defense counsel told the jury it was "baffling" the evidence was never sent to the crime lab. He argued there was no physical evidence that defendant was the shooter and stated "[m]aybe there is something there that says he is the guy that did this. What do you have? I mean what exactly did the State give you. They gave you three witnesses who are all related, two of whom are convicted felons." He then asked the jury "how could you convict someone of a murder when there are all kinds of things that you don't know."

The State's rebuttal arguments were directed to this defense argument. Besides the argument cited above by defendant, the State also argued in its rebuttal,

> "There is no evidence. You didn't hear from a single person or single piece of evidence that there was anyone else out there with any kind of weapon. There is no evidence of any additional shooters. The only evidence that you are to consider is what came off of that stand or was stipulated to by the parties. The only evidence that you heard, the only evidence there is, is that the defendant was shooting [Davenport.] *** there is nothing to match [the firearms evidence] up to because [defendant] took the gun. You can't match a bullet to a gun when you don't have the gun because the defendant did whatever he could to get rid of it, flee with it. Is he going to leave it there?"

The State did not misstate the facts. The lack of corroborative evidence was indeed due in large part to defendant: he disposed of the gun and did not leave any

other corroborating evidence, such as blood stains, for the State to pursue. Without a gun, testing the bullets would have been of no use in tying the bullets to defendant. The State did not misstate the facts.

It is also clear the State did not attempt to shift the burden of proof to defendant. Nowhere in its argument did the State suggest that defendant had to prove the lack of physical evidence was not his fault. Indeed, the State had acknowledged earlier in its argument that it had the burden of proving guilt and, toward the end of rebuttal, again stated defendant is presumed innocent. There was no error in this portion of the State's rebuttal.

(b) Attack on Defense Counsel

Defendant next complains the State improperly accused defense counsel of misleading the jury when, in reference to counsel's statement about the lack of physical evidence, the State argued: "[a]nd what counsel's point is I guess is because he fled with the gun is that he should be rewarded by getting off scot-free," further contending that "opposing counsel is misdirecting you to all these variables that are out there instead of keeping the eye on the ball." A prosecutor may not accuse a defense counsel of trickery, deliberately trying to mislead the jury or trying to free a defendant through confusion, deception or misrepresentation. *People v. Johnson*, 208 Ill. 2d 53, 82 (2003); *People v. Witted*, 79 Ill. App. 3d 156, 165-66 (1979); *People v. Hovanec*, 40 Ill. App. 3d 15, 18 (1976).

Putting the above cited rebuttal argument in context, the entire section of the

State rebuttal is as follows:

> "[D]efendant knew enough to flee, knew enough to take his person out of there so he couldn't get caught. Certainly, he took the murder weapon with him.
>
> It would be great, it would be great if I could choose to say that that gun was left there. But the only person making choices here was this defendant. He is responsible for the evidence.
>
> And what counsel's point is I guess because he fled with a gun is that he should be rewarded by getting off scot-free.
>
> [Objection overruled.]
>
> He decided to do whatever he felt like doing with that gun. No gun equates to not guilty? What about the fact that three separate people saw him shoot [Davenport]. Sort of hard to get around that part. That's why opposing counsel is misdirecting you to all these variables that are out there instead of keeping the eye on the ball."

The State then continued with an extended argument regarding the credibility of the eye witnesses. It discussed the fact that they were felons, their conviction status did not mean they should not be believed or that they were blind and, although the witnesses probably did not want to get involved in testifying, they did because they cared about Davenport. It also discussed how the blood spatter and where the casings were found corroborated the witnesses' testimony regarding where/how Davenport was shot.

We find the State's argument asserting defense counsel was misdirecting the

jury to be without merit. The State was continuing its response to defense counsel's assertion that there is no evidence to corroborate the eye witness testimony that defendant shot Davenport and counsel's questioning the credibility of those eye witnesses. We recognize that, in telling the jury that defense counsel was "misdirecting" the jury, the State was trying to convey to the jury that defense counsel was trying to bury the evidence of guilt by directing the jury to things that did not matter. This may have been true, but the State had no business stating it in such a derogatory manner. Giving the word "misdirecting" its common meaning, we find it equates to "misleading" and "tricking" and, therefore, should not have been applied to defense counsel.

Given that an error occurred, we now look to see whether we can review the error under the plain error doctrine. The first prong of the doctrine does not apply because, as held previously, there was overwhelming evidence to convict defendant and no chance the jury's verdict would have been otherwise except for the State's error. The second prong does not apply because the error was not so fundamental that it denied defendant a fair trial. The State's comment was cursory and comprised only a very minor part of an extensive rebuttal argument in which the State addressed in detail every "flaw" in its case that defense counsel raised. In no way did the comment result in a breakdown of the adversary system egregious enough to have denied defendant a fair trial. The State's error in rebuttal is not reviewable under the plain error doctrine.

It is not the case, as defendant asserts, that the State manifested a "pattern of

intentional prosecutorial misconduct" that so seriously undermined the proceedings that reversal under the plain error doctrine is warranted. The single instance of error did not deny defendant a fair trial warranting reversal.

4. Sentence Credit

Defendant asserts he is entitled to an additional two days sentence credit for the time he spent in custody prior to sentencing. Defendant was arrested for Davenport's murder on November 30, 2006, and sentenced for that murder on April 17, 2009. The mittimus remanding him to the custody of the Department of Corrections was issued and effective on the same day as sentencing, on April 17, 2009. Defendant received 868 days of credit against his sentence but asserts he is entitled to 870 days credit because he did not receive credit for the day of his arrest and the day of sentencing. The State concedes that defendant is due an additional day of credit for the day of his arrest but argues he is not entitled to credit for the day of sentencing because the mittimus was issued that same day.

Defendant is entitled to one day of credit against his sentence for murder for each day or portion of a day that he spent in custody as a result of the murder prior to his sentencing for the murder. *People v. Williams*, 394 Ill. App. 3d 480, 481 (2009); 730 ILCS 5/5-8-7(b) (West 2008). This credit should include the day defendant was taken into custody. *Williams*, 394 Ill. App. 3d at 480. Defendant is, therefore, correct that the mittimus should be corrected to award him a day credit for the day he was arrested, for a total of 869 days.

Defendant is not, however, entitled to credit for the day of sentencing. A defendant is not entitled to credit for the day of sentencing if, as here, the mittimus is issued effective the same day as sentencing. *Williams*, 394 Ill. App. 3d at 483. The State is, therefore, correct that defendant's sentence credit should be 869 days. The clerk of the circuit court is directed to correct the mittimus to reflect 869 days' credit for presentencing detention.

For the reasons stated above, we affirm the decision of the trial court; mittimus corrected.

Affirmed.