SECOND DIVISION
MAY 10, 2011

1-09-2122

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. 06 CR 24410-02
	)	
BRIAN WESTON,	)	Honorable
	)	Neera Lall Walsh
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Karnezis and Harris concurred in the judgment.

ORDER

Held : Where defendant's conviction rested on the testimony of a single eyewitness, evidence was sufficient for a rational juror to find defendant guilty of murder and attempted murder beyond a reasonable doubt. Trial court did not err by declining to answer the jury's request for a definition of reasonable doubt, did not err by allowing the State to introduce evidence of the motive behind the crime, and did not err by allowing the State to make certain statements during its closing argument. Trial court failed to correctly admonish the venire pursuant to Illinois Supreme Court Rule 431(b), but the error was not reversible under the plain error doctrine. Defendant's conviction was affirmed but the mittimus was corrected.

Defendant Brian Weston appeals following his conviction by a jury on charges of first-degree murder and attempted first-degree murder. Defendant alleges that there were a number of

errors during his trial, including lack of sufficient evidence to prove him guilty beyond a reasonable doubt, procedural and evidentiary errors, ineffective assistance of counsel, and insufficient credit for his pretrial detention. We affirm defendant's conviction and correct the mittimus.

I. BACKGROUND

This case revolves around the attempted murder of Nyoka Williams and the murder of her sister, Tai. Defendant raises a large number of issues on appeal, so we will limit our initial recitation of the facts to only those that are pertinent to an understanding of the case and will refer to additional testimony and facts as needed during our analysis.

Nyoka had an intermittent romantic relationship with William Yelvington, a member of the Vice Lords street gang. At some point in early April 2005, Nyoka returned home to find Yelvington in her room with a large number of firearms laid out on her bed, including rifles and shotguns. Yelvington was accompanied by a fellow Vice Lord, Travis Weston. Travis was Yelvington's cousin, and Nyoka had met Travis a number of times.

About a week later and following an argument, Yelvington broke into Nyoka's apartment with a rifle and threatened to kill her. Nyoka recognized the rifle as one of those that Yelvington and Travis had laid out on her bed the week before. Yelvington fled after Nyoka called 911, and she later obtained an order of protection against him.

On April 29, 2005, Nyoka went to bed early. About three hours later, she awoke to find a man standing over her, pointing a gun at her face. Nyoka later described this man, whom she had never previously met but later identified as defendant, as dark skinned, in his early twenties, about 5'6" or 5'7" tall with a short "afro" hairstyle, and wearing a grey hooded sweatshirt.

Defendant repeatedly demanded to know where "those things" were at. At that point, Nyoka saw Travis enter the room with her sister Tai. Defendant then demanded to know the location of Yelvington's guns, while Travis retrieved two pillows from another room. When Travis returned and asked the same thing, Nyoka responded that Yelvington had taken all of the guns with him when he left.

At this point, defendant stated that he would "shoot [Tai] first because you're too loud," and then shoved a pillow over Tai's face. Nyoka attempted to intervene, but defendant struck her in the face with his pistol and then shot her in the back of the head. Nyoka fell, but she was not mortally wounded. She heard Tai yell, "My arm, my arm," which was followed by a scream and then two gunshots. Nyoka heard Travis say, "Shoot that bitch again." Defendant shot Nyoka again, striking her in the shoulder. The two men then fled.

Tai died of her wounds, but Nyoka eventually recovered. Following the attack, Nyoka spoke with police investigators a number of times about the incident. Nyoka quickly identified Travis as one of the perpetrators and picked him out of a photo array and a lineup. Nyoka was unable to identify the man who shot her, however, because she had never met him before the attack. Nyoka was shown photo arrays with possible suspects on two occasions, once in May 2005 soon after the attack and again in September 2005. Neither photo array led to a successful identification. In September 2006, however, Nyoka viewed yet another photo array, this time containing defendant's picture. Nyoka identified defendant as the man who shot her, and she picked him out of a lineup a week and a half later. As it turned out, defendant was Travis' brother.

Defendant and Travis were charged with Tai's murder and the attempted murder of

Nyoka. Following an unsuccessful motion to sever defendant's trial from that of his co-defendant Travis, defendant and Travis were tried together by double jury. Defendant's jury ultimately convicted him of both crimes, and he was sentenced to consecutive sentences of 45 years for Tai's murder and 30 years for Nyoka's attempted murder. Defendant now timely appeals.

II. ANALYSIS

Defendant raises seven distinct issues on appeal, which fall into several broad categories that we will consider in turn.

A. Sufficiency of the Evidence

Defendant's primary argument on appeal is that the State failed to present sufficient evidence in order to prove him guilty beyond a reasonable doubt. Specifically, defendant claims that the State's case rested solely on the testimony of Nyoka Williams, which defendant argues was impeached, uncorroborated, and unreliable.

When reviewing a challenge to the sufficiency of the evidence, it is not our place to retry the defendant. See *People v. Smith*, 185 Ill. 2d 532, 541 (1999). Rather, the question on appeal is " 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *People v. Jackson*, 232 Ill. 2d 246, 280 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). We cannot "substitute [our] judgment for that of the finder of fact on matters involving the weight of the evidence or the credibility of the witnesses," and it is the jury's responsibility " 'to resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.' " *Id.* (quoting

Jackson, 443 U.S. at 319).

The identity of the person who committed a particular crime is one element that the State is required to prove beyond a reasonable doubt at trial. See *People v. Lewis*, 165 Ill. 2d 305, 356 (1995). Defendant acknowledges that it is well settled that "a single witness' identification of the accused is sufficient to sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification." *Id.*; accord *People v. Slim*, 127 Ill. 2d 302, 307 (1989). In this case, defendant argues that the circumstances surrounding Nyoka's identification of defendant as one of her and her sister's assailants were so unsatisfactory and unreliable that no rational juror could accept her testimony. Although the "credibility of a witness is within the province of the trier of fact, and the finding of the jury on such a matter is entitled to great weight, the jury's determination is not conclusive." *Smith*, 185 Ill. 2d at 542 (1999). That said, we will reverse a conviction only where "the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt." *Id.*

We assess the reliability of identification testimony through the factors articulated by the U.S. Supreme Court in *Neil v. Biggers*, 409 U.S. 188 (1972), which are now also a standard part of the Illinois pattern jury instructions. See *Lewis*, 165 Ill. 2d at 356; Illinois Pattern Jury Instructions, Criminal, No. 3.15 (4th ed. Supp. 2008). Those factors include "(1) the opportunity the witness had to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the victim at the identification confrontation; and (5) the length of time between the crime and the identification confrontation." *Lewis*, 165 Ill. 2d at 356.

Defendant claims that analyzing Nyoka's testimony in light of these factors weighs in his

favor and demonstrates that her identification of defendant as the perpetrator is unreliable enough to raise a reasonable doubt of his guilt. We have already recounted the key points of Nyoka's testimony above and will not revisit it in detail here, and we do not agree with defendant that these factors weigh in his favor.

Regarding the first two factors, defendant argues that Nyoka's opportunity and ability to view the perpetrator were limited because the room was lit only by a television (and possibly a closet light), she saw him for only a short period of time, she was distracted by both the gun and Travis' attack on her sister, and she was not previously acquainted with defendant. However, Nyoka stated several times that she was able to view her attacker clearly, even noting at one point that the assailant was so close to her that he was "in my face." Although defendant argues that the assailant's hood was up during the attack, which would prevent Nyoka from getting a clear view of his face, Nyoka specifically testified at several points that his hood was down. Nyoka was able to view her assailant long enough that she could later describe his approximate height, his clothing, his complexion, his age, and his hairstyle. Based on these facts, there is no reason to believe that Nyoka did not have a sufficient opportunity to view the perpetrator.

Regarding the third factor, defendant's argument is based on a discrepancy between Nyoka's original description of her assailant's height as about 5'6" and defendant's actual height of about 6'. The supreme court has generally rejected this line of argument, noting that "discrepancies and omissions as to facial and other physical characteristics are not fatal, but simply affect the weight to be given the identification testimony." *Slim*, 127 Ill. 2d at 308; see also *id.* at 311-12 (citing cases with approval, including *People v. Calhoun*, 132 Ill. App. 3d 665, 668 (1971) (six-inch difference between description and actual height of defendant)).

Regarding the fourth factor, defendant points to the fact that Nyoka said only that "this is the person" when she picked defendant out of the photo array. Defendant argues that this fact weighs in his favor because "although there is nothing to indicate that Nyoka's ID was *un*certain, there is also no evidence that she *was* certain." This argument is circular. At best, the lack of additional evidence one way or the other means that this factor weighs neither in defendant's favor nor against him.

Finally, defendant argues that the 17-month gap between the crime and Nyoka's identification of defendant as the perpetrator casts doubt on her testimony. Although this is a large amount of time, it does not undercut the sufficiency of Nyoka's identification as evidence in support of defendant's conviction. Longer amounts of time than this have been found not to preclude a conviction. See *Slim*, 127 Ill. 2d at 313-14 (citing *People v. Rogers*, 53 Ill. 2d 207, 214 (1972) (two-year gap); *People v. Dean*, 156 Ill. App. 3d 344, 352 (1987) (two-and-a-half-year gap).

After reviewing the *Biggers* factors, we cannot say that Nyoka's testimony was so deficient that no rational juror could accept her identification of defendant. All of defendant's arguments are directed against the weight that Nyoka's testimony should be afforded by the trier of fact, and it is not the place of this court to substitute our judgment for the jury's on this point so long the evidence is not completely "unreasonable, improbable, or unsatisfactory." *Smith*, 185 Ill. 2d at 542. If believed by the jury, Nyoka's testimony was sufficient to prove beyond a reasonable doubt that defendant was the perpetrator.

B. Procedural and Evidentiary Issues

Defendant raises four procedural and evidentiary issues, arguing (1) that the trial court

erroneously declined to answer a question from the jury concerning the definition of reasonable doubt; (2) that the State introduced irrelevant and prejudicial evidence; (3) that the State made improper comments during closing arguments; and (4) that the trial court failed to properly admonish the venire pursuant to Illinois Supreme Court Rule 431(b) (eff. May 1, 2007).

1. Question from the jury

During deliberations, the jury sent a note to the trial court that asked for a legal definition of reasonable doubt and an example. Defendant argues that the trial court erred by refusing to provide the jury with a definition of reasonable doubt in response to the jury's question. We initially observe that defendant has forfeited this issue because he failed to tender a proposed jury instruction (see Illinois Supreme Court Rule 366(b)(2)(I) (eff. Feb 1, 1994)), and also failed to include the issue in his posttrial motion (see *People v. Herron*, 215 Ill. 2d 167, 175 (2005)). But see Ill. S. Ct. 451(c) (eff. July 1, 2006) (allowing review despite forfeiture where "substantial defects" exist in given instructions); *Herron*, 215 Ill. 2d at 175-76 (noting that Rule 451(c) is "coextensive" with the plain error doctrine articulated in Illinois Supreme Court Rule 615(a) (eff. Aug. 27, 1999)).

We consequently may only review this issue pursuant to the plain error doctrine,[1] under which we may review unpreserved error "when (1) a clear or obvious error occurs and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against

[1] Defendant also asserts, without citation or further argument, that we should overlook his forfeiture because it is due to ineffective assistance of trial counsel, which is addressed *post*, Part II(C). Defendant also makes this assertion for the other issues that he has forfeited. See *post*, Part II(B)(2) through (4). Defendant does not offer any authority for this propostion, nor does he explain how our analysis would be different than plain-error review of these issues. We therefore consider this particular argument forfeit pursuant to Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008), and we will not consider it.

the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurs and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Defendant bears the burden of persuasion, both to demonstrate that an error occurred and that it is reversible error under either prong of the doctrine. See *People v. McLaurin*, 235 Ill. 2d 478, 495 (2009).

The first step in plain-error analysis is to determine whether an error occurred. See *Piatkowski*, 225 Ill. 2d at 565. This specific issue has been addressed by the appellate court several times, although the supreme court has yet to weigh in on it. See *People v. Vasquez*, 368 Ill. App. 3d 241, 252-55 (2006) (discussing and analyzing the case law on this issue); *People v. Tokich*, 314 Ill. App. 3d 1070, 1074-75 (2000); *People v. Failor*, 271 Ill. App. 3d 968, 970-71 (1995). As those cases observed, the supreme court has unequivocally stated that "[t]he law in Illinois is clear that neither the court nor counsel should attempt to define the reasonable doubt standard to the jury." *People v. Speight*, 153 Ill. 2d 365, 374 (1992); see also Illinois Pattern Jury Instruction, Criminal, No. 2.05 (4th ed. Supp. 2008) (stating that a definition of reasonable doubt should not be given to the jury).

However, defendant argues that this issue should be controlled by the supreme court's ruling in *People v. Childs*, 159 Ill. 2d 217, 229 (1994), in which the court held that a jury is entitled to have its explicit questions answered. But see *People v. Millsap*, 189 Ill. 2d 155, 161 (2000) (discussing several scenarios in which a trial court may decline to answer a jury's question). Defendant also cites a number of empirical studies and federal court opinions on the issue of giving a reasonable doubt instruction, and he urges us to find that, although the court

and parties should still not attempt to instruct the jury on the meaning of reasonable doubt, a definition should be provided to the jury by the trial court in the event that the jury spontaneously requests one.

This same argument was made in previous cases and has specifically been rejected, most recently in *Vasquez*, 368 Ill. App. 3d at 252-55. *Vasquez*, *Failor*, and *Tokich* have each thoroughly analyzed this issue and have all agreed that what controls this situation is the supreme court's admonition that reasonable doubt is best left undefined, and they also agree that *Childs* does nothing to alter this long-standing rule. See, *e.g.*, *id.* at 255 (distinguishing *Childs*). We see no reason to abandon our previous holdings, and defendant does not raise any arguments that have not already been thoroughly considered in prior cases. We therefore follow *Vasquez*, *Failor*, and *Tokich* and find that it was not error for the trial court to decline to answer the jury's question and define reasonable doubt.

2. Irrelevant and prejudicial evidence

Defendant next argues that he was denied his right to a fair trial because the State introduced irrelevant and prejudicial evidence, specifically evidence (1) that William Yelvington and defendant's co-defendant Travis Weston referred to each other as "Lord," meaning that they were members of the Vice Lords street gang; (2) that Yelvington previously broke into Nyoka's home while holding a rifle and threatened to kill her; and (3) that Nyoka had previously seen Yelvington and Travis with weapons in her home, including the rifle that Yelvington had threatened her with.

As with the previous issue, defendant has forfeited this issue because he failed to object to this evidence at trial and failed to raise the issue in a posttrial motion. It can consequently

only be reviewed under the plain-error doctrine. See *Piatkowski*, 225 Ill. 2d at 565. We first must determine whether an error occurred. See *id.* It is fundamental that a defendant's guilt must be proven by only relevant evidence. See *People v. Johnson*, 208 Ill. 2d 53, 87-88 (2004) ("Our system of justice requires that a defendant's guilt or innocence be determined based upon relevant evidence and legal principles."). Relevant evidence is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ill. R. Evid. 401 (eff. Jan 1, 2011).[2] Relevant evidence is generally admissible unless it is prohibited by a rule of evidence or by law. See Ill. R. Evid. 402 (eff. Jan. 1, 2011).

In this case, the State argues that these three pieces of evidence are relevant because they establish the motive behind the crime, which is often crucial to establishing guilt. See *People v. Hendricks*, 137 Ill. 2d 31, 53 (1990) ("Motive, although not an element of murder, may be a material factor at issue in establishing guilt, particularly when the only evidence is circumstantial."). In essence, the State's argument is that the above evidence established that (1) Travis and Yelvington knew each other because they were fellow gang members, (2) the guns belonged to Yelvington, and (3) Travis knew that the guns had been in Nyoka's house. These facts, in the State's view, establish that the motive behind the crime was to recover Yelvington's guns from Nyoka's home.

Defendant argues that this evidence is completely irrelevant as to him because he was not

[2] For the sake of clarity, we will refer to the recently codified Illinois Rules of Evidence when discussing evidentiary principles. See *People v. Dabbs*, 239 Ill. 2d 277, 289 (2010). With only two exceptions that are not relevant here, the rules fully reflect accepted common-law principles of evidence. See *id.*; see also Ill. R. Evid. Committee Commentary.

present during any of the incidents described, nor was there any proof that he knew about them. However, Nyoka testified that her assailant, whom she later identified as defendant, asked repeatedly, "Where the fuck is William's [Yelvington's] guns?" This statement indicates that defendant's motive for the crime was the recovery of Yelvington's guns, making the above evidence relevant to his motive.

Defendant further argues that, even if this evidence is relevant, it should have been excluded because it was impermissible evidence of prior bad acts that were used to show his propensity to commit this crime. Although evidence of prior bad acts is generally barred under Illinois Rule of Evidence 404(b) (eff. Jan. 1, 2011), defendant's argument is flawed for two reasons. First, the evidence that defendant complains of did not relate to his own acts, but instead related to the acts of Yelvington or Travis. Rule 404(b) is therefore not implicated and cannot be used to bar this evidence. Second, even assuming that we were to somehow find that the evidence related to defendant's prior actions, Rule 404(b) explicitly states that evidence of prior bad acts is admissible in order to prove motive. See Ill. R. Evid. 404(b) (eff. Jan. 1, 2011).

Alternatively, defendant argues that the evidence was unfairly prejudicial and subjected him to "guilt by association." Otherwise relevant evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice." Ill. R. Evid. 403 (eff. Jan. 1, 2011). This argument relates to the gang affiliation evidence more than the guns evidence, and it is arguable that there was some risk of prejudice to defendant based on the evidence of co-defendant Travis' gang membership. It is somewhat significant that, at the hearing on motions *in limine*, the trial court limited the State to arguing that only Travis was a gang member. The supreme court has cautioned that "street gangs are regarded with considerable disfavor by other

segments of our society," and that "there may be a strong prejudice against street gangs." *People v. Strain*, 194 Ill. 2d 467, 477 (2000).

However, as defendant himself notes, none of this evidence directly involved defendant. It is less likely that the jury would hold the gang affiliation of his co-defendant against defendant than it would be had the evidence shown that defendant himself was a gang member. Moreover, the evidence of Travis' gang affiliation was limited to a single, brief exchange regarding how Travis and Yelvington addressed each other. Given that the evidence was relevant to proving the motive behind the crime and that defendant bears the burden under the plain-error doctrine of demonstrating error, we cannot say on these facts that the probative value of the evidence that defendant complains of was substantially outweighed by any potential prejudice.

Because this evidence was relevant and its admission was not barred, it was not error for the trial court to admit it. There consequently can be no plain error.

3. Closing arguments

Defendant next argues that the State's closing argument contained several statements that were unfairly prejudicial or had no basis in the evidence presented at trial. Although defendant's trial counsel objected to some of the prosecutor's statements, defendant did not include this issue in his posttrial motion. The issue is therefore forfeit and may only be reviewed under the plain error doctrine. See *People v. Ramsey*, 239 Ill. 2d 342, 440 (2010); *People v. Wheeler*, 226 Ill. 2d 92, 122 (2007). As with the above issues, we must first determine whether an error occurred. *Piatkowski*, 225 Ill. 2d at 565.

In order to determine whether the prosecutor's closing argument was improper, we "must evaluate the comments in the context in which they were made." *Ramsey*, 239 Ill. 2d at 441.

We review this issue *de novo*. See *Wheeler*, 226 Ill. 2d at 121. See generally *People v. Johnson*, 208 Ill. 2d 53, 64-67 (discussing the problem of prosecutorial misconduct in closing arguments). Prosecutors are generally allowed wide latitude in making closing arguments, and a prosecutor "may comment during closing argument on the evidence and on any fair and reasonable inference the evidence may yield, even if the suggested inference reflects negatively on the defendant." *People v. Perry*, 224 Ill. 2d 312, 347 (2007). The question on review is "whether or not the comments engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilty resulted from them." *Id.* at 123. Put another way, "[m]isconduct in closing arguments is substantial and warrants reversal and a new trial if the improper remarks constituted a material factor in defendant's conviction. [Citation.] If the jury could have reached a contrary verdict had the improper remarks not been made, or the reviewing court cannot say that the prosecutor's improper remarks did not contribute to the defendant's conviction, a new trial should be granted." *Id.*

Defendant claims two types of error in the closing argument. First, defendant argues that the prosecutor attempted to garner sympathy for Nyoka Williams, who was the victim and the State's key witness against defendant. Defendant points to statements by the prosecutor that Nyoka had to endure "terror," "fear," and a "nightmare," and that she "could never feel safe again." Defendant also points to statements that it was difficult for Nyoka to take the witness stand, as well as statements that Nyoka was a "survivor." Defendant argues that these statements were improper because they were directed to the emotions of the jury and were designed to distract them from flaws in Nyoka's testimony.

It is well settled that a prosecutor may not appeal to the emotions of the jury in order to

"shift the focus of attention away from the actual evidence of the case." *People v. Johnson*, 208 Ill. 2d 53, 83-84 (2004). In this case, although some of these specific comments are obviously directed at the emotions of the jury and skirt the line of propriety, when they are read in context with the entire closing argument we cannot say that they were improper. The prosecutor's comments regarding the "terror" Nyoka suffered appear during the opening portion of the prosecutor's closing argument, during which the prosecutor largely summarizes the forthcoming argument and sets the scene for the jury. Notably, the comments consist of only a few words on a single page in the record. Following her opening, the prosecutor went on to discuss the evidence in the case in detail, spanning 47 transcript pages in the record. The comments that defendant complains of, although emotive, were at most made in passing.

Regarding the comments about Nyoka's status as a "survivor" and the difficulty of getting on the witness stand, in context these remarks appear in a portion of the prosecutor's argument that related to Nyoka's demeanor during her testimony. After citing the appropriate jury instruction regarding consideration of the demeanor of witnesses, the prosecutor stated:

> "And Nyoka is left here to tell what happened and to live with that every single day and to know that a bad guy that she got involved with brought another bad guy into her life and that bad guy brought this guy with his gun. That's a lot to live with. That's a lot on her shoulders, but she carried that in here. She got up on that witness stand, and she told you what happened. She told you the truth because that's the way it went down.
>
> But don't think that she wasn't also a person who suffered greatly in this and suffered a crime. Absolutely. She was the victim back then of a crime. She

> is now a survivor but she was on that night a victim but also a victim who survived, survived attempt first degree murder."

Although prosecutor's choice of words again flirts with impropriety, we cannot say that this argument was improper in this context. The prosecutor's comments here related to Nyoka's demeanor on the stand, which is a permissible area for commentary.

Second, defendant argues that the prosecutor made prejudicial arguments that lacked any basis in the evidence. Defendant points to four specific statements: (1) that the guns were "worth a lot of money, worth even more on the street for what they can do, what they are used for, what they have been used for"; (2) that despite defendant and Travis' youth, "in terms of violence and in terms of terrorizing people, they might as well each be a hundred years old"; (3) a comment during rebuttal that implied defendant would have fled had he known that police were searching for him; and (4) during rebuttal, a comment by the prosecutor to the effect that defendant's cross-examination of Nyoka regarding whether defendant's hood was up during the crime was faulty.

Regarding the first statement, defendant asserts that it was unsupported by evidence and implied that defendant was planning to sell the guns to criminals on the street. However, it is appropriate to comment not only on the evidence but also any inference that may be drawn from it. See *Perry*, 224 Ill. 2d at 347. When this comment is read in context, it is readily apparent that the prosecutor was explaining the potential for financial gain that was part of the motive behind this crime:

> "This is the work of a young man who got together with his brother, his brother who knew some pretty important information. Travis Weston was at

> Nyoka Williams' house just weeks before that when guns were literally spread all over Nyoka's bed.
>
> This defendant's partner in crime, Travis, he saw those guns. And they weren't just any guns. They were big rifles, shotguns, worth a lot of money, worth even more on the street for what they can do, what they are used for, what they have been used for. All of these things add up to insider information, information that Brian's partner, his brother, had."

Although the prosecutor's choice of words could certainly have been better, the context of the comments was geared toward explaining the reason behind the crime, which in the prosecution's theory was to obtain valuable weapons from Nyoka's home. The fact that the weapons were valuable is a logical inference from the evidence, particularly given the fact that there were a significant number of weapons in the cache. Consequently, the prosecutor's comment in this context was not improper.

Regarding the second statement, defendant argues that it prejudicially implies that defendant had a long history of violent crime. In context, this statement appears in a section of the argument in which the prosecutor commented on the fact that defendant and Travis acted together during the crime yet each individually took violent actions:

> "[THE STATE]: Think about what was happening in that bedroom. Think about how at first Brian was the one who decided to kill off Tai because she's the siren. She's the loud one. The guns aren't there. What do we do now? This one is talking too much. That's what this defendant decided to do all on his own.
>
> But he didn't just do his own bid[d]ing. In the end, when his brother

> Travis told him to shoot that bitch again, referring to Nyoka Williams who was still somewhat alive on the floor, that's exactly what this defendant did. He was in it for the team, a team of two. Him and his brother Travis.
>
> And think about what Travis brought to the table for their mission of getting these guns, their mission of greed, getting these valuable guns. Travis had the insider information. ***
>
> That's why these two young men are together. And they may be young, ladies and gentlemen, in age, but in terms of violence and in terms of terrorizing people, they might as well each be a hundred years old."

When read in context, this statement cannot be read as implying that defendant had a criminal history of violence. Instead, the comment is directed to the violent actions that defendant and his co-defendant took against Nyoka and her sister during their commission of the crime. The statement was a direct comment on the severity of defendant's violent actions during this specific crime, and the comment was therefore not improper.

Regarding the third statement, defendant claims that the State argued without evidence in rebuttal that defendant had a "guilty conscience" and would have fled had he known the police were looking for him. This assertion is belied by the record. One of defendant's arguments during trial was that the police had not created and distributed a composite drawing of the suspect based on Nyoka's description of her assailant. The statement that defendant complains of reads as follows:

> "No, this isn't an amber alert situation. We didn't put him on a milk carton. You know what, we weren't trying to tip off [defendant] we were looking

> for him. The law enforcement is not trying to give him the heads up, to get out of town. The investigation continues quietly. They intend to identify him and arrest him. They are not here to publish to the world that they are looking for him."

When read in context, this statement is intended to counter defendant's own argument that the lack of a composite sketch creates doubt regarding Nyoka's identification of defendant as her assailant. Although it is possible that this statement could be taken to imply that defendant would flee, in context this is not the main point of the prosecutor's comment. Instead, the comment is designed to rebut defendant's own argument, and it was therefore not improper.

Finally, the fourth statement revolves around a factual dispute during trial regarding whether the hood of Nyoka's assailant was up or down during the attack. Nyoka testified several times that the hood was down, but defendant introduced a seemingly inconsistent statement that she had given to a detective, indicating that the attacker's hood was up. On cross-examination of the detective by defense counsel, the following exchange occurred:

> "[DEFENSE COUNSEL]: And you also indicate in this report that the person was last seen wearing a gray hoodie sweatshirt with the hood on his head; is that correct?"
>
> [WITNESS]: Yes."

Defendant used this exchange during closing, arguing that Nyoka's testimony that she had seen defendant's face because the hood was down should not be believed. The State attempted to rebut this argument by explaining the discrepancy in the report as a mistake of the detective who wrote the report, rather than an inconsistent statement by Nyoka:

> "You're going to receive an instruction from the court with respect to your

note taking. *** But that instruction also informs you that you shouldn't rely on the notes of another person. You should rely on your independent recall of the testimony. Why is that? Because note taking can be reliable and it can be unreliable. It's dependent on the note taker.

And in the course of this investigation [Nyoka] was being interviewed numerous times. You know what's absent in that cross-examination [by defense counsel]? That on May 3rd she told you he was wearing a hood. On May 4th she told you he was wearing a hood. May 5th. How about the first interview when you talked to the officer, you told him he was wearing a hood? Gone. Devoid because it didn't happen because she never said he was wearing a hood in any of those other interviews."

Defendant argues that the last portion of this argument was improper because it was not based on any evidence that Nyoka had never made any such statements in those interviews. However, the prosecutor's rebuttal on this point is supported by the facts in evidence, or rather by the absence of facts in evidence. The same detective that defendant cross-examined on the report also testified that he interviewed Nyoka on May 3rd and May 4th. Yet as the prosecutor observed in his comment, defense counsel never elicited any testimony from the detective about a statement by Nyoka regarding the hood on those dates. Although defendant claims that this amounts to "introducing" evidence during rebuttal, we disagree. The prosecutor's comment on this point was a rebuttal argument to defendant's claim that Nyoka's alleged description of her assailant's hood as up, as recorded in a third party's report, was dispositive for the question of identification. The prosecutor did not argue evidence not in the record, and therefore the

comment was not improper.

In sum, we reject defendant's contention that the prosecution's closing argument amounted to misconduct. As we noted several times above, however, some of the State's comments in this case came perilously close to the line between proper and improper argument, especially the comments of the prosecutor who delivered the first part of the State's closing argument. We do not hesitate to say that the tenor of that particular prosecutor's argument came close to misconduct at several points because her comments were obvious attempts to appeal to the jury's emotions. The supreme court has made clear it will not tolerate prosecutorial misconduct in closing argument "that deliberately undermines the process by which we determine a defendant's guilt or innocence." *Wheeler*, 226 Ill. 2d at 121-22. With that said, however, this is not a case like *Wheeler*, *Johnson*, or *Blue* in which the prosecutor's closing argument was "deliberately designed to forge just the sort of 'us-versus-them' mentality decried by this court *** and foster a situation where jurors might feel compelled to side with the State and its witnesses in order to ensure their own safety." *Id.* at 129. The first prosecutor in this case displayed poor judgment in choosing her words, but the comments that defendant complains of were isolated instances and when viewed in context do not cross the line into misconduct. Moreover, the arguments of a different prosecutor during the State's rebuttal were directly related to arguments raised by defendant and were closely related to contested facts.

Even if we might consider some of the State's comments improper, when they are considered in the context of the entire closing argument they do not rise to the level of substantial prejudice because the vast majority of the prosecution's closing argument was directed to the evidence adduced at trial. There is no indication that the jury would have reached

a contrary verdict in the absence of the State's comments. See *Wheeler*, 226 Ill. 2d at 123. There was consequently no error in the closing argument, and we need not consider the remaining questions in plain-error review. See *Ramsey*, 239 Ill. 2d at 443.

4. Rule 431(b) instructions

Defendant next argues that the trial court erred by failing to properly question potential jurors pursuant to Illinois Supreme Court Rule 431(b) (eff. May 1, 2007). Rule 431(b) requires the trial court to ask the venire, either individually or in groups, whether they understand and accept the four principles expounded in *People v. Zehr*, 103 Ill. 2d 472, 477 (1984). In this case, following a recitation of each principle, the trial court asked the venire only, "Is there anyone here who will not follow this instruction?"

This issue is controlled by the supreme court's decision in *People v. Thompson*, 238 Ill. 2d 598 (2010). Defendant failed to object to this admonishment during voir dire, so this issue is also forfeit and may only be reviewed under the plain error doctrine. See *id.* at 611. The only question in determining error in this case is whether the trial court strictly complied with Rule 431(b) when questioning the jurors. The supreme court described the correct analysis as follows in *Thompson*:

> "Rule 431(b), therefore, mandates a specific question and response process. The trial court must ask each potential juror whether he or she understands and accepts each of the principles in the rule. The questioning may be performed either individually or in a group, but the rule requires an opportunity for a response from each prospective juror on their understanding and acceptance of those principles." *Id.* at 607.

It is undisputed in this case that the trial court neglected to ask the jurors whether they understood and accepted each principle. The trial court failed to comply with Rule 431(b)'s clear requirements, and that is error under *Thompson*.

The remaining question is whether the error is reversible. An error is reversible under the plain-error doctrine only where "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *Piatkowski*, 225 Ill. 2d at 565.

Defendant asserts that the evidence in this case was closely balanced because it was based only on Nyoka's identification of defendant. Although there was no physical evidence tying defendant to the scene, Nyoka's identification of defendant as the perpetrator was unrebutted. Even if we were to assume for the sake of argument that the evidence was closely balanced because Nyoka was the sole eyewitness, defendant does not explain how the mere fact that the trial court neglected to strictly follow Rule 431(b) could have tipped the balance against him. In particular, defendant fails to explain how the trial court's incorrect Rule 431(b) admonishments caused the jury to improperly assess the credibility of Nyoka as a witness.

Defendant's sole argument relies on the fact that the jury queried the court regarding the definition of reasonable doubt, which defendant argues indicates that they did not understand the Rule 431(b) principles. Yet this fact indicates that the jury *did* understand their duty. The second principle is that the State must prove defendant guilty beyond a reasonable doubt. By inquiring about the meaning of reasonable doubt, the jury demonstrated that it understood which

standard of proof applied to this case. Defendant does not offer any other argument regarding how the Rule 431(b) error could have tipped the balance against him. Given that he carries the burden of persuasion on this issue, he has not demonstrated that the Rule 431(b) error is reversible error under the first prong of the plain error doctrine.

Defendant also argues that the error is reversible under the second prong. The supreme court in *Thompson* found that a Rule 431(b) error of this kind is reversible under the second prong of the doctrine only where a defendant can demonstrate that the error resulted in impaneling a biased jury. See *Thompson*, 238 Ill. 2d at 613. However, defendant has not offered any evidence or argument that the jury was biased, and he has therefore failed to carry his burden under the second prong of the plain error doctrine.

In sum, although the trial court failed to properly admonish the venire pursuant to Rule 431(b), defendant has failed to carry his burden of demonstrating plain error. As a result, we honor defendant's procedural default of this issue.

C. Ineffective Assistance of Counsel

Defendant next argues that his constitutional right to assistance of counsel was violated because his trial counsel failed to properly preserve several of the above-discussed issues for appeal and failed to call a witness in order to impeach Nyoka Williams by prior inconsistent statement.

Ineffective assistance of counsel claims are governed by the familiar test articulated in *Strickland v. Washington*, 466 U.S. 668, 694 (1984). See *People v. Jocko*, 239 Ill. 2d 87, 92-93 (2010). Under this two-part test, a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

(Internal quotation marks omitted.) *Jocko*, 239 Ill. 2d at 92.

Because we have already found that none of defendant's claims were error, defendant's argument that his trial counsel's failure to preserve issues for appeal cannot satisfy the *Strickland* test. Without error, a claim for ineffective assistance of counsel fails. See *Johnson*, 218 Ill. 2d at 139 ("[S]ince an attorney's performance is ineffective only if it falls below an objective standard of reasonableness [citation], counsel cannot be deficient if he fails to object to remarks which are not improper. Thus, before we can determine whether there was plain error or ineffective assistance of counsel, we must first decide if there was error.").

This leaves only defendant's contention that his trial counsel should have called an additional witness to impeach Nyoka by prior inconsistent statement. Defendant argues that his trial counsel should have called Officer Hadden, who testified in front of co-defendant Travis Weston's jury regarding a number of statements by Nyoka. In front of defendant's jury, Nyoka testified to the following points: (1) she worked an overnight shift, (2) the gun used by her assailant was silver with a white handle, and (3) that she had never told police that it was Travis who kicked in the door to her apartment. Defendant argues that Hadden would have testified that Nyoka told him (1) that she was unemployed, (2) that she did not know the color of the gun, and (3) that it was Travis who kicked in the door to the apartment.

The decision of whether to call a witness is a matter of trial strategy and will generally not support a claim of ineffective assistance of counsel. See *People v. Hobley*, 159 Ill. 2d 272, 305 (1994); *People v. Jones*, 155 Ill. 2d 357, 369-70 (1993). It is difficult to label defendant's trial counsel as deficient on this point, particularly given that Nyoka had already been impeached by inconsistent statements on her ability to perceive her assailant. Hadden's testimony on the

first and third points would therefore be largely redundant. Additionally, the second point was cumulative of testimony that had already been given. Defense counsel had already challenged Nyoka's ability to identify her attacker through cross-examination and the introduction of contradictory statements, and Hadden's testimony would not have added much to the evidence already adduced. As a result, we cannot say that counsel's failure to call Hadden was professionally deficient.

Because defendant has not established that his trial counsel's performance was objectively deficient and resulted in prejudice, his constitutional right to the effective assistance of counsel was not violated.

D. Mittimus

Finally, defendant asserts that his mittimus incorrectly reflects only 990 days of presentence incarceration credit, rather than the 1,025 that he is entitled to. See 730 ILCS 5/5-8-7(b) (West 2008). The State concedes that defendant is entitled to the additional 35 days, so we order the mittimus to be corrected without further discussion. See Ill. S. Ct. R. 366(a) (eff. Feb. 1, 1994).

III. CONCLUSION

For the reasons stated above, we affirm defendant's conviction, and we order the mittimus to be corrected in order to reflect 1,025 days of presentence incarceration credit.

Affirmed.