2012 IL App (1st) 093496-U

SIXTH DIVISION
SEPTEMBER 28, 2012

No. 1-09-3496

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. 04 CR 13399
	)	
IRVING MADDEN,	)	Honorable
	)	Joseph G. Kazmierski,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ROBERT E. GORDON delivered the judgment of the court.
Presiding Justice Lampkin and Justice Palmer concurred in the judgment.

ORDER

¶ 1 *Held:* Where a trial court properly barred an expert witness from testifying to defendant's state of mind, used an improper jury instruction that did not rise to the level of plain-error, properly sustained objections to inadmissible testimony and where the State did not commit error in its closing arguments, and where there was no ineffective assistance of counsel, and where the trial court properly admitted defendant's previous felony convictions for armed robbery, the trial court's ruling will be affirmed.

¶ 2 After a jury trial, defendant Irving Madden was convicted of the first-degree murder of Hamid Shahande and the attempted first-degree murder of Antoinette Woods. After hearing aggravation and mitigation, the trial court sentenced defendant to consecutive terms of 55 years

and 45 years in the Illinois Department of Corrections (IDOC), for murder and attempted murder, respectively, totaling 100 years.

¶ 3 Defendant testified at trial that, on April 26, 2004, he shot both the deceased, Hamid Shahande, and the surviving victim, Antoinette Woods. Defendant's defense at trial was that he had an unreasonable belief in the need for self-defense, and now asks this court to reduce his first-degree murder conviction to second-degree murder.

¶ 4 On appeal, defendant claims: (1) that the trial court incorrectly barred his expert witness and parts of defendant's testimony about his state of mind at the time of the shooting; (2) that the trial court allowed an incorrect self-defense jury instruction and that defense counsel was ineffective for not objecting to it; (3) that the prosecutor committed misconduct and defense counsel was ineffective for not objecting to it when the State: (a) invaded defendant's attorney-client privilege; (b) impeached defendant with evidence that he had invoked his constitutional right to remain silent and to an attorney; and (c) misstated both the law of self-defense and the preponderance of the evidence standard in closing argument; and (4) that the trial court committed reversible error by admitting evidence about defendant's prior armed robbery conviction. We affirm.

¶ 5 BACKGROUND

¶ 6 At trial, there was no dispute that defendant was the shooter in an incident that occurred on April 26, 2004, which left Hamid Shahande dead and Antoinette Woods wounded. Defendant, Monique Hampton and the two victims were involved in a narcotics transaction that evening and defendant shot Shahande and Antoinette Woods in a motor vehicle before leaving the scene.

¶ 7 I. Pretrial Proceedings

¶ 8 Prior to trial, defendant filed a motion *in limine* to bar the use of evidence of his prior conviction for armed robbery on June 13, 1996, which the State intended to use to impeach his credibility. After a hearing, the trial court ruled to admit defendant's prior conviction, stating

> "Also, with regard to the nature of that prior conviction case, it is of such a nature that it could be used to judge a person's credibility and truthfulness for honesty. So it does fall under the purview of the *Montgomery* decision as well. Looking at the probative nature of that, also the possible prejudice, weighing all of those particular interests as it would appear at trial in this case, given all the considerations, I find if the Defendant does testify, the prior conviction can be properly admitted into evidence."

¶ 9 Also prior to trial, the State filed a motion *in limine* to bar defense expert Barry Hargan, a psychologist, from testifying about the effects of heroin withdrawal on defendant. The State sought to preclude Hargan's testimony on the ground that his testimony did not bear on a material issue in the case and was thus irrelevant. Defendant responded that Hargan's testimony would support defendant's claims about his belief in the need for self-defense by explaining "how heroin addicts think, [and] act on withdrawal." Defendant argues that if the jury did not find self-defense, Hargan's testimony would support a second-degree murder conviction. The defense argued that Hargan's testimony would provide an explanation of "whether or not my client's belief in self-defense was a valid belief although an unreasonable belief." Defendant also

submitted Hargan's written report to the trial court so that the trial court would be familiar with the expert testimony that would be offered. The report claimed that defendant was addicted to heroin before the shooting, that he stopped using heroin one week before the shooting and that heroin withdrawal causes anxiety and dysphoria. The report also claimed that heroin withdrawal could induce Substance-Induced Mood Disorder, with symptoms of depression, mania, or irritability. After a hearing, the trial court found that the expert witness would be unnecessary and granted the State's motion to bar his testimony. The trial court stated the following two reasons for barring the expert witness testimony: (1) "I don't believe barring Mr. Hargan's [*sic*] testimony will prevent the defendant from presenting his defense if he so chooses to *** with regard to his addiction ***."; and (2) "I think to allow Mr. Hargan's [*sic*] testimony would actually go toward the issue of presenting the evidence as some form of diminished capacity which I don't believe would be properly done *** given the defenses that you have alleged in your answer to discovery."[1]

¶ 10 II. Evidence at Trial

¶ 11 A. State's Case-In-Chief

¶ 12 The State's case-in-chief consisted of the testimony of 13 witnesses. They included Dameion Harris, a passerby who discovered Antoinette Woods, and Antoinette Woods herself. They also included five police officers who investigated the shooting: Sergeant David Deja,

[1] In defendant's answer to State's motion for pretrial discovery, defendant stated that it would "rely upon the State's inability to prove him guilty beyond a reasonable doubt including self-defense."

Detective Robert Cordero, Detective Jim Gilger, Sergeant Frank Pierri, and Lieutenant Anthony Wojcik. The remaining five witnesses were forensic experts: Arthur Oswald, a forensic crime scene investigator, Dr. J. Lawrence Cogan, the forensic pathologist who performed the autopsy, Lisa Fallara, a forensic scientist in biology and DNA analysis, Tonia Brubaker, a firearms examiner, and Sergeant Robert Berk, who conducted a gunshot residue analysis. Except for the testimony of victim Antoinette Woods and Detective Cordero who testified about defendant's statement to him, most of the State's case-in-chief concerned the identification of the shooter, which actually was not an issue in this case.

¶ 13 Dameion Harris, the State's first witness, testified that, on April 26, 2004, he observed a woman with a bloodied face slumped in the front seat of a vehicle parked in an alley between South Parkside and South Waller Avenues. The alley ran between 100 blocks of both avenues. He exited the alley and alerted nearby police officers. The woman was later identified as Antoinette Woods.

¶ 14 Antoinette Woods testified that she occasionally acted as a driver for the deceased, Hamid Shahande, in exchange for heroin and cocaine. The deceased was a drug dealer. On April 26, 2004, Antoinette Woods drove Shahande to defendant's residence. Woods testified that Shahande intended to sell heroin and a gold chain to defendant and that the gold chain was previously pawned from defendant in exchange for drugs.

¶ 15 Antoinette testified that, after arriving at defendant's residence, Monique Hampton, defendant's girlfriend, came outside to speak with Shahande. Monique told Shahande that she needed to collect money from a friend to complete the purchase, then Monique and defendant

entered the back seat of Antoinette's vehicle. Defendant directed Antoinette to drive the vehicle into an alley and to stop the vehicle. Monique then asked to borrow Shahande's telephone. Antoinette was in the driver's seat and Shahande was in the front passenger seat. When Shahande reached for his telephone, Antoinette heard a gunshot and observed a flash close to her. Antoinette observed that Shahande, seated next to her, had stopped moving.

¶ 16 Antoinette testified that she then ducked her head down, put a hand over her head, and began to drive the vehicle down the alley. She was then shot in her hand and in her head. Defendant then reached forward from the backseat and placed the vehicle in park. Defendant then twisted Antoinette Woods's head and neck and she became tangled in her seatbelt. Defendant exited the vehicle, walked to the driver's side door, and attempted to pull Antoinette from the vehicle. Defendant then struck her in the face with his gun. Antoinette heard Monique say, "Kill her, [baby], kill her. You know we can't leave no witnesses."

¶ 17 Antoinette testified that, at some point, defendant ceased his attack, and the next thing she remembered was someone asking her who was responsible for the beating. Antoinette was placed in an ambulance, where she spoke with a detective about the shooting. She identified defendant and Monique as her attackers. Antoinette was then taken to a hospital and later identified defendant and Monique Hampton from a photographic array.

¶ 18 Antoinette testified that she did not observe Shahande with any kind of a weapon, though he frequently carried a pocketknife. Antoinette testified that there was no argument between the parties prior to the shooting and no threats were made. During cross-examination, the following exchange took place:

"DEFENSE COUNSEL: At the time back in April you had two cousins who were members of the Traveling Vicelords, right?

WOODS: I got a lot of cousins and friends that - -

PROSECUTOR: Objection. Relevance.

THE COURT: Sustained.

DEFENSE COUNSEL: Your Honor, I believe it goes to the state of mind of my client at the time of the occurrence.

THE COURT: Sustained."

No offer of proof was made by defendant.

¶ 19 Sergeant David Deja, a former detective in Chicago's Area Five Detective Division in homicide investigations, testified that he and his partner, Detective Robert Cordero, were assigned to a shooting incident on April 26, 2004. The detectives arrived at the scene of the shooting where Sergeant Deja observed a deceased male who was later identified as Hamid Shahande. Sergeant Deja also observed that a second victim, Antoinette Woods, was lying on a gurney inside an ambulance and that her upper body was bloody.

¶ 20 Sergeant Deja interviewed Antoinette Woods before she was transported to the hospital. During this interview, Antoinette told him that a person she knew as "Nobe" or "Noble" had shot her and Shahande. She also said that a black female known to be the shooter's girlfriend was also present at the shooting. Antoinette indicated to the sergeant that she and Shahande had driven to Noble's house to sell drugs. She then described the physical appearance of Noble and his girlfriend, and shared Noble's home address. She also told Sergeant Deja that Noble was on

house arrest and was on some form of home monitoring.

¶ 21 Sergeant Deja testified that, based on this conversation, he, Detective Cordero, and Sergeants James Sanchez and Anthony Wojcik believed that defendant and defendant's girlfriend, Monique Hampton, were suspects in the shooting incident. The police officers proceeded to defendant's residence where defendant's grandmother granted them permission to inspect defendant's basement apartment. The police officers discovered bloodstains throughout the home. Sergeant Deja and Detective Cordero then went to West Suburban Hospital where they learned from hospital personnel that Monique Hampton had been admitted and was in an examination room and that defendant was also in the hospital. Sergeant Deja and Detective Cordero discovered and seized defendant's and Monique Hampton's clothing and other relevant evidence from the hospital. Sergeant Deja and Detective Cordero then spoke with Monique Hampton, who agreed to accompany them back to the police station for an interview.

¶ 22 Sergeant Deja testified that, after interviewing Monique, he and Detective Cordero interviewed defendant throughout the morning of April 27, 2004. Defendant initially denied involvement with the shooting. Deja testified that they told defendant that Antoinette Woods had identified defendant as the shooter and that they were also interviewing Monique Hampton.

¶ 23 Detective Cordero testified, that the defendant first agreed to speak with him at 4:20 a.m., but denied involvement in the homicide. Detective Cordero testified that he told defendant that Monique Hampton was in custody and that Antoinette Woods had identified defendant as the shooter.

¶ 24 Detective Cordero testified that he questioned defendant a second time at 5:20 a.m. and a

third time at 6:20 a.m. Detective Cordero testified that, during this third questioning, defendant stated the following: that he regularly purchased drugs from Shahande and had arranged to purchase heroin that evening. Defendant stated that, recently, Shahande had been increasing the price of heroin and lowering its quality. In addition, defendant had pawned a gold chain to Shahande, and when defendant attempted to repurchase the chain, Shahande doubled its price. Defendant stated that he, Monique, Antoinette, and Shahande had an argument outside of defendant's residence on the night of the shooting. The parties entered the vehicle to avoid disturbing the neighborhood and Antoinette drove the vehicle into the alley where defendant shot Shahande in the head.

¶ 25 Detective Cordero testified that he questioned defendant a fourth time at 6:30 a.m. where defendant repeated what he said in his third interview and also stated the following: When Shahande arrived at defendant's residence the night of the shooting, defendant sent Monique to conduct the drug transaction. Monique returned to defendant and claimed that "she was disrespected by [Shahande]." An argument ensued among all parties and defendant asked everyone present, Shahande, Antoinette, and Monique, to enter the vehicle to avoid disturbing the neighborhood. Antoinette, who was driving, parked the vehicle in a nearby alley where she and Monique continued to argue.

¶ 26 Defendant stated that he could not handle the argument any longer, so he pulled out a gun and shot Shahande in the back of the head. After defendant shot Shahande, Antoinette "turned and went for [defendant]" and defendant then shot her as well. Defendant and Monique Hampton then exited the scene of the shooting and returned to his residence. At the time, defendant was on

home monitoring for a prior offense. He contacted the Illinois Department of Corrections to explain that he was taking Monique to a hospital due to pregnancy complications.

¶ 27 Detective Cordero testified that defendant stated that he knew that Shahande was protected by the Gangster Disciples, a street gang, and that defendant feared Shahande because of the street gang. Defendant also stated that he felt threatened while he was in the vehicle with Shahande when Shahande pointed at defendant and demanded payment for prior drug transactions.

¶ 28 Detective Cordero testified that assistant State's attorney Veryl Gambino arrived at some point during this fourth questioning, which lasted from 6:30 a.m. until 7:15 a.m.

¶ 29 Detective Jim Gilger, a violent crimes detective in Chicago's Area Five Detective Division in homicide investigations, testified that he assisted the lead officers, Sergeant Deja and Detective Cordero, in investigating the shooting. Detective Gilger conducted a computer search based on descriptions of the suspects from the lead officers. Detective Gilger also submitted a photographic array to the victim, Antoinette Woods, who identified defendant as the shooter.

¶ 30 Sergeant Frank Pierri testified that he was a detective at the time of the shooting and that he assisted in the homicide investigation. At 1 a.m., Sergeant Pierri and his partner, Detective Vincent Viverito, spoke with Antoinette Woods while she was in the emergency room. Woods described defendant's residence and Sergeant Pierri shared this description with his fellow detectives. Shortly after speaking with Woods, Sergeant Pierri learned that defendant had been taken into custody at Area Five.

¶ 31 Sergeant Pierri testified that, at 2 a.m., he and Detective Viverito interviewed defendant at

Area Five. Detective Viverito advised defendant of his Miranda rights and defendant agreed to speak with the detectives. At the time, Sergeant Pierri was aware that other detectives had received permission to enter defendant's residence from defendant's grandmother. Still, Sergeant Pierri asked for and received written permission from defendant to enter his residence.

¶ 32 Lieutenant Anthony Wojcik testified that he was a sergeant in the Area Five, Violent Crimes Unit, at the time of the shooting. He went from the scene of the shooting to defendant's grandmother's house along with Sergeant Deja, Detective Cordero and Sergeant Sanchez. Defendant's grandmother granted the police officers permission to enter defendant's basement apartment where they observed blood stains. Lieutenant Wojcik then contacted the crime laboratory and requested an examination of the residence.

¶ 33 Arthur Oswald, a retired member of the Chicago Police Department's Forensic Services Division and a member of the Mobile Crime Lab Unit, testified that, beginning in the late evening of April 26, 2004, he conducted a forensic investigation of the crime scene. Oswald examined the crime scene, placed markers to visually indicate evidence, documented the scene of the crime with a video recording and photographs, and recovered the following evidence: three ammunition cartridge cases, clothing, a plastic cup, a container, and blood swabs. Oswald then traveled to five other locations and recovered the following evidence: clothing, photographs, blood residue, a fired bullet, and a steak knife. Oswald also conducted a fingerprint analysis on defendant's vehicle and he recovered five fingerprint impressions.

¶ 34 Dr. J. Lawrence Cogan, an assistant medical examiner for the Cook County Medical Examiner's Office, was accepted by the trial court as an expert in forensic pathology. Dr. Cogan

testified that he performed Shahande's post-mortem examination and opined that Shahande died as a result of a gunshot wound to the head.

¶ 35 Lisa Fallara, a forensic scientist in the Illinois State Police Forensic Science Center, was accepted by the trial court as an expert in forensic biology and DNA. Fallara preserved blood and DNA samples from Shahande, Antoinette Woods, Monique Hampton, and defendant. Fallara also preserved and analyzed the following evidence: a $1 bill, a plastic bag, some gloves, 10 paper towels, clothing, swabs, a washcloth, and a light switch cover. Fallara testified that blood was found on many of these items and that the evidence was then outsourced to a laboratory for further testing.

¶ 36 Tonia Brubaker, a forensic scientist specializing in firearms identification at the Illinois State Police's Forensic Science Command, testified and was accepted by the trial court as an expert in the field of firearms investigation. Brubaker testified that she examined two fired bullets and three cartridge cases. She opined that all three cartridge cases came from the same firearm, and both fired bullets came from the same firearm, though she could not determine whether the cartridges and the bullets came from the same firearm.

¶ 37 Robert Berk, a trace evidence analyst in the Illinois State Police's Forensic Science Center, was accepted by the trial court as an expert in trace evidence analysis. Berk testified that he conducted a gunshot residue analysis on Monique Hampton's sweater, which tested negative for gunshot residue, and a sweatshirt, which tested positive for gunshot residue.

¶ 38 The parties stipulated to the following: (1) that a T-Mobile Voicestream produced Shahande's phone records that showed incoming and outgoing calls to defendant's home on the

night of the shooting; (2) that the Illinois State Police Forensic Science Center shipped forensic evidence to Bode Technology Group, Inc., for DNA and blood analysis, for Shahande, Antoinette Woods, Monique Hampton, and defendant; and (3) that defendant's electronic home monitoring log indicates that defendant returned home from work on April 26, 2004, at 10:53 p.m. and requested permission to travel to a hospital at 11:08 p.m.

¶ 39 After the State rested, defendant moved for a directed verdict, which was denied.

¶ 40 B. Defendant's Case

¶ 41 Defendant called Azzie Simpson, his grandmother, and took the stand in his own defense.

¶ 42 Azzie Simpson testified that defendant lives with Monique in Simpson's basement apartment. In late March or early April of 2004, a window was broken in the basement apartment and Simpson did not know who broke the window.

¶ 43 Defendant testified that he purchased heroin from Shahande every day during the four months prior to the shooting incident. In 2004, defendant had been working for his father until approximately two weeks prior to the shooting. Defendant's father terminated his employment so that defendant could focus on ending his drug habit. Defendant testified that he was on house monitoring and going through heroin withdrawal at the time of the shooting. Defendant also testified that he was convicted of armed robbery in 1996.

¶ 44 Defendant testified that, approximately two weeks prior to the shooting, defendant borrowed money from Shahande to repay a debt to his father. Defendant gave Shahande his gold chain as security for the loan. Defendant was unable to repay the loan and Shahande began to contact defendant and Monique regularly. Approximately one week later, defendant received

some funds and went to Shahande's house to repay the loan. Antoinette Woods answered the door and defendant observed four men inside the house standing behind her. Defendant could hear Shahande screaming, and after a brief conversation with Antoinette, defendant quickly left the premises. Defendant testified that he was concerned about "me, my safety, an [*sic*] honestly I was concerned about [Shahande]."

¶ 45 Defendant attempted to testify as to death threats made by Shahande, however the trial court sustained the State's objection to this testimony:

> "DEFENDANT: Well, okay, before I tried to pay him, during the time period I was giving him the runaround, we got kind of – we got – he got infuriated with me about that, so to the extent death threats were being made.
>
> PROSECUTOR: Objection.
>
> THE COURT: Sustained.
>
> DEFENSE COUNSEL: Again, Judge, it goes to the state of mind of my client at the time.
>
> THE COURT: Sustained."

After this visit, defendant contacted Shahande, apologized for any harm that his inability to repay his loan in a timely manner may have caused, and agreed to repay the loan within the week.

¶ 46 At trial, defendant attempted to testify to the source of Shahande's money that was used for the loan, however the trial court sustained the State's objection to this testimony:

> "DEFENDANT: *** he told me that the money he had

wasn't his, it belong to a Gangster.

PROSECUTOR: Objection.

THE COURT: Sustained."

¶ 47 However, defendant did testify that Shahande's heroin was supplied by the Vicelords, a street gang on the west side of Chicago. Defendant also attempted to testify to the scene at Shahande's house when he first attempted to repay the loan, however the trial court sustained the State's objection to this testimony:

"DEFENSE COUNSEL: So you went to [Shahande's] house *** right?

DEFENDANT: Right.

DEFENSE COUNSEL: What, if anything, happened?

DEFENDANT: I knocked on the door and Antionette [*sic*] Woods opened the door and she warned me to get away from the premises because –

PROSECUTOR: Objection.

THE COURT: Sustained.

DEFENSE COUNSEL: Your Honor, this goes to the state of mind of my client on our defense.

THE COURT: Sustained."

¶ 48 Defendant testified that, prior to the shooting, defendant's bedroom window was broken and defendant believed that Shahande was the culprit. Defendant testified that, as a result of this

broken window, he was "petrified for my family, my grandmother and my aunt." Defendant attempted to testify that someone witnessed Shahande break the window; however, the trial court sustained the State's objection to this testimony.

"DEFENSE COUNSEL: And who did you think that was?

DEFENDANT: [Shahande.]

DEFENSE COUNSEL: And why did you think that?

DEFENDANT: Because someone seen a Latino-looking man kick my window out.

PROSECUTOR: Objection.

THE COURT: Sustained."

On cross-examination, defendant testified that he believed Shahande broke his window, that someone had identified Shahande as the person who broke defendant's window, but that defendant did not witness any of this.

¶ 49 Defendant testified that, on April 26, 2004, defendant asked Monique to notify Shahande that defendant was prepared to pay back the loan and repurchase his gold chain. Defendant asked Monique to meet Shahande outside, repay the loan and retrieve the gold chain. After several minutes, defendant heard screaming and yelling from outside his apartment. He heard Monique say, "Get your hands off me" and Shahande demanded to speak with defendant. Defendant testified that he feared Shahande and what he was doing to Monique.

¶ 50 Defendant testified that he then armed himself with a gun. He testified that he had previously observed Shahande with multiple guns. Defendant exited his apartment and observed

Shahande and Monique "wrestling." Defendant broke up the fight and Monique handed defendant his money and received the gold chain; however, the chain was missing a piece. Defendant and Shahande began to argue about the missing piece and the amount of money that defendant owed. At one point, Shahande reached his hand into his pocket and appeared to be holding a gun. Defendant and Monique Hampton then put their hands up and again asked for the missing piece to be returned. Shahande stated that the missing piece was in his vehicle.

¶ 51 Defendant testified that Antoinette led Shahande, Monique, and defendant to Antoinette's vehicle and everyone entered. Antoinette Woods sat in the driver seat, Shahande sat in the front passenger seat, Monique Hampton sat in the left rear passenger seat behind Antoinette, and defendant sat in the right rear passenger seat behind Shahande. Antoinette began to drive and defendant protested, explaining that he could not travel far because he was on house monitoring. Defendant testified that, as the vehicle drove down the alley, he panicked and felt scared. Defendant believed that driving down the alley was dangerous and that "Gangster," Shahande's heroin supplier, was waiting in the alley.

¶ 52 Defendant testified that, as the vehicle drove down the alley, Monique jumped towards the front seat and placed the vehicle in park. Antoinette and Shahande grabbed Monique and attempted to pull her into the front seat. Eventually, Monique grabbed the keys from the vehicle's ignition, and at this time defendant shot Shahande as he tried to pull Monique into the front seat. Defendant testified that he observed something in Shahande's hand and he believed that Shahande was going to shoot Monique. After defendant shot Shahande, Antoinette continued to grab at Monique, and Hampton attempted to strike Antoinette with the vehicle's keys. Defendant

was unable to observe Antoinette because, after the first gunshot, she slumped down into her seat and was pulling Monique on top of her.

¶ 53 Defendant testified that he then heard Monique say, "She got a knife. Help me." Defendant testified that he observed a knife in Antoinette hand and that he shot at the knife. After the gunshot, he was able to pull Monique into the backseat and then he fired another shot into the driver's seat. Defendant and Monique Hampton then exited the vehicle and Monique walked around to the driver's side door to continue fighting with Antoinette. Defendant grabbed Antoinette around the neck to stop the two women from fighting and threw her against the vehicle. Monique directed defendant to shoot Antoinette; however, defendant chose not to and instead left the scene. Defendant returned to his residence and Monique told defendant that she was having miscarriage type symptoms. Defendant then contacted his parole agency to notify them that there had been an accident. The parole agency granted defendant permission to take Monique to the hospital. Eventually, defendant and Monique went to a hospital where defendant was taken into custody and transported to Area Five.

¶ 54 Defendant testified that the police officers searched him and took his money. Defendant testified that he refused to talk about what had happened that night with the officers. He did, however, tell the police about his prior experiences with Shahande. Defendant testified that he told the officers that he had purchased drugs from Shahande previously, and that Shahande had recently sold defendant some bad drugs or overcharged defendant. Defendant testified that the police officers took this information about prior interactions with Shahande and manipulated it in their reports and testimony so that it would appear as if defendant was talking about the night of

the shooting. Defendant also testified that he requested an attorney "[e]very ten seconds." For some period of time, defendant continued to ask to speak with an attorney or his family, however the police did not give him an opportunity to contact either. Eventually, he received permission to contact his family. He requested an attorney and eventually one arrived at the police station.

¶ 55 Defendant testified that, at some point, he had a conversation with an assistant state's attorney at the police station. The ASA requested defendant to sign a statement or film a confession; however, defendant stated that he continued to ask for an attorney.

¶ 56 C. State's Rebuttal Case

¶ 57 The State's rebuttal evidence consisted of the testimony of two witnesses: Veryl Gambino, the Assistant State's attorney (ASA) who heard defendant's oral statement; and Detective Robert Cordero, the detective who interviewed defendant and who had previously testified.

¶ 58 1. ASA Gambino

¶ 59 ASA Veryl Gambino testified that she met with defendant and Detective Cordero on the morning of April 27, 2004, at 7:20 a.m. In sum, Gambino testified that, after advising defendant of his *Miranda* rights, defendant admitted that he shot the victims and that he did not request an attorney.

¶ 60 Gambino testified that she met with defendant for a second time at 9:30 a.m. She again advised defendant of his *Miranda* rights, and defendant again agreed to speak with her and again did not request an attorney. Prior to making a statement, defendant asked to speak with his family and called his family after this second questioning took place. Gambino testified that defendant

then described the events that took place the prior evening. Defendant stated that he had made arrangements to purchase heroin from Shahande and that he sent Monique to complete the drug purchase. He said that Monique returned without the heroin, claiming Shahande wanted more money. Defendant began to argue with Shahande. However, he did not want to cause a commotion in the neighborhood so defendant, Monique, Shahande, and Antoinette all entered Antoinette's vehicle. Antoinette then drove the vehicle into an alley. Defendant stated that Shahande demanded more money and was yelling and threatening to kill defendant and his family if the loan was not repaid within 24 hours. Defendant then pulled out his gun and shot Shahande in the back of the head. Antoinette attempted to help Shahande, and defendant then shot Antoinette twice. Defendant and Monique then fled the scene. Defendant then went to his apartment, and eventually went to the hospital with Monique. Gambino testified that, besides Shahande's threats in the vehicle prior to the shooting, defendant did not state anything about prior threats or fears, nor about any physical fighting between the parties.

¶ 61 At the conclusion of this questioning, Gambino explained that defendant's statement could: (1) remain an oral statement and it would be summarized by Gambino in her paperwork; (2) be a handwritten statement that he, Gambino, and the detective would all produce together; (3) be a videotaped statement; or (4) be taken by a court reporter. Gambino testified that defendant chose to have his statement videotaped. She then submitted a request for a police videographer to the felony review unit. Before the police videographer arrived to film defendant's statement, defendant's attorney arrived at Area Five. The attorney entered the interview room and spoke privately with defendant. After that conversation, defendant refused to

memorialize his previous statement.

¶ 62 2. Detective Cordero

¶ 63 Detective Cordero, the State's next rebuttal witness, testified that defendant did not request an attorney during the first questioning at 4:20 a.m. and that defendant was willing to speak with Detectives Cordero and Deja. During a second and third interview at 5:20 a.m. and 6:20 a.m., defendant again agreed to speak with the detectives and did not ask for an attorney. During a fourth and fifth interview at 6:30 a.m. and 9:30 a.m., ASA Gambino was present and again defendant agreed to speak without an attorney present. At the conclusion of the fifth interview, defendant agreed to make a videotaped statement. Prior to giving such a statement, defendant requested and received permission to contact his mother. After the telephone call, defendant told Detective Cordero that he would still do a videotaped statement, but that he first wanted to speak with his mother again to find out if an attorney was on his way to Area Five.

¶ 64 Detective Cordero testified that an attorney eventually arrived and was allowed to speak privately with defendant. After the attorney and defendant spoke, defendant refused to memorialize his statement. Detective Cordero testified that defendant said nothing during any of these interviews about prior disputes with Shahande before the night of the shooting incident.

¶ 65 III. Jury Instructions

¶ 66 On appeal, defendant claims that the trial court gave an incorrect jury instruction on the law of self-defense and so we provide the disputed instruction in full. Defendant requested the trial court to instruct the jury on both second-degree murder and self-defense in an instruction tendered by defendant.

¶ 67 During the jury instruction conference, defendant requested that language be added to the self-defense jury instruction tendered by the State so that the instruction would read: "However, a person is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself *and/or another, and/or to prevent the commission of a kidnap upon himself and/or another*." (Emphasis added.) The trial court denied defendant's proposed jury instruction, stating,

> "the evidence that's before the jury does not bring out the necessity of instructing on the issue of kidnapping because I don't think that's before the jury. So your *** 24-25.06 and the 8.01 will be refused based upon the inclusion of that element in the instructions *** with regard to kidnapping."

The trial court instructed the jury on second-degree murder stating:

> "The defendant has the burden of proving by a preponderance of the evidence that a mitigating factor is present so that he is guilty of the lesser offense of second degree murder instead of first degree murder. *** That the defendant, at the time he performed the acts which caused the death of Hamid Shahande, believed circumstances to be such that they justified the deadly force he used, but his belief that such circumstances existed was unreasonable."

The trial court instructed the jury on self-defense stating,

> "[a] person is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm *to himself*. However, a person is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm *to himself*." (Emphasis added.)

¶ 68 IV. Closing Arguments

¶ 69 On appeal, defendant claims that the State misstated the law of both self-defense and the preponderance of the evidence standard in its closing argument. We provide below a description of the disputed arguments.

¶ 70 In describing the law of self-defense during closing argument, defense counsel explained that the relevant question for the jury is "is it reasonable to believe that you're justified in defending yourself, your girlfriend?" In contrast, the State said:

> "Self-defense means imminent danger, right now. It means one person gets to live because somebody else has to die.
>
> True self-defense, Ladies and Gentlemen, is waiting and calling 911. It's waiting for the authorities to arrive. It's waiting to give them whatever weapon may have been involved. It's waiting to

> explain what happened. That, Ladies and Gentlemen, is self-defense.
>
> Self-defense is not hightailing it home and calling electronic monitoring because you're worried. It's not hightailing it home and washing your hands. It's not hightailing it home and coming up with an excuse that you're [*sic*] pregnant girlfriend is miscarrying or having labor pains."

¶ 71 In describing the preponderance of the evidence standard during closing argument, the State argued: "Unreasonable belief? Mitigating factor? Preponderance of the evidence? What that means is that it's much more likely than not that that's what happened."

¶ 72 V. Conviction and Sentencing

¶ 73 After closing argument, the jury found defendant guilty of the first-degree murder of Hamid Shahande and the attempted first-degree murder of Antoinette Woods. Defendant filed a posttrial motion for a new trial, which was denied.

¶ 74 After hearing factors in aggravation and mitigation, the trial court sentenced defendant to consecutive terms of 55 years and 45 years, totaling 100 years, in the Illinois Department of Corrections, for the murder and attempted murder, respectively. Defendant filed a posttrial motion to reconsider sentence on December 1, 2009, which was also denied. This direct appeal followed.

¶ 75 ANALYSIS

¶ 76 On this appeal, defendant claims: (1) that the trial court incorrectly barred his expert

witness and parts of defendant's testimony about his state of mind at the time of the shooting; (2) that the trial court provided an incorrect self-defense jury instruction and that defense counsel was ineffective for not objecting to it; (3) that the prosecutor committed misconduct and defense counsel was ineffective for not objecting to it when the State: (a) invaded defendant's attorney-client privilege; (b) impeached defendant with evidence that he had invoked his constitutional right to remain silent and to an attorney; and (c) misstated both the law of self-defense and the preponderance of the evidence standard in closing argument; and (4) that the trial court committed reversible error by admitting evidence about defendant's prior armed robbery conviction. We affirm.

¶ 77 A. Excluded Testimony

¶ 78 Defendant argues that the trial court violated his constitutional right to present a complete defense by barring an expert witness's testimony and parts of defendant's testimony about his state of mind at the time of the shooting. Defendant argues that testimony about his state of mind at the time of the shooting was essential because it supported his claim of self-defense.

¶ 79 Defendant argued self-defense and second-degree murder at trial. Self-defense is a complete defense and, to successfully raise a self-defense claim, a defendant must prove that he reasonably believed such conduct was necessary to defend against an imminent threat to himself or another. 720 ILCS 5/7-1 (West 2002). Thus, "[i]f the subjective belief is reasonable, the result is a justifiable use of force," and a self-defense claim may be satisfied. *People v. Lockett*, 82 Ill. 2d 546, 552 (1980). By contrast, a defendant may mitigate his charge from first-degree to second-degree murder by proving that at the time of the killing he believed the circumstances to be such

that, if they existed, would justify the killing even if his belief is unreasonable. 720 ILCS 5/9-2(a)(2) (West 2004). Therefore, if the subjective believe is unreasonable, the result could be second-degree murder. *Lockett*, 82 Ill. 2d at 552. "[A]t the time *Lockett* was decided, what is now second degree murder was called voluntary manslaughter." *People v. Washington*, 2012 IL 110283, ¶ 21 (2012).

¶ 80 "The admission of evidence is within the sound discretion of a trial court, and a reviewing court will not reverse the trial court absent a showing of an abuse of that discretion." *People v. Becker*, 239 Ill. 2d 215, 234 (2010). In particular, "[d]ecisions of whether to admit expert testimony are reviewed using this same abuse of discretion standard." *Becker*, 239 Ill. 2d at 234. "An abuse of discretion occurs when no reasonable person would take the view adopted by the court." *Trettenero v. Police Pension Fund*, 333 Ill. App. 3d 792, 801 (2002) (citing *In re Marriage of Blunda*, 299 Ill. App. 3d 855, 865 (1998)).

¶ 81 For the following reasons, we cannot say that the trial court abused its discretion when it barred both defendant's proposed expert witness and sustained objections to portions of defendant's testimony about his state of mind at the time of the shooting.

¶ 82 1. Expert Witness Testimony

¶ 83 Defendant argues that the trial court incorrectly barred expert witness testimony about the effect of heroin withdrawal on a person's state of mind. Defendant argues that this inappropriately eased the State's burden in disproving defendant's self-defense claim and also frustrated defendant's ability to argue for second-degree murder.

¶ 84 When deciding whether to allow expert testimony, a trial court must consider five basic

questions. First, the testimony must be relevant to a material fact in the case. *People v. Cloutier*, 156 Ill. 2d 483, 501 (1993). Second, it must be shown that the testimony would assist the jury in determining a fact in issue. *In re Marriage of Jawad*, 326 Ill. App. 3d 141, 153 (2001). Third, the witness must be qualified to give such testimony. *Thomas v. Gordon*, 221 Ill. 2d 414, 429 (2006). Fourth, the testimony must be reliable and have a proper basis for the opinion to meet foundational requirements. *Soto v. Gayton*, 313 Ill. App. 3d 137, 146 (2000). Fifth, the probative value of the testimony must not be substantially outweighed by the dangers of confusion, undue consumption of time, or unfair prejudice. *People v. Davis,* 335 Ill. App. 3d 1, 17 (2002).

¶ 85 In granting the State's motion to bar this expert witness testimony, the trial court explained that, "to allow Mr. [Hargan's] testimony would actually go toward the issue of presenting the evidence as some more of diminished capacity which I don't believe would be properly done ***." In addition, the trial court stated that, "I don't believe barring Mr. [Hargan's] testimony will prevent the defendant from presenting his defense [of self-defense] *** with regard to his addiction ***."

¶ 86 Illinois courts have frequently barred expert witness testimony when it relates to a defendant's state of mind at the time of a crime. In *People v. Hulitt*, 361 Ill. App. 3d 634 (2005), the defendant was charged with first-degree murder for the killing of her daughter. At trial, the defendant admitted that she killed her daughter and argued that she acted recklessly in violation of the involuntary manslaughter statute. *Hulitt*, 361 Ill. App. 3d at 636. The defendant attempted to call an expert witness who would testify that the defendant's behavior was tied to her postpartum depression. *Hulitt*, 361 Ill. App. 3d at 635-36. The trial court barred the expert

testimony and we affirmed the trial court's ruling on appeal, stating, "a jury would be more than capable of determining, based on their common knowledge, that defendant was depressed and/or overwhelmed at the time and whether she acted recklessly ***." *Hulitt*, 361 Ill. App. 3d at 636-38.

¶ 87 Similarly, in *People v. Elder*, 219 Ill. App. 3d 223 (1991), the defendant murdered his former lover and the trial court barred testimony from a psychologist who planned to testify that the defendant acted "under a sudden and intense passion ***." *Elder*, 219 Ill. App. 3d at 225. On appeal, the appellate court affirmed, stating that, "a jury is capable of determining whether the defendant was acting under a sudden and intense passion as a result of serious provocation." *Elder*, 219 Ill. App. 3d at 226. Thus, both *Hulitt* and *Elder* indicate that a jury is capable of determining a defendant's state of mind, even when a defendant suffers from a serious mental condition such as postpartum depression, sudden and intense passion, or in the case at bar, drug withdrawal. *Hulitt*, 361 Ill. App. 3d at 636-38; *Elder*, 218 Ill. App. 3d at 226.

¶ 88 Like in *Hulitt* and *Elder*, and in the case at bar, the jury was capable of determining defendant's state of mind at the time of the shooting from the evidence received without the aid of expert testimony. But more importantly, in the case at bar, defendant never testified what he was experiencing as a result of his drug withdrawal and as a result, the expert's opinion would not have had a proper basis to establish an adequate foundation for its admissibility. *People v. Bush*, 214 Ill. 2d 318, 333 (2005) (holding that the admission of expert testimony requires an adequate foundation to establish that the information upon which the expert has based his testimony is accurate).

¶ 89 The defense argues that they were attempting to show defendant's state of mind but that the trial court sustained objections to defendant's testimony so that he never had the opportunity to demonstrate his state of mind. However, in reviewing the testimony of defendant, we do not find that the questions and answers that objections were sustained to or stricken related to withdrawal symptoms of drugs. No offer of proof was given and as a result we cannot say that the trial court abused its discretion in barring defendant's expert, or in sustaining objections to questions that defendant claims would have shown his state of mind.

¶ 90 2. Defendant's State of Mind Testimony

¶ 91 Defendant argues that the trial court incorrectly sustained the State's objections to three out-of-court statements: (1) that money that he borrowed from Shahande belonged to a gang member; (2) that, when defendant visited Shahande's home to repay the borrowed money, Antoinette Woods made additional comments to defendant after she warned him to leave the house; and (3) that defendant received death threats prior to the shooting. None of this testimony concerned defendant's withdrawal symptoms from drugs. If the testimony that the trial court sustained objections to were being used to show its effect on defendant's subjective state of mind, then the statements were not hearsay because they did not go to the truth of the matter. *People v. Hanson*, 238 Ill. 2d 74, 102 (2010) (holding that out-of-court statements are admissible if they are offered for purposes other than proving the truth of the matter asserted).

¶ 92 The rule against hearsay generally prevents the introduction at trial of out-of-court statements offered to prove the truth of the matter asserted. *People v. Evans*, 373 Ill. App. 3d 948, 964 (2007). Thus, a statement offered for some reason other than "the truth of the matter

asserted" does not violate the rule. *Evans*, 373 Ill. App. 3d at 964. "For example, if a statement is offered to prove its effect on the listener's state of mind, or to show why the listener acted as he did, it is not hearsay." *Evans*, 373 Ill. App. 3d at 964.

¶ 93 Furthermore, a defendant claiming self-defense is afforded "substantial latitude" to submit evidence about the victim's prior violent or threatening acts. *In re W.D.*, 194 Ill. App. 3d 686, 706 (1990); *People v. Stombaugh*, 52 Ill. 2d 130, 139 (1972). This evidence is admissible "to show the circumstances confronting [the defendant], the extent of [the defendant's] apparent danger, and the motive by which [the defendant] was influenced." *In re W.D.*, 194 Ill. App. 3d at 706. However, "where the court admits substantial evidence concerning the reasons for the defendant's fear, the exclusion of evidence which would further elucidate those reasons may be harmless error." *People v. Damnitz*, 269 Ill. App. 3d 51, 60-61 (1994); see also *People v. Montes*, 263 Ill. App. 3d 680, 691 (1994).

¶ 94 In *People v. Ortiz*, 65 Ill. App. 3d 525 (1978), this court held that out-of-court statements are admissible where they show a defendant's state of mind during criminal activity. In *Ortiz*, the defendant was involved in a fistfight with the victim that culminated in a shooting later that evening. *Ortiz*, 65 Ill. App. 3d at 527. The defendant claimed that he shot the victim in self-defense. *Ortiz*, 65 Ill. App. 3d at 527. However, at trial he was barred from testifying that, after the fistfight but prior to the shooting, the defendant was informed that it was a mistake to fight the victim because the victim was a "killer." *Ortiz*, 65 Ill. App. 3d at 528. We held that "the statement was probative of the defendant's mind at the time of the shooting" and thus, that "the testimony was not hearsay and should have been admitted ***." *Ortiz*, 65 Ill. App. 3d at 533.

¶ 95 Like in *Ortiz*, defendant here sought to present evidence probative of his state of mind at the time of the shooting to support a self-defense claim. Defendant's excluded testimony was not asserted for the truth of the matter, but instead was intended to inform the jury that defendant feared Shahande and the threat of violence. Defendant's testimony that the trial court did not allow was to show his fear of the gang that supported Shahande. The trial court wanted to keep gang testimony out of the trial. A trial court must balance the prejudicial effect of gang involvement against its probative value before permitting this type of testimony. *People v. Johnson*, 159 Ill. 2d 97, 118-19 (1994). There was no direct testimony that Shahande belonged to a gang, only defendant's bald unsupported testimony. The trial court was within its sound discretion to sustain the objection to Shahande's gang involvement. On the other hand, even if the trial court erred in sustaining the objections to the gang evidence, our conclusion would still be the same.

¶ 96 Assuming the trial court erred in sustaining objections to certain portions of defendant's testimony, the State bears the burden of proving beyond a reasonable doubt that the error was harmless and did not contribute to the verdict. *Johnson*, 238 Ill. 2d at 488 (defendants "properly preserved their claims of error, thus requiring the State to show that the errors were nonprejudicial under a harmless-error analysis"); *Stechly*, 225 Ill. 2d at 304. A reviewing court may find an error harmless, if the remaining evidence is overwhelming or if the evidence at issue merely duplicates other properly admitted evidence. *Becker*, 239 Ill. 2d at 240.

¶ 97 In *People v. Damnitz*, 269 Ill. App. 3d 51, 60-61 (1994), we clarified that we "will not reverse a conviction based upon the exclusion of admissible evidence unless the evidence could

reasonably have affected the verdict." In *Damnitz*, the defendant claimed self-defense when he shot the victim minutes after a minor altercation. *Damnitz*, 269 Ill. App. 3d at 53. At trial, defendant presented evidence about the victim's involvement with a gang and that the victim had threatened the defendant. *Damnitz*, 269 Ill. App. 3d at 61. However, the trial court excluded evidence that Hispanic gang members shot at the defendant and firebombed his house prior to the shooting at issue. *Damnitz*, 269 Ill. App. 3d at 53. We held that the excluded evidence would "further show why defendant believed that [the victim] might use deadly force, but it would add little to the evidence the jury heard." *Damnitz*, 269 Ill. App. 3d at 61. Thus, we held that the trial court's exclusion of the evidence was harmless error. *Damnitz*, 269 Ill. App. 3d at 61.

¶ 98 The exclusion of defendant's gang testimony in the case at bar was harmless because it would not have impacted the jury's verdict. Similar to *Damnitz*, defendant had already presented evidence about Shahande's gang involvement and prior threats, thus showing the jury why defendant believed that Shahande might use deadly force on the night of the shooting. In addition, defendant was permitted to testify that: (1) Shahande received his drugs from a gang; (2) defendant was late repaying a loan to Shahande and that Shahande called defendant and Monique Hampton every day about the outstanding loan; (3) defendant heard Shahande screaming in his house one night while four unidentified men stood inside the house, and that defendant left because he was concerned for his own safety; (4) defendant's bedroom window was kicked in and someone told defendant that Shahande was the offender; (5) defendant always observed Shahande with a gun on his waistband; (6) Shahande threatened defendant and Monique Hampton in the alley on the night of the shooting if defendant did not repay the loan;

(7) defendant knew that Shahande "had guns when he told me he'd kill me ***."

¶ 99 All of this testimony supports defendant's argument that he believed Shahande might use deadly force. The excluded testimony would have merely restated the reasons why defendant feared Shahande. Thus, we find that if the trial court erred, any evidence the trial court excluded was harmless error and not grounds for reversal. In addition, none of the testimony excluded referenced drug withdrawal symptoms.

¶ 100 B. Jury Instruction

¶ 101 Defendant argues that the trial court provided an improper self-defense jury instruction when it altered words in a pattern jury instruction, namely Illinois Pattern Jury Instructions, Criminal, No. 24-25.06 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 24-25.06), which states:

> "A person is justified in the use of force when and to the extent that he reasonably believes that such conduct is necessary to defend *[(himself) (another)]* against the imminent use of unlawful force. However, a person is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent [(imminent death or great bodily harm to *[(himself) (another)]*) (the commission of _____) [.]" (Emphasis added.) IPI Criminal 4th No. 24-25.06.

The trial court instructed only that a person may be justified in defense of himself and it failed to note that the defense of a third-party may also be a legal justification. Defendant argues that the trial court's instruction incorrectly informed the jury that defendant's alleged actions in defense

of Monique Hampton did not constitute self-defense. Defendant concedes that he failed to challenge the jury instruction both at trial and in a posttrial motion. Instead, defendant asks this court to review the jury instructions under both prongs of the plain error doctrine.

¶ 102 On appeal, a reviewing court will reverse a trial court's determination about what instructions to give only if the trial court abused its discretion. *People v. Rodriguez*, 387 Ill. App. 3d 812, 821 (2008). However, "when the question is whether the jury instructions accurately conveyed to the jury the law applicable to the case, our review is *de novo*." *People v. Pierce*, 226 Ill. 2d 470, 475 (2007) (citing *People v. Parker*, 223 Ill. 2d 494, 501 (2006)).

¶ 103 *De novo* review means that we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011). In the case at bar, the parties agree that the trial court should have submitted IPI Criminal 4th No. 24-25.06 to the jury. Instead, the parties dispute whether the trial court's instruction accurately conveyed the law applicable to the case. Thus, our standard of review is *de novo*.

¶ 104 "Generally, a defendant forfeits review of any jury instruction error if he does not object to the instruction or offer an alternative at trial and does not raise the issue in a posttrial motion." *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007) (citing *Herron*, 215 Ill. 2d at 175). However, Illinois Supreme Court Rule 451(c) provides that "substantial defects are not waived by failure to make timely objections thereto if the interests of justice require." Ill. S. Ct. R. 451(c) (eff. July 1, 1997). The Illinois Supreme Court has instructed that Supreme Court Rule 451(c) "is coextensive with the plain-error [doctrine] *** and we construe these rules 'identically.' " *Herron*, 215 Ill. 2d at 175 (quoting *People v. Armstrong*, 183 Ill. 2d 130, 151 n. 3 (1998)).

¶ 105 The plain error doctrine allows a reviewing court to consider unpreserved error when (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 was 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; *People v. Woods*, 214 Ill. 2d 455, 471 (2005). Under both prongs of the plain-error test, the burden of persuasion remains with the proponent. *People v. Walker*, 232 Ill. 2d 113, 124-25 (2009). However, before considering whether the plain-error doctrine applies, we must determine whether any error occurred at all. *Herron*, 215 Ill. 2d at 187; *People v. Johnson*, 218 Ill. 2d 125, 139 (2005).

¶ 106 First, this court must conduct a substantive review of the issues raised. *Walker*, 232 Ill. 2d at 124-25. Once the plain-error doctrine has been triggered, the burden is on the defendant to prove that one of the two prongs has been satisfied. *People v. Heider*, 231 Ill. 2d 1, 26-27 (2008).

¶ 107 Supreme court rules require trial courts to use those Illinois Pattern Jury Instructions that are both (1) applicable to the facts and law of the case; and (2) correct statements of law. Ill. S. Ct. R. 451(a) (eff. July 1, 1997). Supreme Court Rule 451(a) states unequivocally that a trial court "shall" use the "Illinois Pattern Jury Instructions, Criminal (4th ed. 2000)" when it is "applicable in a criminal case, giving due consideration to the facts and the governing law *** unless the court determines that it does not accurately state the law." Ill. S. Ct. R. 451(a); *Piatkowski*, 225 Ill. 2d at 566 (prior version of section No. 3.15 of the IPI Criminal 4th was not an accurate statement of the law, because it was internally inconsistent). Although pattern

instructions are not themselves law and are open to challenge if they are inaccurate statements of the law, the instructions are mandatory, if applicable and accurate. *Schultz v. Northeast Illinois Regional R.R. Corp.*, 201 Ill. 2d 260, 273 (2002); *Powers v. Illinois Central Gulf R.R. Co.*, 91 Ill. 2d 375, 385 (1982) (although mandated by supreme court rule, IPI instructions are open to legal challenge until "considered" and upheld by our supreme court). Furthermore, our court has held that " '[v]ery slight evidence' presented on the issue will justify instructing the jury on self-defense ***." *People v. Tyler*, 188 Ill. App. 3d 547, 552 (1989) (quoting *People v. Bratcher*, 63 Ill. 2d 534, 540 (1976)).

¶ 108 Thus, in the case at bar, the trial court was required to use the pattern instruction, as written, if it was applicable and an accurate statement of the law. *People v. Walker*, 392 Ill. App. 3d 277, 295 (2009). The words at issue, namely, "and/or another," were both applicable and accurate, and thus should have been included in the jury instruction on self defense at trial. First, the words "defend himself *and/or another*" were applicable to the facts at bar where defendant testified that he fired a gun only after he believed his pregnant girlfriend, Monique Hampton, was in danger. Second, the words "or another" could not have been a misstatement of the law because they are included in both the Illinois Pattern Instructions and the applicable Illinois statute. IPI Criminal 4th No. 24-25.06; 720 ILCS 5/7-1 (West 2002). The trial court erred because "[t]he evidence presented satisfie[d] the very slight evidence standard and therefore, the jury should have been instructed on the issue of self-defense." *Tyler*, 188 Ill. App. 3d at 552-53 (holding that the jury should have been instructed that a defendant is justified in the defense of herself or another where she and her friend were insulted and attacked before the defendant committed the

alleged offense).

¶ 109 Having found error, we must now examine whether the error rose to the level of plain-error (*Rodriguez*, 387 Ill. App. 3d at 821 (even if an instruction was faulty, we will not reverse unless the error caused prejudice)), and if so, whether the prejudice rose to the level of plain error (*Piatkowski*, 225 Ill. 2d at 564).

¶ 110 Both parties did not cite authority, and our own research confirmed that there are no Illinois cases concerning a self-defense jury instruction that omits defense of a third-party that rises to the level of plain error. First, in our analysis, we must determine whether the evidence was closely balanced.

¶ 111 The evidence was not closely balanced. In *People v. Ware*, 407 Ill. App. 3d 315 (2011), this court held that evidence is not closely balanced simply because event witnesses present conflicting testimony. *Ware*, 407 Ill. App. 3d at 357. In *Ware*, two event witnesses testified that the defendant was the aggressor, while a third event witness, and the defendant, testified that he acted in self-defense. *Ware*, 407 Ill. App. 3d at 335-38. However, in addition to the conflicting event witness testimony in *Ware*, police took photographs and recovered evidence from the crime scene that supported the State's theory of the case. *Ware*, Ill. App. 3d at 336-37, 356-58. This court held that the evidence was not closely balanced because we were able to look to extrinsic "evidence to corroborate or contradict the different versions of what occurred." *Ware*, 407 Ill. App. 3d at 357.

¶ 112 In contrast, in *People v. Naylor*, 229 Ill. 2d 584, 608 (2008), our supreme court held that evidence is closely balanced under the plain-error doctrine when it comes down to a credibility

determination between conflicting testimony. In *Naylor*, two police officers testified at trial that the defendant sold the police officers heroin, while the defendant testified and denied the charge. *Naylor*, 229 Ill. 2d at 588-90. In conducting a plain-error analysis, our supreme court found that "credibility was the only basis upon which defendant's innocence or guilt could be decided," and thus, the evidence was closely balanced. *Naylor*, 229 Ill. 2d at 608. The court only found the evidence closely balanced given the conflicting testimony and "the fact that no extrinsic evidence was presented to corroborate or contradict either version ***." *Naylor*, 229 Ill. 2d at 607. Thus both *Naylor* and *Ware* stand for the same proposition that evidence is not closely balanced just because there is conflicting testimony when extrinsic evidence corroborates or contradicts one version of what occurred.

¶ 113 In the case at bar, the evidence was not closely balanced. Defendant testified that he and Shahande had argued prior to the shooting, and that during this argument he observed a gun in Shahande's pocket. Defendant also testified that he shot Shahande because he observed something in Shahande's hand. In contrast, Antoinette Woods testified that she did not hear the parties argue and did not observe Shahande with any kind of weapon on the night of the shooting. Antoinette also testified that, just prior to the gunshot that hit Shahande, Monique Hampton asked to borrow Shahande's telephone. Additionally, both Shahande and Hampton were taken from the vehicle by ambulance and police officers testified that no gun was recovered from the scene of the shooting. Police officers also testified that defendant never claimed self-defense during his initial questioning, and instead explained that he was angry because Shahande had disrespected Monique. Like in *Ware*, there was significant extrinsic evidence in the case at bar to

corroborate Antoinette Woods's version and to contradict defendant's version of the events. *Ware*, 407 Ill. App. 3d at 357. Unlike in *Naylor*, in the case at bar, the credibility determination between Antoinette and defendant by the trial court and the extrinsic evidence produced at trial showed that the evidence was not closely balanced. *Naylor*, 229 Ill. 2d at 608.

¶ 114 Second, the claimed error did not affect the fairness of the defendant's trial or challenge the integrity of the judicial process. *Piatkowski*, 225 Ill. 2d at 565; *Woods*, 214 Ill. 2d at 471. Our supreme court has defined the second prong of plain-error as a systemic error which serves to erode the integrity of the judicial process and undermine the fairness of the defendant's trial. *People v. Thompson*, 238 Ill. 2d 598, 613-14 (2010) (quoting *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009)). In *Thompson*, our supreme court explained that "[a] finding that respondent was tried by a biased jury would certainly satisfy the second prong of plain-error review." *Thompson*, 238 Ill. 2d at 614 (holding that respondent did not satisfy the second prong of plain-error review because he did not present any evidence that the jury was biased). In the case at bar, the claimed error did not rise to the level of the example in *Thompson*. *Thompson*, 238 Ill. 2d at 614. In *People v. Washington*, 2012 IL 110283, ¶ 59, our supreme court cited examples of the second prong as "the complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of the right of self-representation, denial of a public trial, and defective reasonable doubt instructions." *Washington*, 2012 IL 110283, ¶ 59 (citing *Neder v. United States*, 527 U.S. 1, 8-9 (1999)). The claimed error here did not rise to the level of plain error under the second prong of the plain-error doctrine illustrated in *Washington*. But most importantly, there was little evidence that defendant or Monique were in any danger prior to the

shooting or why defendant pulled out a gun and shot Shahande and wounded Antoinette Woods.

¶ 115 C. Ineffective Assistance of Counsel

¶ 116 Defendant also claims ineffective assistance of trial counsel for failing to ensure that the jury received a correct self-defense instruction. The Illinois Supreme Court has held that, to determine whether a defendant was denied his or her right to effective assistance of counsel, we must apply the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Colon*, 225 Ill. 2d 125, 135 (2007) (citing *People v. Albanese*, 104 Ill. 2d 504 (1984) (adopting *Strickland*)). Under *Strickland*, a defendant must prove both that (1) his attorney's performance was deficient; and (2) the deficient performance prejudiced the defendant. *Colon*, 225 Ill. 2d at 135; *People v. Evans*, 209 Ill. 2d 194, 219–20, (2004); *Strickland*, 466 U.S. at 687–94.

¶ 117 Under the first prong of the *Strickland* test, a defendant must prove that his counsel's performance fell below an objective standard of reasonableness "under prevailing professional norms." *Colon*, 225 Ill. 2d at 135; *Evans*, 209 Ill. 2d at 220. Under the second prong, a defendant must show that, "but for" his counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Colon*, 225 Ill. 2d at 135; *Evans*, 209 Ill. 2d at 220. "[A] reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome—or put another way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair." *Evans*, 209 Ill. 2d at 220; *Colon*, 225 Ill. 2d at 135. In other words, the defendant must have been prejudiced by his attorney's performance. To prevail, a defendant must satisfy both prongs of the *Strickland* test. *Colon*, 225 Ill. 2d at 135; *Evans*, 209 Ill. 2d at 220. "That is, if an

ineffective-assistance claim can be disposed of because the defendant suffered no prejudice, we need not determine whether counsel's performance was deficient." *People v. Graham*, 206 Ill. 2d 465, 476 (2003).

¶ 118 Neither defendant nor the State cited any authority in their briefs before this court that analyzed whether an attorney is ineffective when he or she fails to ensure a correct jury instruction. Both parties merely cited to the *Strickland* two-prong test. This court has repeatedly held that a party waives a point by failing to cite authorities. *Lozman v. Putnam*, 379 Ill. App. 3d 807, 824 (2008); *People v. Ward*, 215 Ill. 2d 317, 332 (2005) ("point raised in a brief but not supported by citation to relevant authority *** is therefore forefeited"). See Ill. S. Ct. R. 341(h)(7) (eff. Jul. 1, 2008). Placing forfeiture aside, the evidence in this case is overwhelming. Defendant admits to shooting Shahande and Woods. They were in the front seats of an automobile while he was in the rear. No weapon was found on or near Shahande, and he was shot in the back of the head. In fact, no weapon was found in or about the vehicle. Defendant was not prejudiced by the conduct of his lawyer and as a result we cannot find ineffective assistance of counsel. Also, as noted above, in argument defense counsel said that the relevant question for the jury was "is it reasonable to believe that you're justified in defending yourself, *your girlfriend*?" (Emphasis added.) *Supra* ¶ 70. So the arguments correctly stated the law.

¶ 119 D. Prosecutorial Misconduct

¶ 120 Defendant claims that the State violated his right to a fair trial through prosecutorial misconduct in three distinct ways: (1) by violating defendant's attorney-client privilege during cross-examination; (2) by improperly impeaching defendant with evidence that he invoked his

constitutional right to remain silent and to counsel; and (3) by misstating the law of self-defense and the preponderance of the evidence standard during closing argument. Defendant preserved claim (2), however he failed to raise claims (1) and (3) either during trial or in a posttrial motion.

¶ 121 The Illinois Supreme Court has held that a "defendant must both specifically object at trial and raise the specific issue again in a posttrial motion to preserve any alleged error for review." *People v. Woods*, 214 Ill. 2d 455, 470 (2005); *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007). When a defendant has failed to preserve an error for review, we may still review for plain error. *Piatkowski*, 225 Ill. 2d at 562–63; Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court."). Since the defendant did preserve issue (2), the plain-error doctrine can apply only to claims (1) and (3).

¶ 122 "[T]he plain-error doctrine allows a reviewing court to consider unpreserved error when (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; *Woods*, 214 Ill. 2d at 471. However, before we reach the issue of plain error, we must first determine whether any error occurred at all. *People v. Walker*, 392 Ill. App. 3d 277, 294 (2009) ("[i]n a plain[-]error analysis, 'the first step' for a reviewing court is to determine whether any error at all occurred").

¶ 123 Since we find, for the reasons discussed, that no prosecutorial misconduct occurred, we

do not need to perform a plain-error analysis.

¶ 124 1. Attorney-Client Privilege

¶ 125 First, defendant argues that the prosecutor violated his attorney-client privilege on cross-examination when the prosecutor asked, "Everything that you said about the kidnapping came out today, right," and defendant responded, "I guess." A trial is an adversarial proceeding. *People v. McKibbins*, 96 Ill. 2d 176, 189 (1983). Accordingly, a defendant who takes the stand on his own behalf not only offers himself as a witness, but also subjects himself to cross-examination. *People v. Burris*, 49 Ill. 2d 98, 104 (1971). The determination as to the proper scope of that cross-examination rests within the sound discretion of the trial court. *McKibbins*, 96 Ill. 2d at 189; *People v. Breton*, 237 Ill. App. 3d 355, 363 (1992). Subject to that discretion, the prosecution is entitled to use all of the impeaching evidence it possesses in order to impact the credibility of the defendant if he chooses to testify. *McKibbins*, 96 Ill. 2d at 189.

¶ 126 Defendant relies on two cases to support his theory that the State violated defendant's attorney-client privilege. First, in *State v. Holsinger*, 124 Ariz. 18 (1979), the Arizona supreme court held that a prosecutor's cross-examination violated a defendant's attorney-client privilege when the prosecutor asked the defendant, "have you discussed the case with [your] two attorneys," and "on how many occasions have you discussed the case with them?" *Holsinger*, 124 Ariz. at 22-23. On appeal, the court held that "the effect of the questioning was to force the defendant either to waive the attorney-client privilege or to invoke the privilege before the jury." *Holsinger*, 124 Ariz. at 23. Second, in *Haley v. State*, 398 Md. 106 (2007), the Maryland

supreme court overturned a trial court decision where the State violated the defendant's attorney-client privilege. *Haley*, 398 Md. at 130-31. On cross-examination, the prosecutor asked the defendant, "Isn't it true *** that you never brought up any of [this] information with your attorney until 4:30 yesterday afternoon," and "did you tell your attorney sitting at that table only yesterday about this relationship that you had?" *Haley*, 398 Md. at 122, 124. On appeal, the court held that "[t]he prosecutor's repeated questions as to when and what [defendant] told his attorney went beyond the scope of proper cross-examination and invaded the attorney-client privilege." *Haley*, 398 Md. at 130-31.

¶ 127 Unlike *Holsinger* and *Haley*, the claimed improper question by the State was only asked once. Furthermore, in contrast with *Holsinger* and *Haley* where the challenged questions clearly were to attorney-client communication, in the case at bar the State asked defendant on cross-examination whether everything that defendant had said about the kidnapping had come out at trial, which was in response to the following questions asked on direct examination:

> "DEFENSE COUNSEL: You say you walked to the car?
>
> DEFENDANT: Eventually, but at first I told [Shahande] I can't move.
>
> DEFENSE COUNSEL: Why couldn't you move?
>
> DEFENDANT: I told him I was on house arrest, that I'm locked in, it's too far.
>
> DEFENSE COUNSEL: What did he say?
>
> DEFENDANT: He say, I know you emptied the garbage

before. We just going to the car to get this. Let's go.

DEFENSE COUNSEL: So he asked you to go to the car?

DEFENDANT: Yes.

DEFENSE COUNSEL: Did you go willingly?

DEFENDANT: No, I didn't go willingly. I can't. It's too far for me to walk. The [house monitoring] box would be going off. It's probably beeping at that moment. I'm too far."

Although defendant did not testify that he was being kidnapped, he did say that he did not enter Shahande's vehicle willingly. The prosecutor's question about kidnapping did not invade the attorney-client privilege. *People v. Phillips*, 392 Ill. App. 3d 243, 250 (2009) (holding that the defendant's conversations with his prior attorney were privileged, but that he would waive the privilege if he continued to testify about them, and that other matters not discussed with his prior attorney were not outside the scope of cross-examination because the defendant opened the door when he testified about them on direct examination). Defendant opened the door to the State's cross-examination concerning defendant being kidnapped when defendant testified he did not go into the vehicle willingly. However, even if the question was improper, there is nothing in the question or the answer to indicate any attempt to violate defendant's attorney-client privilege.

¶ 128 2. Improper Impeachment

¶ 129 Defendant argues that the State impeached defendant with evidence that he had invoked his constitutional right to remain silent and speak to an attorney. During the State's rebuttal case, ASA Gambino and Detective Cordero both testified that defendant agreed to provide a

videotaped statement after giving an oral statement, but after defendant met with his attorney, a videotaped statement was never recorded. Both testified that defendant never refused to speak with them, and while they were waiting for the videographer to arrive to record the confession, defendant requested and was allowed to speak with his family and later an attorney. Immediately following the testimony, the defense requested a mistrial which the trial court denied. This rebuttal testimony was used to explain or contradict defendant's testimony that he refused to talk with police officers on the night of the shooting and requested an attorney "every 10 seconds," and repeatedly asked to speak with his family. Defendant further had testified that Gambino wanted him to make a videotaped confession, but that he continued to request an attorney.

¶ 130 This court has defined rebuttal evidence as that which is presented "to explain, repel, contradict, or disprove evidence presented by the defendant. *People v. Mischke*, 278 Ill. App. 3d 252, 264 (1995); *People v. Rios*, 145 Ill. App. 3d 571, 584 (1986). We will reverse a trial court's decision about whether to admit rebuttal testimony only if the trial court abused its discretion. *Mischke*, 278 Ill. App. 3d at 264; *Rios*, 145 Ill. App. 3d at 584. "An abuse of discretion occurs when no reasonable person would take the view adopted by the court." *Trettenero v. Police Pension Fund*, 333 Ill. App. 3d 792, 801 (2002) (citing *In re Marriage of Blunda*, 299 Ill. App. 3d 855, 865 (1998)). We cannot say that no reasonable person would take the view adopted by the court.

¶ 131 In *Doyle v. Ohio*, 426 U.S. 610 (1976), the United States Supreme Court instructed that "it would be fundamentally unfair and a deprivation of due process to allow [an] arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Doyle*, 426

U.S. at 618; *People v. Patterson*, 217 Ill. 2d 407, 444 (2005). However, three years later the Supreme Court clarified *Doyle*, stating, "*Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent." *Anderson v. Charles*, 447 U.S. 404, 408 (1980); *People v. Frieber*, 147 Ill. 2d 326, 353 (1992) (noting that "Illinois also recognizes the *Anderson* qualification of *Doyle*). Furthermore, this court has found that, "where the defendant's exculpatory testimony at trial is manifestly inconsistent with statements made after arrest, the State may present evidence or comment on the defendant's failure to give the same statement at the time of arrest." *People v. Manley*, 222 Ill. App. 3d 896, 905 (1991).

¶ 132 In the case at bar, the prosecutor properly elicited rebuttal testimony to contradict inconsistencies in defendant's post-arrest statements and his trial testimony.

¶ 133 The State's rebuttal evidence falls squarely within the exception to *Doyle*. Defendant's testimony at trial directly contradicted post-arrest statements heard by both ASA Gambino and Detective Cordero. Therefore, we cannot say that the trial court abused its discretion when it allowed the State to present rebuttal evidence for the purpose of impeaching defendant's testimony about his post-arrest statements.

¶ 134 Defendant also claims ineffective assistance of trial counsel for eliciting testimony about this subject during cross-examination of the State's rebuttal witnesses. Our supreme court has found that, to determine whether a defendant was denied his right to effective assistance of counsel, we must apply the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668

(1984). *People v. Colon*, 225 Ill. 2d 125, 135 (2007) (citing *People v. Albanese*, 104 Ill. 2d 504 (1984) (adopting *Strickland*)). Under *Strickland*, a defendant must prove both that (1) his attorney's performance was deficient; and (2) the deficient performance prejudiced the defendant. *Colon*, 225 Ill. 2d at 135; *People v. Evans*, 209 Ill. 2d 194, 219–20, (2004); *Strickland*, 466 U.S. at 687–94.

¶ 135 Under the first prong of the *Strickland* test, a defendant must prove that his counsel's performance fell below an objective standard of reasonableness "under prevailing professional norms." *Colon*, 225 Ill. 2d at 135; *Evans*, 209 Ill. 2d at 220. Under the second prong, a defendant must show that, "but for" his counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Colon*, 225 Ill. 2d at 135; *Evans*, 209 Ill. 2d at 220. "[A] reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome—or put another way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair." *Evans*, 209 Ill. 2d at 220; *Colon*, 225 Ill. 2d at 135. In other words, the defendant must have been prejudiced by his attorney's performance. To prevail, a defendant must satisfy both prongs of the *Strickland* test. *Colon*, 225 Ill. 2d at 135; *Evans*, 209 Ill. 2d at 220. "That is, if an ineffective-assistance claim can be disposed of because the defendant suffered no prejudice, we need not determine whether counsel's performance was deficient." *People v. Graham*, 206 Ill. 2d 465, 476 (2003).

¶ 136 Since the evidence against defendant was overwhelming, as we have previously discussed, defendant could not have been prejudiced.

¶ 137 3. Prosecutor's Closing Argument

¶ 138 Defendant argues that the State denied defendant a fair trial when it committed prosecutorial misconduct during closing argument. Defendant argues that the prosecutor misstated both the law of self-defense and the preponderance of evidence standard during closing argument. Defendant failed to object to this issue both at trial and in his posttrial motion. As previously discussed, to preserve an alleged trial error for appellate review, a defendant must both: (1) specifically object at trial; and (2) raise the specific issue again in a posttrial motion. *Woods*, 214 Ill. 2d at 470; *Piatkowski*, 225 Ill. 2d at 564. However, even when a defendant fails to preserve an error for review, we may still review for plain error. *Piatkowski*, 225 Ill. 2d at 562-63; Ill. S. Ct. R. 615(a). The plain-error doctrine permits an appellate court to reverse on the basis of unpreserved error if either: (1) the error was "clear or obvious" and the evidence at trial was so closely balanced that this error could have tipped the scales against the defendant; or (2) the unpreserved error was "so serious" that it challenged the integrity of the judicial process and the fairness of defendant's trial. *Piatkowski*, 225 Ill. 2d at 565; *Woods*, 214 Ill. 2d at 471. Before a reviewing court analyzes the two prongs of the plain-error doctrine, its first step is to determine whether any error occurred at all. *Walker*, 392 Ill. App. 3d at 294. For the reasons discussed below, we find that no error occurred.

¶ 139 It is not clear whether the appropriate standard of review for this issue is *de novo* or abuse of discretion. This court has previously made this same observation in both *People v. Phillips*, 392 Ill. App. 3d 243, 274–75 (2009), and *People v. Johnson*, 385 Ill. App. 3d 585, 603 (2008). The Second District of the appellate court has agreed with our observation that the standard of

review for closing remarks is an unsettled issue. *People v. Robinson*, 391 Ill. App. 3d 822, 839–40 (2009).

¶ 140 The confusion stems from an apparent conflict between two supreme court cases: *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007), and *People v. Blue*, 189 Ill. 2d 99, 128, 132 (2000). In *Wheeler*, our supreme court held: "Whether statements made by a prosecutor at closing argument were so egregious that they warrant a new trial is a legal issue this court reviews de novo." *Wheeler*, 226 Ill. 2d at 121. However, the supreme court in *Wheeler* cited with approval *Blue*, in which the supreme court had previously applied an abuse-of-discretion standard. *Wheeler*, 226 Ill. 2d at 121. In *Blue* and numerous other cases, our supreme court had held that the substance and style of closing argument is within the trial court's discretion, and that the trial court's decision will not be reversed absent an abuse of discretion. *Blue*, 189 Ill. 2d at 128, 132 ("we conclude that the trial court abused its discretion" by permitting certain prosecutorial remarks in closing); *People v. Caffey*, 205 Ill. 2d 52, 128 (2001); *People v. Emerson*, 189 Ill. 2d 436, 488 (2000); *People v. Williams*, 192 Ill. 2d 548, 583 (2000); *People v. Armstrong*, 183 Ill. 2d 130, 145 (1998); *People v. Byron*, 164 Ill. 2d 279, 295 (1995). Our supreme court had reasoned: "Because the trial court is in a better position than a reviewing court to determine the prejudicial effect of any remarks, the scope of closing argument is within the trial court's discretion." *People v. Hudson*, 157 Ill. 2d 401, 441 (1993). Following *Blue* and other supreme court cases like it, this court had consistently applied an abuse-of-discretion standard. *People v. Tolliver*, 347 Ill. App. 3d 203, 224 (2004); *People v. Abadia*, 328 Ill. App. 3d 669, 678 (2001).

¶ 141 Since *Wheeler*, appellate courts have been divided regarding the appropriate standard of

review. The second and third divisions of the First District have applied an abuse-of- discretion standard, while the Third, and Fourth Districts and the fifth division of the First District have applied a *de novo* standard of review. Compare *People v. Love*, 377 Ill. App. 3d 306, 313 (2007) (Wolfson, J., 2d Div.), and *People v. Averett*, 381 Ill. App. 3d 1001, 1007 (2008) (Quinn, P.J., 3d Div.), with *People v. McCoy*, 378 Ill. App. 3d 954, 964 (2008), *People v. Palmer*, 382 Ill. App. 3d 1151, 1160 (2008), *People v. Ramos*, 396 Ill. App. 3d 869, 874 (2009) (Toomin, P.J., 5th Div.); *People v. Vargas*, 409 Ill. App. 3d 790, 797 (2011) (Epstein, J., 5th Div.).

¶ 142 However, we do not need to resolve the issue of the appropriate standard of review at this time, because our holding in this case would be the same under either standard. This is the same approach that we took in both *Phillips* and *Johnson*, and the same approach taken by the Second District in its *Robinson* opinion. *Phillips*, 392 Ill. App. 3d at 275; *Johnson*, 385 Ill. App. 3d at 603; *Robinson*, 391 Ill. App. 3d at 840 ("In any event, like the Johnson court, we leave the resolution of this issue to another day, as our conclusion would be the same applying either standard.").

¶ 143 A State's closing argument will lead to reversal only if the prosecutor's remarks created "substantial prejudice." *Wheeler*, 226 Ill. 2d at 123; *People v. Johnson*, 208 Ill. 2d 53, 64 (2003); *People v. Easley*, 148 Ill. 2d 281, 332 (1992) ("The remarks by the prosecutor, while improper, do not amount to substantial prejudice."). Substantial prejudice occurs "if the improper remarks constituted a material factor in a defendant's conviction." *Wheeler*, 226 Ill. 2d at 123.

¶ 144 When reviewing claims of prosecutorial misconduct in closing argument, a reviewing court will consider the entire closing arguments of both the prosecutor and the defense attorney,

in order to place the remarks in context. *Wheeler*, 226 Ill. 2d at 122; *Johnson*, 208 Ill. 2d at 113; *People v. Tolliver*, 347 Ill. App. 3d 203, 224 (2004). A prosecutor has wide latitude during closing argument. *Wheeler*, 226 Ill. 2d at 123; *Blue*, 189 Ill. 2d at 127. "In closing, the prosecutor may comment on the evidence and any fair, reasonable inferences it yields ***." *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). Furthermore, "[a] misstatement of the law during closing argument does not normally constitute reversible error if the circuit court properly instructs the jury on the law ***." *People v. Lawler*, 142 Ill. 2d 548, 564 (1991).

¶ 145 a. Self-Defense

¶ 146 First, the prosecutor stated, "True self-defense *** is waiting and calling 911. It's waiting for the authorities to arrive. It's waiting to give them whatever weapon may be involved. *** That, Ladies and Gentlemen, is self-defense." In comparison, the actual definition of self-defense requires that a defendant must prove that he reasonably believed such conduct was necessary to defend against an imminent threat to himself or another. 720 ILCS 5/7-1 (West 2002).

¶ 147 Defendant relies on *People v. Scaggs*, 111 Ill. App. 3d 633 (1982), to support his claim that the prosecutor's closing argument provided an improper definition of the law of self-defense. In *Scaggs*, this court found that a prosecutor's definition of self-defense during closing argument was highly prejudicial and thus improper. *Scaggs*, 111 Ill. App. 3d at 637. During closing, the prosecutor stated the following:

> "[t]he standard is reasonable men. I submit to you what goes on in that man's mind is it reason-to begin with? Reasonable men don't carry guns to visit people in their homes. Reasonable men don't

> drag-race on the streets like teenagers. They don't bet like a teenager and carry guns with them and drink." *Scaggs*, 111 Ill. App. 3d at 637.

On appeal, we held that the prosecutor's closing argument was improper because it "sought to divert the jury's attention from defendant's actions at the time of the shooting to an evaluation of defendant as a person." *Scaggs*, 111 Ill. App. 3d at 637.

¶ 148 The case at bar is distinguishable from our holding in *Scaggs*. Unlike *Scaggs*, where the prosecutor's closing argument "sought to divert the jury's attention" from the relevant facts, in the case at bar the prosecutor merely described defendant's actions following the shooting and submitted to the jury that defendant's behavior was inconsistent with someone who had just defended himself. Taken in context, the prosecutor was not attempting to define the law of self-defense, but instead was concluding that defendant's actions were the "actions of a guilty person and a guilty conscious." Furthermore, "these remarks by the prosecutor were not definitions of the law but were instead permissible deductions from the evidence." *People v. Graca*, 220 Ill. App. 3d 214, 226 (1991) (holding that statements like "[m]ight have had a gun isn't good enough to use deadly force" were not definitions of the law, but properly addressed what use of force was reasonable in the defendant's self-defense claim). Thus, the prosecutor's comments did not deprive defendant of a fair trial.

¶ 149 b. Preponderance of the Evidence

¶ 150 Second, the prosecutor argued, "Preponderance of the evidence? What that means is that it's much more likely than not that that's what happened." In comparison, the actual definition is

that the proposition must be "more probably true than not true." Illinois Pattern Jury Instructions, Criminal, No. 4.18 (4th ed. 2000). In our analysis, we must consider the closing arguments in their entirety to place the remarks in their proper context. Prior to the challenged statement, the same prosecutor argued to the jury that "you must be persuaded *** that it is *more probably true than not true* that the [self-defense] mitigating factor is present ***." (Emphasis added.) Furthermore, the trial court instructed the jury that the preponderance of the evidence standard requires that a proposition be "more probably true than not true."

¶ 151 Reviewed in its entirety, the prosecutor correctly argued the preponderance of the evidence standard in its closing. In addition, the trial court submitted a jury instruction that defined preponderance of the evidence. Even if the preponderance definition differed from the court's definition, the meaning was the same. Even if this was a minor misstatement of the law during closing argument it does not constitute reversible error. *Lawler*, 142 Ill. 2d at 564.

¶ 152 c. Ineffective Assistance of Counsel

¶ 153 Defendant also claims ineffective assistance of trial counsel for failing to object to these statements during closing argument. Our supreme court has held that, to determine whether a defendant was denied effective assistance of counsel, we must apply the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Colon*, 225 Ill. 2d 125, 135 (2007) (citing *People v. Albanese*, 104 Ill. 2d 504 (1984) (adopting *Strickland*)). Under *Strickland*, a defendant must prove both that (1) his attorney's performance was deficient; and (2) the deficient performance prejudiced the defendant. *Colon*, 225 Ill. 2d at 135; *People v. Evans*, 209 Ill. 2d 194, 219–20, (2004); *Strickland*, 466 U.S. at 687–94.

¶ 154 Under the first prong of the *Strickland* test, a defendant must prove that his counsel's performance fell below an objective standard of reasonableness "under prevailing professional norms." *Colon*, 225 Ill. 2d at 135; *Evans*, 209 Ill. 2d at 220. Under the second prong, a defendant must show that, "but for" his counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Colon*, 225 Ill. 2d at 135; *Evans*, 209 Ill. 2d at 220. "[A] reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome—or put another way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair." *Evans*, 209 Ill. 2d at 220; *Colon*, 225 Ill. 2d at 135. In other words, the defendant must have been prejudiced by his attorney's performance. To prevail, a defendant must satisfy both prongs of the *Strickland* test. *Colon*, 225 Ill. 2d at 135; *Evans*, 209 Ill. 2d at 220. "That is, if an ineffective-assistance claim can be disposed of because the defendant suffered no prejudice, we need not determine whether counsel's performance was deficient." *People v. Graham*, 206 Ill. 2d 465, 476 (2003).

¶ 155 We cannot say that the prosecution's definition of preponderance of the evidence did not mean the same thing that the jury instructions told the jury. As a result, we cannot find any prejudice to defendant.

¶ 156 d. Defendant's Prior Conviction

¶ 157 Defendant argues that the trial court committed reversible error by permitting the State to impeach defendant with his prior conviction for armed robbery. The trial court denied defendant's pre-trial motion *in limine* to exclude his prior conviction. We will not reverse a trial

court's decision concerning the admission of a defendant's prior conviction absent a showing that the trial court abused its discretion.

¶ 158 In *People v. Montgomery*, 47 Ill. 2d 510 (1971), our supreme court adopted Federal Rule of Evidence 609 to determine whether a defendant's prior conviction is admissible to impeach his credibility. *Montgomery*, 47 Ill. 2d at 519. In relevant part, the *Montgomery* rule states that a defendant's prior conviction is admissible for the purpose of attacking his credibility only if: (1) the crime was punishable by death or imprisonment in excess of one year under the law under which he was convicted; (2) less than 10 years had elapsed since the date of the defendant's prior conviction or his release from confinement, whichever is later; and (3) the probative value of admitting the defendant's prior conviction outweighs the danger of unfair prejudice. *People v. Atkinson*, 186 Ill. 2d 450, 461 (1999); *Montgomery*, 47 Ill. 2d at 516-19; Fed R. Evid. 609.

¶ 159 On appeal, defendant argues that the trial court improperly applied only the third *Montgomery* factor. However, defendant does not cite to any authority to show that defendant's prior conviction for armed robbery should have been excluded. Moreover, this court has held that a prior conviction may have probative value "where a defendant claims self-defense or otherwise attempts to justify his actions, [because] his testimony necessarily places his credibility at issue." *People v. Gomez*, 402 Ill. App. 3d 945, 956 (2010).

¶ 160 In *Gomez*, this court found that a trial court did not abuse its discretion when it admitted a defendant's prior conviction for aggravated discharge of a firearm under the *Montgomery* rule. *Gomez*, 402 Ill. App. 3d at 956. We reasoned that, because defendant claimed

self-defense, defendant's prior conviction could inform the jury about whether the defendant was likely the initial aggressor. *Gomez*, 402 Ill. App. 3d at 956. Like in *Gomez*, in the case at bar defendant claimed self-defense, and the admission of his prior conviction had clear probative value for the jury to determine whether defendant was the initial aggressor.

¶ 161 Finally, the trial court properly instructed the jury that "[e]vidence of a defendant's prior conviction of an offense may be considered by you only as it may affect his believability as a witness and must not be considered by you as evidence of his guilt of the offense with which he was charged." In *Atkinson*, our supreme court held that the trial court did not abuse its discretion in part because it properly provided the jury with a similar instruction limiting their use of defendant's prior conviction only for impeachment purposes. *Atkinson*, 186 Ill. 2d at 463.

¶ 162 Therefore, we cannot say that the trial court abused its discretion under the *Montgomery* rule in admitting defendant's prior armed robbery conviction.

¶ 163 CONCLUSION

¶ 164 For the foregoing reasons, we affirm. The trial court did not err in barring defendant's expert witness and portions of defendant's testimony. The trial court submitted an improper jury instruction on the law of self-defense, but that error does not rise to the level of plain error. Defendant did not suffer from ineffective assistance of counsel. The State did not commit prosecutorial misconduct. Finally, the trial court properly admitted defendant's prior armed robbery conviction under the *Montgomery* rule.

¶ 165 Affirmed.