2011 IL App (1st) 1093573-U

SECOND DIVISION
November15, 2011

No. 1-09-3573

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CR 18683
	)	
JERROLD DAGANS,	)	Honorable
	)	Luciano Panici,
Defendant-Appellant.	)	Judge Presiding.

O R D E R

PRESIDING JUSTICE QUINN delivered the judgment of the court.
Justice Connors and Justice Harris concurred in the judgment.

¶ *1* *HELD*: Defendant who was convicted of first degree murder was not entitled to reversal or a new trial, where the State proved him guilty beyond a reasonable doubt, defense counsel provided effective assistance of counsel; the trial court did not err in admitting a witness's prior statement; the State's closing argument was not improper; the trial court's failure to adhere to Rule 431(b) did not result in a biased jury, and defendant was not deprived of a fair trial or due process of law.

¶ 2 Following a jury trial, defendant, Jerrold Dagans, was found guilty of first degree murder in the shooting death of Reginald Biggs and subsequently sentenced to 60 years' imprisonment. Defendant filed a motion to reconsider sentence, which the trial court denied, and defendant filed

a timely notice of appeal. On appeal, defendant contends that (1) the State failed to prove him guilty beyond a reasonable doubt; (2) defense counsel's trial performance was deficient where counsel failed to introduce evidence that the State's witnesses had motives to implicate defendant, failed to object to evidence that defendant dealt drugs, and failed to object to a jury instruction regarding prior inconsistent statement evidence; (3) the trial court erroneously allowed the State to introduce a witness' prior inconsistent statement; (4) the State's closing argument included numerous improprieties warranting reversal; (5) the trial court violated Supreme Court Rule 431(b) in questioning potential jurors; and (6) the cumulative effect of the errors in the case deprived defendant of a fair trial and due process of law. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The evidence adduced at trial revealed that on September 10, 2002, defendant was shot in the arm while standing on his front porch. Harvey police officer Burdi investigated the shooting, spoke to the defendant and others who were at the scene, and canvassed the area for witnesses but was unable to gather any information about the shooting. Defendant had surgery and was released from the hospital the next day. Eight days later, on September 18, 2002, Reginald Biggs was shot and killed while sitting in the front passenger seat of his friend, Reginald Wilder's car, which was parked in front of ABC Liquor Store at 147th Street and Washington Avenue in Harvey, Illinois, a few blocks from defendant's home. The Harvey police investigated Biggs' murder but did not identify any suspects. In 2007, the Cook County Sheriff's Department reopened the case and after interviewing several witnesses and obtaining a witness identification from a photo array, defendant was charged with first-degree murder.

¶ 5 At trial, the State called Evonne Sharkey as a witness. Sharkey testified that in September 2002, defendant was her boyfriend, that they lived together with her children in Harvey, and that defendant was earning money by selling drugs and working at a car wash. She stated that defendant sold drugs across from the ABC Liquor Store. Sharkey testified that on September 10, 2002, defendant got shot in the arm and required surgery. Sharkey picked defendant up from the hospital and when they got home defendant told her that "some guys came through the gangway by the house where he was standing at and shot him over, I guess, it was over the turf or whatever that they were selling drugs on." Defendant told Sharkey that he was "going to get them."

¶ 6 On September 18, 2002, Sharkey testified that she and defendant argued because she did not want defendant to go outside because his arm was not healed but defendant told her that he "was going out to see if the guys were down there that had anything to do with him getting shot" and that he was "going to kill them." Sharkey testified that she tried but was unable to keep him at home. Later that evening, defendant returned to the apartment and according to Sharkey, they argued again and defendant again left. Sharkey said that she dropped her kids off at her upstairs neighbor's apartment and followed defendant. Sharkey stated that she saw defendant stop and talk to an older, dark-skinned man she did not know. She said that as she followed defendant she called out his name but was not chasing him.

¶ 7 Sharkey stated that she saw defendant walking in the direction of ABC Liquors and continued to follow him from a distance. She testified that she approached the alley near the store and was able to see through the store parking lot when she saw defendant lean into a car in

which two passengers were sitting and shoot a gun. After seeing defendant run away across Sibley, Sharkey left the scene and went home. Sharkey testified that defendant returned to the apartment and told her that "the devil is taking over his soul and that he had got him." She stated that defendant had been wearing hospital scrubs and that he took them off and put them into a plastic bag. She also testified that defendant had a black .38 caliber gun that he put under the bed or under the couch. Defendant then took the plastic bag with his clothes in it to her friend Megan Brown's house and threw it in the garbage. Sharkey talked to Brown for a while and then returned to the apartment with defendant. Sharkey testified that a few days later, she and defendant got into an argument and defendant pointed a gun at her, which was the same gun she saw him use in the shooting in the ABC Liquors parking lot. She said that she then talked to her mother about what happened and decided to go to the Harvey police. She testified that she gave a statement to Harvey Detective Billy Martin about the shooting and did not speak with anyone about it again until 2007, when Sheriff's Detective Nowaczyk contacted her and she told him what happened.

¶ 8 The State's next witness, Reginald Wilder, testified that on the evening of September 18, 2002, he picked up Reginald Biggs from a restaurant and drove three or four blocks to ABC Liquors. Wilder went into the liquor store and Biggs walked across the street to buy some drugs for Wilder. After the men returned to the car, Wilder saw someone walking along the passenger side of the car and saw Biggs looking out the front passenger window. Wilder heard Biggs say "Oh, man, no" just before Biggs slumped over onto him. Wilder testified that he did not see who had walked up to the side of the car. Wilder wiped his forehead and realized he had blood on his

hands. He then jumped out of the car and ran back into ABC Liquors. Wilder said that he saw the shooter for less than a second and noticed that he was wearing a hood or something on his head but could not remember what else he was wearing.

¶ 9 On cross-examination, Wilder stated that he was taken to the Harvey Police Department for questioning and was shown a photo of defendant but was unable to identify him as the shooter because he had not seen the shooter. Wilder did not speak with anyone again about the shooting until August 10, 2007, when detectives from the Cook County Sheriff's Department contacted him. When he spoke with the detectives, he told them that the shooter was wearing a shirt and a light blue hoodie but still could not identify him

¶ 10 Next, Thorner Walker testified that in September 2002, he was living near 147th Street and Washington Avenue in Harvey, Illinois. Walker said that on the evening of September 18, 2002, he was sitting on the front stairs of his house with his girlfriend when defendant, whom he knew from the neighborhood as a drug dealer, approached and started talking to them. Wilder said that defendant was wearing blue or green hospital scrubs. While they were talking, a police car drove past, and defendant said to Wilder that he was happy the police did not stop, then raised his shirt and showed Wilder a .38 caliber handgun. Defendant left and walked toward ABC Liquors, which was about a half block away. Walker stated that he too decided to go to ABC Liquors and that when he was about 30 feet from the store, he saw defendant in the store parking lot next to a car occupied by two men. Walker saw defendant arguing or talking to one of the men and said that defendant "pulled out something and started shooting, and then he left." Walker said he saw someone get out of the car and go into the store.

¶ 11 On September 26, 2002, Walker was arrested for driving on a suspended license and was taken to the Harvey police station. Walker told Detective Billy Martin what he saw on the evening of the shooting after receiving an I-bond for his case. Walker said that Detective Martin never offered him any deals regarding his suspended license case. Walker did not talk to anyone else about the shooting until April 2007, when detectives from the Cook County Sheriff's Department contacted him. Walker told the officers his account of what occurred on September 18, 2002 and the next day identified defendant as the shooter form a photographic lineup.

¶ 12 Detective Fred Nowaczyk from the Cook County Sheriff's Department testified that in 2007, pursuant to a grand jury subpoena, a task force from the Cook County Sheriff's Police, the State's Attorney's Office, and the Illinois State Police procured records from the Harvey Police Department regarding their unsolved homicides. Nowaczyk reviewed the file on the Biggs case and began contacting witnesses. On April 9, 2007, Nowaczyk interviewed Thorner Walker, who provided an account of what he saw on September 18, 2002 that was consistent with what he told the Harvey police in 2002. Walker told Nowaczyk that he thought he could identify the shooter and the next day, Walker identified defendant in a photo lineup. Walker also told Nowaczyk that defendant had been shot a week or so before Biggs was killed.

¶ 13 Nowaczyk testified that he also interviewed Evonne Sharkey, who told him what she saw and that she had talked to a Harvey police officer about a month after the shooting. On cross-examination, Nowaczyk said that Sharkey told him that defendant got the gun from Megan Brown, that she heard one gunshot, that she went to Brown's house to tell her what she saw before she went home, and that she heard from a friend that defendant disposed of his clothes in

Brown's dumpster.

¶ 14 The State rested and defendant did not call any witnesses. Following jury deliberations, defendant was convicted of first degree murder and of personally discharging a firearm that proximately caused the death of another person. The trial court sentenced defendant to 60 years' imprisonment. Defendant filed a motion to reconsider sentence, which the trial court denied. Defendant now appeals.

¶ 15 II. ANALYSIS

¶ 16 A. Guilt Beyond a Reasonable Doubt

¶ 17 On appeal, defendant first contends that the State failed to prove him guilty beyond a reasonable doubt because Reginald Wilder, the State's primary occurrence witness, could not identify defendant as the shooter and the State's other two witnesses, Thorner Walker and Evonne Sharkey, were not worthy of belief because they did not immediately go to the police, had motives to testify falsely and provided testimony that was inconsistent, impeached, and conflicting on several key points. Defendant asserts that because the State presented no physical evidence and defendant made no inculpatory statements, the entire case was based on the inconsistent and incredible testimony of Walker and Sharkey, which failed to prove him guilty beyond a reasonable doubt and therefore, reversal is warranted.

¶ 18 It is not the function of this court to retry the defendant. *People v. Tenney*, 205 Ill. 2d 411, 428 (2002). It falls within the province of the trier of fact to judge the credibility of witnesses, resolve conflicts in the evidence, and draw conclusions based on all the evidence. *People v. Titone*, 115 Ill. 2d 413, 422 (1986). A reviewing court will not substitute its judgment

for that of the trier of fact on these matters. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). On review of a guilty verdict, a reviewing court asks only if any rational trier of fact could have reached the same conclusion viewing the evidence in the light most favorable to the prosecution. *Id*. at 259. The findings and judgment will not be reversed unless the evidence is so improbable as to create reasonable doubt of the defendant's guilt. *Id*. A reviewing court must consider all of the evidence submitted at the original trial to resolve the question of the sufficiency of the evidence. *People v. Olivera*, 164 Ill. 2d 382, 393-94 (1995).

¶ 19 That one witness's testimony contradicts the testimony of other prosecution witnesses does not render each witness's testimony beyond belief. See *People v. Cunningham*, 212 Ill. 2d 274, 283 (2004). The trier of fact is free to accept or reject as much or as little of a witness's testimony as it pleases. *People v. Logan*, 352 Ill. App. 3d 73, 81 (2004); *People v. Goodar*, 243 Ill. App. 3d 353, 357 (1993) (affirming a conviction even though there were discrepancies between the accounts given by several witnesses). It is sufficient if all of the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009).

¶ 20 Defendant first argues that the State's case is undermined by its primary occurrence witness, Reginald Wilder, because, although he was sitting next to Biggs in the car, he was unable to identify the shooter and because he undermined the State's theory of the case when he testified that Biggs was not a drug dealer. First, we note that the State did not argue that Biggs was a drug dealer but rather, that defendant shot him because he believed Biggs was involved in his shooting. The State acknowledged that whether Biggs actually played any role in defendant's

shooting was unknown. Further, while it is true that Wilder could not identify defendant as the shooter, he provided a description of defendant's clothing and corroborated the testimony of other witnesses regarding the events on the night of the shooting.

¶ 21 Defendant also contends that inconsistences between the testimony of Walker and Sharkey on several points and their motives to testify falsely are grounds for reversal. In particular, defendant points out that Sharkey testified that the shooter "went over to the car, leaned in, [and] shot whoever was in the car," while Walker testified that the shooter was "standing there arguing or talking and all of a sudden he pulled out something and started shooting." Defendant also points out that the witnesses offered conflicting testimony as to where the shooter went after the shooting, with Walker testifying that the shooter ran behind Washington Street into a vacant lot and Sharkey stating that he ran across Sibley. Further, defendant contends that Sharkey was motivated to testify falsely because she never got along with defendant and Walker testified falsely because he had an outstanding warrant for failing to appear on violation of probation petition related to a drug charge.

¶ 22 Defendant relies on *People v. Pellegrino*, 30 Ill. 2d 331 (1964) and *People v. Kilgore*, 59 Ill. 2d 173 (1974), to argue that reversal of a murder conviction is warranted where conflicting identification evidence alone supports a conviction. First, in *Pellegrino*, the court found that the two identification witnesses were "unsatisfactory as to reasonable doubt of defendant's guilt," where one of the witnesses was bleeding and crying at the time of the incident and had accused two other men before implicating defendant and the other witness was a habitual drunk, who could not walk five feet without holding the wall and did not recognize someone who was three

feet away from her. *Id.* at 334. In *Kilgore*, a murder conviction was reversed where three witnesses provided entirely different descriptions of the shooter. *Kilgore*, 59 Ill. 2d at 177. Clearly both of those cases are factually distinguishable from the instant case, where two eyewitnesses who had known defendant for an extended period of time testified that they saw defendant before the shooting, watched him as he walked up to the victim's car while armed with a handgun and then shoot into the car, and therefore, we do not find them controlling here.

¶ 23 Further, all of the inconsistencies defendant notes, as well as any motives the witnesses may have had to testify falsely, were subject to cross-examination and available for consideration by the jury, which was free to accept or reject as much or as little of a witness's testimony as it wanted to. *Logan*, 352 Ill. App. 3d at 81. In sum, there is little in the defendant's challenges to the testimony of all three prosecution witnesses that compels us to question the guilty finding by the trier of fact. Taking all of the evidence in the light most favorable to the prosecution, we cannot say that no rational trier of fact could have found credible portions of the testimony of the three prosecution witnesses, consistent with the other incriminating evidence, such that the essential elements of murder were proved beyond a reasonable doubt. The evidence was more than sufficient to support the defendant's murder conviction.

¶ 24 B. Ineffective Assistance of Trial Counsel

¶ 25 Next, defendant argues that his trial counsel was ineffective for failing to show the jury that one of the State's witnesses, Thorner Walker, had an outstanding warrant and failing to move to exclude evidence that defendant was a drug dealer. In determining whether a defendant was denied the effective assistance of counsel, we apply the familiar two-prong test set forth in

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. More specifically, the defendant must demonstrate that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052. The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. " *Id.* at 697, 104 S.Ct. 2052.

¶ 26 Defendant first maintains that defense counsel was ineffective for failing to produce evidence that Walker had a motive to testify falsely, namely an outstanding arrest warrant, after stating in opening arguments that such evidence would be produced. Specifically, defendant argues that "[c]ounsel's failure to impeach Walker with evidence of his motive after promising the jury evidence of a warrant was unacceptably deficient, and highly prejudicial where Walker and Sharkey's credibility was the primary issue before the jury." However, the record shows that during cross-examination, defense counsel properly elicited Walker's two prior convictions and tried to elicit evidence of the outstanding arrest warrant but was not permitted to do so by the trial judge, who determined that the evidence was irrelevant. For instance, the following exchange occurred during cross-examination:

"Defense Counsel: Mr. Walker, you are a convicted felon, is that correct?

Walker:	Yeah, you can say that.
Defense Counsel:	You are a two-time convicted felon, correct?
Walker:	Not that I know of.
Defense Counsel:	All right. Well, in 1999, you were arrested and charged with possession of a controlled substance, correct?
Walker:	I was charged with controlled substance, yes, ma'am
Defense Counsel:	And you were released?
Walker:	Yes, ma'am.
Defense Counsel:	Told to come back to court?
Walker:	Yes, ma'am.
Defense Counsel:	You didn't go?
State	Objection. Relevance.
Court:	We're not going to get into this case, counsel.
Defense Counsel:	I'm not getting into the facts of the case.
Court:	You are."

¶ 27 The admissibility of evidence is a matter within the sound discretion of the trial court and that determination may not be overturned on appeal absent a clear abuse of discretion. *People v. Adkins*, 239 Ill. 2d 1, 23 (2010). Therefore, where an attorney makes several good faith attempts to introduce evidence that he promised in his opening statement, and the trial court, in its

discretion, keeps it out, finding said evidence irrelevant, counsel's performance will not be deemed ineffective. *People v. Goodloe*, 263 Ill. App. 3d 1060, 1076 (1994). Here, defense counsel attempted to get the outstanding warrant introduced into evidence but was not permitted to do so by the trial court. This will not be deemed ineffective assistance.

¶ 28 Defendant also contends that his trial counsel was ineffective for failing to object to irrelevant and highly prejudicial "other crimes" evidence that defendant was a drug dealer where the State failed to provide evidence that defendant sold drugs or that drugs played any role in the shooting. According to defendant, this evidence was highly prejudicial to defendant and had no probative value and therefore, should have been objected to by defense counsel.

¶ 29 Evidence of the defendant's commission of other crimes is admissible where relevant to prove any material question other than the defendant's propensity to commit crime, including intent, identity, motive or absence of mistake. *People v. Kliner*, 185 Ill. 2d 81, 146 (1998). Here, the State sought to admit evidence that defendant was a drug dealer in order to establish that he shot the victim because he believed that the victim had shot him a week earlier or was somehow involved in the shooting. Whether the victim was indeed involved in that shooting was not relevant, but the key issue was defendant's state of mind, and his belief that the victim was involved. Evidence that defendant was a dope dealer would support Sharkey's testimony that defendant had told her that he was shot in a dispute over drug dealing turf. Consequently, Walker's and Sharkey's testimony that defendant was a drug dealer and Sharkey's testimony that defendant wanted to get the people who shot him was admissible, and defense counsel's failure to object was not objectively unreasonable. Further, defendant cannot meet the second prong of

the *Strickland* test because it is unlikely that the jury would have acquitted defendant had defense counsel successfully objected to admission of testimony regarding defendant's drug dealing. Given that Walker and Sharkey were familiar with defendant, had conversations with defendant immediately prior to defendant shooting the victim, knew defendant was armed, saw defendant walk up to the car in which the victim was a passenger, and saw defendant fire into the car, it is unlikely the outcome of the trial would have been different.

¶ 30 C. Admission of Prior Inconsistent Statement

¶ 31 Next, defendant argues that the trial court committed reversible error by allowing the State to introduce a prior statement made by Evonne Sharkey during its re-direct examination of Detective Nowaczyk and by permitting the State to make substantive use of that statement in its closing argument. Specifically, defendant argues that during opening arguments, the State suggested that defendant killed Biggs because he believed Biggs was involved in shooting him a week earlier. On direct examination, Sharkey stated that she did not know who shot defendant. However, during re-direct examination of Detective Nowaczyk, the State introduced evidence, over defendant's objection, of a prior statement by Sharkey that Biggs was involved in defendant's shooting when Nowaczyk read the following from his report:

> "[Sharkey] advised that several days before Biggs was murdered Dagans had been shot in the arm across the street from ABC liquors. He later told her that Reggie and some other guys shot him because he had chased them off the block for selling drugs on his block."

¶ 32 Defendant argues that this statement was introduced to support the State's argument that Biggs was involved in defendant's shooting and the defendant shot him in retaliation. Defendant

asserts that this statement should not have been admitted because it is a hearsay statement that is not admissible as a prior consistent statement because the State failed to elicit any testimony from Sharkey linking Biggs to the shooting or as a prior inconsistent statement because it was not being used to impeach Sharkey. Defendant further asserts that this error was compounded when the State used this statement substantively during closing argument when the prosecutor stated:

> "[T]his defendant was shot the week before [Biggs] was shot. Now, there is a question. Was Reginald Biggs the one that shot him out in Harvey? Was he the one that shot him that night? Don't know. Was Reginald Biggs just [a] friend with some people that shot him? We don't know. Was Reginald Biggs just happened to be out there and be someone that short [sic] of looks like somebody that he thought shot him."

¶ 33 Defense counsel objected and the trial judge limited the prosecutor to the evidence provided by Officer Burdi, who had investigated defendant's shooting. The State subsequently argued: "You know what the motive is on this case? Here is the motive, for whatever reason you cross this guy out on the street, penalty, death. Death, that's what the motive is."

¶ 34 Defendant asserts that the introduction of Sharkey's prior statement and the State's references to Biggs' alleged involvement in defendant's shooting are grounds for reversal. For support, defendant relies on *People v. Cruz*, 162 Ill. 2d 314 (1994), which found reversible error where the State improperly introduced an inconsistent statement to impeach their own witness and then argued the contents of the statement as substantive evidence in closing argument. The *Cruz* court held that the "test for determining whether impeachment is permissible depends on

objectively identifiable facts from which the examiner's state of mind can be inferred." *Id*. at 361. The court concluded that the State's improper motive was apparent where the State referenced the prior statement several times in closing argument. *Id.* at 365. Defendant argues that similarly here the State's improper motive was evident from the record and is grounds for reversal. The State responds that Sharkey's testimony at the grand jury was properly admissible as substantive evidence under 725 ILCS 5/115-10.1 (West 2008) and that the State's argument did not refer to Sharkey's statement to Detective Nowaczyk.

¶ 35 Defendant concedes that he failed to preserve this issue in a post-trial motion but asks this court to review the issue under the plain-error doctrine. In *People v. Herron*, 215 Ill. 2d 167 (2005), our supreme court held that the plain-error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either "(1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." *Id.* at 187. Under the first prong, the defendant must prove "prejudicial error," by showing both that there was plain error and that "the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him." *Id.* Under the second prong, the defendant must prove that there was plain error and that "the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Id.* Prejudice to the defendant is presumed because of the importance of the right involved, " ' *regardless* of the strength of the evidence.' " (Emphasis in original.) *Id.* In both instances, the burden of persuasion remains with the defendant. *Id.*

¶ 36 Here, defendant argues that reversal is warranted under the first prong because the

evidence was so closely balanced and under the second prong because the substantive use of prior-statement evidence is "so highly prejudicial that it denies a defendant "his right to a fair trial or impartial jury." *People v. Kimbrough*, 131 Ill. App. 2d 36, 45 (1970). We disagree. First, we note that this case is distinguishable from *Cruz*, where reversible error was found when the State repeatedly used the contents of a prior inconsistent statement substantively in closing argument. Here, the State never made reference to Sharkey's alleged prior inconsistent statement to Detective Nowaczyk during closing argument. The State did argue that Biggs may have been shot in retaliation because defendant thought he was involved in shooting him. This argument was based on the evidence presented at trial that defendant told Sharkey he was going to get the person that shot him and that he was going down to ABC Liquors to "see if the guys were down there that had anything to do with him getting shot" and defendant's statement when he returned home that "he got him." Therefore, the State's argument, which did not mention Sharkey's prior inconsistent statement, was supported by the evidence or a reasonable inference based on the evidence.

¶ 37 Further, we note that even if the admission of Sharkey's prior statement was in error, it did not rise to the level of plain error. First, as addressed above, the evidence of defendant's guilt was not closely balanced where two eyewitnesses who knew defendant identified defendant as the shooter. "Plain-error review under the closely-balanced-evidence prong of plain error is similar to analysis for ineffective assistance of counsel based on evidentiary error insofar as a defendant in either case must show he was prejudiced: that the evidence is so closely balanced that the alleged error alone would tip the scales of justice against him, *i.e.*, that the verdict 'may

have resulted from the error and not the evidence' properly adduced at trial (see *People v. Herron*, 215 Ill. 2d 167, 178 (2005) (plain error)); or that there was a 'reasonable probability' of a different result had the evidence in question been excluded (see *Strickland*, 466 U.S. at 694)." *People v. White*, No. 109689 (Aug. 11, 2011). As in *White*, it is clear that the defendant in the instant case cannot show prejudice. The proper analysis is evidence dependent and result-oriented.

¶ 38 Under the second prong of the plain error doctrine, we will consider errors that are so fundamental and of such magnitude that the fairness of the trial and the integrity of the judicial process are called into question. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Plain error marked by fundamental unfairness occurs only in situations revealing a breakdown in the adversary process as distinguished from typical trial errors. *People v. Lewis*, 234 Ill. 2d 32, 47 (2009). Thus, plain error encompasses matters affecting the fairness of the proceeding and the integrity of the judicial process. *Id.* at 47. Here, we do not find that evidence that Sharkey previously told Nowaczyk that "Reggie" shot defendant would constitute an error so fundamental and of such magnitude that the fairness of the trial and the integrity of the judicial process are called into question.

¶ 39 Defendant also contends that his trial counsel was ineffective for failing to ask the judge to advise the jury that Detective Nowaczyk's statement was inadmissible for substantive purposes. Specifically, defendant asserts that his trial counsel should have objected to the submission of IPI 3.11, which instructs the jury, in part, that evidence of prior inconsistent statements "may be considered by you only for the limited purpose of deciding the weight to be

given to the testimony you heard from the witness in this courtroom" but that "you may consider a witness's earlier inconsistent statement as evidence without this limitation when the statement narrates, describes, or explains an event or condition the witness had personal knowledge of and the statement was written or signed by the witness." Defendant contends that IPI 3.11 was inappropriate in this case where the State used Sharkey's prior statement to Detective Nowaczyk as impeachment evidence and Sharkey did not see the events discussed in the statement and that his trial attorney's failure to object to it or to request an appropriate limiting instruction was objectively unreasonable. Further, defendant argues that had the jury been properly instructed, there was a reasonable probability of a different outcome.

¶ 40 Because we find that this instruction was appropriate, we conclude that there was no error by trial counsel in failing to object to its submission. Two of the State's witnesses, Walker and Sharkey, made several prior inconsistent statements, which were used by defense counsel in an effort to impeach them. Therefore, IPI 3.11 was necessary in order to advise the jury regarding their consideration of these prior inconsistent statements. Further, as addressed above, we disagree with defendant's assertion that the State used Sharkey's prior inconsistent statement substantively in closing arguments. Therefore, we do not find that defense counsel's failure to object or request a limiting instruction was objectively unreasonable or that there was a reasonable probability that such an objection would have resulted in a different outcome.

¶ 41 D. Closing Arguments

¶ 42 Defendant next argues that the State's closing argument warrants reversal because the State (1) "promised' the defendant would "kill" the jurors, (2) misled the jury into believing the

State had additional evidence against defendant that it was not allowed to present, (3) improperly attacked the credibility of the defense theory of the case, and (4) misstated evidence. Defendant concedes that he failed to raise these issues at trial but asks this court to invoke the plain-error doctrine. Defendant argues that reversal is warranted under either prong of the plain error doctrine because the evidence was so closely balanced and because the comments in closing argument affected the integrity of the trial. Before considering whether the plain-error exception applies, we must first determine whether any error occurred in this case. *People v. Lovejoy*, 235 Ill. 2d 97, 148 (2009).

¶ 43 In *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007), the court held that whether statements made by a prosecutor at closing argument were so egregious that they warrant a new trial is a legal issue which is reviewed *de novo*. This holding is contrary to numerous other supreme court cases which employ an abuse of discretion standard. See, e.g., *People v. Blue*, 189 Ill. 2d 99, 128 (2000). We need not determine the proper standard of review in this case because the result would be the same under either a *de novo* or an abuse of discretion standard of review. *People v. Raymond*, 404 Ill. App. 3d 1028, 1060 (2010).

¶ 44 A prosecutor is allowed wide latitude during closing arguments. *People v. Nieves*, 193 Ill. 2d 513, 532-33 (2000). A prosecutor may comment on the evidence presented at trial, as well as any fair, reasonable inferences therefrom, even if such inferences reflect negatively on the defendant. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). Remarks made during closing arguments must be examined in the context of those made by both the defense and the prosecution and must always be based upon the evidence presented or reasonable inferences

drawn therefrom. *People v. Coleman*, 201 Ill. App. 3d 803, 807 (1990). The prosecutor may properly comment on the evidence presented or reasonable inferences drawn from that evidence, respond to comments by defense counsel which clearly invite response, and comment on the credibility of a witness. *People v. Moss*, 205 Ill. 2d 139, 184 (2001).

¶ 45 To preserve claimed improper statements during closing argument for review, a defendant must object to the offending statements both at trial and in a written posttrial motion. *Wheeler*, 226 Ill. 2d at 122. Improper comments by the prosecutor themselves will not warrant reversal unless those comments were a material factor in convicting the defendant. *Id.* at 123. In addition, " '[a]lthough the prosecutor's remarks may sometimes exceed the bounds of proper comment, the verdict must not be disturbed unless it can be said that the remarks resulted in substantial prejudice to the accused, such that absent those remarks the verdict would have been different.' " *People v. Woods*, 351 Ill. Dec. 732, 744 (2011) quoting *People v. Byron*, 164 Ill. 2d 279, 295 (1995). Here, contrary to defendant's assertions, we do not believe the complained-of comments deprived defendant of a fair trial or constituted such a factor that the jury would have reached a different verdict in the absence of those comments. Accordingly, we find no plain error.

¶ 46 First, defendant contends that the State traumatized the jurors by telling them that defendant "will kill you." The following is the portion of the State's closing argument that defendant takes issues with:

> "Evonne [Sharkey] and Thorner [Walker][,] they did the best that they could. They did the best that they could. They are who they are. They could have just turned

> their back on Reginald Biggs and just walked away, but they didn't. They had courage, they [sic] a heck of [a] lot more courage than this guy, Mr. Coward over here, who just goes up and just shoots somebody without him even seeing except at the last second. Oh, man, no, they had the courage to come in here and tell you what happened and they did that from the witness stand from their perspective. They know that they're looking at in the courtroom. Thorner Walker, he's is [sic] up on that stand, knows that's a killer over there. That guy is serious. He'll kill you. He will kill you. Evonne Sharkey, same thing. She knows, she saw. He will kill you. He will kill you."

¶ 47 Clearly, an argument that if defendant is not convicted he will kill again is improper. See *People v. Holman*, 103 Ill. 2d 133 (1984) (granting a new death sentencing hearing after prosecutor stated that defendant might kill again if death penalty was not imposed). Here, when read in context, it is clear that the State was not suggesting that defendant might kill the jurors, but rather, that despite the fact Sharkey and Walker knew defendant to be a murderer, they came forward and testified knowing the possible consequences of their actions. Therefore, the State's argument was aimed at addressing the credibility of the witnesses, which is proper during closing arguments. Defendant contends that before returning the verdict, the jury sent a note to the judge asking that they be taken to their cars before the courtroom is dismissed "conclusively proves" that the State's remarks were improper and pervaded the jury's deliberations. We disagree. It is not unheard of for jurors returning a verdict in a first-degree murder case to be concerned about their safety, and any assertion that the note was related to the State's closing argument is speculative and unsupported by any evidence.

¶ 48 Defendant also contends that during its closing argument, the State tried to mislead the jury into believing that it had additional evidence against defendant that it was not allowed to present by suggesting that Biggs's mother, who testified as a "life and death" witness, knew of evidence implicating defendant but was not permitted to disclose it. The comment complained of is as follows:

> "Not to get philosophical, but there's two main things to look at and zero in on. One, you just kind of look at. It's rationalization, you know? People want to make sense of everything. And, hey, you just look at it, you just count the victim. Reginald Biggs, hey, you know what? He's probably some gang-banger, just forget about it. He is one of those people that lives in those neighborhoods. He's just another black kid that got killed and ignored. You know what? Throwing out there that Reginald Biggs, you know some of the arguments, well, he kind of deserves this. You know what? Reginald Biggs, he was a real living person.
>
> The mother that testified, she can't really by law say a whole lot more than she did. She is allowed to say he's alive and he's dead. Don't hold that against her if she didn't explain more about it. That's all she's allowed to do. But you know what, Reginald felt that same terror and panic as anyone would when he would see a guy holding a gun to his head. Probably felt the same pain when the bullet first touched his head. Martin Luther King said it best: If justice isn't for everyone, then justice isn't for anyone.
>
> Second thing that happens, there's people that just discount whole communities like, well, it just happens over there, it doesn't happen here. You know what, you're

right. This would not happen in Orland Park, this wouldn't happen in Hinsdale. This wouldn't happen in Winnetka. You know what? You have a police department there, again, incompetent at best."

¶ 49 The argument, when read in context, is an effort by the State to explain why the Harvey police failed to pursue this case and elicit evidence that might explain a motive for the shooting. In stating that the mother"can't really by law say more than she did" the State was simply stating that as a "life and death" witness, she could only establish that the victim had been alive and is now dead. The mother would not have been permitted to testify regarding any good characteristics of her son or how much she missed him. *People v. Hope*, 116 Ill. 2d 265, 275 (1986). The State's argument certainly did not imply that if permitted to, she would provide more details about the shooting. Therefore, we do not find this portion of the State's closing argument to be in error.

¶ 50 Defendant also asserts that the State's closing argument improperly undercut the credibility of the defense theory of the case, belittled defense counsel, and improperly called into question defense counsel's conduct. Defendant points to a comment by the State that it was "sick" for the defense to suggest that Walker was an unreliable witness because he was a drug addict, given that defendant was a drug dealer. Defendant asserts that consideration of a witness' drug use in assessing credibility is proper and the prosecutor's comment suggested that defense counsel acted improperly by raising it as an issue. Further, defendant argues that when the prosecutor stated that he "could be up and screaming and objecting to every little thing," but that he "let it go," the State improperly implied that defense counsel's conduct was objectionable. We

disagree.

¶ 51 First, we note that the State's comments did not attack defense counsel or defense counsel's credibility or conduct but did challenge the theory of defendant's case, which is proper provided there is evidence justifying the challenge. *People v. Hudson*, 157 Ill. 2d 401, 444 (1993). Further, the State's comments regarding Walker were invited by defendant's closing argument and trial strategy. *Woods*, 351 Ill. Dec. at 744 (remarks made during closing arguments must be examined in the context of those made by both the defense and the prosecution, and must always be based upon the evidence presented or reasonable inferences drawn therefrom). During his cross-examination of Thorner Walker and Evonne Sharkey, defense counsel questioned their motives for testifying, suggesting that they were lying by identifying defendant. Then, during closing argument, defense counsel stated:

> "Thorner and his aliases walk into the Harvey Police Department. As he walks into the Police Department, his prior felony convictions aid him like a walking stick. His purpose, give a little to get a little. Walking into the Police Department with an outstanding warrant, he speaks to Detective Martin of the Harvey Police Department, and in that conversation, he says the person that lives across the street from me is the shooter. He is asked who, what, when, why, and how. Similar to a coloring book, he gives enough details to outline a picture, but not enough details to color it in. Detective Martin takes down his statement and then Mr. Thorner walks out of the Harvey Police Department with that same warrant."

¶ 52 And with regard to Walker's testimony, defense counsel stated:

"Evonne Walker does not come on the scene until 2007. ***She did not tell the Harvey Police Department, Cook County Sheriff that she was an eyewitness to a murder. She was silent. She does not come into the scene until 2007. Now what could possibly be Evonne's motive? We may never know. What we do know, is that her inconsistencies under oath and outside of the court is the only thing that she adds to this case."

¶ 53 Defense counsel then argued that there were many inconsistencies between the testimony of Walker and Sharkey regarding whether defendant had a bandage on his arm, the number of shots fired, and the clothes the shooter was wearing. In response, the prosecutor argued during closing:

"You look at the witness' testimony, little charts here. I'm not a chart guy, but you look at what was put on there and you look at the testimony about how there's all these inconsistencies and that equals reasonable doubt. The good thing is there's a group of you listening to this testimony. I could be up and screaming and objecting to every single little thing. Let it go. Let it go. You know, one other thing damaged [sic] up, Evonne said he was bandaged up. What piece of testimony did you hear from the stand where Evonne said he was bandaged up when he went outside? You didn't hear that. It wasn't said. That's not here in this courtroom."

¶ 54 Then detailing the inconsistencies mentioned by defense counsel as grounds for finding reasonable doubt, the prosecutor argued that the evidence was not presented during the trial. These arguments were all in response to the defense counsel's theory of the case that the State's two identification witnesses had a motive to testify falsely and presented inconsistent testimony.

The State's comment was clearly invited by and in response to defense counsel's questions at trial and comments in closing arguments, as well as the evidence adduced at trial. The defendant cannot claim prejudice when comments are invited by its own closing argument. *People v. Figueroa*, 381 Ill. App. 3d 828, 849 (2008).

¶ 55 Defendant also contends that during closing arguments the State misrepresented the testimony of Officer Burdi, who investigated the shooting of defendant, to make it appear as though defendant hindered the investigation of his own shooting. Defendant points to the following statement by the prosecutor during closing arguments:

> "You don't know whether or not [the victim] could have been involved in the shooting. The reason you don't know anything about the shooting is because of [Dagans], because of [Dagans]. Officer Burdi came into this courtroom and he told you that he talked to the people on the porch the night that this defendant was shot. He's not going to tell the police officer anything; he can't. He's a drug dealer. He can't say, excuse me, Mr. Officer, I'll tell you what it is; I know what's going on here. See here over here on 147th Street and Washington, this is my turf, this is my territory. I peddle; I deal out here. He couldn't say that. That's why you don't know. You know what the motive is on this case? Here is the motive, for whatever reason you cross this guy out on the street, penalty, death. Death, that's what the motive is."

¶ 56 Defendant contends that the prosecutor's claim that defendant impeded OfficerBurdi's investigation was squarely contradicted by the record. We disagree. The record shows that the following testimony regarding the investigation of defendant's shooting was elicited from Officer

Burdi's during cross-examination:

Q. And so you begin to talk to the people there, correct?

A. Yes.

Q. And you see other people there, correct?

A. Yes.

Q. One of them was Jerrold Dagans, correct?

A. Correct.

Q. He talked to you, correct?

A. I believe so.

Q. You believe so? So did you or did you not talk to Jerrold Dagans?

A. I did talk to him.

Q. He didn't refuse to talk to you, correct?

A. No.

Q. In fact, he just told you that [the gunfire] came from an unknown area-direction, correct?

A. I believe so.

Q. So, he was giving you what he could, correct?

A. He gave me what he gave me. I don't know if it was what he could, but he told me what he told me.

***

Q. Did anybody on the porch refuse to talk to you?

A. I don't know. If it happened, it was documented in my report. All that I got from all my interviews with all subjects on the porch and in the house was that they heard multiple gunshots, and they had no offender information.

¶ 57 Therefore, Officer Burdi's testimony indicates that he was unable to obtain any information regarding who shot defendant. However, Evonne Sharkey testified that defendant said he was going to "get" the people that shot him and that he was going down to ABC Liquors "to see if the guys were down there that had anything to do with him getting shot." Based on that testimony and the testimony of Officer Burdi, the prosecutor suggested that defendant knew who shot him but failed to inform the police. This assertion was based on the evidence and a reasonable inference therefrom and therefore, it was not improper.

¶ 58 For the foregoing reasons, we find that none of the State's arguments during closing were improper. We also, therefore, reject defendant's argument that the cumulative effect of the State's arguments was prejudicial. Having found no error there can be no plain error. *People v. Bannister*, 232 Ill. 2d 52, 71 (2008). "The whole can be no greater than the sum of its parts," (*People v. Albanese*, 102 Ill. 2d 54, 82-83 (1984)), and here defendant has failed to demonstrate reversible error in the arguments offered. While it is true that trial errors may have a cumulative effect when considered together, defendant has failed to establish that in this case.

¶ 59 Defendant argues alternatively that his trial counsel was ineffective under the standard announced in *Strickland*, for failing to object to the State's closing argument. As noted above, in order to meet this standard the defendant must demonstrate that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a “reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694 at 694, 104 S.Ct. 2052. Since we do not find that State's closing argument was grounds for an objection or that any objections, if sustained, would likely have resulted in a different outcome, defendant has not met the standard delineated in *Strickland*.

¶ 60 E. Rule 431(b)

¶ 61 Defendant next contends that the trial court violated Rule 431(b) when it failed to ask the potential jurors during *voir dire* whether they understood and accepted the principles set forth in *People v. Zehr*, 103 Ill. 2d 472 (1984). Where an issue concerns compliance with a supreme court rule, review is *de novo*. *People v. Ware*, 407 Ill. App. 3d 315, 353 (2011).

¶ 62 Effective May 1, 2007, the supreme court amended Rule 431(b), deleting the language "[i]f requested by the defendant," and leaving the remainder unchanged. Rule 431(b) now reads:

> "(b) The court shall ask each potential juror, individually or in a group, whether that juror, understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects.
>
> The court's method of inquiry shall provide each juror an opportunity to respond

to specific questions concerning the principles set out in this section." Ill. S.Ct. R. 431(b) (eff. May 1, 2007).

¶ 63 Thus, Rule 431(b), as amended effective May 1, 2007, currently imposes a *sua sponte* duty on the circuit court to question each potential juror as to whether he understands and accepts the *Zehr* principles. Such questioning of the potential jurors is no longer dependent upon a request by defense counsel.

¶ 64 Defendant contends that the circuit court violated Rule 431(b) by failing to ask potential jurors whether they understood and accepted the principle that he was not required to offer any evidence on his own behalf. Defendant concedes that he did not object to the circuit court's alleged failure to comply with Rule 431(b), but asserts that this court should review the issue under the plain error doctrine.

¶ 65 Our supreme court recently addressed these issues in *People v. Thompson*, 238 Ill. 2d 598 (2010). In *Thompson*, the defendant, Angelo Thompson, was convicted of aggravated unlawful use of a weapon and sentenced to one year in prison. *Id.* at 601. On appeal, Thompson argued his conviction should be reversed because the trial court failed to comply with Rule 431(b). *Id.* at 605. Specifically, the trial court did not question whether any of the prospective jurors understood and accepted that Thompson was not required to produce any evidence on his own behalf. *Id.* at 607. Further, the trial court did not ask the prospective jurors whether they accepted the presumption of innocence. *Id.* Thompson did not object to the alleged Rule 431(b) violation or include it in his posttrial motion, but the appellate court found the alleged error was subject to plain-error review. *Id.* at 605. The appellate court held that the trial court committed

reversible error by failing to comply with Rule 431(b) and so reversed Thompson's conviction and remanded for a new trial. *Id.*

¶ 66 The supreme court reversed the appellate court. Thompson did not argue plain error under the first prong, but only argued under the second prong that the Rule 431(b) violation infringed his right to an impartial jury and thereby affected the fairness of his trial and the integrity of the judicial process. *Thompson,* 238 Ill. 2d at 613. The supreme court disagreed, noting it had equated the second prong of plain-error review with structural error. *Id.* at 613-14 (quoting *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009). The supreme court held:

> "A finding that defendant was tried by a biased jury would certainly satisfy the second prong of plain-error review because it would affect his right to a fair trial and challenge the integrity of the judicial process. Critically, however, defendant has not presented any evidence that the jury was biased in this case. Defendant has the burden of persuasion on this issue. We cannot presume the jury was biased simply because the trial court erred in conducting the Rule 431(b) questioning.
>
> ***
>
> Our amendment to Rule 431(b) does not indicate that compliance with the rule is now indispensable to a fair trial. As we have explained, the failure to conduct Rule 431(b) questioning does not necessarily result in a biased jury, regardless of whether that questioning is mandatory or permissive under our rule. Although the amendment to the rule serves to promote the selection of an impartial jury by making questioning mandatory, Rule 431(b) questioning is only one method of helping to ensure the selection

> of an impartial jury. [Citation.] It is not the only means of achieving that objective. A violation of Rule 431(b) does not implicate a fundamental right or constitutional protection, but only involves a violation of this court's rules. [Citation.] Despite our amendment to the rule, we cannot conclude that Rule 431(b) questioning is indispensable to the selection of an impartial jury." *Thompson,* 238 Ill. 2d at 614-15.

¶ 67 The supreme court noted, in the case before it, the prospective jurors had received some, but not all, of the required Rule 431(b) questioning and had been admonished and instructed on Rule 431(b) principles. *Id.* at 615. The supreme court concluded that Thompson had not established that the trial court's violation of Rule 431(b) resulted in a biased jury and therefore, he failed to meet his burden of showing the error affected the fairness of his trial and the integrity of the judicial process. *Id*. Finally, the supreme court declined Thompson's request to adopt a bright-line rule of reversal for any violation of Rule 431(b) to ensure that the trial courts will comply with the rule. *Id.* at 615-16.

¶ 68 In the present case, as in *Thompson,* defendant's failure to object at trial constituted a forfeiture of the circuit court's alleged error in its Rule 431(b) questioning. As in *Thompson,* defendant has failed to establish that the forfeiture rule should be relaxed under the *Sprinkle* doctrine, as there is no indication the trial court would have ignored an objection nor is there any evidence the trial court overstepped its authority in the presence of the jury. Further, defendant has failed to establish plain error. As addressed above, the case was not closely balanced, so the alleged error is not reversible under the first prong. Nor is the alleged error reversible under the second prong. Defendant has presented no evidence the jury was biased in this case. Defendant

bears the burden of persuasion on this issue, and we "cannot presume the jury was biased." *Id.* at 614. In the absence of any evidence of jury bias, defendant has failed to meet his burden of showing that the alleged Rule 431(b) violation constituted plain error.

¶ 69 F. Cumulative Effect of Errors

¶ 70 Lastly, defendant argues that the cumulative effect of the errors in this case deprived him of a fair trial and is grounds for reversal. For support, defendant relies on *People v. Johnson*, 215 Ill. App. 3d 713 (1991), where this court found that although individual errors made by a trial court would not merit reversal alone, the cumulative effect of the errors may deprive defendant of a fair trial. Under such circumstances, due process and fundamental fairness require that a cause be remanded for retrial. *Id.* at 735. In *Johnson*, this court found that the trial court erred when it denied defendant's motion *in limine* which sought to preclude the State from introducing testimony about defendant's sexual orientation, abused its discretion by allowing testimony of defendant's alleged violent character, and failed to dismiss three jurors for cause after they expressed doubts about their ability to be impartial because of their experience with crimes. This court found that the cumulative effect of the errors of the trial court deprived defendant of a fair trial, and warranted reversal. *Id.* No such comparable errors occurred in this case, and therefore, we find no basis for reversing defendant's conviction.

¶ 71 III. CONCLUSION

¶ 72 For the reasons set forth above, we affirm the circuit court.

¶ 73 Affirmed.