FIFTH DIVISION
June 8, 2012

No. 1-10-1268

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.	)	TJ 523320
	)	
MICHAEL GARDNER,	)	Honorable
	)	Daniel B. Malone,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE EPSTEIN delivered the judgment of the court.
Justices J. Gordon and Howse concurred in the judgment.

ORDER

¶ 1 *Held*: Circuit court did not abuse its discretion in admitting police officer's testimony, and even assuming that the court erred in admitting the testimony, defendant cannot show that the evidence was closely balanced to support claim his plain error claim. Even if testimony regarding defendant's refusal to answer questions after receiving *Miranda* warnings was improperly admitted, defendant cannot establish prejudice from isolated statement. Prosecutor's remarks during closing arguments were not improper, and the trial court's remarks before trial were not improper.

¶ 2 Defendant appeals his conviction for driving under the influence of alcohol (625 ILCS 5/11-501(a)(2) (West 2008)). On appeal, defendant argues that: (1) the trial court erred by permitting the State to introduce evidence that defendant was a habitual criminal; (2) his right to

due process of law was violated when a police officer testified on cross-examination that defendant refused to answer questions after receiving *Miranda* warnings; (3) the State improperly blamed the defendant for the jurors' service during closing arguments; and (4) the trial court improperly suggested that the jury's deliberations should not take long. We affirm.

¶ 3 BACKGROUND

¶ 4 Following an early-morning arrest on July 5, 2006, defendant Michael Gardner was charged with driving under the influence of alcohol (DUI) and driving with a suspended license. Defendant pleaded not guilty to DUI, but pleaded guilty to the charge of driving with a suspended license before trial. Just prior to trial, the court granted defendant's motion *in limine* to bar all mention of defendant's suspended license.

¶ 5 At trial, the State presented testimony from Chicago police officer Howard Burton. At 3:14 a.m. on July 5, 2006, Officer Burton was sitting in a marked police car on the shoulder of Lake Shore Drive at 2200 North. Using the radar system in his vehicle, Officer Burton observed a car headed northbound traveling at 71 miles per hour. Burton pulled the car over at the beginning of the Fullerton Street exit ramp.

¶ 6 Officer Burton walked to the vehicle and observed the driver, who Burton identified in court as the defendant. Burton asked for defendant's license and insurance card, but he was "unable" to produce either. Officer Burton observed that defendant's eyes were "red and glassy," his speech was "slightly slurred," and he "had a strong odor of an alcoholic based beverage coming from his breath and person." Officer Burton asked defendant if he had anything to drink, and defendant stated that he had a pint of "Wild Irish Rose," which Burton recognized as a

"cheap whiskey" or "cheap wine." Officer Burton stated that he specifically remembered the case because in over 300 DUI arrests, he had never had anyone else admit to drinking "Wild Irish Rose." Officer Burton explained that there was a male passenger in the car, but he did not make any observations of that person or remember anything about him.

¶ 7 Officer Burton then conducted field sobriety tests. Burton explained that he had received training in field sobriety tests and passed examinations related to that training. Prior to the tests, defendant confirmed that he did not have any injuries or ailments that would impair his ability to perform the tests. Defendant was wearing shoes, but he chose to take off his shoes for the tests. Defendant failed the three tests administered. When asked to put his left foot in front of his right foot, heel to toe, for nine steps in a straight line and then turn around, defendant stepped off the imaginary line, used his hands for balance more than six inches from his side, and failed to turn correctly. Officer Burton recalled that there was more than half an inch between heel and toe, but he could not remember the exact distance. Defendant also could not raise his leg six inches off the ground and hold it for thirty seconds while looking at his feet; defendant was swaying during the test and using his arms for balance. Finally, when asked to touch his index finger to his nose, defendant missed his nose on multiple occasions. Burton arrested defendant for DUI and transported him to the police station, where defendant was informed of the "warnings to motorists." Defendant refused to take a breathalyzer test.

¶ 8 Officer Burton offered his personal and professional opinion that defendant was under the influence of alcohol that night. This opinion was based on defendant's red and glassy eyes and slurred speech, the strong odor of alcohol coming from his breath and person, his poor

performance on the field sobriety tests, and defendant's choice to stop his car at a place on the exit ramp where he was blocking traffic.

¶ 9 The jury returned a guilty verdict on the DUI charge. The court sentenced defendant to two years conditional discharge, a victim impact panel, treatment, thirty days of participation in the Sheriff's Work Alternative Program (SWAP), and a $500 fine. On defendant's motion to reconsider the sentence, the court agreed to convert the SWAP to community service. This appeal followed.

¶ 10 ANALYSIS

¶ 11 For each claim of error, defendant first invokes the plain error rule, which "bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved claims of error in specific circumstances." *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). A reviewing court will only apply the plain error rule 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.' " *Id.* (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)).

"In plain-error review, the burden of persuasion rests with the defendant." *Id.* Generally, the first step in applying the plain error rule is to determine whether a clear or obvious error occurred. *Id.*

¶ 12 Defendant also argues that he received ineffective assistance of counsel because his trial

counsel failed to raise various objections during trial, failed to preserve these issues in a post-trial motion, or both. The right to counsel guaranteed by the United States Constitution includes the right to effective assistance of counsel. U.S. Const., amends. VI, XIV. To prevail on a claim of ineffective assistance of counsel, defendant must satisfy the familiar two-part test set forth in *Strickland v. Washington*: first, "defendant must show that counsel's performance fell below an objective standard of reasonableness," and second, defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. Manning*, 241 Ill. 2d 319, 326 (2011) (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *Id.*

¶ 13 Evidence of Other Crimes or Bad Acts

¶ 14 Defendant first argues that the trial court erred when it allowed the State to introduce evidence suggesting that he was a habitual criminal. According to defendant, the State chose to paint this picture by "misleading innuendo" in two instances: first, by suggesting that the arresting officer had additional encounters with defendant after his 2006 arrest, and second, by suggesting that defendant was driving on a suspended license. Defendant concedes that his trial counsel failed to preserve these issues for review but argues that we should address them under the plain error rule. See *Thompson*, 238 Ill. 2d at 613. We first address whether the trial court's decision to admit evidence was a clear and obvious error. Id.

¶ 15 This court reviews the trial court's decision to admit evidence for an abuse of discretion. People v. Becker, 239 Ill. 2d 215, 234 (2010). "An abuse of discretion occurs where the trial

court's decision is arbitrary, fanciful or unreasonable [citation] or where no reasonable person would agree with the position adopted by the trial court [citations]." Id. Defendant first complains of improper questioning at the end of the State's direct examination of Officer Burton:

"Q. Now, officer, this case happened in 2006? Why is it so memorable to you?

A. Because it hasn't gone away.

Q. What do you mean by that?

A. Normally a 2006 six [*sic*] case would have been settled and—

[Defense Counsel]: Objection, Judge.

THE COURT: Sustained.

Q. What, outside of normally, why is this case memorable to you?

A. Because I have been coming here sense [*sic*] 2000.

[Defense Counsel]: Objection, Judge.

THE COURT: Yes, that's sustained, too, counsel.

[Defense Counsel]: I would ask to strike all of that.

THE COURT: Yes. The jury will be instructed to disregard that question.

Q. Without going into why you have been coming here, why is this case specifically memorable to you?

A. Because I keep seeing the name Michael Gardner.

[Defense Counsel]: Objection, Judge.

THE COURT: I'm going to overruled that [*sic*]. That can stand."

Focusing on Burton's testimony that he "[kept] seeing the name Michael Gardner," defendant

argues that Burton improperly suggested that he had several run-ins with defendant since the 2006 arrest. Our precedent establishes that a police officer's testimony that he is familiar with a person, without further explanation, should be avoided unless it is otherwise relevant because it suggests that defendant has a criminal history. See *People v. Bryant*, 113 Ill. 2d 497, 514 (1986); *People v. Stover*, 89 Ill. 2d 189, 196 (1982). We find no error of this nature in the present case, however, because we cannot accept defendant's characterization of Officer Burton's testimony. The record indicates that defendant in fact had no convictions or arrests since the 2006 arrest. In order to accept defendant's reading of the testimony, then, we must conclude that Burton deliberately tried, in the most subtle and indirect way possible, to mislead the jury by suggesting that defendant had been arrested for traffic violations since 2006. The more plausible understanding of the testimony is that Burton kept seeing defendant's name in connection with this case, pending in the circuit court from 2006 to 2009, not in connection with other traffic violations. We cannot say that the trial court abused its discretion in allowing this testimony; that conclusion would require us to fault the trial judge for not taking the rather implausible view of the testimony that defendant offers on appeal. The trial judge properly exercised his discretion in allowing the testimony, which most reasonably refers to Burton seeing defendant's name in connection with the 2006 arrest.

¶ 16 Defendant also contends that the prosecutors engaged in "deliberate misconduct" by "continuing to solicit improper testimony despite the court's rulings." According to defendant, the State's "persistence" in its questioning, despite sustained objections on the first two questions, caused the jury to disregard the judge's ruling on the first two questions. A corrective instruction,

either a sustained objection or an instruction to disregard testimony, generally serves to repair the damage caused by improper testimony. *People v. Larry*, 218 Ill. App. 3d 658, 663 (1991). When the State persists in asking the same impermissible questions despite repeated instructions to stop, however, the trial court's ruling have no salutary effect. *Id.* In the present case, the State was trying to illicit relevant testimony—why the case was memorable to Officer Burton and he therefore had a clear recollection of the arrest—but the witness veered off course. The prosecutor tried to redirect the witness (asking what was memorable "outside of" Burton's previous answer and "[w]ithout going into" his previous answer), and eventually the witness offered an acceptable answer. Where the prosecutor properly attempted to steer the witness away from objectionable answers, there is no basis to conclude that the jury ignored the judge's rulings to disregard the witness's two previous responses.

¶ 17 We next consider a different portion of Burton's testimony, which defendant contends is another example of the State's attempt to portray defendant as a habitual criminal:

> "Q. Now, once you walked up to the defendant's vehicle, what if anything did you do?
>
> A. I make my observations and I asked for his license and insurance.
>
> Q. Okay. Was he able to tender you license and insurance?
>
> A. No.
>
> [Defense Attorney]: Judge, objection.
>
> The Court: Basis?
>
> [Defense Attorney]: Relevant.
>
> The Court: Overruled."

Defendant argues that this questioning was not only an attempt to portray defendant as a "serial drunk driver," it was a direct violation of the court's ruling that there should be no mention that defendant was driving on a suspended license. The State may not present evidence of other crimes or bad acts of the defendant in an effort to show that he has a criminal disposition and therefore likely committed the charged offense. *People v. Stewart*, 105 Ill. 2d 22, 61 (1984). In this particular case, any mention of the suspended license also would have violated the trial court's order barring any reference to defendant's suspended license.

¶ 18 It is apparent from this line of questioning that the prosecutor was attempting to walk the witness through the sequence of events that led to defendant's arrest. We agree with defendant that questioning whether the driver was able to tender license and insurance was not necessary to explain why defendant was pulled over and arrested. The jury heard that defendant was pulled over for speeding and then, after he failed several roadside tests, defendant was arrested for DUI. See *People v. Jackson*, 232 Ill. 2d 246, 268-69 (2009) (" '[E]vidence of other crimes is not admissible merely to show how the investigation unfolded *unless* such evidence is also relevant to specifically connect the defendant with the crimes for which he is being tried.' [Citation.]" (Emphasis in original.)). But we cannot agree that the jury, hearing the above testimony, would assume that defendant was driving on a suspended license. Perhaps the most direct inference from the testimony would be that defendant did not have his license and insurance card with him, either because he simply forgot or because he was being careless after having drunk a pint of wine. Alternatively, the jury could infer that he was not "able" to produce a license and insurance card because he was too inebriated to find those items in his car. For defendant's

theory to be correct, though, the jury would have to assume that defendant did not have a license with him because he did not have a valid license at the time, he did not have a valid license because his license had been suspended or revoked, and his license had been suspended or revoked because he previously had committed a traffic violation. Again, defendant's interpretation of the testimony is too speculative to support a finding that the trial court abused its discretion by allowing the testimony. It was not unreasonable for the trial judge to take a different view of the testimony than defendant offers on appeal and conclude that the testimony was relevant to show that defendant was under the influence of alcohol. We conclude that the trial court did not abuse its discretion in allowing the testimony.

¶ 19 Even if we accept defendant's interpretation of Officer Burton's testimony, however, defendant cannot establish that the evidence was closely balanced and thus cannot prevail on his plain error claim. Officer Burton testified that defendant's eyes were "red and glassy," his speech was "slightly slurred," and he "had a strong odor of an alcoholic based beverage coming from his breath and person." When asked if he had anything to drink, defendant stated that he had a pint of "Wild Irish Rose," which Burton described as a cheap whiskey or wine. Burton, a trained and experienced traffic officer, testified that he performed several field sobriety tests on defendant, which defendant failed. The State also presented testimony that defendant refused to take a breathalyzer test, and the Illinois Supreme Court has held that "that evidence of a person's refusal to take a test designed to determine the person's blood-alcohol content is admissible and may be used to argue the defendant's consciousness of guilt." *People v. Johnson*, 218 Ill. 2d 125, 140 (2005). Although there was no physical evidence to show that defendant was impaired by

alcohol, such as the results from a breathalyzer test or a blood sample, the evidence in this case was not closely balanced. *Cf. People v. Weathersby*, 383 Ill. App. 3d 226, 232 (2008) (finding that evidence was not closely balanced in DUI case, despite lack of physical evidence, where there was evidence of "thick-tongued speech, glassy eyes, and a smell of alcohol on [the defendant's] breath" and where defendant admitted to having a few drinks, refused a breathalyzer test, and open bottle of liquor was found in the car). Even if we assume that the trial court erred in admitting the portions of Officer Burton's testimony discussed above, defendant cannot show that the evidence was closely balanced.

¶ 20 We also reject defendant's claim that he was denied his sixth amendment right to effective assistance of counsel because his trial counsel failed to file a posttrial motion preserving this issue for review. The Illinois Supreme Court has explained "that on a claim of ineffective assistance of counsel for failing to properly preserve issues for review, defendant's rights are protected by Supreme Court Rule 615(a), which allows a court to review unpreserved claims of plain error that could reasonably have affected the verdict." *People v. Coleman*, 158 Ill. 2d 319, 350 (1994); see also *People v. Evans*, 209 Ill. 2d 194, 222 (2004) (finding that where the admission of testimony was not error, "counsel was not deficient for failing to object"). Counsel's failure to renew the evidentiary objections in a posttrial motion cannot support defendant's ineffective assistance claim.

¶ 21 Witness Testimony that Defendant Refused to Answer Questions after *Miranda* Warnings

¶ 22 Defendant next contends that Officer Burton improperly testified that defendant refused to answer questions after he was given *Miranda* warnings. Defendant again concedes that the

issue was not preserved for review and seeks review under the closely-balanced prong of the plain error rule. Defendant also argues that he was denied his right to effective assistance of counsel because his counsel did not object to Officer Burton's testimony or move for a mistrial.

¶ 23 On cross-examination, defense counsel asked Officer Burton the following questions:

> "Q. Okay. Officer, based on the odor of alcohol, you can't tell how much someone has *** to drink, correct?
>
> A. That is correct.
>
> Q. Okay. You can't tell when they have drank alcohol?
>
> A. That is correct.
>
> Q. Okay. You never asked my client when he drank a pint of Wild Irish Rose, did you?
>
> A. On the alcoholic influence reports, that would go after I would have asked him his Miranda warnings. And because he refused to answer any questions, I wasn't able to."

Defendant relies on *Doyle v. Ohio*, which established that "the prosecution generally cannot use a defendant's post-*Miranda*-warning silence for impeachment purposes without violating due process." *People v. Dameron*, 196 Ill. 2d 156, 163-64 (2001) (citing *Doyle v. Ohio*, 426 U.S. 610, 619 (1976)). Defendant further argues that if a witness gives gratuitous, unsolicited testimony concerning the defendant's exercise of his *Miranda* rights, the testimony must be stricken. See *People v. Bunning*, 298 Ill. App. 3d 725, 731-32 (1998) (where defense counsel asked police officer about length of post-arrest interview of the defendant, it was error for officer

to respond that defendant terminated the interview shortly, refused to ask questions, and requested counsel). The State responds that the officer's testimony was not gratuitous or unsolicited; he was responding to defense counsel's open-ended question regarding what the officer asked defendant, which was not limited to the time before the arrest. The State further argues that the statement was made to counter defense counsel's insinuation that Officer Burton did not conduct a sufficient investigation, not for impeachment purposes.

¶ 24 We need not address the constitutional question in this case. Even if we assume that the testimony violates the rule announced in *Doyle*, defendant cannot show the prejudice necessary to satisfy his plain-error or ineffective assistance claims. See People v. White, 2011 IL 109689, ¶ 134 ("It is clear in this case, having reviewed the record, that defendant cannot show prejudice. There is no reason to go further for purposes of either an ineffective assistance analysis or one founded upon the closely balanced prong of plain error. *** Even if we were to assume, *arguendo*, there was error in the admission of evidence concerning the lineup, the evidence against defendant is such that he cannot show prejudice for purposes of either analysis."). As discussed above, the jury heard strong evidence that defendant was driving under the influence of alcohol. Even if we assume that it was error to admit Burton's reference to defendant's post-arrest silence, we conclude that the evidence in this case was not so closely balanced that the error severely threatens to tip the scales of justice against defendant. Similarly, defendant cannot show prejudice to support his claim that his counsel was ineffective for failing to object or move for a mistrial outside the presence of the jury. There is no reasonable probability that the result of the proceeding would have been different without the single remark regarding defendant's

exercise of his right to remain silent. Officer Burton's isolated statement was never mentioned again, and the State did not comment on defendant's post-arrest silence at any time. In view of all the evidence of defendant's guilt, there is no reasonable probability that the jury would have acquitted defendant without Burton's isolated reference to his post-arrest silence.

¶ 25 State's Comments During Closing Argument

¶ 26 Defendant next argues that the court erred by allowing the prosecutor to blame defendant for the jurors' service and inflame their passions against him during closing arguments. Defendant's trial counsel did not object to the prosecutor's comments or file a posttrial motion. On appeal, defendant argues that admission of the testimony was plain error and that his counsel was ineffective for failing to object or move for a mistrial.

¶ 27 Defendant references the following remarks by the assistant State's attorney:

> "Now, folks, I'm sure all of you have heard the statement if it looks like a duck, it walks like a duck, it's a duck. This case is that simple. Defendant looked like he was under the influence of alcohol, sounded like he was under the influence of alcohol, smelled like he was under the influence of alcohol. The defendant was under the influence of alcohol.
>
> Folks, *because of his bad decisions of drinking and driving, is the reason why you are all in these seats today.* Is the reason why he is in that seat as the accused.
>
> Folks, pretty soon you are going to get handed your responsibilities as jurors. It's juror responsibility to determine the defendant's guilt. In exercising

> that responsibility, you took an oath. You said you would follow the law. And we ask you to do that today." (Emphasis added.)

Defendant points to the italicized sentence above and argues that the prosecutor "stoke[d] the jury's ire *** to blame the defendant for the jurors' required performance of jury duty" and encouraged an "us-versus-them" attitude by "emotionally unit[ing] the prosecutors and the jury as public servants." 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*. *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007).

¶ 28 Prosecutors are afforded wide latitude in closing argument. *People v. Kirchner*, 194 Ill. 2d 502, 549 (2000). "In reviewing comments made at closing arguments, this court asks whether or not the comments engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from them." *Wheeler*, 226 Ill. 2d at 123. If the jury could have reached a contrary verdict had the improper remarks not been made, or the reviewing court cannot say that the prosecutor's improper remarks did not contribute to the defendant's conviction, a new trial should be granted. *Id.* Challenged remarks must be viewed in the context of closing arguments as a whole. *People v. Burgess*, 176 Ill. 2d 289, 319 (1997).

¶ 29 Defendant first argues that because the prosecutor blamed defendant for the jurors' service, the jurors could have returned a guilty verdict to punish defendant for inconveniencing them. We disagree. When the prosecutor's remarks are viewed in context, it is apparent that the prosecutor was trying to reiterate the simplicity of the case to the jurors and emphasize that defendant was indeed guilty of driving under the influence of alcohol. The specific comment

referencing "the reason you are all in these seats today" was unnecessary, and we do not approve of it. Defendant's speculative interpretation of the prosecutor's statement, though, is plainly inconsistent with the prosecutor's reminder, made immediately after the complained-of remark, that it is the jury's responsibility to "determine the defendant's guilt" and "follow the law." The prosecutor was attempting to argue that it was defendant's own actions of drinking and driving that caused him, and the jury, to be in the courtroom that day. While this is not a particularly persuasive point, and would have been better left unsaid, we cannot say it had any impact on the verdict.

¶ 30 Defendant's claim that the prosecutor promoted an "us-versus them" attitude is likewise unsupported by the record. There is no indication in the record that the prosecutor aligned himself with the jurors in any way, as in those cases cited by defendant. See, *e.g.*, *People v. Johnson*, 208 Ill. 2d 53, 79 (2003) (concluding that prosecutor improperly "merge[d] his position *** with the jury, the society, and the community" by his remarks that "we as a society do not have to live in their twisted world," "we don't have to allow that to happen in our community," and "we as a people can stand together"). Any attempt to draw analogy to these "us-versus-them" cases requires an implausible reading of the prosecutor's remark.

¶ 31 We conclude that the prosecutor's arguments were within the bounds of permissible argument, and those comments did not engender prejudice against defendant. Having found no error, defendant's plain error and ineffective assistance claims must fail. See *Bannister*, 232 Ill. 2d at 79; *Evans*, 209 Ill. 2d at 222.

¶ 32 Court Comments to Jury

¶ 33 Defendant finally argues that the trial court erred by "suggesting that the jurors would be able to quickly finish deliberations." According to defendant, the trial court thus "suggested that it felt the case against Mr. Gardner was sufficiently strong to merit quick disposition by the jury." Defendant argues that the trial court plainly erred in making those comments and claims that his counsel was ineffective for failing to object or move for a mistrial.

¶ 34 Defendant complains about the court's remarks just after *voir dire*:

> "So we take this very seriously. And there is a potential fine for people who did not show up and are not on time. So I ask everybody to be courteous to their neighbors and make sure that you are here on time and we can get going.
>
> And I fully expect that we will finish. There are, there's definitely one witness. There may be two witnesses but you will, the procedure is you'll hear opening states [*sic*], which are not evidence.
>
> Then you will hear, the State has the burden. They have to call their witness. The defense can cross example [*sic*]. The defense may call the witness after, they don't have to.
>
> Again, I went over all of my principles with you that include the law on that subject matter. After they are completed with their witnesses and they rest, the typical procedure is you'll get the jury instruction.
>
> When you complete your deliberations, you will notify the deputy and we will conclude the case. So, again, I thank all of you. You have all been here now, [*sic*]. It's been a long day. I think tomorrow will move a lot quicker. It will be

interesting. And I'm hopeful, this time tomorrow, you will be nowhere near this room.

That's my prediction but no promise or [*sic*] that okay. So just so you know. Court is dismissed have a good night everybody."

¶ 35 The Illinois Supreme Court has instructed that "statements suggesting that a quick verdict be reached at the expense of a thoughtful verdict [citation] or which reflect the judge's assessment that the facts bear relatively easy resolution are to be avoided [citation], and that it is the effect of the court's statements and not the court's intent that must be examined." *People v. Shum*, 117 Ill. 2d 317, 345 (1987). "To constitute reversible error, defendant must demonstrate that the comments constituted a material factor in the conviction or were such that an effect on the jury verdict was the probable result." *People v. Brown*, 388 Ill. App. 3d 104, 111 (2009).

¶ 36 We cannot conclude that the jury would infer from judge's comments that he believed the jury should need little time to resolve the issues. The trial court here was simply fulfilling his administrative responsibilities of informing the jury about scheduling. The judge walked the jury through the basic events of the trial, compared the slow pace of voir dire to the relatively faster pace of trial, and expressed his hope that the case would move along quickly enough that it would last for about a day. It is improbable that the jury would take the judge's comments regarding the length of the entire trial process as an expression about the ease with which the jury should reach a decision, as the judge had heard no evidence in the case and did not even know how many witnesses would be called. While the trial court must be cautious with any mention of the length of deliberations, the comments here do not constitute reversible error. See, *e.g.*,

People v. Emerson, 189 Ill. 2d 436, 484, 486-87 (2000) (finding that trial court's comments during voir dire for a death-penalty-eligible defendant that "everybody anticipates that this case will be over by next Monday" were "proper in light of the circuit court's administrative responsibilities," and stated that it could not "conclude that the circuit court's estimate of the length of the sentencing hearing had any effect on the eligibility verdict"). Defendant has failed to demonstrate that a single sentence in the judge's overview of trial procedures and scheduling was a material factor in the conviction, and we therefore find no error to support defendant's plain error and ineffective assistance claims.

¶ 37 CONCLUSION

¶ 38 For the foregoing reasons, we affirm defendant's conviction for driving under the influence of alcohol.

¶ 39 Affirmed.