FIFTH DIVISION
September 30, 2013

No. 1-11-0308

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County
Plaintiff-Appellee,	)	
	)	
v.	)	04 CR 7690
	)	
DENNIS EDWARDS,	)	Honorable
	)	Mary Margaret Brosnahan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Gordon and Justice Palmer concurred in the judgment.

O R D E R

¶ 1 HELD:(1) Where defendant acquiesced to the circuit court's response to a jury question, and where the court's response was not in error, the issue was forfeited and defendant was unable to show that his trial counsel was ineffective for failing to object to the court's response; (2) Where the State was properly commenting on the credibility of defendant's testimony, there was no prosecutorial misconduct, and even if the State's comments about the defense expert witness's compensation were improper, the evidence was not closely balanced and there was no plain error; and (3) Where the court admitted prior statements of defendant that provided context for defendant's spontaneous confession, there was no abuse of discretion.

¶ 2 After a jury trial, defendant Dennis Edwards was convicted of first degree murder and

sentenced to 22 years in prison. On appeal, defendant contends that: (1) the circuit court erred when it responded to a jury question about the legal definition of "great bodily harm" by creating a definition, or, in the alternative, defense counsel was ineffective for failing to object to the circuit court's response to the jury question; (2) the prosecutor improperly undermined the credibility of the defense expert and of defendant during closing and rebuttal arguments; and (3) he was denied a fair trial when the circuit court allowed the State to introduce statements that were irrelevant, prejudicial, and damaging to his character. We affirm.

¶ 3 Defendant was charged with the March 6, 2004, murder of Ada Allen, the victim. Defendant's first jury trial resulted in a mistrial entered by the circuit court based on a discovery violation committed by defense counsel. The circuit court denied defendant's subsequent motion to dismiss the charges against him based on principles of double jeopardy. Defendant appealed the court's declaration of a mistrial and its denial of his motion, and we affirmed. *People v. Edwards*, 388 Ill. App. 3d 615 (2009).

¶ 4 For his second trial, defendant was represented by co-counsel from the first trial. Prior to trial, defendant filed a motion to suppress statements he made to police officers after he was arrested on an unrelated DUI charge in 2008. After a hearing, the circuit court denied the motion to suppress, finding that defendant's statements were voluntarily given.

¶ 5 At trial, Rachel Schram testified that at approximately 1 or 2 a.m. on March 6, 2004, she was walking down the street and going through "acute withdrawal syndrome" from heroin withdrawal. While she was vomiting, the victim pulled up next to Schram in a car and asked if Schram was okay. Schram had never met the victim before. The victim invited Schram to get

into the car, then the victim gave Schram $20 and drove Schram to purchase heroin. The victim and Schram then drove to where the victim said a man named Dennis lived. At approximately 2:30 a.m., the victim and Schram arrived at what Schram eventually learned was defendant's apartment at 5138 South Kenwood Avenue. The victim began ringing defendant's doorbell, then knocked on defendant's window, then rang defendant's doorbell and other doorbells until someone buzzed her into the building. Once inside, the victim began knocking loudly on defendant's door. From the time they arrived, defendant repeatedly told the victim to go away. However, after "a good five minutes" of knocking on his apartment door, defendant allowed them into his apartment. Inside, Schram saw another woman she did not know, and noticed drug paraphernalia and empty bottles on the table. The victim told Schram to go into the bathroom and wait a minute because the victim needed to talk with defendant. Schram complied and used heroin and crack cocaine while she was in the bathroom. Schram admitted that she had been using heroin and crack cocaine for seven years. After about 10 minutes, she left the bathroom and saw the victim and defendant arguing. The victim reached into the other woman's purse and took out an ID. The victim refused to return the ID and some keys, and for about "maybe ten to fifteen minutes" the victim, defendant, and the woman were arguing about it. Then the victim broke through defendant's locked bedroom door and started destroying defendant's belongings. Schram saw defendant grab the victim's arm and "push her slightly, shove her, try to restrain her from exiting his apartment." The victim was attempting to leave through the back door, but she was fumbling with a padlock on the metal gate just outside the door. The argument continued but, after two to six minutes, the victim succeeded in opening the back door. In the back yard,

defendant kept demanding his keys and the victim kept telling defendant she did not have his keys. Schram saw the victim hit defendant eight or nine times with her oversized purse and the victim also hit defendant with her fist. Schram saw defendant grab the victim and attempt to keep her from moving, and then, "somehow [the victim] landed on the ground face first." Defendant was on top of the victim, standing over her. Schram had to look away, but said she knew defendant "was choking [the victim], he was strangling [the victim]." Schram heard the victim "making noises, attempting to talk, like somebody who is being choked, and trying to get the person to stop and get off her." Schram tried to stop defendant, grabbed his arm and told him, "stop, you're going to kill her," but defendant would not stop. Schram yelled for help and for someone to call 9-1-1. She went inside for a minute at some point to look for the keys the victim and defendant had been arguing about, but she did not find any. When she went back outside, defendant was still on top of the victim and was still choking her. By then, the victim was not making any noise.

¶ 6 Two days after the incident, on March 8, 2004, Schram testified before the grand jury that defendant pushed the victim from the back, followed her out the back door, and then "flipped [the victim] over his back and [the victim] landed on her stomach face down on the ground." Schram further testified that defendant then got on top of the victim's back and put her in a "choke-hold and started strangling" the victim. At the first trial, Schram testified that when defendant was choking the victim, he had the "crook of his arm" around the victim's neck. Schram admitted that she had previously pled guilty to possession of a controlled substance in 2002 and 2004, and had pled guilty to separate prostitution charges in 2003, 2004, 2005, 2007,

and 2010.

¶ 7 Officer Curtis Thomas testified that just after 3 a.m. on March 6, 2004, when he was working as an officer for the University of Chicago Police Department, he received a dispatch to report to 5138 South Kenwood Avenue for a battery in progress. He arrived less than a minute later and saw two Chicago Police officers, Officer Thurman and Officer Diggs. The officers were looking for where the call came from, when a woman told them the trouble was in the back. Thomas ran to the back of 5138 South Kenwood. He first saw defendant and the victim when he was about 30 feet away. Defendant was straddling the victim and had her in a choke hold. Thomas testified that the victim's neck was in the crook of defendant's right arm. Thomas ran toward defendant and heard Thurman yell "[s]top, police." Defendant looked toward Thurman, released the victim, and Thomas saw the victim fall flat on the ground, hitting face first in the dirt. Thomas and Thurman grabbed defendant and forced him onto the ground, and Thurman handcuffed defendant. While Thomas was holding defendant down, Thurman approached the victim. Thurman and Diggs turned the victim face up. They did not attempt to resuscitate the victim because her tongue was hanging out and she had dirt in her mouth, and Thomas believed the victim was deceased.

¶ 8 Officer Clifton Thurman's testimony substantially corroborated Officer Thomas's testimony. Thurman testified that just after 3 a.m. on March 6, 2004, he and his partner Officer Diggs received a dispatch call for a battery in progress at 5138 South Kenwood. Thurman ran through the alley to the back yard, shining his flashlight ahead of him. Upon arriving, Thurman saw defendant was straddling the victim's back, the victim was face down, and defendant had his

right arm around the victim's neck, with her neck in the crook of his elbow. It appeared defendant was exerting pressure on both sides of the victim's neck. When Thurman yelled, "stop, police" defendant released the victim and she fell face down in the dirt without moving. After turning the victim over, Thurman noted she was showing no noticeable signs of life.

¶ 9 Doctor Nancy Jones, the Chief Medical Examiner for Cook County and an expert in the field of forensic pathology, testified that she performed the post-mortem examination on the victim on March 6, 2004. The victim was 6'1" tall and weighed 284 pounds. Jones performed external and internal examinations on the body, as well as a toxicology screening. She also relied on a case report prepared by an investigator regarding the circumstances surrounding the victim's death. Jones observed two blunt trauma injuries on the left side of the victim's face, a scratch that was less than half-an-inch long and a bruise that was about four inches long and four-tenths-of-an-inch wide. Mud and dirt were present on and around the victim's mouth and on her teeth. Jones described different methods of strangling and described the "choke-hold" as being "where the arm, the forearm is across the neck, and you're using the other arm to put pressure on the front part of the neck." It is also known as a "sleeper hold." Jones said that when those types of holds are utilized it is "very common" not to see any injuries on the outside of the body. During the internal examination, Jones did not notice any evidence of injury on the victim's neck but was not surprised because when a choke-hold or sleeper hold is performed, "it is more common not to find injuries." Jones also noted that the victim had an enlarged heart, weighing about 565 grams, which was consistent with the victim's history of high blood pressure. In addition, the victim's brain had begun to swell, which is expected when someone is having a sleeper hold applied. The

toxicology report was positive for cocaine and benzoylecgonine, which results from the breakdown of cocaine, and her blood-alcohol level was one and-a-half times the legal limit. In Jones's opinion, within a reasonable degree of medical and scientific certainty, the victim died as a result of strangulation. Jones did not see any evidence that the victim died of a heart attack or as a result of a high blood pressure episode. She said the victim "has had high blood pressure and this enlarged heart for probably a number of years, and she didn't die from it prior to this incident."

¶ 10 Officer Jaeho Jung testified that at approximately 7:15 p.m. on September 24, 2008, he and his partner went to 83rd and Throop Streets where a car had rear-ended a motorcycle. Defendant was the driver of the car, and Jung said defendant could not balance without leaning against a fence, had bloodshot, "glossy" eyes, and had breath that smelled of alcohol. Based on these observations, Jung arrested defendant and read defendant his *Miranda* rights. Defendant asked for a lawyer so Jung did not question defendant about the traffic accident or the DUI arrest. Jung took defendant to the police station where they went to the processing room so Jung could ask defendant the necessary processing questions to fill out the paperwork related to making a DUI arrest. Jung had to ask defendant the same processing question multiple times because defendant would say "excessively vulgar things" instead of answering. Defendant called Jung "dumb Chinese or Japanese, white mother f***." Jung did not take offense to the statement because Jung assumed defendant "was trying to figure out what nationality [Jung] was." Defendant also referred to his lawyer as "a Jew but she's not a ho. I f*** her. I f*** her a lot. I don't pay her. I just f*** her. Please tape this because I would like to listen to this as I get my

d*** sucked by her." Defendant's statements were spontaneous and without prompting. About an hour later, Jung was in the restroom with defendant, who was "acting irate" and then screamed "I've got a murder rap, man. Please just tell the judge I did it. March 6, 2004, 5138 Kenwood to where and where I choked her a*** out." Jung was the only person in the bathroom with defendant at the time, although other people were in the vicinity.

¶ 11 Detective James Las Cola testified that he observed a videotaped statement being conducted with defendant. Assistant State's Attorney (ASA) Jeanne Bischoff and a videographer were also present for the statement. The State published defendant's statement to the jury.

¶ 12 The recorded statement shows Bischoff reading the *Miranda* rights to defendant and defendant stating he understood each right after it was read. Defendant said he agreed to have his statement videotaped and signed a form saying the same. During the statement, defendant said when the victim left, he tackled her and put her in a choke hold because he was trying to get his keys back. As the victim was leaving his apartment, defendant begged her "three or four times" for his keys, but she did not turn around, so defendant tackled her and used his body weight to get her down. The victim's back was to defendant, she went down on her knees, and then went face-first onto the ground. The victim was trying to turn over or get up, but defendant would not let her, he was "wrestling" her down for a "good couple minutes." He was leaning on her back and had her in a choke hold. Defendant said the marks on his arm were from putting his arm around the victim's neck. Bischoff asked three times if defendant had his right arm around the victim's neck and defendant agreed he did. Defendant said the victim kept "squirming" so he did not release the "choke hold" or the "pressure." Eventually, when the victim did stop squirming,

defendant released the pressure because he figured she was either tired or unconscious. When the police arrived, defendant was no longer holding the victim, but the officers told defendant not to move and pushed him down and handcuffed him. Defendant was not threatened, nor were any promises made in exchange for the statement, he was not mistreated by the police, Bischoff treated him fairly, he was given food and drink, and he was allowed to use the washroom. Defendant said when he had initially met Bischoff that morning, he asked for a lawyer because he was "kind of scared." Later, when he thought about it and mentioned it to one of the officers, the officer said defendant could still talk to an attorney and it was probably for defendant's "better half." During the statement, Bischoff asked if defendant was the one who told the detective he wanted to talk to the ASA and defendant said yes.

¶ 13 For the defense, Doctor Werner Spitz, an expert in forensic pathology, testified that he reviewed Dr. Jones's autopsy report, the police report, the toxicology report, and medical records to determine the victim's cause of death. Spitz stated that the victim was "markedly overweight" or "morbidly obese." He explained that, as a result, her heart had become enlarged. The victim's heart, based on her height and weight, should have weight about 330 or 350 grams, but in fact weighed over 500 grams. Spitz noted that the victim tested positive for the presence of cocaine and alcohol and testified that someone who had smoked crack cocaine, drank alcohol, had an enlarged heart and high blood pressure, who spent five minutes pounding on doors and windows, and who was involved in a verbal altercation would be greatly increasing the workload on the heart. Spitz did not believe the victim died of strangulation because "there's no evidence in the autopsy to support that." Spitz believed that based on the injuries on the victim's face, she was

held across the face, not the neck, and therefore she could not have died by strangulation, because part of the neck, either the blood vessels or the airways, would need to be compressed in order to cause strangulation. Spitz concluded:

> "In my opinion this individual died as a result of exhaustion of the cardiovascular system, in other words of the heart, of the capability of the heart to sustain this extra stimulation of overweight, morbid obesity, in other words in an individual with a large, excessively large heart and - and a cocaine and alcohol and the totality of this altercation with the exertion to go along with it."

¶ 14 On cross-examination, Spitz agreed that reports from police departments or investigators are usually relied upon by medical examiners. He admitted that the victim's brain had swelled but stated that the swelling could have been caused by her hypertension, her weight, the altercation, and the presence of cocaine and alcohol. He also admitted that an abrasion could be caused by "an arm's length of possibilities" and such an injury on the victim's mandible does not necessarily preclude the possibility that she was choked by an arm being around her neck. He also agreed that someone put in a sleeper hold will not necessarily show any injuries. Spitz charged defendant $8,940 in 2005 and an additional $10,800 for reviewing the file, writing an opinion, coming to Chicago to testify in the current 2010 trial. Spitz had received a letter from defense counsel prior to testifying at the present trial that said, "[a]s you have previously testified *** in this matter, I will expect the same or similar opinion as to the cause of death."

¶ 15 Defendant testified on his own behalf. On March 6, 2004, he was living in a garden level

condominium owned by his parents at 5138 South Kenwood. At approximately 2 a.m., he was at home with a woman named Penny Strickland, when someone who he eventually learned was the victim began ringing his doorbell. At first he ignored it, but then the victim started banging on the window. When he realized who it was, defendant repeatedly told the victim to go away. The victim banged on the back door, returned to the front, and kept ringing the bell. Defendant told her to go away again but finally buzzed her into the building because the victim refused to leave and he was worried his neighbors would call the police. The entire process took about 15 or 20 minutes. Defendant told the victim he did not want to see her anymore because she was "bad news." Defendant explained that the last six times the victim had been to his apartment, she had showed him she had a small gun and he said the victim had a "gangbanger mentality." Defendant had also noticed some of his belongings were missing after prior visits from the victim. When defendant opened his apartment door on March 6, 2004, he saw the victim was with a white woman, Schram, who he did not know. The victim showed defendant 10 bags of crack cocaine that she had, and told defendant if he let her in, he could smoke some. Defendant let them in, but made sure to lock all the doors in his apartment because he did not want his belongings to go missing. The victim, Schram, and defendant joined Strickland in the kitchen. Schram took a hit of the crack that was on the table, then had some of defendant's beer and a glass of brandy. She never went to the bathroom. The victim took a "big, giant hit" of her own crack cocaine from her own crack pipe and became "spacey." The victim saw Strickland's purse and grabbed Strickland's ID from the purse. The victim refused to return the ID to Strickland and the two women were about to get in a fight, but defendant jumped between them to prevent it. Defendant

convinced Strickland to sit down. The victim continued to refuse to return the ID and Strickland confronted the victim again. Defendant jumped back in the middle of the two women and told them not to fight. The victim then saw defendant's keys, snatched them, and refused to give them back. The victim said she wanted to leave. Defendant told the victim she could go home but said she had to leave the keys and Strickland's belongings, and defendant offered to open the front door for her. The victim demanded defendant let her out and started throwing things around. The victim then headed for defendant's parents' bedroom door, which leads to the back door of the apartment. The bedroom door was locked, so the victim threw her shoulder against the door until the door flew open. At that moment, defendant grabbed the victim and told her to "get the hell out" of his apartment, and told Strickland and Schram to call the police. The victim told defendant not to mess with her and that she had a gun. Defendant kept asking her for his keys but the victim would not return them. Defendant followed the victim out the back door and saw the victim reach into her purse. Defendant moved to stop the victim from pulling out anything from her purse, but the victim snatched the purse away and "smacked [defendant] upside the head" which threw defendant into a daze. The victim hit him again with her purse, dropped her purse, then the victim punched defendant, "throwing combinations at [him] like Muhammad Ali." Eventually defendant grabbed the victim and used his weight to bring her down to the ground. They wrestled "for a little while." At some point, defendant saw Schram come out and defendant asked Schram to find his keys. Schram ran into the apartment twice. After she ran in the second time, defendant did not see Schram again until right before the police arrived. Defendant continued wrestling with the victim, who was still moving around. He never

heard the victim gurgling and he said she was moving around the whole time they were wrestling. When the police arrived, defendant was no longer wrestling with the victim because he was "exhausted" and he immediately stood up and said "thank god." The police pushed defendant to the ground and handcuffed him, then shackled defendant around his ankles. Eventually defendant was transported to the police station. Defendant told the police he did not want to speak with them and that he wanted a lawyer. He asked if he could call a family member but they did not let him immediately. They put defendant in a room and let him make a phone call about an hour later. During the hour, Detective Las Cola kept asking defendant if defendant was sure he did not want to talk. When Las Cola told defendant that the victim had died, defendant started crying because he had not known the victim's condition. Defendant decided to talk to the police because Las Cola said it would be in defendant's best interest. Defendant never intended to kill the victim. Defendant started talking to Las Cola and another detective. When ASA Bischoff arrived, defendant said he did not want to talk to her. Las Cola again told defendant talking would be in defendant's best interest and defendant agreed to speak with Bischoff. Defendant asked Las Cola to get his glasses and the victim's purse because he believed the purse had a gun in it. Las Cola retrieved defendant's glasses but could not find the purse. Defendant said he was still intoxicated and "very drunk" during his statement.

¶ 16 Although in the statement defendant said he had the victim in some sort of "choke hold," he was not sure exactly what kind of hold it was. He had his arm around her, but he was not sure where he had his arm. Defendant said there was "no way" he was on top of the victim because he was exhausted and she was "very strong" and they had been back to back. When the victim

stopped using force, defendant relaxed a bit. Defendant never intended to strangle the victim, he was just attempting to hold her until the police arrived.

¶ 17 On cross-examination, defendant said he had served in the Army Reserves as a personal action specialist and was trained in combat, but not hand-to-hand combat. He admitted that he and Strickland had been getting high on crack cocaine and drinking the night of the incident and he admitted he never saw the victim with a gun that night. Defendant said that he removed his glasses before he went outside because he did not want them to break. When he and the victim were outside, defendant was sitting on the ground, they were back to back, and he had his arm around her head. Defendant told Las Cola he was afraid of ASA Bischoff because she walked into the room "like Darth Vader," not because she was smoking and she told him she was a lawyer, but not his lawyer. Defendant also denied ever saying anything to Officer Jung about choking a woman in 2004.

¶ 18 In rebuttal, the State called Detective Las Cola who testified that after ASA Bischoff arrived, defendant told Las Cola that he was scared because she was smoking and she told him she was a lawyer, but not his lawyer. Defendant did not tell Las Cola he wanted an attorney until after Bischoff introduced herself to defendant. Las Cola testified that defendant asked for his glasses but did not ask anyone to get a purse as far as Las Cola was aware. Las Cola also said that he "didn't believe [defendant] was intoxicated. He had been drinking."

¶ 19 The parties then stipulated that if Las Cola were recalled, he would testify that defendant signed a consent form to search for his glasses and the purse. The glasses were retrieved but the purse was not.

¶ 20 During closing arguments, the State argued that although the victim was not a perfect person, she did not deserve to die, and that Schram and the police officers testified credibly that they saw defendant strangling the victim in a choke hold. The State then compared the findings of Dr. Jones and Dr. Spitz, saying in part:

> "Dr. Jones told you she didn't see any evidence on the outside of the neck. Dr. Jones also told you she opened up the neck structure, saw no evidence of injury to the neck structures.
>
> Doctor, is that consistent with being choked to death in a sleeper hold? Absolutely. That is what she told you. That is what her opinion was, not what Werner Spitz has to put out there yesterday afternoon for 19 thousand plus. She never once said those injuries on Ada's face were caused by the choking."
>
> We have in fact proven that the defendant choked Ada Allen. Those were his acts. It wasn't high blood pressure. It wasn't morbid obesity. It wasn't exertion from swinging around a purse like some crazy woman, or banging on a window. It had nothing to do with that.
>
> It had everything to do with having her neck in the crook of this man's arm. That is why she died. And that is what she told you."

The State also argued that the evidence showed defendant had the required intent to kill the

victim, saying:

> "What he told you a couple hours after he choked her to death, he said those injuries in the crook of his arm came from Ada's neck.
>
> ***
>
> Could those red marks be consistent with a tight hand? I suppose that is a fair inference. Another fair inference, ladies and gentlemen, is those red marks are caused by his left hand pulling as hard as he can to make sure that that choke hold does exactly what he wants it to do.
>
> Don't forget Dennis Edwards, Army Reservist, wants you to believe they don't teach hand to hand combat in the military anymore.
>
> Ladies and gentlemen, he knew exactly what he was doing when he put Ada into that choke hold. He was killing her. That was his intent."

¶ 21 The defense also discussed the opinions of Dr. Jones and Dr. Spitz in its closing argument. Counsel observed that Jones recorded the injuries on the victim's face in her autopsy report, and argued she wrote it down "because that was part of what occurred." Then counsel said:

> "Dr. Spitz, who is also a medical examiner of several years.

He is a noted forensic scientist. As you know he wrote a book. In fact the State used his own book to show about the two holds. What did he say about that? He said, no. Neither one of those holds were used.

Now, the State's showing his own book, drawings are taken out. He's viewing the information. He said neither is possible. He said physical, scientific evidence shows someone's arm was across her face, the lower part. That is what Dr. Jones said. She said that is where the scars were. And that is what happened.

And unlike Dr. Jones, Mr. Spitz went into a lot of detail how somehow morbidly obese, and they are out stressing and doing things of that nature, could have easily succumbed to a heart attack. Which sadly is what happened."

Defense counsel also argued:

"Speaking of beating on people, I know Mr. Edwards is very animated. You can probably tell. But one thing that amazed me, he mentioned and admitted in open court that a woman was beating his a***.

Most men wouldn't say that. Most men would never say a woman would beat me. It is just not in most men's nature.

You know why he said that? Because it was true. This

> 6'1", 280 pounds woman was wailing on him. What does he do? He may not have done rope a dope like he said and all that, but he tried to protect himself."

Defense counsel said that defendant "testified truthfully, granted animated. ***. He is telling you what happened with feeling. Because that is what happened." Counsel then continued:

> "You heard me ask him, did you strangle her? He said, no. He admits he was high on both occasions he got arrested.
>
> When asked did he kill her, unequivocally, no. did he ever intent [*sic*] to kill her? Unequivocally, no. Did he strangle her? Not by the medical examiner evidence."

¶ 22 In rebuttal, the State responded:

> "THE STATE: Ladies and gentlemen, a defendant is presumed innocent. He is not presumed honest when he takes the stand.
>
> You have to evaluation [*sic*] his testimony in the light of the evidence along with everybody else. He doesn't get a break because he's the defendant.
>
> Today that was an amazing display of, get me out of this, I didn't commit a murder, by the defendant. He said anything that he had to admit. And he denied everything that he couldn't admit.
>
> What did he tell you? He said about a hundred times he

tried to say, I was so intoxicated. I was intoxicated even when questions weren't pending, I am intoxicated.

Intoxication is not a defense. It is not. So, what is he trying to do? He's trying to get you to use your bias, sympathy and prejudice to help him out. I am intoxicated. I am high. I am drunk. It is not a defense.

Ignore that. And realize that he has a bias and motive to testify. He is on trial for murder. He doesn't want to be found guilty.

He is going to say anything so that you will not find him guilty. But what you have to do, you have to look at his testimony in light of all the evidence. All of it.

There was a lot of talk about choke hold, sleeper hold, zebra hold, bar hold. It is like coke, pop and soda. It is the same thing. Some people call it soda. Some people call it pop. Some people call it coke. It is the same thing.

What we are talking about is having a neck in the crook of an arm, pulling it tight and holding it with the other arm. Okay.

You can call that a choke hold. You can call that a sleeper hold. You can call it whatever you want. It is coke, soda and pop. It is the same thing.

What happens when you do that? Remember what Dr. Jones said. The bigger the area the pressure is moving around. So, you won't have any injuries.

Guess what, that bible that Dr. Spitz wrote said the same thing, but when Dr. Spitz took the stand you saw $19,800 worth of testimony. He was going to say anything for that.

Remember the letter -

DEFENSE COUNSEL: Objection.

THE COURT: Overruled.

THE STATE: He gets a letter from the defense attorney. I expect your opinion to be the same. Wow. Is that an independent evaluation? I expect it to be the same? Come on.

Dr. Spitz didn't even remember what day his last autopsy was. Let's see, looking at my fingers it could have been yesterday or the day before.

What day was it really? You can't remember? Really? That was $19,800 worth of testimony."

¶ 23 Deliberations began at 3:50 p.m. At 6:20 p.m., the circuit court received a note from the jury asking for a legal description of "great bodily harm." Both parties agreed with the court's interpretation that the jury was looking for a legal definition of the term. The court observed that pursuant to case law, the term "great bodily harm" was not susceptible to a precise definition, but

that there must be "an injury of 'graver and more serious character' " than what is involved in ordinary battery. See *People v. Mays*, 91 Ill. 2d 251 (1982); *In re J.A.*, 336 Ill. App. 3d 814 (2003); *People v. Costello*, 95 Ill. App. 3d 680 (1981); *People v. Smith*, 6 Ill. App. 3d 259 (1972). The court read the parties its proposed instruction and the following conversation occurred:

> "DEFENSE COUNSEL: My concern is that it seemed to be being geared toward the definition of what a battery would be. And great bodily harm is an entirely different concept.
>
> It kind of allows for like when you talk about, car [*sic*] some sort of injury like lacerations, things of that nature. That could be something relatively minor.
>
> THE COURT: For bodily harm it would be. I agree with you. I am going on to define, saying great bodily harm is in fact more than that.
>
> In order to know what great bodily harm is, they have to know what bodily harm is and go on from there.
>
> DEFENSE COUNSEL: Right.
>
> THE COURT: Just case law defines bodily harm as I have read it into the record. That it is like the laceration, bruises or abrasions, but it is whether temporary or permanent and go on to say, great bodily harm doesn't have a precise definition, but

requires something more than grave or more serious.

DEFENSE COUNSEL: Okay. But in your response it sounded like you said that you started with it required some sort of, did you define bodily harm first?

THE COURT: Yes.

DEFENSE COUNSEL: Okay. If you have defined bodily harm.

THE COURT: That was my proposal as I am writing it out. Starting with the term bodily harm requires some sort of physical pain or damage to the body like lacerations, bruises or abrasions, whether temporary or permanent. Then go on to talk about great bodily harm not being susceptible to precise definition, but must be injury graver or more serious than that involved in bodily harm.

DEFENSE COUNSEL: Bodily harm.

THE COURT: Then go further to say it is non synonymous with permanent injury.

DEFENSE COUNSEL: Okay.

THE COURT: Is that acceptable to you?

DEFENSE COUNSEL: That is acceptable, Judge."

¶ 24 At 6:45 p.m. the court responded as follows:

"The term 'bodily harm' requires some sort of physical pain

> or damage to the body, like lacerations, bruises or abrasions, whether temporary or permanent.
>
> Although the term 'great bodily harm' is not susceptible of precise definition, there must be an injury of a graver and more serious character than is involved with bodily harm.
>
> The term 'great bodily harm' is not synonymous with permanent injury."

¶ 25 At 7:30 p.m., the jury found defendant guilty of first degree murder. Subsequently, defendant filed a "Motion for Acquittal Notwithstanding the Verdict [or] in the Alternative for a New Trial" in which he argued, in pertinent part, that the court erred in providing a definition for "great bodily harm" in response to the jury question. The court denied the motion, saying:

> "In summary, I find that there was no objection posed at the time, that you articulated that you were in full agreement with the answer. And even going beyond that, I think it was an appropriate answer to the question based strictly on the case law itself, and it didn't point them in one direction or another. Quite easily, they could have come back with a different verdict, but they obviously chose not to based upon all the facts."

¶ 26 The circuit court sentenced defendant to a prison term of 22 years.

¶ 27 In the present appeal, defendant first contends that the trial court erred by creating its own definition of "great bodily harm," arguing that it "misled the jury and directed them to make a

guilty verdict." The State first responds that defendant affirmatively waived his objection by inviting the alleged error when he expressly agreed to the circuit court's response.

¶ 28 Under the doctrine of invited error, a defendant cannot request to proceed in one manner and then later argue on appeal that the agreed-to course of action was in error. *People v. Carter*, 208 Ill. 2d 309, 319 (2003). More specifically, "[w]hen a defendant acquiesces in the trial court's answer to a question from the jury, the defendant cannot later complain that the trial court's answer was an abuse of discretion." *People v. Averett*, 237 Ill. 2d 1, 23-24 (2010). Here, although defense counsel initially expressed some concern about the court's proposed response to the jury question, ultimately he told the court that the response was acceptable. Because defendant expressly agreed to the response, he cannot now challenge that response as error. *Id*.

¶ 29 However, even if he had not affirmatively acquiesced to the court's response to the jury, defendant has forfeited the issue on appeal because he failed to object to it at trial. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (to preserve an issue for review on appeal, the defendant must both object at trial and file a written posttrial motion raising the issue). Defendant argues that to the extent the issue was forfeited, it may nonetheless be reviewed as plain error.

¶ 30 The plain error doctrine is a limited and narrow exception to the general forfeiture rule. *People v. Walker*, 232 Ill. 2d 113, 124 (2009). It allows a reviewing court to consider an error that was not properly preserved if: (1) a clear and obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) a clear and obvious error occurred and the error is so serious that it affected the fairness of the defendant's trial and undermined the integrity of the judicial process. *People v. Piatkowski*,

225 Ill. 2d 551, 565 (2007). The defendant has the burden of persuasion under either prong and, if the defendant fails to satisfy his burden, " 'procedural default must be honored.' " *Walker*, 232 Ill. 2d at 124 (quoting *People v. Keene*, 169 Ill. 2d 1, 17 (1995)). First, we will consider whether any error occurred, because "without error there can be no plain error." *People v. Smith*, 372 Ill. App. 3d 179, 181 (2007).

¶ 31 Generally, " '[j]urors are entitled to have their questions answered.' " *People v. McSwain*, 2012 IL App (4th) 100619, ¶ 26 (quoting *People v. Reid*, 136 Ill. 2d 27, 39 (1990)). Therefore, when the jury poses an explicit question on a point of law arising from facts over which there is doubt or confusion, it is the circuit court's duty to provide instruction. *People v. Davis*, 393 Ill. App. 3d 114, 126-27 (2009). When a circuit court responds to a jury's question, it must do so correctly and without misstating the law. *People v. Leach*, 2011 IL App (1st) 090339, ¶ 15. However, a court may properly decline to answer a jury question in certain scenarios, including where a response would serve no useful purpose or mislead the jury, or where the response would likely direct the verdict one way or the other. *People v. Millsap*, 189 Ill. 2d 155, 161 (2000). In addition, a circuit court has no right to respond to a jury question that requires it to reach a conclusion on its view of the evidence. *Davis*, 393 Ill. App. 3d at 127.

¶ 32 Both parties state that a trial court's decision whether to answer a jury question and how to answer a jury question is reviewed for an abuse of discretion, citing *People v. Falls*, 387 Ill. App. 3d 533, 537 (2008), and *Davis*, 393 Ill. App. 3d at126. However, according to our research, determining the propriety of a circuit court's response to a jury question requires a two-part analysis. *Leach*, 2011 IL App (1st), ¶ 16 (citing *Gray*, 346 Ill. App. 3d 989, 994); see also

McSwain, 2012 IL App (4th) 100619, ¶ 27 (following the two-step analysis set out in *Leach*). First, a court's decision whether to respond to a jury question is reviewed for an abuse of discretion. *Id*. Then, if the trial court has responded to the jury question, we must consider whether the response to the question was correct and, because it is a question of law, it is reviewed *de novo*. *Id*. We note that in the cases on which the parties rely for the standard of review, both appellate courts found the circuit court abused its discretion in determining whether to answer the jury questions. See *Falls*, 387 Ill. App. 3d at 537 (finding the trial court abused its discretion in refusing to answer the jury's questions about a critical point of the law); *Davis*, 393 Ill. App. 3d at 129 (holding that the court abused its discretion when it responded to a factual inquiry by the jurors). Therefore, the reviewing courts never had to reach the question of whether the circuit court's actual response to a jury question was in error. We agree with the *Leach* court that a question of law should be reviewed *de novo* and, accordingly, we choose to follow the two-step analysis set out in that case. *Leach*, 2011 IL App (1st) 090339, ¶ 16.

¶ 33 Here, we find the circuit court properly chose to respond to the jury's question. The jury asked for the"legal description" of great bodily harm, an explicit question on a point of law requiring the court's response. Responding did not require the court to making any determination on the evidence. Where, as here, a jury "makes explicit its difficulties, the court should resolve them with specificity and accuracy." *People v. Childs*, 159 Ill. 2d 217, 229 (1994). Therefore, the court's decision to respond was not an abuse of discretion.

¶ 34 Furthermore, we find the trial court responded to the jury question correctly and without misstating the law. In deciding how to respond, the court involved both parties in an extensive

discussion about the proper response. In addition, the record shows that the circuit court did not "create" any portion of its response, but rather relied on four specific cases to clarify the jury's understanding of "great bodily harm," including *Mays*, 91 Ill. 2d 251, *In re J.A.*, 336 Ill. App. 3d 814, *Costello*, 95 Ill. App. 3d 680, and *Smith*, 6 Ill. App. 3d 259. Based on these cases, the court properly informed the jury that "the term 'great bodily harm' is not susceptible of precise definition" but that it must be "of a graver and more serious character than is involved with bodily harm." See *In re J.A.*, 336 Ill. App. 3d at 815-17; *Costello*, 95 Ill. App. 3d at 684; *Smith*, 6 Ill. App. 3d at 264. The court also properly informed the jury of the definition of bodily harm, (see *Mays*, 91 Ill. 2d at 257), which is susceptible to a precise definition, and that great bodily harm is not synonymous with permanent injury (see *Smith*, 6 Ill. App. 3d at 264).

¶ 35 We disagree with defendant's assertion that the court's response either misled the jury or directed the verdict. First, as we previously noted, the court relied on specific case law to formulate its response and therefore did not mislead the jury but instead properly informed them as to the law. Moreover, the record shows that the court received the jury's question about two and a half hours after the jury began deliberating. After receiving the court's response, the jury asked no further questions and deliberated another 45 minutes before coming to a verdict. We do not believe, as the defendant argues, that the extra 45 minutes of deliberation "shows that the jury was confused about the definition of great bodily harm and conflicted about the verdict, and the trial court’s answer to their question directed them to a guilty verdict." It is true that "notably brief deliberations invite an inference that the circuit court's comments were the primary factor in the procurement of a verdict." *People v. Branch*, 123 Ill. App. 3d 245, 252 (1984). However, an

additional 45 minutes of deliberation is not "notably brief" and has been held to be a sufficiently lengthy period of time to suggest the verdict was not influenced by the court. See *People v. Steidl*, 142 Ill. 2d 204, 232 (1991) (finding an additional 45 minutes of deliberation following notice of sequestration plans did not prejudice defendant's right to a fair trial); *People v. Hanks*, 210 Ill. App. 3d 817, 823 (1991) (same).

¶ 36 Defendant also argues that the court's response was in error because it relied on battery cases, and "the elements of battery and aggravated battery are different than for murder." However, this argument ignores the fact that aggravated battery and first-degree murder both require intent to cause great bodily harm to another. See 720 ILCS 5/9-1(a) (West 2002) (a person commits first degree murder where that person kills an individual and, "in performing the acts which cause the death" he either intends to kill or do great bodily harm to another or he knows that his acts create a strong probability of death or great bodily to another); 720 ILCS 5/12-4(a)(1) (West 2002) (a person commits aggravated battery when in committing a battery that person knowingly causes great bodily harm to another). Defendant does not argue, nor does he cite case law to suggest, that the two statutes define the term great bodily harm differently. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (the argument section of appellant's brief "shall contain the contentions of the appellant and the reasons therefore, with citation of the authorities and pages of the record relied on"). Under these circumstances, we find the circuit court's response to the jury question was proper. Because we find no error, the issue has been forfeited.

¶ 37 Defendant next argues that, if we do not find that the trial court's response to the jury question was plain error, then in the alternative we should find he received ineffective assistance

of trial counsel based on counsel's failure to object to the circuit court's response.

¶ 38 To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and he was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel's performance is considered deficient if " 'counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.' " *People v. Cooper*, 2013 IL App (1st) 113030, ¶ 53 (quoting *Strickland*, 466 U.S. at 687). To show prejudice, a defendant must show that but for counsel's actions there is a reasonable probability that the trial outcome would have been different. *Cooper*, 2013 IL App (1st), ¶ 12. If the defendant fails to show both prongs of the *Strickland* test, his claim will fail. *People v. Manning*, 334 Ill. App. 3d 882, 892 (2002).

¶ 39 Here, we find that counsel was not deficient for failing to object to the trial court's response to the jury question because, as we noted above, the circuit court's response to the jury was proper. Moreover, defense counsel expressed concern about the circuit court's response "being geared toward the definition of what a battery would be" and only agreed to the court's response after the court clarified that it was going to define bodily harm because "[i]n order to know what great bodily harm is, they have to know what bodily harm is and go on from there." Counsel's actions did not constitute errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Cooper*, 2013 IL App (1st) 113030, ¶ 53 (quoting *Strickland*, 466 U.S. at 687).

¶ 40 Additionally, even if defense counsel's performance was deficient, defendant would not be able to show he was prejudiced by counsel's actions because the evidence at trial was

overwhelming. Three witnesses saw defendant standing over the victim and choking her: Schram, and Officers Thomas and Thurman. Schram testified that she saw defendant on top of the victim while the victim was on the ground, and that she knew defendant "was choking [the victim], he was strangling [the victim]." Schram heard the victim making noises "like somebody who is being choked." Officers Thomas and Thurman both testified that, as they approached the scene, they saw defendant on top of the victim, straddling her, with his arm around the victim's neck. Both also specifically said the victim's neck was in the crook of defendant's arm. In his statement, defendant admitted three times that he had his arm around the victim's neck and said he did not release the "choke hold" or the"pressure" until the victim stopped squirming. Four years later, after being arrested for a DUI, defendant yelled,"I've got a murder rap, man. Please tell the judge I did it. March 5, 2004, 5138 Kenwood to where and where I choked her a*** out." Dr. Jones testified that it was her opinion that the victim died as a result of strangulation, based on her internal and external examination of the victim's body, an investigator's report about the circumstances surrounding the victim's death, and a toxicology screening. Jones also explained that it was common not to see external or internal injuries on someone's neck when a choke-hold or sleeper hold is performed.

¶ 41 We acknowledge that defendant's expert, Dr. Spitz, concluded that the victim died as a result of the combination of her high blood pressure, enlarged heart, her obesity, her use of cocaine and alcohol, and her physical exertion that night. Defendant argues that "[w]here there is a difference in opinion as to the cause of death, it is apparent that the evidence was closely balanced." However, defendant provides no citation to authority to support his argument. See

Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (the argument section of appellant's brief "shall contain the contentions of the appellant and the reasons therefore, with citation of the authorities and pages of the record relied on"). In addition, Dr. Spitz admitted that someone put in a sleeper hold would not necessarily show injuries. Where three witnesses saw defendant choking the victim and the medical examiner concluded that the victim died as a result of strangulation, we do not believe there was a reasonable probability that the trial outcome would have been different but for counsel's alleged error, failing to object to the court's response to the jury question. Therefore, defendant cannot show he received ineffective assistance of counsel.

¶ 42 Defendant next contends that the State engaged in prosecutorial misconduct during closing and rebuttal arguments by undermining the defense expert's credibility and by implying that defendant was lying on the stand. As an initial matter, defendant admits that he only objected to one of the comments he is contesting on appeal. However, defendant argues that the comments not properly preserved may be reviewed as plain error. See *Enoch*, 122 Ill. 2d at 186 (to preserve an issue for review on appeal, the defendant must both object at trial and file a written posttrial motion raising the issue). Therefore, we will first consider if any of the comments were made in error.

¶ 43 The State acknowledges an apparent conflict between two Illinois Supreme Court cases as to the proper standard of review, citing *People v. Wheeler*, 226 Ill. 2d 92 (2007), and *People v. Blue*, 189 Ill. 2d 99 (2000). The First District recognized this conflict in *People v. Hayes*, 409 Ill. App. 3d 612 (2011), explaining that the court in *Wheeler* used a *de novo* standard while in *Blue* and other cases, the court used an abuse of discretion standard. *Hayes*, 409 Ill. App. 3d at 624.

However, based on the supreme court's more recent pronouncement in *Wheeler*, we will review this issue *de novo*.

¶ 44 The State has wide latitude to comment on and draw reasonable inferences from the evidence in closing argument. *People v. Lane*, 256 Ill. App. 3d 38, 56 (1993). In addition to commenting on the evidence, a prosecutor may make any reasonable and fair inferences based on the evidence. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). Comments made during rebuttal argument are not improper if they were invited by the defense and comments made during closing arguments must be viewed in the context of the entire arguments of both parties. *People v. Giraud*, 2011 IL App (1st) 091261, ¶ 43, *aff'd*, 2012 IL 113116. A reviewing court will not reverse a jury's verdict based on improper closing arguments unless the comments were of such magnitude that they resulted in substantial prejudice to the defendant and constituted a material factor in his conviction. *People v. Gonzalez*, 388 Ill. App. 3d 566, 587 (2008).

¶ 45 Defendant first argues that the State "repeatedly argued that Dr. Spitz gave '$19,800 worth of testimony' " and that by doing so the State "accused Dr. Spitz of lying and saying whatever the defense wanted him to say since he was being paid $19,800." Defendant concludes that the State, therefore, effectively charged defendant with "fabricating a defense and directing the witnesses to testify accordingly." See *People v. Aguirre*, 291 Ill. App. 3d 1028, 1035 (1997) (noting that it is "blatantly improper to suggest that the defense is fabricated, as such accusations serve no purpose other than to prejudice jury").

¶ 46 The record shows that the State made three references to Dr. Spitz's payment throughout its closing and rebuttal arguments. In closing argument, the State went through Dr. Jones's

testimony extensively, then said "[t]hat is what she told you. That is what her opinion was, not what Werner Spitz has to put out there yesterday afternoon for 19 thousand plus." In rebuttal argument, again discussing the two expert opinions, the State said:

> "THE STATE: Guess what, that bible that Dr. Spitz wrote said the same thing, but when Dr. Spitz took the stand you saw $19,800 worth of testimony. He was going to say anything for that.
>
> Remember the letter -
>
> DEFENSE COUNSEL: Objection.
>
> THE COURT: Overruled.
>
> THE STATE: He gets a letter from the defense attorney. I expect your opinion to be the same. Wow. Is that an independent evaluation? I expect it to be the same? Come on.
>
> Dr. Spitz didn't even remember what day his last autopsy was. Let's see, looking at my fingers, it could have been yesterday or the day before.
>
> What day was it really? You can't remember? Really? That was $19,800 worth of testimony."

¶ 47 Generally, " '[t]he credibility of a witness is a proper subject for closing argument if it is based on the evidence or inferences drawn from it.' " *People v. Hickey*, 178 Ill. 2d 256, 291 (1997) (quoting *People v. Hudson*, 157 Ill. 2d 401, 445 (1993)). Additionally, comments on the compensation of a witness are not improper as long as the witness's compensation was in

evidence or could be inferred from the evidence. *People v. Coulter*, 230 Ill. App. 3d 209, 219 (1992) (citing *Hunter v. Sukkar*, 111 Ill. App. 3d 169, 173 (1982)); see also *Hickey*, 178 Ill. 2d at 291 (finding that the State's comments in closing argument about the defense expert's increase in salary when he began testifying as an expert in criminal trials were acceptable comments on the expert's potential bias). Although we conclude that it is proper to comment on the fact that an expert witness was compensated in exchange for his testimony, we find that it is improper to suggest that an expert witness testified a certain way in exchange for his compensation. Here, the State arguably crossed that line, particularly with its suggestion that Dr. Spitz "was going to say anything" for his $19,800 compensation. Therefore, for the purposes of our review, we will consider whether the State's comments rise to the level of plain error.

¶ 48 Defendant argues that plain error review is appropriate first because the evidence was closely balanced. However, based upon our review of the evidence as outlined above, we find the evidence was not closely balanced. The State presented three eyewitnesses who testified that they saw defendant on top of the victim, choking her. Both police officers said they saw defendant with his arm around the victim's neck. The same day, defendant confessed to having the victim in a choke-hold, and admitted that he had his arm around the victim's neck and applied pressure until she stopped squirming. Then, in 2008, defendant spontaneously told Officer Jung that he had choked a woman on March 6, 2004. In addition, Dr. Jones concluded that the cause of death was strangulation. In light of the evidence presented, defendant cannot meet his burden under the first prong of the plain error review.

¶ 49 In regard to the second prong of the plain error doctrine, defendant argues only that "the

errors were so fundamental and of such magnitude that [he] was denied a fair trial," but does not discuss how the second prong applies in the instant case with respect to the comments about Dr. Spitz. This single reference is not sufficient to meet defendant's burden to show plain error and therefore the issue is forfeited. See *People v. Nieves*, 192 Ill. 2d 487, 503 (2000) (finding that the failure to explain why the error was "so severe that it must be remedied to preserve the integrity of the judicial process" waived plain error on appeal); Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (the argument section of appellant's brief "shall contain the contentions of the appellant and the reasons therefore").

¶ 50 As to the improper comment that was properly preserved for review, we conclude that the error was harmless because the comment did not constitute a material factor in defendant's conviction. The evidence presented at trial was overwhelming and, in addition, the circuit court instructed the jury that closing arguments were not to be considered as evidence. Absent evidence to the contrary, we will presume the jury followed the court's instructions. See *People v. Taylor*, 166 Ill. 2d 414, 438 (1995) (a jury is presumed to follow the instructions given by the court). Given the overwhelming evidence and the court's proper instruction to the jury, we cannot find the State's comment resulted in substantial prejudice to defendant and reversal of the jury's verdict would not be proper. *Gonzalez*, 388 Ill. App. 3d at 587.

¶ 51 Defendant also contends that various State comments in closing and rebuttal arguments improperly implied that defendant was lying on the stand. Defendant again argues that, as a result of these comments, the State "accused the defense of fabricating its defense."

¶ 52 In closing argument, the State argued the evidence showed defendant had the required

intent to kill the victim, during which the State said:

> "Don't forget Dennis Edwards, Army Reservist, wants you to believe they don't teach hand to hand combat in the military anymore.
>
> Ladies and gentlemen, he knew exactly what he was doing when he put Ada into that choke hold. He was killing her. That was his intent."

In rebuttal, the State argued:

> "You have to evaluation [*sic*] his testimony in light of the evidence along with everybody else. He doesn't get a break because he's the defendant.
>
> Today that was an amazing display of, get me out of this, I didn't commit a murder, by the defendant. He said anything that he had to admit. And he denied everything he couldn't admit.
>
> ***
>
> Intoxication is not a defense. It is not. So, what is he trying to do? He's trying to get you to use your bias, sympathy and prejudice to help him out. I am intoxicated. I am high. I am drunk. It is not a defense.
>
> Ignore that. And realize that he has a bias and motive to testify. He is on trial for murder. He doesn't want to be found

guilty.

He is going to say anything so that you will not find him guilty."

¶ 53 When a defendant testifies at trial, his testimony is to be treated no differently than that of any other witness. *People v. Barney*, 176 Ill. 2d 69, 74 (1997). In *Barney*, our supreme court observed that:

> "Where *** a prosecutor suggests to the members of the jury that a defendant's testimony is biased because he has an interest in the outcome of the case, the prosecutor is not telling them anything they do not know and are not already thinking. The notion that the possibility of conviction may color a defendant's testimony is so basic, so rooted in common experience and human nature, that it would be taken into account by the jurors whether the prosecutor mentioned it or not. When the prosecution makes the point during closing argument, it is merely stating the obvious." *Barney*, 176 Ill. 2d at 73.

¶ 54 Here, defendant chose to testify in his own defense and we find the State was properly commenting on defendant's credibility as a witness. Contrary to defendant's argument, at no time did the State accuse the defense of wrongdoing, fabrication, or trying to free a client through trickery or deception. Moreover, in his closing argument, defense counsel argued that defendant "testified truthfully," so the State's comments in rebuttal on defendant's credibility were invited

by defense counsel.

¶ 55 Defendant's reliance on *People v. Abadia*, 328 Ill. App. 3d 669 (2001), is misplaced. First, the defendants in *Abadia* did not testify. *Abadia*, 328 Ill. App. 3d at 672-73. In addition, the prosecutor blatantly accused the defense of fabrication, with comments such as it took "four years for two teams of defense lawyers to come up with and concoct the various theories and ideas of what might have happened and what they wished the evidence would show" and "[y]ou should ask yourself why lawyers for these defendants would stand here and make up stories." *Id.* at 681. *Abadia* is inapplicable to the present case.

¶ 56 Defendant also claims that even if no individual error is sufficient enough to warrant a new trial, the cumulative effect of the State's improper comments deprived him of a fair trial.

¶ 57 The supreme court has held that although individual errors may not require reversal, the same errors considered together may have the cumulative effect of denying defendant a fair trial. *People v. Speight*, 153 Ill. 2d 365, 376 (1992). However, where no individual claim of error amounts to reversible error, the alleged errors cannot cumulatively warrant a new trial. *People v. Dresher*, 364 Ill. App. 3d 847, 863 (2006). Here, since none of the comments amount to reversible error, there is no cumulative error.

¶ 58 Defendant's last contention is that he was denied a fair trial when the court allowed the State to introduce prior statements of defendant’s that were irrelevant, prejudicial, and damaging to his character. Specifically, defendant argues that Officer Jung should not have testified that defendant called him a "dumb Chinese or Japanese, white mother f***" or that defendant said his lawyer was "a Jew but she’s not a ho. I f*** her. I f*** her a lot. I don’t pay her. I just f***

her. Please tape this because I would like to listen to this as I get my d*** sucked by her."

¶ 59 An evidentiary ruling is within the sound discretion of the circuit court and will only be reversed if the circuit court abused its discretion. *People v. Caffey*, 205 Ill. 2d 52, 89 (2001). " 'An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court.' " *Davis*, 393 Ill. App. 3d at 126 (quoting *People v. Hall*, 195 Ill. 2d 1, 20 (2000)). A decision to admit or deny evidence cannot be made in isolation, and the circuit court must consider a number of considerations, including questions of reliability and prejudice. *Caffey*, 205 Ill. 2d at 89. A trial court exercises its discretion when it bases its ruling "on the specific circumstances of [the] case and not on a broadly applicable rule." *Id*. at 89-90.

¶ 60 Here, the testimony about defendant's statements to Officer Jung was necessary to establish the context in which defendant made his spontaneous declaration that he had choked a woman on March 6, 2004. In 2008, defendant was arrested for a DUI after crashing his car into the back of a motorcycle. Jung was attempting to fill out paperwork related to the arrest, which required Jung to ask defendant processing questions. Jung testified that he had to ask defendant the same question multiple times because defendant kept yelling "excessively vulgar things" instead of responding, such as calling Jung a "dumb Chinese or Japanese, white mother f***" and saying that his lawyer was "a Jew but she's not a ho. I f*** her. I f*** her a lot." Jung's trial testimony was brief and provided context for defendant yelling from the bathroom: "I've got a murder rap, man. Please tell the judge I did it. March 6th, 2004, 5138 Kenwood to where and where I choked her a*** out." Jung also testified that defendant was intoxicated and that

defendant's statements did not offend him because Jung assumed defendant was trying to determine Jung's nationality. Defendant's comments to Jung were necessary to show defendant's emotional state at the time that he made a spontaneous confession to murder. Under these circumstances, the circuit court's decision was not arbitrary, fanciful, or unreasonable.

¶ 61 Finally, even if the court did abuse its discretion in allowing Jung to testify to the contested statements, the error would be harmless. An improper evidentiary ruling will be considered harmless if the State can establish beyond a reasonable doubt that the error did not contribute to the jury's verdict. *People v. Wright*, 2012 IL App (1st) 073106, ¶ 128 (citing *People v. Stechly*, 225 Ill. 2d 246, 304 (2007)). A reviewing court may find harmless error where the remaining evidence at trial was overwhelming. *Wright*, 2012 IL App (1st) 073106, ¶ 128. As discussed above, the evidence in the present case was overwhelming and, in light of the overwhelming evidence, we find that Jung's testimony about defendant's racist, derogatory, and vulgar remarks did not contribute to the jury's verdict.

¶ 62 We are not persuaded by defendant's reliance on *People v. Maounis*, 309 Ill. App. 3d 155 (1999). There, the State introduced a statement from the defendant, who was charged with armed robbery, as evidence of motive, that he had purchased and consumed alcohol and crack cocaine, patronized a prostitute, and stayed in transient motels around the time of the armed robbery. *Maounis*, 309 Ill. App. 3d at 159. However, the State failed to prove the required burden for establishing motive that the defendant lacked funds and he was addicted. *Id*. at 159-60. Therefore, the court concluded the admitted statement was prejudicial. *Id*. at 160. The court also concluded that elicited testimony that the defendant was not with his wife and family at

Christmas was "entirely unnecessary and improper" because it was not relevant to the issues at trial. *Id*.

¶ 63 Here, the State was not introducing the contested statements as evidence of motive, and therefore had no additional burden it was required to prove to introduce the statements. In addition, the contested statements were relevant to the case because they were providing context to defendant's emotional state when he spontaneously admitted to choking a woman in 2004. *Maounis* is inapposite to the present case.

¶ 64 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 65 Affirmed.