2013 IL App (1st) 111732-U

FIFTH DIVISION
September 12, 2014

No. 1-11-1732

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 8237
	)	
ORLANDO AVILA,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE PALMER delivered the judgment of the court.
Justices McBride and Taylor concurred in the judgment.

O R D E R

¶ 1 ***Held*:** Where statements made by prosecutor in closing argument were largely invited by defense counsel's own closing, and various claims of defense counsel's ineffectiveness did not result in prejudice to his case, no error occurred so as to trigger application of plain error rule; defendant's conviction and sentence were affirmed.

¶ 2 Following a jury trial, defendant Orlando Avila was convicted of first degree murder. Defendant was sentenced to 65 years in prison, which included a 25-year enhancement for personally discharging a firearm during the crime. On appeal, defendant contends various statements made by the prosecution in opening statement and closing argument were prejudicial and misleading and therefore deprived him of a fair trial. Defendant also claims his trial counsel

was ineffective for failing to seek suppression of the lineup and photo array in which he was identified and that counsel displayed a misunderstanding of evidentiary and procedural rules, among other points. We affirm.

¶ 3 Defendant was convicted of the October 31, 2007, murder of Laticia Barrera (Laticia), who was fatally shot in her front yard at 4819 South Seeley in Chicago. The prosecution presented evidence that defendant and another gunman fired shots that struck Laticia as they attempted to harm members of the Two-Six gang.

¶ 4 The State presented the testimony of several witnesses who identified defendant as one of the gunmen. Artemio Rojas, the victim's neighbor, testified he and his family had just returned home from trick-or-treating with Laticia and her three children. Rojas heard shots and saw two gunmen at the corner of 48th and Seeley; the two apparent intended targets of the shooting were running toward Rojas. Rojas testified one of the gunmen wore a black hooded sweater.

¶ 5 Felipe Santiago also witnessed the shooting. Santiago testified that as he parked his car near his residence, he saw two men at the corner of 48th Street and Seeley. Santiago testified the men wore hooded shirts and made hand gestures and screamed before one man fired six shots. Santiago was able to see the faces of both men. Santiago identified defendant in court as the person he saw firing the gun. Santiago, who lived in the victim's neighborhood, testified that the day after the shooting, he viewed a photo array that did not include a photo of defendant, and he did not identify anyone in that array. About a week later, on November 9, 2007, Santiago was shown another photo array and identified defendant as the shooter. Defendant was arrested on November 12, 2007, and placed in a lineup; Santiago viewed that lineup and told police the shooter "looked a lot like" defendant. Defendant was released after that lineup.

¶ 6 Chicago police detective Thomas Carr testified he showed Santiago a photo array that included pictures of Cecelio Rendon and Hector Dominguez because Nemroy Murray (Roy) had identified them as the offenders in another photo array. Both Rendon and Dominguez had been

taken into custody shortly after the shootings but were released after Carr investigated their alibis. Carr testified the investigation of the shooting revealed Murray and Juan Hernandez were the intended victims.

¶ 7 Raynal Watson, who lived several houses away from the victim's residence, testified he was standing in his front yard at 4810 South Seeley when he saw three Hispanic men walking toward the intersection. The men wore black pants and black hooded shirts. Two of the men stood outside a store and exchanged words with two Hispanic men who emerged from the store and displayed a gang sign. Watson said the men who came out of the store were members of the Two-Six gang, and the men in front of the store shot at the Two-Sixers, who ran away. Watson saw the victim had been shot. Watson did not speak to police at the scene.

¶ 8 Christian Barrera (Christian), who is not related to the victim, testified he lived in the 2700 block of South Seeley and was with three friends near 48th Street and Seeley when the shooting took place. Earlier that night, Christian met Guadalupe "Sticks" Martinez at Martinez's house. Two people he knew as Daniel and Roy were also present; Roy was later identified by another witness as Nemroy Murray. Christian testified that Roy was a member of the Two-Six gang. After meeting at Murray's house, Christian and Roy left to throw eggs at cars. Barrera and Roy became separated and Barrera returned to Martinez's house.

¶ 9 Christian testified that he, Martinez and Daniel were talking in Martinez's front yard when he heard a gunshot and crouched down. Christian turned around and saw defendant fire four shots. Defendant was wearing a black hooded sweatshirt. Christian identified defendant in court. Christian saw Roy run away from the area of the shooting. Christian testified that he went home after the shooting and did not speak to police that day because he and his family were not into "snitching."

¶ 10 Martinez testified he and Daniel saw two people wearing hoodies in an alley prior to the shooting. Martinez said he thought they were Saints because they came from what was known as

"Saints territory." Martinez saw the same individuals at the corner of 48th and Seeley and identified one of those people in court as defendant. Although defendant wore a hoodie, the hood did not conceal defendant's face.

¶ 11 Martinez testified he heard defendant yell "Saint love," and saw him point a gun and fire six shots at Roy and Juan Hernandez, whom Christian had identified as a member of the Two-Six gang. The person who was with defendant also fired a gun. Martinez said he did not tell police that he saw the shooters.

¶ 12 Gregorio Reyes testified he had known defendant for a few years and they lived near each other. Reyes was aware of the Latin Saints gang and acknowledged he knew defendant by the nickname "Little Paulina." The prosecutor asked if Reyes also knew "Little Paulina" by the name "Sinister." Reyes responded he did not. Reyes said he was not a member of the Latin Saints gang and was not sure if defendant was a gang member. Reyes denied that defendant's tattoo's represented his membership in the Latin Saints. Reyes denied that defendant had ever admitted to him that he was involved in the victim's murder. Instead, Reyes said that the police arrested him on March 10, 2008, for having a fake Resident Alien identification card. Two detectives spoke to him at the police station and said they had information that he and defendant were cousins who were "running together." Reyes denied that he volunteered any information to the detectives and only told them that he heard about Laticia's murder on the news. The prosecutor asked Reyes if he told the detectives that he knew defendant, who was also known as "Little Paulina" and "Sinister" for about ten years and that he had been "hanging out" with defendant for about five years. Reyes responded, "Yes, because we know each other from family." However, Reyes denied being at defendant's house two days after Laticia was murdered, denied that defendant looked nervous and scared on that day and did not want to leave his house, and denied that defendant told him that day that he and another gang member went to shoot some "Two-Sixers" and might have shot somebody else instead. Reyes testified that the detectives

questioned him "for hours" and threatened to get immigration services involved because Reyes had been arrested with a fake identification card. Reyes further acknowledged that he testified before a grand jury on March 27, 2008, and testified that he did not tell the prosecutor at that time about a detective threatening to deport him because he did not trust anybody.

¶ 13 The State then questioned Reyes about whether he gave specific testimony before a grand jury on March 27, 2008. These included statements that Reyes was at defendant's house two days after Laticia was murdered, that defendant seemed nervous at the time and that defendant told Reyes that he was involved in Laticia's murder. Reyes initially testified that he did not recall making these statements before the grand jury and later testified that the two detectives told him what to say to the grand jury. Reyes agreed that it would be a "violation" to testify against another gang member. Reyes denied telling a prosecutor several days before defendant's trial that the Latin Saints would kill him and his family if he testified against defendant. Reyes also denied having been hit in the head with a two by four by some Latin Saints who threatened him not to testify against defendant.

¶ 14 The State then responded to Reyes's trial testimony by introducing the transcript of Reyes's grand jury testimony. The State introduced Reyes's grand jury testimony by calling Assistant State's Attorney (ASA) Michael Hogan. ASA Hogan was the prosecutor who met with Reyes on March 27, 2008, and who questioned Reyes before the grand jury that day. ASA Hogan testified that he met with Reyes in his office on March 27 and interviewed him about Laticia's murder. ASA Hogan testified that Reyes told him that he had been treated "fine" and that Reyes never mentioned having been threatened by detectives. Reyes told ASA Hogan that he was motivated to testify before the grand jury because "he felt bad about what had happened." ASA Hogan acknowledged that he did not ask Reyes if he was having any problems with immigration. The trial court then allowed ASA Hogan to publish Reyes's grand jury testimony and admitted the grand jury testimony as substantive evidence pursuant to section 115-10.1 of the

Code of Criminal Procedure (725 ILCS 5/115-10.1 (West 2010)).

¶ 15 Before the grand jury, Reyes testified that he went to defendant's house two days after Halloween. Defendant seemed nervous and told Reyes that he did not want to leave the house. A person named "Kalicala" arrived with a person named "Rubio." Kalicala told Rubio that he had "balls" for what he had done. When Kalicala lifted Rubio's shirt, Reyes saw that Rubio's torso was bruised. Reyes knew that Rubio had joined the gang because of the bruises he had sustained. After Rubio and Kalicala left defendant's house, Reyes questioned defendant about what happened to Rubio and what happened at 48th and Seeley on Halloween night. Defendant said that Rubio "got balls" and the he "knows how to shoot." When Reyes asked defendant about the lady who was shot at 48th and Seeley, defendant responded "I don't know if I shot somebody." Defendant also said that on that day "they went to go shoot the Two-Six," which Reyes told the grand jury was another gang. Reyes then "left it alone" and didn't ask defendant any further questions.

¶ 16 The State also responded to Reyes's trial testimony with the testimony of Detective Joaquin Mendoza. Detective Mendoza testified that on March 10, 2008, he and Detective Luis Otero were contacted by Sergeant Frank Luera and informed that the police had a person in custody, Reyes, who said that he had information about Laticia's murder. Detective Mendoza had not previously heard of or known about Reyes. That evening, Detectives Mendoza and Otero interviewed Reyes at the police station and Reyes told the detectives that his cousin, defendant, was one of the shooters in Laticia's murder. Reyes knew his cousin by the nicknames "Lil Paulina" and "Sinister." Reyes told the detectives that defendant personally told him that he had "done the shooting over at 48th and Seeley." Reyes said that this conversation took place two days after the murder at defendant's home. Jonathan Ochoa, known as "Kaleeks," and Rubio, known as "Shorty," were also present at defendant's home when this conversation took place. Detective Mendoza did not threaten Reyes with deportation or tell him what to say. The

detectives told Reyes to contact them once he was released by the police.

¶ 17 Detectives Mendoza and Otero spoke to Reyes again two days later when Reyes contacted Detective Otero. The detectives met Reyes at 49th and Morgan Streets, a location that Reyes selected because he felt it was safe, and spoke to him in their squad car. Reyes said that he was out of town at the time of Laticia's murder but heard about the shooting on the news. Reyes told the detectives that he was at defendant's house two days after the murder when defendant said that he and Rubio had taken part in shooting. Reyes explained that he had known defendant for about ten years from his aunt's marriage to one of defendant's family members and that Reyes had been "hanging out" with defendant for about five years. Reyes stated that when he was at defendant's home two days after the murder, defendant was "very paranoid" and was afraid to leave his house. Ochoa, Rubio and Ochoa's brother were also at defendant's house that day. Ochoa asked Rubio if it hurt when Rubio was hit by the gang. Ochoa lifted up Rubio's shirt and Rubio had bruises on his upper torso. After Rubio and Ochoa left, defendant told Reyes that he was "one of the shooters involved in the incident on Halloween where the mother got killed" and also that Rubio had a "pair of balls" because Rubio was the second shooter. Defendant told Reyes that he and Rubio had gone to the area of murder to "shoot at Two-Sixers." Reyes told the detectives that defendant then changed the subject and would not talk about the murder. Reyes identified a photograph of defendant and a yearbook photograph of Rubio. The detectives could not locate Ochoa or Rubio.

¶ 18 Chicago police officer Eric Wier testified as a gang expert. Officer Wier explained to the jury that there was an ongoing war between the Two-Six and Latin Saints gangs. The officer further explained that Halloween was an important day for the Latin Saints and that in the days leading up to Halloween, the gang members would go on "missions," which included shootings and other violent acts. Officer Wier identified Nemroy Murray and Juan Hernandez as members of the Danville Two-Six gang. The officer identified defendant and Reyes as members of the

Latin Saints. Officer Wier explained that it was a violation of gang rules for one gang member to testify against a fellow gang member or to cooperate with the police. The officer also explained that some gang members intentionally try to obstruct police investigations.

¶ 19 Officer Wier further testified that Reyes contacted him in October of 2008 and said that he feared for his life because the Latin Saints were going to kill him. Reyes asked to be relocated but ultimately turned down a relocation offer made to him by the State. Later, in preparing for trial, Officer Wier had another conversation with Reyes. Reyes told the officer that he could not testify because the Latin Saints had already hit him with a two-by-four and Reyes feared he would be killed if he testified. When Officer Wier told Reyes he would be committing perjury, Reyes asked what the penalty was for committing perjury. Officer Wier told Reyes it was 15 years' imprisonment, and Reyes said that he would rather spend 15 years in jail than be killed by the Latin Saints.

¶ 20 Finally, the State presented evidence that sometime in March of 2008, Watson viewed a photo array and identified defendant as one of the gunman. Defendant was arrested on March 26, 2008, and on that date, Watson, Martinez and Christian identified defendant in separate lineups.

¶ 21 For the defense, defendant's mother and sister offered alibi testimony; however, both were impeached with their grand jury testimony. Additional facts will be set out below as they relate to defendant's contentions on appeal.

¶ 22 Defendant first alleges the prosecution committed misconduct through various remarks in opening statement and closing argument and in raising certain questions before the jury. Defendant acknowledges that forfeiture applies because he did not object to any of the comments when they were made, though he included the statements in his post-trial motion. See *People v. Enoch*, 122 Ill.2d 176, 186 (1988) (to preserve an issue for review, defendant must object at trial and include the issue in a written posttrial motion). Defendant asks that we review the issue under the plain error doctrine. Under the plain error doctrine, forfeited claims can be considered

on appeal where either: (1) the evidence in the case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence, or (2) the error is so serious that the defendant was denied a substantial right, and thus a fair trial. *People v. McLaurin*, 235 Ill. 2d 478, 485 (2009). Defendant argues plain error review is warranted under either of those alternatives. Defendant bears the burden of persuasion under either prong of the plain error analysis (see *People v. Sargent*, 239 Ill. 2d 166, 190 (2010)), and if he fails to meet that burden, defendant's procedural default of his claims will be honored. See *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). However, "[t]he first step of plain-error review is to determine whether any error occurred." *People v. Lewis*, 234 Ill. 2d 32, 43 (2009); see also *People v. Smith*, 372 Ill. App. 3d 179, 181 (2007) (quoting *People v. Wade*, 131 Ill. 2d 370, 376 (1989)) (noting that before invoking the plain error exception, " 'it is appropriate to consider whether error occurred at all,' because without error, there can be no plain error"). We will therefore first review defendant's claim to determine if any of the prosecution's remarks constituted error.

¶ 23 Defendant's first specific claim of misconduct is that the prosecution promised evidence in his opening statement that it failed to present at trial. He points to the prosecutor's remark that Nemroy Murray went "out of his way" to hinder the police investigation into the shooting by identifying Rendon and Dominguez as the offenders.

¶ 24 Defendant acknowledges that his counsel remarked in his own opening statement on Murray's identification of Rendon and Dominguez and presented the theory that those men were the two shooters in this case. However, defendant asserts the State did not present any evidence that Murray intentionally misled the police, and he argues the "credibility of the defense theory was severely undermined by the prosecutor's remarks" because the jury could have believed Murray had lied about whether Rendon and Dominguez were involved in the shooting.

¶ 25 "The purpose of an opening statement is to apprise the jury of what each party expects the evidence to prove." *People v. Kliner*, 185 Ill. 2d 81, 127 (1998). An opening statement can

include a discussion of the expected evidence and reasonable inferences from the evidence, and reversible error occurs only where the prosecutor's opening remarks are attributable to deliberate misconduct on the part of the prosecutor and result in substantial prejudice to the defendant. *Id*. Put another way, this court will find reversible error only if the defendant demonstrates that the improper remarks were so prejudicial that had the remarks not been made, the jury could have returned a contrary verdict. See *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007). As to closing and rebuttal argument, a prosecutor is generally accorded wide latitude regarding the content of those arguments and may comment on the evidence and any fair and reasonable inference the evidence may yield. *People v. Runge*, 234 Ill. 2d 68, 142 (2009).

¶ 26 Here, the prosecutor described in his opening statement the various "kinds of witnesses" who would testify in this case:

> "They [police detectives] had to deal with witnesses who didn't want to get involved at all, but they also have to deal with the third kind of witness, a witness who went out of his way to try and obstruct this investigation; and you'll learn his name is Nemroy Murray; and he's a member of a gang as well, the Two-Sixers that were at war with the defendant.
>
> He was the one that they were trying to shoot at down here when Laticia got shot and killed, but the problem is Nemroy wanted to take care of it on the streets, and he went out of his way to obstruct this investigation.
>
> Because of Nemroy, the detectives originally arrested two other people for this crime. When they talked to those two other people, though they realized these people were at work because they went to each one of those individual's work. They got time

cards. They talked to the co-workers and talked to the individuals involved. They had absolutely nothing to do with it.

Because Nemroy would rather help him out to get him out on the street and take care of stuff on his own. So they let them go because they didn't have anything to do with it."

¶ 27 Defendant contends the prosecutor compounded the effect of those remarks by pointing out in closing argument that defense counsel did not call Murray as a witness. The evidence established that Rendon and Dominguez were investigated by police and released after the police investigation corroborated their alibis. This was also corroborated by the testimony of Officer Wier, who testified that gang members will intentionally obstruct police investigations. The State's evidence therefore circumstantially supported the State's theory that Murray intentionally thwarted the police investigation and therefore the prosecutor's arguments were not error.

¶ 28 Defendant's next claim of prejudice to his case involves the prosecution's remarks as to whether defendant was known by the nickname "Sinister." He cites the following exchanges during Reyes's testimony:

"MR. SEXTON [Assistant State's Attorney]: Did you also tell the detectives that you knew Orlando Avila, also known as Little Paulina, and also known as Sinister for approximately ten years, and you had been hanging out with him for about five years?

A. Because we have had a relationship between the family.

Q. Yes or no, Mr. Reyes?

A. No, sir."

¶ 29 A similar question was asked shortly thereafter:

"Q. [D]id you tell the detectives that you knew Avila, also known as Little Paulina, also known as Sinister, for about ten years

and you have been hanging out with him for about five years?

A. Yes, because we know each other from family."

¶ 30 Later in Reyes's testimony, Reyes acknowledged identifying to detectives a photograph of defendant "that you know as Little Paulina," but when Reyes was asked if defendant "also goes by the nickname Sinister," he responded, "I'm not sure about that, sir."

¶ 31 Defendant points out that the State also referred to the moniker twice in closing argument. First, one prosecutor remarked in closing argument about the images from a neighborhood surveillance camera that were shown to the jury:

> "You saw the little mask that was on Jessie's head right there, and a wand and some candy in the camera, but that is where their mother lied [*sic*] while they were yards away. Why? Why did this happen? Because Rolando Avila [*sic*] aka Rolando Avila aka Signature [*sic*] aka Little Paulina is a Latin Saint."

¶ 32 The second prosecutor also commented in rebuttal closing argument that Martinez had to be a "gang-banger" because he had the nickname Sticks "[y]ou know, unlike Little Paulina or Sinister over here."

¶ 33 Defendant argues the colloquy during Reyes's testimony fails to raise an inference that Reyes knew defendant by the nickname of "Sinister." He asserts no evidence was presented that he actually was known by that name.

¶ 34 As to the prosecutor's reference to "Sinister," this court has observed that there "is no impropriety in referring to a defendant by his or her nickname." *People v. Murillo*, 225 Ill. App. 3d 286, 294 (1992); see also *People v. Castillo*, 2012 IL App (1st) 110668, ¶ 66 (references to defendant by his nickname of "Kill Bill" 90 times during trial, including 39 references in closing argument, did not rise to the level of plain error). However, "ordinary considerations of fair play would dictate that the use of a nickname which has a pejorative connotation should be permitted

sparingly, only if there is a showing of necessity for its use." *Murillo*, 225 Ill. App. 3d at 294. "[I]t is not improper to allow a defendant to be referred to by his nickname if witnesses knew and identified defendant by that name." *People v. Salgado*, 287 Ill. App. 3d 432, 445 (1997).

¶ 35 The record reveals the prosecution referred to the nickname of "Sinister" several times during questioning and closing argument. Although Reyes's responses to questioning were ambiguous, Detective Mendoza testified Reyes said during an interview he knew defendant was one of the gunmen and knew him by the nicknames "Li'l Paulina" and "Sinister." We therefore find no error in the limited use of defendant's nickname.

¶ 36 Defendant next contends the State aroused the prejudices of the jury by repeated references to the victim's role as a mother and the circumstances of her death, which occurred near her children. Detective Carr testified that when he and his partner arrived at the crime scene, he observed a pool of blood on the sidewalk and Halloween costumes, candy and other personal items scattered nearby. Rojas testified that he and his family had just finished trick-or-treating on Halloween with the victim and her children. These references were factually accurate and set the scene of the occurrence. As a result, the prosecutor's description of the scene was supported by the testimony and we do not find that it rose to the level of prejudicial error.

¶ 37 Defendant next argues the State committed reversible error when, in closing argument, the prosecutors made disparaging remarks about defense counsel and defendant's relatives who testified in support of his case and also vouched for the credibility of their own witnesses. In reviewing whether comments made during closing argument are proper, we must review the closing argument in its entirety and view the remarks in context. *People v. Burman*, 2013 IL App (2d) 110807, ¶ 25, citing *People v. Kitchen*, 159 Ill. 2d 1, 38 (1994). Unless deliberate misconduct by the State during closing argument can be demonstrated, comments will be considered incidental and uncalculated and will not form the basis for reversal. *People v. Cloutier*, 156 Ill. 2d 483, 507 (1993).

¶ 38 Defendant first contends that error occurred when the prosecutors referred to the alibi testimony presented by defendant's mother and sister as "preposterous," "untrue" and "unbelievable" and referred to those relatives as "horrible" and "bias[ed]." During closing argument, the prosecutor may properly comment on the evidence presented or reasonable inferences drawn from that evidence, respond to comments made by defense counsel that invite a response, and comment on the credibility of the witnesses. *Burman*, 2013 IL App (2d) 110807, ¶ 25. Moreover, we note that with the exception of the "preposterous," "untrue" and "unbelievable" remarks, all of the comments that defendant challenges were made by the State in its rebuttal closing argument. When a defendant's own closing argument attacks the State's case and its witnesses, the State is entitled to respond thereto in its rebuttal closing argument, particularly when that response is invited. *People v. Nieves*, 193 Ill. 2d 513, 532 (2000). Here, the State's characterizations of the testimony of defendant's relatives were remarks on the credibility of defendant's alibi, which was contradicted by the prosecution's evidence. Those comments did not constitute error.

¶ 39 Defendant contends the prosecution made remarks in rebuttal closing argument that disparaged defense counsel, suggesting that counsel had some "expertise" with the subject of prostitution. The record establishes that in closing argument, defense counsel discussed the decision of Watson, who lived in the neighborhood and witnessed the shooting, to give a statement to police. Counsel described the transaction between Watson and police detectives as a "game" involving an agreement that Watson would provide testimony by analogizing to a sailor on a furlough and a prostitute trying to make a deal.

¶ 40 Following that analogy, the prosecutor referred to that line of argument in rebuttal, stating that no agreement existed between Watson and police:

> "[C]ounsel talked about: Well, you know he's a man of the world or whatever – and of course he was – he's just saying whatever they

> got to say. He wanted it a deal, it's just kind of like a prostitute, apparently there must be some expertise on his side. But the fact remains that there is no agreement [with Watson]."

¶ 41 We do not find the prosecutor's isolated remark to be error, as it was made in response to defense counsel's references to prostitution. This remark was an obvious use of sarcasm and was utilized to point out that defendant's analogy made no sense. We find that this attempt to characterize this remark as a contention that defense counsel had experience in the area of prostitution to be an argument lacking a good-faith basis.

¶ 42 Although defendant also takes issue with the prosecutor's characterizations in rebuttal argument of the defense case as "an absolute joke," "a lie," "nonsense stuff," "Bull-oney," and a "defense of desperation," we do not find those remarks to be so prejudicial to defendant's case as to warrant relief in this context. Although a prosecutor may not claim that defense counsel has deliberately lied to the jury or fabricated a defense, the prosecutor may challenge the credibility of the defendant and of his defense theory, as well as the persuasiveness of the defense. *People v. Robinson*, 391 Ill. App. 3d 822, 840-41 (2009) (referring to defense theory as "a story" and "ridiculous" is not error); see also *People v. Hayes*, 409 Ill. App. 3d 612, 624-25 (2011) (prosecutor's remark asking jury if it wanted "to buy this load of baloney" was not prejudicial in context of entire closing argument); *People v. Baugh*, 358 Ill. App. 3d 718, 743 (2005) (not improper to refer to defense theory as a "joke"); *People v. Dower*, 218 Ill. App. 3d 844, 851-52 (1991) (reference to defendant's version of events as "nonsense" was reasonable inference from the evidence).

¶ 43 Furthermore, although the prosecutor used the term "lie" in rebuttal, the context of the remark establishes the prosecutor was referring to the lack of evidence of an agreement between Watson and police for Watson's testimony. As to the prosecutor's remark that defendant's counsel presented a "defense of desperation," which was also made in rebuttal argument, this

court has noted its disapproval of that phrase but found no substantial prejudice in its use. See *People v. Hamilton*, 328 Ill. App. 3d 195, 204 (2002); see also *People v. Jenkins*, 333 Ill. App. 3d 534, 540 (2002) (prosecutor's comment that the accused was pursuing a "defense of desperation" did not result in substantial prejudice to defendant); *People v. Zernel*, 259 Ill. App. 3d 949, 957-58 (1994) (reference to defense theory as "desperate" does not constitute error).

¶ 44 Defendant also contends the prosecution improperly vouched for the credibility of its own witnesses by repeatedly stating they were telling the truth. The complained-of comments were made by the State in its rebuttal closing argument, and we note the prosecution may respond in rebuttal to statements made by defense counsel that clearly invite a response. See *People v. Gonzalez*, 379 Ill. App. 3d 941, 954-55 (2008). In its rebuttal, the State referred to Santiago's credibility in response to defense counsel's contention that Santiago spoke to police to gain "fifteen minutes of publicity, notoriety, importance." Defendant also points to the State's remarks that Martinez, another witness, led a humble life and did not want to testify at trial. Although defendant compares that isolated remark to the repeated comments found to comprise reversible error in *People v. Roach*, 213 Ill. App. 3d 119 (1991), and *People v. Rogers*, 172 Ill. App. 3d 471 (1988), we do not deem the single remark regarding Martinez to have so affected the jury as to deprive defendant of a fair trial.

¶ 45 Defendant further contends that in rebuttal closing argument, the State urged jurors to adopt an "us versus them" mindset. He further contends the State sought to align itself with the jury and against gang members.

¶ 46 The prosecutor ended his argument to the jury as follows:

> "All we ask is that you sign a verdict that shows him, that him [*sic*] and the Latin Saints don't own the streets, we own the streets. People like Leticia Barrera own the streets. *** Show him that the law is greater than the gang code."

¶ 47 The record reveals that defense counsel initiated that theme in its own closing argument by informing the jury that there were "two kinds of law," one for "people that have the nice homes and the nice jobs, and those for the people that are here on the edge." Defense counsel also referred to "two levels of our society," with one level made up of "forgotten people." Therefore, the State's remarks were invited by defense counsel's argument.

¶ 48 In summary, we find no error in the any of the prosecutors' remarks. Because we find no error, there can be no plain error and we find that defendant's contention of improper prosecutorial remarks is forfeited. See *Smith*, 372 Ill. App. 3d at 181.

¶ 49 Defendant's second series of arguments on appeal involves the performance of his trial counsel. He argues his attorney erred in failing to challenge as suggestive the police photo arrays and lineup in which he was identified as one of the shooters. Defendant also contends his counsel promised evidence in his opening statement that was not delivered at trial. As to all of these claims, we note that to prevail on an assertion of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that such performance resulted in prejudice to defendant. *Strickland v. Washington*, 466 U.S. 668 (1984). In a motion to suppress identification, the defendant bears the initial burden of establishing that the pretrial identification was "so unnecessarily suggestive that it gave rise to a substantial likelihood of irreparable mistaken identification." *People v. Curtis*, 262 Ill. App. 3d 876, 882 (1994); see also *People v. Allen*, 376 Ill. App. 3d 511, 520 (2007).

¶ 50 Defendant first claims his attorney was deficient in failing to challenge as suggestive the police photo array and lineup in which he was identified. As to the photo array viewed by Watson and Martinez in March 2008, defendant contends the photo array suggested his culpability because he was the only participant photographed against a concrete wall and the size of his body in the photo was "considerably smaller" than the other individuals, who were pictured in separate photographs.

¶ 51 Viewing the photo arrays that defendant has challenged, which have been included in the record on appeal, the participants have similar facial features and facial hair and appear to be close in age. Although defendant was photographed against a concrete wall background, the background is not so distracting as to lead to an erroneous identification.

¶ 52 As to the lineup, defendant argues he appeared different from the other participants because he wore an orange jumpsuit and the other men are wearing "street clothes." A photo of the lineup in question has also been included in the record on appeal, and although defendant refers to his attire in the lineup as "the jail garb of an orange jumpsuit," the State points out, and defendant does not contest, that he wore his own clothing in the lineup. The law does not require that participants in a lineup be identical or nearly identical in their manner of dress. *People v. Faber*, 2012 IL App (1st) 093273, ¶ 57 (lineup not unduly suggestive when defendant was only offender wearing sleeveless T-shirt, which witness described gunman as wearing); *People v. Johnson*, 222 Ill. App. 3d 1, 8 (1991) (lineup was not suggestive even though offender was described as wearing red pants and defendant was the only participant wearing such trousers).

¶ 53 Defendant also argues the procedures were suggestive because he was the only person who was included in both the photo array and the lineup; however, this court has held that identification procedures are not impermissibly suggestive because the defendant was the only person in the lineup whose photograph had previously been shown to a witness. *People v. Prince*, 362 Ill. App. 3d 762, 772 (2005); *People v. Hartzol*, 222 Ill. App. 3d 631, 643 (1991). Because neither the photo array nor the lineup were unduly suggestive, defense counsel was not ineffective in failing to challenge either identification procedure. Moreover, even assuming *arguendo* that counsel's performance was deemed deficient on this point, we cannot conclude that any error resulted in prejudice to defendant's case, given the eyewitness testimony identifying defendant as one of the gunmen.

¶ 54 Defendant next claims his counsel was ineffective because counsel made inappropriate

remarks in opening statement and displayed an ignorance of basic rules of evidence and procedure. He first asserts that although his counsel told the jury the testimony would show the shooters wore masks, counsel attempted to establish that fact through a police officer's cross-examination and did not offer a witness to directly testify as to that fact.

¶ 55 Defendant further contends his counsel told the jury in opening statement that he would present evidence that, in fact, could not be introduced. He argues his counsel challenged the State to show a videotape of defendant's interrogation and told the jury that six people had failed to identify defendant in photo arrays or lineups. He argues a videotape of his interrogation would not have been admissible and his attorney did not show that any one had failed to identify him. In addition, defendant argues his counsel said he would introduce evidence of that "two men went into" a gas station and that two vans were identified. Counsel also attempted to describe the statement that a person named Jesse Alaniz gave to police but did not call Alaniz as a witness at trial.

¶ 56 Again, these claims must be considered under the two-prong approach set out in *Strickland*, under which defendant first must demonstrate that his counsel's representation fell below an objective standard of reasonableness, meaning he must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy. *Strickland*, 466 U.S. at 688; *People v. Smith*, 195 Ill. 2d 179, 188 (2000). Defendant also must establish prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. In a *Strickland* analysis, counsel's performance must be viewed in light of his entire performance. *People v. Bell*, 373 Ill. App. 3d 811, 822 (2007).

¶ 57 Although no comment should be made in opening statement that counsel will not or cannot prove, the "purpose of an opening statement is to apprise the jury of what each party expects the evidence to prove," and can include a discussion of the expected evidence and

reasonable inferences from that evidence. See *Kliner*, 185 Ill. 2d at 127. An attorney's failure to provide promised testimony is not *per se* ineffective assistance of counsel; rather, defendant must show his counsel's decisions were unreasonable and there was a reasonable probability that counsel's errors affected the outcome of the proceedings. *People v. Wilborn*, 2011 IL App 92802, ¶ 80; *People v. Manning*, 334 Ill. App. 3d 882 (2002).

¶ 58 As the State points out, the trial judge sustained the prosecution's objections to this entire line of defense counsel's argument. We also note that as part of trial strategy, defense counsel repeatedly attacked the identification testimony of the eyewitness to the shooting by questioning their motive for testifying against defendant. Regardless, defendant has failed to overcome the presumption that counsel's opening statement was part of a sound trial strategy. In arguing to the contrary, defendant relies upon defense counsel's unsuccessful attempts to introduce certain evidence. For example, while defense counsel cross-examined Christian and Guadalupe Martinez as to whether they saw either of the shooters wearing a mask, as well as cross-examining Officer Goldeneyes as to whether there was a flash message referencing a mask, we cannot say that defense counsel was ineffective merely because counsel was unsuccessful in his attempts to introduce this testimony. When defense counsel made his opening statement, he could not know how these witnesses would testify, whether the prosecution would object to this line of questioning, or how the trial court would rule on any objection. It is not unusual or ineffective for counsel to seek to admit evidence that the trial court might rule is inadmissible. See *People v. Skillom*, 361 Ill. App. 3d 901, 913–14 (2005) (the fact that a trial strategy was ultimately unsuccessful is not a sufficient reason to deem counsel's representation ineffective). To the contrary, defense counsel's decision to seek to include this testimony was part of a sound trial strategy.

¶ 59 Regarding defense counsel's statement that Martinez, Christian and Watson were members of the "Two-Sixers" gang, during closing argument defense counsel theorized that

Officer Wier was lying when he testified that Guadalupe Martinez was not a member of the "Two-Sixers" gang. Despite Officer Wier's testimony to the contrary, defense counsel also argued that Christian and Martinez were motivated to lie because they belonged to that gang and counsel even suggested that the "Two-Sixers" gang told Martinez to identify defendant. Thus, despite the absence of supporting testimony, defense counsel still attempted to convince the jury that these eyewitnesses had a motivation to lie because they belonged to a rival gang. Again, if that strategy was unsuccessful, that does not mean that defense counsel was ineffective within the meaning of *Strickland*. See *Skillom*, 361 Ill. App. 3d at 913–14.

¶ 60 Additionally, the trial court instructed the jury before closing arguments and at the conclusion of trial that what the attorneys said during opening statements was not evidence and that the jury should disregard any statements by the attorneys that were not supported by the evidence. There is a strong presumption that jurors follow the instructions given to them by the court. *People v. Gonzalez*, 379 Ill. App. 3d 941, 954–55 (2008). Considering that presumption and the overwhelming evidence of defendant's guilt, we cannot conclude that defendant was prejudiced by defense counsel's opening statement.

¶ 61 Further, although defendant argues his counsel erroneously told the jury that Murray identified the shooter as a person with a teardrop tattoo under his left eye and that Dominguez has such a tattoo, the trial transcript reveals that defense counsel did elicit testimony from Detective Carr that Dominguez had a teardrop tattoo.

¶ 62 Defendant next contends that his attorney elicited testimony from Christian, Santiago and Martinez that was damaging to his case and "did nothing but strengthen the reliability" of those witnesses' identifications of defendant as one of the gunmen. Defense counsel asked Santiago and Barrera if they were confident that their identifications of defendant in a lineup were accurate, and the witnesses confirmed that they were. Counsel asked Martinez about his testimony before a grand jury that the gunman was a person from the neighborhood who was

known as Little Paulina.

¶ 63 We do not find the reiterations of the identifications on cross-examination were prejudicial to defendant in light of the positive nature of the identifications themselves and the strength of the prosecution's case as a whole. Martinez's grand jury testimony was not prejudicial, as it was cumulative of Reyes's description of one of defendant's nicknames. Further, the fact that defense counsel's cross-examination might have been unsuccessful does not establish that counsel provided ineffective assistance. See *Skillom*, 361 Ill. App. 3d at 913–14.

¶ 64 Defendant further claims his counsel displayed an unprofessional and irreverent attitude at trial that harmed his case and did not endear him to the jury. He points to counsel's reference to police as "coppers" and to gang members as "morons" and counsel's comparison of gang members to Nazis. Defendant also takes issue with several analogies that his counsel raised in closing argument, including references to prostitution and sexual assault, that were apparently intended to make the point that a gang member is easily targeted as a crime suspect. Defendant contends on appeal that those remarks may not have rendered the jury's verdict unreliable alone but "certainly may have contributed to it." We find these assertions to be somewhat vague and they certainly do not establish that defendant was prejudiced under the second prong of *Strickland*. Even if defense counsel's arguments may have been ill-advised, we do not find they could have contributed to the jury's verdict given the strength of the evidence at trial.

¶ 65 Defendant's remaining contention on appeal is that he was denied his sixth amendment right of confrontation when a forensic pathologist testified at trial using the autopsy report prepared by a different doctor. He argues his inability to cross-examine the doctor who created the report violated his confrontation rights as set out in *Crawford v. Washington*, 541 U.S. 36 (2004), which forbids the admission of testimonial hearsay unless the declarant is unavailable and the defendant had a previous opportunity to cross-examine the declarant.

¶ 66 Defendant acknowledges his failure to object at trial to this evidence and the requirement

that he meet the test for review of this claim as plain error. Moreover, defendant concedes in his reply brief that after the filing of his initial brief, the Illinois Supreme Court decided in *People v. Leach*, 2012 IL 111534, that autopsy reports are not testimonial and thus are outside the scope of *Crawford*. This court has since followed *Leach*'s holding in a case similar to the instant proceeding. See *People v. Brewer*, 2013 IL App (1st) 072821, ¶ 43 (March 29, 2013) (admission of autopsy report was not testimonial because its purpose was to determine how the victim died, "not who was responsible). Though defendant argues in his reply brief that *Leach* was wrongly decided, admittedly to preserve the issue for further review, this court is bound to follow supreme court precedent. See *People v. Fish*, 381 Ill. App. 3d 911, 917 (2008). Therefore, defendant's argument on this point is rejected.

¶ 67 In summary, defendant has not shown that any of the challenged remarks made by the State constituted plain error. Additionally, defense counsel's performance did not constitute ineffective assistance of counsel, and defendant cannot obtain relief under *Crawford*.

¶ 68 Accordingly, the judgment of the trial court is affirmed.

¶ 69 Affirmed.