2013 IL App (1st) 112689-U

THIRD DIVISION
March 12, 2014

No. 1-11-2689

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.	)	07 CR 12593
	)	
BOBBY SELVIE,	)	Honorable
	)	Timothy Joseph Joyce,
Defendant-Appellant.	)	Judge Presiding.
	)	

JUSTICE MASON delivered the judgment of the court.
Presiding Justice Hyman and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *HELD*: The evidence was sufficient to sustain a conviction for aggravated battery with a firearm of a peace officer where circumstantial evidence linked the defendant to the shooting and the credibility of the witnesses was a matter for the jury to decide. The trial court did not err in allowing evidence of defendant's gang affiliation to provide motive and context for the shooting. The trial court erred in allowing testimony that younger gang members and drug addicts sold drugs for the gang, but the error did not result in manifest prejudice to the defendant. Arguments made by the State in closing did not deprive defendant of a fair trial. Finally, the trial court did not err in sentencing defendant to the maximum sentence where the trial court did not improperly consider an element of the offense in aggravation and considered the mitigating factors.

¶ 2 Following a jury trial, defendant Bobby Selvie was convicted of aggravated battery with a firearm of a peace officer and sentenced to 60 years in prison. On appeal, Selvie contends that the State did not prove beyond a reasonable doubt that he shot the officer, that he knowingly caused injury to the officer, or that he was legally accountable for the shooting. Selvie further contends that he was denied a fair trial because the circuit court erred in ruling that gang evidence was admissible, the State presented irrelevant and inadmissible gang-related evidence, and the State engaged in prosecutorial misconduct in its closing argument. Finally, Selvie argues that he is entitled to a new sentencing hearing because the circuit court improperly considered in aggravation a factor inherent in the offense and the sentence imposed is excessive. For the reasons that follow, we affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 In the early morning hours of May 14, 2007, Detective Patrick Johnson was shot in the back in the vicinity of 50th Place and Peoria in Chicago. At the time he was shot, Johnson was pursuing a member of the 50 Strong faction of the Gangster Disciples street gang. Two other members of the gang, defendant Bobby Selvie and Richard Butler, were charged in Johnson's shooting. After negotiating a plea deal with the State, Butler testified against Selvie. A jury found Selvie guilty of aggravated battery with a firearm of a peace officer, but acquitted him of attempted murder of a peace officer. The evidence introduced at Selvie's trial is discussed below.

¶ 5 Prior to trial, the State filed a motion to admit evidence of Selvie's gang affiliation and Selvie filed a motion to bar that evidence. Selvie also filed a motion to bar evidence of any prior misconduct by Selvie or any reputation evidence of the Selvie family. The trial court ruled that

the State was allowed to introduce evidence that Selvie was acting as security for the gang at the time of the shooting as well as evidence of the plastic wrappers typically used to package narcotics that were later found in the residence. However, the trial court prohibited the State from introducing evidence of weapons recovered from the Selvie residence on prior occasions. The trial court did not specifically address the issue of the Selvie family's reputation but ruled that evidence that nine persons who used the Selvie address had been arrested on prior occasions would be barred.

¶ 6 Defense counsel filed a motion seeking clarification on the court's ruling regarding evidence of gang affiliation. The trial court reiterated that the State could present evidence that Selvie was a gang member and was working security for the gang on the date in question. The trial court further ruled that if Johnson, who had a long history of investigating the Gangster Disciples, had personal knowledge that Selvie was a member of the gang, he would be permitted to testify to that fact. The issue was revisited again just before trial and the trial court ruled that the State would be permitted to elicit evidence from Johnson regarding his personal knowledge of how the gang conducted its narcotics operations and the use of its security personnel generally.

¶ 7 At trial, Johnson testified that he had worked as a tactical officer, a plainclothes officer assigned to gang suppression, street level narcotics and firearms abatement, in the area that included the 800 block of 50th Place for seven years. As a tactical officer, Johnson was on the street every day, conducting field interviews with suspected gang members, speaking with other police officers, developing confidential informants within the gang, and reviewing police reports and arrest records.

¶ 8 On the day Johnson was shot, the gang operating in the 800 block of 50th Place was the 50 Strong faction of the Gangster Disciples street gang. Although the Gangster Disciples operated all over the city of Chicago, the area controlled by the 50 Strong faction was limited to a few blocks. Surrounding this area on three sides was territory controlled by the Black P-Stone Nation street gang. The fourth side was bounded by railroad property.

¶ 9 The 50 Strong faction was primarily involved in the sale of narcotics. Johnson testified that the gang would use older drug addicts or juvenile gang members to sell narcotics. Adult gang members would be present to oversee the activities and they would generally be armed. In response to defense counsel's objection to the testimony regarding juveniles and drug addicts selling narcotics, the trial court gave a limiting instruction to the jury that Selvie was not charged with selling or possessing drugs and the jury was to consider the evidence only as it related to the alleged shooting.

¶ 10 Shortly before 1 a.m. on May 14, Johnson and his partner Amato were on patrol in the area of the 800 block of west 50th Place. Johnson was dressed in street clothes with a black bulletproof vest on the outside of his clothing, a black duty belt for his gun and handcuffs that were visible, and a Chicago Police Department star that was also visible. He was driving a blue Ford Crown Victoria with municipal license plates.

¶ 11 Johnson drove south on Peoria, approaching 50th Place. As he turned the corner onto 50th Place, he could see that there were three males on the porch of 852 West 50th Place, a house that he knew was owned by the Selvie family. The house is next to a vacant lot to the west that sits on the corner of Peoria and 50th Place.

¶ 12 As Johnson and Amato drove east on 50th Place, they noticed another male standing on the sidewalk in front of the house. Johnson later learned that the man on the sidewalk, who looked familiar to him, was Lester Spruille. As the vehicle approached, Spruille began walking east on the sidewalk and Johnson drove very slowly beside him. Spruille walked briskly, staring straight ahead. Approximately five houses down, Spruille stopped and began fumbling with the latch on a wrought iron gate. Johnson believed Spruille was pretending to have a key to the gate.

¶ 13 As Johnson and Amato opened the door to their vehicle, Spruille turned and ran back west on the sidewalk. Johnson ran after Spruille. Because Johnson was on the driver's side of the car closest to Spruille, he was in front and Amato was behind him, but Johnson did not look back to see whether Amato was following them. Based on Johnson's experience in the area and his belief that Spruille was likely armed, he drew his weapon as he ran.

¶ 14 As Johnson ran past the Selvie house, he looked to his right because there was an individual about halfway up the steps. From a distance of six or seven feet, Johnson looked into that individual's face and identified him as Selvie. Selvie was wearing a white T-shirt and had braided hair. There was a street light across the street from the Selvie house and another one directly in front of the vacant lot next to the house and Johnson did not have any trouble seeing Selvie. Johnson testified that he knew Selvie from conducting field interviews in the neighborhood, had direct contact with him six to eight times a year, and saw him in the neighborhood on a regular basis. Johnson knew that Selvie was a member of the 50 Strong faction of the Gangster Disciples. There was another individual standing behind Selvie on the porch, but Johnson did not get a good look at that person.

¶ 15 Johnson ran past Selvie and followed Spruille north through the vacant lot that was adjacent to the Selvie house. Spruille turned into the alley at the north end of the lot. Johnson had almost reached the alley when he heard a very loud gunshot. The shot came from behind him and sounded like it was coming over his right shoulder from the lot where he was running.

¶ 16 Johnson was hit in the lower back, right above the belt. The impact of the shot caused Johnson to stumble and fall to the ground. Because he had previously drawn his weapon, Johnson turned and pointed his gun back in the direction where he believed the shot had come from. Johnson could no longer see Selvie, but he was able to see south and west and did not see anyone in the immediate area. The Selvie house blocked Johnson's view to the east and he could not see the front door of the Selvie house.

¶ 17 Johnson then took out his radio and called for help. He began to experience severe pain in his abdomen and groin area. Amato arrived within a minute after Johnson was shot. Within several minutes, other police officers began to arrive and Johnson was taken by ambulance to the hospital. Johnson remained in the hospital for two weeks and underwent a total of three surgeries. The bullet entered Johnson's lower back, traveled from right to left across his body and split into two fragments. For medical reasons, the bullet fragments were not removed.

¶ 18 Before Johnson was initially taken into surgery, he spoke briefly with Detective Joseph Frugoli. Johnson gave Frugoli a description of the person he was chasing, but told Frugoli that the person he was chasing was not the person who shot him. Frugoli asked Johnson if he recognized anyone he knew out there and Johnson told him that he recognized Selvie. However, Frugoli's report, prepared after he spoke to Johnson at the hospital, does not mention Selvie.

Two days after the shooting, Detective Patrick Ford, the officer assigned to lead the investigation into the shooting, came to the hospital and showed Johnson a photo array. Johnson positively identified Selvie in the photo array. Johnson also identified Butler in the photo array as one of the men he had seen on the porch initially, but said he was not 100% certain.

¶ 19 Amato testified that when he and Johnson turned the corner onto 50th Place, he noticed two males sitting on the bottom half of the Selvie porch and another individual standing on the sidewalk and talking to the two people on the porch. Amato recognized Selvie as one of the individuals on the porch. Amato testified that prior to that evening, Johnson had pointed Selvie out to him when Amato and Johnson were working together and told Amato Selvie's name.

¶ 20 Amato did not know Spruille, the individual who was standing on the sidewalk. After Johnson began to chase Spruille, Amato initially ran around the back of the car, but soon realized he could not catch up with them. Amato could not see the Selvie porch at that point in time because two trees and a fence were blocking his view. When Amato realized that he was not going to catch up with Johnson and Spruille, he ran back to the police vehicle, planning to follow them in the car and cut Spruille off.

¶ 21 Once he got back in the car, Amato realized that Johnson had taken the keys with him. Amato was in the car facing eastbound when he heard a single gunshot behind him. He jumped out of the car and ran back westbound with his weapon drawn. Although Amato initially told investigators on the scene that he had been on the sidewalk a short distance east of the Selvie house, he later recalled that he was in the police vehicle when he heard the shot. Amato did not see anyone on the street in any direction as he ran west, and did not see anyone on the Selvie

porch. When he reached the vacant lot, Amato could see Johnson rolling around on the ground. Johnson kept saying, "Oh my God, oh my God," and Amato knew he had been shot. Amato called for backup and, when other officers arrived, Amato gave them a description of Spruille because he thought Spruille was the one who shot Johnson.

¶ 22 The following day, Amato viewed a lineup and identified Selvie as one of the individuals sitting on the porch. Amato identified Butler as the other individual he saw on the porch, but said he was not certain about that identification.

¶ 23 Butler testified that he had been indicted with Selvie but had been offered a plea agreement of 10 years in prison on the charge of unlawful use of a weapon in exchange for his truthful testimony. Butler acknowledged that a judge would determine whether his testimony was truthful and that, without his truthful testimony, he would have no plea deal.

¶ 24 Butler testified that he had been a member of the 50 Strong faction of the Gangster Disciples street gang for eight years. This faction controlled a relatively small geographic area and was completely surrounded by rival gangs. The gang's primary business was the sale of narcotics. Juvenile gang members would sell the drugs, because they would not get as much jail time if they were apprehended, while adult members provided security. Providing security entailed providing protection from rival gang members and alerting those who were selling drugs when the police were coming. The gang owned weapons to use for protection from rival gang members. The weapons were stored either outside or at the homes of gang members, including both Butler's and Selvie's homes.

¶ 25 Butler had known Selvie for approximately 10 years and Selvie, Spruille and Kevin

Mitchell, who was arrested with Butler and Selvie, were all fellow gang members. On the evening of May 13, 2007, Butler and Selvie were working security for the gang. Butler retrieved two loaded .45-caliber handguns from his home, a Ruger and a Llama, and took them to Selvie's house. The Selvie house provided a good vantage point for security purposes because it afforded a view of both 50th Place and Peoria.

¶ 26 When he arrived at the Selvie house, Butler gave the Ruger to Selvie and kept the Llama in his waistband. Between 12:30 and 1 a.m., Butler and Selvie were on the porch of Selvie's house, providing security. Shortly before 1 a.m., Mitchell and Jeffrey Selvie arrived at the house. Jeffrey went inside the house while Mitchell remained on the porch with Selvie and Butler. Butler then noticed that a police car was approaching on Peoria. Although the car was unmarked, Butler recognized it as a police vehicle because it was a Crown Victoria with municipal license plates.

¶ 27 Butler told Selvie the police were coming and, as the car turned on 50th Place, Butler went inside the house. Selvie entered the house behind him, but Butler did not know where Mitchell was at that time. Butler sat on the stairs just inside the door and looked out a window through a sheer curtain. Approximately 30 seconds later, Butler saw someone in a black hoodie run past the house. An officer then ran past the house, just as Selvie was going back out the front door.

¶ 28 Selvie went to the west end of the porch and a few seconds later, Butler heard a gunshot. Because the gunshot sounded so close, Butler believed it came from the porch. Selvie then came back inside the house holding the Ruger and went up to the second floor apartment, where he

lived with his mother and sister. Butler followed Selvie upstairs and Selvie told Butler to give him the Llama Butler had in his possession. Selvie took both weapons and went somewhere toward the back of the apartment. Approximately five minutes later, Selvie returned and said two or three times that he had "fucked up."

¶ 29 Shortly thereafter, Butler heard a lot of noise outside and saw a lot of police activity. Police officers knocked on the door but Selvie told everyone not to answer the door. Later that morning, the police officers forced their way into the house and Selvie and Butler, along with several other people, were taken into custody.

¶ 30 Butler acknowledged that he had not always been honest with police because he was not supposed to "tell on" other gang members. In fact, Butler initially said that he was asleep that night and did not see anything. However, Butler said that he told the truth in court in exchange for his plea deal and because he did not want to "go down" for something he did not do.

¶ 31 On cross-examination, Butler acknowledged that he had also been charged with attempted murder of a peace officer and, if convicted of that charge, could get a sentence of anywhere from 35 to 95 years with enhancements. Butler stated that there were no drug sales occurring on the night in question. Defense counsel elicited that members of Spruille's family were "higher-ups" in the gang, but Butler testified that on the night of the shooting, he did not see Spruille. Defense counsel asked Butler to display his gang tattoos to the jury. Finally, defense counsel inquired of Butler whether other members of Selvie's family, including his grandmother, mother, uncle, nieces and nephews lived in the home at 852 West 50th Place.

¶ 32 On redirect, Butler confirmed that Spruille's uncle was a high ranking member of the

gang. Butler was then asked whether other members of the Selvie family living in the home were in the gang and, specifically, whether Sergio Selvie was a gang member. Defense counsel objected on the grounds that his questions on cross-examination had been about who lived in the house, not about the Selvie family in general. The objection was overruled. Butler then confirmed that Sergio and Michael Selvie were also members of the Gangster Disciples. Finally, Butler stated that if the plea agreement was approved, he would not be able to safely return to his neighborhood when he was released from prison.

¶ 33 Following Butler's testimony, defense counsel moved for a mistrial on several grounds, two of which relate to issues raised by Selvie on appeal. Defense counsel sought a mistrial on the ground that the State violated the court's pretrial ruling excluding testimony of the Selvie family's reputation in the neighborhood when the prosecution asked whether Sergio and Michael were gang members. Also, in light of Butler's testimony that no drug sales were occurring on the night of the shooting, defense counsel argued that the evidence the State presented related to the gang's narcotics trade and the security it provided for that trade was irrelevant.

¶ 34 The motion for a mistrial was denied. On the issue of whether the State violated the motion to exclude testimony of the Selvie family's reputation, the trial court found that its *in limine* order has not been violated and that, in any event, evidence regarding other gang members in the home could inure to Selvie's benefit given that there were no eyewitnesses to the shooting. The court further determined that given Butler's testimony that he and Selvie were working security for the gang that night, the fact that there were no narcotics transactions occurring at that time was irrelevant.

¶ 35 When trial resumed, Ford testified that shortly after becoming the lead detective on the case, he had a conversation with Frugoli who had spoken with Johnson at the hospital. After speaking with Frugoli, Ford shifted the focus of the investigation from Spruille to the Selvie house. On cross-examination, Ford acknowledged that after speaking with Frugoli, the focus shifted to the Selvie house but not to any particular individual. Ford named various individuals who were removed from the Selvie house and taken to the police station for questioning as part of the investigation. The individuals included Selvie, Butler, Mitchell, Jeffrey Selvie, two individuals named James Selvie, and Ryan Selvie. Defense counsel then asked Ford about other individuals, witnesses or suspects who were taken to the police station for questioning, including Sergio Selvie.

¶ 36 Forensic evidence established that one fired cartridge case was recovered in the front area of the vacant lot on a concrete foundation ledge, approximately 8 to 10 feet from the porch of the Selvie house. Ballistics testing showed that the cartridge case recovered from the vacant lot was fired by a .45 Ruger like one of the weapons recovered from Selvie's house. There were no latent fingerprints suitable for comparison on the Ruger or the cartridge case. One latent print suitable for comparison was found on the Llama firearm, specifically, on the body of the firearm and not on the grip or trigger. That print was determined to have been made by Selvie. Four latent prints were found on one of the magazines, a magazine that fit the Ruger. One of the prints could not be identified, two of the prints were identified as Selvie's, and one was identified as Butler's. For purposes of comparison, the forensic latent print examiner was provided with fingerprint cards for Selvie, Butler, Mitchell and Jeffrey Selvie. None of the latent fingerprints matched Mitchell

or Jeffrey Selvie.

¶ 37 The jury found Selvie guilty of aggravated battery with a firearm of a peace officer and not guilty of attempted first degree murder of a peace officer. Selvie's motion for a new trial was denied. The trial court subsequently sentenced Selvie to 60 years in prison with three years of mandatory supervised release. Selvie's motion to reconsider the sentence was denied. Selvie timely filed this appeal.

¶ 38 ANALYSIS

¶ 39 A. Reasonable Doubt

¶ 40 We first address Selvie's contention that the State failed to prove beyond a reasonable doubt that he shot Johnson, that he knowingly caused injury to Johnson, or that he was legally accountable for the shooting. Due process requires the State to provide "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged." (Internal quotation marks omitted.) *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004) (quoting *In re Winship*, 397 U.S. 358, 364 (1970)).

¶ 41 When reviewing a challenge to the sufficiency of the evidence, a reviewing court must decide " 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *Id*. (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). A reviewing court does not retry the defendant or substitute its judgment for that of the trier of fact with regard to the credibility of the witnesses, the weight to be given to each witness's testimony, and the reasonable inferences to be drawn from the evidence. *People v. Ross*, 229 Ill. 2d 255,

272 (2008). A criminal conviction will not be overturned on insufficient evidence grounds unless the proof is so improbable or unsatisfactory that a reasonable doubt as to the defendant's guilt exists. *People v. Pollock*, 202 Ill. 2d 189, 217 (2002).

¶ 42 The same standard of review applies whether evidence of defendant's guilt is direct or circumstantial. *Id*. "Circumstantial evidence alone is sufficient to sustain a conviction where it satisfies proof beyond a reasonable doubt of the elements of the crime charged." *Id*. Where a defendant is convicted on the basis of circumstantial evidence, if all the evidence taken as a whole satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt, the trier of fact does not have to be satisfied beyond a reasonable doubt as to each link in the chain of circumstantial evidence. *People v. Hall*, 194 Ill. 2d 305, 330 (2000). "Moreover, the trier of fact is not required to disregard inferences which flow normally from the evidence and to search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt." *Id*. at 332.

¶ 43 We have examined the evidence in light of the foregoing principles and conclude that a rational trier of fact could have found beyond a reasonable doubt that Selvie was guilty of aggravated battery with a firearm in Johnson's shooting. We disagree with the State's argument that there was sufficient "direct" evidence to support a finding of guilt beyond a reasonable doubt. There was little, if any, direct evidence of Selvie's guilt. However, we agree that the substantial circumstantial evidence in this case was sufficient to satisfy beyond a reasonable doubt every element of the crime charged.

¶ 44 A person commits aggravated battery with a firearm of a peace officer when he, by means

of discharging a firearm, knowingly causes any injury to a person he knows to be a peace officer. 720 ILCS 5/12-4.2(a)(2) (West 2006). Further, a person acts knowingly if he is consciously aware that his conduct is practically certain to cause injury. 720 ILCS 5/4-5(b) (West 2006).

¶ 45 Here, there was substantial circumstantial evidence tying Selvie to Johnson's shooting. Although there were no known eyewitnesses to the shooting, both Johnson and Amato identified Selvie as one of the individuals on the porch when they initially drove past. Johnson placed Selvie on the porch as Johnson ran past in pursuit of Spruille, moments before he was shot. The gunshot was very loud and came from the direction of Selvie's porch. Johnson fell to the ground and immediately turned to point his gun behind him but did not see anyone to the south or west. Although the Selvie house blocked Johnson's view to the east, Amato heard the gunshot and ran back from the east toward the Selvie house, but did not see anyone run east, west or south.

¶ 46 Common sense dictates that someone who had just shot and wounded a police officer who was, immediately after being wounded, pointing his gun behind him, would not run north through the vacant lot toward the armed officer. Thus, the logical escape routes for the person who shot Johnson (excluding, for the moment, inside the Selvie home) would have been east or west on 50th Place or south across 50th Place. Yet Amato, who was running west on 50th Place after hearing the shot, did not see anyone running. That Amato saw no one lends credence to the State's theory and Butler's testimony that the shot came from the Selvie porch and that the shooter retreated immediately into the building.

¶ 47 The bullet entered Johnson's body from right to left, consistent with a shot being fired from behind him and to his right from the vicinity of the Selvie porch. The one bullet casing

found in the vacant lot was on the ground 8 to 10 feet from Selvie's front porch. That casing was consistent with ammunition being fired from a .45 Ruger, one of the weapons later found hidden in the Selvie home. That casing was also inconsistent with the only other weapon - the Llama - recovered from the home. Of the four latent fingerprints suitable for comparison found on the weapons, two of the fingerprints on the magazine that fit the Ruger were Selvie's.

¶ 48 Based on the foregoing evidence, a rational trier of fact could have concluded that the gunshot that hit Johnson was fired by someone on the Selvie porch. But we do not agree with the State that this evidence, standing alone, would have been sufficient to convict Selvie. Rather, Butler's testimony, which the jury chose to believe, provided additional details that, when viewed in the light most favorable to the prosecution, were sufficient to prove Selvie's guilt beyond a reasonable doubt.

¶ 49 Butler testified that when he arrived at the Selvie home earlier that evening, he gave the Ruger to Selvie. There is no evidence that anyone other than Selvie was in possession of the Ruger that night. Although Butler and Selvie "spun into" the vestibule when the police drove past, Butler testified that Selvie returned to the porch as Johnson ran past. A moment later, Butler heard a loud gunshot that sounded as if it came from the porch, and immediately after that Selvie came back inside with the Ruger in his hand. Butler further testified that Selvie told Butler to give him the Llama, and Selvie's fingerprint was found on the barrel of the Llama, consistent with Selvie taking the gun from Butler. Butler testified that Selvie took both guns toward the back of the second floor apartment, and the guns, in fact, were recovered from a crawl space above the second floor porch at the rear of the apartment. Finally, after returning without

the weapons, Selvie commented several times that he had "fucked up."

¶ 50 We recognize that the testimony of a codefendant has inherent weaknesses and should only be accepted with utmost caution and suspicion. But such testimony, "whether corroborated or uncorroborated, is sufficient to sustain a criminal conviction *if it convinces the jury of the defendant's guilt beyond a reasonable doubt*." (Emphasis in original.) *People v. Young*, 128 Ill. 2d 1, 47-48 (1989). Here, the jury was fully aware of the plea bargain offered by the State in exchange for Butler's testimony against Selvie. The jury was also aware that Butler's plea deal was contingent on a judge determining at some later time whether his testimony was truthful and that, if it was not, he had no deal. The jury knew that both Johnson and Amato tentatively identified Butler as one of the individuals on the porch initially and that Butler had also been charged with Johnson's shooting. Under these circumstances, it was up to the jury to determine the credibility of Butler's testimony and the weight to be given to that testimony.

¶ 51 We note that Butler's testimony was not directly contradicted and was primarily consistent with the other evidence adduced at trial. Although Butler testified that Spruille was not present at the Selvie residence at the time of the shooting, it is clear that Johnson was chasing an individual who was there and was a part of the group in front of the building when Johnson and Amato drove past. Moreover, Johnson positively identified Spruille as the person he was chasing. We cannot say that the evidence was so unreasonable, improbable or unsatisfactory as to give rise to a reasonable doubt regarding Selvie's guilt.

¶ 52 Selvie also argues that the evidence did not exclude the possibility that Mitchell was the shooter. However, other than the possibility that Mitchell was on the porch at the time, no other

evidence was presented that could implicate Mitchell in the shooting. This speculative argument standing alone is insufficient to create reasonable doubt.

¶ 53 Selvie also contends that the State did not prove that he knowingly caused Johnson's injury. Rather, Selvie argues that, if he was the shooter, he acted with reckless disregard. Selvie's reliance on *People v. Watkins*, 361 Ill. App. 3d 498, 501 (2005) is misplaced. In *Watkins,* the court found that the defendant acted with reckless disregard when he fired five shots into the air in a residential neighborhood because he "found the gun in the closet and just wanted to see how it worked." *Id*. at 500, 502. *Watkins* does not support the conclusion that Selvie acted recklessly when the evidence showed he watched a police officer chase a fellow gang member past his house, went out on his porch, and fired a gun at the officer's back. Johnson testified that the artificial lighting was sufficient for him to identify Selvie as he ran past Selvie's home. That same lighting was sufficient for Selvie to aim and hit Johnson in the back. Thus, the fact that it was dark outside does not mean that Selvie's conduct was necessarily reckless, instead of knowing. Accordingly, the evidence, considered in the light most favorable to the State, was sufficient to establish that Selvie was consciously aware that his conduct was practically certain to cause injury.[1]

¶ 54 B. Gang Evidence

¶ 55 Selvie next contends that the trial court erred in ruling that gang evidence was admissible

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[1] Because we have determined that the evidence was sufficient to convict Selvie of aggravated battery with a firearm of a peace officer, we need not address Selvie's alternative argument that the evidence was insufficient to convict him on an accountability theory, a theory that assumed someone other than Selvie was the shooter.

to show context and motive for the offense, and that he was denied a fair trial where the State presented irrelevant and prejudicial evidence about who sold drugs for the gang and that certain individuals in Selvie's family were gang members.

¶ 56 While we recognize that evidence relating to a defendant's gang membership and activity can be potentially inflammatory (*People v. Roman*, 2013 IL App (1st) 110882, ¶ 37), when there is sufficient evidence that gang membership is related to the crime charged, evidence of gang affiliation is admissible if it is relevant to an issue in dispute and its probative value is not substantially outweighed by its prejudicial effect *(People v. Johnson*, 208 Ill. 2d 53, 102 (2004)). Evidence of gang affiliation is considered relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action either more or less probable than it would be without the evidence. *Id*. Gang evidence is generally admissible to "provide a motive for an otherwise inexplicable act." (Internal quotation marks omitted.) *People v. Villarreal*, 198 Ill. 2d 209, 233 (2001) (quoting *People v. Smith*, 141 Ill. 2d 40, 58 (1990)).

¶ 57 Evidentiary rulings are left to the sound discretion of the trial court and will not be reversed absent a clear showing of abuse of that discretion resulting in manifest prejudice to the defendant. *People v. Lucas*, 151 Ill. 2d 461, 489 (1992). An abuse of discretion will only be found where " 'the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court.' " *People v. Wheeler*, 226 Ill. 2d 92, 133 (2007) (quoting *People v. Caffey*, 205 Ill. 2d 52, 89 (2001)).

¶ 58 We agree with the State that evidence of Selvie's gang membership was relevant to provide a motive and context for the shooting. Selvie and Butler were working security for the

gang, and, for that reason, were armed with weapons that belonged to the gang. Butler's testimony that no drug sales were occurring that night does not, as Selvie argues, make this evidence irrelevant. Butler testified that providing security entailed protecting the gang's territory from rival gang members and warning those who were selling drugs if the police were spotted. The logical inference from this testimony is that security was an ongoing operation and was not restricted to those times that active narcotics sales were occurring. Indeed, Butler and Johnson both testified that the territory controlled by the 50 Strong faction was almost completely surrounded by territory that was controlled by a rival gang.

¶ 59 Although Selvie complains on appeal of prejudice resulting from evidence that Spruille's uncle was a "higher up" in the gang, this evidence was first elicited by defense counsel during Butler's cross-examination. See *Gillespie v. Chrysler Motors Corp.*, 135 Ill. 2d 363, 374 (1990) ("where a party himself introduces or elicits certain evidence, he cannot later complain"). Moreover, evidence that Spruille was also a gang member and that his uncle was a senior member of the gang was relevant to provide a motive for Selvie to shoot Johnson in an attempt to protect Spruille, who was being pursued by Johnson.

¶ 60 We further note that evidence of gang membership was relevant to explain how Selvie came to be in possession of the weapon that was allegedly used in the shooting. Both weapons belonged to the gang and Butler retrieved them from his home and brought them to Selvie's home, giving Selvie the Ruger and keeping the Llama. Without the context that the weapons belonged to the gang and were brought to Selvie's home for the express purpose of providing security for the gang, the jury would have received no explanation for how the Ruger that was

recovered from Selvie's residence came to be in his possession in the first place. Thus, the trial court did not err in allowing evidence of Selvie's gang membership for purposes of providing motive and context for the shooting.

¶ 61 We agree with Selvie that the trial court erred in allowing testimony that drug addicts and juvenile gang members were used to sell narcotics because they would get less prison time, while adult gang members provided security. Although this testimony explains the reason Selvie was working security rather than selling drugs, it was not necessary and the prejudicial effect of the evidence outweighed its probative value. Immediately following the testimony on this point, the trial court gave a limiting instruction to the jury that Selvie was not charged with any drug offenses and that they should only consider the evidence as it related to Selvie's alleged conduct that evening. But the use of juveniles and drug addicts to sell narcotics had no bearing on whether Selvie shot Johnson. Such evidence was irrelevant and inflammatory. We consider below whether the admission of this evidence deprived Selvie of a fair trial.

¶ 62 Selvie also assigns error in the trial court's admission of testimony that two other individuals in Selvie's family were also gang members. However, during Butler's cross-examination, defense counsel asked about other family members residing in the building, including Selvie's mother, grandmother, uncle, nieces and nephews. This questioning appeared aimed at establishing that police rounded up innocent family members when they executed the search warrant the morning after the shooting. We agree with the State that this testimony invited inquiry into other gang members residing in the home to explain why several individuals and not just Selvie and Butler were taken into custody and we, therefore, find no error in its

admission. Moreover, we agree with the trial court's observation that the presence of other gang members in the home could have been favorable to Selvie in that it would allow him to argue that someone else was responsible for shooting Johnson and, in fact, defense counsel pursued this argument regarding Mitchell.

¶ 63 The error in admitting the evidence regarding juveniles and drug addicts warrants reversal only if it resulted in manifest prejudice to Selvie. The case relied on by Selvie to establish manifest prejudice, *People v. Mason*, 274 Ill. App. 3d 715 (1995), is inapposite. In *Mason*, the defendant and victim were both members of the same street gang and defendant told police that he had been ordered to kill the victim by a higher ranking gang member. *Id*. at 717-18. While the *Mason* court agreed that evidence of the gang's organizational structure was relevant to the defendant's motive, it held that evidence regarding gang rivalries, presentment, graffiti, tattoos and drug sales had nothing to do with that motive. *Id*. at 722. The opinion lists 24 different categories of gang-related evidence that were introduced at trial. *Id.* at 720-21. The court further held that the trial court erred in (1) refusing to redact large portions of the defendant's confession related to irrelevant gang evidence, (2) allowing the State to introduce evidence regarding the defendant's status as a "regent," someone who sold drugs, protected drug territories and hid weapons, and (3) admitting photographs of the defendant's tattoos. *Id*. at 722-23. Finally, the court concluded that the defendant was entitled to a new trial because the irrelevant, excessive and inflammatory gang evidence raised doubt as to whether the jury fairly considered the defendant's claim that he only confessed to the murder when it became apparent that the higher ranking gang member who defendant claimed actually committed the murder would evade

capture and the defendant would not be able to return home. *Id*. at 724. Although the court commented that defendant's theory was "not without its weaknesses," the court found that the fairness of defendant's trial was compromised. *Id.*

¶ 64 Here, evidence of Selvie's gang membership and the fact he was working security for the gang, which included alerting those members who were selling narcotics if the police were coming, was both relevant and admissible to provide motive and context for the shooting. Thus, it was inevitable that the jury would hear that the primary activity of the 50 Strong faction was selling drugs. The only evidence that was irrelevant and inadmissible was the testimony that the gang used drug addicts and juvenile members to sell the drugs. This evidence alone was not so excessive and inflammatory that its erroneous introduction resulted in manifest prejudice to Selvie. The references to juveniles and drug addicts were brief and this evidence was not mentioned in the State's closing argument. Viewing the record as a whole, we are convinced that the jury did not convict Selvie because the gang used juveniles and drug addicts to sell drugs but, rather, because it concluded that Selvie shot Johnson.

¶ 65 C. Prosecutorial Misconduct

¶ 66 Selvie contends that the State engaged in prosecutorial misconduct in closing arguments when it (1) vouched for the credibility of witnesses who were police officers and forensic examiners, (2) shifted the burden of proof and argued facts not in evidence, and (3) disparaged defense counsel and Selvie and improperly lampooned the defense theory in the case. Selvie argues that, taken together, these errors denied him a fair trial and this court should reverse his conviction and remand for a new trial.

¶ 67 Prosecutors are afforded wide latitude in closing argument, and a prosecutor's comments in closing argument will only provide a basis for reversal "when they engender substantial prejudice against a defendant to the extent that it is impossible to determine whether the jury's verdict was [based on] the comments or the evidence." *People v. Caffey*, 205 Ill. 2d 52, 131 (2001). We further note that closing arguments must be reviewed in their entirety, and the challenged remarks must be considered in context (*People v. Wheeler*, 226 Ill. 2d 92, 121 (2007); *Caffey*, 205 Ill. 2d at 131) and in relation to the evidence (*People v. Landwer*, 166 Ill. 2d 475, 494 (1995); see also *People v. Edgecombe*, 317 Ill. App. 3d 615, 620 (2000) ("improper remarks are reversible error only when they result in substantial prejudice to the defendant, given the content and context of the language, its relationship to the evidence, and its effect on the defendant's right to a fair and impartial trial.")). However, prosecutorial misconduct is not taken lightly and a new trial is warranted if the remarks were indeed improper and constituted a material factor in a defendant's conviction. *Wheeler*, 226 Ill. 2d at 121-123.

¶ 68 The regulation of the substance and style of closing arguments is within the discretion of the trial court and the trial court's rulings on the propriety of the remarks will not be disturbed absent an abuse of that discretion. *Caffey*, 205 Ill. 2d at 131. However, the issue of whether a prosecutor's statements in closing argument were so egregious that they warrant a new trial is a legal issue that we review *de novo*. *Wheeler*, 226 Ill. 2d at 121.

¶ 69 1. Witness Credibility

¶ 70 The first category of remarks that Selvie contends were improper involves statements relating to the credibility of witnesses. Specifically, Selvie argues that the State repeatedly

vouched for the credibility of Johnson and Amato based on their status as police officers and that the State improperly vouched for the credibility of forensic examiners.

¶ 71 A prosecutor may not argue that a witness is more credible based on his status as a police officer. *People v. Fields*, 258 Ill. App. 3d 912, 921 (1994). This prohibition includes arguments extolling an officer's experience or asserting that an officer would not risk his job, pension, etc. merely to convict a particular defendant. See *People v. Gorosteata*, 374 Ill. App. 3d 203, 219-20 (2007) (and cases cited therein). It is similarly improper for a prosecutor to bolster a police officer's credibility by stating that the officer risks his life every day for people like the jurors. *People v. Williams*, 289 Ill. App. 3d 24, 36 (1997). Finally, it is also improper for a prosecutor to express personal beliefs regarding the credibility of witnesses. *Fields*, 258 Ill. App. 3d at 921.

¶ 72 However, a prosecutor is allowed to "comment on the evidence, draw legitimate inferences therefrom even if they are unfavorable to the defendant, and comment on the credibility of witnesses." *Williams*, 289 Ill. App. 3d at 35. Moreover, because challenged comments are reviewed in the context of the entire closing argument, even remarks generally considered improper may in fact be a proper response to the arguments of defense counsel. See, *e.g.*, *People v. Davis*, 228 Ill. App. 3d 835, 839-41 (1992) (holding that where the prosecutor argued that police officers would not risk their careers, pensions and reputations to frame the defendant, such remarks did not deprive the defendant of a fair trial because they were a proper response to defense counsel's attack on the police officers' credibility). "[A] defendant may not claim prejudice from a prosecutor's comments when the defendant's earlier argument invited those comments." *Williams*, 289 Ill. App. 3d at 36.

¶ 73 With these principles in mind, we examine the statements challenged by Selvie. In its initial closing argument, the State told the jury that Johnson and Amato were not lying "because that's not their character. That's not who they are." When these statements are reviewed in context, they are not improper. The State's case rested on the credibility of its witnesses, primarily Johnson and Butler, and to a lesser extent Amato. The State therefore focused a large portion of its argument on statements regarding the credibility of the witnesses. The preface to the State's comments regarding the character of both Johnson and Amato had nothing to do with their status as police officers, but rather was related to the evidence presented and the State's explanations for slight discrepancies in that evidence. The State noted that defense counsel had intimated throughout the trial that the police officers were lying and then observed that if the officers wanted to lie, they could have done a better job of getting their stories to coincide and Amato could have simply said that he saw Selvie shoot Johnson.

¶ 74 At the close of its initial argument, the State said that Johnson "is one of the good guys. He wouldn't lie to you because it's not in his character." The State prefaced these remarks with a discussion of some of the circumstantial evidence against Selvie to draw a contrast with defense counsel's characterization of Selvie as innocent in opening statements. The State then drew a comparison with Johnson, who got out of his car that night to chase someone who was possibly armed when he could have just let him go. The State commented that Johnson faced a lot of risks but instead of receiving a medal for bravery, he got to come to court and be called a liar. The State then made the remarks related to Johnson's character.

¶ 75 Unlike the State's previous remarks, these statements are more akin to statements that are

generally considered improper. Although the State did not explicitly argue that Johnson should be believed because he was a police officer and Selvie was a gang member, the comparison was drawn and reference was made to the risks Johnson faced in the course of his job as a police officer. However, because the comments specifically referred to Johnson's actions and the risks taken on the night in question and not to the risks generally taken by police officers, we believe they fell short of being improper.

¶ 76 Selvie also contends that arguments related to the character of both Johnson and Amato in rebuttal were not invited by defense counsel's arguments and consisted of additional improper bolstering. In closing argument, defense counsel said:

> "Are we calling Pat Johnson a liar, that he didn't see Bobby Selvie out there that night? Is that what we're saying? Ladies and gentlemen, Detective Johnson has misremembered that detail. You see, Detective Johnson wants someone to be held accountable. He wants someone to pay for what happened, and that's understandable. What happened to him is horrible. And we have no doubt, no doubt that today he believes that it was Bobby Selvie out there on that porch. He believes it. He testified to it. Was he lying about that? Well, ladies and gentlemen, think about the facts that came out."

Defense counsel then proceeded to discuss the fact that Johnson did not initially tell anyone he saw Selvie on the porch and argued that even Butler contradicted Johnson's version of events. Defense counsel also pointed out discrepancies in Amato's testimony.

¶ 77 On rebuttal, the State addressed the character of both Johnson and Amato. The State said

that Amato was a man who heard gunfire and, instead of running away from it, ran toward it to protect people. The State then said that "a man of that character is out there to protect all of us. How dare they call him a liar." The State pointed out that Johnson had risked his life and had been shot in the back, "[b]ut I guess he's not a liar; he's just not telling the truth, according to the defense attorney." In closing, the State noted that it was the job of both officers to protect the citizens of Chicago.

¶ 78 Although Selvie argues that he did not label Johnson and Amato liars, defense counsel clearly challenged the credibility of both officers and thus opened the door to additional remarks by the State on the character of both witnesses. We agree that the State's comments that Amato was "out there to protect all of us" and that the job of both officers was to protect the citizens of Chicago were improper as they bore no relation to Johnson's or Amato's credibility. However, the remaining comments were based on the evidence and inferences drawn therefrom and were a proper response to defense counsel's arguments suggesting that the officers "misremembered" important details.

¶ 79 Finally, Selvie contends that the State improperly bolstered the credibility of forensic examiners when it stated: "Are the crime lab people going to make up stuff? Of course not. All their evidence is preserved. It could be tested by anyone." Both the fingerprint and ballistics witnesses called by the State were cross-examined regarding whether their analyses were "rush jobs," the implication being that the results could not be trusted. The prosecutor's comments did not vouch for the credibility of these witnesses, but were, rather, an observation that the evidence they tested was subject to objective analysis. Thus, these comments were an appropriate

response to the defense attack on the reliability of the scientific evidence presented by the prosecution.

¶ 80 In summary, under the first category of challenged remarks, comments made in the State's initial closing argument regarding the character of Johnson and Amato were not improper. The majority of the remarks were based on the evidence and not on the witnesses's status as police officers and the closing remarks were not improper because the State specifically referenced Johnson's actions and the risks taken on the night in question rather than simply referring to risks taken generally by police officers. On rebuttal, the State's remarks regarding the protection of citizens generally were improper, while the State's remaining character remarks were based on the evidence and therefore proper. Finally, the State's remarks on the credibility of the forensic examiners were not improper. We will discuss below whether the improper comments on witness credibility constitute reversible error.

¶ 81 2. Burden Shifting

¶ 82 Under the second category of challenged comments, Selvie contends that the State's arguments shifted the burden of proof or contained facts not in evidence. First, Selvie argues that the State's comments related to whether the forensic evidence could have been tested by anyone else and whether defense counsel could have served subpoenas on witnesses constituted improper burden shifting. Second, Selvie complains that the State argued facts not in evidence when it referred to a drug operation and stated that Spruille circled around and passed Selvie's house in every way he could in order to get help from "his protection." Finally, Selvie takes issue with the State's comments that Spruille was the nephew of one of the gang's leaders, that Selvie

would have to answer to the gang if he did not protect Spruille, and that Selvie was arrested in the house with drugs.

¶ 83 The burden of proving a defendant's guilt beyond a reasonable doubt always rests on the prosecution and a defendant is not obligated to offer any proof of innocence. *People v. Abadia*, 328 Ill. App. 3d 669, 679 (2001). At closing, the State is permitted to make credibility arguments and discuss the effect of the evidence presented and reasonable inferences drawn therefrom without shifting the burden of proof. *People v. Berry*, 264 Ill. App. 3d 773, 780 (1994).

¶ 84 During redirect examination of the ballistics expert, the State asked whether the ballistics evidence would be available if anyone else wanted to test it. Defense counsel's objection on the grounds of burden shifting was overruled. The State then asked whether anyone had made a request for evidence to be submitted for a retest. In closing argument, when the State was discussing whether the forensic examiners would "make up stuff," the State said: "All their evidence is preserved. It could be tested by anyone, right. The fingerprints, the ballistics, no one is making anything up." During rebuttal argument, the State explained what a subpoena is and then said, "They get to serve subpoenas on witnesses." After defense counsel's objection was overruled, the State said, "They could have subpoenaed anybody out here that they want to. *** They could have served a subpoena on the Selvie family."

¶ 85 We do not agree that these statements constituted improper burden shifting. Selvie's reliance on *People v. Beasley*, 384 Ill. App. 3d 1039 (2008) is unavailing. In *Beasley*, the State argued that it was unconscionable for the defense not to have tested evidence for fingerprints. *Id*.

at 1048. In holding that the trial court sanctioned an erroneous burden of proof by overruling the defendant's objections to the State's comments, the *Beasley* court noted that a defendant never has a burden to submit evidence for analysis so the failure to do so could not be considered unconscionable. *Id*.

¶ 86 Here, the State did not argue that Selvie was required to subpoena witnesses or test evidence. Moreover, we note that in *People v. Patterson*, 217 Ill. 2d 407, 445 (2005), the State also brought out on redirect that the evidence was available to the defense for independent testing but no such request had been made. Our supreme court held that this questioning was proper where the purpose of the State's questions was to answer doubts raised on the testing results by the defense. *Id*. at 446-47. When viewed in context, the State's arguments here were a proper response to the defense theories that there were potential witnesses to the shooting who had not been called and that the forensic examiners had "rushed" through an examination of the evidence. Thus, we conclude that the State's questioning and comments did not constitute burden shifting and the trial court did not abuse its discretion in overruling defense counsel's objections.

¶ 87 We now turn to the issue of whether the State argued facts not in evidence. To preserve a claim for review, a defendant must object at trial and include the alleged error in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). The State points out, and Selvie agrees, that Selvie only objected to and included in his posttrial motion one of the challenged comments. Therefore, Selvie's challenges to the remaining two comments will be reviewed under the plain-error doctrine. See *People v. Thompson*, 238 Ill. 2d 598, 613 (2010) (noting that unpreserved claims of error will be considered when (1) the evidence is so closely balanced that the error

alone threatened to tip the scales of justice against the defendant or (2) the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process). The first step in a plain-error analysis is to determine whether an error occurred. *Id*.

¶ 88 Selvie's argument that the State misstated the facts when it referred to Spruille as the nephew of one of the gang's leaders has no merit. Selvie contends that Butler only testified that members of Spruille's family were "higher-ups" in the gang but never testified that the family member was Spruille's uncle. However, the record discloses that on redirect examination, Butler in fact testified that Spruille's uncle was a high ranking member of the gang.

¶ 89 Selvie also challenges the State's arguments that Selvie and Butler were "busy protecting their drug operation" and that Spruille ran past Selvie's house "to get help from his protection" on the grounds that Butler testified that no drug sales were occurring that night. Moreover, Selvie argues that there was no evidence to support the State's argument that Spruille circled the Selvie house and went past it "every way he [could]."

¶ 90 Evidence at trial established that the primary business of the 50 Strong faction was the narcotics trade and that Spruille was a member of the gang. It was also established that Selvie and Butler were working as security for the gang, and that involved providing protection from rival gang members and acting as lookouts for the police. Finally, there was evidence that when Johnson and Amato exited their vehicle, Spruille, who had been walking in the opposite direction, turned around and ran back toward the Selvie house. Therefore, the State's arguments were reasonable inferences based on the evidence presented at trial and the fact that Butler testified there were no drug sales occurring that night is immaterial. Because there was no error

in the challenged comments, we need not conduct a plain-error analysis.

¶ 91 Selvie also contends that the State misstated the evidence when it argued that Selvie was arrested "in the house with the guns and the drugs." We agree that this was a misstatement of the evidence because no drugs were found in the house. However, the jury was instructed that arguments are not evidence and that if there is a discrepancy between the arguments and the evidence, it should follow the evidence.

¶ 92 3. Disparaging Remarks

¶ 93 The third category of comments that Selvie contends were improper includes arguments that "disparaged" both Selvie and defense counsel and statements in which the State "lampooned" the defense's theory in the case. Selvie argues that he was denied a fair trial when the State argued that the defense was "playing on that myth that there is something wrong with circumstantial evidence," and told the jury that it should be "insulted" by defense counsel's argument that Johnson "misremembered" whether or not he had seen Selvie on the porch immediately prior to the shooting. Because defense counsel merely contested the credibility of the State's witnesses and evidence, Selvie claims that the State's argument belittling defense counsel was improper. Selvie further contends that the State disparaged Selvie when it argued: "When you go after the devil, you have to go to hell to get the witnesses."

¶ 94 When reviewed in context, none of the State's arguments were improper. The comments related to circumstantial evidence were proper given the defense theory that because the State's case was circumstantial, the State had not proven Selvie guilty beyond a reasonable doubt. The State's comment that the jury should be insulted was not improper because it was an attack on the

defense theory that Johnson was not credible and not a personal attack on defense counsel. Finally, the comment about the devil was part of a lengthy analogy used by the State, related to the issue of Butler's credibility, in which it was clearly stated just prior to the devil comment that it was an analogy and not intended to be derogatory to anybody in the case. The comment was not a personal attack on Selvie and thus, was not improper.

¶ 95 4. Summary

¶ 96 To summarize our analysis of Selvie's complaints related to comments made by the State in closing argument, we conclude that two of the State's comments related to the character of the police officers were improper where the State made reference to the fact that the officers protect the public. Moreover, the State misstated the evidence when it argued that drugs were found in Selvie's house. However, we do not believe these comments constituted a material factor in Selvie's conviction and, thus, do not rise to the level of reversible error. See *People v. Byron*, 164 Ill. 2d 279, 295 (1995) ("Although the prosecutor's remarks may sometimes exceed the bounds of proper comment, the verdict must not be disturbed unless it can be said that the remarks resulted in substantial prejudice to the accused, such that absent those remarks the verdict would have been different").

¶ 97 D. Sentencing

¶ 98 Selvie's final contention on appeal is that he is entitled to a new sentencing hearing because the trial court improperly considered a factor inherent in the offense in aggravation and because imposing the maximum sentence was excessive. Selvie first claims that he received a double enhancement because the trial court considered a factor inherent in the offense, namely,

that the victim was a peace officer, as a factor in aggravation.

¶ 99 In general, a factor implicit in the offense for which the defendant has been convicted cannot be used as an aggravating factor to impose a harsher sentence than might otherwise have been imposed. *People v. Phelps*, 211 Ill. 2d 1, 11-12 (2004). Such dual use of a single factor is referred to as a "double enhancement." *Id*. at 12. There is a strong presumption that the trial court based its sentencing decision on proper legal reasoning and the trial court's sentencing decision is therefore afforded deference. *People v. Dowding*, 388 Ill. App. 3d 936, 942-43 (2009). The defendant bears the burden of establishing that the sentence was based on improper considerations. *Id*. at 943. In determining whether the trial court based the sentence on proper aggravating and mitigating factors, we must consider the record as a whole. *Id*.

¶ 100 Our review of the record discloses that the trial court did not improperly consider the fact that Johnson was a peace officer as a factor in aggravation. The trial judge began his comments with a recitation of the evidence in the case, which included the fact that Johnson and Amato were police officers who, instead of deciding to just head back to the station 10 minutes before their shift ended, decided to see if there was anything else they could do. However, the trial judge then explicitly stated that the law recognizes that offenses committed against police officers should be treated differently in terms of sentencing than crimes against other people, not because police officers are entitled to special consideration but because the legislature recognizes their unique importance to the fabric of our society. Having concluded his explanation of the fact that the legislature has imposed sentencing differentiations and the reasons for those differences, the trial judge then turned to a discussion of factors in aggravation and mitigation. Under factors

in aggravation, the trial court addressed the following proper factors: (1) that Selvie's conduct caused a threat and serious harm, (2) Selvie's prior criminal activity, and (3) the need to deter others from committing the same crime. The trial court never mentioned Johnson's status as a police officer in connection with factors in aggravation. Thus, we conclude that Selvie has not met his burden of establishing that the trial court improperly considered Johnson's status as a police officer to impose a harsher sentence than might otherwise have been imposed.

¶ 101 Second, Selvie argues that imposing the maximum sentence allowed under the statute was excessive because it failed to account for his poor upbringing and potential for rehabilitation. The trial court has broad discretion in imposing a sentence and sentencing decisions are entitled to great deference. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). Because the trial court is generally in a better position to weigh such factors as the defendant's credibility, demeanor, and social environment, the reviewing court must not substitute its judgment for that of the trial court merely because it would have weighed the factors differently. *Id*. A sentence will be deemed an abuse of discretion where it is "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." (Internal quotation marks omitted.) *People v. Alexander*, 239 Ill. 2d 205, 212 (2010) (quoting *Stacey*, 193 Ill. 2d at 210).

¶ 102 Our review of the record discloses that the trial court, in fact, discussed the factors in mitigation at great length, referring specifically to Selvie's poor upbringing. However, the trial court noted that others share the same unfortunate circumstances and Selvie's upbringing could not excuse Selvie's actions in shooting Johnson or his five prior felony convictions. The trial court also discussed Selvie's potential for rehabilitation. We note that a defendant's rehabilitative

potential is not entitled to greater weight than the seriousness of the offense. *Id*. at 214 (quoting *People v. Coleman*, 166 Ill. 2d 247, 261 (1995)). Moreover, the trial court was not impressed by Selvie's argument related to rehabilitation potential in light of the fact that Selvie's previous contact with the criminal justice system did not deter him from further criminal activity.

¶ 103 It is not the job of this court to reweigh the factors in aggravation and mitigation. We find no abuse of discretion where the trial court clearly explained its consideration of the factors and the reasoning behind imposing the maximum sentence allowed by statute, and where the sentence is not manifestly disproportionate to the nature of the offense.

¶ 104 For the reasons stated herein, we affirm Selvie's conviction and sentence.

¶ 105 Affirmed.