2014 IL App (1st) 121737-U

FIFTH DIVISION
February 21, 2014

No. 1-12-1737

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. 05 CR 06902
	)	
HOWARD MORGAN,	)	Honorable
	)	Clayton J. Crane,
Defendant-Appellant.	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: (1) The trial court did not err in excluding references to defendant's acquittals from a prior trial; (2) the trial court did not abuse its discretion in denying defendant's request to *voir dire* the potential jurors about police misconduct; (3) defendant was not deprived of a fair trial due to prosecutorial misconduct; and (4) defendant is barred from relitigating a claim of double jeopardy that was previously considered in a prior appeal.

¶ 2 At his first trial, defendant Howard Morgan was found not guilty of two counts of aggravated battery with a firearm and one count of aggravated discharge of a firearm, but the jury was unable to reach a verdict on the remaining charges of four counts of attempted murder and one count of aggravated battery with a firearm. The trial court declared a mistrial and a second trial was conducted. Following the second trial, defendant was convicted of four counts

of attempted murder and one count of aggravated battery with a firearm in the February 2005 shooting of four Chicago police officers. The trial court subsequently sentenced defendant to a total of 40 years in prison.

¶ 3 Defendant appeals, arguing that (1) the trial court erred in excluding references to defendant's acquittals from the first trial; (2) the trial court erred in refusing to allow questions about police misconduct during *voir dire*; (3) defendant was denied a fair trial because of multiple instances of prosecutorial misconduct during rebuttal closing argument; and (4) defendant's convictions violate the doctrine of double jeopardy.

¶ 4 In February 2005, defendant was charged with four counts of attempted murder, three counts of aggravated battery with a firearm, and one count of aggravated discharge of a firearm following a shooting at a traffic stop involving four Chicago police officers in which three of the officers were injured. Defendant's first trial was conducted in May 2007 and after two days of deliberations, the jury found defendant not guilty of two counts of aggravated battery with a firearm and one count of aggravated discharge of a firearm. The jury remained deadlocked on the remaining counts. The trial court instructed the jury to continue deliberations, but issues arose over cell phone use by some of the jurors. Eventually, the trial court declared a mistrial. Defendant filed a motion to bar reprosecution of the remaining counts on the basis of double jeopardy, but the motion was denied. Defendant appealed and this court affirmed the trial court, authorizing a second trial. See *People v. Morgan*, No. 1-07-3373 (August 28, 2009) (unpublished order pursuant to Supreme Court Rule 23).

¶ 5 A second jury trial was conducted in January 2012. Prior to trial, the State moved in a motion *in limine* to bar any references to police or prosecutorial misconduct not supported by the facts of this case at any stage of the trial or jury selection. At the hearing on the motion, defense

counsel objected to this request, arguing that the defense should be permitted to *voir dire* the potential jurors about their attitudes about the police and whether they could accept the theory of the defense. The trial court granted the State's motion.

¶ 6 At a second pretrial hearing on the State's motion *in limine*, the State argued that the parties refer to the prior trial as a "proceeding" and that defendant be precluded from mentioning the verdicts from the prior trial. Defendant objected to the motion, but the trial court granted the State's request.

¶ 7 The following evidence was presented at trial.

¶ 8 Officer Timothy Finley testified that on February 21, 2005, he was on patrol with his partner Officer John Wrigley. The officers were in uniform and driving a marked squad car. At approximately 12:40 a.m., the officers were in the vicinity of 14th and Hamlin in Chicago when they heard "a loud report," which Officer Finley described as a loud noise that could have been a gunshot. They drove south on Hamlin to investigate. Officer Finley stated that Hamlin is a one way southbound street, but he observed a van driving northbound on the street with its lights off. The van turned east onto 15th and then south onto Lawndale, making several rolling stops. The officers continued to follow the van. While Officer Finley was driving, Officer Wrigley entered the license plate through the in-car computer. Officer Finley activated his emergency signals to stop the van between 16th and 18th Streets. The van pulled over near 1902 South Lawndale. Officer Finley parked behind and was offset to the east of defendant’s van for their safety.

¶ 9 Defendant immediately exited his vehicle and appeared "irate" and asked why he was being pulled over. Officer Finley unholstered his weapon and held it in a “low-ready position,” which meant that the gun was pointed toward the ground at approximately a 45-degree angle. Officer Finley drew his weapon because he considered it to be a “high risk stop,” based on

several factors, including the loud report, the van traveling the wrong way on a one-way street with its lights off, the van not pulling over for a block after the squad car's emergency equipment was activated, and defendant exiting the van and appearing agitated. Officer Finley approached defendant while Officer Wrigley approached the passenger side to determine whether there were any passengers in the van. Officer Finley ordered defendant to place his hands on the van and defendant complied. Officer Finley put his weapon in its holster and began to pat down defendant. While Officer Finley was conducting the pat down, defendant continued to ask why he had been pulled over. When Officer Finley began to move toward defendant's waistband, defendant turned and began to fight with the officer.

¶ 10 As the fight began, two other Chicago police officers, Officers Eric White and Nicholas Olsen, came to assist Officer Finley. The three officers and defendant fell to the ground as the officers attempted to handcuff defendant. Defendant started to get up and Officer Finley saw that he had a gun in his hand. The officer yelled, "gun gun gun." Defendant turned and started to fire in the direction of all the officers. Officer Finley ran to his squad car for protection and returned fire at defendant. He testified that he fired 4 to 6 gunshots at defendant. When he reached his vehicle, he radioed his dispatch of shots fired at their location. Officer Finley reloaded his gun with a new magazine. When defendant stopped firing, Officer Finley approached defendant. He stated that defendant was in front of the van and reaching for his gun which was a few inches from his hand. Officer Finley kicked defendant's gun away and observed that the gun was in the "slide lock" position, which indicated that the gun was empty. Officer Finley was able to handcuff defendant with the assistance of additional officers who had arrived at the scene. Officer Finley testified that he was not injured.

¶ 11 On cross-examination, Officer Finley stated that he had been a police officer less than two years at the time of the shooting and had been partnered with Officer Wrigley for three months. He admitted that at some point he heard defendant say, "I'm a police officer." Officer Finley later learned that defendant was an officer with Burlington Northern and Santa Fe (BNSF) Railroad.

¶ 12 Officer John Wrigley testified to substantially the same sequence of events leading to the traffic stop as Officer Finley. Officer Wrigley stated that when defendant exited his vehicle, he said in an aggressive tone, “what the f*** you stopping me for?” Officer Wrigley also unholstered his weapon and kept it to his side and pointed toward the ground. Like Officer Finley, Officer Wrigley explained that he unholstered his weapon because of the gunshot he had heard, the van driving the wrong way on a one-way street without its lights on, and defendant exited his vehicle without being asked. Officer Wrigley said he told defendant to “relax” and asked him to “get back in his vehicle,” but defendant did not do so. The officer then approached the passenger side of defendant’s vehicle and again told defendant to relax and to get back into his vehicle. Defendant refused to do so and said, “what the f*** you harassing me for.” Officer Wrigley responded that they had heard a gunshot and were checking it out.

¶ 13 Officer Wrigley stated that defendant said something like, "F*** that, I'm the police," and then turned around and started to fight with Officer Finley. Officer Wrigley put his weapon back in the holster and came around the van to try to help. He saw two officers that he did not know helping Officer Finley. He described the fight as "very violent." He was trying to determine how to assist the officers when he saw defendant reach into his waistband. He tried to warn the officers that defendant might have a gun, but then heard Officer Finley call, "gun gun gun."

¶ 14 Officer Wrigley saw defendant rise and then a muzzle flash in front of defendant. He then saw the gun in defendant's hand. Officer Wrigley unholstered his gun and fired toward defendant. Defendant was firing at another officer when he turned and pointed the gun at Officer Wrigley. As Officer Wrigley was returning fire, he felt a sharp pain in his left arm and left chest. The officer knew he had been shot, but he continued to fire his weapon until defendant fell to the ground. When he fired his weapon, he checked to make sure none of the other officers were in his line of fire. Officer Wrigley obtained cover from the passenger side of his squad car and reloaded his weapon. He heard Officer Finley making a radio call and Officer Wrigley shouted, "officer down, officer hit." Officer Wrigley assessed his injuries and saw a hole in his left arm and he was bleeding heavily. He approached the first officers he saw on the scene and had them transport him to Stroger Hospital.

¶ 15 At the hospital, a spent bullet dropped from his chest area when he removed his jacket. The bullet was recovered. Officer Wrigley had a bruise on his chest where the bullet struck, which was stopped by the bulletproof vest. Officer Wrigley was treated for a gunshot wound to his left arm and released later that day.

¶ 16 On cross-examination, Officer Wrigley said he was the most senior police officer at the scene of the shooting. He had been with Chicago police department for three years, but had previously worked as a police officer in other cities. He did not know how many times he fired his weapon, but each time he did, he aimed for "center mass."

¶ 17 Officer Eric White testified that on February 21, 2005, he was working with partner Officer Nicholas Olsen in uniform and in a marked squad car. Officer White was the passenger while Officer Olsen was driving. The officers were assigned to the targeted response unit in high crime areas and were not confined to a particular beat or neighborhood.

¶ 18 They were driving north in an alley near 1500 South Hamlin when Officer White saw a van drive east on 15th Street, followed by a marked squad car. The officers followed. He saw the van pull over by 19th and Lawndale. He observed one officer on the driver's side of the van and the other on the passenger's side and both had their weapons in a low ready position. Officer White did not know either officer. He could not hear what was being said, but the driver was agitated by his gestures. As he exited his vehicle, Officer White also unholstered his weapon and held in the low ready position. Officer White then saw Officer Finley start to struggle with defendant and he holstered his weapon and came to assist with Officer Olsen. They all fell to the ground struggling. The officers commanded defendant to "stop resisting" and to "give [them] your hands," but defendant did not comply. Officer Finley told Officer White that defendant said he was a police officer and may have a gun. As defendant was pushing himself up with his left hand and reaching toward his waistband with his right hand, Officer White punched defendant in the back of the head to try to stun him, but the blow did not disable defendant or allow the officers to gain control of him.

¶ 19 Defendant then pushed himself off the ground and pointed the gun at Officer Wrigley's chest. Officer White yelled, "he's got a gun," and heard a shot as he retreated. Defendant was on his knees and had his weapon pointed at Officer White. Officer White saw a flash come out of the muzzle and a spark hit the ground, and then felt something hit his leg. The officer then fired directly into defendant's back, but the shot did not immobilize defendant.

¶ 20 Defendant continued to fire at all four officers. During this time, Officer White was constantly moving north and south so he had a clear line of fire at defendant and not strike any of the other officers. At some point, defendant was struck by several shots and, as he fell to the ground, fired a round that Officer White heard go past his ear. Defendant continued to fire from

the ground and then rose to his feet and continued to fire at those officers. Officer White returned fire during this time, and eventually defendant was on the ground and stopped shooting. The officer approached defendant with his weapon drawn and saw defendant reaching toward his weapon, which was lying nearby on the ground in a "slide-lock" position. Officer White saw someone kick the weapon away from defendant.

¶ 21 Officer Olsen came up to him and showed him a hole in his arm from a gunshot. Officer White drove Officer Olsen to the hospital, where Officer White was also treated for a puncture wound to his right calf. A bullet fragment was removed from the wound and he was released. He returned to the scene and walked through the events with detectives.

¶ 22 On cross-examination, Officer White testified that he now knows that defendant was an officer with the BNSF Railroad and he normally would extend professional courtesy to other law enforcement officers. When he first fired at defendant, he estimated that he was about a foot away. He believed he fired 14 shots and each time he aimed for center mass. Officer White thought he was the first officer to fire his weapon.

¶ 23 Officer Nicholas Olsen also testified substantially similar to Officer White's testimony about the events leading up to the shooting. He did not know Officers Finley or Wrigley prior to that night. When he arrived at the scene, he saw the officers' guns in low ready position so he removed his gun. He observed Officer Finley trying to pat down defendant, but defendant was resisting. Officer Olsen holstered his gun and ran to assist. Officer Olsen tried to place defendant's arms behind his back to handcuff him, but was unable to do so. None of the officers were able to gain control of defendant. Defendant pushed himself up and pulled out a gun.

¶ 24 Officer Olsen heard someone yell "gun," and then he heard a gunshot. He ran to seek cover by Officer Finley's squad car. As he was seeking cover, he heard a shot and then felt a

pain in his right arm. He took cover behind Officer Finley's squad car. Officer Olsen drew his weapon, but he did not fire it because of the pain in his arm and because Officer Wrigley was in his line of fire. His partner later took him to the hospital. He was treated for a single through and through gunshot wound to his arm.

¶ 25 Several other officers testified about their actions after responding to the scene. Officer Richard Pruger responded to the scene after hearing a radio call that shots had been fired and that an officer was down. Upon arriving at the scene, he saw defendant lying on his stomach and reaching for a nearby handgun. He approached defendant with Officer Finley with their guns pointed toward the ground and Officer Finley kicked the gun away from defendant's hand. The officers placed handcuffs on defendant. Officer Pruger searched defendant and recovered a cell phone and wallet. He guarded defendant's weapon until it was recovered by crime scene personnel.

¶ 26 Lieutenant Sean Loughran testified that he was the sector sergeant on duty the morning of the shooting. When he arrived on the scene, he observed defendant handcuffed on the ground. He checked defendant's van to make sure another person was not hiding. Sergeant Tom Mitchell was a detective assigned to the case and he received a cell phone and wallet from Officer Pruger, which he later inventoried. Officer William Walker testified that he and his partner Officer David Harris arrived at the scene and encountered Officer Wrigley and they transported him to the hospital. Officer Edward Pakula, Jr., assisted in traffic enforcement by conducting a rolling roadblock as Officer Wrigley was transported to the hospital. At the hospital, he observed a bullet fall when Officer Wrigley removed his jacket. He recovered the bullet and inventoried it. Officer Nina Moore also observed the bullet fall from Officer Wrigley's jacket at the hospital and

she recovered his clothing and personal belongings which were turned over to a forensic investigator.

¶ 27 Paula Alexander testified that on February 21, 2005, she lived on Lawndale within a block of where the shooting took place. Alexander was getting ready for bed at around 12:50 a.m. on February 21, 2005, when she heard a vehicle traveling down the street at a high rate of speed and then stop. Shortly thereafter, she heard gunshots coming from the corner of 19th Street and Lawndale. The gunshots were continuous and too numerous to count. She went to her living room window that faced onto Lawndale and noticed that there was a bullet hole through the window and that the glass was shattered. She notified the police, and Officer Mark Mizula testified that he recovered that spent bullet.

¶ 28 Justin Dukes testified that he was a paramedic for the Chicago fire department and he treated defendant at the scene for multiple gunshot wounds. When Dukes arrived, defendant appeared agitated and was cursing and yelling at everyone near him. Dukes identified himself as a paramedic and defendant continued to yell profanities and said that he did not want any help and that the paramedics should just "let him die." Dukes observed multiple gunshot wounds. While Dukes and his partner were dressing defendant's wounds, defendant became physically combative and struck Duke's female partner. The paramedics subsequently transported defendant to the hospital.

¶ 29 Dr. Andrew Dennis testified that he was a trauma surgeon at Cook County Hospital and he treated Officer Wrigley after the shooting. Dr. Dennis also stated that he was a police officer with the Des Plaines police department, the Cook County Sheriff's Office, and medical director for the Northern Illinois SWAT team. Dr. Dennis observed a spent bullet fall from the officer's clothing as he undressed. Officer Wrigley presented two injuries, one was a large laceration to

his left forearm consistent with a fired bullet, and the other was a large bruise in the area where Officer Wrigley's arm met his chest that was caused by a bullet impact to his bulletproof vest.

¶ 30 Dr. Phillip Zaret testified that he was a trauma surgeon at Mt. Sinai hospital and he treated both Officer Olsen and defendant following the shooting. Officer Olsen had a gunshot wound to his arm caused by a bullet that entered the back of his arm and exited through the front.

¶ 31 Dr. Zaret stated that defendant may have been shot 28 times. Dr. Zaret testified that it was difficult to match the entrance and exit wounds. Specifically, defendant had gunshot wounds to his right neck, right chest, right forearm, and front of his left leg. Defendant had gunshot wounds to his back, the back of his left leg, and the back of his right leg. Defendant also had injuries to his liver, kidney, diaphragm, and colon, as well as an open fracture to his left leg and a fracture to his right arm. Dr. Zaret retrieved three bullets from defendant's body during surgery.

¶ 32 Maurice Henderson testified that he was a forensic investigator with the Chicago police department and he and his partner arrived at the scene at approximately 1:25 a.m. They photographed and videotaped the scene and collected a large amount of ballistics evidence, including multiple fired bullets, fragments, and shell casings. Henderson also recovered defendant's weapon.

¶ 33 Robert Berk testified that he was employed as a forensic scientist for the Illinois State Police and an expert in trace evidence analysis. He examined the jacket and sweater that were recovered from defendant. Berk stated that the right cuff from the jacket contained unique and consistent gunshot residue particles, which is the basis for a positive test result. This result indicated that the right cuff of the jacket had either contacted a primer gunshot residue item or

was in the environment of a firearm when it was discharged. However, there were not sufficient particles on the sweater to yield a positive result.

¶ 34 Jennifer Barrett testified that she worked as a forensic scientist and expert in the area of latent fingerprints. She stated that she examined the firearms evidence recovered in this case and found no suitable fingerprints to compare.

¶ 35 Zbieniew Niewdach testified that he was a forensic investigator for the Chicago police department. He went to the police auto pound on the day of the shooting and recovered firearm evidence from defendant's van and Officer Finley's squad car. Niewdach testified that he did not conduct "rodding" on the bullet holes in defendant's van, which is a process used to determine the angle in which the bullets entered the vehicle.

¶ 36 William Demuth testified that he was an expert in firearms examination and employed by the Illinois state police as a forensic scientist. He stated that he examined the firearms evidence recovered in this case, including expended shell casings, fired bullets and fragments, defendant's Glock semi-automatic pistol, and the weapons belonging to Officers White, Wrigley and Finley. Demuth explained that only defendant's Glock had polygonal rifling, which does not allow for the positive identification of a bullet as having been fired from a particular weapon. However, polygonal rifling does not prevent the positive identification of a shell casing having come from a particular weapon. Demuth testified that on the date of the shooting, Chicago police officers were not allowed to carry weapons that have polygonal barrels.

¶ 37 Demuth concluded that the fired bullet recovered from Officer Wrigley's vest had polygonal rifling and could not have been fired from any of the officers' handguns. Demuth could not identify or eliminate the fired bullet as having been fired from defendant's Glock. Two fired bullet fragments recovered from the driver's side door panel of Officer Finley's squad

car also exhibited polygonal rifling and therefore could not have been fired from any of the officers' weapons. Demuth could not identify or eliminate the two bullets as having been fired from defendant's Glock. A fired bullet recovered from the wall of the apartment at 3648 West 19th Street also had polygonal rifling. A fired bullet jacket fragment recovered from just north and east of defendant's van exhibited polygonal characteristics and therefore could not have come from the officers' weapons and could not be identified or eliminated as having been fired from defendant's Glock. The 17 fired cartridges recovered in close proximity to where defendant was located on the east side of his van were all Remington brand cartridges which, aside from one unfired bullet, were the only Remington brand cartridges found on the scene. All 17 of those cartridges were fired from defendant's Glock. One unfired bullet recovered from the driver's side front tire area of defendant's van was also a Remington brand bullet.

¶ 38 Demuth also testified that one of the fired bullets recovered from defendant's body during surgery was positively identified as having come from Officer Wrigley's gun, two were positively identified as having been fired from Officer White's gun, and three lead fragments were unsuitable for comparison.

¶ 39 Demuth further stated that a bullet recovered from the driver's side door of defendant's van was positively identified as having been fired from Officer Wrigley's gun, a fired bullet recovered from in front of defendant's van was positively identified as having been fired from Officer Wrigley's gun, and a bullet recovered from the top of the van was positively identified as having been fired from Officer Wrigley's gun. A bullet recovered from the driver's side rear storage area and wheel well rear quarter panel of defendant's van could not be identified or eliminated as having been fired by Officer Finley's gun or Officer Wrigley's gun, but was not fired from Officer White's gun or defendant's gun. A metal fragment recovered from next to

defendant's van could not be eliminated as having been fired from either Officer Wrigley or Finley's gun, but was not fired from Officer White's gun or defendant's gun. Bullets recovered from the center front floor area and from underneath the driver's seat of defendant's van were positively identified as having been fired from Officer White's gun. A fired bullet recovered from underneath defendant's van and a fired bullet recovered from behind defendant's van were positively identified as having been fired from Officer White's gun. Fired cartridge casings recovered from north and west of defendant's van were positively identified as having been fired from Officer Finley's gun. Fired cartridge casings recovered from east of defendant's van and from the intersection of 19th and Lawndale were positively identified as having been fired from Officer White's gun.

¶ 40 A spent casing recovered from the windshield wiper area of Officer Wrigley's squad car was positively identified as having come from Officer Wrigley's gun, and numerous spent casings from the intersection of 19th Street and Lawndale and just northeast and north of defendant's van were all positively identified as having come from Officer Wrigley's gun.

¶ 41 A bullet recovered from under a car located at 1902 Lawndale was positively identified as having been fired by Officer Finley's gun, and a cartridge case recovered from a puddle located at the scene was positively identified as having been fired from Officer Finley's gun. A fired bullet recovered from next to a red van parked south of defendant's van could not be identified or eliminated as having been fired from Officer Wrigley or Officer Finley's gun, but was not fired from Officer White's weapon or defendant's gun. The bullet recovered from Alexander's house at 1866 South Lawndale was positively identified as having been fired from Officer White's gun. A bullet recovered from the scene east of defendant's van could not be positively identified or eliminated as having been fired from Officer White's gun, but could not

have been fired from Officer Finley's gun, Office Wrigley's gun, or defendant's gun. A fired bullet recovered from the curb in front of 1902 South Lawndale could not have been fired from Officer Finley's gun, Officer Wrigley's gun or defendant's gun, but could not be identified or eliminated as having been fired from Officer White's gun.

¶ 42 Brian Bass testified that he was one of defendant's supervisors at BNSF Railroad and that defendant's shifts on February 20 and 21, 2005, were 6 a.m. to 2 p.m.

¶ 43 Sergeant Mike Vorreyer testified that he was a master sergeant with the Illinois State Police firearm services bureau. He stated that all Illinois residents, including police officers, are required to possess a firearm owner identification card (FOID) in order to acquire and possess a handgun in Illinois, and that defendant did not have a valid FOID card on the date of the shooting.

¶ 44 After the State rested its case, defendant called several friends to testify about his good reputation in the community for being peaceful and law-abiding. Two witnesses also testified as to his truthfulness.

¶ 45 Charice Rush testified that at the time of the shooting she was sitting in a car that was parked outside of the building at 1863 South Lawndale. She observed a van drive past her and pull over at 19th and Lawndale. She saw two squad cars behind it, both with their emergency lights on. The officers exited their vehicles and approached the van. She stated that the officers "snatched" the driver from the van.

¶ 46 Rush saw struggling between the officers and the driver. The officers surrounded defendant and attempted to push him down to the ground. Rush did not see a gun in defendant's hands, which were behind his back as he was struggling with the officers. Rush then heard an officer yell, "he has a gun," and she saw that defendant's hands were still behind his back. She

heard a shot and ran to a gate and laid down on the ground. From her position, she could see the officers shooting. She said the officers fired several shots, then paused and fired more again. She testified that the driver was not shooting at the officers.

¶ 47 When the shooting stopped, Rush entered a nearby apartment and looked outside and saw lots of police officers. The police came to the apartment and Rush initially told an officer that she did not see what had happened. Rush explained that she did not want to go to the police station and explain what she witnessed because her sister-in-law's sister had just passed and the funeral was the following day. Later, Rush told the police what she saw and then went to the police station and related the same version of events to which she had testified. She later told the same version of events to an Assistant State's Attorney (ASA) and also signed a handwritten statement. Rush later spoke to the police at a "round table" and also testified before a grand jury.

¶ 48 On cross-examination, Rush admitted that the handwritten statement did not state that the officers "snatched" defendant from the van. She also acknowledged that at the roundtable, she stated that she was too far away to see if defendant had a gun in his hands.

¶ 49 Defendant testified on his own behalf. He was a Chicago police officer for five years, beginning in 1979, and in 1992 he became a BNSF railroad police officer. According to defendant, he worked from 6 a.m. until 2 p.m. on February 20, 2005. He then went to his sister-in-law's home to spend time with his wife, who was staying there while he renovated his house. Defendant left to go home at approximately midnight. Defendant was driving with his headlights on and denied that he drove on Hamlin in his route home. He stated that he stopped at all stop signs when he was pulled over by the police and he initially thought the police would drive past him. Two officers approached with their weapons pointed directly at defendant. As the officers approached, defendant made his hands visible and shouted through the partially open

window that he was a police officer. He asked if there was a problem, but the officers did not respond and continued to approach his vehicle. Defendant was ordered to exit his vehicle and before he could lower his hands to reach the door handle, the officers "snatched" him out of his van. Defendant did not see additional police officers, but he "felt" other hands pushing on him. Defendant was down on one knee and repeated that he was a police officer and asked if there was a problem. He was then struck on the left side of his head, which burst his eardrum. The officers were pressing him down and then he felt someone pull his weapon from his waistband. He heard "gun, gun," and was then shot in the chest and stomach. Defendant lost consciousness and the next thing he remembered was waking up at the hospital. Defendant testified that he did not put his hands on his weapon or fire it at the officers.

¶ 50 Defendant stated that he was treated for 28 gunshot wounds to his body, which included fractures in his right arm and left leg and damage to his internal organs. He spent several months in the hospital and still has bullets remaining in his body.

¶ 51 Officer Michael Trobiani testified that he arrived at the scene around 1 a.m. on February 21, 2005, and he prepared the general offense case report. He stated that he did not speak with Officers Finley, Wrigley, White or Olsen, but talked only with his partner and his supervisor, Lieutenant Loughran. In the report, Officer Trobiani wrote that the officers ordered defendant out of the van. Lieutenant Loughran was recalled to the stand. He did not recall talking with Officer Trobiani or his partner at the scene. He also testified that he did not speak with Officers Wrigley, White or Olsen. He did talk to Officer Finley, but he said he told Officer Finley to relax because the officer was feeling survivor's guilt since he was the only officer who was not injured.

¶ 52 Following deliberations, the jury found defendant guilty of four counts of attempted murder for each officer and one count of aggravated battery with a firearm of Officer Wrigley. The trial court subsequently sentenced defendant to a total of 40 years for the attempted murder convictions and the aggravated battery conviction merged into the other counts.

¶ 53 This appeal followed.

¶ 54 Defendant first argues that the trial court erred in barring defendant from informing the jury about the acquittals on some of the charges at his first trial. According to defendant, this evidence was relevant because it formed the foundation of his defense and the State was permitted to introduce evidence of this conduct at the second trial. The State maintains that the trial court properly excluded references to the acquittals from the first trial. The admission of evidence lies within the discretion of the trial court and we will not reverse the trial court's decision absent an abuse of that discretion. *People v. Becker*, 239 Ill. 2d 215, 234 (2010).

¶ 55 Defendant relies on the supreme court's decision in *People v. Ward*, 2011 IL 108690, and the appellate decisions in *People v. Bedoya*, 325 Ill. App. 3d 926 (2001) and *People v. Overton*, 281 Ill. App. 3d 209 (1996), to support his argument. However, as the State points out, these cases involved the admission of more traditional other crimes evidence, that is, evidence of separate crimes with different victims.

¶ 56 In *Ward*, the defendant was charged with the criminal sexual assault of one victim and the State sought to present evidence of another sexual assault pursuant to section 115-7.3 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-7.3 (West 2006)). The supreme court explained that "[i]f a defendant is tried on one of the enumerated sex offenses, section 115-7.3(b) of the Code (725 ILCS 5/115-7.3(b) (West 2006)) allows the State to introduce evidence that the defendant also committed another of the specified sex offenses. The statute expressly permits

this other-crimes evidence to be admitted for any relevant purpose. 725 ILCS 5/115-7.3(b) (West 2006)." *Ward*, 2011 IL 108690, ¶ 25. There, the trial court allowed the admission of a prior offense of criminal sexual assault, but excluded evidence that the defendant had been acquitted in the prior case. *Id.*, ¶ 19. The reviewing court conducted a balancing test to weigh the probative value of the evidence against the undue prejudice to the defendant. *Id.*, ¶ 35-46. The *Ward* court concluded that "barring the admission of the acquittal evidence was an abuse of the trial court's discretion. The ruling was unreasonable under the facts and circumstances of this case." *Id.*, ¶ 48. "Due to the inherently high, and often overly persuasive, probative value of such propensity evidence, the need to avoid unfair prejudice by providing a full context for the other-crimes testimony is readily apparent. Given the real possibility the jury would convict defendant based on his alleged prior bad acts alone, barring the acquittal evidence further enhanced the already high danger of undue prejudice against him." *Id.*, ¶ 46 (citing 725 ILCS 5/115-7.3(c) (West 2006)).

¶ 57 Similarly, in *Bedoya*, the defendant was originally tried for aggravated discharge of a firearm and first degree murder and he was acquitted of the firearms charge, but convicted of the murder charge. The aggravated discharge of a firearm count was based on separate conduct and a different victim than the murder charge. However, the murder conviction was overturned on appeal. At the retrial on the murder charge, the State introduced evidence of the prior firearms charge as other crimes evidence to show the defendant's mental state at the time of the killing, but the defendant was barred from introducing evidence that he had been acquitted of the firearms charge in a prior trial. *Bedoya*, 325 Ill. App. 3d at 928. The *Bedoya* court held that "[f]airness required disclosure" because "[t]he jury could have been left with the false impression that those 'offenses' were alive and pending." *Bedoya*, 325 Ill. App. 3d at 943.

¶ 58 In *Overton*, the defendant was convicted of armed robbery. During his trial, other crimes evidence was admitted relating to another armed robbery that occurred a couple weeks after the offense on trial, but the jury was not informed that the defendant had been acquitted of the other armed robbery. *Overton*, 281 Ill. App. 3d at 215. The reviewing court found that the State failed to show the relevance of this other crimes evidence or that this evidence was not prejudicial. *Overton*, 281 Ill. App. 3d at 216. The *Overton* court concluded that this other crimes evidence was "unnecessarily prejudicial, outweighing any potential probative value." *Overton*, 281 Ill. App. 3d at 216.

¶ 59 The other crimes issues present in *Ward*, *Bedoya*, and *Overton* are inapposite to the issue raised by defendant on appeal. In those cases, the trial court admitted evidence of unrelated other crimes without disclosing that the defendant had been acquitted of the other crimes which was unfairly prejudicial to the defendant. However, in the instant case, defendant sought to inform the jury of the acquittal of two counts of aggravated battery with a firearm and one count of aggravated discharge of a firearm from his prior trial in this action as evidence of his innocence.

¶ 60 The State cites an old supreme court case to support excluding the admission of the acquittal. In *People v. Stephens*, 297 Ill. 91 (1921), the defendant was charged with the murder of one police officer and the shooting assault of a second officer. He was tried and acquitted of the murder charge, but convicted in a second trial of the assault. On appeal, he asserted that he should have been permitted to introduce the acquittal because the prosecution of the offense on the second officer was barred. *Stephens*, 297 Ill. at 97. The supreme court held that the acquittal of the murder charge did not bar the prosecution of the assault charge because the shots fired constituted two separate offenses. *Stephens*, 297 Ill. at 97-98. The defendant also argued that

the acquittal evidence should have been admitted because if he was not guilty of killing one officer, then he could not be guilty under the indictment. The reviewing court disagreed and found this argument "without force." *Stephens*, 297 Ill. at 98.

¶ 61 The State also points to several more recent federal cases that have considered whether to admit evidence of a prior acquittal in a trial arising from the same criminal conduct. In *US v. Jones*, 808 F.2d 561 (7th Cir. 1986), the defendants were acquitted in a state court of various sexual assault and kidnapping charges. The defendants were then tried in federal court on charges arising from the same incident. The district court, on the government's motion, excluded all evidence of the prior acquittals and instructed the parties to refer to the prior trial as a "proceeding" or "testimony." *Jones*, 808 F.2d at 566. The defendants asserted on appeal that the evidence of the acquittal was relevant to refute the current charges and to prevent the jury from inferring that they had been previously tried or convicted. *Jones*, 808 F.2d at 566. The Seventh Circuit held that there was no error.

¶ 62 "In general, evidence of a prior acquittal is only relevant in determining whether the prosecution is barred by double jeopardy or collateral estoppel." *Jones*, 808 F.2d at 566. "Evidence of an acquittal is not otherwise relevant 'because it does not prove innocence but rather merely indicates that the prior prosecution failed to meet its burden of proving beyond a reasonable doubt at least one element of the crime.' " *Jones*, 808 F.2d at 566 (quoting *United States v. Kerley*, 643 F.2d 299, 300-01 (5th Cir. 1981)). " Even if evidence of the acquittal were relevant, it may be excluded if its probative value is substantially outweighed by the likelihood of unfair prejudice." *Jones*, 808 F.2d at 566. "Appellate courts traditionally afford substantial deference to a district court's decision to exclude such evidence and will not reverse such a

decision unless it is clear that the district judge has abused his discretion." *Jones*, 808 F.2d at 566-67.

¶ 63 Similarly, in *US v. De La Rosa*, 171 F.3d 215 (5th Cir. 1999), the defendant was charged with conspiracy to influence a juror, aiding and abetting the influencing of the same juror, and an accessory after the fact for hindering a prosecution. At his first trial, the jury acquitted the defendant of the conspiracy charge, but was hung on the remaining two charges. At his second trial, the government moved *in limine* to exclude evidence of the acquittal, which the district court granted. Following trial, the defendant was convicted of the two remaining charges. *De La Rosa*, 171 F.3d at 217-18. On appeal, the defendant argued that the trial court committed reversible error by not allowing him to introduce evidence of his acquittal on the conspiracy charge. The Fifth Circuit observed that it had "squarely held that, as a general matter, a trial court does not abuse its discretion in excluding evidence of a prior acquittal on a related charge." *De La Rosa*, 171 F.3d at 219. The *De La Rosa* court noted that the prior acquittal was hearsay and "even if not for these barriers to admissibility, evidence of a prior acquittal will often be excludable under [Federal Rule of Evidence 403 (Fed. R. Evid. 403)], because its probative value likely will be 'substantially outweighed by the danger of prejudice, confusion of the issues, or misleading the jury.' " *De La Rosa*, 171 F.3d at 219-20 (quoting *Kerley*, 643 F.2d at 301). The court also acknowledged that several other circuits agreed with this reasoning that evidence of prior acquittals is generally inadmissible. *De La Rosa*, 171 F.3d at 220.

¶ 64 The court in *De La Rosa* further rejected the defendant's contention that the jury should have been instructed on his prior acquittal. The court left the issue to the discretion of the trial court, holding that "an acquittal instruction is not required merely because evidence of acquitted conduct is introduced." *De La Rosa*, 171 F.3d at 220. Other federal decisions have followed this

reasoning and upheld the exclusion of prior acquittals as evidence. See *US v. Halteh*, 224 F. App'x 210, 214-15 (4th Cir. 2007) ("A prior acquittal, especially when the elements of the charged crimes are different, does not tend to prove innocence. Additionally, the limited probative value of an acquittal on prior charges relating to the same conduct at issue in a later trial may be substantially outweighed by the danger of unfair prejudice or jury confusion"); *US v. Tirrell*, 120 F.3d 670, 678 (7th Cir. 1997) (quoting *Jones*, 808 F.2d at 566) ("we 'afford substantial deference to a district court's decision to exclude' evidence of an acquittal and will reverse such a decision only for an abuse of discretion"); *Prince v. Lockhart*, 971 F.2d 118, 122 (8th Cir. 1992) (finding that the defendant's acquittal of possession of a controlled substance was not relevant at trial for burglary and theft of a pharmacy).

¶ 65 We find the federal cases relevant to the issue before us. While defendant contends that *Ward* "expressly ruled that it was rejecting federal evidentiary analysis" in its decision, we point out that the *Ward* court found that it did not need to consider federal authority because there was sufficient state case authority on the issue. *Ward*, 2011 IL 108690, ¶ 28. None of the Illinois cases cited by defendant considered the precise issue raised, the exclusion of prior acquittal of a charge arising from the same criminal conduct. The federal cases and *Stephens* squarely addressed this issue and we find the analysis to be well reasoned.

¶ 66 Contrary to defendant's argument, evidence of his prior acquittals was not proof of his actual innocence, but simply showed that the State was unable to meet its burden of proof in the prior trial. The admission of the prior acquittals would have created confusion for the jury and the prejudicial effect would have outweighed any probative value. Further, if the evidence of the prior acquittals was introduced, then in fairness to the State, would the trial court have been required to disclose the fact that the prior jury was unable to reach a verdict on the remaining

counts. This disclosure could easily have confused the jury and shifted the focus away from the charges currently on trial. As cited above, prior acquittals arising out of the same incident are only relevant for claims of double jeopardy and collateral estoppel to preclude a second trial. Defendant's claims of double jeopardy were considered and rejected in his prior appeal, as discussed in more detail below. Evidence of the prior acquittals was not relevant to the jury's determination of defendant's guilt at the second trial and would have only caused undue prejudice and confusion. Accordingly, we hold that the trial court did not abuse its discretion in excluding evidence of the prior acquittals.

¶ 67 Next, defendant contends that the trial court abused its discretion when it denied defendant's request to question the potential jurors about their attitude toward police misconduct and, as a result, he was unable to select a fair jury and to uncover any bias or prejudice of the potential jurors. The State responds that the trial court properly ruled within its discretion to deny defendant's attempt to indoctrinate the jury with his theory of defense involving police misconduct.

¶ 68 "[T]he trial court is given the primary responsibility of conducting the *voir dire* examination, and the extent and scope of the examination rests within its discretion." *People v. Strain*, 194 Ill. 2d 467, 476 (2000). "However, the trial court should exercise its discretion in a manner that is consistent with the goals of *voir dire*. *Voir dire* is conducted to assure the selection of an impartial jury, free from bias or prejudice, and grant counsel an intelligent basis on which to exercise peremptory challenges." *People v. Dixon*, 382 Ill. App. 3d 233, 243 (2008). "Thus, the trial court abuses its discretion only if the trial court prevents the selection of a jury that harbors 'no bias or prejudice which would prevent them from returning a verdict according to the law and evidence.' " *Dixon*, 382 Ill. App. 3d at 243 (quoting *Strain*, 194 Ill. 2d at 476). We

review a trial court's denial of a party's request to question prospective jurors on a particular viewpoint for an abuse of discretion. *People v. Reeves*, 385 Ill. App. 3d 716, 729-30 (2008).

¶ 69 "The purpose of the *voir dire* examination is to assure the selection of an impartial jury; it is not to be used as a means of indoctrinating a jury, or impaneling a jury with a particular predisposition." *People v. Bowel*, 111 Ill. 2d 58, 64 (1986). Generally, "a defense lawyer's questions concerning a specific defense will be excluded." *People v. Mapp*, 283 Ill. App. 3d 979, 986-87 (1996). "A trial court properly refuses questions designed to educate the jurors on the defendant's theory of defense and ensure the selected jurors are receptive to that defense." *Reeves*, 385 Ill. App. 3d at 730 (citing *Bowel*, 111 Ill. 2d at 65).

¶ 70 Prior to trial, the State filed a motion *in limine* which included a request that the defense be precluded from mentioning, referencing, or arguing about police misconduct not supported by the facts of the case during the trial or jury selection. Defense counsel objected to this request, arguing:

> "As to the mention of police misconduct, during jury selection I believe that and what we are asking is that we be allowed to *voir dire* jurors as to their attitudes about the police and whether or not that they would be jurors that could accept our theory of defense, which is that there was police misconduct in this case.
>
> ***
>
> But I do believe that we have a right to *voir dire* jurors, prospective jurors about their attitudes towards police conduct and whether or not they are jurors that could in fact believe that the police could engage in this conduct.

> If we pick all jurors who say they are unable to even hold the thought that the police might engage in such conduct, that is certainly not a fair jury. I believe we have a right to explore jurors' perceptions and beliefs about the police, beyond the simple veracity of it."

¶ 71 The trial judge informed defense counsel that he would ask the venire if they "treat a police officer the same as they would any other witness." The judge said he believed that was sufficient and ruled that he would not allow a specific question about police misconduct. Defense counsel asked whether a question could be asked whether the venire would be "willing to believe that a police officer could engage in improper conduct." The trial judge answered no, but said that if "the original response [he receives] from the individuals may open it up to that. If it does, [he'll] delve into that." He declined to question each juror about police misconduct.

¶ 72 Defendant relies on the decision in *Strain* as support. In *Strain*, the supreme court held that when testimony pertaining to gang membership and gang-related activity was an integral part of the defendant's trial, the defendant must be afforded an opportunity to question prospective jurors concerning any gang bias. *Strain*, 194 Ill. 2d at 477. Defendant asserts that similar to a bias against gangs, "many are inherently biased in favor of the police."

¶ 73 Illinois courts have declined to extend *Strain* to other subject areas. The reviewing court in *Dixon* considered whether under *Strain*, the defendant should be allowed to probe potential jurors for bias against drug or alcohol addiction. *Dixon*, 382 Ill. App. 3d at 245. The *Dixon* court declined to extend the holding in *Strain* to other areas of potential bias. *Dixon*, 382 Ill. App. 3d at 245; see also *People v. Anderson*, 407 Ill. App. 3d 662, 681-82 (recognizing *Dixon's* refusal to extend *Strain*). "We are not persuaded that such a fact would result in effectively

closing the minds of jurors to the evidence such ‘ “that they cannot apply the law as instructed in accordance with their oath.” ’ ” *Dixon*, 382 Ill. App. 3d at 245 (quoting *Strain*, 194 Ill. 2d at 476, quoting *People v. Cloutier*, 156 Ill. 2d 483, 495-96 (1993)).

¶ 74 Defendant's argument is similar to one that was rejected by the reviewing court in *People v. Karim*, 367 Ill. App. 3d 67 (2006). There, the defendant contended that the trial court erred in denying his request to question the jurors about their views on self-defense. *Karim*, 367 Ill. App. 3d at 91. The reviewing court noted that Illinois courts have consistently refused questions during *voir dire* about self-defense. "The rationale behind these cases is that 'allowing [a] defendant to question the prospective jurors regarding any pre-disposition to a self-defense claim goes to an ultimate question of fact and would serve no purpose other than to improperly attempt to preeducate and indoctrinate the jurors as to defendant's theory of the case.' " *Karim*, 367 Ill. App. 3d at 92-93 (quoting *People v. Skipper*, 177 Ill. App. 3d 684, 688 (1988)).

¶ 75 In this case, it is clear that the questions defense counsel sought to ask the potential jurors related to their theory of defense. Counsel specifically stated that she wanted to ask questions to determine if the venire could accept their theory of defense. As cited above, these types of questions are not appropriate and the trial court properly refused the questions. See *Reeves*, 385 Ill. App. 3d at 730. As in *Karim*, defendant sought to indoctrinate the jurors with his theory of defense that the police engaged in misconduct when they shot him. The trial court did not abuse its discretion in refusing to allow defendant's general questions of their views on police misconduct.

¶ 76 We further point out that the trial court did ask the potential jurors questions about the police, including their relationship to any police officers and if so, would that affect their ability to be a fair juror, and whether they could treat a police witness the same as other witnesses.

Defendant refers to a few instances in which potential jurors expressed doubt about whether they could be fair, given their connection to police officers. In one example, defendant points to a potential juror who questioned whether the police and other witnesses would engage in a conspiracy against defendant. However, rather than illustrate the need for additional questioning, these examples demonstrate that the questions posed were sufficient to discover any bias or prejudice. The record shows that the trial court sufficiently questioned the venire about potential bias or prejudice involving the police and used its discretion and properly refused defendant's questions that sought to indoctrinate the venire about his theory of defense.

¶ 77 Defendant next argues that the prosecutor's improper remarks during rebuttal closing argument deprived him of a fair trial. Defendant asserts that the prosecutor's comments "pander[ed] to the raw emotions of the jury, without connection to the evidence" and was "reversible error." The State responds that defendant failed to preserve most of the complained-of comments, and in the alternative, the trial court cured any error and the comments were invited by defense counsel's closing argument.

¶ 78 To preserve an issue for review, defendant must both object at trial and in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Failure to do so operates as a forfeiture as to that issue on appeal. *People v. Ward*, 154 Ill. 2d 272, 293 (1992). "To preserve claimed improper statements during closing argument for review, a defendant must object to the offending statements both at trial and in a written posttrial motion." *People v. Wheeler*, 226 Ill. 2d 92, 122 (2007). Here, defendant complains of eight improper comments, however, an objection was raised for only two of these comments. Nor were the comments raised in a posttrial motion. Defendant acknowledges his forfeiture in his reply brief and asks this court to

review the comments under the plain error rule. We will first consider the comments that were preserved before considering the forfeited comments under the plain error rule.

¶ 79 Generally, a prosecutor is given wide latitude in closing arguments, although his or her comments must be based on the facts in evidence or upon reasonable inferences drawn therefrom. *People v. Page*, 156 Ill. 2d 258, 276 (1993). "The prosecutor has the right to comment on the evidence and to draw all legitimate inferences deducible therefrom, even if they are unfavorable to the defendant." *People v. Simms*, 192 Ill. 2d 348, 396 (2000). "Whether a prosecutor's comments or arguments constitute prejudicial error is evaluated according to the language used, its relation to the evidence, and the effect of the argument on the defendant's right to a fair and impartial trial." *Simms*, 192 Ill. 2d at 396. "In reviewing comments made at closing arguments, this court asks whether or not the comments engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from them." *Wheeler*, 226 Ill. 2d at 123. "Prosecutorial misconduct warrants reversal only if it 'caused substantial prejudice to the defendant, taking into account the content and context of the comment[s], its relationship to the evidence, and its effect on the defendant's right to a fair and impartial trial.' " *People v. Love*, 377 Ill. App. 3d 306, 313 (2007) (quoting *People v. Johnson*, 208 Ill. 2d 53, 115 (2004)). "If the jury could have reached a contrary verdict had the improper remarks not been made, or the reviewing court cannot say that the prosecutor's improper remarks did not contribute to the defendant's conviction, a new trial should be granted." *Wheeler*, 226 Ill. 2d at 123. "The trial court may cure errors by giving the jury proper instructions on the law to be applied; informing the jury that arguments are not themselves evidence and must be disregarded if not supported by the evidence at trial; or sustaining the defendant's objections and instructing the jury to disregard the inappropriate remark." *Simms*, 192 Ill. 2d at 396-97.

¶ 80 During rebuttal closing argument, the prosecutor stated:

> "If he would have had his way, there wouldn't be live witnesses here, which might have made for a better case because in this society, in this city, we don't like our police until they are dead."

¶ 81 Defense counsel then objected. The trial court sustained the objection, struck the comment and instructed the jury "to disregard that last statement."

¶ 82 Later, the prosecutor made the following statement:

> "Everybody, everybody is coming over there. Come join us in our conspiracy. Or actually, we need some help. We are getting killed over here. Someone is trying to murder us.
>
> He didn't succeed. Nick Olsen's badge, it sits on his chest and not in a glass case at 35th and Michigan. When Tim Finley goes to church, they are not playing Amazing Grace for him outside of Holy Name as six strong men carry his casket. When Eric White goes to Soldier Field and goes to the Gold Star Memorial, he doesn't get to see his name."

¶ 83 Defense counsel then objected and the trial court sustained the objection. Additionally, the trial court instructed the jury that closing arguments "are not evidence, and any statement or argument by the attorneys which is not based on the evidence should be disregarded."

¶ 84 Defendant concedes in his reply brief that both objections were sustained, "[b]ut the harm was done." However, defendant does not argue that these individual comments were too egregious to be cured by the trial court's actions, but instead he simply asserts that the cumulative impact of the multiple improper remarks caused defendant prejudice.

¶ 85 We disagree, upon defense counsel's objection, the trial court sustained the objection and instructed the jury to disregard. The jury was also instructed that closing arguments were not evidence and that any statement made by an attorney not based on the evidence should be disregarded. We find that this action was sufficient to cure any error and defendant has not argued otherwise. See *Simms*, 192 Ill. 2d at 396-97.

¶ 86 Next, we consider whether the unpreserved comments satisfy the plain error rule. Supreme Court Rule 615(a) states that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). The plain error rule "allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (citing *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005)). The plain error rule, however, "is not 'a general saving clause preserving for review all errors affecting substantial rights whether or not they have been brought to the attention of the trial court.' " *Herron*, 215 Ill. 2d at 177 (quoting *People v. Precup*, 73 Ill. 2d 7, 16 (1978)). Rather, the supreme court has held that the plain error rule is narrow and limited exception to the general rules of forfeiture. *Herron*, 215 Ill. 2d at 177.

¶ 87 Defendant carries the burden of persuasion under both prongs of the plain error rule. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). Here, defendant asserts that the evidence was closely

balanced under the first prong of the plain error rule. However, "[t]he first step of plain-error review is to determine whether any error occurred." *Lewis*, 234 Ill. 2d at 43. We will review defendant's claim to determine if there was any error before considering it under plain error.

¶ 88 Defendant complains the following comments were improper. He does not analyze each comment for error, but rather, he lists all the comments and asserts that "[t]he cumulative effect of these comments deprived [defendant] of a fair trial. As a result, reversal is warranted."

> "But that is the way this trial is going to go from beginning to end, and you saw it. You saw it from beginning to end. We are not going to focus on what is here, what happened, what the evidence is. According to the defense, all the evidence is the stuff that isn't here."
>
> "We try our cases to the satisfaction of you folks. Otherwise – I don't know if you ever had this wonderful experience – it is like dating an alcoholic. Everything is your fault. Nothing is their fault. You should have fixed it. It should have been that way. Why wasn't it this way? No, thanks. Here is the door. I am going to try my case to you folks, not them."
>
> "When the evidence is overwhelming, you can't concentrate on the mountain of evidence that is here. You have to ask the jury to focus on stuff that is not here."
>
> "He turns a traffic stop into a bullet festival. He wants you to reward him with four free attempt murders and one free aggravated battery with a firearm. That is not the way it works."

> "When their bodies survive, their characters get assassinated. When they do what they are supposed to do, they get Monday morning quarterbacked. People tell you well, why didn't you do this, why didn't you do that, why don't you police the way the defense bar wants you to?"
>
> "When you go into that room, you are going to do something that you already swore you would do, and that is justice. And justice in this case means holding this defendant responsible for what he did that night. Not giving him a pass because he lost the gunfight. Not overlooking the fact that he couldn't put on his big boy pants and keep his own FOID card up-to-date. Not buying into the four-month sanding of the floors project. Not buying into any of that. Recognize him for what he was that night, an angry armed man who tried to kill four police officers who never did him any harm, who swore to serve and protect you."

¶ 89 While a prosecutor's remarks may sometimes exceed the bounds of proper comment, the verdict must not be disturbed unless it can be said that the remarks resulted in substantial prejudice to the accused, such that absent those remarks the verdict would have been different. *People v. Byron*, 164 Ill. 2d 279, 295 (1995). Thus, "comments constitute reversible error only when they engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from those comments." *People v. Nieves*, 193 Ill. 2d 513, 533 (2000).

¶ 90 Defendant has not shown that these unpreserved comments affected the verdict. Rather, he sets forth a conclusion that the remarks deprived him of a fair trial. In his reply brief, he notes that the preserved remarks are not subject to plain error review, but in summarizing why the comments amount to plain error, he highlights the preserved comments rather than the forfeited ones. He also makes general statements that the comments were "not probative of anything; they are emotional pulls, designed to elicit hate for [defendant]. These comments were egregious and reversible error." Since defendant has not asserted how the remarks affected the outcome of the trial, we cannot say that these comments created such prejudice as to have influenced the jury's verdict.

¶ 91 Moreover, even if the complained-of remarks were error, the evidence was not closely balanced so as to warrant a finding of plain error. Contrary to defendant's assertion, the fact that a prior jury was unable to reach a verdict does not mean the evidence was closely balanced.

¶ 92 Here, the State presented the testimony of four police officers about the traffic stop and ensuing gunfire. The two sets of partners did not know each other prior to that night. Officers Finley and Wrigley heard "a loud report," which could indicate a gunshot and then observed defendant's vehicle driving the wrong way down a one-way street with its headlights off. Upon stopping the vehicle, defendant exited the vehicle and was uncooperative and engaged Officer Finley in a physical altercation. Officers White and Olsen corroborated this scene and responded to the altercation. Defendant then pulled a gun from his waistband and fired at all four officers, three were injured. Three of the officers returned fire and defendant was shot several times.

¶ 93 When additional officers and emergency help responded to the scene shortly thereafter, defendant was still combative. Officer Pruger observed defendant still reaching for his gun when he arrived at the scene. The paramedic testified that defendant struck his female partner and was

not cooperating to receive medical treatment. Several officers and technicians testified about the location of the bullets and shell casings. The ballistics supported the officers' testimony about the location of defendant and the officers at the time of the gunfire. Multiple witnesses observed a bullet fall from Officer Wrigley's jacket when he was obtaining treatment at the hospital.

¶ 94 In contrast, defendant testified that the officers took his gun from him and he passed out after being shot. Defense witness Rush testified that she did not see a weapon in defendant's hand, but she did not observe the entire incident and was laying on the ground to avoid being hit. Rush was also impeached with a prior statement in which she said she was too far away to see if defendant had a gun.

¶ 95 We find that the evidence was not closely balanced. The evidence presented by the State was substantial and more than sufficient to find defendant guilty and cannot support a plain error review. Additionally, the trial court properly sustained objections to the improper comments and instructed the jury that closing arguments were not evidence. Any improper comments by the State were cured by these actions. Further, defendant failed to preserve any error in the majority of the complained-of comments. While we do not condone some of the comments made by the prosecutor, particularly the final comment that the officers were sworn to serve and protect the jury, the comments do not constitute an error so plain such that it affected the outcome of the trial. Therefore, we conclude that the result of the trial would not have been different absent the preserved comments and defendant forfeited any claim of error for the unpreserved comments.

¶ 96 Finally, defendant attempts to relitigate the issue of whether his double jeopardy rights were violated by a retrial. This issue was previously raised and considered in his appeal following the first trial. As to the aggravated battery charges premised on the shooting of Officers Wrigley, White and Olsen, we concluded that "because defendant has failed to establish

that the jury necessarily determined he did not discharge a firearm by acquitting him of the aggravated battery charges, we find that he may be retried for the attempt first degree murder of Officers Olsen, White, and Wrigley without violating double jeopardy principles." *People v. Morgan*, No. 1-07-3373, slip op. at 34. As to the aggravated discharge of a firearm against Officer Finley, we similarly found that "defendant has failed to meet his burden of establishing that, in acquitting him of that charge, the jury necessarily determined that he did not discharge his firearm." *Morgan*, slip op. at 34.

¶ 97 "[T]he law of the case doctrine bars relitigation of an issue already decided in the same case." *People v. Tenner*, 206 Ill. 2d 381, 395 (2002). "Rulings on points of law made by a court of review are binding in that case upon remand to the trial court and on subsequent appeals to that same reviewing court unless a higher court has changed the law." *Petre v. Kucich*, 356 Ill. App. 3d 57, 63 (2005). "The purpose of the law of the case doctrine is to protect settled expectations of the parties, ensure uniformity of decisions, maintain consistency during the course of a single case, effectuate proper administration of justice, and bring litigation to an end." *Petre*, 356 Ill. App. 3d at 63.

¶ 98 Defendant acknowledges that he is precluded from raising the same issue, but advances the issue a second time, noting that the Illinois Supreme Court never reviewed his double jeopardy claim. We point out that defendant filed a petition for leave to appeal in the prior appeal, but the supreme court denied the appeal. See *People v. Morgan*, No. 109708 (March 24, 2010). Since the law of the case precludes defendant from relitigating an issue that has already been decided, we decline to consider defendant's double jeopardy claims in this appeal.

¶ 99 Based on the foregoing reasons, we affirm defendant's convictions and sentence.

¶ 100 Affirmed.