SIXTH DIVISION
December 19, 2014

No. 1-13-0363

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. 04 CR 27938
	)	
EDGAR FERNANDEZ,	)	Honorable
	)	Thomas V. Gainer, Jr.,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's first-degree murder conviction is affirmed, where he was not denied a fair trial due to prosecutorial misconduct alleged to have occurred during the State's closing and rebuttal arguments.

¶ 2 Following a jury trial, defendant-appellant, Edgar Fernandez, was convicted of first-degree murder and sentenced to a term of 45 years' imprisonment. On appeal, defendant contends that he was denied a fair trial where, during its closing and rebuttal arguments, the State improperly misstated the law, argued facts not in evidence, and made comments designed solely to inflame the passions of the jury. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Petitioner was charged by indictment with—*inter alia*—multiple counts of first-degree murder, each of which generally alleged that he shot and killed Luis Jimenez on or about October 23, 2004. Following extensive pretrial proceedings not relevant to this appeal—involving defendant's unsuccessful motions to suppress statements, quash arrest, and suppress evidence, and the withdrawal of defendant's initial plea of guilty—this matter proceeded to a jury trial in October of 2012.

¶ 5 At trial, the State presented evidence that the victim died as a result of a single gunshot wound to the back of his head. It was undisputed at trial that, shortly before 11 p.m. on October 23, 2004, defendant fired the gunshot that killed the victim. Rather, the primary issue at trial was whether or not defendant should be convicted of first-degree murder, with the defendant arguing that he should be convicted of—at most—second-degree murder. As such, and in light of both the focus of the trial and nature of the issues raised on appeal, we will restate only those additional facts relevant to our disposition.

¶ 6 Thus, the evidence introduced at trial also included a videotaped statement defendant provided to the police and an assistant state's attorney on October 25, 2004. In that statement, defendant acknowledged that he was, at the time, a 20-year-old member of the "Latin Kings" street gang. On the evening of October 23, 2004, defendant was drinking beer and smoking marijuana with a group of 12 other people in River Park on the northwest side of Chicago. That group included: (1) fellow Latin Kings members Brandon Turner, Erik Mendoza, Eduardo Chiquini, and a man defendant only knew as "Loco;" (2) defendant's three younger brothers, Tony, a former Latin King, and Ricky and Freddy, former "shorties," or future gang-members, that never "turned" to become members of the Latin Kings; (3) defendant's friend, David Rolan; (4) a man defendant knew only as Jamie; and (5) three more individuals that defendant did not

know well, but described as 16-year-old shorties or "young rookies" that "don't know what's going on." One of those young rookies had an arm in a "cast."

¶ 7 At some point the group needed more cigars to make "blunts," which defendant described as being a marijuana-stuffed cigar. The defendant stated that he, therefore, decided to go to the liquor store to purchase more cigars, and he was going to be driven there in a beige four-door car occupied by himself, the three shorties, and Mr. Rolan. The entire group then headed off toward a liquor store in a three-vehicle convoy led by a white Astro van, which was followed by a black SUV, followed by the beige car occupied by defendant. The van was occupied by the four other Latin Kings, and the SUV was occupied by defendant's three younger brothers and the man defendant knew as Jamie.

¶ 8 However, defendant contended in his statement that he never had an opportunity to go to the liquor store before the convoy, led by the van, suddenly headed south on Kedzie Avenue and east on Montrose Avenue into a neighborhood controlled by a rival street gang, the "Familia Stones." Defendant was not entirely certain, but he believed that the occupants of the van and some men on the street then exchanged gang signs and the van stopped to initiate a confrontation. When defendant realized that one of the men was a member of Familia Stones, but was also his cousin, he called out of the window of the beige car and told the other members of his group "no, it's cool, he's my cousin, he's cool, ain't nothing happening." The convoy then headed further east on Montrose Avenue.

¶ 9 When they reached the area of 3045 West Montrose Avenue, all three vehicles stopped. Again, defendant stated that he was not entirely certain, but he believed that the men in the van and a second group of Familia Stones had been exchanging gang signs. At or around this time, the shortie with the cast threw a one-shot Derringer-style pistol into defendant's lap. That gun

had been given to the shortie by Eduardo Chiquini, and defendant believed that the shortie had gotten "scared." The members of defendant's group exited their vehicles and began fighting with the Familia Stones. By the time defendant exited his vehicle, everyone was fighting and he saw that his younger brother Ricky was fighting off two of the Familia Stones.

¶ 10 Defendant stated that he "got mad because it's my little brother" and that he "let one shot out to try to get the guys off my brother." Thereafter, the two men fighting defendant's brother ran off and the members of defendant's group ran back to their vehicles. Defendant stated that he did not know if he had shot anyone, but he was told by Mr. Rolan that "somebody got hit[.]" Defendant gave the gun back to the shortie with the cast, and never saw it again. He recalled that the members of his group all "split their own way," with defendant going to Mr. Rolan's house and falling asleep. Defendant concluded his statement by expressing remorse and indicating that it was not his intention to hurt the victim.

¶ 11 The State also presented the testimony of several members of defendant's group, including: (1) Mr. Rolan; (2) Alexander Villegas, one of shorties who had occupied the beige car with defendant; and (3) Daniel Marzullo, the shortie who had his arm in what he actually described as a sling on the night of the incident. In general, their testimony was consistent with the version of events contained in defendant's own statement, but they did provide some additional and/or conflicting details.

¶ 12 For example, Mr. Rolan testified that, at the park, Mr. Marzullo informed the group that he had been "jumped" by some Familia Stones and had been beaten with a pipe. At some point, Mr. Chiquini gave a gun to Marzullo and Marzullo gave that gun to defendant. The group then headed into Familia Stones' territory to "start trouble." After defendant called off the attack on defendant's cousin, Mr. Rolan heard defendant tell his cousin "what was gonna happen," and that

he should stay away because "something about to go down" and "it's gonna get *** grimy." Mr. Rolan explained that the word "grimy" indicated that there was going to be violence, either a fight or a killing.

¶ 13 As the subsequent fight between the two groups began, Mr. Rolan testified that 9 to 11 of defendant's group got out of the vehicles and a number of Familia Stones ran away leaving only two members of that group. Mr. Rolan never saw any of his own group overpowered during the fight. What he did see is defendant shoot one of the Familia Stones in the head from 10 or 12 feet away. Mr. Rolan and the other members of his group then left in their vehicles, and at some point Mr. Rolan heard defendant cry and state that he had shot and killed one of the Familia Stones. Defendant and Mr. Rolan ultimately returned to Mr. Rolan's house, where they were both arrested the following morning.

¶ 14 Mr. Villegas testified that, at the time of the incident, he was a shortie who aspired to be a Latin King. Mr. Villegas testified that he joined in the fight with the Familia Stones, but he never saw defendant's brothers Rickey or Freddy fighting, nor did he see any member of his group being "beat up" by any Familia Stones. While he testified that it was Mr. Mendoza that brought the gun to the beige car, he confirmed that the gun eventually ended up in defendant's hands. He did not see who fired the gunshot during the fight, but he heard it. While driving away from the scene of the fight, Mr. Villegas asked what had happened and defendant said he thought he had shot someone in the head.

¶ 15 Mr. Marzullo testified that at the time of the incident he was 15-years old, not a gang member, but hung out with the Latin Kings because he thought it was "cool." He confirmed that he was in a sling suffering from a broken shoulder after having been jumped by a group of Familia Stones, and that his group left River Park and headed toward Familia Stones territory to

"gangbang," or start trouble. Prior to leaving, Mr. Chiquini gave a gun to Mr. Rolan, who passed it to Mr. Marzullo. Mr. Marzullo got scared, so defendant took the gun from him.

¶ 16 The initial altercation occurred when the men in the white van identified some Familia Stones walking on the street. When asked how he knew that the men on the street were in fact Familia Stones, Mr. Marzullo explained that the Familia Stones were identified by "older members" of the Latin Kings and that "[t]hey were older people. You listen to them, it's not like we questioned are they Stones or not." After defendant stopped the attack on his cousin, the group continued into Familia Stones territory and a "big, crazy fight" began.

¶ 17 Mr. Marzullo stayed inside the beige car due to his injury. From this vantage point, he never saw any Familia Stones "get the best of" any of his group. What he did see is defendant shoot the victim in the head from about 10 feet away and saw the victim fall. Mr. Marzullo did not know what defendant did with the gun after his group fled the scene.

¶ 18 The State also presented the testimony of defendant's cousin, Felix Torres, and a man that was walking on Montrose Avenue with Mr. Torres on the night of the incident, Juan Talayo. Although neither defendant nor Mr. Talayo knew it at the time, they were cousins as well. Each man confirmed the above summarized details regarding their interaction with defendant's group on the night of the incident, including the fact that the members of defendant's group were driving down Montrose flashing gang signs. In addition, Mr. Torres confirmed that both he and the victim where members of Familia Stones.

¶ 19 Lastly, Mr. Torres testified that he and defendant had a five minute conversation after defendant stopped the other members of his group from attacking Mr. Torres. While Mr. Torres testified that defendant denied that he and his group were "banging," Mr. Torres also stated that it was unusual for Latin Kings to be driving down Montrose Avenue at night flashing gang signs.

Such behavior indicated to Mr. Torres that either a "drive by or a shooting" was going to take place, something that was common at the time.

¶ 20 Finally, the State presented the testimony of Leocadio Radillo, a friend of the victim. Mr. Radillo was not a gang member at the time of the incident, but the victim was a member of Familia Stones. That night, Mr. Radillo was drinking beer and eating food with a group of men that included the victim in front of a house at 3045 West Montrose Avenue. Suddenly another group of men pulled up in vehicles and ran toward Mr. Radillo's group. They were flashing gang signs and yelling "King Killer," "King Love," and "Stone Killer." Mr. Radillo testified that these phrases indicated that the men were Latin Kings, and they intended to kill one of the Familia Stones in his group. He and most of his group ran away, but as he ran away, Mr. Radillo saw the victim being attacked by two men and defendant approaching the victim. Mr. Radillo never saw a gun, but he heard a shot and fell to the ground. The attackers fled, yelling the same phrases as before, and Mr. Radillo returned to the scene of the attack. There he saw that the victim had been shot in the head and was lying on the sidewalk in a puddle of blood.

¶ 21 The State rested its case, defendant's motion for a directed verdict was denied, and defendant introduced no further evidence at trial. At a jury instruction conference, it was determined that the jury would be instructed on both first and second-degree murder, over the State's objection. Following the parties' subsequent closing arguments, the jury found defendant guilty of first-degree murder. Defendant's motion for a new trial was denied, and defendant was ultimately sentenced to a term of 45 years' imprisonment. A timely notice of appeal was thereafter filed.

¶ 22 II. ANALYSIS

¶ 23 On appeal, defendant asserts that he was denied a fair trial due to a number of purportedly improper comments and arguments made by the State in its closing and rebuttal arguments. We address each of defendant's specific challenges to the State's arguments in turn, after laying out the legal framework that will guide our analysis.

¶ 24 A. Legal Framework and Standard of Review

¶ 25 A defendant "faces a substantial burden in attempting to achieve reversal of his conviction based upon improper remarks made during closing argument." *People v. Moore*, 358 Ill. App. 3d 683, 693 (2005). As this court has recognized:

> "A prosecutor is allowed wide latitude during closing arguments. [Citation.] A prosecutor may comment on the evidence presented at trial, as well as any fair, reasonable inferences therefrom, even if such inferences reflect negatively on the defendant. [Citation.] Remarks made during closing arguments must be examined in the context of those made by both the defense and the prosecution ***." *People v. Willis*, 409 Ill. App. 3d 804, 813 (2011).

"A reviewing court will not reverse a jury's verdict based on improper remarks made during closing arguments unless the comments resulted in substantial prejudice to the defendant and constituted a material factor in his conviction." *People v. Cox*, 377 Ill. App. 3d 690, 706 (2007).

¶ 26 We note that defendant never objected at trial to the comments he has now challenged on appeal, nor did he challenge them in his posttrial motion. Therefore, defendant has not preserved these issues for appeal. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (to preserve a claim for review, a defendant must both object at trial and include the alleged error in a written posttrial motion). Defendant, thus, asks this court to review these comments for plain error.

¶ 27 The plain error doctrine "bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error ***." *People v. Herron*, 215 Ill. 2d 167, 186 (2005). The plain-error doctrine is applied where "(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). In either circumstance, the burden of persuasion remains with the defendant. *Herron*, 215 Ill. 2d at 182. Here, defendant only asserts plain error under the first prong of the plain-error doctrine.[1]

¶ 28 We also note that in *People v. Wheeler*, 226 Ill. 2d 92 (2007), our supreme court reviewed the issue of allegedly improper prosecutorial statements during closing arguments *de novo*. *Id*. at 121. In *People v. Blue*, 189 Ill. 2d 99 (2000), which was cited by *Wheeler*, our supreme court applied an abuse of discretion standard to this issue. *Id*. at 128. We need not resolve this conflict, as we find no reversible error in this case under either standard.

¶ 29 B. Misstatements of the Law

¶ 30 We first address defendant's contention that he was prejudiced when the State twice misstated the law during its rebuttal argument by contending that defendant, as a member of the group of initial aggressors, could never be justified in using deadly force against the victim. We disagree.

¶ 31 This court has recognized:

[1] Even if defendant had asserted error under both prongs, "[e]rror under the second prong of plain error analysis has been equated with structural error" and "[e]rror in closing argument does not fall into the type of error recognized as structural." *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 78.

> "Although a prosecutor is allowed wide latitude during closing argument, a misstatement of law can be grounds for reversal. [Citation.] However, '[a] misstatement of the law during closing argument does not normally constitute reversible error if the circuit court properly instructs the jury on the law, as counsel's arguments are construed to carry less weight with the jury than do instructions from the circuit court.' [Citation.] The test to determine whether the misstatement constituted substantial prejudice to the defendant is whether the jury would have reached a contrary verdict had the misstatement not been made. [Citation.]" *People v. Jackson*, 2012 IL App (1st) 092833, ¶ 36.

¶ 32 At the instruction conference the trial court determined that the jury would be instructed on both first and second-degree murder, in light of defendant's theory that he was only acting to protect his brother Rickey. In order to allow defendant the possibility of being convicted of second-degree murder, the jury was instructed on the requirements of section 9-2(a)(2) of the Criminal Code of 1963 (Code). 720 ILCS 5/9-2 (West 2004) (noting that a person commits second-degree murder when, "[a]t the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code, but his belief is unreasonable"); see also Illinois Pattern Jury Instructions, Criminal, No. 7.05 (4th ed. 2000) (applicable pattern jury instruction).

¶ 33 The jury was, therefore, further instructed on the relevant, proper legal justifications for the use of force contained in the Article 7 of Code, including: (1) the proper use of force in defense of another (see 720 ILCS 5/7-1(a) (2012) (outlining the legal requirements for the justifiable use of force in defense of another); Illinois Pattern Jury Instructions, Criminal (IPI), No. 24-25.06 (4th ed. 2000) (pattern jury instruction applicable to this situation)); and (2) the proper use of force by initial aggressors (see 720 ILCS 5/7-4(c)(1) (2012) (outlining the legal

requirements for the justifiable use of force by an initial aggressor); IPI, No. 24-25.09 (4th ed. 2000) (pattern jury instruction applicable to this situation)). While a slightly modified version of the instruction No. 24-25.09 was given at trial to account for the fact pattern of this case—over defendant's objection to its specific wording—that instruction has not been challenged on appeal as being improper in any way.

¶ 34 What defendant does challenge on appeal with respect to IPI No. 24-25.09 is the following statement made by the State during its rebuttal argument:

> "You're going to get another instruction which has to do with initial aggressor's use of force, okay, 'A person or another who initially provokes the use of force himself is justified in the use of force only if the force used against him or another is so great that he reasonably believes he or another is in imminent danger or great bodily harm and he has exhausted every reasonable means to escape the danger other then the use of force which is likely to cause death or great bodily harm to another.' Basically what that tells you if you're the initial aggressor you don't get to use deadly force, okay."

¶ 35 Both defendant and the State agree on appeal that this statement began with a correct recitation of the modified jury instruction on the justifiable use of force by initial aggressors, as it was phrased in the modified instruction provided to the jury. But, as defendant asserts and as the State concedes on appeal, the State then continued to improperly summarize this recitation of the instruction by simply stating "if you're the initial aggressor you don't get to use deadly force[.]"

¶ 36 However, it must also be noted that "closing arguments must be viewed in their entirety, and the challenged remarks must be viewed in context." *Wheeler*, 226 Ill. 2d at 122. Immediately after improperly summarizing the relevant instruction, the State continued on to state:

> "Here the Latin Kings are the initial aggressors. There's no deadly force being used against them, they're not in any danger of death or great bodily harm and they certainly have not exhausted every means available to them to get out of there and escape before the victim in this thing is shot. They aren't boxed in, they aren't in a desperate situation. They're just shooting a guy before they leave there."

¶ 37 Thus, the State improperly summarized the instruction only briefly before continuing on to provide a much more detailed and unchallenged application of the instruction regarding the justifiable use of force by initial aggressors.

¶ 38 Furthermore, the record also reflects that the jury was repeatedly informed that it was the trial judge who would instruct them on the relevant law, and that trial court did provide the jury with the full, modified instruction regarding the justifiable use of force by initial aggressors. As such, while the State may have briefly misstated the instruction during its closing argument, the jury was also: (1) provided with the instruction by the State prior to its improper interpretation of that instruction; (2) instructed by the trial court that it would provide the relevant law that must be followed; and (3) actually provided with the instruction by the trial court.

¶ 39 Indeed, this court declined to find prejudicial, reversible error under similar circumstances in *Jackson*, 2012 IL App (1st) 092833, after further concluding that the evidence was not closely balanced. *Id*. ¶ 38. We come to a similar conclusion here, where defendant contends that he was prejudiced by this misstatement of the instruction because it may have been a determinative factor in the jury's decision to convict him of first, as opposed to second-degree murder.

¶ 40 Indeed, despite defendant's arguments to the contrary, we conclude that the evidence was not close that defendant, his brother Rickey, and the other members of defendant's group were

the initial aggressors. The vast majority of the evidence showed that all 13 members of this group traveled to Familia Stones' territory with the intention of committing serious, violent acts, and that they initiated the violent attack on the victim's group. Furthermore, there was absolutely *no* evidence presented at trial tending to establish that any of defendant's group, including defendant himself and his brother Ricky, reasonably or unreasonably believed that they had exhausted *any*—let alone *every*—reasonable means to escape the danger purportedly posed by the members of the victim's group. In such a factual context, we conclude that defendant was not prejudiced by the State's brief, improper summary of the instruction regarding the justifiable use of force by initial aggressors.

¶ 41 Defendant next contends that the State misstated the initial aggressor instruction again during its rebuttal argument when, regarding the Latin Kings' actions in attacking the victim's group, it stated: "They were initial aggressors. They had no right to use deadly force whatsoever." However, this argument again takes the State's statements out of their full context. A full quotation of the State's comments regarding the Latin Kings' actions after the aborted attack on Mr. Torres is as follows:

> "Now, then they go down the street, they jump out again. They're yelling 'King Love, Stone Killers,' certainly showing what their intent is. Stone Killer, what does that mean? It means they want to kill a Stone. That's what they're there for. It's why they have a gun. There's no question in this case the people who are the initial aggressors are, in fact, the Latin Kings. Defendant didn't use deadly force as a last resort because it was the only way to save his brother's life. It wasn't any evidence that this brother was in any danger of death or great bodily harm. They were initial aggressors. They had no right to use deadly force whatsoever."

¶ 42 Thus, this statement was not intended to reflect a blanket statement of law that no initial aggressor could ever justifiably use deadly force. Rather, the State's comment clearly intended to reflect its argument that, based upon the actual facts presented at trial, the Latin Kings that attacked the victim's group—including defendant—were not legally justified in using deadly force *in this instance*. There was nothing improper about that argument.

¶ 43 In sum, we conclude that none of the State's comments during its rebuttal argument—even if incorrect—misstated the modified instruction given at trial in such a way that defendant was prejudiced so as to establish plain error.

¶ 44 C. Misstatements of the Evidence

¶ 45 Defendant also contends that the State improperly misstated the evidence, where it contended during its closing and rebuttal argument that defendant was the leader of the group of Latin Kings on the day of the incident and planned the attack.

¶ 46 Specifically, defendant faults the State for: (1) repeatedly making the argument that defendant was "the leader of that group;" "was in charge of the group," and "was a person of authority" who was "running the show;" (2) arguing that defendant had "plann[ed] the attack on the Stones" and "created a mission;" and (3) contending that "the kind of control [defendant] had over the situation and his people" was demonstrated by defendant's ability to stop the attack on his cousin Mr. Torres. Defendant maintains that these arguments were directly contradicted by the evidence introduced at trial, which defendant contends actually showed (1) defendant was impaired from his consumption of beer and use of marijuana; (2) defendant was "passively" riding, and not driving, in the rear-most vehicle of the three-vehicle convoy; (3) it was the gang members in the leading white van that began throwing gang signs and initiated both the aborted attack on Mr. Torres and the subsequent attack on the other members of the Familia Stones; (4)

defendant was the last person to join in the altercation that ended with the victim's death; and (5) defendant only shot the victim in an effort to aid his out-numbered brother. Defendant maintains that the evidence, therefore, actually established that he "blindly accompanied acquaintances to what ultimately turned into a fight with a rival gang," and that the State's contentions otherwise were not based upon the evidence and prejudiced defendant's efforts to be convicted of only second-degree murder.

¶ 47 The State responds that its arguments below were in fact properly based upon the evidence at trial and the reasonable inferences drawn from that evidence. We agree with the State.

¶ 48 " 'An inference is a factual conclusion that can rationally be drawn by considering other facts. Thus, an inference is merely a deduction that the fact finder may draw in its discretion, but is not required to draw as a matter of law.' " *People v. Velez*, 2012 IL App (1st) 101325, ¶ 28 (quoting *People v. Funches*, 212 Ill. 2d 334, 340 (2004)). Furthermore, the State is permitted to " 'draw inferences unfavorable to the defendant if such inferences are based upon the evidence.' " *People v. Burton*, 338 Ill. App. 3d 406, 418 (2003) (quoting *People v. Gutirrez*, 205 Ill. App. 3d 231, 261 (1990)).

¶ 49 At trial, the State presented evidence tending to show—*inter alia*—that: (1) of those whose ages were known and established at trial, defendant was the oldest member of the group of Kings, "shorties," and others involved in the incident; (2) the older members of the Kings gang were generally listened to and not questioned; (3) defendant's group left River Park with the specific intention to "start trouble" with a rival gang such as the Familia Stones, and drove through that gang's territory in a manner indicating that there would be a drive-by or a shooting; (4) all of the other members of the group listened to defendant when he called off the imminent

attack on his cousin, Mr. Torres; (5) defendant specifically warned his cousin that he should leave because it was going to "get grimy," which was understood to mean that there would be violence or that someone would be killed; (6) members of the defendant's group shouted phrases indicating that a Familia Stone would be killed as they began their attack on the victim and his companions; and (7) defendant was the only member of the group armed with a gun at the time of the incident, and the only one to cause the death of a Familia Stone.

¶ 50 Thus, when the State asserted that defendant was the leader of this group and that they would follow his direction, the State was either directly referencing the above referenced evidence or asking the jury to make reasonable inferences based upon that evidence. While those inferences may have been unfavorable to the defendant, and while neither defendant nor the jury were required to agree with them, we do not find that these inferences were unreasonable or not based upon the evidence presented at trial. Indeed, it is well recognized that " '[j]ust as the jury is entitled to draw inferences from the evidence that are reasonable [citation], the attorneys—including the prosecutor—may argue those inferences. To the extent that the jury could reasonably infer certain facts, the prosecutor is justified in arguing them.' " *People v. Hubner*, 2013 IL App (4th) 120137, ¶ 26 (quoting *People v. Dunlap*, 2011 IL App (4th) 100595, ¶ 29)).

¶ 51 Nor do we agree with defendant's contention that these comments amounted to a misstatement of the evidence because they failed to account for the fact that it was the Latin Kings in the van that both led the three-vehicle convoy and initiated both altercations with the members of Familia Stones. There was evidence presented at trial that the decision to "gang-bang" in Familia Stones territory was made before the group of Latin Kings ever left River Park, and, thus, the two altercations with the Familia Stones were not the result of the independent

decision of the Latin Kings in the van. Moreover, when the State referenced defendant's leadership role, it was clearly referring to his role in the events of the entire evening, not incorrectly commenting on his location as the Latin Kings in the van led the convoy into Familia Stones territory.

¶ 52 Defendant also objects that some of these improper comments were made during the State's rebuttal argument, foreclosing the opportunity for a response. Thus, defendant specifically contends that the State's rebuttal argument improperly contained assertions, with respect to the aborted attack on Mr. Torres, that "when this defendant told them to do something, they listened. To them he was a person of authority. To them he was the person running the show." We reject defendant's challenge to these comments.

¶ 53 First, to the extent that the State discussed the fact that the other members of defendant's group listened to him and stopped any attack on Mr. Torres, this was simply a recital of the actual evidence introduced at trial. *Willis*, 409 Ill. App. 3d at 813 (the State is allowed to comment on the evidence presented at trial in closing arguments). There is no dispute that the other members of defendant's group did, in fact, stop their imminent attack on Mr. Torres after defendant intervened on his behalf.

¶ 54 Second, to the extent that the State used this as an example of defendant's "authority" and the fact that he was "running the show," we again conclude that this was nothing more than a permissible inference based upon this uncontroverted evidence.

¶ 55 Third, we note that these comments were clearly a response to defense counsel's own closing argument, where it was repeatedly asserted that there was in fact "no evidence" that defendant was a leader of his group and that, "[a]s a matter of fact, the evidence points to the exact opposite." It is well recognized that "the prosecution may fairly comment on defense

counsel's characterizations of the evidence and may respond in rebuttal to statements of defense counsel that noticeably invite a response." *People v. Willis*, 2013 IL App (1st) 110233, ¶ 110. Thus, "when defense counsel provokes a response, the defendant cannot complain that the prosecutor's reply denied him a fair trial." *People v. Hudson*, 157 Ill. 2d 401, 445 (1993).

¶ 56 Finally, we acknowledge that of the inferences the State asked the jury to draw, the ones with the least evidentiary support were that defendant had "plann[ed] the attack on the Stones" and "created a mission." However, even if we were to find these or any of the State's other comments and arguments lacked evidentiary support, any possible prejudice was cured by the trial court's instructions to the jury.

¶ 57 "[I]mproper arguments can be corrected by proper jury instructions, which carry more weight than the arguments of counsel. [Citations.] Moreover, any possible prejudicial impact is greatly diminished by the court's instructions that closing arguments are not evidence." *Willis*, 409 Ill. App. 3d at 814. Here, the trial court properly instructed the jury both before and after closing arguments that arguments were not evidence and should not be considered as such. The State and defense counsel also acknowledged this point of law during their own arguments. Therefore, we find that any possible error was cured by the admonishments provided to the jury, the evidence was not closely balanced, and that, therefore, none of these complained-of comments constituted such a material factor that the jury would have reached a different verdict in the absence of these comments. Accordingly, we find no prejudicial error, let alone plain error, with respect to these comments.

¶ 58 D. Inflammatory Comments

¶ 59 The next argument raised by defendant is that he was prejudiced by a number of statements made by the State during its closing arguments that served no purpose other than to

inflame the passions of the jury or to create in them an "us-versus-them" mentality. He specifically complains that the State once improperly noted that defendant left the victim "on the sidewalk of our city street in a pool of blood," and twice improperly referenced the fact that it was "tragic" that neither the jury nor defendant knew anything about the victim's life, dreams, or aspirations. We disagree.

¶ 60 It is certainly true that "[e]very defendant is entitled to a fair trial free from prejudicial comments by the prosecution.' *People v. Billups*, 318 Ill.App.3d 948, 958 (2001). As such, "[a] prosecutor cannot use closing argument simply to 'inflame the passions or develop the prejudices of the jury without throwing any light upon the issues.' [Citation.] Moreover, it is improper for a prosecutor to utilize closing argument to forge an 'us-versus-them' mentality that is inconsistent with the criminal trial principle that a jury fulfills a nonpartisan role, under the presumption that a defendant is innocent until proven guilty." *Wheeler*, 226 Ill. 2d at 128-29.

¶ 61 Nevertheless, we reiterate that the State is entitled to comment on the evidence introduced at trial. *Willis*, 409 Ill. App. 3d at 813. Noting that defendant left the victim "on the sidewalk of our city street in a pool of blood" is first and foremost a simple comment on that very evidence.

¶ 62 Moreover, defendant cites to *Wheeler* in support of his contention that this particular comment attempted to forge such an "us-versus them" mentality. However, in that case our supreme court specifically noted that the State did not "make a few solitary improper remarks," but rather "a chief goal of the prosecutor's closing argument in this case was to inflame the passions and prejudices of the jury, uniting the interests of the jurors in their own safety with that of the interests of the State in convicting defendant." *Wheeler*, 226 Ill. 2d at 130-31. As such, the court noted that the prosecutor—*inter alia*—improperly: (1) suggested that he was the "lone"

and "solitary figure" left to "champion the deceased;" (2) said he was outnumbered by the defense attorneys; (3) told the jurors that they lived "sheltered lives" away from the "mean streets;" and (4) argued that the police that testified on behalf of the State were there to protect the jurors, while defendant's witnesses were not. *Id*. Obviously, the single comment that defendant points to in this case is much different than those present in *Wheeler*, both in number and in scope.

¶ 63 With respect to the other allegedly improper statements, we reiterate that prosecutorial comments constitute reversible error only if they engender "substantial prejudice" (*id*. at 123), and a defendant faces a substantial burden in attempting to obtain reversal on this basis (*Moore*, 358 Ill. App. 3d at 693). Furthermore, a significant factor in determining the impact of improper comments on a jury verdict is whether those comments were brief and isolated in the context of lengthy closing arguments. *People v. Hayes*, 409 Ill. App. 3d 612, 625 (2011). Finally, it has also been recognized that where the evidence of mitigation for second-degree murder was not closely balanced, a defendant cannot show that any purportedly improper comments exhibited such substantial prejudice such that the verdict would have been different had the prosecutor not made those remarks. *Id*. at 626.

¶ 64 Here, even if it is assumed that the above referenced statements were improper, they were relatively brief and isolated within the context of the State's overall closing arguments. Furthermore, as we have already discussed, the evidence with respect to second-degree murder was not closely balanced. As such, we conclude that defendant has failed to meet his substantial burden of establishing any substantial prejudice resulting from these purportedly improper comments.

¶ 65 E. Cumulative Error

¶ 66 Defendant finally asserts that the cumulative effect of the individual errors he has claimed with respect to the State's arguments also requires reversal. We disagree.

¶ 67 We have already rejected the majority of defendant's assertions of error as being unfounded and concluded that the rest did not amount to prejudicial, reversible error. "Where the alleged errors do not amount to reversible error on any individual issue, there generally is no cumulative error. *Moore*, 358 Ill. App. 3d at 695. Therefore, we find no reversible error based on the cumulative effect of the State's closing arguments, as we conclude that there was no "pervasive pattern of unfair prejudice." *People v Johnson*, 208 Ill. 2d 53, 84 (2003).

¶ 68 III. CONCLUSION

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

¶ 70 Affirmed.