2015 IL App (1st) 130862-U
No. 1-13-0862

THIRD DIVISION
June 1, 2016

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 10 CR 12446
	)	
ANTHONY TOWNSEND,	)	
	)	The Honorable
Defendant-Appellant.	)	James B. Linn,
	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Mason and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* Judgment affirmed over defendant's challenge to the sufficiency of the evidence to sustain his murder conviction, claims of ineffective assistance of trial counsel and prosecutorial misconduct.

¶ 2 Defendant, Anthony Townsend, was convicted of first degree murder on a theory of accountability for his participation in an attempted armed robbery when he was identified in a lineup and his DNA was found on a hat at the murder scene. Defendant seeks to have his conviction reversed arguing insufficiency of the evidence where the eyewitness identification

was allegedly unreliable. Alternatively, defendant seeks to have his conviction reversed due to ineffective assistance of counsel for, among other things, failing to present the testimony of an expert witness on the unreliability of identifications. Third, defendant also raises arguments of prosecutorial misconduct based on various statements made by the prosecutor in closing argument. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 Defendant was charged by indictment with first degree murder, based on responsibility, attempt first degree murder, aggravated discharge of a firearm, attempt armed robbery, and aggravated unlawful restraint for events that occurred on December 23, 2006. Defendant was found guilty of the first degree murder of Muhaiman Karim on November 27, 2012, following a jury trial.

¶ 5 The following relevant facts are from the record, as summarized in the parties' briefs.

¶ 6 On December 23, 2006, one partially masked man shot and killed Muhaiman Karim outside of his barbershop after Muhaiman[1] came to the aid of his employee, Dameon Johnson, while Dameon was involved in a struggle with a second partially masked man. Johnson and a second eyewitness, Jemere Smith, described the two offenders as black males who were dressed in black clothing and wore black masks over the lower half of their faces. Johnson and Smith described one of the offenders as medium-complected. In a lineup on April 22, 2010, Johnson identified defendant, recognizing defendant as one of his customers at the barbershop some time before the murder occurred. Defendant's DNA matched one of two DNA profiles from a mixed sample collected from a black knit hat recovered from the rear of the barbershop where Muhaiman was killed.

[1] Muhaiman Karim and his father, Abdul Karim, are referred to by first name for clarity.

¶ 7 At trial, Abdul Karim testified that Muhaiman Karim was one of his four children. Abdul last saw Muhaiman on December 22, 2006, when they attended religious services.

¶ 8 Dameon Johnson worked as a barber at Karim's Kuts barbershop at 8237 South Cottage Grove Avenue, which had been in operation for about 10 years. Johnson had worked there for six years. Muhaiman, who was a friend, owned the barbershop. Johnson was in the process of purchasing the barbershop at the time of Muhaiman's murder. At the time of trial, Johnson owned the barbershop.

¶ 9 The barbershop is located at the end of a section of several stores, and two parking spots are designated for the barbershop at the end of a parking lot behind the storefronts, next to a brick wall. Customers enter the barbershop through the front door. There was a locking gate for the front door when the store closed. There was a rear door at the back of the barbershop, which employees used. There was lighting above the back door.

¶ 10 On December 23, 2006, Muhaiman parked his car next to the brick wall, and Johnson parked next to him. The barbershop was very busy that day with customers getting their hair cut for the holidays, so Johnson and Muhaiman worked from 9 a.m. until 10 p.m. Smith helped clean up the barbershop that evening. Around 10:20 p.m., Johnson, Smith, and Muhaiman began to clean up to close and lock the barbershop. Johnson left work around 10:30 p.m., exiting the back door behind Smith, who was taking out the garbage. When Johnson exited, he looked to the right and saw the top of a dumpster open and two African American men come out with guns in their hands. The men wore masks which covered the lower half of their faces, from the bridge of their noses down.

¶ 11 Although one offender said not to run, Johnson ran around Muhaiman's car, along the brick wall, and to the back door of the barbershop, where one of the men was standing and

holding a gun. Johnson saw Smith head toward the end of the alley, followed by the other masked man. When Johnson saw the masked man at the back door, he ran toward him, placed his hands on the gun, and pointed it in the air. Johnson got on the side of this masked man; they struggled for the gun and it fired once. Johnson screamed: "Don't shoot, don't shoot." Muhaiman then came outside and put his arm around the masked man's neck and also struggled with the offender. A few seconds later, Johnson heard four or five gunshots above his head, but from a different gun, to the right. Johnson no longer observed Muhaiman. The struggle continued and Johnson bit the offender on the hand. The offender then bit Johnson's forearm. Johnson pushed the offender against the passenger side of his parked car, forced him to the ground, took the gun, and struck the offender three times in the face with it. The offender was able to push Johnson away. The offender then picked up a cartridge that had fallen out of the gun and fled. Johnson tried to fire the gun but it did not shoot. The entire event lasted approximately two minutes.

¶ 12 After the masked offender fled, Johnson noticed Muhaiman lying in the doorway of the barbershop. Johnson ran inside and called the police. Johnson set the gun down at his work station inside the barbershop. When the police arrived, Johnson spoke with the officers and told them that both offenders were wearing black, and he described the man with whom he had the struggle as about the same height, build, and complexion as himself, and wearing a black knit hat. Johnson described the other individual, who fired the four or five shots, as shorter, about 5'7", also wearing a knit cap, and darker complected than the individual with whom he struggled. Johnson testified that both offenders wore hoods as well.

¶ 13 On April 22, 2010, three and a half years after the occurrence, Johnson went to the Area 2 police station to view a lineup. The police told him that they had recovered two hats from the scene and that they had DNA on a hat. When Johnson viewed the photos of the crime scene, he

identified the hat with the Timberland logo at the scene as his. Johnson testified he always wore that hat. Before viewing the lineup, Johnson signed a "Lineup/Photospread Advisory Form" (the State's Exhibit No. 3) which stated, "I understand that the suspect may or may not be in the lineup/photospread." The lineup advisory form also stated, "I understand that I am not required to make an identification." Johnson identified defendant from the lineup: "I recognized him because I used to cut his hair and I knew him from—the moment I saw him, I knew he was the guy that I was wrestling with."

¶ 14 Jamere Smith started working at Karim's Kuts at age 13, four years before the occurrence. Smith referred to Muhaiman as "Uncle Mo." On the date of the murder, Smith was working with Johnson and Muhaiman. At about 10:30 p.m., Smith took out the garbage, exiting the rear door with Johnson walking behind him. Smith saw two parked cars behind the barbershop and the red garbage can to his right had the lid closed. As he walked outside, away from the door, Smith heard scuffling and turned around to see an African American individual wearing a skull cap, point a gun in his face. Smith also saw that the lid to the garbage can was now open. The individual told Smith to get on his knees and take everything off, and Smith complied. While on his knees, Smith heard Johnson behind him saying, "Don't shoot me," and heard a scuffle happening but could not see Johnson. The individual standing in front of Smith fired one shot above Smith's head, and then shuffled to the left and fired four shots toward the doorway. Smith saw "flames" coming out of the gun. Smith saw Johnson struggling with someone. The individual then ran to the right, toward 83rd Street, and Smith started running in the opposite direction, toward 82nd Street, through an alley to a restaurant, where he called police and waited until they arrived. Smith attempted to give a description to the police but became "belligerent and disrespectful" after different officers kept asking him the same

questions, which he found frustrating. Smith went to the police station and recounted the events to the detectives.

¶ 15 On October 5, 2011, the court denied defendant's motion to suppress his lineup identification.

¶ 16 Forensic investigator David Ryan arrived at the scene around 11:45 p.m. and took photographs and marked evidence. Ryan recovered the following items: two black knit caps, one of which was near Muhaiman's feet and the other was a Timberland hat; a live 10 millimeter cartridge near Muhaiman on the pavement; a fired bullet which fell out of Muhaiman's clothing; a 10 millimeter cartridge case; keys; three fired .40 caliber cartridge cases; a metal fragment; and a 10 millimeter Smith & Wesson model 10006 handgun from a counter inside the barbershop. There was no magazine inside but there was a fired cartridge case inside the chamber of the gun. Normally, the cartridge case would eject after being fired. However, if the opening was blocked, the "fired cartridge case will not eject and another live cartridge will not load into the firing chamber of the handgun." Ryan photographed and inventoried all the pieces of evidence. Ryan also dusted the vehicles and the red garbage dumpster for fingerprints but was unable to recover any. At Area 2 headquarters, Ryan photographed some small injuries on Johnson's left shoulder and forearm, inventoried Johnson's shirt, and performed gunshot residue tests on Johnson and Smith.

¶ 17 Scott Rochowicz, an expert in microscopy and trace chemistry, later analyzed the gunshot residue kits. Smith tested negative for gunshot residue. Johnson tested positive, a result that could have been produced if Johnson was close to or touching a firearm when it was fired.

¶ 18 Detective Danny Stover was assigned to Muhaiman's murder as part of the homicide cold case unit in March 2010, after DNA testing on the black knit hat at the murder scene matched

defendant's DNA from a government database. Defendant was placed in a lineup the following day, April 22, 2010. When Johnson viewed the lineup, all the individuals were wearing masks similar to the masks worn by the offenders during the murder. Stover showed Johnson pictures of the crime scene before taking Johnson to view the lineup. Johnson identified his hat and the other hat that was worn by the offender with whom he had struggled and which came off when he and the offender wrestled to the ground. Johnson identified defendant, who was the middle person in the lineup. According to Stover, Johnson said, "I recognize his eyes…I remember seeing the guy before the murder occurred coming in and I've actually cut his hair before…I remember this guy. This is the guy that did it." Defendant was not charged at that time, however, because Stover was awaiting the analysis of defendant's buccal swab. After the DNA test result confirmed that defendant's DNA matched the DNA from the second black knit hat at the scene, Stover obtained an arrest warrant and arrested defendant on June 15, 2010.

¶ 19 Stover also interviewed Smith twice. The first interview was on May 3, 2010, in DeKalb, Illinois. The second interview was at Area 2 headquarters where Stover obtained a buccal swab sample from Smith.

¶ 20 The parties stipulated that if Dr. Mitra Kalelkar were called to testify, she would be qualified as an expert in the fields of pathology and forensic pathology. Kalelkar performed Muhaiman's autopsy, and she observed three gunshot wounds, none of which were at close range. Kalelkar concluded the cause of death was a gunshot wound and the manner of death was homicide.

¶ 21 The State called Fred Tomasek, an expert in firearms and tool mark identification, who analyzed the bullets and cartridge cases. Two 10 millimeter cartridge cases found at the scene were from the Smith & Wesson recovered from the barbershop. Bullets from Muhaiman's body

and clothing as well as four .40 caliber cartridge cases found at the scene were from a different gun, *i.e.*, not the Smith & Wesson. Tomasek noted that the particular Smith & Wesson firearm will not fire even with a bullet in the chamber if there is no magazine loaded.

¶ 22 Ruben Ramos, an expert in forensic DNA analysis, testified that he found two mixed DNA profiles on the hat samples submitted to the laboratory by Gordon, a major profile and a minor profile. There was more of the major profile in the mixture in both samples. Ramos compared both profiles to a blood standard from Muhaiman and determined that Muhaiman's DNA was not in the mixture in either sample from the hats. Ramos could not tell when either the major or minor profiles were left on the hat. Ramos acknowledged that some people shed DNA more easily than others, and that the person who matched the major DNA profile in either sample from the hats would not necessarily have worn the hat longer or more recently than the one who left the minor DNA profile.

¶ 23 In March 2010, Brian Schoon, another expert in forensic DNA analysis, learned of the match between the major DNA profile left on one of the hats and the DNA profile of defendant, which was in the government database. Detectives Danny Stover and Timothy Murphy obtained a search warrant to collect defendant's buccal swab. Murphy collected the sample from defendant after his arrest. Schoon requested defendant's standard for additional testing.

¶ 24 Defendant's buccal swab standards were provided to Meredith Misker, also an expert in forensic DNA analysis. Misker extracted defendant's DNA profile using polymerase chain reaction (PCR) analysis and then compared his profile to the major and minor profiles identified on both of the hats recovered from the scene. Misker excluded defendant as the source of the DNA sample from Johnson's Timberland hat and determined that defendant matched the major DNA profile found on the sample from the other black knit hat. Misker calculated that the

probability that a random person would match the DNA profile on the hat sample was approximately 1 in 440 quadrillion African American individuals, 1 in 12 quintillion white individuals, and 1 in 13 quintillion Hispanic individuals. Misker explained that a quadrillion has 15 zeroes and that there are approximately seven billion people on earth. Following Misker's testing, police re-arrested defendant and this time took him into custody.

¶ 25 The State entered into evidence exhibits 1 through 80 and rested their case-in-chief. Defendant's motion for a directed verdict was denied.

¶ 26 Defendant called the police officers who spoke to Johnson and Smith as witnesses for the defense. Officer Herbert Williams and his partner spoke to Johnson and Smith at the scene. Johnson and Smith described the offenders as African American males and wore black clothing and black masks. Williams did not recall Johnson telling either him or his partner that one of the offenders lost a hat or that he recognized the eyes of one of the offenders.

¶ 27 Detective Oscar Artega also arrived at the scene and asked Johnson for a description of the offenders. Johnson described the two offenders as African American males dressed in black clothing and wearing masks. Johnson described one of the offenders as having a medium brown complexion. Johnson did not provide height or weight estimates of the offenders, did not say he recognized either one of them, did not mention anything about a hat, and did not follow up later with Artega with any additional information. Johnson did not describe the eyes of either offender. Although several hats were found at the scene, Artega did not walk Johnson through the scene because he was distraught. Artega also spoke with Johnson later at the police station, where Johnson told him that he struck the offender with whom he struggled with the gun but did not mention a hat. Every time Artega talked to Johnson and Smith they were distraught, and it was difficult to talk to Smith even at the police station.

¶ 28 Artega also spoke with an individual named Jemell Rowe who was detained during the initial investigation because he was found injured in the area. However, Artega excluded Rowe as a suspect after he determined that Rowe was in an unrelated fight with a different individual. A gunshot residue test for Rowe also came back negative.

¶ 29 The defense then rested.

¶ 30 During closing arguments, the prosecutor argued, over defense objection, the following:

"Ladies and gentlemen, December 23, 2006 this defendant right here and his partner in crime [objection; overruled] wanted what they did not want to work for, and they were willing to commit violence to do it, and because, because, of that, this man Muhaiman Karim is no longer running a thriving business, he's no longer mentoring a 13-year-old boy. [Objection; overruled.] He's no longer meeting his father for prayers on a Friday afternoon, because this defendant right here stole his life, and that, ladies and gentlemen, is first-degree murder."

¶ 31 Regarding the Timberland knit hat, the prosecutor argued the following:

"*** by the way, why didn't we test the hat, the Timberland hat? We know who wore the Timberland hat, [Johnson] wore the hat. He came in here and he told you, 'That's my hat.' These are valuable resources, why would we test a hat that we know who its belongs to [sic]."

¶ 32 Defense counsel argued to the jury that the evidence was insufficient to prove defendant guilty beyond a reasonable doubt. Defense counsel argued that the fact that defendant's DNA was on the black knit hat, along with someone else's DNA, did not prove that defendant was the offender because Johnson did not state that the offender wore a hat until after defendant's DNA was found on the hat. Defense counsel also argued that Johnson's identification of defendant was

unreliable because Johnson never previously stated that he recognized the offender's eyes, or that the offender had been his customer at the barbershop, and these facts were not in the police reports.

¶ 33 In rebuttal, the prosecutor argued that "[d]efense counsel talked about what was in the police reports, what wasn't in the police reports," and argued to the jury, "[w]hat you need to rely on is what was told to you by [Johnson] and what was told to you by [Smith] and the evidence brought forward to you. That's what you need to rely on."

¶ 34 After deliberating, the jury found defendant guilty of first degree murder, but not of personally discharging a firearm.

¶ 35 Defendant filed a motion for a new trial on January 3, 2013. Defense counsel argued that the evidence was insufficient to convict defendant; that the State denied defendant a fair trial by presenting a blown-up photograph of Muhaiman on the "big screen" while arguing the things Muhaiman would miss in life. The court denied the motion.

¶ 36 On that same date, January 3, 2013, defendant was sentenced to 40 years' imprisonment in the Illinois Department of Corrections. Defendant filed his appeal on January 11, 2013.

¶ 37 ANALYSIS

¶ 38 I. Sufficiency of the Evidence

¶ 39 Defendant first argues that the evidence is insufficient to support his murder conviction because it is based on unreliable identification testimony and on the mere fact that his DNA, mixed with someone else's DNA, was found on a hat from the outside of the barbershop where defendant was a customer.

¶ 40 A defendant's conviction will be reversed only if the evidence is so improbable or unsatisfactory that there remains a reasonable doubt of the defendant's guilt. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009).

¶ 41 To sustain a conviction for murder in the first degree by accountability the State is required to show that defendant kills an individual if, in performing the acts which cause the death he was attempting to commit the offense of armed robbery; that the defendant or one for whose conduct he is legally responsible performed the acts which caused the death; and that a person is legally responsible for the conduct of another when he either before or during the commission of the offense and with intent to promote or facilitate the commission of the offense, knowingly solicits, aid, abets, agrees to aid or attempts to aid the other person in the planning or commission of the offense.

¶ 42 On a claim of insufficiency of the evidence, this court must determine whether, after taking the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48. Due process protects an accused against conviction except upon proof beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). It is the responsibility of the trier of fact to weigh, resolve conflicts in, and draw reasonable inferences from the testimony and other evidence. *Brown*, ¶ 48. The weight of the evidence and credibility of witnesses are matters for the trier of fact, who may accept or reject as much or little of a witness's testimony as it chooses. *People v. Rouse*, 2014 IL App (1st) 121462, ¶¶ 43, 46. This court does not retry the defendant – that is, we do not substitute our judgment for that of the trier of fact on the weight of the evidence or credibility of witnesses – and we accept all reasonable inferences from the record in favor of the State. *Brown*, ¶ 48. The trier of fact must judge how flaws in part of a witness's

testimony, including inconsistencies with prior statements, affected the credibility of the witness. *People v. Cunningham*, 212 Ill. 2d 274, 283 (2004). To sustain a conviction "[t]he trier of fact need not be satisfied beyond a reasonable doubt as to each link in the chain of circumstances, *** [i]t is sufficient if all the evidence taken together satisfied the trier of fact beyond a reasonable doubt of the defendant's guilt." *In re Jonathon C.B.*, 2011 IL 107750, ¶ 60.

¶ 43 A. Identification

¶ 44 The State is required to prove identity beyond a reasonable doubt. *People v. Slim*, 127 Ill. 2d 302, 307 (1989). In assessing the reliability of a witness' identification, our courts adopted the well-established factors set forth in *Neil v. Biggers*, 409 U.S. 188 (1972), in *People v. Slim*, 127 Ill. 2d 302, 307 (1989). These non-exhaustive factors include: (1) the witness' opportunity to view the accused at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the time of confrontation; and (5) the length of time between the crime and the identification. *Biggers*, 409 U.S. at 199-200; *Slim*, 127 Ill. 2d at 308. This court has held that "[t]he testimony of a single credible witness with ample opportunity to make a positive identification is sufficient to convict." *People v. Barnes*, 364 Ill. App. 3d 888, 895 (2006).

¶ 45 The cold case hit in March 2010 for defendant's DNA based on testing of the DNA mixture found on one of the black knit hats is what led to defendant's arrest. Johnson identified the Timberland hat from crime scene photos as his own and deduced that the other hat at the scene must have been the offender's, because it was only Johnson, Muhaiman, and the masked offender during the struggle in the back of the barbershop. At the April 2010 lineup, which was three-and-a-half years after the murder, Johnson identified defendant and stated that he recognized defendant's eyes and remembered cutting his hair at the barbershop.

¶ 46 Defendant argues that the description given was too general; that the only description given by Johnson and Smith the night of the murder was that both offenders were African American males who had on black clothing and wore black masks over the lower half of their faces; that one of the individuals was medium complected; and that the offender with whom Johnson struggled was about the same height, build, and complexion as Johnson. Defendant focuses on the items where forensic evidence was lacking: no fingerprints found on the dumpster, no DNA from saliva recovered from Johnson's shirt, although the offender bit him on the arm during the struggle, and no fingerprints on the gun. At trial, defense counsel strenuously argued the identification by Johnson during closing arguments. Defense counsel made the implication that Johnson identified defendant only because he had recognized him from having been a customer. Defense counsel also argued that defendant's hat could have been left at the scene simply because defendant was a customer at the barbershop.

¶ 47 While Johnson initially failed to tell police that he recognized the offender as a customer from the barbershop when the murder occurred, Johnson later made an unequivocal positive identification of defendant in a lineup when he was shown in a mask, which is how Johnson viewed the offender.

¶ 48 We find that Johnson had an opportunity of approximately two minutes to observe the unmasked part of the offender's face, up close, during the physical struggle. A light above the back door lighted the back of the barbershop by the rear exit. During the struggle, according to Johnson's testimony, he was able to force the offender to the ground and strike him three times in the face. Johnson had a clear opportunity to view the offender, up close, face-to-face. The use of a mask during the lineup does not invalidate this *Biggers/Slim* factor of opportunity to view the accused. See *People v. Bryant*, 94 Ill. 2d 514, 519 (1983).

¶ 49 Second, Johnson's testimony indicates that he had a heightened degree of attention. Johnson testified that when he exited the barbershop in the rear, he noticed the lid of the dumpster was open. Johnson recalled the exact number of shots and from which direction. He also specifically recalled that he could no longer observe Muhaiman after he heard the shots from the side. Overall, Johnson's degree of attention was heightened.

¶ 50 Third, Johnson also was able to recall that the offender had a very similar build to himself, and also remembered the offender's complexion, which was an accurate physical description.

¶ 51 Fourth, Johnson demonstrated an unequivocal level of certainty in identifying defendant at the lineup. Upon seeing the lineup, Johnson immediately identified defendant. Johnson stated, "I knew him from – the moment I saw him, I knew he was the guy that I was wrestling with." Detective Stover corroborated Johnson's immediate recognition of defendant and testified that Johnson said, "I recognize his eyes…I remember seeing the guy before the murder occurred coming in and I've actually cut his hair before…I remember this guy. This is the guy that did it."

¶ 52 Finally, the length of time between the crime and the identification, nearly three and a half years, somewhat mitigates against reliability. However, we do not find this period of time so long as to completely render the identification unreliable. The fact that Johnson did not mention anything about the offender's eyes or recognizing him as a customer the night of the murder, but only three-and-a-half years later at the lineup, does not, in and of itself, render his identification of defendant unreliable. See *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 76 (holding that despite 7 out of 8 witnesses waited 26 years to come forward with information implicating the defendant, the trier of fact is in the best position to determine the credibility of the witnesses, to

resolve any inconsistencies or conflicts in their testimony, to assess the proper weight to be given to their testimony and to draw reasonable inferences from all of the evidence).

¶ 53 Given the traumatic nature of the event, Johnson's up-close struggle with the offender, and Johnson's unequivocal identification of defendant, we find that the *Biggers*/*Slim* factors weigh in favor of reliability of Johnson's identification of defendant.

¶ 54 Defendant cites to *People v. Charleston*, 47 Ill. 2d 19, 21 (1970), *People v. Hughes*, 17 Ill. App. 3d 404 (1974), and *People v. King*, 10 Ill. App. 3d 652, 653 (1973), where witnesses failed to immediately tell police they recognized the offender from a previous acquaintance. While Johnson's identification in this case could have been stronger had he stated to police at the time of the murder that he recognized the offender as a customer of his, we do not find his subsequent lineup identification so unreliable as to raise a reasonable doubt of defendant's guilt, particularly since as a customer, the offender would not have been wearing a face mask. And, defendant's DNA was found on an item of evidence found at the scene, setting this case wholly apart from *Charleston, Hughes* and *King.*

¶ 55 Defendant also argues the general fallibility of eyewitness identification, citing to a New Jersey case (*State v. Henderson*, 208 NJ 208 (Sup. Ct. N.J. 2011)) which has no precedential value and concerns the admissibility of eyewitness identification testimony. The court ordered a hearing where there was some evidence of suggestiveness in the identification procedure.

¶ 56 However, the State counters by citing *Perry v. New Hampshire*, 132 S. Ct. 716 (2012), decided after *Henderson*. The United States Supreme Court held that "[t]he fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness." *Perry*, 132 S. Ct. at 719.

¶ 57 In this case, as the State argues, there was no part of the police procedures that was suggestive. Johnson did not yet know the results of the DNA test, or that one of the individuals in the lineup was someone he knew. The fact that Johnson identified defendant at the lineup, and did not immediately make the connection to defendant at the time of the murder, could be explained by the fact that defendant wore a bandana masking his face in the lineup. The lineup was the first time Johnson had seen defendant in a mask, other than the time of the murder, which could be what emphasized defendant's eyes to Johnson and sparked Johnson's memory. Johnson may not have been able to recognize defendant as the offender from the times he had been to the barbershop previously for this simple logical reason. The jury was presented with defendant's inference, that Johnson identified defendant only because he recognized him from previously having been a customer, and the State's inference, that Johnson recognized defendant at the lineup because he was similarly presented with a mask, and the jury believed the State's inference beyond a reasonable doubt. We cannot say that no reasonable jury would have concluded the same thing.

¶ 58 We note that the jury in this case took some time deliberating, a fact the court below highlighted. This fact indicates to us that the jury carefully weighed all of the evidence in this case, including the lack of certain evidence and the issue of Johnson's identification. After weighing all the evidence, the jury unanimously found defendant's guilt beyond a reasonable doubt, thereby indicating it rejected the defense's inferences. "The trier of fact is in the best position to judge the credibility of witnesses, the weight to be given to testimony, and the reasonable inferences to be drawn from such testimony." *People v. Hernandez*, 319 Ill. App. 3d 520, 532-33 (2001) (citing *People v. Byron*, 164 Ill. 2d 279 (1995)).

¶ 59 "[O]nly where the record leaves the reviewing court with a grave and substantial doubt of guilt should the conviction be reversed." *People v. Pursley*, 284 Ill. App. 3d 597, 609 (1996) (citing *People v. Mendoza*, 208 Ill. App. 3d 183, 204 (1991)). That is not the case here with Johnson's identification of defendant.

¶ 60 B. DNA Evidence On the Hat

¶ 61 Defendant also argues that the evidence was insufficient to prove him guilty beyond a reasonable doubt because the State did not prove the hat belonged to him, despite the presence of his DNA on the hat found at the crime scene.

¶ 62 We first address defendant's argument, in a footnote, that the record "does not contain sufficient evidence for [defendant] to challenge the accuracy of the DNA match." Defendant states: "No testimony was offered on the type of DNA testing performed to detect the DNA profiles on the black knit hat, or on whether [defendant's] DNA profile was a full or partial match to the major profile identified on that hat."

¶ 63 We find defendant's contention to be without merit. Meredith Misker, the Illinois State Police Laboratory forensic scientist who performed the DNA testing, testified clearly that she performed polymerase chain reaction (PCR) DNA testing. Misker also testified that she compared defendant's DNA from his buccal swab to the major DNA profile from the black knit hat and that defendant's DNA "matches," not that it was a partial match. Misker further calculated the probability of this match as 1 in 440 quadrillion African Americans, and that there are 15 zeroes in a quadrillion. This means that the probability of a random African American male matching the major DNA profile on the black knit hat was 1 in 440,000,000,000,000,000. To argue that there was no testimony on the type of DNA testing performed and that, therefore, the record is insufficient to argue against the DNA match, is disingenuous. Misker's testimony

was clear. After reviewing the record, we find no support for any argument against the match between defendant's DNA and the major DNA profile on the black knit hat.

¶ 64 Nevertheless, defendant argues that the prosecution failed to prove that the hat was actually his. Defendant cites *People v. Gomez*, 215 Ill. App. 3d 208 (1991), where the court reversed the defendant's murder conviction despite evidence that the defendant's fingerprint was inside a ransacked drawer in the victim's kitchen near the crime scene. Although the victim had been hit with a paint can and paint was found near his room in his home, the defendant argued that the paint could have come from when he previously painted the house and there was no scientific test to show how long that paint had been there. *Id*. at 213-14.

¶ 65 However, unlike *Gomez*, we are not presented in this case with the mere presence of the hat, by itself. As the State points out, in this case we also have the eyewitness identification of defendant, which distinguishes *Gomez*.

¶ 66 Defendant also argues that Johnson and Smith did not say anything about the offenders wearing hats on the night of the murder but, instead, at trial "belatedly" claimed that the offenders were wearing hats, after the DNA in the mixed sample on the black knit hat came back as a match to defendant. Defendant takes issue with Johnson's testimony in particular, in trying to account for how the hat fell off defendant, telling Detective Stover that the hat must have fallen off when he and the offender struggled on the ground, but then at trial testifying that he did not remember telling Stover that the hat fell off during the struggle.

¶ 67 The only inconsistency here concerns Johnson's memory of whether he told Detective Stover that the hat fell off during the struggle. Defendant portrays this portion of Johnson's testimony as "trying to distance himself from this claim." However, Johnson did not waver in his assertion that the hat must have fallen off the offender during his struggle with him.

¶ 68 Defendant also argues that Johnson's initial description was inconsistent as he said both offenders as wearing hoodies but then, upon being shown photos of the crime scene, determined that the black knit hat "must have" been the offender's hat because there were only three of them [struggling] back there (Johnson, Muhaiman, and the offender). We note that the description is not inconsistent. The offender could have worn the hat under the hoodie, which may not have been clearly visible to Johnson, and the hat could have fallen off during his struggle with him, just as Johnson deduced.

¶ 69 We note also that Johnson did not immediately tell the police that he himself had been wearing the "Timberland" hat but when he was shown the crime scene photos before the lineup he readily identified the hat from the crime scene photo. Johnson testified that he was told that there was DNA on one of the hats. While defendant points to Johnson's later identification of the knit hat as suggestive and unreliable, there is no reason that Johnson would also identify one of the hats as his own, unless it was simply true.

¶ 70 Although defendant attempted to establish a negative inference from the belated identification of the hats from the crime scene photo, an equally, if not more plausible inference is that Johnson did not identify the hats from the crime scene photographs until shortly before the lineup because that is the first time he was actually shown the crime scene photos. Johnson was shown the crime scene photographs in April 2010, nearly three and one half years after the murder. Johnson was initially interviewed by the police right after the murder. There was no evidence that any photos of the crime scene had yet even been developed. And there was testimony the police did not walk Johnson through the crime scene when they arrived.

¶ 71 Defendant offered several explanations of how the hat wound up in the parking lot at the crime scene to support his insufficiency of the evidence argument:

"[S]ince Johnson said that [defendant] was at the shop before the murder occurred, on that busy Saturday in December, or any recent day before, Townsend could have entered the barbershop wearing a hat, removed the hat to get his hair cut, and walked out the shop without his hat. The hat could have then ended up behind the barbershop for any number of reasons. Smith could have had the hat in his hands, his back pocket, or in one of the garbage bags he was carrying at the time of the events. Or, the hat could have been dropped by Smith or someone else at a different point that day on the way to the garbage can. Indeed, the notion that someone other than [defendant] handled that hat at some point is corroborated by the fact that two DNA profiles appeared on the hat."

¶ 72 Defendant also speculates the following:

"[W]here [defendant] was present at the barbershop before the events occurred, his skin cells could have transferred to the hat simply by touching it at some point, whether he was holding it for someone else, whether he tried it on while he was at the barbershop, or whether he simply picked it up because it had been left on a chair he intended to sit on."

¶ 73 But there was no evidence to support any of these inferences from the evidence actually presented at trial. The defense did not even admit that defendant had been in the barbershop the day of the murder, much less that he had innocently touched or tried on the hat and then left it there.

¶ 74 While defendant suggests that the presence of the hat at the crime scene could have an innocent explanation because defendant was a customer at the barbershop, Johnson testified that customers would enter the barbershop through the front door, and that the front door would be locked when the store was closed. There was no testimony that customers either entered or exited

through the back door of the barbershop. Defendant offers no credible explanation for how a hat with his DNA on it wound up in the back of the barbershop, at the crime scene. The defense offered no evidence that defendant ever came into the barbershop from the rear of the shop or that he ever left the barbershop through the rear, or that he ever simply walked through the parking lot in the back of the barbershop. At trial, the defense did not argue any other plausible explanation for the hat's presence there and we will not speculate. Defendant's belated speculations are not reasonable inferences from the evidence that was actually adduced at trial.

¶ 75 Further in the crime scene photos the hat is not dirty, and does not otherwise look like it had been there for any length of time, thereby easily leading to the inference that it had been left there recently, including on the day of the murder. From the DNA evidence, there was no serious question that it was defendant's hat. The jury was left with the reasonable conclusion that it was defendant's hat, and that he was there on the day of the murder.

¶ 76 On cross-examination and re-cross examination of the DNA forensic scientist who extracted the mixed DNA profiles from the black knit hat, defense counsel developed testimony that the scientist could not tell when either the major or minor profiles were left on the hat, that some people shed DNA more easily than others, and that the person who matched the major DNA profile in either sample from the hats would not necessarily have worn the hat longer or more recently than the one who left the minor DNA profile. However, despite this possibility of a doubt raised by defendant regarding when the hat was worn by defendant and whether defendant had worn the hat for longer than the other DNA contributor (*e.g.*, whether it was defendant's hat), there was no evidence at trial to support any of defendant's above alternate theories.

¶ 77 " '[T]he trier of fact is not required to disregard inferences which normally flow from the evidence and to search out all possible explanations consistent with innocence and raise them to the level of reasonable doubt.' " *People v. Wheeler*, 226 Ill. 2d 92, 117 (2007) (quoting *People v. Howery*, 178 Ill. 2d 1, 27 (1997)). Given that there was no explanation for how the hat wound up at the crime scene, the jury could have reasonably inferred and concluded beyond a reasonable doubt that it was left when the crime was committed. See *People v. Gomez*, 215 Ill. App. 3d 208, 216 (1991).

¶ 78 We must affirm defendant's conviction if the evidence, viewed in the light most favorable to the prosecution, could lead any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *People v. Sutherland*, 155 Ill. 2d 1, 17 (1992), *cert. denied*, 510 U.S. 858 (1993). Under our required standard of review, taking all the evidence together, in the light most favorable to the prosecution, the evidence in this case supports defendant's conviction beyond a reasonable doubt.

¶ 79 II. Ineffective Assistance of Counsel

¶ 80 Related to the failure to show an insufficiency of the evidence based on Johnson's identification testimony, defendant argues that he was denied his constitutional right to effective assistance of counsel (U.S. Const., amends. VI, XIV; Ill. Const.1970, art. I, § 8) due to his counsel's failure to call an expert to testify to the unreliability of eyewitness identification, *i.e.*, that witnesses' memories and identifications are fallible for a wide variety of reasons. This area of expert testimony has sometimes been dubbed "human factors" expert testimony. See *People v. Kramer*, 278 Ill. App. 3d 963 (1996).

¶ 81 Both the United States and Illinois Constitutions guarantee a criminal defendant the assistance of counsel. U.S. Const. amends. VI, XIV; Ill. Const.1970, art. I, § 8. This requires not

only that a person accused of a crime have the assistance of counsel for his or her defense, but also that such assistance be "effective." *United States v. Cronic*, 466 U.S. 648, 655-56 (1984). To establish a claim of ineffective assistance, a defendant must prove two prongs: (1) that counsel's performance was deficient or fell below an objective standard of reasonableness; and (2) that the defendant suffered prejudice as a result of the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Ford*, 368 Ill. App. 3d 562, 571 (2006). The failure to establish either prong is fatal to a claim of ineffective assistance of counsel. *People v. Richardson*, 189 Ill. 2d 401, 411 (2000). Given the undisputed facts surrounding defendant's ineffective assistance of counsel claim, our review is *de novo*. *People v. Nowicki*, 385 Ill. App. 3d 53, 81 (2008).

¶ 82 Regarding the first prong, our review of counsel's performance under *Strickland* "must be highly deferential." *Id.* at 689. We "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. In other words, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). We do not focus on "isolated incidents of conduct" but instead "look to the entire record to determine if under all of the circumstances counsel's assistance was ineffective." *People v. Cloyd*, 152 Ill. App. 3d 50, 57 (1987). Counsel's "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690.

¶ 83 Regarding the second prong, "[p]rejudice is shown when there is 'a reasonable probability' that, but for counsel's ineffectiveness, the defendant's sentence or conviction would have been different." *Ford*, 368 Ill. App. 3d at 571 (citing *People v. Mack*, 167 Ill. 2d 525, 532

(1995)). A reasonable probability is defined as "a probability sufficient to undermine confidence in the outcome" of the trial. *Strickland*, 466 U.S. at 694. "The defendant must show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair." *Richardson*, 189 Ill. 2d at 411 (citing *People v. Evans*, 186 Ill. 2d 83, 93 (1999)); *People v. Whitehead*, 169 Ill. 2d 355, 380-81 (1996).

¶ 84 Both the Illinois Supreme Court and this court have acknowledged that there can be problems with eyewitness identification testimony and that, in the appropriate case, such expert testimony can assist the trier of fact.

¶ 85 In his reply brief, defendant relies on *People v. Starks*, 2014 IL App (1st) 121169, ¶¶ 68, 71, in which this court recognized that the issue of expert eyewitness identification testimony was "rapidly evolving" and had "shift[ed] in favor of admissibility" in appropriate cases. We noted that recently courts across the country have recognized that "contrary to longstanding assumptions, fallibilities in eyewitness identifications are not readily understood by juries." *Id*. at ¶ 72. We noted that such eyewitness identification experts can provide explanations of such fallibilities "without usurping the jury's fact finding function." *Id*. In *Starks*, the three eyewitnesses who identified the defendant did not know the defendant and gave a general description of the shooter, had the opportunity to view the offender for only a few seconds and under stressful circumstances, and gave conflicting accounts of important details. *Id*. There was "no direct physical evidence" linking the defendant to the crime, and the three eyewitnesses gave very general descriptions of the offender, and their testimony concerning important details of the crime was conflicting. *Starks*, 2014 IL App (1st) 121169, ¶ 72. This court granted the defendant a new trial on other grounds but, because of the particular facts of that case, ordered the trial court to give "serious consideration" to allowing an identification expert on remand. *Id*.

¶ 86 Recently, in *People v. Lerma*, 2016 IL 118496, also relied upon by defendant in his reply brief, the Illinois Supreme Court held that the circuit court abused its discretion in denying defendant's motion to allow expert testimony concerning the reliability of eyewitness identifications. The court granted the defendant a new trial and specifically instructed the circuit court to allow an expert on eyewitness identification where the sole evidence of the defendant's guilt was two eyewitness identifications; and the victim's mother testified that her son and the defendant had been friends for several years, while the other eyewitness had also knew the defendant and had seen him a few times previously, then testified that she did not know the defendant. *Id*. at ¶¶ 5-6, 26. There was no physical evidence linking the defendant to the crime. *Id*. at ¶ 26. Only one eyewitness was subject to cross-examination; the identification by the victim was admitted under the excited utterance exception to the hearsay rule. *Id*. at ¶ 26. The court found that "there is no question that this is the type of case for which expert eyewitness testimony is both relevant and appropriate." *Id*. The court held that such expert testimony would have assisted the jury "under the circumstances present in this case," and reversed. *Id*. at ¶¶ 39-40.

¶ 87 We acknowledge persistent problems with eyewitness identification. We reaffirm that, in the appropriate case, expert testimony regarding the reliability of eyewitness testimony can be useful to aid the trier of fact. Long ago, the Illinois Supreme Court noted in *People v. Gardner*, 35 Ill.2d 564, 572 (1966), that, "[o]f all the factors that account for the conviction of the innocent, the fallibility of eye-witness identification ranks at the top." In *Lerma*, the court noted that advances in DNA testing have confirmed that eyewitness misidentification is now the single greatest source of wrongful convictions and is responsible for more wrongful convictions than all other causes combined.

¶ 88 In the present case, however, there is other evidence, and the DNA evidence *confirms* the eyewitness' identification. The corroborating DNA evidence sets this case apart from cases where a defendant is convicted based solely on eyewitness testimony, and under circumstances that cast grave doubt on the eyewitness' identification.

¶ 89 We must emphasize that eyewitness expert testimony is helpful only in the appropriate case, which means that determinations about the trial court's discretion in allowing or disallowing such expert testimony must be on a case-by-case basis. Both this court in *Starks* and the Illinois Supreme Court in *Lerma* noted that such expert testimony would be useful under the particular circumstances of the case before it. See *Starks*, 2014 IL App (1st) 121169, ¶ 72 (discussing the "specific circumstances of the case"); *Lerma*, 2016 IL 118496, ¶¶ 39-40 ("under the circumstances present in this case").

¶ 90 We reaffirm the recent trend in our State to recognize the usefulness of expert testimony concerning reliability of eyewitness identifications in the appropriate case. The State's reliance on older authority rejecting this area as inappropriate for expert testimony is no longer valid.

¶ 91 Defendant asks us to create a *per se* rule that failure to present expert eyewitness identification evidence constitutes ineffective assistance of counsel. The Illinois Supreme Court in *Lerma* held only that it was an abuse of discretion to exclude proffered expert testimony regarding eyewitness identification in an appropriate case. The supreme court has not gone so far as to hold, or even suggest, that not offering such expert testimony is a ground for finding ineffective assistance of counsel. We see no reason to do so either.

¶ 92 We continue to examine trial counsel's overall trial strategy under the facts of each case in assessing whether or not there was ineffective assistance, especially where the record demonstrates that the eyewitness was heavily cross-examined by defense counsel about his or

her ability to observe the offender. There is no authority to suggest that testimony by an expert regarding the reliability or unreliability of eyewitness identifications is necessary for a fair trial or that failure to present such evidence constitutes ineffective assistance of counsel.

¶ 93 Rather, whether to present such expert witness testimony regarding the reliability of eyewitness identifications remains a matter of trial strategy. "Decisions concerning which witnesses to call at trial and what evidence to present on defendant's behalf" are "matters of trial strategy" which are "generally immune from claims of ineffective assistance of counsel." People v. Reid, 179 Ill. 2d 297, 310 (1997). To overcome this presumption of soundness, counsel's trial strategies "must appear irrational and unreasonable in light of the circumstances that defense counsel faces at the time" such that "no reasonably effective criminal defense attorney, facing similar circumstances, would pursue such strategies." *People v. Faulkner*, 292 Ill. App. 3d 391, 394 (1997). This court has recognized that a defense counsel's "failure to call an expert witness is not *per se* ineffective assistance, even where doing so may have made the defendant's case stronger, because the State could always call its own witness to offer a contrasting opinion." *People v. Hamilton*, 361 Ill. App. 3d 836, 847 (2005).

¶ 94 Here, defense counsel conducted very thorough cross-examination regarding Johnson's identification of defendant, and highlighted the fact that defendant had previously been a customer. Even had there been expert testimony about eyewitness reliability, the jury was still faced with the hat with defendant's DNA on it. We cannot say that counsel's performance and strategy were so unsound as to fail to conduct any meaningful adversarial testing.

¶ 95 We therefore hold that that defendant has failed to sustain his burden under the first required prong under *Strickland* to show that his counsel's performance was deficient. Because of our disposition of this issue, we need not reach the second *Strickland* prong.

¶ 96 III. Prejudicial Statements in Closing Arguments

¶ 97 Finally, defendant argues that he was denied a fair trial due to prejudicial statements made by the prosecutor during closing arguments.

¶ 98 As defendant points out, there is conflicting authority concerning our standard of review of the issue of prosecutorial misconduct. The Illinois Supreme Court has employed both a *de novo* standard of review (*People v. Wheeler*, 226 Ill. 2d 92, 121 (2007)) and an abuse of discretion standard of review (*People v. Blue*, 189 Ill. 2d 99, 128 (2000)). The court has not yet clarified this conflict. Defendant argues that because there are no factual issues, our review should be *de novo*. See *People v. Sims*, 192 Ill. 2d 592, 615 (2000) ("Because the present case involves the application of the law to undisputed facts, our standard of review is *de novo*."). We find precedential support for applying a *de novo* standard of review to this issue where the facts are undisputed. See *People v. Nowicki*, 385 Ill. App. 3d 53, 81 (2008) (holding that because the facts surrounding defendant's ineffective assistance of counsel claim were undisputed, our review was *de novo*). However, we need not resolve the issue of the appropriate standard of review, as our determination would be the same under either standard. *People v. Johnson*, 2015 IL App (1st) 123249, ¶ 39.

¶ 99 Prosecutors have wide latitude in making closing arguments, and a reviewing court will not reverse a jury's verdict based upon 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. Bell*, 343 Ill. App. 3d 110, 116 (2003) (citing *People v. Foster*, 322 Ill. App. 3d 780, 790 (2000)). "During closing argument, the prosecutor may properly comment on the evidence presented or reasonable inferences drawn from that evidence, respond to comments made by defense counsel which clearly invite response, and comment on the

credibility of witnesses." *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 57 (citing *People v. Rader*, 178 Ill. App. 3d 453, 466 (1988). "In reviewing whether comments made during closing argument are proper, the closing argument must be viewed in its entirety, and remarks must be viewed in context." *Cosmano*, 2011 IL App (1st) 101196, ¶ 57 (citing *People v. Kitchen*, 159 Ill. 2d 1, 38 (1994)). "[E]ven improper remarks do not merit reversal unless they result in substantial prejudice to the defendant." *Id.*

¶ 100 The State argues that defendant forfeited review of all of the comments alleged as prosecutorial misconduct on appeal except one which was preserved, the comments referring to Muhaiman's mentoring of a young boy and no longer being able to meet his father for prayer because of his murder. We first consider the preserved error for review, and then we address the remainder of comments cited by defendant as prosecutorial misconduct.

¶ 101 A. Preserved Comments: Comments Regarding the Victim

¶ 102 We find no error in the prosecutor's comments about Muhaiman's mentoring of a young boy and no longer being able to meet his father for prayer because of his murder. Defendant argues that the prosecutor "improperly preyed on the emotions of the jurors." Defendant goes on the argue that "[s]uch an appeal could have affected those juror who were otherwise hesitant to find that the State proved [defendant's] identity beyond a reasonable doubt, where a consideration of how the outcome of this case would affect [Muhaiman's] family and friends might allow reasonable doubt to be overcome by a belief that it was better to err on the side of finally holding someone responsible for his death." Defendant further argues that these comments constituted misconduct and prejudicial error where they were made while photos were displayed on the "big screen."

¶ 103 As the State argues, there was no objection to the use of photos on the screen at trial, and defendant did not object to the evidence that the victim had last seen his father while attending church with him. While obviously referring to this evidence as unfavorable to defendant, these were comments on properly admitted evidence. See *People v. Childress*, 158 Ill. 2d 275, 297-300 (1994) (rejecting a prosecutorial misconduct claim of error where the prosecutor commented that the victim was a young mother and wife and "look at the wide expanse of suffering by other people" and a photo was admitted that showed the victim attending a wedding with her sister and family).

¶ 104 Also, these comments were brief and did not prejudice defendant so that he was deprived of a fair trial. The comments were made once and never mentioned again during closing arguments or rebuttal. See *People v. Sims*, 285 Ill. App. 3d 598, 611-12 (1996) (held that opening statement and closing comments that the decedent was a husband and a father and testimony from the decedent's mother and widow that he was married and had four children held to be incidental and not prejudicial). Viewing this comment in the context of the prosecutor's closing argument as a whole, we find no calculated effort to influence the jury to convict defendant. See *People v. Ward*, 154 Ill. 2d 272, 302 (1992) ("We do not discern here a calculated effort by the prosecution to present this information or material as evidence bearing on defendant's guilt or innocence.").

¶ 105 Defendant cites *People v. Littlejohn*, 144 Ill. App. 3d 813, 827-828 (1986), but unlike *Littlejohn*, the prosecutor here did not focus on the experiences the victim would not have and there were no other comments during closing argument which were intended to inflame the passions of the jury.

¶ 106 Defendant's citations to *People v. Bernette*, 30 Ill. 2d 359, 371-72 (1964), and *People v. Hope*, 116 Ill. 2d 265 (1986), are inapposite because the instant case is not a death penalty case and there is no direct relation between the comments made and the punishment given to defendant. Moreover, the jury was properly instructed that they must base their verdicts only on the evidence presented, and that neither sympathy nor prejudice should influence them. We "assume that the jury followed the instructions given." *People v. Bernard*, 149 Ill. App. 3d 684, 695 (1986).

¶ 107 B. Forfeited Comments: Plain Error Analysis

¶ 108 Next, defendant argues that because he preserved his argument regarding one comment in closing arguments, forfeiture does not apply to the remainder of the comments because we must consider the entire context of the prosecutor's closing argument. However, as the State points out, defendant misstates the standard. "While closing arguments must be viewed in their entirety, statements which are not properly objected to are forfeited and thus, their use is limited merely to 'add to the context of the remark properly objected to.' " *People v. Jackson*, 391 Ill. App. 3d 11, 38 (2009) (quoting *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007)). A defendant must both specifically object at trial and raise the issue again in a posttrial motion to preserve an alleged error for review. *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007). Failing to do so, defendant forfeited review of all the other complained-of comments.

¶ 109 Defendant maintains that these comments are still subject to review because they constitute plain error. Under the plain error doctrine this court may consider unpreserved error if "(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. Jenkins*, 2016 IL App (1st) 133656, ¶ 25 (citing *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)); see also *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). Defendant argues plain error under both prongs.

¶ 110 Under the first prong, "the defendant must prove 'prejudicial error.' " *Herron*, 215 Ill. 2d at 187. "That is, the defendant must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him." *Id*. "The State, of course, can respond by arguing that the evidence was not closely balanced, but rather strongly weighted against the defendant." *Id*.

¶ 111 Under the second prong, "the defendant must prove there was plain error and that the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Id*. (citing *People v. Keene*, 169 Ill. 2d 1, 17 (1995)). In *People v. Glasper*, 234 Ill. 2d 173 (2009), the Illinois Supreme Court "equated the second prong of plain-error review with structural error, asserting that 'automatic reversal is only required where an error is deemed "structural," i.e., a systemic error which serves to "erode the integrity of the judicial process and undermine the fairness of the defendant's trial." ' " *People v. Thompson*, 238 Ill. 2d 598, 613-14 (2010) (quoting *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009) (quoting *Herron*, 215 Ill. 2d at 186)). "Prejudice to the defendant is presumed because of the importance of the right involved, '*regardless* of the strength of the evidence.' " (Emphasis in original.) *Herron*, 215 Ill. 2d at 187 (quoting *People v. Blue*, 189 Ill. 2d 99, 138 (2000)).

¶ 112 "Under both prongs, the defendant has the burden of persuasion and, if he fails to meet his burden, his procedural default will be honored." *People v. Johnson*, 2015 IL App (1st) 133663, ¶ 12 (citing *People v. Hillier*, 237 Ill.2d 539, 545 (2010)); see also *Piatkowski*, 225 Ill.

2d at 564 (the burden of persuasion is on the defendant); *People v. Woods*, 214 Ill. 2d 455, 471 (2005) (with respect to plain error, "it is the defendant who bears the burden of persuasion with respect to prejudice").

¶ 113 We emphasize that the plain-error doctrine is intended to ensure a defendant receives a fair trial, but it does not guarantee defendants a perfect trial. *People v. Johnson*, 238 Ill. 2d 478, 484 (2010). Rather than operating as a general savings clause, it provides a narrow and limited exception to the general rule of procedural default. *Id*.

¶ 114 "The first step of plain-error review is determining whether any error occurred." *People v. Thompson*, 238 Ill. 2d 598, 613 (2010) (citing *People v. Walker*, 232 Ill. 2d 113, 124-25 (2009)); see also *Hillier*, 237 Ill. 2d 545 ("To obtain relief under this rule, a defendant must first show that a clear or obvious error occurred."). We therefore examine each of the remaining comments to consider whether the prosecutor committed any error in making the statement and, if so, whether it was plain error.

¶ 115 1. Comments Regarding the Timberland Hat

¶ 116 Though there was no objection at trial, defendant argues that the prosecutor's comments regarding the Timberland hat were plain error. The prosecutor argued the following:

> "*** by the way, why didn't we test the hat, the Timberland hat? We know who wore the Timberland hat, [Johnson] wore the hat. He came in here and he told you, 'That's my hat.' These are valuable resources, why would we test a hat that we know who its belongs to [*sic*]."

¶ 117 Allegations of prosecutorial misconduct require that arguments of both the prosecutor and defense counsel be reviewed in their entirety and in their proper context, rather than on selected phrases or remarks. *People v. Williams*, 192 Ill. 2d 548, 573 (2000). During the cross-

examination of forensic scientist Ramos, defense counsel asked, "You didn't compare [the DNA profiles from the hats] to [Johnson's DNA profile]?" Defense counsel further asked if the hats were tested against the DNA from Smith or an individual named Rowe. Ramos responded that he only compared the DNA profiles from the hats to Muhaiman's DNA profile. Defense counsel also asked forensic scientist Misker whether any DNA comparison testing was done to compare the DNA from the hats to Smith or Rowe, and Misker stated she only compared defendant's DNA to the DNA from the hats.

¶ 118 " 'To be proper, closing argument comments on evidence must be either proved by direct evidence or be a fair and reasonable inference from the facts and circumstances proven.' " *Cosmano*, 2011 IL App (1st) 101196, ¶ 64 (quoting *People v. Hood*, 229 Ill. App. 3d 202, 218 (1992)). In *People v. Williams*, 40 Ill. 2d 522 (1968), defendant's failure to produce a gun, where evidence was adduced at trial that the gun was registered to him, and his failure to explain the absence of the gun was a "legitimate subject of comment by the prosecution" during rebuttal closing argument. See *Williams*, 40 Ill. 2d at 529.

¶ 119 Similarly here, although on the side of the prosecution, the prosecutor's comments regarding the non-testing of the Timberland hat was a proper subject of comment, especially where defendant made it an issue. The prosecutor fairly commented on the evidence adduced at trial. Given the defense's insinuation during trial through his questioning of Ramos and Misker that some necessary other DNA comparisons were not done, the prosecutor explained why such comparisons were unnecessary.

¶ 120 2. Comments Regarding Police Reports

¶ 121 Defendant also argues that the prosecutor committed misconduct which constituted plain error in misstating the facts and law concerning the police reports when he urged the jury to consider only the evidence admitted at trial.

¶ 122 We find no error in this argument and, therefore, no plain error. Defendant fails to point out any portion of this argument that is a misstatement of either the facts or the law. We find that these comments concerning the police reports were not a misstatement of the facts or law. It is well established that "[i]n general, police reports may be used for impeachment purposes but are inadmissible as substantive evidence." *People v. Sutton*, 260 Ill. App. 3d 949, 961 (1994). Further, the court gave a proper impeachment jury instruction that "[e]vidence of this kind may be considered by you only for the limited purpose of deciding the weight to be given the testimony you heard from the witness in this courtroom." This is exactly what the prosecutor stated, which accurately reflected the law.

¶ 123 We also find that this argument was invited by defense counsel's argument that Johnson's identification was unreliable because the police reports did not contain certain information. Defense counsel had argued that Johnson's identification of defendant was unreliable because Johnson never previously stated that he recognized the offender's eyes, or that the offender had been his customer at the barbershop, and these facts were not in the police reports. The State may properly respond to comments made by defense counsel that clearly invite a response. *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 63 (citing *People v. Hudson*, 157 Ill. 2d 401, 444 (1993)).

¶ 124 There was no error in either of the above two unpreserved comments made by the prosecutor and, therefore no plain error. Because there was no error in the first place, we do not

proceed to analyze the above comments under both prongs under the plain error rule. Thus, we honor defendant's procedural default as to these comments.

¶ 125 CONCLUSION

¶ 126 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 127 Affirmed.