2016 IL App (1st) 141206-U

FIRST DIVISION
December 29, 2016

No. 1-14-1206

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. 11 CR 3722
	)	
KYJUANZI HARRIS,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE MIKVA delivered the judgment of the court.
Presiding Justice Connors and Justice Simon concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court did not abuse its discretion by limiting defendant's cross-examination of a witness regarding her psychiatric history or by excluding the testimony of an expert witness for the purpose of explaining how the witness's psychiatric history and substance abuse issues affected her credibility; (2) the trial court did not abuse its discretion by allowing testimony that one witness knew defendant because they used to sell drugs together; (3) none of the State's allegedly improper comments in closing or rebuttal argument created reversible error; (4) because the evidence at trial was not closely balanced, the trial court's failure to properly admonish the potential jurors pursuant to Illinois Supreme Court Rule 431(b) did not rise to the level of plain error; and (5) the trial court made an adequate *Krankel* inquiry into defendant's *pro se* ineffective assistance of trial counsel claims.

¶ 2 After a jury trial, defendant Kyjuanzi Harris was found guilty of two counts of first degree murder and sentenced to two mandatory concurrent natural life sentences based on the May 21, 2009, shooting deaths of Derrick Armstrong and Bernadette Turner. On appeal, Mr. Harris contends that: (1) the trial court erred by denying him the right to fully cross-examine an eyewitness about her psychiatric history and by refusing to allow him to call an expert witness to explain how the eyewitness's mental illnesses and substance abuse issues affected her credibility; (2) the trial court abused its discretion by allowing testimony that the same eyewitness knew Mr. Harris because they used to sell drugs together; (3) the State's improper comments in closing and rebuttal arguments deprived Mr. Harris of a fair trial; (4) the trial court's failure to make proper inquiries of potential jurors in compliance with Illinois Supreme Court Rule 431(b) rose to the level of plain error because the evidence at trial was closely balanced; and (5) the trial court's inquiry into Mr. Harris' *pro se* motion for ineffective assistance of counsel was inadequate. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 A. Pre-Trial Matters

¶ 5 Mr. Harris retained a private attorney to represent him. Before trial, defense counsel filed a motion to suppress the photo array identifications made by the State's two eyewitnesses. The trial court denied the motion, finding that the procedures used by the police were not suggestive.

¶ 6 Defense counsel also filed a motion to find one of the State's witnesses, Debra Hardy, incompetent to testify at trial. In the motion, counsel noted multiple psychiatric diagnoses Ms. Hardy had received between 1985 and 2001, and also noted that, in 2007, she was diagnosed with schizophrenia and "had not taken her medication for over six years." On November 27, 2012, defense counsel requested a continuance in order to retain an expert to analyze Ms. Hardy's medical records and to possibly testify at the competency hearing regarding her mental

health. The court stated that it would *voir dire* Ms. Hardy about her competence to testify, but would not allow an expert to testify about her competence based on her psychiatric history. According to the court, it would find Ms. Hardy competent as long as she "underst[ood] the oath and *** [could] distinguish the truth from a lie and underst[ood] the consequences of taking the oath and lying under oath." Defense counsel then stated that, if the court were to find Ms. Hardy competent to testify, then Mr. Harris "should be entitled to put on an expert in [his] case in chief [who] would explain to the jury about her psychological conditions." The court informed counsel that he could cross-examine Ms. Hardy, but that prior to hearing Ms. Hardy's testimony it would not assume Mr. Harris needed a witness to impeach her.

¶ 7 On December 3, 2012, just before trial began, defense counsel renewed his motion for a continuance, explaining that he had hired an expert, Dr. Michael Rabin, to examine Ms. Hardy's medical records and that Dr. Rabin would "opine that [Ms. Hardy's] chronic mental health problems and drug abuse contribute[d] to her lack of ability to perceive things around her." The court denied the motion, stating that the issue of Ms. Hardy's psychiatric history was "collateral" and that it would not allow the expert to opine on her credibility. Defense counsel then argued that if Ms. Hardy denied certain things while testifying, then he "would be entitled to call [Dr. Rabin] for impeachment purposes," but the court stated that it did not want "to get into, 'Well, were you prescribed this tranquilizer on this day some years ago or another tranquilizer' " because such issues were collateral. The court also stated it would not allow an expert to testify about the effect of Ms. Hardy's chronic drug and alcohol use but would allow defense counsel "latitude to ask [Ms. Hardy] questions about what was going on with her the day of the incident" and whether she was on medication at the time of trial. Dr. Rabin's written report, which contained the opinions on which the defense wanted him to testify, listed Ms. Hardy's psychiatric diagnoses between 1984 and 2001 and concluded that she was "an individual with

low intelligence," had displayed "memory deficits" and "the inability to distinguish reality from fantasy or imagined events," and that "in [19]85, she was displaying signs of brain damage, including impaired memory, and ha[d] been abusing drugs and alcohol since, suggesting that her organic brain syndrome [was] likely to have progressed." Dr. Rabin further noted in his report that because there were no treatment records for Ms. Hardy since 2001, "her mood disorder may have gone untreated for the past eleven years."

¶ 8 The day trial was set to begin, defense counsel also filed a motion *in limine* to bar Ms. Hardy's testimony that she knew Mr. Harris because she previously bought and sold drugs with him. Defense counsel argued that Ms. Hardy could "testify that she ha[d] known Mr. Harris, ha[d] had contact with him, dealings with him, but it d[id] not have to include purchasing drugs from him or selling drugs for him." The trial court denied the motion, reasoning that the "jury ha[d] a right to hear the truth from the witness."

¶ 9 After a hearing, the trial court found Ms. Hardy was competent to testify.

¶ 10 B. The Trial

¶ 11 At trial, the State presented the testimony of a cousin of one of the victims, two eyewitnesses to the shooting, the investigating detective, an investigating police officer, and three forensic witnesses. We will discuss the trial testimony to the extent necessary for an understanding of the present appeal.

¶ 12 1. Ruthie Guider's Testimony

¶ 13 The State first presented Ruthie Guider, Derrick Armstrong's cousin, who testified that in May 2009 she knew the victims, Mr. Armstrong and Bernadette Turner. Ms. Guider saw both Mr. Armstrong and Ms. Turner alive on May 21, 2009, and confirmed that the next time she saw them, they were dead.

¶ 14 2. Tamira Smith's Testimony

¶ 15 Tamira Smith was the first eyewitness to testify. She stated that she was with Ms. Turner and Mr. Armstrong on May 21, 2009, at Horan Park, located at 3000 West Van Buren Street in Chicago, Illinois. According to Ms. Smith, the three arrived at the park at approximately 3 p.m. but, at about 6 or 6:30 p.m., Ms. Smith and Ms. Turner left the park. They returned at approximately 8:40 p.m. and parked the car on the street. Ms. Smith stated that there were other people at the park at that time, smoking and drinking. Mr. Armstrong got into the car with the two women; Mr. Armstrong was in the driver's seat, Ms. Turner was in the front passenger seat, and Ms. Smith was seated behind Ms. Turner. Ms. Smith testified that they sat in the car while Ms. Turner and Mr. Armstrong were "rolling a blunt," but that they never had a chance to smoke it.

¶ 16 Ms. Smith testified that, at approximately 9:15 p.m., a black vehicle pulled up along the passenger side of their car. Ms. Smith saw the vehicle's driver, who was about three feet away, and identified him in open court as the defendant, Mr. Harris. Ms. Smith stated that, although she viewed the shooter through the small rear side window of Ms. Turner's two-door car, no one else was in the car with Mr. Harris and she could see Mr. Harris's face; she first saw his hair, which was in dreadlocks, his complexion, and his eyes. She saw his face for "like five or ten seconds before he started shooting." According to Ms. Smith, there was street lighting, "[i]t wasn't that dark," and nothing obstructed her view of Mr. Harris. She stated that Mr. Harris held the gun in his left hand, out of his vehicle's window, and fired toward Ms. Turner's side of the car, "[s]everal, eight times." Ms. Smith stated that, after Mr. Harris started shooting, she "ducked down" while he continued to shoot. When she sat back up, he was gone. Ms. Smith stated that she did not know Mr. Harris before the shooting. When the police arrived, Ms. Smith gave them

a description of the shooter as having a "[l]ight-skinned complexion, dreadlocks, and [she] told them about his eyes, and [she] told them about the car."

¶ 17 On November 8, 2010, Ms. Smith viewed a photo array at the police station after she signed a "Photo Spread Advisory Form," which stated that she understood "the suspect may or may not be in this photo spread," that she was "not required to make an identification," and that she did not "assume the person administering the photo spread kn[ew] which person [wa]s the suspect." Ms. Smith testified that she identified Mr. Harris in the photo array as the shooter.

¶ 18 On February 11, 2011, Ms. Smith met with a detective and viewed an in-person lineup after signing a Lineup Advisory Form, which stated that she understood "that the suspect may or may not be in this lineup," that she was "not required to make an identification," and that she did not "assume that the person administering the lineup kn[ew] which person [wa]s the suspect." Ms. Smith testified that she identified Mr. Harris from the lineup as the shooter.

¶ 19 On cross-examination, Ms. Smith initially agreed that she told the police that the shooter had a light complexion, but when asked whether she told the detectives that the shooter had a medium complexion, she said "[m]edium complexion is his color, light is his color." Ms. Smith believed the shooter was wearing a scarf or a mask over the bottom of his face but was "not sure." Ms. Smith denied that the shooter was wearing a hat and denied that she told the police he was wearing a black baseball hat backwards. She agreed that, after the shooting things were "crazy," people were screaming, she was shocked, and she had not expected the shooting to occur.

¶ 20 3. Debra Hardy's Testimony

¶ 21 Debra Hardy was the second eyewitness to testify. She testified that, at the time of trial, she was serving a two-and-a-half year sentence on a 2010 conviction for possession of a controlled substance. She also had a 2006 conviction for possession of a controlled substance for

which she received a two-year prison sentence and a 1984 conviction for murder for which she received a 20-year sentence. Ms. Hardy testified that Ms. Turner was "like a goddaughter" to her and she had been familiar with Mr. Armstrong. Ms. Hardy testified that prior to the shooting she also knew Mr. Harris, who she identified in open court, because they had "dealt in drugs together."

¶ 22 Ms. Hardy further testified that she arrived at Horan Park at approximately 5 p.m. on May 21, 2009. According to Ms. Hardy, it was light out at that time, it was a nice day, and there were several other people in the park. Ms. Hardy agreed that Horan Park was located near an entrance ramp to the Eisenhower Expressway, making it a heavy traffic area. Ms. Hardy stated that Ms. Turner and Mr. Armstrong were already in their car at the park when she arrived and that they stayed at the park the whole time; Ms. Hardy never saw their car leave Horan Park. Ms. Hardy testified that she drank one beer at the park that day.

¶ 23 Ms. Hardy testified that at approximately 9:30 p.m., Ms. Turner and Mr. Armstrong were still parked "directly in front" of her, sitting inside their car, "just talking." Ms. Hardy initially stated that she was "a couple of inches" from their car, but later testified that she was about 20 feet away from them, sitting on a bench, when Mr. Harris drove up to Ms. Turner's car and began shooting. Ms. Hardy stated that she was "[p]artially" able to see his face. Later, when asked whether the reason she could only see a part of Mr. Harris's face was because half of his face was covered, she said that his face was not covered and she saw "the whole face." Ms. Hardy testified that she was scared when she saw Mr. Harris's gun and that, when she saw flashes coming from the gun, she "was stunned for a moment," ducked behind the car, and remained there while the shots were going off. "[A]fter the gunshots got through [she] ran directly in front of [Ms. Turner's] car." Ms. Hardy did not remember how long she saw Mr.

Harris's face. Ms. Hardy stated that she was unable to help Ms. Turner and she was "just scared." She denied at trial that the shooter was wearing a mask or scarf over his face.

¶ 24 Ms. Hardy testified that she followed the ambulance to the hospital, where she told Ms. Turner's mother, "I know who did this," but did not tell her who it was. Ms. Hardy agreed that she did not provide the name of the shooter "because she saw him open fire on a car and kill two people that [she] knew." Ms. Hardy did not go to the police on the night of the shooting.

¶ 25 Ms. Hardy testified that, on June 6, 2009, Detective Roberts and Detective Corlett saw her walking home and she agreed to speak with them. She told them that a black man shot the victims; she testified that she also gave them the shooter's name that day and told them she "was scared."

¶ 26 On December 9, 2010, Ms. Hardy again spoke with two detectives at the police station and told them that Mr. Harris shot Ms. Turner and Mr. Armstrong. Ms. Hardy testified that she also signed a photo advisory form and was shown a photo array that day, from which she identified Mr. Harris.

¶ 27 On cross-examination, Ms. Hardy admitted that she used heroin on May 21, 2009, and was snorting heroin daily at that time. She also admitted that she had several instances of psychiatric treatment over her lifetime and had been diagnosed with various psychiatric disorders, including paranoid schizophrenia. She was not on medication for that "anymore" and was not taking medication in May 2009. Ms. Hardy denied that she was experiencing auditory hallucinations as a result of her paranoid schizophrenia around the time of the shooting. Defense counsel then attempted to question Ms. Hardy regarding psychiatric and drug use evaluations she received while incarcerated. The court sustained the State's objections to this line of questioning.

¶ 28 Ms. Hardy admitted that she was asked questions about her drug use when she was admitted to the Illinois Department of Corrections (IDOC), including whether she was using

larger and larger amounts of the drug for more time than she intended, to which she responded "[n]o." She did not remember whether she told the IDOC personnel that she had tried to cut down on drugs but was unable to do so. She also did not remember saying that she had gotten so high or sick that she missed work or school. When defense counsel then asked Ms. Hardy whether she "told [the IDOC personnel] that [she] had to use more and more drugs in order to get the same effect as before," the State objected and the court sustained the objection and told the jury to "disregard the last couple of questions and answers."

¶ 29 4. Detective David Roberts's Testimony

¶ 30 Detective David Roberts testified that at approximately 10 p.m. on May 21, 2009, he was assigned to investigate the double homicide of Ms. Turner and Mr. Armstrong. During the course of his investigation, he learned that Ms. Smith witnessed the shooting and he interviewed her at the police station the night that it happened. Detective Roberts testified that Ms. Smith was upset and had been crying but that she provided him with a description of the shooter: a black man in his twenties, with a medium complexion—she never described him as having a light complexion—who was driving a dark-colored four-door vehicle. Detective Roberts stated that Ms. Smith did not tell him that the shooter's face was covered by a mask or scarf.

¶ 31 Detective Roberts further testified that on June 5, 2009, he went with another detective to the residence of Ms. Famara Turner, Bernadette Turner's mother. Famara told the detectives that she spoke with Ms. Hardy at the hospital on the night of Bernadette's murder and "Debra Hardy had told [Famara] that she was a witness of [Famara's] daughter's murder and she was present that night." Detective Roberts testified that he eventually spoke with Ms. Hardy but was not able to ascertain a possible identity of the shooter. During that conversation, Ms. Hardy mentioned neither that Mr. Harris was the shooter nor that there was a passenger in the back seat of Ms. Turner's vehicle.

¶ 32 Detective Roberts testified that on November 2, 2010, he received an anonymous telephone tip after which he put together a photo array of six photographs. The array included a photo of Mr. Harris, who Detective Roberts identified in open court. Detective Roberts testified Ms. Smith identified Mr. Harris in a photo array on November 8, 2010. He did not inform Ms. Smith that he had a suspect before she made that identification.

¶ 33 On December 9, 2010, Detective Roberts interviewed Ms. Hardy again and, for the first time according to the detective, she provided the shooter's name as Mr. Harris. Ms. Hardy told Detective Roberts that she did not need to view a photo array, but he presented her with one anyway and she identified Mr. Harris.

¶ 34 Detective Roberts also agreed that, on Van Buren Street, the streetlights were located on the north side of the street and there were no streetlights on the south side. However, the detective also stated that there were "park lights" on the south side of the street, "close to the sidewalk." Detective Roberts explained that, at the time of the shooting, the victims' car was parked on the south side of Van Buren and the shooter pulled up his vehicle just north of the victims' vehicle so that the streetlights were on the north side of the shooter's car.

¶ 35 On February 11, 2011, after Ms. Smith and Ms. Hardy testified before the grand jury, Detective Roberts located and arrested Mr. Harris. After the arrest, Ms. Smith viewed an in-person lineup and identified Mr. Harris. Ms. Hardy did not view a lineup because, according to Detective Roberts, "she told [him] that she had known [Mr. Harris] for six to eight years" because "she used to buy and sell drugs" for Mr. Harris and she had known Mr. Harris "since he was a child." After this testimony, the court instructed the jury that it had heard "the additional information that the witness claims he heard from Ms. Hardy *** not for any purpose other than to explain the basis of her identification of the Defendant and for no other purpose. Any other criminal acts are not in evidence of his guilt for which he is charged here."

¶ 36 On cross-examination, Detective Roberts agreed that, in his training, he learned that it is important to use non-suggestive procedures when asking a witness to make an identification. Although he acknowledged that another detective could have shown the photo array to Ms. Smith, he claimed that at that time he only "had a name" and "didn't consider [Mr. Harris] a suspect." Detective Roberts testified that there are many ways of conducting a photo array, including showing "[i]ndividual photos, six photographs on a single sheet of paper, or to put photos on a table and have somebody view them." Detective Roberts laid all the photos out on a table at the same time. He disagreed that a successive photo array, in which photos are presented one at a time, is the best way to prevent suggestiveness.

¶ 37 The State concluded its case and the defense presented no further evidence.

¶ 38 5. Jury Instructions

¶ 39 At the jury instruction conference, the trial court refused an instruction on the credibility of a drug addict, explaining that the "jury can choose to believe an addict if they want to, they can choose not to believe her, but the fact of her addiction is just one item."

¶ 40 After closing arguments, the trial court instructed the jury that "[n]either opening statements nor closing arguments are evidence, and any statements or arguments made by the attorneys which [are] not based on the evidence should be disregarded." The court further instructed the jury:

> "Evidence has been received that the Defendant has been involved in conduct other than that charged in the Indictment.
>
> This evidence has been received on the issue of the Defendant's identification and may be considered by you only for that limited purpose.

> It is for you to determine whether the Defendant was involved in that conduct and, if so, what weight should be given to this evidence on the issue of identification."

After deliberations, the jury found Mr. Harris guilty of the first degree murders of both Mr. Armstrong and Ms. Turner.

¶ 41 6. *Krankel* Hearing

¶ 42 On January 30, 2013, in the presence of Mr. Harris, defense counsel, and the State, the trial court addressed defense counsel's motion to withdraw based on a complaint Mr. Harris filed against him with the Illinois Attorney Registration and Disciplinary Commission (ARDC). According to the court, the ARDC told defense counsel that "no action was warranted," but defense counsel nevertheless "[felt] that created some kind of issue for his continued representation." Although Mr. Harris had not written directly to the court about his dissatisfaction with his defense counsel's representation, the court obtained the letter Mr. Harris wrote to the ARDC and concluded that it warranted a hearing, pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), into Mr. Harris's claims of ineffective assistance of defense counsel.

¶ 43 The trial court first questioned Mr. Harris, who said that he did not understand why his defense counsel did not call his alibi witnesses. Mr. Harris said he did not feel that his counsel represented him to the best of his ability. "He said that it be good on our behalf that he didn't put my alibi witnesses on the stand because we was winning, sir. How could we be winning and then I get found guilty, sir?"

¶ 44 Defense counsel responded:

> "[R]egarding the alibi witnesses; I made a careful determination that those alibi witnesses would not be beneficial given the evidence that had been heard at trial. We felt that given the inconsistencies between the two eyewitnesses and other

> evidence that had been brought out in the State's case and on cross-examination, I did not feel those alibi witnesses were necessary. I thought we were in a position that reasonable doubt was being established.
>
> Additionally, I interviewed those witness[es], my investigator interviewed those witness[es], those witnesses were actually here and available. I made a strategic decision not to call those witnesses because I felt that they would not be believed by the jury and we would be in danger of damaging a lot of the reasonable doubt that we had established during direct and cross-examination."

¶ 45 In denying Mr. Harris's *Krankel* motion, the trial court observed that defense counsel had been "extremely conscientious, assertive, did all he could with what he had" during pretrial motion proceedings. The court then stated:

> "The fact is there were two people that identified Mr. Harris as the shooter in this case, that was responsible for two murders. The jury heard them, they came into court with the baggage they did, they were explored totally, the fact that a lawyer made a strategic [decision] not to put on alibi witnesses because he had no confidence that they would be believed; as a matter of fact, he thought it would make the situation worse, speaks for itself."

The court further explained:

> "I've conducted the [*Krankel*] hearing and I don't think that there's anything that's been brought to my attention that indicates that I need to do anything further about the issues of incompetence of counsel. I think you were extremely aggressively represented by a dedicated lawyer that did the best with what he had. Lawyers can't create evidence, they present what's given to them and he did so [in] good faith, tried as hard as he possibly could."

¶ 46 The court granted defense counsel's motion to withdraw, gave Mr. Harris a continuance to hire another lawyer, and ultimately appointed a public defender to represent him. Mr. Harris then filed a motion for a new trial, which the trial court denied. On April 8, 2014, the court sentenced Mr. Harris to a mandatory sentence of natural life in prison.

¶ 47 The trial court denied Mr. Harris's motion to reconsider his sentence on April 10, 2014, and Mr. Harris timely filed his notice of appeal that same day. Accordingly, this court has jurisdiction pursuant to article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6) and Illinois Supreme Court Rules 603 and 606, governing appeals from a final judgment of conviction in a criminal case. (Ill. S. Ct. Rs. 603, 606 (eff. Feb. 6, 2013)).

¶ 48 ANALYSIS

¶ 49 A. Right to Cross-Examine and Call Expert Regarding Ms. Hardy

¶ 50 Mr. Harris contends that the trial court erred by denying him the right to fully cross-examine Ms. Hardy about her psychiatric history and by refusing to allow him to call an expert witness to explain how Ms. Hardy's mental illnesses and substance abuse issues affected her credibility. We will address these arguments in turn.

¶ 51 1. The Limitation of Cross-Examination Into Ms. Hardy's Psychiatric History

¶ 52 The State claims that Mr. Harris has forfeited on appeal any objection to the scope of cross-examination of Ms. Hardy because, in his motion for a new trial, he raised only his inability to ask Ms. Hardy four specific questions and failed to make a formal offer of proof as our supreme court has indicated is necessary to preserve such an issue. *People v. Peeples*, 155 Ill. 2d 422, 457 (1993). "The purpose of an offer of proof is to inform the trial court, opposing counsel, and a reviewing court of the nature and substance of the evidence sought to be introduced." *Id.*

¶ 53 While the record here does not contain a formal offer of proof from Mr. Harris, it does contain the documents that he wanted to cross-examine Ms. Hardy about, including Dr. Rabin's report detailing much of Ms. Hardy's psychiatric history and her 2012 IDOC psychiatric records. On appeal, Mr. Harris presents the specific psychiatric issues that he claims Ms. Hardy should have been cross-examined about, with citations to both Dr. Rabin's report and the IDOC records. Because we are able to assess "the nature and substance of the evidence sought to be introduced" from the record and from Mr. Harris's appellate argument, we find that Mr. Harris did not forfeit the issue of the limitations the court placed on his cross-examination of Ms. Hardy. Defense counsel certainly made clear to the trial court that he objected to these limitations. Mr. Harris has properly preserved the issue for our review.

¶ 54 Both the United States and the Illinois constitutions guarantee a defendant's right to confront the witnesses against him. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. However, "the right to confront and cross-examine is not absolute." *People v. Bean*, 137 Ill. 2d 65, 93 (1990). "A trial judge may limit cross-examination to prevent irrelevant inquiries or inquiries that threaten to distract the jury from the actual issues by unduly emphasizing details of a witness' life." *People v. Printy*, 232 Ill. App. 3d 735, 745 (1992).

¶ 55 Mr. Harris urges us to review this issue *de novo*. However, our case law demonstrates the correct standard of review is slightly more nuanced. This court has observed:

> " 'Cross-examination to show interest, bias or motive on the part of a witness is a matter of right, subject only to the broad discretion of the trial court to preclude repetitive or unduly harassing interrogation and, *assuming a proper subject matter*, to control the extent of cross-examination. [Citation.] It is a right protected by both the Federal and Illinois constitutions. *** The interest is satisfied when counsel is permitted to expose the jury [to] facts from which the

> jurors, as the sole triers of fact and credibility, could *appropriately* draw inferences relating to the reliability of the witness. [Citation.] It is important to note that the constitutional requirement must be satisfied first and only then does the court have discretion to limit the scope or extent of cross-examination.' " (Emphases in original.) *People v. Green*, 339 Ill. App. 3d 443, 455-56 (2003) (quoting *People v. Furby*, 228 Ill. App. 3d 1, 3-5 (1992)).

Although whether a cross-examination meets constitutional scrutiny is a question of law that is reviewed *de novo* (*People v. Williams*, 238 Ill. 2d 125, 141 (2010)), if a cross-examination is found to be constitutionally sufficient, then a trial court's limitation of that cross-examination is reviewed for an abuse of discretion (*People v. Arze*, 2016 IL App (1st) 131959, ¶ 113). " '[T]he latitude to be allowed on cross-examination rests within the sound discretion of the trial court; a reviewing court should not interfere absent a clear abuse of discretion resulting in manifest prejudice to the defendant' " *Id.* (quoting *People v. Hall*, 195 Ill. 2d 1, 23 (2000)).

¶ 56 We first consider whether Mr. Harris's cross-examination of Ms. Hardy was constitutionally sufficient:

> " 'To determine the constitutional sufficiency of a cross-examination, a court looks not to what a defendant has been prohibited from doing, but to what he has been *allowed* to do. [Citation.] If the entire record shows that the jury has been made aware of adequate factors concerning *relevant* areas of impeachment of a witness, no constitutional question arises merely because defendant has been prohibited on cross-examination from pursuing other areas of inquiry.' " (Emphases in original.) *Green*, 339 Ill. App. 3d at 456 (quoting *People v. Averhart*, 311 Ill. App. 3d 492, 497 (1999)).

¶ 57 Mr. Harris sought to cross-examine Ms. Hardy regarding her psychiatric history and drug use to attack her credibility as a witness. It is undisputed that, " 'in determining credibility of a witness or the weight to be accorded his testimony, regard is generally given to his mental condition. Almost any emotional or mental defect may materially affect the accuracy of the testimony.' " *People v. Plummer*, 318 Ill. App. 3d 268, 279 (2000) (quoting *People v. Phipps*, 98 Ill. App.3 d 413, 416 (1981)).

¶ 58 The record shows that Mr. Harris's cross-examination of Ms. Hardy in the present case, as a whole, was constitutionally sufficient. Mr. Harris questioned Ms. Hardy about topics related to her credibility, including her convictions, her drug addiction, and her 2007 diagnosis of paranoid schizophrenia. He questioned Ms. Hardy about her prior and current drug convictions and about her daily use of heroin at the time of the shooting. Mr. Harris also elicited testimony that she was not taking medication for her paranoid schizophrenia at the time of the shooting. Although Ms. Hardy denied that she was experiencing auditory hallucinations at the time of the shooting, Mr. Harris was permitted to question her on the subject. He also questioned Ms. Hardy about her ability to view the shooting and elicited testimony that she informed police that Mr. Harris was the shooter in June 2009, testimony that was later contradicted during Mr. Harris's cross-examination of Detective Roberts, who testified that Ms. Hardy did not identify the shooter until the second time she met with detectives in December 2010.

¶ 59 Because Mr. Harris's cross-examination of Ms. Hardy was constitutionally sufficient, we now consider whether the trial court abused its discretion when it limited Mr. Harris's cross-examination with regard to Ms. Hardy's psychiatric history. "A trial court abuses its discretion only when its ruling is arbitrary, fanciful or unreasonable or where no reasonable man would take the view adopted by the trial court." (Internal quotation marks omitted.) *People v. Santos*, 211 Ill. 2d 395, 401 (2004). Specifically, Mr. Harris objects to limitations on cross-examination

about Ms. Hardy's past psychiatric diagnoses, other than her 2007 diagnosis of paranoid schizophrenia, and about the psychotic symptoms reflected in her 2012 IDOC records.

¶ 60 The past diagnoses that Mr. Harris wanted to question Ms. Hardy about include mixed organic brain syndrome and adjustment disorder with depressed mood and psychotic features and a finding that she was unfit to stand trial in 1983; a diagnosis of organic brain syndrome and a finding that she was hearing voices and unfit to stand trial in 1985; a diagnosis of borderline personality disorder in 1986, when she was later found fit to stand trial; a 1996 psychiatric evaluation noting that Ms. Hardy was hearing voices, using cocaine and heroin to "quiet the voices," and that "[h]er memory was poor for recent and past events, and her insight and judgment were considered poor" (emphasis omitted); a diagnosis of schizophrenic disorder tied to cocaine dependence in 1996; a diagnosis of major depression in 1997; and diagnoses of opioid-induced mood disorder, opioid dependency, and anti-social behavior in 2001. All of these diagnoses were remote enough in time from both the shooting and the trial that we cannot say that the trial court abused its discretion in excluding them.

¶ 61 Mr. Harris also claims that he should have been permitted to question Ms. Hardy about her psychiatric records from her 2012 IDOC incarceration. These records reflect that Ms. Hardy reported to IDOC personnel that her medication, Trazodone, was "not helping," and further complained: "I can't sleep. I am still up. My depression is up and down[.] I get very paranoid sometimes. I can hear them talking about me in my head. Sometimes I forget my name, I can't remember." Mr. Harris argues that these records relate to Ms. Hardy's ability to remember and perceive, and also call in question her testimony that she was not experiencing psychiatric symptoms at the time of the shooting. However, these records would not indicate whether Ms. Hardy could have perceived the shooting on May 21, 2009, or whether she remembered what had occurred when she reported it that night to Ms. Turner's mother or to the police on

December 9, 2010. Nor would they have reflected directly on her psychiatric condition at either of those times.

¶ 62 Although these records were relatively close in time to her trial testimony, they do not relate directly to her credibility as a witness. Mr. Harris fails to explain how her symptoms in hearing "them talking" about her in her head, as reported in 2012, contradict her testimony at trial. Ms. Hardy denied experiencing auditory hallucinations at the time of the shooting and was not asked about whether she was experiencing hallucinations at the time of trial. This is in contrast to *People v. Flowers*, 371 Ill. App. 3d 326 (2007), the case that Mr. Harris relies on. In *Flowers*, the witness "denied having [auditory and visual] hallucinations at the time of the shooting" during his trial testimony but had told an investigator that he did have hallucinations at that time and "was not taking his [prescribed] medication on the day of the shooting." *Id.* at 328, 330. The court found that "the trial court erred in precluding defense counsel from cross-examining [the witness] further based on the information in the mental health records," since those could have undermined his ability to perceive at the time of the shooting and would have also severely limited his credibility in claiming that he was not hallucinating on the day of the shooting. *Id.* at 330. There is nothing about Ms. Hardy's 2012 IDOC records that is sufficiently connected to Ms. Hardy's credibility that the trial court's limitation of their use on cross-examination was so arbitrary, fanciful, or unreasonable that it constituted an abuse of discretion.

¶ 63 2. Mr. Harris's Request to Call an Expert Witness

¶ 64 Mr. Harris contends that the trial court erred by preventing him from calling Dr. Michael Rabin, a licensed clinical and forensic psychologist, "to explain how Hardy's mental illnesses and substance abuse affected her credibility."

¶ 65 Generally, expert testimony will be allowed if the expert's " 'experience and qualifications afford him knowledge which is not common to lay persons and where such testimony will aid the trier of fact in reaching its conclusion.' " *People v. Lerma*, 2016 IL 118496, ¶ 23 (quoting *People v. Enis*, 139 Ill. 2d 264, 288 (1990)). "A trial court does not err in barring expert testimony where the matter at issue is not beyond the ken of an average juror." *People v. Becker*, 239 Ill. 2d 215, 235 (2010). Mr. Harris again contends that this issue should be reviewed *de novo*, claiming that it implicates his constitutional right to call witnesses. See *People v. Burns*, 209 Ill. 2d 551, 560 (2004). However, "[w]hen determining the reliability of an expert witness, the trial court is given broad discretion." *Lerma*, 2016 IL 118496, ¶ 23. Moreover, to the extent that the trial court's exclusion of this testimony rested on its understanding of the proper role for experts in a criminal trial, we agree with the trial court's legal conclusions.

¶ 66 At trial, Mr. Harris claimed that he wanted to call Dr. Rabin to "opine that [Ms. Hardy's] chronic mental health problems and drug abuse contribute[d] to her lack of ability to perceive things around her." As the trial court pointed out, in so doing, Mr. Harris essentially looked to Dr. Rabin to testify about Ms. Hardy's credibility as a witness. "The credibility of witnesses in criminal proceedings is strictly within the competence of the fact finder." *People v. Nix*, 133 Ill. App. 3d 1054, 1059 (1985). For that reason, "[e]xpert testimony regarding the credibility of witnesses is properly excluded if the expert's opinion does not present a concept beyond the common and ordinary understanding of the trier of fact." *Id.*; see also *Becker*, 239 Ill. 2d at 235-36 (finding no abuse of discretion where the trial court barred the testimony of an expert who would have "offer[ed] extensive testimony attacking the credibility of [the victim's] out-of-court statements and her trial testimony").

¶ 67 In his appellate brief, Mr. Harris notes that the conclusions Dr. Rabin reached in his report "are not commonly known and are highly relevant to Hardy's credibility, namely her

ability to perceive, memorize, and recall the shooting." However, we agree with the trial court that it is not outside the "ken of the average juror" that chronic drug and alcohol use over many years negatively affects the user's body and mind. Similarly, that a chronic mental health problem such as paranoid schizophrenia might have an effect on a witness's ability to perceive or recall an event is not outside the ken of the average juror. Notably, in closing argument, Mr. Harris argued that Ms. Hardy's "drug addiction, her psychological history, [and] her criminal history" affected her credibility as a witness.

¶ 68 Mr. Harris relies on *People v. Lerma*, 2014 IL App (1st) 121880, ¶ 39, *aff'd*, 2016 IL 118496, in which the court reversed a criminal conviction, in part, because the trial court did not give proper consideration to the report of an expert on eyewitness testimony before denying the defense the right to call the expert as a witness. *Lerma* is different, however. That case rests on the specific requirement that Illinois courts consider and scrutinize proposed expert eyewitness identification testimony because "courts in Illinois and around the country have recognized that scientific studies have shown significant errors in eyewitness identifications and that the public have misconceptions of eyewitness identification." *Id.* There is no similar finding about public misperception of the reliability of persons with mental health and drug histories that has led to a requirement that trial courts consider expert testimony like that proposed here.

¶ 69 Mr. Harris also argues that Dr. Rabin should have been permitted to testify based on his analysis of Ms. Hardy's medical records from 2001 and earlier, as well as her 2012 IDOC records. For the same reasons we conclude that the trial court did not abuse its discretion in preventing Mr. Harris from cross-examining Ms. Hardy on either of these matters, we also cannot say that the trial court abused its discretion in preventing an expert witness from testifying about the same subjects.

¶ 70 B. The Admissibility of Other-Crimes Evidence

¶ 71 Mr. Harris claims that the trial court abused its discretion when it allowed the jury to hear other-crimes evidence through the testimony of Ms. Hardy, who stated that she knew Mr. Harris because they "dealt in drugs together," and of Detective Roberts, who testified that Ms. Hardy told him "she used to buy and sell drugs" for Mr. Harris.

¶ 72 Generally, evidence of other crimes is "inadmissible to demonstrate propensity to commit the charged crime." *People v. Donoho*, 204 Ill. 2d 159, 170 (2003). "Other-crimes evidence is admissible, however, to prove intent, *modus operandi*, identity, motive, absence of mistake, and any material fact other than propensity that is relevant to the case." *Id.* (citing *People v. Illgen*, 145 Ill. 2d 353, 364-65 (1991)). "Even if other-crimes evidence falls under one of these exceptions, the court still can exclude it if the prejudicial effect of the evidence substantially outweighs its probative value." *Id.* "The admissibility of other-crimes evidence rests within the sound discretion of the trial court, and its decision on the matter will not be disturbed absent a clear abuse of discretion." *People v. Wilson*, 214 Ill. 2d 127, 136 (2005).

¶ 73 Here, the trial court allowed the testimony that Ms. Hardy knew Mr. Harris because they used to deal drugs together for the purpose of proving Mr. Harris's identity. The details of how Ms. Hardy knew Mr. Harris were relevant to her ability to identify him. One of the factors to consider when "assessing the reliability of a witness identification" is "the witness's level of certainty." *People v. Booker*, 2015 IL App (1st) 131872, ¶ 70. Mr. Harris argues that Ms. Hardy's identification of him could have been sufficiently established through testimony that she had known him since he was a child. While this is true, we agree with the State that there is a "qualitative difference between being acquainted with someone from the same block and therefore recognizing them and actually knowing someone to the extent that [Ms.] Hardy and [Mr. Harris] did, where they engaged in 'business' together." Under these circumstances, the

trial court's decision to admit this evidence was not so arbitrary, fanciful, or unreasonable that it was an abuse of discretion.

¶ 74 Mr. Harris also claims that, as the State presented no motive for the shooting, this other-crimes evidence was "highly prejudicial because it invited the jury to speculate that Harris shot the victims over a drug dispute when absolutely no evidence supported such a conclusion." Mr. Harris's suggestion that a reasonable juror was likely to infer a specific motive in this case solely from Mr. Harris's past involvement with drugs is tenuous at best and does not persuade us that the evidence at issue was more prejudicial than probative.

¶ 75 Mr. Harris further argues that the prejudice caused by the trial court's admission of testimony that Ms. Hardy sold drugs with him was "amplified" because the court failed to provide a timely limiting instruction. Although the trial court did not instruct the jury that the other-crimes evidence was for a limited purpose at the time Ms. Hardy testified, as Mr. Harris acknowledges, the court subsequently instructed the jury twice: just after Detective Roberts testified that Ms. Hardy told him she knew Mr. Harris because "she used to buy and sell drugs" for Mr. Harris and again when the court gave the jury instructions before deliberation. Our supreme court has observed that, while "[t]he better practice may be for trial courts to instruct the jury, not only at the close of the case, but also at the time other-crimes evidence is admitted," the "trial court's failure to do so *** does not mandate reversal." *People v. Heard*, 187 Ill. 2d 36, 60-61 (1999). Here, as the court provided the jury with a limiting instruction about the other-crimes evidence two times, "absent a showing to the contrary, we presume the jury followed the instruction." *People v. Simms*, 192 Ill. 2d 348, 373 (2000).

¶ 76 C. The State's Comments During Closing and Rebuttal Arguments

¶ 77 Mr. Harris contends that the State made multiple inappropriate comments during closing and rebuttal arguments that amounted to prosecutorial misconduct and violated his right to a fair

trial. Mr. Harris concedes that, of the five objections he currently makes to the State's arguments, only the first two discussed below were properly preserved for appeal. Where no contemporaneous objection was made, we review arguments that are alleged to be improper under the plain error doctrine. *People v. Piatkowski*, 225 Ill. 2d 551, 566 (2007). However, because we find no error in any of the allegedly improper arguments, it is unnecessary to reach the second step of the plain error analysis, to determine whether "the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant" or whether the error itself was "so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Id.* at 565; see also *People v. Calhoun*, 404 Ill. App. 3d 362, 382-83 (noting that "[s]ince there was no error, there can be no plain error").

¶ 78 It is well-settled that "[p]rosecutors are afforded wide latitude in closing argument." *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007). When reviewing allegedly improper remarks, "closing arguments must be viewed in their entirety, and the challenged remarks must be viewed in context." *Id.* at 122. "Argument and statements that are based upon the facts in evidence, or upon reasonable inferences drawn therefrom, are within the scope of proper closing argument." (Internal quotation marks omitted.) *People v. Burgess*, 2015 IL App (1st) 130657, ¶ 158. We consider in turn each of these comments, or groups of comments, challenged by Mr. Harris on appeal.

¶ 79 1. Comments About Defense Counsel

¶ 80 Mr. Harris contends that several comments made by the prosecutor during rebuttal argument about defense counsel's theories in closing were "highly improper and inflammatory" and "were calculated to undermine the honesty, integrity, and intelligence of anyone who opposed his efforts to win a conviction." Mr. Harris argues that the prosecutor made an improper comment when in rebuttal he referred to a demonstration defense counsel made to help the jury

visualize the scene of the crime as demeaning to the jurors' intelligence. Mr. Harris also takes issue with the prosecutor's response to defense counsel's argument that Detective Roberts used suggestive procedures for the identifications of Mr. Harris by Ms. Smith and Ms. Hardy. Because "[d]uring rebuttal, the State may respond to statements made by defense counsel in closing argument that invite a response" (*People v. Thompson*, 2015 IL App (1st) 122265, ¶ 39), we consider the challenged comments in the context of defense counsel's closing argument.

¶ 81 During closing argument, defense counsel used props, including his wallet, to create a demonstration for the jury over the State's objection, stating that he wanted to put the jury "in a three-dimensional formation." Defense counsel explained that he was going to "get into the lighting conditions and where the witnesses were" because he wanted the jury to consider "whether Debra Hardy and whether Tamira Smith are actually making reliable enough identifications" to find Mr. Harris guilty.

¶ 82 In his rebuttal argument, the prosecutor stated:

> "[THE STATE:] One of the things I want to get out of the way. Counsel comes up here and insults you with his little demonstration with his markers and—
>
> [DEFENSE COUNSEL]: Objection.
>
> [THE COURT]: Overruled.
>
> [THE STATE]: Insults you with his markers, wallet, and everything else.
>
> [DEFENSE COUNSEL]: Objection.
>
> [THE COURT]: Overruled.
>
> [THE STATE]: Pay attention to the evidence that has been presented to this Court. This is the scene, Ladies and Gentlemen. This is the car. These are the lights. You have heard. There was lighting out there. There is nothing obstructing

> that light. You see the lights going up and down. Counsel wants to portray that this is a dark street, can't see anything, can't see in front of your face. He comes up here with his markers and his wallet and whatever else. That is not evidence."

¶ 83 With respect to the identification procedures used, after arguing that the in-person lineup was suggestive, defense counsel stated in closing argument that Detective Roberts was an "interested officer" who "worked [the] case for months and months and months." Defense counsel then argued, "when he tells you that he had no clue who his suspect was when he showed [Ms. Smith] these pictures, what do you think? That is not true. He knew who his suspect was. The suspect was Kyjuanzi Harris and that is who he wanted her to pick, so that is who she picked." Defense counsel stated that Detective Roberts "want[ed] to make sure that the right identification, what he thinks is the right identification, is made."

¶ 84 In his rebuttal argument, the prosecutor stated:

> "[THE STATE:] To suggest that Detective Roberts based on no evidence at all—you heard his testimony. You heard Detective Roberts. It is insulting. It is insulting to him, and it should be insulting to you for the Defense to suggest that he somehow said, 'Hey, hey, it is this guy right here, it is my case, I got to solve it.' That is insulting. That is insulting to Detective Roberts. That is insulting to everyone.
>
> [DEFENSE COUNSEL]: Objection, Judge.
>
> [THE COURT]: Overruled.
>
> [THE STATE]: What does he do next? The Defendant is taken into custody. Tamira Smith comes in. He does a physical lineup. Once again, Counsel wants to somehow portray that once again Detective Roberts, 'Got to protect my

> case. Hey, number two, that's him.' That is insulting. He wasn't even—that just is so unbelievable and so outrageous."

¶ 85 In both of these instances, the prosecutor's comments were made in direct response to statements made by defense counsel in closing argument. An examination of the comments in context shows that the prosecutor's comments were not made "simply to 'inflame the passions or develop the prejudices of the jury' " (*Wheeler*, 226 Ill. 2d at 128 (quoting *People v. Halteman*, 10 Ill. 2d 74, 84 (1956))) or to create an " 'us-versus-them' mentality" (*id.* (quoting *People v. Johnson*, 208 Ill. 2d 53, 80)). Comments that bear on the credibility or degree of support for a defense theory are not improper. *People v. Kirchner*, 194 Ill. 2d 502, 549 (2000) Accordingly, the trial court did not err in overruling Mr. Harris's objections to these statements.

¶ 86 2. Comments About the West Side

¶ 87 Mr. Harris also objected to several comments the prosecutor made about the "west side" in rebuttal. Again, these comments must be viewed in the context of defense counsel's closing argument. In closing, defense counsel attacked the credibility of Ms. Smith's testimony:

> "She says that the car pulls up next to their car and for a period of five to ten seconds she looks at the shooter's face before he pulls out the gun, so she would have you all believe that this car pulls up, the guy stares at her for 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and then he pulls out his gun and shoots. Use your common sense. There is no way that that happened. There is no way that a shooter intent on murdering two people is going to pull his car up and sit there and stare them in the eye for five to ten seconds. Implausible, impossible, and it did not happen."

¶ 88 In rebuttal, the prosecutor argued:

> "[THE STATE:] This Defendant was so bold brazen, so bold, that he thought he could pull up on the west side—this is a west side murder—up to a park with

> people out there, take his gun, and fire into that vehicle over and over and over and just get away with it. This is the west side. No one cooperates with the police, no one comes forward.
>
> [DEFENSE COUNSEL]: Objection.
>
> [THE COURT]: Overruled.
>
> [THE STATE]: This is how it works on the west side. That is what the Defendant did on that day. That is how bold, how brazen, he was. He didn't think anyone would come forward."

¶ 89 As to Ms. Hardy, defense counsel called into question her credibility by asking the jury why she would have admitted to being a witness if she was afraid of the shooter: "Why would she go there and say, 'Hey, I know who did it, but I can't tell you because I am scared.' That makes no sense at all, because if she was really scared of this shooter, she would have kept her mouth shut and said nothing."

¶ 90 The prosecutor responded, stating:

> "Counsel wants to say [Ms. Hardy] did not come forward right away. Why not? Well, the reason she didn't come forward was she just saw this man that she knows, that she has worked with, execute two people right in front of her, in front of other people. She was scared. She was scared to come forward. She was scared to cooperate. This is a west side murder. You don't help the police on a west side murder. But she did. She came, and she did the right thing. She came forward.
>
> * * *
>
> Hold the Defendant accountable for his actions, his actions that night. This is a west side murder, and those were the victims in this case."

¶ 91 The record shows that to the extent the prosecutor was using this argument to bolster its narrative as to what occurred, what the prosecutor described was supported by the evidence. Ms. Smith testified that there were other people in the park when she and Ms. Turner returned to pick up Mr. Armstrong. Ms. Hardy testified that there were several other people in the park that day and agreed that the park is located next to an entrance to the Eisenhower Expressway and is, therefore, a heavy traffic area. Ms. Hardy also testified that she told the detectives "[she] was scared" when she initially talked to them about the shooting. Based on this evidence, it was not unreasonable for the prosecutor to suggest that other people may have seen the shooting that night and refused to come forward; that the shooter may have relied on the silence of witnesses in the neighborhood and this may have affected when, where, and how the crime was committed; or that Ms. Hardy was scared about the murder. Viewed in context, these remarks were based on reasonable inferences drawn from the evidence and we find that the trial court also did not err in overruling Mr. Harris's objection to these statements. To the extent that the prosecutor's argument might have been an unsupported generalization about the lawlessness of the west side of Chicago, Mr. Harris has not explained how this argument prejudiced him specifically before the jury. Thus, we find these comments did not rise to the level of error.

¶ 92 3. Comments About Ms. Hardy

¶ 93 Mr. Harris also takes issue with the prosecutor's comments in closing argument that "[Ms. Hardy] would have liked to have been any place but on that witness stand" and asking the jury to "[t]hink about the life that [Ms. Hardy] leads now and she will lead after this after pointing the finger at this man in a full courtroom full of people, a man who killed two people." Mr. Harris argues that these comments were improper because "[p]rosecutorial comments which suggest that witnesses were afraid to testify because defendant had threatened or intimidated them, when not based upon any evidence in the record are *** highly prejudicial and

inflammatory." (Internal quotation marks omitted.) *People v. Mullen*, 141 Ill. 2d 394, 405 (1990).

¶ 94 We agree with the State that these comments were not improper. The prosecutor's comments did not suggest that Ms. Hardy was being threatened by Mr. Harris; rather, the prosecutor's comments were reasonable inferences based on Ms. Hardy's testimony that she told the detectives "[she] was scared" when she gave them Mr. Harris's name and that she did not name Mr. Harris as the shooter to Ms. Turner's mother on the night of the shooting "because she saw him open fire on a car and kill two people that [she] knew." See *People v. Sims*, 285 Ill. App. 3d 598, 605-06 (1996) (the prosecutor's comments which suggested that a witness changed his testimony because he was afraid of the defendant were not improper because they "conformed to the evidence in the record" and were "brief").

¶ 95 4. Comment About the Victims' Families

¶ 96 Mr. Harris argues that the prosecutor's comment in closing argument that the jury should "[g]ive justice to the families of Derrick and Bernadette" was "improper and prejudicial." However, our supreme court has stated that "common sense tells us that murder victims do not live in a vacuum and that, in most cases, they leave behind family members. [Citation.] Thus, every mention of a deceased's family does not *per se* entitle the defendant to a new trial." (Internal quotation marks omitted.) *People v. Hope*, 116 Ill. 2d 265, 275 (1986).

¶ 97 In sharp contrast to the cases on which Mr. Harris relies, here the single complained-of comment referencing the victims' families was brief and made only in closing argument. See, *e.g.*, *Hope*, 116 Ill. 2d at 275-76 (reversing for a new trial where the prosecutor made reference to the victim's family in opening statement, elicited testimony on direct examination of the victim's widow, introduced a photograph of the victim and his family into evidence over objection, and mentioned the victim's family again in closing argument); *People v. Bernette*, 30

Ill. 2d 359, 370-71 (1964) (finding reversible error where the State elicited multiple statements about the victim's young children during direct examination of the victim's widow *and* the prosecutor then commented on the victim's family during closing argument). At trial, the only direct evidence pertaining to the victims' families was incidental to other testimony and not improper: Mr. Armstrong's cousin simply identified the victims and the fact of their deaths, and two witnesses testified that Ms. Turner's mother interacted with Ms. Hardy on the night of the shooting. Such a brief reference in closing argument to the victims' families was not improper.

¶ 98 5. Comments About the Reasonable Doubt Standard

¶ 99 Mr. Harris takes issue with the prosecutor's statements during rebuttal argument about the reasonable doubt standard. When considered in context, however, the comments are not improper. Defense counsel first made the following statements in closing argument:

> "[M]ost importantly, you get to hold the State's Attorney's office to their burden of proof beyond a reasonable doubt. When you go into the jury room and you start deliberating, think about why it is in this country that we have the highest level of a burden of proof in criminal cases than anywhere in the world, proof beyond a reasonable doubt."

The prosecutor then began rebuttal argument by stating:

> "Ladies and Gentlemen, the only thing Counsel and I do agree on is that we have to prove the defendant guilty beyond a reasonable doubt. It is a burden, and we embrace it. It is not proof beyond no doubt. It is beyond a reasonable doubt. There are prisons throughout this country filled with people that have been found guilty beyond a reasonable doubt."

It is this portion of argument that Mr. Harris has challenged, arguing that it "undermine[d] the reasonable doubt standard."

¶ 100 "The law in Illinois is clear that neither the court nor counsel should attempt to define the reasonable doubt standard for the jury." *People v. Speight*, 153 Ill. 2d 365, 374 (1992). "The rationale behind this rule is that 'reasonable doubt' is self-defining and needs no further definition." *People v. Downs*, 2015 IL 117934, ¶ 19. "Comments by a prosecutor during closing statements which minimize the State's burden of proving guilt beyond a reasonable doubt by suggesting that the burden is merely a *pro forma* or a minor detail are improper." *People v. Ligon*, 365 Ill. App. 3d 109, 125 (2006). However, comments that are substantially identical to those used in the present case have been found not to have reduced the State's burden of proof. See, *e.g.*, *People v. Moore*, 171 Ill. 2d 74, 104 (1996) (finding the prosecutor's comments that "[Defense counsel] would have you believe there's an impossible burden to be met, but the burden here is the same burden as in every courtroom in this building and every courtroom in Will County, going on everywhere in the United States from 1776 to date, and it's met every single day" were not improper); *People v. Phillips*, 127 Ill. 2d 499, 527-28 (holding as not improper the prosecutor's statements that the reasonable doubt standard "is the same standard, ladies and gentlemen, that is applicable in all criminal cases. Every criminal case that is tried in this courtroom, in this county, in this state and in this country in any type of criminal case. ***Ladies and gentlemen, suffice it to say it is not proof beyond all doubt, it is not proof beyond any doubt, it is proof beyond a reasonable doubt"). The record also shows that defense counsel's closing argument invited the prosecutor's remarks when he emphasized that the burden of proving a defendant guilty beyond a reasonable doubt was "the highest level of a burden of proof in criminal cases *** anywhere in the world." Under these circumstances, we cannot find that the prosecutor's comments were improper.

¶ 101 Because we have concluded that it was not error for the trial court to allow these last three comments, which were not objected to, there can be no plain error. *Calhoun*, 404 Ill. App.

3d at 382-83. Moreover, even if we were to consider either of the first two properly preserved comments to be error, such error would not be reversible. Generally, improper comments by a prosecutor "do not constitute reversible error unless they result in substantial prejudice to the accused and were material to [the] conviction." *People v. Barker*, 298 Ill. App. 3d 751, 757 (1998). As we discuss below in considering Mr. Harris's challenge to the trial court's failure to comply with Rule 431(b), the evidence at trial was not closely balanced. In addition, "[a]n instruction that closing arguments are not evidence and any statement not based on the evidence should be disregarded," as the trial court gave here, "tends to cure possible prejudice from improper remarks." *People v. Thomas*, 200 Ill. App. 3d 268, 275 (1990). Accordingly, we find that the challenged comments, even if erroneously permitted by the trial court, were harmless.

¶ 102 D. The Trial Court's Rule 431(b) Instructions

¶ 103 Mr. Harris argues that the trial court failed to comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) in its questioning of the potential jurors because it failed to ask them whether they understood the principles enumerated in the rule. Rule 431(b) provides, "clearly and unambiguously," that a "trial court 'shall ask' potential jurors whether they understand and accept the enumerated principles" (*People v. Thompson*, 238 Ill. 2d 598, 607 (2010)), including "(1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that if a defendant does not testify it cannot be held against him or her" (Ill. S. Ct. R. 431(b) (eff. July 1, 2012)).

¶ 104 In the present case, the State concedes that the trial court's failure to inquire whether the potential jurors understood the Rule 431(b) principles was error. Mr. Harris agrees that he did not properly preserve this error for appeal because he failed to make a contemporaneous

objection or raise the issue in a posttrial motion. *People v. Hiller*, 237 Ill. 2d 539, 544 (2010). Therefore, we review this failure under the plain error analysis. *Thompson*, 238 Ill. 2d at 613. Mr. Harris contends that the trial court's error rose to the level of plain error because the evidence presented at his trial was so closely balanced. This consideration, in turn, depends upon the strength of the two eyewitness identifications of Mr. Harris as the shooter.

¶ 105 "The testimony of a single eyewitness may suffice to convict if the witness is credible and was able to view the defendant under conditions permitting a positive identification." *People v. Thompson*, 2016 IL App (1st) 133648, ¶ 34. In considering the reliability of identification testimony, courts in Illinois generally follow the factors set out by the Supreme Court in *Neil v. Biggers*, 409 U.S. 188 (1972). Mr. Harris invites us to instead follow the analysis in *State v. Henderson*, 27 A.3d 872 (N.J. 2011), a New Jersey Supreme Court case in which the court "significantly changed the framework for evaluating the reliability of eyewitness testimony in that state." *People v. McGhee*, 2012 IL App (1st) 093404, ¶ 53. However, *Henderson* has not been followed in Illinois (see *McGhee*, 2012 IL App (1st) 093404, ¶¶ 53-54) and we will follow the law as it currently stands in this state.

¶ 106 The factors set out in *Biggers* include: "(1) the opportunity the witness had to view the offender at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the offender; (4) the level of certainty demonstrated by the witness at the identification confrontation; and (5) the length of time between the crime and the identification confrontation." *People v. Starks*, 2014 IL App (1st) 121169, ¶ 48.

¶ 107 With respect to the first factor, Ms. Smith testified that she saw Mr. Harris's face for "five or ten seconds before he started shooting," that there was street lighting and it "wasn't that dark," and that her view of Mr. Harris, who was about three feet away from Ms. Smith, was unobstructed. Ms. Hardy did not recall how long she viewed Mr. Harris before he began

shooting, but she was only 20 feet away from the cars and had known Mr. Harris for a number of years, so had a basis for recognizing him.

¶ 108 Although both Ms. Smith's and Ms. Hardy's opportunities to view Mr. Harris were brief, a short opportunity to view an offender does not negate an identification. See, *e.g.*, *People v. Williams*, 2015 IL App (1st) 131103, ¶ 74. Mr. Harris suggests that Ms. Smith was "exposed to a situation that could not have been more stressful," undermining her ability to accurately observe. However, Ms. Smith testified that she observed Mr. Harris's face for five to ten seconds *before* he pulled out his gun. Moreover, Mr. Harris's argument that Ms. Smith "would have warned" the victims about Mr. Harris if she really had five to ten seconds to look at him before he began shooting is speculation. Nothing in the record indicates that Ms. Smith believed Mr. Harris would begin shooting in those seconds that she observed him before the shooting. Mr. Harris also contends that the lighting conditions were poor because Ms. Turner's car was parked on the south side of Van Buren, the only streetlights were on the north side of Van Buren, and because the shooter pulled up alongside the north side of Ms. Turner's car, he was backlit and difficult to see. However, Detective Roberts also testified that, while there were no streetlights on the south side of Van Buren, there were park lights on the south side of the street that were "close to the sidewalk;" these could have provided additional light. Moreover, in contrast to Mr. Harris's speculation that the lighting was insufficient to make an identification of the shooter, both Ms. Smith and Ms. Hardy testified that they could see Mr. Harris, and Ms. Smith specifically testified that it "wasn't that dark." The evidence reflects that the two eyewitnesses had sufficient opportunity to observe Mr. Harris to make an identification.

¶ 109 As for the second and third factors, the degree of attention and the accuracy of the witnesses' description of the offender, Ms. Smith provided the police with a description: "light-skinned complexion, dreadlocks, and [she] told [the officers] about his eyes, and [she] told them

about the car." Although Detective Roberts testified that Ms. Smith never said that Mr. Harris had a light complexion, but rather described him as having a medium complexion, "discrepancies and omissions as to facial and other physical characteristics are not fatal, but merely affect the weight to be given the identification testimony." *People v. Lewis*, 165 Ill. 2d 305, 357 (1995). Moreover, this discrepancy was fully brought to the jury's attention.

¶ 110 Although Ms. Hardy testified somewhat inconsistently that she was able to only partially see Mr. Harris's face and also that she saw his entire face, the inference that Ms. Hardy paid enough attention to the shooter to recognize Mr. Harris was supported by her testimony that, on the night of the shooting, she told Ms. Turner's mother that she knew who the shooter was. This testimony was also corroborated, at least in part, by Detective Roberts who spoke with Famara Turner and confirmed that Ms. Hardy admitted to being a witness to the shooting. Considering all of the above, we believe these two factors support, at least to some extent, the reliability of the identifications.

¶ 111 The fourth factor, the level of certainty demonstrated, weighs heavily in favor of the reliability of the identifications. There was no indication in the testimony of Ms. Smith or Ms. Hardy that they were uncertain about the identity of the shooter. Ms. Smith identified Mr. Harris as the shooter in a photo array, an in-person lineup, and in open court. Ms. Hardy knew Mr. Harris and told the detectives he was the shooter before viewing the photo array. This is supported by the trial testimony of both Detective Roberts, who stated that Ms. Hardy told him that she did not need to see the photo array, and of Ms. Hardy, who testified that she told the detective that she did not need to view the photo array because she knew who the shooter was, but then he had her view the photo array anyway.

¶ 112 The final factor, the length of time between when the crime occurred and when the identification was made, does undermine both identifications, as no identification of Mr. Harris

as the shooter was made until November 2010, almost 18 months after the shooting. Nonetheless, Ms. Smith's identifications of Mr. Harris as the shooter were unequivocal for the photo array, the in-person lineup, and the identification in open court. Moreover, Ms. Hardy knew Mr. Harris and, although she did not come forward with his name for more than 18 months, she told Ms. Turner's mother she knew who committed the shooting on the night of the shooting and, at trial, explained that she did not come forward with his name immediately because she was "scared." Thus, in sum, these identifications had significant indicia of reliability when examined under the *Biggers* factors.

¶ 113 Mr. Harris takes issue with Detective Roberts having conducted the array and lineup, since Detective Roberts knew the identity of the suspect, and suggests the police should have used someone who did not know Mr. Harris's identity to conduct the array and lineup. Mr. Harris also claims that the detectives should have used a sequential photo array, showing the witnesses one photo at a time, rather than showing them all six photographs at once. We disagree, however, that the absence of these precautionary measures necessarily makes the identifications unreliable.

¶ 114 The trial testimony established the steps that were taken to avoid an unduly suggestive photo array and lineup. According to the testimony, Detective Roberts did not inform Ms. Smith that the police had a possible suspect when he called her about viewing the photo array and both Ms. Smith and Ms. Hardy signed a Photo Spread Advisory Form before viewing the photo array. We also find it telling that the evidence suggests Ms. Hardy named Mr. Harris as the shooter before she viewed the photo array. Similarly, Ms. Smith testified that she signed a Lineup Advisory Form before viewing the in-person lineup.

¶ 115 Mr. Harris also claims that the photos themselves were suggestive because he was the only person in a photograph on a white background; the other photographs had darker

backgrounds, from light to medium gray. We have viewed the photos used in the photo array. There is not anything in the record that explains why Mr. Harris is the only person on a white background while the other five men are on darker backgrounds. However, that difference is mitigated, in part, by the fact that all six men have generally similar physical characteristics—they have similar hairstyles and seem to be of similar age and build. Three of the men, including Mr. Harris, are wearing white t-shirts, while the other three are in dark shirts. Moreover, the photo identification was confirmed by an in-person lineup identification by Ms. Smith. We have reviewed a photo of that lineup and there is no significant difference between Mr. Harris and the rest of the men in that lineup that sets him apart. While we agree with Mr. Harris that it would have been better practice to have used the same or similar backgrounds for each person in the photo array, we do not think the failure to do so undermines the reliability of the identifications so as to render the evidence closely balanced.

¶ 116 Mr. Harris contends that the multiple inconsistencies in the testimony of the State's witnesses call into question the reliability of both identifications. Mr. Harris observes that, for example, Ms. Smith testified at trial that she initially described the shooter to the police as having a light complexion and not wearing a hat, but Detective Roberts testified that Ms. Smith described the shooter as having a medium complexion and wearing a hat; that Ms. Smith testified that she and Ms. Turner left the park at 6 or 6:30 p.m. and returned at 8:40 p.m., but Ms. Hardy testified that Ms. Turner and Mr. Armstrong never left the park; and that Ms. Hardy testified that she told the police Mr. Harris was the shooter in June 2009, but Detective Roberts testified that Ms. Hardy did not reveal the name of the shooter until December 2010. While we recognize that the testimony of Ms. Smith and Ms. Hardy was inconsistent in some details, they both positively and consistently identified Mr. Harris as the shooter. As we noted above, the "testimony of a single eyewitness may suffice to convict if the witness is credible and was able to view the

defendant under conditions permitting a positive identification." *Thompson*, 2016 IL App (1st) 133648, ¶ 34. In the present case, we have two eyewitnesses who were able to view Mr. Harris under conditions permitting a positive identification.

¶ 117 Considering the five factors set forth in *Biggers* and Mr. Harris's arguments about the reliability of the two eyewitness identifications, we find that these two independent identifications provided strong enough evidence of guilt that we cannot conclude that the evidence was closely balanced. Accordingly, Mr. Harris cannot demonstrate that the court's failure to properly charge the jury in accordance with Rule 431(b) rose to the level of plain error.

¶ 118 E. The Trial Court's *Krankel* Inquiry

¶ 119 Finally, Mr. Harris argues that his cause must be remanded for a new hearing on his *pro se* motions alleging ineffective assistance of trial counsel pursuant to our supreme court's decision in *People v. Krankel*, 102 Ill. 2d 181 (1984), because the trial court's inquiry into his *Krankel* motion was inadequate. More specifically, Mr. Harris claims the court's inquiry into his claim that defense counsel should have called his alibi witnesses was inadequate because it was "based on judgments about defense counsel's performance outside the courtroom, and thus outside the scope of the court's knowledge."

¶ 120 "The common law procedure developed from [the supreme court's] decision in *Krankel* is triggered when a defendant raises a *pro se* posttrial claim of ineffective assistance of trial counsel." *People v. Jolly*, 2014 IL 117142, ¶ 29. Our supreme court has stated:

> "[W]hen a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel, the trial court should first examine the factual basis of the defendant's claim. If the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. However, if the allegations show possible neglect of the

case, new counsel should be appointed." *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003).

¶ 121 When a defendant challenges a trial court's *Krankel* inquiry on appeal, "[t]he operative concern for the reviewing court is whether the trial court conducted an *adequate* inquiry into the defendant's *pro se* allegations for ineffective assistance of counsel." (Emphasis added.) *Id.* at 78. "During this evaluation, some interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the allegedly ineffective representation is permissible and usually necessary in assessing what further action, if any, is warranted on a defendant's claim." *Id.* "Also, the trial court can base its evaluation of the defendant's *pro se* allegations of ineffective assistance on its knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face." *Id.* at 79. "The issue of whether the [trial] court properly conducted a preliminary *Krankel* inquiry presents a legal question that we review *de novo*." *Jolly*, 2014 IL 117142, ¶ 28.

¶ 122 The record here shows that the trial court conducted an adequate inquiry into Mr. Harris's *pro se* claims of ineffective assistance of counsel. The trial court examined both Mr. Harris and defense counsel during its inquiry into his claims. Mr. Harris told the court that he did not understand why his defense counsel did not call his alibi witnesses. Defense counsel explained that not calling the alibi witnesses was "a careful determination" based on what he perceived to be weaknesses in the State's case, namely, the conflicting testimony of the State's witnesses and because he "felt that [the alibi witnesses] would not be believed by the jury." In declining to appoint counsel to represent Mr. Harris on his claims, the trial court noted that counsel proffered a strategic reason for choosing to not put on the alibi witnesses and that defense counsel was "dedicated" attorney who "extremely aggressively represented" Mr. Harris.

¶ 123 We note that "[d]ecisions about whether to call witnesses are generally considered matters of trial strategy and reserved to the discretion of trial counsel." *People v. Lewis,* 2015 IL App (1st) 122411, ¶ 84. Accordingly, when defense counsel explained that his decision not to call the alibi witnesses was strategic and Mr. Harris presented nothing to suggest that it was not strategic, "the trial court generally was entitled to accept those representations." *Id.* Moreover, contrary to Mr. Harris's argument that the trial court "had no basis to judge whether defense counsel's statements about the alibi witnesses were correct," this court has stated that a "trial court [i]s entitled to evaluate the adequacy of [a] claim[ ] of ineffective assistance of counsel on [its] face." *Id.* ¶ 85.

¶ 124 The trial court examined both Mr. Harris and defense counsel and, based on their statements and its knowledge of counsel's performance at trial, found that no further action was warranted on Mr. Harris's claim of ineffective assistance. Under these circumstances, no remand for a new *Krankel* hearing with appointment of new counsel is required.

¶ 125 CONCLUSION

¶ 126 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 127 Affirmed.