2016 IL App (1st) 141480-U

FOURTH DIVISION
September 29, 2016

No. 1-14-1480



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 11 CR 08919 |
| | ) | |
| THEATHUS WHITE, | ) | Honorable |
| | ) | Domenica Stephenson, |
| Defendant-Appellant. | ) | Judge Presiding. |

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JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Ellis and Justice Howse concurred in the judgment.

**ORDER**

¶ 1 *Held*: Although defendant was proven guilty of attempted first degree murder beyond a reasonable doubt, the prosecutor's comments in opening statement and closing arguments cumulatively denied defendant a fair trial, a remand for a new trial is ordered.

¶ 2 Following a January 2014 jury trial, defendant Theathus White was found guilty of attempted first degree murder and aggravated discharge of a firearm, and subsequently sentenced to a 26-year prison term. Defendant appeals, arguing that: (1) the State failed to prove him guilty beyond a reasonable doubt; (2) he was denied a fair trial due to repeated acts of prosecutorial misconduct; (3) the exclusive jurisdiction provision of the Juvenile Court Act is unconstitutional

as applied to defendant; and (4) defendant is entitled to a new sentencing hearing under section 5-4.5-105 of the Criminal Code (730 ILCS 5/5-4.5-105 (West 2016)).

¶ 3 Defendant was arrested on May 25, 2011, and subsequently charged with attempted first degree murder and personally discharging a firearm during the commission of that offense. He was also charged with aggravated discharge of a firearm and aggravated assault. The following evidence was admitted at his jury trial.

¶ 4 James Robinson testified that on May 23, 2011, he was a senior at Corliss High School in Chicago, Illinois. Robinson stated that May 23 was "senior ditch day." He did not attend classes that day, but instead, he went to the lake with friends by bus. At the end of the day, Robinson was waiting for the bus with 25 to 30 classmates and friends at a bus stop near Dunbar High School, which had recently dismissed its students for the day. Robinson testified that an "altercation" occurred with students from Dunbar, during which the Dunbar students told some of Robinson's classmates that they would "whoop us." Nearby police officers told the students to disperse, and Robinson and his classmates boarded the bus.

¶ 5 On the bus ride home, Robinson had a conversation with two individuals identified as Dequan White, defendant's older brother and a classmate from Corliss, and another young man named Ashanti. Robinson did not know Ashanti's last name, but stated that he had attended grammar school with Ashanti. During the conversation, White and Ashanti said they were not going to help the Corliss students in the fight. Robinson testified that Ashanti said that "they don't fight, they shoot." Robinson then observed Ashanti make a phone call, but he could not hear the conversation. Robinson felt "worried" for his life, so he called his uncle and asked him to meet him at 79th and King Drive. Robinson called his uncle because he "felt [Ashanti] was

calling somebody trying to hurt [him]." Robinson exited the bus at 79th and King Drive, where his uncle was waiting for him with a car. Neither White nor Ashanti exited the bus at that stop.

¶ 6 Robinson then rode with his uncle to 95th and King Drive to meet White and Ashanti. He arrived before the bus reached the stop and exited the car alone. When the bus arrived, White and Ashanti exited, along with some of Robinson's classmates. Robinson approached White and asked if he wanted to fight. White said no, that he did not want to fight, but Ashanti responded that he did. Robinson then turned and started fighting with Ashanti, as Robinson's classmates stood nearby. No weapons were involved in the fight. At some point during the scuffle, Robinson saw White walk away, then walked back and stand behind Robinson. When Robinson finished fighting Ashanti, he turned and saw White, and hit White in the face once. White fell to the ground. Robinson then left and went home.

¶ 7 About five minutes after leaving, Robinson received a phone call from Jarrett Jones, a classmate who was present during the fight. Jones told Robinson "to be looking out" and that "they [were] calling somebody to come back and shoot at me." Robinson called his father because he was concerned.

¶ 8 Robinson then went to his friend Brittany Nelson's house, at 103rd and Corliss. He stayed outside of Nelson's house on the front porch talking with Krisean Noble and an individual he knew as "Woo." Robinson was standing on the sidewalk in front of Nelson's house, while Noble was in the grass by a bush and Woo was standing on the side of the porch. Robinson testified that no one else was standing near him on the sidewalk.

¶ 9 According to Robinson, a blue car drove by them and he heard a gunshot. Robinson initially thought the gunfire was coming from the car, so he ducked and turned to run. However, at that point, Robinson saw defendant holding a gun, so he turned and ran the other way.

¶ 10 As he ran away, Robinson heard three more gunshots coming in his direction. Robinson testified that other than Noble and Woo, he did not see anyone other than defendant standing outside or holding a gun. Once he started to run, Robinson did not turn back to look because he was "scared for [his] life." Robinson hopped a gate, ran around the building, and when he came to the front, he did not see anyone.

¶ 11 Robinson testified that he recognized defendant, whom he has known since they were "little," over ten years. They went to the same school, but were in different grades. Robinson saw defendant from approximately three houses away in the walkway of a gangway, and the shooting occurred at approximately 5:20 p.m. in the daylight. There was nothing blocking his view of defendant and defendant did not have anything covering his face, other than a band-aid under one eye. Prior to that day, Robinson did not have any problems with defendant, White or Ashanti. Robinson identified defendant as the shooter to police officers.

¶ 12 On cross-examination, defense counsel asked Robinson when he last saw defendant and Robinson answered, "I haven't seen him." Robinson testified that he had not seen defendant other than on May 23, 2011, at any time from 2006 through 2011. When asked when he last had any contact with defendant, Robinson said he "really [did not] have contact with him or nothing like that." Robinson said he had "probably" seen defendant within ten years because Robinson is "always riding past somewhere." Robinson could not remember any context in which he had contact with defendant. He admitted that he saw defendant in grade school, but he "really c[ould]n't go back that far."

¶ 13 Robinson knew Noble and Woo because they were teammates with him on the basketball team. At the time of the shooting, Robinson stated that Noble was approximately two feet away from him and Woo was approximately four feet away from him.

¶ 14 Robinson remembered testifying at a preliminary hearing, but did not remember testifying that a girl was present. Robinson testified that a girl named Jahkayah Lewis was present on the porch, but denied that a girl named Shaketha Lewis was present. Robinson denied knowing anyone by that name. Robinson testified that Jasmine Stokes was in the area, but that she was not present when the shooting occurred and was there only after the shooting.

¶ 15 Robinson testified that five to six seconds passed between the first gunshot and the additional gunshots. When asked if Robinson remembered testifying at the preliminary hearing that one or two minutes passed between the first gunshot and the additional gunshots, Robinson answered no and denied saying that.

¶ 16 Robinson stated he described the shooter as wearing all black and a hood. He admitted that he did not describe his height, weight, or skin color to police. Robinson also stated that he observed defendant ride by in a red truck near 103rd and Corliss before the shooting. Robinson testified, "Then like he turned up a block and I ran to the alley to see if he was coming through the alley, but I didn't see him. When I went back and stood in front of the house, like, I say like five or three minutes go past and I heard shots."

¶ 17 On redirect, Robinson testified that defendant went to Corliss, but he never saw defendant there. When asked how he knew defendant attended Corliss, Robinson answered, "To be honest, I don't know."

¶ 18 The parties later stipulated that during the preliminary hearing, Robinson testified that Shakita Lewis was present when the shooting occurred.

¶ 19 Jarrett Jones testified that on May 23, 2011, he was a senior at Corliss High School. He had participated in senior ditch day and had gone to the lake with approximately 30 classmates. Jones's testimony was consistent with Robinson in describing the altercation with students from

Dunbar as the Corliss students waited for the bus. Jones stated that while on the bus, Robinson got into a "verbal dispute" with White and Ashanti, but he could not hear what they were saying. He said Robinson exited the bus first. Jones exited the bus at 95th and King Drive, as did White and Ashanti. Jones testified that Robinson was already there. Jones observed Robinson say something to White and Ashanti, and then they started fighting.

¶ 20 According to Jones, Robinson fought Ashanti first, and then Robinson hit White. White fell and Robinson left. The fight lasted "like a minute," and after it was over, White and Ashanti remained at the scene. Jones overheard a telephone conversation White had with someone. Jones stated that he could not recall "word for word, but [White] was saying stuff like, we just got in a fight with James. They just come on us. He was like, bring everything." Jones stated that he then called Robinson and told him about White's conversation. Jones called Robinson because he wanted to warn him and he assumed people were going to come after Robinson.

¶ 21 Officer Michael Mitchell testified he was employed by the Chicago police department and assigned to the third district. On May 25, 2011, he was assigned to the sixth district "tact" team. Officer Mitchell received a case report about a shooting that occurred on May 23, 2011, which listed defendant as the offender. Prior to that date, Officer Mitchell knew defendant because the officer worked part-time in security at Corliss High School, where defendant was a student. He went with his partner to defendant's residence and placed him under arrest. Officer Mitchell testified that defendant had a band-aid under his eye. He then transported defendant to the fifth district police station and processed him. Officer Mitchell described defendant as approximately 6'2" with a dark brown complexion.

¶ 22 The State rested following the officer's testimony. Defendant moved for a directed verdict, which the trial court denied.

¶ 23 Jasmine Stokes testified for the defense. Stokes stated that on May 23, 2011, she was at a party at 103rd and Corliss. She was standing in front of Nelson's house with Robinson, Nelson, and Jahkayah Lewis. While she was there, she observed a man come from the side of the house and start shooting. She heard two gun shots and described the shooter as "short and light skinned with a black hood on."

¶ 24 Stokes testified that she knows defendant, and identified him in court. She stated that defendant was not the shooter "because he's tall and black." Stokes had known defendant and Robinson for approximately six years and attended school with them.

¶ 25 On cross-examination, Stokes stated that she attended Corliss High School and in May 2011, she was a senior. At the time of the shooting, Robinson, Nelson, and Lewis were present as well as other people, but she did not "remember who was right there." Stokes said she ran the same direction as Robinson. Stokes testified that the shooter was "kind of close," and estimated it was "probably about like four feet." Stokes did not consider herself friends with defendant, Robinson, Nelson or Lewis, but "just went to school with everybody."

¶ 26 Defendant testified on his own behalf. He admitted that he had been convicted of theft of services in January 2013. Defendant testified that he had never been to 103rd and Corliss, and specifically denied being there on May 23, 2011. He also denied shooting a gun at Robinson, or ever firing a gun. He said that neither he, nor anyone in his family, owned a gun. Defendant knew Robinson, who was older than defendant and in his brother's grade, but he never had a physical altercation or argument with Robinson, and he had no reason to dislike Robinson.

¶ 27 At approximately 5:20 p.m. on May 23, 2011, defendant was at his friend Dominique Henderson's house from around 1 p.m. until about 6 p.m. Defendant admitted that he did not give the police Henderson's phone number. Defendant explained that at that time, Henderson did

not have a phone number. He stated that Henderson "had a phone in that year, but at that particular time [Henderson] had no cellphone." Defendant admitted that he did not look for Henderson when released on bond, but he knew that Henderson had moved.

¶ 28 Defendant admitted knowing an individual named Ashanti, but they were not friends. He did not know Ashanti's last name or where he lived. Defendant described Ashanti as short, light skinned, with shoulder length hair. He described Stokes as an acquaintance from school.

¶ 29 The prosecutor asked defendant if he attended Corliss High School and asked where it was, defendant answered that he did and it was at 103rd and Corliss. The prosecutor asked defendant if he was lying when he testified that he had never been to 103rd and Corliss, defendant responded that he meant "on that day I haven't been on 103rd and Corliss." Defendant testified that on May 23, 2011, his brother, Dequan White, told him that Ashanti and Robinson had been in a fight. Defendant denied that his brother had told him that he had been in the fight.

¶ 30 On redirect, defendant testified that he has never been to Nelson's house at 10324 South Corliss. Defense counsel specifically asked if defendant had ever been to any of the residential homes in the area of 10324 South Corliss, and defendant responded that he had not.

¶ 31 Following deliberations, the jury found defendant guilty of attempted first degree murder and aggravated discharge of a firearm. Defendant filed a motion for a new trial, which the trial court denied. The trial court merged defendant's conviction for aggravated discharge of a firearm conviction into the attempted murder conviction. Subsequently, the trial court sentenced defendant to six years for the attempted murder and a 20-year mandatory enhancement for personal discharge of a firearm, for a total of 26 years.

¶ 32 This appeal follows.

¶ 33 Defendant first argues that the State failed to prove him guilty of attempted first degree murder beyond a reasonable doubt. Specifically, defendant contends that the State's case rested solely on Robinson's testimony identifying defendant as the shooter, which was unreliable and contradicted by Stokes. The State maintains that Robinson's testimony was sufficient to sustain defendant's conviction and asserts that this court "should decline defendant's request to consider defendant's arguments anew as the issues raised by defendant were properly resolved by the trier of fact."

¶ 34 When this court considers a challenge to a criminal conviction based upon the sufficiency of the evidence, it is not our function to retry the defendant. *People v. Hall*, 194 Ill. 2d 305, 329-30 (2000). Rather, our inquiry is limited to "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in original.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); accord *People v. Cox*, 195 Ill. 2d 378, 387 (2001). It is the responsibility of the trier of fact to "fairly *** resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Id.*

¶ 35 The reviewing court must carefully examine the record evidence while bearing in mind that it was the fact finder who saw and heard the witnesses. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). Testimony may be found insufficient under the *Jackson* standard, but only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt. *Id.* However, the fact that a judge or jury did accept testimony does not guarantee it was reasonable to do so. Reasonable people may on occasion act unreasonably. Therefore, the fact finder's decision to accept testimony is entitled to great deference but is not conclusive and does not bind the reviewing court. *Id.* Only where the evidence is so improbable

or unsatisfactory as to create reasonable doubt of the defendant's guilt will a conviction be set aside. *Hall*, 194 Ill. 2d at 330.

¶ 36 For an attempted murder conviction, the State must prove, beyond a reasonable doubt, that the defendant, with the specific intent to kill, committed any act which constituted a substantial step toward the commission of murder. 720 ILCS 5/8-4 (West 2010); *People v. Valentin*, 347 Ill. App. 3d 946, 951 (2004). " 'Intent is a state of mind which, if not admitted, can be established by proof of surrounding circumstances, including the character of the assault, the use of a deadly weapon, and other matters from which an intent to kill may be inferred. [Citations.] Such intent may be inferred when it has been demonstrated that the defendant voluntarily and willingly committed an act, the natural tendency of which is to destroy another's life.' " *People v. Green*, 339 Ill. App. 3d 443, 451 (2003) (quoting *People v. Winters*, 151 Ill. App. 3d 402, 405 (1986)).

¶ 37 Defendant contends that absent any physical evidence, such as a gun, shell casings, or bullets, the State's case rested entirely on Robinson's testimony as the only eyewitness to the shooting, and Robinson's testimony was unreliable, partially impeached, and contradicted. Thus, according to defendant, the State was unable to meet its burden of proof.

¶ 38 The State bears the burden of proving beyond a reasonable doubt the identity of the person who committed the charged offense. *People v. Lewis*, 165 Ill. 2d 305, 356 (1995). The testimony of a single witness, if it is positive and the witness credible, is sufficient to convict. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). Illinois courts consider identification testimony under the factors set forth by the Supreme Court in *Neil v. Biggers*, 409 U.S. 188 (1972). *Id.* Those factors include: "(1) the opportunity the victim had to view the criminal 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 victim at the identification confrontation; and (5) the length of time between the crime and the identification confrontation." *Id.*

¶ 39 The first factor has been met here. Robinson testified that he observed defendant at the time of the crime. Initially, Robinson thought the first gunshot came from a passing vehicle, but when he ducked and turned to run, he saw the shooter, whom he identified as defendant. Robinson turned away from defendant to run and heard three additional gunshots. Robinson estimated that defendant was standing three houses away from him at the time during daylight and with no objects blocking his view. Although the time Robinson had to observe and identify the shooter as defendant was brief, a short length of time does not negate an identification.

¶ 40 Second, we consider Robinson's degree of attention. Here, he observed defendant during the shooting, but testified that he was able to see defendant and notice a band-aid under his eye. Officer Mitchell also testified that defendant had a band-aid under an eye at the time of his arrest. This information also supports the third factor, accuracy of the description. While Robinson did not offer police a description of the shooter, he identified defendant by name. Where, as here, a named identification is made, we do not believe the lack of a physical description weighs against the identification.

¶ 41 Fourth, Robinson's level of certainty was high. Robinson never wavered in his identification from immediately after the shooting through his trial testimony, unequivocally maintaining that defendant was the offender. Finally, Robinson identified defendant to police officers on the same evening as the shooting occurred. Thus, the length of time between the crime and the identification was minimal.

¶ 42 "[D]iscrepancies and omissions as to facial and other physical characteristics are not fatal, but merely affect the weight to be given the identification testimony." *Lewis*, 165 Ill. 2d at 357. "Such discrepancies and omissions do not in and of themselves generate a reasonable doubt as long as a positive identification has been made." *Id.* "In assessing identification testimony, we will not substitute our judgment for that of the trier of fact on questions involving witness credibility." *People v. Negron*, 297 Ill. App. 3d 519, 530 (1998). While Robinson's identification was questioned at trial, the weight of the factors, viewed in the light most favorable to the State, was not so improbable or unsatisfactory as to create reasonable doubt of defendant's guilt. The jury heard all of the testimony, including impeaching and conflicting statements. We will not substitute our judgment for the jury. Accordingly, defendant's challenge to the sufficiency of the evidence fails.

¶ 43 Next, defendant argues that the repeated acts of prosecutorial misconduct deprived him of a fair trial. Specifically, he asserts that (1) the prosecutor promised evidence in the opening statements that was not presented at trial, namely additional witnesses identifying defendant as the shooter; and (2) comments in closing argument which improperly discussed Robinson's lack of criminal background compared to defendant's minor criminal history, misstated the law, and shifted the burden of proof by telling the jury that they had to believe Robinson lied to find defendant not guilty. Defendant also contends that even if one individual error does not warrant the granting of relief, the cumulative effect of these errors denied him the right to a fair trial.

¶ 44 We note that there is a question of the correct standard of review for prosecutorial misconduct. In *Wheeler*, our supreme court suggested we review this issue *de novo*. *Wheeler*, 226 Ill. 2d at 121. However, *Wheeler* cited with approval *People v. Caffey*, 205 Ill. 2d 52 (2001), which suggested the standard of review is abuse of discretion (*Caffey*, 205 Ill. 2d at 128).

*Wheeler*, 226 Ill. 2d at 122-23. Since *Wheeler*, appellate courts have been divided regarding the appropriate standard of review. *People v. Alvidrez*, 2014 IL App (1st) 121740, ¶ 26 (noting that the issue remains divided). Nevertheless, we need not resolve the issue of the proper standard in this case because our review is under the plain error rule.

¶ 45 Defendant admits that he did not object at trial to all of these statements or raise the majority of them in a posttrial motion, but asks this court to review the issue under the plain error rule. To preserve an issue for review, defendant must object both at trial and in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Failure to do so operates as a forfeiture as to that issue on appeal. *People v. Ward*, 154 Ill. 2d 272, 293 (1992). Supreme Court Rule 615(a) provides that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). The plain error rule "allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (citing *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005)). However, the plain error rule "is not 'a general saving clause preserving for review all errors affecting substantial rights whether or not they have been brought to the attention of the trial court.' " *Herron*, 215 Ill. 2d at 177 (quoting *People v. Precup*, 73 Ill. 2d 7, 16 (1978)). Rather, the plain error rule is a narrow and limited exception to the general rules of forfeiture. *Id.*

¶ 46 Defendant carries the burden of persuasion under both prongs of the plain error rule. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). Defendant asserts that this first alleged error would qualify as a plain error under both prongs. However, "[t]he first step of plain-error review is to determine whether any error occurred." *Lewis*, 234 Ill. 2d at 43.

¶ 47 Defendant's first contention is that he was denied a fair trial when the prosecutor in opening statements promised evidence that the State failed to present during the trial. Specifically, defendant asserts that the prosecutor stated on more than one occasion that other witnesses would identify defendant as the shooter and corroborate Robinson's identification. However, no other eyewitnesses were called by the State, and Stokes, a defense witness, testified that she was present and defendant was not the shooter.

¶ 48 "The purpose of an opening statement is to apprise the jury of what each party expects the evidence to prove." *People v. Kliner*, 185 Ill. 2d 81, 127 (1998). "An opening statement may include a discussion of the expected evidence and reasonable inferences from the evidence." *Id.* "No statement may be made in opening which counsel does not intend to prove or cannot prove." *Id.* "It is impermissible for a prosecutor to comment during opening statement upon what testimony will be introduced at trial and then fail to produce that testimony since such an argument is, in effect, an assertion of the prosecutor's own unsworn testimony in lieu of competent evidence." *People v. Bunning*, 298 Ill. App. 3d 725, 729 (1998). "Reversible error occurs only where the prosecutor's opening comments are attributable to deliberate misconduct of the prosecutor and result in substantial prejudice to the defendant." *Kliner*, 185 Ill. 2d at 127; *People v. Risper*, 2015 IL App (1st) 130993, ¶ 27.

¶ 49 In *Bunning*, the defendant argued on appeal that the prosecutor improperly stated in his opening that the defendant's statements to the police were confessions and that two witnesses

would testify about the crime, but neither appeared at trial. *Bunning*, 298 Ill. App. 3d at 728-29. The reviewing court found no prejudice to the defendant in regard to the confession statement because the prosecutor fully disclosed the nature of the statements, which were more akin to admissions. *Id.* at 730. However, the court did find error in the prosecutor's references to witnesses who did not testify at trial. The court observed that these witnesses were served subpoenas only two days prior to the one-day trial. *Id.* at 730-31. The court concluded that the cumulative impact of the prosecutor's comments regarding those witnesses, coupled with improper testimony regarding defendant's postarrest silence, warranted a new trial, even though these errors were unpreserved and may not have required reversal individually. *Id.* at 731-32; See also *Whitlow*, 89 Ill. 2d at 337-41 (finding cumulative error after numerous instances of prosecutorial misconduct, including the prosecutor discussing evidence that was never presented during opening statements.)

¶ 50 Here, the prosecutor made the following comments during opening statements.

> "The police arrived. James Robinson talked to the police. Other witnesses talked to the police that saw the defendant shooting at James Robinson. This isn't a case where police had to look for [an] African American male, 20 years old, certain height, certain weight or unknown race, unknown gender. When James Robinson talked to the police, he told the police, the person who shot at me, the person I saw, the person whose face was not covered, the person who was 50 feet away from me in broad daylight is TJ, whose real name is Theathus White. Other witnesses identified the shooter as TJ, Theathus White."

Later in opening, the prosecutor stated, "At the close of this case, after you have heard from the witnesses who will identify the defendant, we're asking that you find him guilty on both charges."

¶ 51 We agree with defendant that it was improper for the prosecutor to make multiple references to other eyewitnesses who never testified at trial. The prosecutor in opening statements made three references that other witnesses identified defendant as the shooter, including a statement that these witnesses identified defendant to the police. Nothing in the evidence presented at trial supported these statements by the prosecutor. At trial, the State only presented the eyewitness testimony of Robinson. According to Robinson's testimony, three other individuals were present at the time of the shooting, Krisean Noble, Jahkayah Lewis, and "Woo," whose last name was unknown. The State's answer to discovery listed Noble and Lewis as potential witnesses.

¶ 52 The State responds on appeal that it was a reasonable inference that the State expected to call one or both of them to corroborate Robinson's testimony. The State's argument with respect to Noble, however, is contradicted by the record. In July 2013, six months prior to trial, an order was entered stating that Noble, who was apparently in custody on another case, was "no longer needed as a witness" in this case. The only possible witness remaining was Lewis. Other than her name on a potential witness list, there is nothing to suggest that the State expected to call Lewis as a witness. There is no subpoena for Lewis, or any other witness, that appears in the record on appeal.

¶ 53 The State cites this court's decision in *People v. Risper*, 2015 IL App (1st) 130993, as instructive. However, we find the facts of *Risper* to be distinguishable from the instant case. In *Risper*, the defendant argued on appeal that the prosecutor improperly commented in opening

statements that the defendant was identified by three eyewitnesses, but only two witnesses testified at trial. *Id.* ¶ 24. The prosecutor also elicited testimony from a police officer regarding the identification by three witnesses. *Id.* ¶ 30.

¶ 54 In considering the comment about eyewitnesses in opening statement, we noted that the defendant conceded that there was not any bad faith by the prosecutor in making the comment, and found no reason to disagree. *Id.* ¶ 28. We also concluded that the defendant did not suffer substantial prejudice because "there was significant, credible evidence at trial that tied defendant to this crime, including the identification of defendant by two different witnesses" and the trial court took curative action in instructing the jury to disregard comments not based on evidence. *Id.* ¶ 29. "The strength of the evidence against defendant and the curative effect of the jury admonishments convince us that defendant suffered no substantial prejudice." *Id.*

¶ 55 In contrast, and as we discuss later, the evidence in this case was closely balanced with the identification of the shooter in dispute. The comments at issue here were three references to other witnesses that spoke to police after the shooting and identified defendant. Instead, only Robinson identified defendant at trial as the shooter. Further, this identification was contradicted by Stokes, who testified for the defense that defendant was not the shooter. The facts of this case did not provide the "significant credible evidence" present in *Risper* to support a conclusion that defendant did not suffer prejudice.

¶ 56 Although the trial court did instruct the jury that opening statements were not evidence, and any statement not based on evidence should be disregarded, the giving of this instruction alone is not always curative. It is a factor to be considered in determining whether the defendant was prejudiced by the improper comments. *People v. Arroyo*, 339 Ill. App. 3d 137, 154 (2003). Although we find no deliberate misconduct on the prosecutor's part, and these other witnesses

were not referred to again, we will consider this error in the opening statement alongside the other errors alleged in closing arguments to determine if the cumulative effect of these errors deprived defendant of a fair trial. " 'Where there are numerous instances of improper prosecutorial remarks, a reviewing court may consider their cumulative impact rather than assessing them in isolation.' " *People v. Abadia*, 328 Ill. App. 3d 669, 684 (2001) (quoting *People v. Brown*, 113 Ill. App. 3d 625, 630 (1983), citing *People v. Whitlow*, 89 Ill. 2d 322, 341 (1982)); see also *People v. Smith*, 141 Ill. 2d 40, 64 (1990) (although the court found no deliberate misconduct in the prosecutor's erroneous opening remarks, it would still consider whether those remarks coupled with other comments prejudiced the defendant and warranted the reversal of defendant's conviction).

¶ 57 Defendant also briefly argues that the prosecutor improperly presented his own testimony before the jury when he described a motive for the crime. Specifically, the prosecutor stated in opening statements that defendant "was angry" because Robinson had been in a fight with defendant's brother. No testimony at trial established that defendant's motive for the shooting was because he was angry with Robinson over the fight. The circumstances of the fight were introduced through the testimony of Robinson and Jones. Defendant testified that he had heard about a fight, but stated that he was unaware that his brother had been involved. While not proven at trial, we do not find this comment to be reversible error because we do not find the single comment was attributable to deliberate misconduct by the prosecutor. See *Kliner*, 185 Ill. 2d at 127.

¶ 58 Next, we consider defendant's claims concerning the State's closing arguments.

¶ 59 Generally, a prosecutor is given wide latitude in closing arguments, although his or her comments must be based on the facts in evidence or upon reasonable inferences drawn

therefrom. *People v. Page*, 156 Ill. 2d 258, 276 (1993). "The prosecutor has the right to comment on the evidence and to draw all legitimate inferences deducible therefrom, even if they are unfavorable to the defendant." *People v. Simms*, 192 Ill. 2d 348, 396 (2000). "Whether a prosecutor's comments or arguments constitute prejudicial error is evaluated according to the language used, its relation to the evidence, and the effect of the argument on the defendant's right to a fair and impartial trial." *Id.* "In reviewing comments made at closing arguments, this court asks whether or not the comments engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from them." *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007). Stated another way, "[p]rosecutorial misconduct warrants reversal only if it 'caused substantial prejudice to the defendant, taking into account the content and context of the comment[s], its relationship to the evidence, and its effect on the defendant's right to a fair and impartial trial.' " *People v. Love*, 377 Ill. App. 3d 306, 313 (2007) (quoting *People v. Johnson*, 208 Ill. 2d 53, 115 (2004)). "If the jury could have reached a contrary verdict had the improper remarks not been made, or the reviewing court cannot say that the prosecutor's improper remarks did not contribute to the defendant's conviction, a new trial should be granted." *Wheeler*, 226 Ill. 2d at 123. As pointed out above, "The trial court may cure errors by giving the jury proper instructions on the law to be applied; informing the jury that arguments are not themselves evidence and must be disregarded if not supported by the evidence at trial; or sustaining the defendant's objections and instructing the jury to disregard the inappropriate remark." *Simms*, 192 Ill. 2d at 396-97.

¶ 60 Here, defendant argues that several comments in rebuttal closing argument were improper. First, defendant asserts that the prosecutor inaccurately recounted Robinson's testimony by stating that Robinson "ducked because a bullet went by him." Defendant points out

that Robinson's testimony was that he ducked when he heard a gunshot and turned, but he did not testify that he heard or saw a bullet near him. While it is technically correct that Robinson did not testify that a bullet went by him, the prosecutor's comment was not improper. The prosecutor is given latitude to make inferences based on the evidence. The evidence showed that Robinson ducked when he heard a gunshot, turned, and saw someone shooting in his direction. We find no error in this comment.

¶ 61 Next, defendant contends that the prosecutor improperly bolstered Robinson's credibility by commenting on Robinson's lack of criminal background.

> "Counsel brought up the fact that the Defendant has a conviction for theft of services. Theft of services, that is a crime of moral turpitude. That brings his morals into question.
>
> When Mr. Robinson took the stand you didn't hear me asking any questions about thefts of services or crimes of moral turpitude. And you can be sure that if he had any crimes that he'd been convicted of that have to do with your morals, [defense counsel] would have brought that out. He didn't."

¶ 62 Defendant argues that these comments were improper, specifically that they amount to an improper bolstering of the witness's credibility. "Generally, a prosecutor may not vouch for the credibility of a witness or express personal opinions about the case." *People v. Barraza*, 303 Ill. App. 3d 794, 797 (1999). Defendant also points out that prior to trial, the State filed a motion *in limine* to bar the introduction of evidence regarding defendant's lack of any prior felony convictions. See *People v. Flax*, 147 Ill. App. 3d 943, 952 (1986) (quoting 1 Wharton's Criminal Evidence § 230, at 499 (13th ed. 1972) (holding that "a criminal defendant cannot prove his good

character by showing that he 'had never been previously arrested, charged, prosecuted, or convicted of a crime' " by presenting evidence of specific acts or personal opinion). A defendant may introduce evidence of his good character in order to establish that his character traits are inconsistent with the commission of the crime charged only by introducing evidence of his general reputation for the specific character trait. *Id.*

¶ 63 Defendant argues that the State benefited from both preventing defendant from presenting character evidence by way of his lack of felony convictions, but then bolstering Robinson's character by arguing his lack of criminal convictions. Defendant also notes that this argument was presented in rebuttal to which no response may be given, and no evidence had been admitted regarding Robinson's lack of a criminal background.

¶ 64 The State responds that these comments were made in response to comments made by defense counsel during closing argument. It is correct that "[s]tatements will not be held improper if they were provoked or invited by the defense counsel's argument." *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). Additionally, "[a] closing argument must be viewed in its entirety, and the challenged remarks must be viewed in their context." *Id*.

¶ 65 Specifically, the State points to the following comments from defense counsel's closing argument as inviting his response. Defense counsel argued, "You heard from James Robinson, who clearly has, arguably at least has an interest in the outcome of the case as he claims that someone fired a gun in his direction." Later, counsel stated,

> "The state needs you to believe the testimony of James Robinson because they have the burden of showing that there was an intent to kill and that firearm was discharged. I'll ask you to go back and rack your brains through any evidence that came from

> anyone other than James Robinson that's consistent with the idea that Theathus White did these things that are alleged. And it's pretty clear that there isn't any credible evidence, other than what James Robinson said."

¶ 66 Finally, defense counsel argued, "There is a frightening absence of credible evidence to support both of the allegations that have been made against Mr. White."

¶ 67 Defense counsel's argument focused on the lack of corroborating evidence, including damage to a house or vehicle struck by a bullet and shell casings, Stokes's impartial testimony, and Robinson's credibility. Defense counsel observed that both Robinson and defendant had an interest in the outcome in the case as the victim and the defendant, respectively. In contrast, counsel noted that Stokes had no interest in the outcome of the case. The closing argument did not suggest that Robinson was lying. Rather, counsel pointed out that based on Robinson's testimony, the distance between the shooter and Robinson, as well as how long it had been since Robinson had seen defendant, raised questions about the believability of the witness. Counsel referred to the case as a "whondunit," and suggested it was more likely that Ashanti had committed the crime. Counsel maintained that the State had failed to prove defendant guilty beyond a reasonable doubt.

¶ 68 The State maintains that the prosecutor's comments noting Robinson's lack of criminal background were a response to defense counsel's argument that Robinson's testimony was not credible. " 'The prosecutor may comment on a witness's credibility only if the remarks are fair inferences from the evidence.' " *People v. Young*, 2013 IL App (2d) 120167, ¶ 47 (quoting *Barraza*, 303 Ill. App. 3d at 797). "It is, however, improper for the prosecutor to argue assumptions or facts not based upon the evidence in the record." *Kliner*, 185 Ill. 2d at 151.

¶ 69 We find the prosecutor's comments about Robinson's lack of a criminal background to be the improper bolstering of the State's witness. It was proper for the defense to challenge Robinson's credibility in closing and none of defense counsel's comments were improper. Further, it was also proper for the prosecutor to respond to attacks on credibility. However, no evidence was presented at trial about Robinson's criminal history. The prosecutor's comments related to facts not in evidence that served to bolster Robinson's testimony and are not fair inferences from the evidence presented. Accordingly, this comment by the prosecutor was improper.

¶ 70 Defendant next contends that the prosecutor misstated the law and impermissibly shifted the burden of proof to the defense when he argued that the jury had to convict defendant unless they believed Robinson had a reason to lie. A prosecutor's misstatements of law in closing arguments can be grounds for reversal. *People v. Young*, 347 Ill. App. 3d 909, 925 (2004). Comments distorting the burden of proof by improperly suggesting what the jury must find in order to find the defendant guilty fall within this restriction. *Id.* " 'The test is, of course, not which side is more believable, but whether, taking all of the evidence in the case into consideration, guilt as to every essential element of the charge has been proven beyond a reasonable doubt.' " *Id.* at 926 (quoting *People v. Crossno*, 93 Ill. App. 3d 808, 822 (1981)).

¶ 71 We note that this issue was presented in defendant's motion for a new trial, but was not objected to at trial. In rebuttal, the prosecutor made the following argument.

> "Finally, ladies and gentlemen of the jury, [defense] counsel began his opening statement by saying, you know, the state said this is easy. I wish it was that easy. Well, guess what, it

really is that easy. It really is that simple. Either you believe James Robinson or you don't.

If you believe James Robinson, if you watched him on that stand and listened to the way he testified and believed him when he said that he looked at the person that had shot at him and was holding the gun on that daylight day three houses away, where he could see his face, where it wasn't covered, where he saw a Band-Aid, which he still had on him two days later, if you believe James Robinson, then you need to convict the Defendant.

If you do not believe James Robinson, if you think James Robinson, and it came out of the Defendant as well, there is not [a] beef between them, they had no problems with each other, he didn't beat him out for quarterback or basketball team or steal a girl for him. What reason does James Robinson have to pin this attempt murder and shooting on the Defendant? You've heard no reason. There has not been one iota of evidence to say why James Robinson would make this up. Because that's what you're going to have to believe. That James Robinson took that stand and lied and pointed out the Defendant as the person that shot at him. Why? Why would he do that? There has been no evidence elicited from that witness stand to say why he would do that.

Why would he then, by pointing out the Defendant, let the person that actually tried to kill him go? What sense would that

> make? You looked at him. He came in here, he testified, he told the truth."

¶ 72 Although neither party has cited these cases, the Illinois Supreme Court has drawn "a distinction between situations where a prosecutor permissibly argues that a jury would have to believe the State's witnesses were lying in order *to believe* the defendant's version of events and where a prosecutor improperly argues that a jury would have to believe the State's witnesses were lying in order *to acquit* defendant." (Emphasis in original.) *People v. Banks*, 237 Ill. 2d 154, 185 (2010) (citing *People v. Coleman*, 158 Ill. 2d 319, 346 (1994)); see also *People v. Temple*, 2014 IL App (1st) 111653, ¶ 71. Put another way, the former argument constitutes permissible commentary on the evidence, the inferences which may be drawn from it, and witness credibility, but the latter argument distorts the proper burden of proof and ignores the possibilities that the jury could find that the State's witnesses were mistaken or that even if accepted as true, their testimony is insufficient to meet the reasonable doubt standard. See *id.* at 185.

¶ 73 The line between the permissible and impermissible comments about lying is subtle. The comments at issue in this case fall into the impermissible type of argument. See *People v. Cole*, 80 Ill. App. 3d 1105, 1108 (1980) (finding that it was a misstatement of law that prejudiced the defendant for the prosecutor to "to inform the jury that in order to believe the defense witnesses the jury must find that each of the State's witnesses were lying" when the witnesses did not contradict each other and could have been mistaken, rather than lying, in identifying the defendant). The defense's theory of the case was not that Robinson was lying about the shooting, but that his identification of defendant was not credible or even mistaken. Thus, it was possible for the jury to believe Robinson's testimony and still find him to be mistaken about the identity

of the shooter. Specifically, the jury would not have to find that Robinson was lying in order to believe the defense's theory, the permissible type of argument. Rather, this argument impermissibly suggested to the jurors that they were "going to have to believe" that Robinson made it up and lied on the stand. While the prosecutor did not explicitly state that the jury would have to find that Robinson lied to acquit defendant, the suggestion was there. The only evidence of defendant's participation in the crime was Robinson's testimony, making the question of whether to believe Robinson's testimony the turning point of the case. Significantly, if the jury did not believe Robinson, there was no other option other than to acquit because no physical evidence was presented, nor did any other witnesses testify for the State about the shooting.

¶ 74 Further, these statements mischaracterized the State's burden of proof. See *Young*, 347 Ill. App. 3d at 925. "[I]f you believe James Robinson, then you need to convict the Defendant," does not accurately detail the State's burden of proving guilt beyond a reasonable doubt. While Robinson's testimony was the basis of the State's case, it is improper to suggest that believing Robinson was all the jury was required to find to reach a guilty verdict. Even if this comment did not explicitly shift the burden to defendant, it inaccurately described what the State was required to prove, that defendant discharged a firearm with the specific intent to kill Robinson. Based on our review, we find these comments to be improper.

¶ 75 Because we have concluded that several of the comments made were improper, we consider whether the errors may be noticed under the first prong plain error exceptions to forfeiture. Under the first prong of plain error, we review whether a clear or obvious error occurred and whether 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. *Piatkowski*, 225 Ill. 2d at 565. "When error occurs in a close case, we will opt to 'err on the side of fairness, so

as not to convict an innocent person.' " *Piatkowski*, 225 Ill. 2d at 566 (quoting *Herron*, 215 Ill. 2d at 193).

¶ 76 The Illinois Supreme Court has instructed that when examining whether evidence is closely balanced, courts should engage in "[a] qualitative—as opposed to strictly quantitative—commonsense assessment of the evidence." *People v. White*, 2011 IL 109689, ¶ 139. Our examination of the evidence presented reveals that the instant case was so closely balanced that the errors alone may have threatened to tip the scales of justice against the defendant. *Piatkowski*, 225 Ill. 2d at 565. Here, Robinson's identification was the only evidence of defendant's participation in the shooting. There was no physical evidence or corroborating occurrence testimony. Robinson was questioned thoroughly on his familiarity with defendant. Robinson testified that prior to the shooting in 2011, he could not remember when he last saw defendant, even as far back as 2006. Robinson denied seeing defendant at school. In contrast, Stokes testified for the defense that she was present at the time of the shooting and observed someone other than defendant as the shooter. She described the shooter as short with light skin, but stated that defendant was tall with dark skin. Further, the motive for the shooting consisted of testimony about a fight that occurred earlier in the day between Robinson, an individual named Ashanti, and defendant's older brother. Defendant also testified on his behalf and denied possessing a gun and participating in the shooting. He stated that at the time of the shooting, he was with his friend Dominique Henderson.

¶ 77 Because the evidence was so closely balanced, we conclude that the cumulative errors engendered substantial prejudice against defendant such that it is impossible to say whether or not the verdict of guilt resulted from them. See *Wheeler*, 226 Ill. 2d at 123. "Misconduct in closing argument is substantial and warrants reversal and a new trial if the improper remarks

constituted a material factor in a defendant's conviction." *Id.* "If the jury could have reached a contrary verdict had the improper remarks not been made, or the reviewing court cannot say that the prosecutor's improper remarks did not contribute to the defendant's conviction, a new trial should be granted." *Id.* Here, we cannot say that the improper comments did not contribute to defendant's conviction.

¶ 78 In sum, the jury was improperly informed by the prosecutors (1) that other witnesses identified defendant as the shooter to police and would testify, (2) that Robinson had no criminal history when there was no evidence in this regard at trial, and (3) that the jury would have to believe that Robinson lied to find defendant not guilty. Given the closely balanced nature of the evidence at trial, we cannot conclude that these errors did not impact the jury's verdict or were cured by an instruction by the trial court. Accordingly, we hold that the cumulative effect of the errors constituted plain error and denied defendant a fair trial. We therefore reverse defendant's conviction and remand for a new trial.

¶ 79 Since we have reversed defendant's conviction and are remanding for a new trial, we need not consider defendant's remaining arguments on appeal, specifically the constitutionality of the exclusive jurisdiction provision of the Juvenile Court Act, and the retroactivity of section 5-4.5-105 of the Criminal Code.

¶ 80 Based on the foregoing, we reverse the decision of the circuit court of Cook County and remand for a new trial in accordance with this decision.

¶ 81 Reversed and remanded.