2016 IL App (1st) 142763-U

SIXTH DIVISION
August 26, 2016

No. 1-14-2763

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 11 CR 12720 (02)
	)	
MARVIN FIELDS,	)	Honorable Dennis J. Porter,
	)	Judge Presiding.
Defendant-Appellant.	)	

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Rochford and Justice Hoffman concurred in the judgment

ORDER

¶ 1 ***Held:*** We affirmed defendant's conviction and sentence for attempted murder over his numerous contentions of error. We vacated defendant's electronic citation fee and corrected the fines, fees and costs order to reflect credit for time defendant spent in pretrial custody.

¶ 2 Defendant Marvin Fields was charged by indictment with multiple felonies, including attempted murder of a peace officer. After a joint jury trial with a co-defendant who is not a party to this appeal, defendant was acquitted of attempted murder of a peace officer but convicted of the lesser-included offense of attempted murder, and sentenced to 37 years' imprisonment.

¶ 3 On appeal, defendant argues that: (1) the jury's verdict acquitting him of attempted murder of a peace officer demonstrated that the jury believed that he had an unreasonable belief in the need for self-defense and therefore lacked the requisite mental state to commit attempted murder, (2) he was denied the effective assistance of counsel due to his attorney's failure to request a jury instruction regarding unreasonable belief in the need for self-defense, (3) the State denied him a fair trial by inflaming the jury and overemphasizing forensic evidence, and (4) his 37-year sentence "shocks the conscience," violates principles of equal protection, and was excessive in light of his youth and criminal background. These arguments are meritless, however, and so we affirm defendant's conviction and sentence.

¶ 4 Defendant also claims that the trial court improperly levied a $5 electronic citation fee against him, and he further claims that the court should have offset $65 in fines for time defendant spent in pretrial custody. The State has conceded error on these points, and so we vacate the electronic citation fee and correct the fines, fees and costs order as set forth below.

¶ 5 BACKGROUND

¶ 6 In August 2011, defendant was charged by indictment with, *inter alia*, two counts of attempted murder of a peace officer (720 ILCS 5/8-4(a) (West 2010); 720 ILCS 5/9-1(b)(1) (West 2010)). The gist of defendant's indictment was that he tried to kill Chicago Police Officer Victor Portis by repeatedly firing a gun at him and that defendant knew or should have known that Portis was a peace officer.

¶ 7 At trial, Officer Portis testified that he and his partner, Officer Andrew Dennis, were working a "violence suppression mission" in Chicago's Roseland neighborhood on the evening of January 12, 2011. Their area of responsibility was a sector bounded by 119th Street, 120th Street, Wentworth Avenue, and State Street, which they patrolled in an unmarked police car with

"M" license plates driven by Officer Portis. The mission required that the officers blend in with the community, so Officer Portis was outfitted in civilian clothes—grey pants and a grey hoodie—along with a bullet-proof vest, a duty belt and service weapon. His police badge was displayed on a chain hanging from his neck.

¶ 8 According to Officer Portis, at some point during the patrol, he observed two individuals loitering in an alley between State Street and Lafayette Avenue. Officer Portis decided to conduct a field interview, so he approached the individuals in his car. One of the individuals immediately fled west in the direction of Lafayette Avenue; the other person remained behind. Officer Portis radioed other units assigned to the mission to notify them about the person who fled. An officer in one of those units obtained visual contact with the person and notified Officer Portis that the person had doubled back and was now heading in Officer Portis's direction. At that point, Officer Portis gave chase. The pursuit led Officer Portis to 120th Street and State Street, at which point he terminated the chase.

¶ 9 At that moment, Officer Portis looked to his left in the direction of 120th Street and saw two individuals running eastbound on 120th Street onto State Street. Officer Portis stated that these individuals were not the same people that he and Officer Dennis had encountered in the alley. When the individuals were a half block away from him, Officer Portis yelled that he was a police officer and instructed the individuals to "stop" and "get back." One of the individuals, whom Officer Portis identified as defendant, then stopped, "immediately" raised a gun, and fired it at Officer Portis.

¶ 10 Officer Portis returned fire and the individuals retreated behind a vehicle. Officer Portis then took cover behind a parked car and radioed for assistance. During this time, Officer Portis continued to "receive overlapping gunfire" that struck the parked car. Officer Portis continued to

return fire, and soon thereafter, Officer Dennis, driving in the police car, arrived at 120th and State. Officer Portis stopped firing and Officer Dennis drove toward him. At that point, the two individuals fled toward 120th Street and Lafayette Street.

¶ 11 On cross-examination, Officer Portis testified that he was not brandishing his gun when he initially saw defendant, and he denied saying "what the fuck are you doing" and "why the fuck you running" to defendant before the shooting began.

¶ 12 Officer Dennis testified that he was on patrol with Officer Portis around 9 p.m. on January 12, 2011, when they stopped to conduct a field interview with two individuals in an alley. One of the individuals fled and Officer Portis gave chase, leaving Officer Dennis alone to question the remaining person. Twenty to 25 seconds later, Officer Dennis heard gunfire, so he ended the field interview, got back into his police car, and drove eastbound on 120th Street towards State Street. There, he observed muzzle flashes from gunfire and saw Officer Portis crouching behind a car near 120th Place and State Street. After the gunfire ceased, Officer Dennis drove to Officer Portis and picked him up.

¶ 13 On cross-examination, Officer Dennis testified that during the time when he heard shots being fired, he did not hear anyone saying anything and he did not hear Officer Portis yelling that he was a police officer.

¶ 14 Officer Timothy Davis testified that on the night of January 12, 2011, he was patrolling the Roseland neighborhood in his police uniform in a marked police car with his partner, Officer Dana Shelton. Around 9 p.m., Officer Davis heard a call for assistance over his radio, so he went to 11925 South Perry Avenue. There, he encountered several officers who were struggling to detain co-defendant, who was resisting arrest. Officer Davis helped subdue co-defendant and then began canvassing the neighborhood looking for defendant.

¶ 15 After searching for approximately 20 to 25 minutes, Officer Davis walked into a gangway between two houses located at 12015 and 12011 South Lafayette Avenue. While there, Officer Davis saw a person inside the 12011 house look first at him, then to an area underneath the house's porch, and then back at Officer Davis. Officer Davis shined a flashlight underneath the porch, where he discovered defendant sitting on a jacket amongst a pile of trash and debris. Officer Davis ordered defendant to come out and placed him in custody. Officer Portis then arrived and identified defendant.

¶ 16 Defendant testified that sometime between 7:20 and 7:30 p.m. on January 12, 2011, he went to his brother's house at 12005 South Lafayette Avenue. Around 8:30 p.m., defendant left his brother's house and walked to a house located at 120th Street and State Street to purchase cigarettes from a woman. According to defendant, as he was leaving the cigarette house, he saw a person run out of a gangway eastbound on State Street. Defendant went into the street and saw a "heavyset, dark skinned" person wearing jeans and a hoodie with a "skull cap on his head" and "little twisties like dreads." In addition, the person was holding a gun. Defendant testified that he did not see the person wearing a police badge, handcuffs, walkie-talkies, or anything else that would have suggested to defendant that the person was a police officer.

¶ 17 According to defendant, while holding the gun, the person said "something along the lines of 'what the fuck you looking at' or 'what the fuck are you doing.' " The person then "slightly raised the gun – was in position to raise the gun." Defendant then "started shooting." Defendant testified that he began shooting because he "was in fear for [his] life." He explained that shootings were common in his neighborhood and that two of his friends had recently been shot in the same area. Defendant testified that he did not hear the person say "get back" or that he was a police officer.

¶ 18 After defendant fired his gun, he "took off running" to Lafayette Street and hid under a porch. Defendant explained that he ran and hid because "I seen two police cars as I was running, and I was terrified that the police was out here and I know I had just discharged a firearm. And I knew that the person that I just got through shooting at was still out there, too." The police apprehended defendant approximately 45 minutes later.

¶ 19 On cross-examination, defendant testified that he did not go back into the cigarette house or run to 120th Street when he saw the man with the gun. Defendant conceded that he ran past his brother's house in order to hide at the house located at 12011 South Lafayette Avenue. He admitted that he saw multiple police cars while he was running to Lafayette Avenue. Defendant further acknowledged that he falsely told a police detective that he was coming from a store when the shooting took place. Likewise, defendant admitted that he falsely told the detective that he saw two black males shooting at a man when he got to State Street.

¶ 20 The jury found defendant not guilty of attempted murder of a peace officer, but guilty of attempted murder. The court sentenced defendant to 37 years' imprisonment. This appeal followed.

¶ 21 ANALYSIS

¶ 22 A. Propriety of the Jury's Verdict

¶ 23 We first consider defendant's argument that the jury's verdict acquitting him of attempted murder of a peace officer demonstrated that defendant acted with an unreasonable belief in the need for self-defense. This argument is somewhat opaque, so to frame our discussion we simply quote from defendant's brief, omitting only citations to the record:

> "By acquitting defendant Fields of attempt first degree murder of a peace officer, the jury rejected Officer Portis's testimony that

> Fields knew Portis was a police officer, *i.e.* that Fields recognized Portis's badge and tactical gear or heard him yell 'police.' As such, the only version of events the jury could have accepted as true was Field's undisputed testimony that he saw a man in street clothes emerge from a gangway in the middle of the night. Given these facts, the jury must have concluded, at the very least, that Fields unreasonably believed that his life was in danger when he fired shots at Portis, especially since Fields's friends were attacked in the same manner a few days earlier. Since a person acting in unreasonable self-defense 'would not have the intent to unlawfully kill,' Fields did not commit attempt murder under the jury's interpretation of the facts. *People v. Lopez*, 166 Ill. 2d 441, 448-49 (1995)."

¶ 24 Neither the law nor the evidence support this argument. To begin, it has long been understood that an "[a]cquittal does not demonstrate a defendant's innocence." *People ex rel. City of Chicago v. Le Mirage, Inc.*, 2013 IL App (1st) 093547, ¶ 134. Rather, an acquittal "means only that the prosecution was unable to prove the defendant guilty beyond a reasonable doubt." *Id.* Therefore, we cannot accept defendant's argument that the jury's verdict demonstrates that it believed that defendant acted in imperfect self-defense. To the contrary, the only legally permissible inference that can be drawn from the fact that the jury acquitted defendant of attempted murder of a peace officer while simultaneously convicting him of attempted murder is that the State failed to prove beyond a reasonable doubt that defendant knew or should have known that the individual he was shooting at was a police officer.

¶ 25 The record amply supports that conclusion. Specifically, the record shows that the jury could have found reasonable doubt with respect to defendant's knowledge that Officer Portis was a police officer even without defendant's testimony. The State presented testimony from several Chicago police officers who explained that the police department was running a violence suppression mission on the night of January 12, 2011. Those witnesses, Officer Portis among them, testified that one of the mission's integral components was that the officers blend into the community so that they not be recognized as police officers. To that end, Officer Portis himself testified that he was wearing civilian clothes rather than his police uniform when the shootout occurred.

¶ 26 Moreover, even though Officer Portis testified that he yelled "police" at defendant and co-defendant both before and during the shootout, Officer Portis' partner, Officer Dennis, testified that he *did not* hear Officer Portis yelling anything when Officer Dennis arrived at the scene of the shootout. Thus, the jury had ample evidence—even without considering defendant's own testimony—from which it could have found that the State failed to prove beyond a reasonable doubt that defendant knew Officer Portis was a police officer. As such, there is no valid legal basis exists for us to conclude, as defendant claims, that the jury had to credit defendant's testimony in order to reach the verdict that it did.

¶ 27 To the contrary, the jury's verdict directly refutes defendant's argument. At trial, defendant testified that he acted in self-defense, and the jury received an instruction regarding self-defense. Since self-defense is an affirmative defense to first-degree murder, the jury's guilty verdict necessarily means that the jury found beyond a reasonable doubt that defendant did not act in self-defense. *People v. Jeffries*, 164 Ill. 2d 104, 127 (1995) ("Once an affirmative defense

is raised, the State has the burden of proving the defendant guilty beyond a reasonable doubt as to that issue together with all the other elements of the offense.").

¶ 28 Thus, even assuming that defendant's argument is legally proper, in order to accept defendant's ultimate conclusion, we would need to set aside the jury's finding that defendant did not act in self-defense. This court has the power to set aside a jury's verdict, but only when we are satisfied that no rational trier of fact could have found the defendant guilty beyond a reasonable doubt. See *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004). So long as " 'the record evidence could reasonably support a finding of guilt beyond a reasonable doubt,' " we may not overturn a jury verdict. *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 318 (1979)). And, in making that determination, we must view the record evidence "in the light most favorable to the prosecution." *Id.*

¶ 29 To obtain a conviction for attempted murder, the State must prove beyond a reasonable doubt that: "(1) the defendant performed an act constituting a substantial step toward the commission of murder, and (2) the defendant possessed the criminal intent to kill the victim." *People v. Petermon*, 2014 IL App (1st) 113536, ¶ 39 (internal quotation omitted). Illinois defines first degree murder as killing "without lawful justification." 720 ILCS 5/9-1(a) (West 2010). "One of the recognized justifications to first degree murder is the affirmative defense of self-defense." *Jeffries*, 164 Ill. 2d at 127. Before a court can instruct the jury on self-defense, the defendant must put forth some evidence showing that: "(1) force is threatened against a person; (2) the person threatened is not the aggressor; (3) the danger of harm was imminent; (4) the threatened force was unlawful; (5) he actually and subjectively believed a danger existed which required the use of the force applied; and (6) his beliefs were objectively reasonable." *Id.*

at 127-28. If the State negates even just one of these elements, the defendant's self-defense argument fails. *Id*. at 128.

¶ 30 The jury's guilty finding necessarily implies that it found beyond a reasonable doubt that defendant was not acting in self-defense. Accordingly, the question before us is whether any rational juror could have made that finding. Based on our review of the record, the answer is "yes."

¶ 31 The testimony of Officer Portis was in irreconcilable conflict with that of defendant, so the jury's resolution of the self-defense issue turned largely on its assessment of the credibility of defendant and Officer Portis. That alone poses a near insurmountable hurdle for defendant. The jury could view the witnesses and observe their demeanor, and thus make credibility determinations. The jury's credibility assessments are entitled to "great weight" and may be overridden on appeal only when "the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of defendant's guilt." *People v. Wheeler*, 226 Ill. 2d 92, 115 (2007).

¶ 32 Officer Portis and defendant offered contrasting and irreconcilable versions of their encounter. According to Officer Portis, he was standing in the street near the intersection of 120th Street and State Street after he stopped chasing an unidentified individual. Defendant and co-defendant then ran from 120th Street onto State Street in his direction and, after a few moments, defendant opened fire. According to defendant, after he left a house to buy cigarettes, he saw a man in the street with a gun in his hand. When the man saw defendant, he said "what the fuck are you looking at" and "slightly raised" the gun, at which point defendant opened fire.

¶ 33 Assuming for the sake of argument that "slightly" raising a gun and saying "what the fuck are you looking at" justifies the preemptive use of lethal force, then under defendant's

version of the facts, Officer Portis was the aggressor and threatened defendant with lethal force. If the jury believed this version of the facts, then it would have had to vindicate defendant's self-defense claim and acquit him. But the jury did not acquit defendant of attempted murder, despite his self-defense claim. Given the irreconcilable nature of defendant's and Officer Portis's accounts, it is reasonably clear to us that the jury credited Officer Portis's testimony and did not believe defendant's testimony.

¶ 34 The record provides ample support for such a finding by the jury. Although he was questioned by defendant's attorney at trial, Officer Portis was not impeached in any meaningful way, the jury had no reason to disbelieve his testimony. Defendant's testimony, by contrast, was riddled with inconsistencies and statements that cast doubt on his self-defense claim. First, defendant testified that he was at his brother's house on Lafayette Avenue before the shooting took place. According to defendant, after the shooting, he fled the scene and hid in an abandoned house on Lafayette Avenue because, *inter alia*, he was afraid that the person who he shot at was still at large. The jury, however, had good reason to disbelieve that testimony, since defendant acknowledged that in order to get to the abandoned house where he admitted that he hid outside for an extended period of time in cold temperatures, he had to actually pass his brother's house, where he presumably could have sought safe refuge.

¶ 35 Second, defendant admitted that he saw several police cars drive past him while he was hiding in the abandoned house. If, however, defendant had actually acted in self-defense and was actually afraid he would have a second encounter with the person at whom he shot, as he so testified, then his decision to remain hidden from police officers who could have taken him to safety defies all logic.

¶ 36 Third, contrary to Officer Portis, who testified that he was attacked by defendant and co-defendant and identified both individuals after they were apprehended, defendant testified that he was alone when the shooting took place. However, Officer Davis corroborated Officer Portis's version of events. Officer Davis testified that he responded to a call for assistance and helped detain co-defendant at a location near where the shooting took place, and then located and apprehended defendant hiding nearby approximately 25 to 30 minutes later.

¶ 37 Fourth, defendant admitted that he twice lied to police investigating the shooting. Specifically, defendant told the police that he was coming from a store, not the cigarette house, and he fabricated a story about seeing two black men shoot at another individual. In light of the foregoing, we find that a rational jury could have easily discredited defendant's testimony and, by extension, rejected his self-defense claim. As such, the record shows that the jury *did not*, contrary to defendant's claims, "implicitly credit [defendant's] testimony." See *People v. Williams*, 209 Ill. App. 3d 709, 721 (1991) ("When a defendant elects to explain the circumstances of what has occurred he is bound to tell a reasonable story or be judged by its improbabilities.").

¶ 38 The fact that the jury did not credit defendant's testimony is fatal to his claim that he acted under an unreasonable belief in self-defense. A defendant acts in unreasonable self – defense "when there is sufficient evidence that the defendant believed he was acting in self-defense, but that belief is objectively unreasonable." *Jeffries*, 164 Ill. 2d at 113. To find that defendant intended to kill Officer Portis, the jury necessarily had to have rejected defendant's testimony that he acted in self-defense, including his testimony that he was threatened by Officer Portis. The jury's verdict shows that the jury found that defendant did not "believe[] he was acting in self-defense" when he shot at Officer Portis, thus dooming his argument. *Id.*; see

People v. Guyton, 2014 IL App (1st) 110450, ¶ 46 (fact that the jury found the defendant guilty of attempted murder was evidence that the jury found the defendant acted with the requisite intent to commit the offense of attempted murder).

¶ 39 B. Ineffective Assistance of Counsel

¶ 40 We next consider defendant's argument that defense counsel was ineffective for failing to request an instruction on unreasonable belief in self-defense. To make out of claim of ineffective assistance of counsel, a defendant must satisfy the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a defendant must show that (1) counsel's performance was objectively unreasonable and (2) absent counsel's unprofessional errors, the result at trial would have been different. *Id.* at 687.

¶ 41 "The function of jury instructions is to convey to the jurors the law that applies to the facts so they can reach a correct conclusion." *People v. Hopp*, 209 Ill. 2d 1, 8 (2004). "If IPI instructions contain an applicable instruction on a subject about which the trial court determines the jury should be instructed, the trial court must use that instruction, unless the court determines that the instruction does not accurately state the law." *People v. Bannister*, 232 Ill. 2d 52, 81 (2008). Moreover, the trial court may, in its discretion, give a non-IPI instruction. *Id.* "Whether a court has abused its discretion will depend on whether the nonpattern instruction is an accurate, simple, brief, impartial, and nonargumentative statement of the law." *Id.*

¶ 42 Defendant cannot satisfy either *Strickland* prong. First, he cannot show that counsel's failure to ask for an instruction on unreasonable self-defense was constitutionally deficient because such a request would have been futile. In *People v. Lopez*, 166 Ill. 2d 441 (1995), the Illinois Supreme Court explained that the offense of attempted second-degree murder by virtue of imperfect self-defense does not exist:

> "[A] defendant intending to defend himself, although unreasonably, would not have the intent to unlawfully kill. Such a defendant would have the intent to lawfully kill using self-defense. The two different intents, intent to kill unlawfully and intent to kill in self-defense, cannot coexist in the same crime.
>
> Turning now to attempted second degree murder, we note that the crime of attempted second degree murder would require the intent to commit the specific offense of second degree murder. Thus, the intent required for attempted second degree murder, if it existed, would be the intent to kill without lawful justification, plus the intent to have a mitigating circumstance present. However, one cannot intend either a sudden and intense passion due to serious provocation or an unreasonable belief in the need to use deadly force. Moreover, concerning the mitigating factor of an imperfect self-defense, one cannot intend to unlawfully kill while at the same time intending to justifiably use deadly force. Thus, the offense of attempted second degree murder does not exist in this State." *Id*. at 448-49.

¶ 43 Accordingly, had defense counsel requested such an instruction, it would have been inconsistent with the law and the trial court would have been bound to reject it. See *Guyton*, 2014 IL App (1st) 110450, ¶ 46 ("Because there is no offense of attempted second degree murder, the jury could not be instructed and could not find the defendant guilty of attempted second degree murder of Flores based on the same unreasonable belief in the need for self-

defense.”). Therefore, defendant cannot show that counsel’s decision not to seek an instruction on imperfect self-defense was constitutionally deficient.

¶ 44 Second, defendant cannot show that the outcome at trial would have been different had an unreasonable self-defense instruction been granted because, as we explained above, the jury’s guilty verdict in the face of defendant’s self-defense claim is proof that the jury did not “believe he was acting in self-defense,” *Jeffries*, 164 Ill. 2d at 113—a finding necessary for a successful unreasonable self-defense argument. 720 ILCS 5/9-2(a)(2) (West 2010). Accordingly, defendant’s ineffective assistance of counsel claim fails.

¶ 45 C. Fair Trial

¶ 46 We next consider defendant’s argument that the State denied him his right to a fair trial by engaging in prosecutorial misconduct. Defendant specifically claims that the prosecutor (1) inflamed the passions of the jury by eliciting testimony from police officers about their awards and departmental commendations, mocking defendant during his cross-examination, and describing defendant as a terrorist during closing argument, and (2) overemphasized the import of forensic evidence during closing argument. We review these claims for plain error because defendant did not raise them in his post-trial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988).

¶ 47 The plain-error doctrine permits us to review unpreserved claims of error where (1) the evidence was closely balanced, regardless of how serious the error was, or (2) where a serious error occurred, regardless of how close the evidence was. *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). Defendant argues that both prongs of the plain-error doctrine apply here.

¶ 48 With respect to the first prong, defendant contends that the evidence was closely balanced because, in his view, “the jury credited [his] testimony that he did not know that he was shooting

at a police officer because they acquitted him on the attempt murder of a peace officer charge." We have explained that theory is incorrect. The jury's verdict finding defendant guilty of attempted murder means, as a matter of necessity, that the jury rejected his claim of self-defense—an outcome the jury could not have possibly reached had it "credited defendant's testimony." Accordingly, we reject defendant's suggestion that the evidence was closely balanced. As a result, defendant's first-prong plain-error argument fails.

¶ 49 Defendant's second-prong plain error argument is equally unavailing. To constitute second-prong plain error, a challenged error must be (1) "clear or obvious" and (2) "so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Criminal defendants have a constitutional right to a fair and impartial trial. That right is violated when the State engages in "pervasive prosecutorial misconduct which is designed to 'encourage[ ] the jury to return a verdict grounded in emotion, and not a rational deliberation of the facts.' " *People v. Johnson*, 208 Ill. 2d 53, 84-85 (2003) (quoting *People v. Blue*, 189 Ill. 2d 99, 139 (2000)). A defendant is entitled to reversal of a conviction based on prosecutorial misconduct only when the alleged misconduct "caused substantial prejudice to the defendant" and was a "material factor" in the conviction. *Id.* at 115.

¶ 50 We start with defendant's claim that the prosecutor engaged in misconduct during defendant's cross-examination. His claim centers around two lines of questioning. First, during cross-examination, the prosecutor asked defendant whether he was "a responsible gun owner." Defendant did not respond—the record indicates "no audible response"—and the prosecutor then said "you don't have to answer that." Second, during a later colloquy, the prosecutor commented

on defendant's courtroom attire, asking him "[t]hat's not how you wear clothes around Roseland; right?" Defense counsel objected and the trial court sustained the objection.

¶ 51 With respect to second line of questioning, we find that no error occurred. First, the trial court sustained defendant's objection to the question about his clothing. Moreover, the record shows that when the court instructed the jury, it specifically advised the jurors to disregard any questions to which an objection was sustained. The trial court's actions thus cured any error that the prosecutor might have committed by asking defendant about his clothes, thus vitiating his claim with respect to that question. *People v. Jacobs*, 405 Ill. App. 3d 210, 220 (2010).

¶ 52 With respect to the first line of questioning, we cannot conclude based on the cold record that the prosecutor was, as defendant claims, mocking defendant when it asked him if he was a responsible gun owner. Moreover, even if we could make such a determination, defendant would still not be entitled to relief under the plain-error doctrine because the stray question at issue here—which, notably, went unanswered—could not have been a "material factor" in defendant's conviction. *Johnson*, 208 Ill. 2d at 115. Instead, defendant's conviction likely resulted from the numerous inconsistencies in his testimony which we recounted above, including his testimony in which he admitted to twice telling the police two material lies—one regarding his whereabouts before the shooting, and another in which defendant told the police a fabricated story about seeing a shooting nearby.

¶ 53 Defendant's claim that the prosecutor attempted to inflame the jury during closing arguments involves three comments from the State's argument. First, during the State's opening argument, the prosecutor stated:

> "It almost became a date in spades by Officer Portis's gravestone because this defendant and his partner in crime decided to terrorize

> the streets of Roseland. This is not Iraq. This is not the streets of Baghdad but they turned it into a war zone. They turned it into a war zone when they decided to light up the street of 120th and State Street and tried to kill Officer Portis."

Second, during rebuttal argument, the prosecutor stated, "Officer Portis was out there trying to protect the neighborhood of Roseland from people like the defendant." Finally, at the end of the State's argument, after asking the jury to find defendant guilty, the prosecutor stated, "you can come back in here with your head held high knowing that you did the right thing today."

¶ 54 "A prosecutor has wide latitude in making a closing argument and is permitted to comment on the evidence and any fair, reasonable inferences it yields." *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). "[C]losing arguments must be viewed in their entirety, and the challenged remarks must be viewed in context." *Wheeler*, 226 Ill. 2d at 122. "Statements will not be held improper if they were provoked or invited by the defense counsel's argument." *Glasper*, 234 Ill. 2d at 204. When reviewing comments made during closing argument, the relevant question is whether the prosecutor's comments "engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from them." *Id.* at 123. Substantial prejudice exists when "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.*

¶ 55 When judged in light of the foregoing principles and read in their proper context, it is clear that none of the challenged comments were improper. First, the prosecutor's statement that

defendant was "terroriz[ing] the streets of Roseland" was a fair comment on the State's evidence, which showed that defendant engaged in an unprovoked armed assault against an unidentified person in a residential neighborhood in Chicago. Second, the prosecutor's statement during rebuttal that Officer Portis was "out there trying to protect the neighborhood of Roseland from people like the defendant" was a fair response to defendant's own closing argument, during which defendant reiterated his testimony that Officer Portis was the initial aggressor.

¶ 56 Third, the prosecutor's statement to the jury at the end of rebuttal telling them they could "come back *** with your head held high" if they returned a guilty verdict was not improper. The supreme court has long held that "[i]t is entirely proper for the prosecutor to dwell upon the evil results of crime and to urge the fearless administration of justice." *People v. Harris*, 129 Ill. 2d 123, 159 (1989). Here, the prosecutor's statement came at the end of the State's rebuttal after the prosecutor had summarized the evidence and responded to defendant's closing argument. When viewed in this context, it is clear that the prosecutor was simply urging the "fearless administration of justice" (*Harris*, 129 Ill. 2d at 159) rather than attempting to "incite the jury to act out of undifferentiated passion and outrage, rather than reason and deliberation" (*People v. Johnson*, 208 Ill. 2d 53, 79 (2003)).

¶ 57 Finally, we consider defendant's contention that the State violated his right to a fair trial by eliciting testimony from Officers Portis, Dennis, and Skapurinski, regarding departmental awards and honors they received during their careers. As stated above, the introduction of this testimony can constitute second-prong plain error only if its admission was (1) clearly or obviously erroneous and (2) the error was so serious that it compromised "the integrity of the judicial process." In support of his argument, defendant cites *People v. Roman*, 323 Ill. App. 3d 988 (2001).

¶ 58 In *Roman*, the defendant was tried and convicted of unlawful use of a weapon and aggravated assault of a peace officer. *Id*. at 990. At trial, the officer who the defendant allegedly assaulted testified that he received a valor award from the police department as a result of the shooting for which defendant was currently on trial. *Id*. at 992. On appeal, this court held that the admission of that testimony was erroneous because it (1) constituted hearsay and (2) was not relevant because it did not "tend to prove that the defendant committed either of the offenses charged or to disprove the defendant's testimony." *Id*. at 998-99. We find that reasoning persuasive, and therefore hold that it was the testimony at issue here was clearly improper because it was not relevant to any issue at trial.

¶ 59 That, however, is as far as *Roman* can carry defendant, and it is not far enough. In *Roman*, we found that the evidence was closely balanced and thus reviewed the defendant's claim, but only under the first-prong of the plain error doctrine. *Id*. at 997. *Roman*, therefore, *does not* stand for the proposition that the introduction of testimony like that at issue in this case compromises the "integrity of the judicial process." *Piatkowski*, 225 Ill. 2d at 565.

¶ 60 Generally speaking, an error will be found to erode the integrity of the judicial process when it (1) is structural, such as when a defendant suffers a complete denial of the right to counsel, (see *People v. Thompson*, 238 Ill. 2d 598, 613 (2010)), or (2) results in a complete or near total deprivation of a constitutional right, such as when a defendant is convicted of an offense that is not a lesser-included offense of the charged offense (see *People v. Clark*, 2014 IL App (1st) 123494, ¶ 41). The error which defendant complains of here—the introduction of irrelevant testimony—is nothing like a structural error, and it did not come close to effecting a complete or near-total deprivation of his right to a fair trial. His second-prong plain-error argument therefore fails.

¶ 61 Finally, we consider defendant's contention that the prosecutor misstated forensic evidence during closing argument. During closing arguments, after summarizing the forensic evidence in an effort to discredit defendant's testimony, including his testimony that he was alone when the shooting took place, the prosecutor stated, "The point is the science proves that everything [defendant] said was garbage. You can take his testimony and throw it away. It doesn't mean anything." Defendant contends that statement was improper "since the forensic evidence sheds no light on what [defendant] was thinking at the time of the incident."

¶ 62 At trial, Nancy DeCook, an evidence technician, testified that she went to the house where defendant was apprehended and retrieved a Sig Sauer pistol from the south window. The Sig Sauer was later identified as defendant's gun. DeCook also retrieved a Smith and Wesson pistol near the north window of the house. Marc Pomerance, a forensic scientist with the Illinois State Police, testified that he examined 15 cartridges inventoried from the crime scene. Pomerance's examination revealed that ten cartridges were fired from defendant's Sig Sauer pistol and five cartridges were fired from the Smith and Wesson pistol that DeCook recovered from the north window area of the house at 12011 South Lafayette Avenue. Furthermore, the evidence showed that while co-defendant was fleeing the police, he discarded a glove that he had been wearing. The glove tested positive for the presence of GSR.

¶ 63 Prosecutors "may comment on the evidence and on any fair and reasonable inference the evidence may yield." *People v. Runge*, 234 Ill. 2d 68, 142 (2009). As we noted, defendant testified that he was alone when the shooting occurred, while Officer Portis testified that defendant was with co-defendant. The forensic evidence to which the prosecutor referred undermined defendant's testimony. Based on our review of the evidence adduced at trial and the totality of the prosecutor's closing argument, we find that the challenged statement was a fair

comment on the evidence. Accordingly, the statement was not improper and did not deny defendant his right to a fair trial.

¶ 64 Finally, defendant contends that trial counsel's failure to preserve the errors discussed above amounted to ineffective assistance of counsel. However, for the reasons we rejected defendant's arguments above, his ineffective assistance claim also fails.

¶ 65 D. Constitutionality of Illinois's Sentencing Statute

¶ 66 We next consider defendant's claim that his 37-year sentence was unconstitutional. Defendant first claims that his sentence violates the proportionate penalties clause of the Illinois Constitution and the Eighth Amendment to the United States Constitution. See Ill. Const. 1970, art. I, § 11; U.S. Const., amd. VIII. Defendant argues that, if he had actually killed Officer Portis, his hypothetical crime, first-degree murder, would have been mitigated down to second-degree murder because he acted in imperfect self-defense, resulting in a sentencing range of 4 to 20 years' imprisonment. See 730 ILCS 5/5-4.5-30(a) (West 2010). Since, however, defendant was convicted of attempt murder, with a mandatory firearm enhancement, he faced a sentencing range of 21 to 45 years' imprisonment. See 720 ILCS 5/8-4(c)(1) (West 2010) (attempted murder is a Class X felony); 730 ILCS 5/5-4.5-25(a) (West 2010) (the sentencing range for Class X felonies is 6 to 30 years' imprisonment); 720 ILCS 5/8-4(c)(1)(B) (West 2010) (mandatory 15 year sentence enhancement if defendant commits attempted murder while armed with a firearm). In other words, according to defendant, Illinois law subjected him to 17 extra years in prison for not killing Officer Portis. As such, defendant concludes that his sentence for attempted murder is disproportionate to the sentence the legislature has imposed for second-degree murder.

¶ 67 We rejected a similar argument in *People v. Lauderdale*, 2012 IL App (1st) 100939. In that case, the defendant was convicted of attempted first-degree murder and sentenced to 31

years' imprisonment. *Id.* ¶ 40. On appeal, the defendant claimed that his sentence "shocks the moral sense of the community" because it was "more severe than the sentence of 20 years he would have received for second degree murder" had he killed his victim. *Id.* We disagreed:

> "[T]he flaw in defendant's argument is that the offense attempted was first degree murder, not second degree murder. As we have already concluded, no mitigating circumstances were present because the evidence in this case does not support a finding that defendant acted under a sudden and intense passion resulting from serious provocation. If defendant had killed Smith, defendant would have been charged with first degree murder. Accordingly, defendant's argument fails." *Id.*

¶ 68 Similarly, the flaw in defendant's argument here is that the jury quite clearly rejected defendant's claim that he acted in self-defense. By logical necessity, his assertion that he acted in imperfect self-defense cannot gain traction since that claim would require a finding that defendant believed self-defense was necessary—a finding foreclosed by the jury's rejection of his self-defense claim. Thus, just as in *Lauderdale*, "no mitigating circumstances were present" in this case. *Id.* Simply put, defendant's sentence is not disproportionate to a hypothetical offense that he could not have committed, based on the facts as found by the jury.

¶ 69 Separately, defendant contends that the firearm enhancement, pursuant to which 15 years of his 37 year sentence are attributable, "renders [his] sentence grossly disproportionate." Over a decade ago, in the context of a *facial* challenge, our supreme court held that "it is neither cruel nor degrading, nor would it shock the moral sense of the community, to apply the 15/20/25–to–life enhancements to attempted first degree murder. *People v. Sharpe*, 216 Ill. 2d 481, 524

(2005) (citing *People v. Morgan*, 203 Ill. 2d 470, 488 (2003)). Defendant purports to be making an as-applied challenge to the firearm enhancement. He appears to argue that, had he killed Officer Portis, he would have only been convicted of second-degree murder and thus the firearm enhancement would not have applied. But as we have explained, defendant was properly convicted of attempted murder, so this argument is completely without merit.

¶ 70 We next turn to defendant's due process challenge. Defendant, invoking both the Illinois Constitution and the Fourteenth Amendment to the United States Constitution (see Ill. Const. 1970, art. I, § 2; U.S. Const, amd. XIV), contends that "the harsh treatment of [his] attempt murder conviction denied him due process of law."

¶ 71 "To pass muster under the due process clause, a penalty must be reasonably designed to remedy the particular evil that the legislature was targeting." *Sharpe*, 216 Ill. 2d at 531. That threshold is easily met here. As explained, second-degree murder is defined in a manner that takes into consideration the fact that a mitigating factor existed at the time of the crime which lessened the degree of the defendant's criminal culpability. Since, however, a defendant cannot intend for a mitigating factor to exist when he or she *attempts* to kill someone, a conviction for attempted murder reflects a greater degree of criminal culpability than second degree murder, even though the victim dies in the latter offense and survives in the former. Because a conviction for attempted murder involves a higher degree of culpability than second-degree murder, we find that penalty for attempted murder is "reasonably designed to remedy the particular evil that the legislature was targeting." *Id.* at 531. Accordingly, defendant's due process argument fails.

¶ 72 We next consider defendant's argument, brought pursuant to the equal protection clauses of the Illinois Constitution and fourteenth amendment to the United States Constitution (see U.S.

Const., amd. XIV; Ill. Const. 1970, art. I, § 2) that his sentence denied him equal protection of the law because "a defendant who shoots and kills receives a far less harsh sentence than one who fails to kill."

¶ 73 "The equal protection clause requires that the government treat similarly situated individuals in a similar fashion, unless the government can demonstrate an appropriate reason to treat them differently." *People v. Masterson*, 2011 IL 110072, ¶ 24. If, as here, a law does not involve a suspect class of individuals or burden the exercise of a fundamental right, rational basis applies and the challenged law will be upheld as long as the it "bears a rational relationship to a legitimate government purpose." *Id.*

¶ 74 Here, defendant cannot show that he, a person convicted of attempted first-degree murder, is similarly situated to a person who was convicted of second-degree murder. As we have explained, a conviction for attempted murder reflects a greater degree of unmitigated criminal culpability than a conviction for second-degree murder, since second-degree murder is defined to take into account the existence of mitigating factors. Accordingly, "[b]y the very definition of the [attempted murder and second-degree murder], those accused of one would be dissimilarly situated from those accused of the other." *People v. Bradley*, 79 Ill. 2d 410, 417 (1980). Therefore, defendant's equal protection argument fails. See *People v. Whitfield*, 228 Ill. 2d 502, 513 (2007) (rejecting defendant's equal protection argument where the defendant failed to show he was similarly situated to comparison group).

¶ 75 E. Excessive Sentence

¶ 76 We next consider defendant's contention that his 37-year sentence was excessive in light of his youth and minimal criminal record. We review this issue for plain error because defendant did not file a motion reconsider sentence. See *People v. Reed*, 177 Ill. 2d 389, 394 (1997). "In

the sentencing context, a defendant must *** show either that (1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing." *People v. Hillier*, 237 Ill. 2d 539, 545 (2010).

¶ 77 Defendant has raised arguments under both prongs of the plain-error doctrine. With respect to the first prong, he claims that the evidence at sentencing was close because evidence regarding the seriousness of his offense was "nullified" because defendant did not know Officer Portis was a police officer and no one was injured during the shooting. Defendant further contends that the trial court did not "explicitly" consider evidence regarding his youth and minimal criminal background. Defendant's argument with respect to the second prong of the plain-error doctrine is a tangential to his first-prong argument. He argues that sentencing errors are "fundamental errors" because they implicate his right to liberty.

¶ 78 We find that no error occurred during sentencing and therefore reject both of defendant's plain-error arguments. "It is well settled that the trial court has broad discretionary powers in imposing a sentence [citation], and the trial court's sentencing decision is entitled to great deference." *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). As such, we may set aside a sentence only when it constitutes an abuse of discretion. *People v. Velez*, 388 Ill. App. 3d 493, 514 (2009). The trial court is afforded such deference because the trial court "has the opportunity to weigh such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age." *Stacey*, 193 Ill. 2d at 209. We may not substitute our judgment for that of the trial court's merely because we would have weighed the sentencing factors in a different manner. *Id.* "[A] sentence within the statutory limits will only constitute an abuse of discretion if 'it is manifestly disproportionate to the nature of the offense.' " *People v.*

Martin, 2012 IL App (1st) 093506, ¶ 47 (quoting *People v. Jackson*, 375 Ill. App. 3d 796, 800 (2007)).

¶ 79 When imposing a sentence, the trial court "need not articulate the process by which it determines the appropriateness of a given sentence." *People v. Wright*, 272 Ill. App. 3d 1033, 1045-46 (1995). The trial court is not required to "expressly indicate its consideration of mitigating factors." *Id*. Instead, "[w]here mitigating evidence is before the court, it is presumed the court considered that evidence absent some contrary indication other than the sentence imposed." *People v. Markiewicz*, 246 Ill. App. 3d 31, 55 (1993); see also *Wright*, 272 Ill. App. 3d at 1046 ("Where the sentencing court examines a presentence report, it is presumed that the court considered the defendant's potential for rehabilitation.").

¶ 80 At sentencing, the trial court noted that it considered defendant's presentence report, which indicated his youth and criminal background. Furthermore, immediately before announcing its sentence, the court stated that it had considered "the nature and circumstances of the offense, the character and background of the defendant, [and] the arguments of counsels." Finally, defendant's sentencing range was 21 to 45 years' imprisonment, so his 37-year sentence was well within the guideline range. The trial court did not abuse its discretion by imposing a 37-year sentence on defendant. Accordingly, defendant's plain-error arguments fail.

¶ 81 Finally, we note that defendant has argued that his trial counsel was ineffective for failing to file a motion to reconsider sentence. We reject this argument. Because, as we have explained, the sentence imposed by the trial court did not constitute an abuse of discretion, a motion to reconsider sentence would have been futile.

¶ 82 F. Fines and Fees

¶ 83 The trial court entered a fines, fees and costs order against defendant for $699. As relevant here, defendant was assessed the following fines and fees: a $50 fine for being found guilty of a felony (55 ILCS 5/5-1101(c)(1) (West 2010)), a $15 state police operations fee (705 ILCS 105/27.3a-1 (West 2010)), a $5 electronic citation fee (705 ILCS 105/27.3e (West 2010)), a $2 public defendant records automation fee (55 ILCS 5/3-4012 (West 2010)), and a $2 State's attorney records automation fee (55 ILCS 5/4-2002.1 (West 2010)).

¶ 84 The record shows that defendant served 1,117 days in pretrial custody. Section 5/110-14(a) of the Code of Criminal Procedure provides that "[a]ny person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of $5 for each day so incarcerated upon application of the defendant. However, in no case shall the amount so allowed or credited exceed the amount of the fine." 725 ILCS 5/110-14(a) (West 2010). The State concedes, and we agree, that defendant is entitled to $5885 ($5 x 1,177 days) in pre-sentence incarceration credit. Accordingly, defendant is entitled to an offset of $65 (applying to his $50 fine for being found guilty of a felony and his $15 police operations fee). See *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 31 (holding that the police operations "fee" is actually a fine).

¶ 85 Defendant further contends, and the State agrees, that defendant's $5 electronic citation fee should be vacated. We agree. Section 105/27.3e of the Clerks of Courts Act provides that the electronic citation fee "shall be paid by the defendant in any traffic, misdemeanor, municipal ordinance, or conservation case upon a judgment of guilty or grant of supervision." 705 ILCS 105/27.3e (West 2010). Defendant was found guilty of a felony. Accordingly, the electronic citation fee could not be imposed on him. See *People v. Moore*, 2014 IL App (1st) 112592-B, ¶ 46 (stating that the electronic citation fee does not apply to felonies). Finally, we note that,

although defendant initially claimed in his appellate brief that the public defender and State's attorney automation fees were improperly levied against him, he has conceded in his reply brief that those fees were properly levied against him in light of *People v. Bowen*, 2015 IL App (1st) 132046, ¶¶ 62-64.

¶ 86 Based on the foregoing, we vacate defendant's $5 electronic citation fee and direct the clerk of the circuit court to correct the fines, fees and costs order to reflect $629 in fines, fees and costs.

¶ 87 CONCLUSION

¶ 88 For the foregoing reasons, we affirm defendant's conviction and sentence. We vacate defendant's $5 electronic citation fee and correct the fines, fees and costs order to reflect $629 in fines, fees and costs.

¶ 89 Affirmed in part; vacated in part; mittimus corrected.