2012 IL App (2d) 100893-U
No. 2-10-0893
Order filed March 12, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 10-CF-343
ELVIN R. DOOLEY,	)	Honorable James K. Booras,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Justices Burke and Schostok concurred in the judgment.

ORDER

Held: Due to errors of the trial court improperly admitting weapons-related evidence and the State's improper closing argument, we reversed defendant's conviction and remanded the case for a new trial.

¶ 1 After a jury trial, defendant, Elvin R. Dooley, was convicted of aggravated cruelty to an animal (510 ILCS 70/3.02 (West 2010)) and sentenced to 20 months' imprisonment. Defendant makes several arguments as to why he was denied a fair trial: (1) the trial court erred by admitting weapons-related evidence that was not related to the charges at issue; (2) he was deprived of his right to present a defense due to various rulings by the court; (3) the prosecutor engaged in numerous

instances of misconduct; and (4) the trial court erred by failing to respond to repeated inquiries by the jury. We reverse and remand for a new trial.

¶ 2 I. BACKGROUND

¶ 3 On February 24, 2010, a grand jury indicted defendant on one count of animal torture (510 ILCS 70/3.03(a) (West 2010)), one count of aggravated cruelty (510 ILCS 70/3.02 (West 2010)), and 18 counts of possession of a firearm without a requisite firearm owner's identification (FOID) card (430 ILCS 65/2(a)(1) (West 2010)). The charges stemmed from the shooting of a black terrier type of dog in a field near defendant's home in Grayslake on January 26, 2010. In a separate indictment, defendant was also charged with several counts of unlawful use of a weapon by a felon.

¶ 4 Prior to trial, defendant moved *in limine* to allow certain testimony of Renee Wright, an employee of Lake County Animal Care and Control. Defendant intended to call Wright to show that on several occasions, he had contacted that control unit to safely remove stray animals found on his property. According to defendant, it was essential for the defense to be able to question Wright about her interactions with defendant in removing animals from his property because the State would try to prove that defendant intentionally inflicted extreme physical pain and suffering to a stray dog in causing its death. The court reserved ruling on defendant's motion, stating that it may or may not be relevant depending on the State's evidence.

¶ 5 In addition, defendant moved to sever the FOID charges from the animal torture and cruelty charges. The State objected to this motion, arguing as follows. A State witness had seen defendant raise a gun up to his eyes, point it out the back window of his house, and fire it. When the police went to defendant's house two days after the incident, defendant had moved all of his weapons to a friend's house. The State did not know which gun defendant had fired, so it needed to show its

witness the guns and have her try to identify which one was used. The court responded that the State was "not going to bring 18 guns in and say pick which gun." Claiming that it was entitled to bring in the weapons at trial, the State responded that it would file a certificate of impairment. The court admonished the State that it was insisting on this method to "unduly prejudice" defendant, and that there was "no reason whatsoever to bring in 18 guns" and tell the witness to pick the one that defendant allegedly fired at the dog. The court granted defendant's motion to sever the FOID charges.

¶ 6 At the next hearing, the State admitted that it had overreacted and was now able to narrow down the gun used to between four and six guns. The court replied that the State had missed the point of its ruling. Because only one gun was used in the shooting, the prejudicial effect of bringing in more than one gun outweighed any probative value.

¶ 7 The case was subsequently transferred to another judge, and the new judge reconsidered the original judge's ruling regarding the admission of guns. The State advised the court that its witness had seen a scope on the gun used by defendant. Based on this information, the court ruled that the State could introduce three guns with scopes into evidence.

¶ 8 In addition, defense counsel asked the court to rule on its motion *in limine* to allow Animal Care and Control witness Wright to testify. Wright would testify that she had responded to defendant's residence after he had captured "stray animals from dogs to other animals" and "held them for animal control to come and take them versus harming them." Defense counsel argued that Wright's testimony was "extremely relevant" to disprove that defendant intentionally harmed the dog." The court did not find Wright's testimony relevant and denied the motion.

¶ 9 A. Trial

¶ 10 1. Opening Arguments

¶ 11 During opening arguments, the State advised the jury that it would provide evidence showing the following. A "black terrier chow dog" was discovered outside of the Save-A-Pet shelter in the early morning hours of January 26, 2010. The employees at the shelter tried to catch the dog, but to no avail. The dog then ran across the street and was spotted in a field in the vicinity of the shelter. One of the shelter employees drove to that location and saw the dog. As she drove up, she heard two shots fired. There was only one house in the area, which she could see into through the window. Looking into the house, she saw defendant hold up a rifle, put the scope to his eye, and fire a third shot out the back window in the direction of the dog. She knocked on defendant's door to try to get him to stop shooting and then ran out back to get the dog. The dog, lying in a pool of blood, was taken to the animal emergency clinic, but not in time.

¶ 12 Three days later, a warrant was issued for defendant's arrest, and detectives went to his home. Though the detectives found manuals for guns, cases for guns, ammunition for guns, and reloading equipment for guns, there were no guns at defendant's house. Defendant admitted to detectives that he had moved all of his guns. At this point, defense counsel objected. In overruling the objection, the court cautioned the State in a sidebar conference to not refer to the number of guns. The State continued that defendant admitted to detectives that he had moved all of his guns to a friend's house.

¶ 13 The defense theory was that defendant's backyard contained different targets, such as plywood and cans on top of a barrel, and that the shooting was an accident. Defendant opened his door to a woman saying, " 'You just shot my dog,' " to which he immediately responded, " 'I wasn't shooting at a dog. Come in, I'll show you exactly what I was doing.' " Defense counsel argued that the woman did not want to hear "that" and went immediately to retrieve the dog.

¶ 14 2. State's Witnesses

¶ 15 Save-A-Pet employee Marilyn McLin testified first on behalf of the State. On January 26, 2010, she arrived at the shelter at 5:30 a.m. When she pulled into the parking lot, a black dog that had been sitting by a rock ran up to her car. Next to the dog was a bag of dry dog food and dog toys. McLin tried to catch the dog several times, but each time it would run away. As more staff arrived, they opened the doors to the shelter and put out food for the dog. The dog ate but could not be caught.

¶ 16 Village of Round Lake Public Works employee Craig Harrison testified next. He was working at the public works building around 7:45 a.m. on January 26 when he saw a little black dog out in a nearby field, along with a coyote. Fearing that the coyote would "chew up" the dog, Harrison and his co-worker drove out to the area to scare away the coyote. As they tried to catch the dog, it ran into the woods and they could not find it. Later, as they were driving, they saw the dog again around 11:45 a.m. They parked and tried to catch the dog again, but it ran off into the field.

¶ 17 Around 2:15 or 2:30 p.m. that afternoon, he and his partner were back at the public works building and saw a white SUV in the area. Harrison thought the person may be looking for the dog, so he and his co-worker drove to the SUV and saw the driver, Dana Deutsch, running towards the dog in the field. The dog was "down." Harrison drove into the field and got to the dog first. Its chest and neck were covered with blood. Deutsch, who was "crying hysterically," said, " 'This SOB shot the dog.' " Harrison replied, " 'That's not good, we're in the line of fire.' " Harrison put the vehicle to the side because "if someone was shooting at a dog, we didn't want to get shot at." When asked what he observed about Deutsch, Harrison responded that "[s]he was crying profusely. She couldn't talk to the 9-1-1 operator like I stated before, and I had to finish the call for her and let the

9-1-1 operator know where we were." The dog took a "couple deep gasps of air." Harrison's co-worker put the dog in the back of their truck, transferred it to Deutsch's SUV, and then she drove the dog to the emergency vet.

¶ 18 Lake County Deputy Sheriff Scott Pacholsky testified that he and Deputy Lechner responded to the scene. They approached defendant's house and knocked on the door but there was no response. They then peered through some windows of the house, and Deputy Lechner saw a large gun in one of the rooms.

¶ 19 Deputy Pacholsky then went to the emergency vet and spoke with Deutsch. When asked if he made any observations of Deutsch, he said "yes, I did. She was hysterical, sobbing." Defense counsel objected, and the trial court sustained the objection, telling the State to rephrase. The following colloquy then occurred:

"Q. You stated that [Deutsch] was crying?

A. Yes.

Q. Did you notice anything else besides crying?

A. No, mostly just crying.

Q. Was she crying the whole time you spoke with her?

A. The majority. It took me a while to have her calm down to get a statement."

¶ 20 Save-A-Pet employee Deutsch testified regarding the shelter's continual efforts on January 26 to capture the dog, which she described as a 35 to 45-pound schnauzer mix. Because it was cold that day, the shelter staff worried about the dog freezing. Around 2:45 p.m., Deutsch received a report from the shelter administrator regarding a sighting of the dog, and she drove her SUV to that location, which was less than one mile from the shelter. At this point, it had been about eight hours

since the dog was first found, and the dog had been without resources because it had not taken any food or water that was put out by the shelter staff.

¶ 21 Deutsch drove her SUV by the only house in the area and spotted the dog, standing in a nearby field. In backing up her SUV to better access the dog, Deutsch heard a gun shot, followed by another shot. Deutsch backed up more to see what was happening and looked through the front window of the house. Inside, defendant raised his arms and using a scope on the gun, took aim and fired a third shot. At this point, Deutsch exited her SUV, ran up to the house, and pounded on the door. Defendant opened the door, and she screamed " 'you're shooting my dog.' "

¶ 22 Deutsch then got back in her SUV, drove to the field, and ran to the dog, which was covered in blood. As she ran, she called 911. At the same time, a public works truck pulled up beside her and one of the workers completed the 911 call for her. They transported the dog to her SUV, and she drove to the emergency vet.

¶ 23 Deutsch identified pictures of the scene after the dog had been shot. One of the pictures depicted dry corn that she found in defendant's yard between his house and the place where the dog was shot. Deutsch thought the corn was left out for feeding deer.

¶ 24 On cross-examination, Deutsch was questioned about her conversation with defendant when he opened the door, and the State objected. At a sidebar conference, the State argued that whatever defendant said to Deutsch was self-serving hearsay and inadmissible. Defense counsel argued that defendant's statements to Deutsch were admissible under the completeness doctrine. The jury was excused so that defense counsel could make an offer of proof, which was as follows. After Deutsch told defendant he was shooting her dog, defendant replied " 'I'm not. Would you like to come in and see what I'm shooting at?' " Deutsch did not go inside to see what he was shooting at because

she did not trust him. She told defendant she was calling the police, and then she went to her car and called 911. The court determined that defendant's statement was self-serving and not subject to any hearsay exception for admissibility.

¶ 25 Deutsch further testified on cross-examination that she had named the dog "Justice" because she did not think it was fair that the dog died without a name.

¶ 26 Lake County Detective Kevin Harris was assigned to search defendant's residence three days after the incident, on January 29, 2010. In the family room, detective Harris found the original packaging for rifles and a large chest with several shotguns. At this point, defense counsel objected and the jury was excused. The State argued that when the police searched defendant's house, they found holsters, empty boxes for firearms, manuals for firearms, and ammunition, but no firearms. So when the police found this "mountain of evidence" with no guns, it led them to Mr. Bartz's residence where defendant's guns were recovered. The State argued that this evidence was admissible to show the trail of how defendant had moved his guns. Defense counsel responded that only one shot killed the dog and that the rest of the evidence was extremely prejudicial to defendant. The court ruled that the State could introduce evidence of ammunition, empty gun boxes, gun manuals, and empty cases. Defense counsel requested clarification, pointing out that the court had allowed the State to bring in only three guns. Defense counsel asked if the State was now permitted to introduce empty gun boxes, ammunition, and gun manuals that did not pertain to those three guns. The State responded that it was not seeking to do that, and the court said that the State was "not going to make a reference that they are for these guns or not. They are trying to establish that the guns were there and were moved, that's what they were trying to establish." According to the court, this evidence was "very relevant."

¶ 27 After further discussion, defense counsel agreed to stipulate that the three guns found at Mr. Bartz's house belonged to defendant. Following an offer of proof as to what caliber of gun could have caused the dog's wound, the court ultimately limited the number of guns that the State could introduce to two.

¶ 28 The State resumed its questioning as to what Harris found in defendant's home. Harris answered:

> "there were several original packaging-type boxes for some firearms, we found owner's manuals for some firearms, we found several hundred spent shell casings, the rounds that already had been fired and had collected the shell casings, we found multiple buckets of those. We found reloading equipment to reload rounds as well as gunpowder to do those reloads. We found the actual reloading equipment to reload ammunition, we found several hundred rounds of live ammunition."

Harris further testified that in the backyard of defendant's house, he found a shed with a sporting clay launcher, which launched porcelain-type clays for shotgun shooting. In an attached garage, Harris found the majority of the live ammunition that he referred to above.

¶ 29 When asked if he found any guns at defendant's house that corresponded with all of these items, Harris answered no. Harris then spoke to defendant and based on that conversation, went to Thomas Bartz's home to recover some guns that were owned by defendant. Bartz told Harris that defendant had dropped off the firearms at his house because defendant's house was for sale and he needed another place to store them. Harris then identified two of defendant's guns recovered from Bartz's home. Harris described how the scopes on the two guns allowed a person to zoom in on a

target. Next, the stipulation that the two guns located at Bartz's house belonged to defendant was read to the jury.

¶ 30 Emergency veterinarian Sharon Grogan testified regarding the dog's necropsy on January 26 at 3 p.m. The dog was deceased when it arrived. Grogan opined that the dog bled to death due to a gunshot wound.

¶ 31 The State rested, and defense counsel moved for a directed verdict. The trial court denied this motion. At this time, defense counsel also asked the court to reconsider its ruling on its previous motion *in limine* to allow Animal Care and Control employee Wright to testify. Defense counsel gave an offer of proof as to Wright's testimony. Wright would testify that on several occasions, she received calls from defendant's home asking Animal Care and Control to come and remove animals from the property. Wright would further testify that upon arriving at defendant's home, he would be outside waiting for her to come and remove the animals, and that it happened on more than one occasion. Defense counsel clarified that the testimony was not being offered for character evidence, but instead to rebut the State's charge that defendant had the intent to poorly treat or torture an animal. The State argued that the evidence was not relevant. The trial court reasoned that defendant's good deeds on other occasions was not sufficient to negate the his intent in the instant case; therefore, defense counsel's motion was denied.

¶ 32 3. Defense Witnesses

¶ 33 Defense investigator David Asma testified regarding some photos he took of defendant's backyard on February 23, 2010. One of the photos depicted a 55-gallon drum or burn barrel with a pony-sized can of beer sitting on top of it. There were several holes in the burn barrel. Another photo depicted a three by four foot piece of plywood leaning up against a tree that also had several

holes in it. Defense counsel sought to admit the photographs, and the State objected on the basis that defense counsel could not "tie up" the photos to the case. After a discussion, defense counsel agreed that Asma would not testify that the holes in the photos were bullet holes. The court reserved its ruling as to admissibility of the photos. On March 31, 2010, Asma measured the distance from the back door of the house to the 55-gallon drum and to the piece of plywood leaning up against a tree. The distance to the drum was 165 feet and the distance to the plywood was 180 feet.

¶ 34 Lake County Detective Robert Dever testified that he was part of the investigation regarding the shooting of the dog. Detective Dever testified that he went to look for evidence in defendant's backyard. In the backyard, he found a pony-sized can of beer sitting on top of a burn barrel. The burn barrel had holes in it, and the beer can had one hole in it. Detective Dever took his own photos of defendant's backyard, including the burn barrel and beer can. Defense counsel showed him a photo of the burn barrel and beer can, and Detective Dever agreed that it was a fair and accurate description of what he saw in defendant's backyard on January 29, 2010. When defense counsel requested to admit the photo into evidence, the State again objected.

¶ 35 At a sidebar conference, defense counsel argued that it was relevant in that it went to defendant's defense. The court found that "the whole testimony here unless it is tied up somehow to be irrelevant, and I might strike the whole testimony about the barrel and the Coors beer. It doesn't prove or disprove anything here." The court commented that it did not "see any connection whatsoever." Defense counsel responded that the photos went directly to intent and whether defendant was shooting at the dog or something else. Defense counsel pointed out that, as part of Detective Dever's investigation, he had taken pictures of items with bullet holes in defendant's backyard. This evidence, according to defense counsel, was "possibly exculpatory" and something

the defense should be allowed to introduce. The court ruled that absent any further tie-up, it was reluctant to let the testimony stand.

¶ 36 Defense counsel resumed questioning, and Detective Dever testified that he took pictures of the burn barrel and beer can because he thought such evidence might be relevant to the case. The State declined to cross-examine Detective Dever and moved to strike his testimony as irrelevant and immaterial. The court reserved ruling on that issue as well. Following a conversation between defense counsel and defendant, defendant decided not to testify, and the defense rested.

¶ 37 The State then renewed its objection and moved to strike not only Detective Dever's testimony but Asma's testimony as well. According to the State, defense counsel failed to tie it up to the case. Defense counsel argued that excluding that evidence would deny defendant a fair trial, and that the photos and testimony were crucial to defendant's defense. Defense counsel also argued that the State had introduced only certain photos of the backyard, and that "not allowing the other photos where the surrounding, surrounding backyard and what else was in that backyard where the dog may have been where the dog may have traveled" was extremely prejudicial. The court stated that even assuming that the evidence showed that there was shooting in the backyard, "when was that done? Last summer? Last fall? Ten years ago?" The court went on to say "regrettably, I will have to grant the State's motion for the defense not having tied up the exhibits and the testimony to— or make it relevant in other words." The court denied admissibility of the two photos, one showing the burn barrel and beer can with holes and the other showing the plywood with holes. It also struck the testimony of Detective Dever and Asma, but only as it related to those two photos.

¶ 38 4. Closing Arguments

¶ 39 Assistant State's Attorney (ASA) Raquel Robles-Eshbach began her closing argument stating "His name was Justice. In Illinois, animals are protected by law, the law that you promised Judge Booras you would follow in this case." ASA Robles-Eshbach discussed the elements of the two offenses of animal torture and aggravated cruelty in conjunction with the facts of the case. She continued that "[o]n January 26, 2010, this dog we know now as Justice could not be protected from the defendant." At this point, defense counsel objected. At a sidebar conference, defense counsel asked ASA Robles-Eshbach to not cry in front of the jury because it was an "added emotional element." ASA Robles-Eshbach explained that her dog had died a few days before. The court overruled defense counsel's objection, stating "[i]t's argument."

¶ 40 Defense counsel's theory during closing argument was that accidents happen. Defense counsel pointed out that defendant's house was located on at least one acre of farmland, and the State had not shown that defendant intended to shoot the dog because there was no evidence as to what else was in defendant's backyard.

¶ 41 During rebuttal, ASA Michael Mermel stated:

> "Again, things that are said in opening statements and things that are said in argument are simply not evidence unless you've actually heard it from a witness or saw it in the form of an exhibit. So when the defense stands up before you and goes well, maybe was an accident. Well, nobody came forward to say that. No witness said that— "

Defense counsel objected. At a sidebar conference, defense counsel argued that ASA Mermel was shifting the burden of proof in saying that the defense did not present anything. The court sustained the objection. ASA Mermel disputed shifting the burden of proof, claiming that defense counsel was allowed to argue that the shooting was an accident. Based on ASA's comment that there was "no

evidence presented by anyone," the trial court changed its earlier ruling and overruled the objection, advising the jury that any argument not based on the evidence should be disregarded. ASA Mermel continued his rebuttal:

"MR. MERMEL [Assistant State's Attorney]: And because of what His Honor just told you, when there is no evidence, no evidence of any sort other than an intentional shooting by the defendant, then—

MS. MANAK [Defense counsel]: Objection.

MR. MERMEL: —then you cannot find that as evidence and you cannot find that as something that happened in the case, just because—

THE COURT: Overrule the objection. Same instruction.

MR. MERMEL: But because the defense gets up and say may this, maybe that, unless you hear it as evidence this case, it's not—

MS. MANAK: Objection.

MR. MERMEL: —it's just lawyers talking.

THE COURT: Overruled."

The rebuttal argument continued:

"MR. MERMEL: So we did show you something that was significant in the backyard. I believe someone described this as deer corn.

MS. MANAK: Objection, Judge.

MR. MERMEL: Now the inference—

MS. MANAK: It is not.

MR. MERMEL: That is what the person described it as.

THE COURT: Any argument not based on the evidence should be disregarded. I will overrule the objection.

MR. MERMEL: That's evidence of bating [*sic*], ladies and gentlemen. This is [defendant's] little shooting gallery. That's what his backyard is."

ASA Mermel later went on to say:

"MR. MERMEL: You know what happened here. There was a small black dog. He was alone, cold, hungry, and now I can say it, the evidence shows he would have been confused. He was suffering the tragedy of abandonment."

MS. MANAK: Objection.

MR. MERMEL: —and now—

THE COURT: It's argument. Overruled.

MR. MERMEL: —and now he suffers the final epitome, the final stripping away of any civilized treatment—he wandered into [defendant's] shooting gallery. There is no reason for this. The law protects companion animals from this type of treatment. You don't use man's best friend for blood sport and skill killing."

5. Jury Questions

¶ 42 During jury deliberations, the jury sent a note to the court asking if it was legal or illegal to kill a feral dog. Both parties agreed that the court should respond that the jury already had all the instructions and evidence. Later on, the jury sent another note to the court stating "We cannot reach a unanimous decision on either charge at this time. Please advise." Both parties agreed that the court should advise the jury to continue deliberating. Two hours later, the jury sent four notes to the court: (1) asking if there was any further clarification on the legal definition of companion animal;

(2) asking if the jury could obtain a transcript of Dr. Groan's testimony; (3) stating that it had not made progress since the last note; and (4) asking if "[b]y default, is a dog considered a companion animal?" The court responded that the jury had the evidence and the law necessary for it to decide the case and to keep deliberating. Finally, the jury sent a note to the court stating that certain members did not believe that they would make any more progress that night. The court released the jury for the night to reconvene in the morning. The next day, the jury found defendant guilty of aggravated cruelty and not guilty of animal torture.

¶ 43 Defendant filed a posttrial motion, which the trial court denied. Following a sentencing hearing, defendant received a term of 20 months' imprisonment.

¶ 44 II. ANALYSIS

¶ 45 Defendant makes several arguments on appeal as to why he was denied a fair trial. Specifically, defendant argues that the trial court improperly: (1) admitted weapons-related evidence; (2) barred Deutsch from testifying on cross-examination as to defendant's response after she knocked on his door and accused him of shooting her dog; (3) barred photos and testimony of Dever and Asma of target practice in defendant's backyard; (4) barred Wright's testimony of his past actions with Animal Care and Control; (5) allowed the State to elicit testimony that Deutsch was crying hysterically and that Harrison feared that they were in the line of fire and did not want get shot at; (6) allowed the State to inflame the passions of the jury during closing argument by repeatedly referring to the dog as "Justice," crying, portraying defendant as a "gun-crazed animal killer," and shifting the burden of proof; and (7) failed to clarify for the jury the meaning of the term "companion animal." We do not review all of defendant's contentions but determine that three of them have merit.

¶ 46 A. Weapons-Related Evidence

¶ 47 First, defendant argues that he suffered substantial prejudice when the trial court allowed the State to introduce evidence relating to weapons that was not connected to the offenses with which he was charged.

¶ 48 It is within the trial court's discretion to determine whether evidence is relevant and admissible. *People v. Hanson*, 238 Ill. App. 3d 74, 101 (2010). A decision to admit evidence will not be overturned unless it is arbitrary, fanciful, or unreasonable. *Id.* Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination more probable or less probable than it would be without the evidence. *People v. Green*, 339 Ill. App. 3d 443, 453-54 (2003). Evidence is admissible if it is relevant to an issue in dispute or its probative value is not substantially outweighed by its prejudicial effect. *Id.* In other words, a court may exercise its discretion and exclude evidence, even if it is relevant, if the danger of unfair prejudice substantially outweighs any probative value. *Hanson*, 238 Ill. App. 3d at 102.

¶ 49 Turning to the weapons evidence in particular, a weapon may be admitted into evidence only where there is proof to connect it both to the crime and to the defendant. *People v. Tucker*, 317 Ill. App. 3d 233, 241 (2000). "In order to establish a connection there must be: (1) sufficient testimony to establish that a weapon was used; (2) substantial evidence the defendant participated in the crime, and (3) testimony that the weapon admitted was similar to the one used during the crime." *Id.*

¶ 50 At the outset, we recognize that defendant does not challenge the two guns admitted into evidence. Rather, he challenges Detective Harris' testimony regarding weapons-related paraphernalia that was found in his home and on his property. Specifically, Detective Harris testified that in defendant's home, he found several original packaging-type boxes for some firearms, owner's

manuals for some firearms, several hundred spent shell casings, multiple buckets of the rounds that had already been fired, reloading equipment and gunpowder to reload rounds, and several hundred rounds of live ammunition. In addition, Detective Harris testified that defendant's backyard contained a shed with a sporting clay launder, and that the attached garage stored the majority of live ammunition.

¶ 51 Defendant likens this case to an older supreme court case, *People v. Smith*, 413 Ill. 218, 220-21 (1952), where the defendant, convicted of murder after a holdup, argued that the admission of two sawed-off shotguns and some ammunition found in the trunk of the car that he was driving at the time of his arrest constituted reversible error. The defendant, driving a car he did not own but that was used in the holdup, was arrested six months after the murder. A search of the car revealed that the gun found under the front seat of the car was, according to witness testimony, connected to the shooting. *Id.* at 221-22. However, the State made no attempt to connect the weapons in the trunk with the crime committed. *Id.* at 221. The supreme court found the admission of the shotguns improper, reasoning that such an array of weapons could only serve to arouse the jury and prejudice the defendant's position. *Id.* at 223. According to the court, the rule is universal that the evidence in a trial must be confined to the question in issue, and the test of admissibility is the connection of the evidence offered with the offense charged. *Id.* at 222-23.

¶ 52 The State does not argue harmless error; it argues that no error occurred because the court carefully limited the evidence to packaging, manuals, and ammunition that was not inconsistent with the two weapons determined to have been capable of firing the shot that killed the dog. We disagree with the State's position on this issue, as the record indicates otherwise. The weapons-related

evidence was *not* limited to the two guns admitted into evidence because it was introduced to show the trail of defendant moving his guns.

¶ 53 When this matter was being debated before the trial court, defense counsel asked if the State was now permitted to introduce evidence of empty gun boxes, ammunition, and gun manuals that did not pertain to the two guns admitted into evidence. The State interjected that this was not the purpose behind introducing the gun-related evidence; it was to show the trail of why defendant's guns were retrieved from his friend's, Mr. Bartz's, house. The court agreed, saying that the State was trying to establish that the guns were moved from defendant's house, which was "very relevant." Perhaps if the discussion would have ended here, it would have made sense to introduce some evidence showing how the detectives were led to Mr. Bartz's house. What happened next, however, is that defense counsel stipulated that the two guns found at Mr. Bartz's house belonged to defendant. Once this "trail" was stipulated to, the issue was no longer in dispute, and there was no reason for the State to introduce a plethora of weapons-related paraphernalia found in defendant's home and property. Despite defendant's stipulation, the State was allowed to introduce evidence of empty gun boxes, gun manuals, several hundred rounds of ammunition and spent shell casings, and reloading equipment and gunpowder.

¶ 54 This weapons-related paraphernalia was in no way related to the offenses with which defendant was charged. Defendant did not deny being the shooter, and the reality is that one bullet from one gun caused the dog's death. Once the guns were stipulated to, there was simply no reason to introduce this evidence, except to cast defendant in a bad light. Admission of the weapons-related evidence was thus highly prejudicial. *See People v. Pelo*, 404 Ill. App. 3d 839, 867 (2010). ("prejudicial effect" in this context means that the evidence in question will somehow cast a negative

light upon a defendant for reasons that have nothing to do with the case on trial; the jury would then be deciding the case on an improper basis, such as sympathy, hatred, contempt, or horror).

¶ 55 B. Closing Arguments

¶ 56 The improper admission of the weapons-related evidence was compounded by ASA Mermel's comments during rebuttal argument, another issue raised by defendant. When the State questioned Deutsch, she identified a photo of deer corn located in defendant's backyard between his house and where the dog was shot. During rebuttal, ASA Mermel played off of the improperly admitted weapons-related evidence by arguing that the deer corn found in defendant's backyard was evidence of "baiting" for his "little shooting gallery," and that "[y]ou don't use man's best friend for blood sport and skill killing."

¶ 57 Every defendant is entitled to a fair trial free from prejudicial comments by the prosecution. *People v. Burney*, 2011 IL App (4th) 100343, ¶ 65. Still, prosecutors are generally accorded wide latitude in the content of their closing arguments, and they may comment on the evidence and on any fair and reasonable inferences the evidence may yield. *People v. Runge*, 234 Ill. 2d 68, 142 (2009). We consider the closing argument as a whole, rather than focusing on selected phrases or remarks, and will find reversible error only if the defendant demonstrates that the improper remarks were so prejudicial that real justice was denied or that the verdict resulted from the error. *Id.; see also People v. Chronik*, 408 Ill. App. 3d 1028, 1040 (2011) (improper remarks by a prosecutor generally do not constitute reversible error unless they result in substantial prejudice to the accused).

¶ 58 The State argues that this issue is forfeited because defense counsel objected only to the deer corn reference by ASA Mermel, and not the other two comments of "baiting" for defendant's "little shooting gallery," and using "man's best friend for blood sport and skill killing." We note that

defense counsel's objection to the deer corn immediately preceded the "baiting" comment and was overruled by the trial court. In any event, it is not necessary to object to every single statement in order for us to consider the propriety of ASA Mermel's remarks on appeal. See *People v. Beltran*, 2011 IL App (2d) 090856, ¶ 60 (quoting *People v. Wheeler*, 226 Ill. 2d 92, 122-23 (2007)) (" 'Accordingly, the simple fact that the defendant did not properly object to a statement does not render that statement as if it never existed. Indeed, all statements must be considered as part of the entirety of a prosecutor's closing argument, and even statements not properly objected to may add to the context of a remark properly objected to' ").

¶ 59 Also in support of forfeiture, the State argues that defendant failed to include this issue in his posttrial motion. Defendant's posttrial motion included arguments regarding the State's closing argument, such as ASA Robles-Eshbach's crying, which we address next. However, we agree with the State that defendant's posttrial motion did not specifically reference ASA Mermel's comments that the deer corn found in defendant's backyard was evidence of "baiting" for his "little shooting gallery," and that "[y]ou don't use man's best friend for blood sport and skill killing." Nevertheless, defendant did raise the impact of these comments in the context of an intertwined argument, which was his inability to introduce Wright's testimony that he had called Animal Care and Control on other occasions to rescue animals trapped on his property. Defendant maintained that Wright's testimony would have rebutted the State's argument that he had used deer corn to lure animals onto his property to hunt them. Thus, defendant did raise the issue in his posttrial motion in an indirect way, and we determine that defendant has sufficiently preserved this argument for review.

¶ 60 ASA Mermel's comments during rebuttal were highly prejudicial and not based on the evidence or a fair inference from the evidence. Luring or baiting animals with the deer corn was not

a reasonable inference from Deutsch's testimony that she thought that the corn was left out for feeding deer. Moreover, we disagree with the State's contention that referring to defendant's backyard as his shooting gallery was a proper comment on the evidence. As the State points out, the defense theory was that defendant was not shooting at the dog but something else in his backyard, such as a target, and that shooting the dog was an accident. Contrary to the defense theory that defendant had physical targets in his backyard, the State argued that defendant used deer corn to bait animals into his "little shooting gallery" for "blood sport and skill killing." A shooting gallery of physical targets or objects is very different than a shooting gallery of live animals. Also, ASA Mermel made this argument in rebuttal, after defendant was denied the opportunity to present Wright's testimony regarding his past behavior with other animals on his property. Defendant was also barred from presenting evidence of physical targets in his backyard. While we are not saying that the trial court erred by barring Wright's testimony and the evidence of physical targets, ASA Mermel's remarks were inflammatory and highly prejudicial, especially in light of the erroneous admission of the weapons-related paraphernalia. Defendant was portrayed as a person who lured animals onto his property for sport, and the several hundred spent shell casings, several hundred rounds of live ammunition, and reloading equipment supported this theory by the State.

¶ 61 The third contention raised by defendant in which we agree error occurred also pertains to closing argument; specifically, ASA Robles-Eshbach's crying. Defense counsel objected to this behavior based on it already being an emotional-laden case, and ASA Robles-Eshbach explained that she was crying because her own dog had died just days earlier. Rather than sustaining the objection, the trial court overruled it, commenting that it was "argument."

¶ 62 It is improper to cry during closing arguments. *People v. Beltran*, 2011 IL App (2d) 090856, ¶ 67. For example, in *People v. Dukes*, 12 Ill. 2d 334, 340-41 (1957), the prosecutor, during closing argument, wept and told the jury that he knew the victim of the homicide. The supreme court determined that his conduct was "highly improper and prejudicial," and coupled with several instances of improper argument, required reversal of the defendant's conviction. *Id.* at 341, 343.

¶ 63 Further contributing to the error in this case was the court's failure to cure the error by sustaining defense counsel's objection to the crying and instructing the jury to disregard it. *See Runge*, 234 Ill. 2d at 143 (appropriate considerations in assessing the possibility of prejudice during closing arguments is whether the objection was sustained and the jury properly instructed). In this case, the crying of the prosecutor did nothing but intensify an already emotionally-charged case, and the jury was not advised of the reason why.

¶ 64 C. Impact of Errors

¶ 65 We next consider the impact of these errors. We may invoke the harmless error doctrine to dispose of claims of error that have a *de minimus* impact on the outcome of the case. *People v. Blue*, 189 Ill. 2d 99, 138 (2000). Prejudice, however, is not the sole concern that drives our analysis because a defendant, whether guilty or innocent, is entitled to a fair, orderly, impartial trial conducted according to law. *Id.* Cumulative error requires reversal when, as a result of multiple trial court errors, a defendant is denied a fair trial. *People v. Bowens*, 407 Ill. App. 3d 1094, 1111 (2011), citing *Blue*, 189 Ill. 2d at 139. To determine whether a defendant's right to a fair trial has been compromised, we must decide whether the integrity, reputation, and fairness of the judicial process had been compromised. *Bowens*, 407 Ill. App. 3d at 1111, citing *Blue*, 189 Ill. 2d at 138.

¶ 66 In light of the three errors described above, we believe that defendant was denied a fair trial. Though there was overwhelming evidence that defendant fired the fatal shot to the dog, the improper admission of the weapons-related evidence coupled with the State's portrayal of defendant as a person who baited animals into his backyard for target shooting, plus the crying, deprived defendant of the defense that the shooting was an accident. Therefore, defendant is entitled to a new trial. See *Blue*, 189 Ill. 2d at 139 (because the errors created a pervasive pattern of unfair prejudice to the defendant's case, a new trial was necessary despite the overwhelming evidence of the defendant's guilt).

¶ 67 Given our conclusion, we need not address the other alleged errors raised by defendant. Many of these issues are unlikely to recur or are dependent upon whether defendant chooses to testify.

¶ 68 III. CONCLUSION

¶ 69 For the reasons stated, we reverse defendant's conviction and remand the case for a new trial.

¶ 70 Reversed and remanded.