2012 IL App (2d) 101305-U
No. 2-10-1305
Order filed June 6, 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. 07-CF-2510
	)	
JOSE A. SEPULVEDA,	)	Honorable
	)	Daniel B. Shanes,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices McLaren and Birkett concurred in the judgment.

ORDER

Held: Defendant's conviction of first-degree murder was affirmed where: (1) trial counsel's decisions not to file a motion to suppress or to question defendant during his jury trial about defendant's last minute assertion that he was promised leniency in exchange for a confession did not constitute ineffective assistance, and (2) defendant's claims of error regarding jury instructions and prejudicial prosecutorial misconduct were forfeited, and he failed to establish the applicability of plain-error review. However, the trial court erred in not crediting defendant for time served in custody in Wisconsin.

¶ 1 Following a jury trial, defendant, Jose A. Sepulveda, was convicted of first-degree murder (720 ILCS 5/9-1(a)(2) (West 2006)) and sentenced to 28 years' imprisonment. Defendant argues that he was denied the effective assistance of counsel, the trial court erred in instructing the jury, he was denied a fair trial because of prosecutorial misconduct, and the trial court erred in calculating his

credit for time spent in custody. For the following reasons, we affirm defendant's conviction and remand with directions to enter an amended sentencing order reflecting credit for time defendant spent in custody in Wisconsin.

¶ 2 BACKGROUND

¶ 3 On July 25, 2007, a grand jury returned a four-count indictment charging defendant with first-degree murder.[1] The indictment alleged that defendant, without lawful justification, struck Ricardo Osorio about the body with his hands and a stick, thereby causing his death. Counts I and II alleged that defendant committed the offense with the intent to kill and with the intent to do great bodily harm, respectively (720 ILCS 5/9-1(a)(1) (West 2006)). Counts III and IV alleged that defendant committed the offense knowing that such acts created a strong probability of death and knowing that such acts created a strong probability of great bodily harm, respectively (720 ILCS 5/9-1(a)(2) (West 2006)). The State later nol-prossed count I. The charges stemmed from events that occurred on July 4, 2007, during a fight in the parking lot of a Family Dollar store in Waukegan, Illinois.

¶ 4 Defendant was tried by a jury in April 2010. The evidence adduced at trial established the following undisputed facts regarding the events leading up to Ricardo Osorio's death. On July 4, 2007, Ricardo drove to a fireworks display to pick up his cousin, Amelia Lopez; Amelia's husband, Ernesto Lopez; and their daughter. Also in the car with Ricardo were Amelia's younger sisters, Alondra and Viridiana, and Ricardo's girlfriend, Juana, who was pregnant with his baby. As the group drove, Viridiana, who was 15 years old at the time, was receiving harassing calls on her cell

[1]In the same indictment, the grand jury identically charged Jose Guadarrama. He subsequently pleaded guilty to second-degree murder, was sentenced to five years' imprisonment, and testified at defendant's trial.

phone from a male caller. Ernesto took the phone from Viridiana and exchanged words with the male caller. Ernesto agreed with the caller to meet at the Family Dollar store at the corner of Washington and Jackson Streets in Waukegan. En route, Ricardo stopped at Amelia's father's house to drop off Amelia's daughter and Juana.

¶ 5 The male caller was Eduardo, one of defendant's friends. Eduardo; defendant; defendant's brother, Luis Sepulveda; and their friend, Jose Guadarrama, were at a party at a house on Jackson Street in Waukegan, where defendant and his brother each rented a room. The house was down the street from the Family Dollar store. Eduardo, 17 years old at the time, was calling Viridiana from his cell phone.

¶ 6 Ricardo's group drove into the Family Dollar parking lot as Eduardo entered the lot on foot. Ernesto and Eduardo began a fist fight. Neither man had a weapon of any kind.

¶ 7 The facts regarding the ensuing events were contested. However, it was undisputed that when paramedics arrived at the scene later, Ricardo was lying in the parking lot on his back with a large amount of bleeding from his head, slow breathing, and a weak pulse. Despite paramedics' attempts to resuscitate him, Ricardo never regained consciousness and was pronounced dead at the hospital at 11:21 p.m. that night.

¶ 8 We now examine the disputed facts, beginning with Amelia Lopez's testimony. Amelia testified that, as they drove to Family Dollar, she was in the back seat with her sisters, while Ricardo drove and Ernesto was in the front passenger seat. The Family Dollar parking lot was well lit. Ernesto exited the vehicle, removed his shirt, and walked quickly toward the male caller (Eduardo[2]),

[2]Amelia did not know the identity of the male caller at the time. However, because it was undisputed that Eduardo was the male caller, we will refer to him by name for the sake of clarity.

who was approaching on foot. Ernesto and Eduardo, who were about the same size, began to fight. Amelia, Ricardo, Alondra, and Viridiana remained by the car, about 10 to 12 feet away. Two other men were also in the parking lot watching the fight, which continued for approximately five minutes. Amelia thought that the fight was "even."

¶ 9 Amelia testified that, as the fist fight continued, three men came running toward the fight from the same direction that Eduardo had come. Ricardo removed his necklace and walked quickly toward the approaching men. Ricardo was much bigger than Ernesto and Eduardo. One of the three approaching men held a tree branch the size of a baseball bat; Ricardo had nothing in his hands. One of the three men knocked Ricardo to the ground but Amelia could not tell who it was or if he used the branch. Ricardo was knocked flat on his back, face up, about 20 feet from Amelia. The man with the branch then hit Ricardo in the face with the branch while the other two men were kicking him. Both in court and in a photo line-up on July 6, 2007, Amelia identified defendant as the man who hit Ricardo with the branch. (The parties later stipulated that Officer Granger of the Waukegan police department would testify that on July 5, 2007, Amelia identified Jose Guadarrama in a photo line-up as one of the subjects who was hitting Ricardo.)

¶ 10 Amelia further testified that defendant dropped the branch and walked toward the fist fight. Amelia got involved and tried "pushing them away" and then yelled that she was calling the police. Defendant and the others who had come with him ran away in the direction from which they had come. Ernesto and Amelia unsuccessfully tried to catch them and then returned to the parking lot. Ricardo was still on the ground, not moving, his face covered in blood. He never got up.

¶ 11 On cross-examination, Amelia testified that defendant hit Ricardo on the face "[n]ot more than once." Defendant seemed "a little bit bigger" than the two "medium size, light-weight guys"

who were kicking Ricardo. Amelia reiterated that she did not see how Ricardo was knocked down, even though her attention was focused on him, and he was only about 15 or 20 feet away. Amelia testified again that two men were watching the fight and that three additional men approached. She acknowledged her written statement to police on July 4, 2007, in which she had mentioned the two men who were "just standing there." She had written in her statement that "all of a sudden this guy comes running" but testified that she probably forgot the "s." She meant to write more than one because there was more than one guy.

¶ 12 Through both live witness testimony and stipulated testimony of various police personnel and certified evidence technicians, the following items were admitted into evidence: a three and one-half foot long tree branch, Ricardo's blood-stained t-shirt, defendant's clothing (later retrieved from his work truck and having no blood stains), Guadarrama's clothing (having no blood stains), photographs of the scene, and autopsy photographs of Ricardo.

¶ 13 Detective Domenic Cappelluti of the Waukegan police department testified that he was the lead investigator on the case.[3] Based on witness interviews, Cappelluti decided that defendant and "his one brother" were suspects. After further investigation, Cappelluti and three other detectives drove to a house in Kenosha, Wisconsin, on July 6, 2007. In conjunction with Kenosha police, Cappelluti and the Waukegan officers arrested defendant and his brother, Luis, and took them into custody at the Kenosha police department.

[3]Cappelluti testified that he spoke fluent Spanish and that many of the witnesses and possible suspects spoke only Spanish.

¶ 14 After advising defendant of his *Miranda* rights, Cappelluti and another detective interviewed defendant on videotape.[4] Defendant agreed to talk and described the events of July 4, 2007, to Cappelluti as follows. Defendant came home from his roofing job and had a few beers with other residents and people who had gathered at the house for a party. Eduardo was there on his cell phone, trying to talk to a girl, but then he was conversing with a male, who had apparently taken, or was given, the girl's cell phone. The conversation "went south" as the male questioned Eduardo about who he was and why he was calling. Eduardo told defendant that "these guys want to meet up and were going to fight." Eduardo and the man on the phone decided to meet at the Family Dollar store.

¶ 15 Cappelluti testified that defendant further told him that he (defendant), Eduardo, Guadarrama, and Luis, walked to Family Dollar to meet the other party. As defendant's group approached the parking lot, defendant picked up a tree branch. When they arrived at the parking lot, a Mustang pulled in. The driver of the Mustang exited the vehicle and removed his shirt. Eduardo removed his shirt and began to fight with the Mustang's driver (Ernesto[5]).

¶ 16 Cappelluti continued testifying that defendant told him that, as Eduardo and Ernesto fought, the Mustang's front-seat passenger, a heavier subject (Ricardo[6]), exited the vehicle. Ricardo

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[4]The interview was entirely in Spanish. The parties stipulated as to the accuracy of a transcript, translated into English, of the interview. Neither the videotape nor the transcript was admitted into evidence.

[5]Although the testimony differed as to who was driving the Mustang, it was undisputed that Eduardo and Ernesto were the two engaged in the initial fist fight. For the sake of clarity, we will use Ernesto's name where Cappelluti's testimony referred to the Mustang's driver.

[6]The testimony differed as to who was the front-seat passenger. However, given that it was

approached the fight and jumped on top of Eduardo and Ernesto. Ricardo had nothing in his hands. Guadarrama jumped in next, on top of Ricardo. Cappelluti testified that defendant said that he decided to strike Ricardo on the head and did so three times. Defendant sustained no injuries.

¶ 17 Cappelluti further testified that defendant said he heard Luis shouting to everybody to stop and to calm down. Luis told defendant that they should leave because the police were coming. Defendant ran from the parking lot back to his residence with Luis, Eduardo, and Guadarrama. Defendant dropped the branch as he left the parking lot. Defendant and Luis immediately drove to a friend's house in Waukegan to spend the night. They were afraid and hiding from the police. After defendant found out that Ricardo died, he went to Kenosha, Wisconsin.

¶ 18 Cappelluti testified that he asked defendant what he would say to Ricardo's family if given the opportunity. Defendant put his head down and said, " 'I'm very sorry—I'm sorry for what I did.' " Defendant said that he felt bad for Ricardo's family, but told Cappelluti that " 'if they had a stick and we didn't, they could have killed one of us.' "

¶ 19 On cross-examination, Cappelluti acknowledged that defendant and Luis were both average size. Cappelluti agreed that defendant said he hit Ricardo in the head but never said that he hit him in the face. He clarified that defendant told him that he (defendant) decided to get involved in the fight when Luis was trying to separate the two fist-fighters and Ricardo "threw himself on him." Defendant struck Ricardo and Ricardo fell to the ground. Cappelluti agreed that Guadarrama was probably about 6 feet tall and 250 pounds. When Cappelluti asked defendant why he used the branch, defendant replied, " 'to defend my friend.' " Cappelluti agreed that defendant told him that

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undisputed that the altercation was between Ricardo and defendant's group, we will refer to him by name.

when Ricardo "started striking" Luis, defendant and Guadarrama hit Ricardo.

¶ 20 Silvestre Gallardo testified that he was defendant's family friend and drove defendant and his brothers, Luis and Carlos, to a friend's house in Kenosha, Wisconsin, about 30 minutes away. Defendant told Silvestre that he wanted to leave the state because the police were looking for them.

¶ 21 Dr. Eupil Choi testified that he was a forensic pathologist who performed the autopsy on Ricardo, who was 6 feet tall and weighed 246 pounds. He suffered two major injuries to his head—one on his lower left cheek and one on his nose. On the lower left cheek there was an "open fracture gap" where Ricardo's cheekbone was broken horizontally. Ricardo's nose had lacerations, abrasions, and "crush injuries." Ricardo's nose was flattened and had three broken bones, in layers, each one deeper than the previous. Ricardo's mouth had extensive bruising, swelling, and small cuts on both lips. Dr. Choi found no injuries on the sides of Ricardo's head.

¶ 22 Dr. Choi opined that Ricardo died from blunt trauma to the head—specifically, the injuries to the cheekbone and nose. Based on the appearance of the left cheekbone and the nose, Dr. Choi opined that a blunt weapon was used. Regarding the nose, he also noted "the destruction of the inside of the structure." When shown the tree branch recovered from the scene, Dr. Choi opined that it was consistent with these injuries. At least two strikes were necessary to cause both the cheekbone and nose breaks. Dr. Choi testified that it took a "strong force" to cause a fracture the size of the one in the cheekbone and the three breaks in the nose. Neither punching nor a fall to the ground would likely have caused them. Blood spatter on Ricardo's t-shirt supported the conclusion that a weapon was used as opposed to a fist. The mouth injuries, though consistent with a blunt weapon, could also have been caused by fists.

¶ 23 Dr. Choi identified autopsy photographs of Ricardo and pointed out four cuts to the nasal area

and a diagonal abrasion from the left eye down toward the right cheek. Based on the size and shape of these wounds, Dr. Choi said they were likely caused by a blunt object, consistent with the tree branch, but not a fist, which would have left smaller, different shaped "knuckle injuries." Ricardo's face had many cuts, abrasions, and hemorrhagic areas that could have been caused by a fist or a weapon.

¶ 24 Over defense objection, Dr. Choi demonstrated how he believed the branch caused Ricardo's injuries. Dr. Choi held the branch and placed it on an assistant State's Attorney's face. Based on the angle of the nose, Dr. Choi testified that it was "unlikely" that one strike of the branch could have caused the injuries to both the nose and the left cheekbone.

¶ 25 On cross-examination, Dr. Choi acknowledged that his written autopsy report did not mention the use of a weapon. The skull diagrams prepared with the autopsy report showed "a very minute area of hemorrhaged areas on the right side of the head" just above the ear, which was not visible on the outside of the head. Dr. Choi did not have an opinion as to how that injury was caused but agreed that it could have been from a fall or a light strike to the head.

¶ 26 Dr. Choi further testified that he agreed that repeated punching to the face could cause cuts, abrasions, and lacerations. It was also possible, though unlikely, that the injury to the left cheekbone was caused by a series of punches, especially if the victim were lying on asphalt so that his head could not go backwards when punched. Dr. Choi acknowledged that death caused by blunt head trauma was consistent with either the use of a weapon or of a fist.

¶ 27 Dr. Choi testified that the blood spatter on Ricardo's t-shirt indicated that the blood had been airborne and could have spattered elsewhere in the area, including on the weapon used. He admitted that, if the branch had been used as in the demonstration for the jury, a significant portion of the

branch's surface area would have been near Ricardo's face, exposed to the blood there. It was also certainly possible that the weapon would not have any blood on it.

¶ 28 Esmerelda Osorio, Ricardo's sister, testified that Ricardo was one year older than she and that they also had two younger sisters. Ricardo was 21 years old when he died. Esmerelda last saw Ricardo at their mother's house on the morning of July 4, 2007. He was preparing to go to the mall to buy baby clothes with his girlfriend, Juana, who was seven months pregnant. Juana had since given birth to Ricardo's son, whom she named after him. Esmerelda identified a photograph of Ricardo taken when he was 20 years old.

¶ 29 After the State rested its case-in-chief, the trial court denied defendant's motion for a directed verdict. Jose Guadarrama testified for the defense about being at defendant's house for the July 4, 2007, party with Luis and Eduardo. Eduardo had been talking on the phone to a girl. Guadarrama, Eduardo, and Luis left defendant's house to go to the Family Dollar store parking lot to meet the girl. There was no mention of a fight. Defendant was behind them.

¶ 30 Guadarrama testified that, when they arrived at the parking lot, a boy (Ernesto) got out of a car, took off his shirt, and started fist fighting with Eduardo for three or four minutes. Guadarrama stood next to a man he did not know (Ricardo). Ricardo was a little bit taller and heavier than Guadarrama. Defendant was behind Guadarrama. Luis pushed past Ricardo to get to Eduardo to try to pull him out from under Ernesto. Ricardo punched Guadarrama in the back of the head two or three times. Guadarrama pushed Ricardo and then punched him once in the face and two or three times on the body. Defendant defended Guadarrama by hitting Ricardo "[l]ike two times" in the side of the head. Defendant had something in his hand but Guadarrama did not know what it was. Ricardo fell on his side and then turned over, facing up. There was a lot of blood on Ricardo's face

and mouth but Guadarrama had seen no blood before Ricardo fell. Someone said that the police were coming. Defendant, Luis, and Eduardo ran away before Guadarrama did. Guadarrama never hit Ricardo while he was on the ground.

¶ 31 Guadarrama further testified that he had provided a videotaped statement to police on July 5, 2007. Defense counsel impeached Guadarrama with the statement, in which he said that he had hit Ricardo two more times after he fell to the ground. He denied saying that he hit Ricardo after he fell to the ground. Guadarrama also denied telling police that he did not know if defendant hit Ricardo. On July 5, Guadarrama identified defendant in a photo line-up and told police that defendant hit Ricardo on the head with a piece of wood. When asked if he told police that he (Guadarrama) hit Ricardo and he fell, Guadarrama responded, "Yes, I told him that I hit him." When asked if he told police that he saw defendant hit Ricardo only once, Guadarrama responded, "Yes. I saw him that he hit."

¶ 32 Guadarrama acknowledged that he had been charged with first-degree murder in the case. In December 2007, he pleaded guilty to second-degree murder, agreeing to testify in defendant's trial. The first-degree murder charges were dismissed. Guadarrama testified that, under the plea, the potential sentence was 4 to 20 years' imprisonment, with a requirement that he serve 50 percent, instead of 20 to 60 years on first-degree murder. He was sentenced to 5 years' imprisonment. At the time of defendant's trial, Guadarrama had completed his sentence.

¶ 33 On cross-examination, the State further impeached Guadarrama with his statement to police. On redirect examination, Guadarrama testified that the police sometimes questioned him outside of the videotape room. The State objected and defense counsel made an offer of proof outside the jury's presence. Guadarrama said that he had talked about the fight to the police in the police car

when they picked him up from his home but was not asked about defendant then. Both defense counsel and the State indicated that they had no police reports of a non-recorded interview. The court ruled that no limiting instruction was needed. Neither side had any more questions for Guadarrama.

¶ 34 Luis Sepulveda, defendant's younger brother, testified that he was 20 years old in July 2007 and worked in a factory. At the July 4 party, Luis, Eduardo, Guadarrama, and defendant were drinking beer and other alcohol. Eduardo and Guadarrama were talking on the phone with a girl and seemed to be arguing. Eduardo said they were going to the Family Dollar store. Luis, Eduardo, and Guadarrama went to the Family Dollar parking lot. When asked why they went to the parking lot, Luis responded, "I told Jose Guadarrama that he said that we were going to look for girls there. He said to me [']oh, maybe we are going to fight and —.['] " Defendant did not go with them.

¶ 35 Luis explained that Ernesto and Eduardo were fist fighting and kicking each other. After about four minutes, Luis tried to break up the fight, telling them to calm down. Luis pushed Ernesto, who was taller than Eduardo. Eduardo was on the ground and Ernesto was kicking him. Luis saw Guadarrama punching "the boy" (Ricardo) in the face while Ricardo was on the ground. Luis told Guadarrama not to hit Ricardo. Guadarrama hit Ricardo three or four times with both hands while Ricardo was on the ground. The police were coming and Luis noticed that defendant was there. Luis and defendant ran back to the house. Guadarrama was still hitting Ricardo. Eduardo and Guadarrama returned to the house two or thee minutes later. Luis did not see defendant hit anyone in the parking lot. Luis was never hit and suffered no injuries.

¶ 36 Luis further testified that they went to a friend's house that night. Sometime the next day, they went to Kenosha to calm down and see a lawyer. They never found an attorney because they had no money.

¶ 37 Defendant testified that in July 2007, he was 28 years old. Defendant took care of Luis. Since birth, Luis had a vision problem, "an eye when he wants to look straight, the eye moves to one side and the other side." They lived in a house with their other brother, Carlos, and two friends. On July 4, 2007, defendant had a couple of beers after work. At about 8 or 9 p.m., Luis, Guadarrama, and Eduardo came to defendant's house. Eduardo talked on the phone for about 20 minutes. Then, Guadarrama and Eduardo went "to see some girls and that's when they started fighting." Luis left after Eduardo and Guadarrama. Defendant knew that Eduardo, Guadarrama, and Luis were going to the Family Dollar parking lot because he saw them walking that way. Defendant left five or six minutes later. From his house, defendant could see Eduardo and the other guy (Ernesto) fighting in the parking lot. Defendant did not "exactly" know what was going on but he went to the lot because Luis was headed toward the fight. Defendant picked up a branch as he went because he "thought they could need something or something so [he] was going to go there to defend [him]self." Defendant had a beer bottle in his hand when he left the house but left it in the yard because he thought that if he hit someone with it, it might break and cut someone.

¶ 38 Defendant testified that, when he arrived at the parking lot, people were watching Eduardo and Ernesto fight. Defendant stood by Luis, who was standing by Guadarrama. There was a big, heavy guy (Ricardo) on the other side of Guadarrama. Ricardo was the biggest person in the parking lot. Luis and defendant were about the same size as each other. Ernesto, who was bigger than Eduardo, threw Eduardo on the ground and was kicking him. Luis tried to grab Eduardo. Defendant saw that Ricardo was going to hit Luis so defendant hit Ricardo with the branch on the right side of the head. Defendant held the branch with only one hand when he hit Ricardo. He hit Ricardo only once. When asked why he used the branch, defendant testified, "Because I saw he was so big and

I thought he was going to hurt my brother." Defendant testified that Ricardo "was going to grab" Luis.

¶ 39 Defendant testified that Ricardo fell to the ground, face up. Defendant got scared and moved back. Guadarrama was hitting Ricardo in the face. Defendant and Luis were both telling Guadarrama to leave Ricardo alone. Luis told defendant that the police were coming. Defendant and Luis ran to their house. Eduardo and Guadarrama remained in the parking lot; they arrived at the house about three to five minutes later. The four drove in Guadarrama's car to a friend's house for the night because they were scared that "other people were going to come [to defendant's house] to start a fight."

¶ 40 Defendant testified that he went to work the next morning and received a phone call at about 11 a.m. from his landlord's son telling him that Ricardo had died. Defendant told his boss what happened and that he was going to hire an attorney. Defendant left work and went back to his friend's house but the friend asked him to leave because he did not want any problems. Defendant and his brothers went to Silvestre Gallardo, who drove them to a friend's house in Kenosha. They went to Kenosha because they were scared and wanted to get an attorney while things settled down. Silvestre thought it would be good for them to be in a different state. The next day, police came to the Kenosha house, arrested defendant and Luis, and took them to the Kenosha police department. Defendant told his brother, "[n]o, we got caught." Defendant felt "very sad for what happened" and did not mean for Ricardo to die.

¶ 41 When defense counsel asked defendant what the detectives said to him in Kenosha, the State objected, and there was a lengthy discussion outside the jury's presence. Defense counsel reported to the court that defendant just told him in the last day or so that the detectives had questioned him,

after giving him *Miranda* warnings, before the videotaped interview. During the non-recorded questioning, defendant told the police that he hit Ricardo only once. The detectives told him that Guadarrama said that defendant hit Ricardo more than once, probably three times. They suggested to defendant that it would make things better for him if he said he hit Ricardo three, four, or five times. The detectives said they talked to their boss and that if defendant said three, four, or five times, they would let him and his brother go. During the videotaped interview, defendant told police that he hit Ricardo "no more than three" times.

¶ 42 Defense counsel told the court that, although defendant mentioned the non-recorded questioning to him in the past, he had not filed a motion to suppress because defendant had received his *Miranda* rights and, therefore, voluntarily talked to police, whether on or off the tape. Defense counsel noted that neither he nor the State had received any report of the non-recorded questioning. When the court asked if he was going to file a motion to suppress, defense counsel responded that he had no good faith basis to do so. Defense counsel shared that, although he had been representing defendant for over two years, he thought that defendant had not trusted him because he had recommended that defendant accept a plea offer. Over the State's objection, the court ruled that defense counsel could question defendant about the circumstances preceding his recorded statement.

¶ 43 The jury was brought back and defense counsel resumed direct examination of defendant. Counsel asked defendant if he had spoken to Waukegan police officers while in Kenosha; defendant answered yes. Defense counsel then had no further questions.

¶ 44 On cross-examination, defendant testified that he left his beer bottle at home because he did not want to hurt anyone and that when he left his home he had no idea there was going to be a fight. Defendant did not know "exactly" that there would be a fight; he was "trying to prevent it." He then

agreed that when he left his house, he knew there was going to be a fight, and that is why he took the branch. Of the six men involved in the fighting, defendant was the only one who had anything in his hands. When defendant saw that he was the only person with a weapon, he decided to keep the branch anyway. No one else ever touched the branch while defendant was in the parking lot. Defendant denied hitting Ricardo across the nose or on the left cheek with the branch. Defendant was trying to prevent Ricardo from attacking Luis, because Ricardo was "going straight to" Luis. Defendant did not choose to hit Ricardo in the legs or back or arms or anywhere else. He agreed that he chose to target Ricardo's head. Defendant did not see if Ricardo was bleeding when he fell because he got scared. Defendant did not call 911 or make an effort to help Ricardo. When he found out the next day that Ricardo had died, defendant went to Wisconsin because he was scared of getting caught by the police. He could not afford a lawyer then. Defendant acknowledged telling police that if the men on the other side had had a stick that one of them might have been killed.

¶ 45 The jury found defendant guilty of first-degree murder under count IV—knowing that his acts created a strong probability of great bodily harm. The court denied defendant's motion for a new trial and sentenced defendant to 28 years' imprisonment to be served at 100% with credit for time served in custody in the Lake County, Illinois, jail. The court subsequently denied defendant's motion to reconsider sentence. Defendant timely appeals.

¶ 46 ANALYSIS

¶ 47 Defendant argues that (1) he received ineffective assistance of counsel; (2) the trial court erred in instructing the jury; (3) he was denied a fair trial by the prosecutor's eliciting improper testimony about Ricardo's family and making prejudicial comments during closing argument; and (4) the trial court erred in calculating his credit for time spent in custody. We address each argument

in turn.

¶ 48 Ineffective Assistance of Counsel

¶ 49 Defendant contends that counsel was ineffective for failing to file a motion to suppress his videotaped statement after learning that the statement was induced by promises of leniency. Defendant further contends that, at a minimum, counsel was ineffective for failing to question defendant about the circumstances surrounding his statement so that the jury could be aware of them. Under the familiar, two-prong test of *Strickland v. Washington*, 466 U.S. 668 (1984), to succeed on a claim of ineffective assistance of counsel, "a defendant must show that (1) his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant in that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different." *People v. Houston*, 226 Ill. 2d 135, 144 (2007). In demonstrating that counsel's performance was deficient, a defendant must overcome the strong presumption that counsel's conduct might be considered sound trial strategy. *Strickland*, 466 U.S. at 689; *Houston*, 226 Ill. 2d at 144. A reasonable probability that the result of the proceeding would have been different is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694; *Houston*, 226 Ill. 2d at 144. Failure to satisfy either prong of the *Strickland* test defeats an ineffective-assistance claim. *Strickland*, 466 U.S. at 697; *Houston*, 226 Ill. 2d at 144-45.

¶ 50 Whether or not trial counsel's performance was objectively deficient, defendant's argument fails under the second *Strickland* prong. To establish prejudice for counsel's failure to file a motion to suppress, the defendant must demonstrate a reasonable probability both that the motion would have been granted and that the outcome of the trial would have been different absent the suppressed

evidence. *People v. Givens*, 237 Ill. 2d 311, 331 (2010). Here, assuming *arguendo* a motion to suppress would have been granted, there was overwhelming evidence to convict defendant of first-degree murder, even without the objected-to testimony. Although defendant argues that counsel was ineffective for failing to file a motion to suppress his videotaped statement, defendant takes issue with only a portion of Detective Cappelluti's testimony as to what defendant told him during the videotaped statement.[7] He maintains that, absent Cappelluti's testimony that defendant told him he hit Ricardo three times, because the evidence was closely balanced, there was a reasonable probability that the jury would not have found him guilty of first-degree murder. Alternatively, defendant asserts that, had counsel questioned him about the circumstances of his statement to Cappelluti, the jury "would have viewed that admission in an entirely different light."

¶ 51 Defendant was convicted of first-degree murder as charged in count IV—that he performed the acts that caused Ricardo's death knowing that such acts created a strong probability of great bodily harm (720 ILCS 5/9-1(a)(2) (West 2006)). The jury was instructed, and the State argued, that defendant could be found guilty of first-degree murder under a theory of accountability. Accountability itself is not a crime but, rather, a mechanism through which a criminal conviction may be achieved. *People v. Rodriguez*, 229 Ill. 2d 285, 288-89 (2008). To prove a defendant guilty of an offense under a theory of accountability, the State must prove that, "either before or during the commission of an offense, and with the intent to promote or facilitate that commission, he or she solicits, aids, abets, agrees, or attempts to aid that other person in the planning or commission of the offense." 720 ILCS 5/5-2(c) (West 2010). To prove a defendant's intent to promote or facilitate a

[7]Neither the videotaped statement nor the transcript of it was admitted into evidence. The content of the statement was admitted via Detective Cappelluti's testimony.

crime, the State must show either that the defendant shared the principal's intent or that there was a common criminal design. *People v. Velez*, 388 Ill. App. 3d 493, 512 (2009). "A common design may be inferred from the circumstances surrounding the commission of a crime." *People v. Hernandez*, 362 Ill. App. 3d 779, 789 (2005). Relevant circumstances include the defendant's presence at the scene of the crime, close affiliation with the actors after the crime, failure to report the crime, and flight from the scene of the crime. *People v. Reeves*, 385 Ill. App. 3d 716, 727 (2008). Words of agreement are not necessary to establish a common purpose. *Reeves*, 385 Ill. App. 3d at 727. When two persons engage in a common criminal design or agreement, any further acts committed by one are considered to be the other party's acts in the common design, and both are equally accountable for the consequences of such further acts. *Hernandez*, 362 Ill. App. 3d at 789.

¶ 52 Here, there was overwhelming evidence to support the inference that defendant and Guadarrama were engaged in a common criminal design. Defendant and Guadarrama were friends who were together at a party at defendant's residence. They went to the Family Dollar parking lot at, or about, the same time, when Eduardo went there to fight with Ernesto. Although Guadarrama testified that there was no mention of a fight when they left, Luis testified that Guadarrama told him they were going to "look for girls" and "maybe we are going to fight." Cappelluti testified that defendant told him they went to the parking lot to fight. Defendant admitted on cross-examination that he knew there was going to be a fight and that was why he left the beer bottle at home but picked up the branch on the way. In the parking lot, Eduardo and Ernesto immediately began to fist fight.

¶ 53 The evidence established that the one-on-one fist fight quickly erupted into a larger clash between Ernesto and Ricardo on one side and, on the other side, defendant, Guadarrama, Eduardo, and Luis. Ricardo interjected himself into the action by leaving the Mustang and moving toward

defendant's group. Guadarrama testified that he and Ricardo began fighting when Luis pushed past Ricardo to try to pull Eduardo out of the fist fight, and that defendant came to Guadarrama's defense. According to Cappelluti's testimony, defendant told him that Ricardo jumped into the fight onto Eduardo and Ernesto. Defendant testified that Ricardo was going straight for Luis and that he (defendant) entered the fray to protect Luis by hitting Ricardo in the side of the head with the branch. Defendant and Luis testified that Guadarrama punched Ricardo in the face as he lay on the ground. This evidence overwhelmingly supported the inference that defendant and Guadarrama were engaged in the common design to batter Ricardo to prevent his involvement in the fist fight and, especially since Ricardo was the largest man involved, to try to secure a "win" for their side. See *People v. Merritte*, 242 Ill. App. 3d 485, 492 (1993) (affirming defendants' first-degree murder convictions under an accountability theory where one defendant knocked the victim to the ground and kicked him while the second defendant hit the victim with a shovel, and a third party subsequently appeared on the scene and beat the victim in the head with a wire crate, by concluding that all three men were engaged in a common design to brutally beat the victim).

¶ 54 Moreover, defendant's conduct after the fight supports the inference of a common design. It was undisputed that defendant and Guadarrama fled the scene, whether they did so simultaneously or a few minutes apart. According to defendant's own testimony, once the four (defendant, Guadarrama, Eduardo, and Luis) were reassembled at defendant's house, they all drove in Guadarrama's car to a friend's house for the night because they were scared. Though defendant subsequently went to Kenosha, he nonetheless maintained a close affiliation with Guadarrama overnight. By defendant's own testimony, he failed to report the crime, despite his alleged remorse. See *Reeves*, 385 Ill. App. 3d at 728 (stating that the defendant's presence for all facets of the crime,

including his flight and not reporting the crime supported the inference of a common design).

¶ 55 Given that defendant and Guadarrama were engaged in a common design, defendant was accountable for Guadarrama's acts in furtherance of the common design. See *Hernandez*, 362 Ill. App. 3d at 789. The evidence was uncontroverted that Ricardo died of two of the injuries to his face, the broken nose and the broken left cheek bone. It was uncontested that defendant and Guadarrama were the only persons who hit Ricardo in the face or head. However they are apportioned, the acts of defendant and Guadarrama in furtherance of their common design to beat Ricardo were the undisputed cause of Ricardo's death. We also note that, by defendant's own testimony, his targeting Ricardo's head with the branch knocked Ricardo to the ground, face up. Defendant's deliberate action placed Ricardo in an extremely vulnerable position that allowed Guadarrama or defendant, or both, to further batter him. Accordingly, the evidence that defendant was guilty of first-degree murder under a theory of accountability was overwhelming, even without Cappelluti's testimony that defendant told him he hit Ricardo three times. See *People v. Terry*, 99 Ill. 2d 508, 515 (1984) (holding that, where the codefendants engaged in a common design to commit a battery and the result of their concerted efforts was murder, they were all legally accountable under the common-design rule); *Hernandez*, 362 Ill. App. 3d at 790 (holding that the defendant was accountable for murder, even if the defendant's blow was not the fatal one, where the defendant threw a brick at the victim's head after his fellow gang members attacked the victim and knocked him to the ground).

¶ 56 Defendant contends that the "evidence was closely balanced on the question of who and what object" caused Ricardo's death and that whether he hit Ricardo three times or only once was "critical" to the jury's determination of his guilt of first-degree murder. He maintains that the State sought to prove that he hit Ricardo three times to conform its theory of the case to Dr. Choi's

testimony. According to defendant, other than the statement to Cappelluti, there was no evidence to support that it was "solely" defendant who hit Ricardo with the branch three times. Defendant's argument misses the mark. A determination of whether defendant caused the breaks to Ricardo's nose and left cheekbone with the branch (as supported by the testimonies of Dr. Choi and Amelia) or Guadarrama caused those injuries with his fists (as supported by Luis's and defendant's testimonies) was not required for the jury to find defendant guilty of first-degree murder under an accountability theory.

¶ 57 In a related argument, defendant maintains that the defense theory of the case was that defendant hit Ricardo only once with the branch in the side of the head. He posits that Guadarrama could have inflicted the deadly blows to Ricardo's face, either with the branch or his fists, after defendant fled the scene. According to defendant, the evidence was thus closely balanced on the question of "who and what object caused" Ricardo's death. This argument is similarly unavailing.

¶ 58 We note that, although defendant testified that he told Guadarrama to stop hitting Ricardo, he was the only witness to testify to this. Moreover, even if defendant's testimony is taken as true, it is insufficient to relieve him of guilt under a theory of accountability. A defendant's involvement in a common criminal design is presumed to continue until he detaches himself from the criminal enterprise. *People v. Jones*, 376 Ill. App. 3d 372, 386 (2007). Effective withdrawal from the criminal enterprise requires the defendant to communicate his intent to withdraw. *Jones*, 376 Ill. App. 3d at 386. A "defendant may communicate his withdrawal from a crime in three ways: (1) by wholly depriving the group of the effectiveness of his prior efforts in furtherance of the crime; (2) giving timely warning to the proper law enforcement authorities; or (3) otherwise making proper efforts to prevent the commission of the crime." *Jones*, 376 Ill. App. 3d at 386 (citing 720 ILCS 5/5-

2(c)(3) (West 2000)). Defendant testified that he told Guadarrama to stop hitting Ricardo and then fled. This was insufficient to constitute withdrawal as he did nothing to undermine the effectiveness of his prior acts, did not notify authorities, and did nothing to prevent the crime. See *People v. Nunn*, 184 Ill. App. 3d 253, 272 (1989) (affirming defendants' first-degree murder convictions under an accountability theory and rejecting an argument that defendants withdrew from the common design to jointly beat the victim where some defendants "simply walked away while the others continued their assault upon the victim" and some defendants pulled one codefendant off of the victim).

¶ 59 Based on the foregoing, even without the testimony to which defendant objected, there was not a reasonable probability that the result of the proceeding would have been different. Accordingly, defendant's argument that counsel was ineffective for failing to file a motion to suppress fails under the second *Strickland* prong. See *Givens*, 237 Ill. 2d at 334 (rejecting the defendant's claim of ineffective assistance of counsel for failure to establish that she was prejudiced by her counsel's decision to withdraw a motion to suppress prior to trial).

¶ 60 Defendant alternatively argues that counsel was ineffective for not questioning him about the circumstances surrounding his statement to Cappelluti. Even assuming that the jury had heard defendant's assertion that he was promised leniency and that the jury had chosen to completely disregard defendant's alleged statement to Cappelluti that he hit Ricardo three times, as discussed above, the evidence of defendant's guilt was still overwhelming. Accordingly, defendant has not satisfied the prejudice requirement under *Strickland*'s second prong.

¶ 61 Jury Instructions

¶ 62 Defendant next argues that the trial court erred in instructing the jury on the use of force by an initial aggressor because there was no factual basis for it. Defendant also maintains that the trial

court erred in giving the jury the instruction on causation in homicide cases because it "is not intended for homicide cases where the State's theory is simply" accountability. Defendant acknowledges his forfeiture of these issues by failing to preserve them in the trial court; however, defendant urges us to review these claims of error under the plain-error doctrine.

¶ 63 Under the plain-error doctrine, a reviewing court may consider unpreserved error when a clear or obvious error occurs and (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008); Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967).[8] Defendant bears the burden of persuasion under either prong. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 64 Here, defendant argues that plain error occurred under both prongs. Given our earlier determination that the evidence was not closely balanced, defendant failed to meet his burden of persuasion under the first prong of plain-error analysis.

¶ 65 To meet the burden of persuasion under the second prong, a defendant must show that the erroneous or omitted jury instruction "severely threaten[ed] the fundamental fairness" of his trial.

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[8]Illinois Supreme Court Rule 451(c) (eff. July 1, 2006) also allows a reviewing court to overlook forfeiture where unpreserved claims of error in jury instructions are argued on appeal. Ill. S. Ct. R. 451(c) (eff. July 1, 2006) (providing that "substantial defects [in jury instructions in criminal cases] are not waived by failure to make timely objections thereto if the interests of justice require"). Rule 451(c) is coextensive with Rule 615(a)'s plain-error clause, and we construe them identically. *People v. Snowden*, 2011 IL App (1st) 092117, ¶ 79.

(Internal quotation marks omitted.) *People v. Hopp*, 209 Ill. 2d 1, 8 (2004). "The sole function of jury instructions is to convey to the jury the correct principles of law applicable to the evidence submitted to it in order that, having determined the final state of facts from the evidence, the jury may, by the application of proper legal principles, arrive at a correct conclusion according to the law and the evidence." *People v. Pinkney*, 322 Ill. App. 3d 707, 717 (2000). Thus, an erroneous jury instruction rises to the level of plain error only when it "creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law." *Hopp*, 209 Ill. 2d at 8 (addressing the erroneous omission of a jury instruction and noting that "even an incorrect instruction on an element of the offense is not necessarily reversible error" (*Hopp*, 209 Ill. 2d at 10)).

¶ 66 In the present case, the trial court instructed the jury on the use of force by an initial aggressor using a non-IPI instruction[9] as follows:

> "A person who initially provokes the use of force against himself or another is justified in the use of force only if the force used against him or another is so great that he reasonably believes he or another is in imminent danger of death or great bodily harm, and he has exhausted every reasonable means to escape the danger other than the use of force which is likely to cause death or great bodily harm to the other person."

Defendant maintains that the initial-aggressor instruction should not have been given because there was no evidence to support it. The State responds that, on the evidence presented, it was unclear who was the initial aggressor. The State contrasts defendant's and Guadarrama's testimonies that

[9]The record contains a jury instruction labeled as Illinois Pattern Jury Instructions, Criminal, No. 24-25.09 (4th ed. 2000) with a typed notation, "(amended)." There is also a handwritten notation stating, "Given over obj[ection] w/agreement re: 'or another.' "

Ricardo was the initial aggressor (where defendant testified that Ricardo jumped on Luis and Guadarrama said that Ricardo was hitting him) and Amelia's testimony that Ricardo did not get involved until defendant ran toward the fist fight with the branch and that someone knocked Ricardo down somehow.

¶ 67 We agree with defendant that it was error to give the initial-aggressor instruction on the facts of this case. The giving of a jury instruction must be supported by "some evidence." (Internal quotation marks omitted.) *People v. Snowden*, 2011 IL App (1st) 092117, ¶ 80. The initial-aggressor instruction provides that a defendant may not provoke the use of force, retaliate, and then claim self defense. *People v. Fleming*, 155 Ill. App. 3d 29, 37 (1987). The IPI version of the instruction does not include the words "or another." Apparently,[10] this language was added here because, rather than self defense, defendant raised the affirmative defense of defense of another (Illinois Pattern Jury Instructions, Criminal, No. 24-25.06 (4th ed. 2000)). However, the initial-aggressor instruction given makes sense only if defendant somehow provoked Ricardo's use of force against Luis and then retaliated against Ricardo, claiming defense of Luis. Amelia's testimony, while supporting the conclusion that defendant was the initial aggressor as between him and Ricardo, does not in any way suggest that defendant provoked the use of force against Luis. Accordingly, the trial court erred in giving the instruction because there was no evidence that supported it. See *Fleming*, 155 Ill. App. 3d at 37 ("It is error to submit an instruction where no evidence is advanced in support thereof.").

¶ 68 Having determined that error occurred, we must now determine whether the initial-aggressor

[10]The jury instruction conference contained in the report of proceedings does not shed any light on the reason for the additional language.

instruction denied defendant a fair trial such that he has established plain error under prong two. We must consider the effect of the instruction on the trial. *Hopp*, 209 Ill. 2d at 8 (stating that an erroneous jury instruction rises to the level of plain error only when it "creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law"). According to defendant, the initial-aggressor instruction "improperly led the jury to believe that the defendant was not entitled to use force against the decedent in the absence of the decedent first using any force against him." Defendant elaborates that the jury could have believed that he had no right to use force to defend his brother (or Guadarrama) "unless he first exhaust[ed] all other alternative means to escape the danger." Defendant's argument assumes that the giving of the instruction compelled the jury to "find" that defendant was the initial aggressor. This is not so. *Fleming*, 155 Ill. App. 3d at 37 (stating that giving the initial-aggressor instruction does not erroneously assume that the defendant was the initial aggressor; rather, it remains a question of fact for the jury).

¶ 69 Defendant further asserts that the "real issue" was not who the initial aggressor was but, rather, whether defendant acted on the belief that the use of force was necessary to defend another. As noted, the jury's role as fact finder was unhindered. *Fleming*, 155 Ill. App. 3d at 37. Thus, the jury could reach the "real issue" of defendant's alleged belief in the necessity of force to defend Luis. Indeed, the jury was instructed on the affirmative defense of defense of another (based on a reasonable belief in the necessity of deadly force) and on the lesser offense of second-degree murder (based on an unreasonable belief in the need for the use of deadly force) (Illinois Pattern Jury Instructions, Criminal, No. 7.06 (4th ed. 2000)). See *Fleming*, 155 Ill. App. 3d at 37 (stating that where the evidence is conflicting regarding self defense, a jury is properly instructed on both self defense and initial aggressor). Accordingly, the erroneous giving of the initial-aggressor instruction

did not rise to the level of plain error because it did not create a serious risk that the jury incorrectly convicted defendant because it did not understand the applicable law. See *Hopp*, 209 Ill. 2d at 8.

¶ 70 Defendant alternatively maintains that, even if the instruction were properly given, it was error to give it without also instructing the jury on the use of force by a non-initial aggressor (Illinois Pattern Jury Instructions, Criminal, No. 24-25.09X (4th ed. 2000)). Given our conclusion that the trial court's error in giving the initial-aggressor instruction did not rise to the level of plain error, we need not address defendant's alternative argument that omitting the non-initial-aggressor instruction was plain error.

¶ 71 Defendant also argues that the trial court erred in giving the causation-in-homicide-cases instruction. That pattern instruction provides:

> "In order for you to find that the acts of the defendant caused the death of _____, the State must prove beyond a reasonable doubt that defendant's acts were a contributing cause of the death and that the death did not result from a cause unconnected with the defendant. However, it is not necessary that you find the acts of the defendant were the sole and immediate cause of death." Illinois Pattern Jury Instructions, Criminal, No. 7.15 (4th ed. Supp. 2011).

Defendant cites *Pinkney* to argue that this instruction should not have been given because it was intended for cases in which there was an intervening and alternative explanation for the cause of death, such as a negligently performed surgery following a shooting. See *Pinkney*, 322 Ill. App. 3d at 718. The State responds that the instruction was properly given because defendant placed causation in issue. We agree with defendant.

¶ 72 We find *Pinkney* instructive. In *Pinkney*, as in the instant case, the defendant was convicted

of first-degree murder where the victim was fatally beaten by the defendant and another man. *Pinkney*, 322 Ill. App. 3d at 710. As in the instant case, the State in *Pinkney* presented alternative theories of guilt—either that the defendant actually caused the victim's death by beating him or that the defendant was legally accountable for the victim's death. Also like the instant case, Pinkney argued that his use of force did not cause the victim's death and maintained that the other party administered the fatal blows. The trial court instructed the jury on causation.[11] *Pinkney*, 322 Ill. App. 3d at 716.

¶ 73 On appeal, the court agreed with the defendant's argument that the causation instruction was improperly given because there was no evidence or argument that an intervening event outside of the joint beating caused the victim's death. *Pinkney*, 322 Ill. App. 3d at 718. The court stated, "[T]he State's argument that defendant was criminally liable for the victim's death was appropriately addressed by the instructions on accountability, not cause of death." *Pinkney*, 322 Ill. App. 3d at 718. Reversing and remanding, the court held that second-prong plain error occurred, concluding that the error deprived the defendant of a fair trial because the instruction "allowed the jury to hold defendant responsible for [codefendant's] conduct without finding that the State had proven that defendant was accountable for that conduct beyond a reasonable doubt." *Pinkney*, 322 Ill. App. 3d at 716, 718. The court reasoned that the error was compounded by the State's rebuttal argument, in which it told the jury that "if it found that [codefendant] actually dealt the fatal blows to the victim, it could convict defendant of murder as long as his acts were 'connected' to [codefendant's] acts." *Pinkney*, 322 Ill. App. 3d at 718.

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[11]Though a non-IPI instruction was given in *Pinkney*, the language was "substantively equivalent" to the language of the IPI version. *Pinkney*, 322 Ill. App. 3d at 718.

¶ 74 Under *Pinkney*, the trial court in the instant case erred in giving the causation instruction. Our inquiry does not end here, however; we must now determine whether the error constituted second-prong plain error. Defendant relies on *Pinkney* to support his argument that the error deprived him of a fair trial because the erroneous causation instruction allowed the jury to find him guilty "irrespective of his accountability." Careful review of *Pinkney* reveals that it does not compel the conclusion that the error in the instant case rose to the level of plain error. While it is true that the court in *Pinkney* concluded that, in that case, the jury could have convicted the defendant based only on causation, without actually finding him accountable, in the instant case, we do not believe that the jury could have been so confused that it improperly convicted defendant. See *People v. Grimes*, 386 Ill. App. 3d 448, 454-55 (2008) (holding that the trial court had not abused its discretion in denying the defendant's request for the causation instruction and noting that "trial courts should be especially cautious about giving the homicide-causation instruction when a defendant is tried on a common-design theory because the instruction *could* confuse the jury") (Emphasis added.)). Most obviously, the State in the present case did not compound the instruction error by arguing that defendant could be held accountable for Guadarrama's acts simply because his acts were connected to Guadarrama's. This is significant, because, not only did the *Pinkney* jury receive an incorrect and possibly confusing instruction, but the State, in a rather lengthy discourse, also essentially asked the jury to find the defendant guilty based solely on the element of causation and to ignore the remaining elements it was required to prove. As we discuss in detail below, the jury was not so misdirected here, and we do not see how the erroneous instruction created a severe threat to the fairness of defendant's trial. See *Hopp,* 209 Ill. 2d at 10 (stating that "even an incorrect instruction on an element of the offense is not necessarily reversible error").

¶ 75 In the present case, consistent with the State's alternative theories that defendant could be guilty as either the principal or as the accomplice, the jury was properly instructed on the definition of first-degree murder, the definition of accountability, and on the elements of first-degree murder with accountability language included as an alternative means of proving the offense. Specifically, the jury was instructed that, to prove the charge of first-degree murder, the State was required to prove the following propositions:

> "First Proposition: That the defendant *or one for whose conduct he is legally responsible* performed the acts which caused the death of Ricardo Osorio; and
>
> Second Proposition: That when the defendant *or one for whose conduct he is legally responsible* did so,
>
> he intended to do great bodily harm to Ricardo Osorio;
>
> or
>
> he knew that such acts created a strong probability of death;
>
> or
>
> he knew that such acts created a strong probability of great bodily harm.
>
> Third Proposition: That the defendant was not justified in using the force which he used." (Emphasis added.)

¶ 76 The jury was clearly instructed that causation was only one of the elements that the State had to prove. To prove defendant guilty as the principal, the State also had to prove the intent element—that defendant knew that his acts created a strong probability of great bodily harm as charged in count IV (720 ILCS 5/9-1(a)(2) (West 2006)). To prove defendant guilty under the theory of accountability, the State had to prove the intent element by establishing that he shared a common

design with Guadarrama. See *Velez*, 388 Ill. App. 3d at 512 (stating that intent for accountability may be shown by proving a common criminal design). Under either theory, the State also had to prove the third element—that defendant had no lawful justification to use the force he did (720 ILCS 5/9-1(a) (West 2006)). We see no serious risk that the jury did not understand the applicable law. In contrast, although the *Pinkney* jury was given the accountability instruction (*Pinkney*, 322 Ill. App. 3d at 719 (Illinois Pattern Jury Instructions, Criminal, No. 5.03 (3d ed. 1994))), we cannot glean from the opinion whether the jury also received an elements instruction that included the accountability language.[12]

¶ 77 Moreover, assuming *arguendo* the jury was misled into convicting defendant as the principal based on causation and "irrespective of his accountability," as defendant urges, there was still no serious risk that the jury "incorrectly convicted" (*Hopp*, 209 Ill. 2d at 8) him because the evidence of guilt under the theory of accountability was overwhelming. Accordingly, unlike in *Pinkney*,[13] defendant here has failed to establish second-prong plain error because he did not show that the erroneous instruction created a "serious risk that the jurors incorrectly convicted [him] because they did not understand the applicable law, so as to severely threaten the fairness of the trial." *Hopp,* 209

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[12]The court's analysis focused on the accountability and causation instructions only, concluding that a jury would be confused by the causation instruction in the case of a common beating that resulted in death. *Pinkney*, 322 Ill. App. 3d 719.

[13]We also note that the court in *Pinkney* held that the trial court abused its discretion by not instructing the jury either on self defense or on second-degree murder based on unreasonable self defense. *Pinkney*, 322 Ill. App. 3d at 720. Overall, then, the *Pinkney* jury was severely misinformed as to all of the applicable law.

Ill. 2d at 8.

¶ 78 Defendant alternatively urges that, if we decline to address his claims of jury-instruction error under the plain-error doctrine, we should conclude that his trial counsel was ineffective for failing to preserve the claims. As noted above, ineffective-assistance-of-counsel claims are governed by the two-prong *Strickland* standard. Given that the evidence was not closely balanced, defendant's claim must fail under *Strickland*'s prejudice prong. See *People v. Enoch*, 122 Ill. 2d 176, 201-02 (1988) (rejecting the defendant's ineffective assistance of counsel claim based on counsel's failure to preserve a trial error for review where the defendant did not demonstrate prejudice); *People v. Sundling*, 2012 IL App (2d) 070455-B ¶ 90 (holding that the defendant's ineffective assistance of counsel claim failed where the defendant could not prove prejudice because the evidence was not closely balanced evidence).

¶ 79 Prosecutorial Misconduct

¶ 80 Defendant's penultimate argument is that he was denied a fair trial by the prosecutor's intentional elicitation of testimony and closing argument regarding Ricardo's pregnant girlfriend and posthumously born baby. Defendant acknowledges his forfeiture of this argument and urges plain-error review under only the closely-balanced-evidence prong. We first determine whether error occurred. See *People v. Taylor*, 2011 IL 110067, ¶ 30.

¶ 81 A defendant has the right to a fair and impartial trial, free from the danger of conviction based on prejudicial prosecutorial comments rather than the evidence. See *People v. Wheeler*, 226 Ill. 2d 92, 121-23 (2007). Prosecutors have great latitude in closing arguments and may comment on the evidence and all reasonable inferences to be drawn therefrom. *People v. Blue*, 189 Ill. 2d 99, 127 (2000). "However, argument that serves no purpose but to inflame the jury constitutes error."

Blue, 189 Ill. 2d at 128.

¶ 82 In its rebuttal closing, in reference to defense counsel's remark that defendant was not the type of person who would kill somebody "for sport," the State noted, "None of us knew him before today." The State continued:

> "The last thing I want to say is this: Speaking of people we've never met, we've never had the opportunity of meeting Ricardo either. Ricardo Osorio was 21 years old on the day that the Defendant took his life. He was a kid—I mean he was a young man. He had a family. He had a pregnant girlfriend with a kid on the way.
>
> Now because of the Defendant Ricardo never got a chance to meet the boy. The boy never got a chance to meet his father. What I'm asking you is when you think about the fact that the Defendant used a deadly weapon on an unarmed man, when you think about the fact that the Defendant took this man away from his family forever, I'm asking you for justice for the family, for the little boy, for Ricardo's brothers and sisters, for his parents, everyone. First degree murder is justice."

¶ 83 While overall not particularly lengthy, and while possibly an invited comment (see *People v. Hudson*, 157 Ill. 2d 401, 441 (1993) (observing that the prosecutor may respond to defense counsel's comments that "clearly invite a response")), the State's comments were not based on evidence relevant to defendant's guilt or innocence. See *Blue*, 189 Ill. 2d at 129. Rather, the comments were of the type intended to appeal to the jurors' emotions, and thus, constituted error. See *Blue*, 189 Ill. 2d at 130-31; see, *e.g.*, Ill. Rs. Prof. Conduct, R. 3.8 (eff. Jan. 1, 2010) (stating that the prosecutor has a duty to "to seek justice, not merely to convict"). However, because, as we discuss above, defendant has not established that the evidence was closely balanced, his procedural

default will stand. See *Naylor*, 229 Ill. 2d at 593 (noting that a procedural default must be "honored" when a defendant fails to establish plain error).

¶ 84 Credit for Time Served

¶ 85 Defendant finally contends that he is entitled to credit for the time he spent in custody in Kenosha, Wisconsin. The State agrees. Because defendant was arrested in Kenosha on the charges in the present case, he is entitled to sentencing credit for that time served. See 730 ILCS 5/5-8-7(b) (West 2006) (repealed by Pub. Act 95-1052, § 95 (eff. July 1, 2009)); *People v. Elder*, 392 Ill. App. 3d 133, 138 (2009).

¶ 86 For the foregoing reasons, we affirm the judgment of conviction of the circuit court of Lake County and remand with directions to amend the sentencing order to reflect the credit for time served, beginning when defendant was arrested in Kenosha, Wisconsin.

¶ 87 Affirmed as modified and cause remanded with directions.