2012 IL App (2d) 101331-U
No. 2-10-1331
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 Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 81-CF-1990
JESUS RODRIGUEZ, a/k/a Jesus Villarreal,	)	Honorable Daniel P. Guerin,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Bowman and Hudson concurred in the judgment.

ORDER

Held: Defendant showed no reversible plain error or ineffective assistance of counsel as to the State's closing argument: the evidence was not close, and nearly all of the challenged comments were proper (the improper comments having been too limited to warrant relief on either theory).

¶ 1 After a jury trial, defendant, Jesus Rodriguez, a/k/a Jesus Villarreal, was convicted of first-degree murder (Ill. Rev. Stat. 1981, ch. 38, ¶ 9-1(a)(1)) and sentenced to 37 years' imprisonment. On appeal, he argues that the State's improper remarks in closing argument denied him a fair trial

and alternatively that his attorney was ineffective for failing to object to most of the remarks and failing to preserve the claim of error. We affirm.

¶ 2 On the morning of August 26, 1981, defendant fatally shot John Spoors in a parking lot near the corner of Lake Street and Mill Road in Addison. At the time, defendant was sitting in his car and Spoors and Harry Krivoshein, Spoors' friend and coworker, were in the parking lot. Defendant later fled to Mexico but was eventually returned to Illinois for trial. He relied on a claim of self-defense (Ill. Rev. Stat. 1981, ch. 38, ¶ 7-1(a)) and, alternatively, a claim that the evidence proved only voluntary manslaughter (now known as second-degree murder) based on an unreasonable belief in the need for self-defense (Ill. Rev. Stat. 1981, ch. 38, ¶ 9-2(b), now codified at 720 ILCS 5/9-2(a)(2) (West 2010)). We recount the evidence from his trial.

¶ 3 Krivoshein testified on direct examination as follows. Since 1997, he had been convicted of numerous offenses, including attempted obstruction of justice in 1997; defrauding an innkeeper in 2006; forgery, false imprisonment, and bail jumping in 2006; and theft and forgery in 2007. At the time of trial, he was on probation in Wisconsin for the forgery conviction. On August 26, 1981, he was 26 years old and was a supervisor for his father's construction company, for which Spoors worked. At the time, the company had a project in Wilmette. Each workday morning, Krivoshein drove his van from his home in Carol Stream, stopped at the parking lot of Millie's Pancake House at the corner of Lake and Mill, picked up Spoors, and drove to the site.

¶ 4 Krivoshein testified that, on the morning of August 26, 1981, he was driving north on Mill Road toward the meeting site when a Pontiac Grand Prix darted out onto the road from the area of an apartment building, "did a donut" (made a 360-degree turn), and kept heading north. Krivoshein slammed on his brakes and changed lanes to avoid a collision. He then pulled into the parking lot

to meet Spoors, who was waiting for him. The Grand Prix was stopped at the light at Lake, waiting to turn. Krivoshein and Spoors exited their vehicles, and Krivoshein told Spoors what had just happened. Krivoshein and the driver of the Grand Prix "gave each other the finger." Krivoshein loaded Spoors' tools into his van. By this time, the Grand Prix had left.

¶ 5 Krivoshein recounted that, as he and Spoors were about to leave, the Grand Prix pulled "right back up" and headed "right towards" the two men, who were standing near their vehicles. The car stopped within five or six feet of them. Neither Krivoshein nor Spoors was holding anything in his hands. Krivoshein saw the driver of the Grand Prix; in court, he identified him as defendant. A few months after the incident, Krivoshein went to the Addison police station and identified defendant from a photographic lineup. He also wrote out a statement.

¶ 6 Krivoshein testified that, as the Grand Prix entered the parking lot, defendant's right hand went into the center console, and he saw defendant "come out with a small black gun." Krivoshein said nothing, but Spoors asked defendant, "What are you going to do, shoot me?" Defendant raised the gun and pointed it at Spoors. Krivoshein ran around the back of the Grand Prix and headed east, and Spoors headed straight west. As he was running away, Krivoshein heard two or three gunshots. He turned around and saw Spoors lying on the ground about 15 feet from the Grand Prix. The Grand Prix pulled out, but Krivoshein got the license plate number and later told it to the police. He ran to where Spoors lay; Spoors was motionless on his stomach, and there was blood on his back.

¶ 7 Krivoshein testified on cross-examination as follows. After exchanging hand gestures with defendant, he thought that the encounter was over. Five minutes later, as he and Spoors were walking toward Krivoshein's van, defendant pulled up and parked between Millie's Pancake House and a gas station. He was three or four feet away from Krivoshein and Spoors. Asked whether the

two men then approached defendant's car, Krivoshein testified, "We didn't have to approach him. He pulled right up to us." Reminded that, in his statement to the police, he had written, "we took a couple of steps toward the car when the Mexican driver pulled out a gun, pointed at us, and started shooting," Krivoshein explained, "Well, when he pulled up, he was approximately five feet away. We took maybe one step toward his car to see what he wanted." Asked how far away defendant's car had been, Krivoshein responded, "about three or four [feet]." Asked whether he had approached the vehicle, he responded, "Not really." Asked why he and Spoors had taken even one step toward defendant's car, Krivoshein testified, "To see what he wanted." Krivoshein recounted that, as he ran away, he looked over his shoulder and saw Spoors running west; he denied that Millie's Pancake House had obstructed his view. Krivoshein reiterated that, despite the long interval between the incident and the trial, he could identify defendant as "[p]robably the person that did it."

¶ 8 The State next called Angelo Denofrio, who testified as follows. On August 26, 1981, he was an Addison police officer and was the first officer to arrive at the shooting scene. He did not take pictures and could not recall whether anyone did. Denofrio spoke to Krivoshein and radioed other officers to look for the car that defendant had been driving.

¶ 9 Julian Cortez testified as follows. On August 26, 1981, he had known defendant for about a year and had lent him $300 to buy a Grand Prix titled in Cortez's name. That day, he was at home in Hoffman Estates. Defendant came over in the Grand Prix and asked to borrow Cortez's other car, a Buick. He gave Cortez the keys to the Grand Prix and Cortez gave him the keys to the Buick. Defendant left. A few minutes later, police officers arrived and questioned Cortez about a shooting. Cortez told them that he was just home from the hospital, and he recounted defendant's visit. The police took the Grand Prix and Cortez later got the Buick back.

¶ 10 Guy Hoffrage, who in 1981 was an Addison police detective, testified as follows. After speaking to Cortez, the police recovered the Grand Prix and the Buick. They did not find defendant. The next day, after speaking to defendant's brother, Hoffrage drove to Indian Lakes Resort and recovered a workers' sign-in-sheet with the name "Jesus Rodriguez" on it. On August 28, 1981, a search of defendant's apartment recovered documents in the name of, or addressed to, "Jesus Rodriguez," some letters addressed to "Jesus Villareal" at various addresses, and some photographs of defendant.

¶ 11 Robert Grochowski testified that, on August 26, 1981, working as a police evidence technician, he processed the Grand Prix and the Buick, recovering latent fingerprints from both cars and from a pack of cigarettes in the Grand Prix. Seven live rounds of ammunition were found in the Grand Prix's center console. Jennifer Cones testified that, in 2007, while employed by a forensic crime lab in Du Page County, she examined the fingerprints. Three of the 13 prints suitable for comparison matched defendant's fingerprints, establishing that they were his.

¶ 12 Lanz Dolz, who performed the autopsy on Spoors on August 26, 1981, testified that there were two bullet entry wounds in the body: one in the left chest and one in the left back. The bullets did not ricochet off anything but entered the body directly. Both bullets took a slight upward angle through the body and crossed paths inside the right lung. That they took an upward angle through the body did not imply that they traveled at an upward angle in relation to the ground before entering Spoors' body. The absence of a bullet wound in the left arm was consistent with Spoors having had his left arm raised in some way, including because he was running. Either bullet would have been fatal.

¶ 13 Addison police officer Jose Gonzalez testified on direct examination as follows. On December 16, 2008, he helped to arrest defendant at O'Hare Airport. In a squad car with several other officers, he obtained a *Miranda* waiver from defendant and spoke with him in Spanish. Defendant told Gonzalez that, in Mexico, an officer had arrested him for a homicide in Illinois. He told that officer that he had never been in Illinois; that he had never killed anyone; and that his surname was Villarreal, not Rodriguez. Gonzalez told him that the police had fingerprints tying him to the 1981 homicide. At first, defendant repeatedly denied ever having been in Illinois. However, after Gonzalez told him that the police had obtained his fingerprints from Mexican authorities, defendant said that he had been in Illinois in 1982 for two days but had not been there in 1981. Gonzalez told him that the fingerprints had been taken in 1981. Defendant then said that he would tell Gonzalez what really happened.

¶ 14 Gonzalez testified that defendant then told him as follows. On August 26, 1981, he was living with his brother in Addison. That morning, as he drove to work, he stopped at a gas station. Two strange men started walking toward him, shouting insults and laughing at him. One threw a tire iron that hit, but did not break, the Grand Prix's rear window. Defendant drove away but soon returned to the gas station; he explained to Gonzalez that he wanted to know whether the two men were going to insult him some more. He parked again. One of the strangers approached his car on the driver's side, and the other approached on the passenger side. Each held a metal object. Gonzalez testified that defendant never said that either man raised the object as though to hit him.

¶ 15 Gonzalez testified that defendant continued as follows. When the man on the driver's side got close, defendant took his gun from the glove compartment, pointed it out the window, and shouted in English, "[G]et out of here." The man ran, but, as he did, he yelled something to the other

man. Defendant fired the gun once. (He said nothing to Gonzalez about firing it downward.) He drove off to work and stayed there briefly. At work, he told his brother what had happened. His brother gave him $500 and told him to flee. Defendant returned to his car and threw the gun into the trash. He then drove to Cortez's house, exchanged the Grand Prix for the Buick, and drove to a friend's apartment. He was stopped by police but allowed to depart.

¶ 16 Gonzalez testified that, about 49 minutes into the ride, the police drove defendant past the scene of the shooting and then past his former apartment building. Defendant said that he could not identify either. An officer bought defendant food and the squad car arrived at the police station about an hour after the ride began. Defendant was taken to an interview room. Gonzalez interviewed defendant in Spanish with a detective present. The interview was videotaped.

¶ 17 Gonzalez testified that, in the interview, defendant said the following. When he drove to the gas station the first time, a car came up perpendicular to his. (Defendant did not say that the car blocked him in.) Two men exited and began to laugh, curse, and call him "wetback." They started to walk away, but defendant had to drive around their car to exit the station. One of the men threw a tire iron, hitting the rear window. Defendant drove away but decided to come back because he wanted to know whether the men were going to tell him anything more. He parked, took the gun out of the glove compartment, and held it with his right hand in his lap. The two men were now standing along a wall. They took some metal items and started walking toward him. Defendant was not blocked in. One of the men went across the front of his car and to the driver's side, and the other man approached him on the passenger side. Once he got close to defendant, he raised the hand that was holding the metal object. Defendant raised the gun, pointed it at him, and told him, "[G]et out of here." The man started to run away and said something to the other man. At that point, defendant

shot at the first man. Defendant explained to Gonzalez that he shot in his direction but was aiming down, not trying to hit him. Defendant said that he fired only one shot.

¶ 18 Gonzalez testified that he asked defendant how far away the man was before defendant shot him; defendant said that he taken "ten steps or more." Defendant also conceded that he had taken the gun out before anyone approached him. On December 17, 2008, Gonzalez spoke to defendant again. In all, from his arrest through December 17, 2008, defendant said at least five times that the victim had been running away from him before he shot him.

¶ 19 Gonzalez testified on cross-examination that the Addison police spent much time and effort to return defendant to Illinois. On December 16, 2008, Gonzalez knew that defendant had been in a Mexican jail, fighting extradition, for some time. On redirect, Gonzalez testified that, in the videotaped interview, defendant said that the returned to the gas station because he was angry.

¶ 20 The State rested. Defendant testified on direct examination that, after fleeing to Mexico, he lived in his hometown, Zacatecas, with his wife and five children and worked on a ranch for about 25 years. He had only a third-grade education. In 1981, he was in the United States illegally.

¶ 21 Defendant testified that, on August 26, 1981, both he and his brother were employed at Indian Lakes. That morning, defendant left his apartment and drove to the gas station on Mill Road. He did not do any "doughnuts" and could not recall having cut anyone off. At the gas station, a car was in front of him. Two men exited and yelled at him. He knew no English, or very little, and could not understand what they were saying, but he could tell that they were angry. Defendant put his car into reverse; one of the men threw a pipe at his car. Defendant pulled out and drove three or four blocks to see whether the men would leave. He was scared. However, five minutes later, he made a "dumb decision" and returned to the station because he needed more gas. Defendant had a

gun; he had bought it about two weeks earlier "on the street" and had kept it in his car at all times since. In 1981, he did not know whether it was illegal to have the gun.

¶ 22 Defendant testified that, when he returned to the gas station and parked, the two men were still there. They approached him, each holding a pipe in his hand—whether the left hand or the right hand, defendant could not recall. They got "very, very close" to the car, about four feet away. Each man raised the hand holding the pipe. Describing what happened next, defendant testified, "When the guy got close, he approached the car, and I told him I know how to say that in English, and the guy was laughing." Asked what happened next, he testified, "I shot him." Asked why, he testified, "I was scared because of my life." Defendant testified that at no time before he fired the gun was either man running away from him. Asked whether he shot only once, he responded, "I think so."

¶ 23 Defendant testified that, after firing the gun, he left. He was "scared" because he "didn't have papers" and did not know what to do. He went to his brother at work. His brother handed him money and told him to flee. Defendant feared getting caught and had no idea what would happen to him. Eventually, he got to Zacatecas. Later, he spent 11 months in a Mexican jail, fighting extradition. On his return, the police treated him kindly, unlike in Mexico. Defendant conceded that he told Gonzalez that the man he shot was running away when he shot him. He explained that he lied because Gonzalez kept telling him what to say and he just repeated it. Defendant had told the police several inconsistent stories because he had been scared, but he was now telling the truth.

¶ 24 Defendant testified on cross-examination that he could not recall how he had pointed the gun at the victim before shooting him. However, when the prosecutor asked him to demonstrate, he did so. Defendant testified that, when he fired the gun, the victim was facing him. Asked what part of

the victim's body he hit, defendant testified, "I didn't know. I never tried to hurt him." Asked whether the victim went down after being shot, defendant testified, "I didn't see."

¶ 25 Defendant conceded that he never told the police officers that the reason that he returned to the gas station was that he needed more gas. While in the Mexican jail, he lied to people about his identity, whether he had ever been to Illinois, and whether he had shot anyone. Back in the United States, he told the police more lies, such as that he had never used the name "Jesus Rodriguez"; that he had never been in Illinois; and that he had been in Illinois only in 1982. Further, at the hearing on his motion to suppress, he lied under oath by stating that he had thought that Gonzalez and the other officers in the squad car were his attorneys.

¶ 26 Defendant conceded that, at any time after returning to the gas station and before shooting the victim, he could have just driven away. He lied to the police when he told them that he had shot downward. He also lied to the police when he said that he shot the victim as the victim was running away and when he said that the victim was at least 10 steps away when he shot him.

¶ 27 On redirect examination, defendant conceded that, from December 16, 2008, on, he had told the police many inconsistent stories. He did so only because the officers "would ask the same question, a lot of times the same thing." Despite demonstrating on cross-examination how he had shot the victim, defendant testified that he did so because the prosecutor "got too close." On re-cross-examination, he denied having shot the victim in the back.

¶ 28 The trial judge agreed to instruct the jury on when a person who initially provokes the use of force is justified in the use of force (Illinois Pattern Jury Instructions, Criminal, No. 24-25.09 (2d ed. 1981)) and that the use of force is not justified if a person initially provokes the use of force

against himself with the intent to use that force as an excuse to inflict bodily harm on another (Illinois Pattern Jury Instructions, Criminal, No. 24-25.11 (2d ed. 1981)).

¶ 29 We turn to closing argument. To facilitate our discussion of the issues, we have identified, with bracketed numerals and italics, comments that defendant claims are improper.

¶ 30 In closing argument, Assistant Attorney General Stephen Knight stated that, after killing Spoors, defendant "took the first steps to escape justice." Knight summarized defendant's escape route to Mexico and commented:

> "[1] *Ladies and gentlemen, thank God law enforcement was not born yesterday. Law enforcement does not forget. The Addison Police Department did not forget about John's killer. They worked hard. They worked diligently. They tracked down John's killer to Mexico. And finally, finally, he was captured and taken into custody.*
>
> *Then lie after lie, one month of lies, two months' worth of lies. Eventually, after 11 months of lying, John's killer was finally brought back to our country, our state, our county. And he sits right here in court today*."

¶ 31 After stating that the prosecution had proved first-degree murder, Knight continued:

> "So, you have to determine really was [*sic*] John and Harry coming after him with pieces of metal—pipes or whatever he said he [*sic*] had. That's what you have to consider. [2a] *And I submit to you that everything the defendant told you about John and Harry is made up. It's a fairy tale to try his very last step to escape justice. It's his last step. And he is absolutely, absolutely not guilty of voluntary manslaughter. He is guilty of murder.*
>
> [2b] *And why do we know that his story about this justification is nothing more than a bunch of lies sprinkled with pretend fairy dust?* *** Do you remember the doctor? He

told us how he did that examination, how he found not one, but two—two bullet holes—one in the side of the upper chest and one right in the back. Two bullets."

¶ 32 Knight noted the evidence that, no fewer than six times in all, defendant told Gonzalez that he shot Spoors as Spoors was running away. Defendant had admitted lying under oath at the hearing on his motion to suppress, so his testimony at trial was also unworthy of belief:

"[2c] *What you saw yesterday on the stand from the defendant, what you witnessed was nothing more than the shifting sands of a guilty mind. He told you a story that's nothing more than a house of cards built on a foundation of lies.*"

¶ 33 Turning to the credibility of Krivoshein, Knight stated:

"Now, from Mr. Jacobs' [defendant's attorney's] opening statement, I guess he wants you to believe that somehow Harry who was with his friend John in that parking lot *** somehow was making things up, not telling the truth, and this is all based on the fact that Harry for the last 10 or 12 years has had a bunch of scrapes with the law. He is on probation for forgery now. [3a] *He'd have you believe somehow that what's gone on in Harry's life over the last 10 or 12 years has some relevance to this case. It has absolutely no relevance.*

Whatever has been going on in Harry's life that's caused him to run into the law has nothing to do with what happened 29 years ago. Look at what Harry—look at Harry's life 29 years ago when this happened. He had a job, he was working for his dad ***.

His dad's company had jobs all over the place. *** He wasn't out in the street, causing problems. He was working."

Knight observed that, immediately after the shooting, Krivoshein had run up to Denofrio and told him "the same thing that he told [the jury]."

¶ 34 Knight continued that defendant's claim of self-defense was refuted by the overwhelming evidence that he could have escaped danger by shutting the car window, honking the horn to draw attention to the danger, or simply driving away. Further, defendant had been the initial aggressor, having brandished the gun, so that the law required him to escape if reasonably possible. However, defendant instead shot Spoors as Spoors was running away—hitting him in the back. Krivoshein's version of the incident, from the initial confrontation over defendant's driving through the aftermath of the shooting, was correct.

¶ 35 Defense attorney Brian Jacobs argued as follows. The State, relying solely on Krivoshein's word, was guilty of a "rush to judgment." Further, the State and the police department's minds were "made up 29 years ago. *** They had already decided that [defendant] had committed murder." Having taken the time and effort to find defendant and return him from Mexico, the State "want[ed] a conviction, despite the fact that they [did not] have the evidence."

¶ 36 Asserting that the State wanted to turn the trial into "a question of whether or not [defendant] lied," Jacobs conceded, "There is no doubt about it. 100 percent, my client has lied a bunch of times." However, Jacobs reasoned, that was because defendant had rightly felt that an illegal immigrant with a gun in his car who knew nothing about the American legal system, was working under a false name, and had a third-grade education could not get a "fair shake."

¶ 37 Jacobs argued that defendant was highly suggestible and easily intimidated, as demonstrated by his statements on cross-examination and by his response to Gonzalez's tactics. Nonetheless, Jacobs continued, defendant had been consistent throughout on some crucial matters: he had always told the police that the attackers had approached him and had menaced him with metal objects. But the police kept questioning him, and he parroted much of what they told him.

¶ 38 Turning to Krivoshein's testimony, Jacobs responded to Knight's argument as follows:

> "The first thing, the State told you that his criminal history has nothing to do with this case, what he has done in the last 12 years. It absolutely has something to do with this case. That's why the evidence is here. Because he is a liar. And we know he is a liar. And for the State to prove [its] case, you have to believe Harry Krivoshein."

Jacobs stated that Krivoshein had lied to the police because he knew that the truth—that he and Spoors had menaced defendant with metal pipes—would have gotten him into trouble. Jacobs also called Krivoshein "Superman," claiming that his testimony implied that he could see through walls, because Millie's Pancake House would have obstructed his view of Spoors as they were allegedly fleeing defendant. Equally incredible was Krivoshein's positive identification of defendant in court 29 years after the shooting. Finally, Krivoshein's testimony that he and Spoors had not approached defendant's car was inconsistent with his statement to the police.

¶ 39 Jacobs contended that the crucial witness was Dolz and that his testimony actually supported defendant. According to Jacobs, the evidence that Spoors was shot in the back by a bullet that did not ricochet and went upward upon entry proved either that Spoors had been "running sideways" with his arm up or that he had been close to defendant and had had his arm up menacing defendant. Jacobs reiterated that the State had not disproved defendant's claim of self-defense.

¶ 40 In rebuttal closing argument, Assistant State's Attorney Joseph Ruggierio stated that defendant's act was not self-defense but "retaliation and revenge and retribution." He could have withdrawn had he felt threatened, and he did not have to shoot a man who was running away. Even his backup claim of voluntary manslaughter was "[2d] *ridiculous*. There is no way he believed or anybody could believe that this was self[-]defense." Also, defendant had been the initial aggressor.

¶ 41 Ruggierio contended that the case did not come down to a credibility contest between Krivoshein and defendant. Although Jacobs had tried to "[3b] *muddy up*" Krivoshein, defendant's earlier statements proved his guilt, which was why his testimony deviated from what he had repeatedly told the police. Turning to Jacobs' argument that Krivoshein's criminal record since 1997 showed that he had lied in court, Ruggierio said, "Well, I guess you could make that argument." However, he contended, Krivoshein's 1981 statement was credible and consistent with his testimony at trial. Moreover, "tak[ing] a couple of steps" did not make him and Spoors the aggressors.

¶ 42 Further along, Ruggierio summarized defendant's many "lies" to the police and the court, including the "new story" that he returned to the gas station because he needed gas. Ruggierio turned to the fact that defendant had had a gun in the car: although carrying a gun for protection is legitimate, that had apparently not been defendant's purpose. Instead, "He kept [the gun] in his car just in case he had a drive-by to commit." Jacobs objected to this remark, and the trial court sustained the objection. Ruggierio commented:

> "[4] *Well, this was a drive-by shooting, ladies and gentlemen.*
>
> *Maybe in 1981 it wasn't fashionable. But maybe he was a little bit ahead of his time. This was a guy who was angry, got his gun out, and went and did a drive-by shooting. That's what this is.*"

¶ 43 Further along, Ruggierio stated:

> " [5a] *Don't really blame anybody for coming to the United States. This case is not about the defendant sneaking into the United States illegally. The United States equals freedom. And freedom is derived from safety, that we can go out and do what we want. We*

don't have to worry about being pushed around by people who have guns and things like that.

And we have to defend that freedom fiercely. This isn't Juarez or Tijuana where you have got an illegal pistol in your car and you call the shots, that you decide who lives and who dies."

Ruggierio added, among other things, "[5b] *He violated all our freedom.* And by signing a guilty verdict form, you are telling him something. You are telling him what the truth is." He continued:

"[5c] *Even in Zacatecas, Mexico, justice isn't going to quit, even if it takes three decades. And on Lake Street, sir—not sure of your name—but you should have just kept going down Lake Street and thanked God you had a job and you were in America.*"

¶ 44 The jury convicted defendant. He moved for a new trial, but his motion did not claim any error in the State's closing argument. The trial court denied the motion, sentenced defendant to 37 years' imprisonment, and denied his motion to reconsider the sentence. Defendant timely appealed.

¶ 45 On appeal, defendant argues that certain comments in the State's closing argument and rebuttal closing argument denied him a fair trial. Recognizing that he neither objected to any of the challenged comments nor raised the issue in his posttrial motion, defendant invokes the plain-error rule. Alternatively, he argues that Jacobs' failure to raise or preserve the issue amounted to ineffective assistance.

¶ 46 We decline to apply the plain-error rule. We recognize that we may consider unpreserved error when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence. *People v. Hebron*, 215 Ill. 2d 167, 186-87 (2005). "As a matter of convention," a court of review applying the plain-error rule first decides

whether there was error at all. *People v. Rinehart*, 2012 IL 111719, ¶ 15. Here, because applying the second prong of the plain-error test practically requires us to decide the merits of defendant's claim, as does considering defendant's alternative claim of ineffective assistance, we shall reach the merits of defendant's claim of improper prosecutorial comment. However, we first hold that defendant fails the first prong of the plain-error test.

¶ 47 Defendant characterizes the case as a credibility contest between himself and Krivoshein, but we agree with the State that defendant's testimony was contradicted not only by Krivoshein's but also by defendant's numerous prior incriminating statements and by the medical evidence. Defendant repeatedly told the police (who, he admitted, treated him well) that he shot Spoors well after Spoors had started running away from him. Also, defendant told the police that he returned to the gas station for a second look at (or confrontation with) Spoors and Krivoshein, which strongly supported the State's contention that he not only committed murder but was the initial aggressor. Defendant consistently told the police that he had shot Spoors only once, but the undisputed medical evidence was that Spoors was shot twice—including once in the back—and that either shot would have been fatal. At trial, defendant equivocated on this point; when asked whether he shot Spoors only once, he responded, "I think so." We do not see how a rational jury could *not* find that defendant shot Spoors in the back. This finding would make a claim of self-defense, and even one of an unreasonable belief in the need for self-defense, extremely difficult to maintain.

¶ 48 We now decide whether any error was "so fundamental, and of such magnitude, that the accused is denied the right to a fair trial and remedying the error is necessary to preserve the integrity of the judicial process." *People v. Hudson*, 228 Ill. 2d 181, 191 (2008). Determining the seriousness

of any error is practically inextricable from deciding whether there was error. For the most part, we hold, there was not.

¶ 49 Defendant alleges that, in block [1], Knight improperly (1) personally vouched for the credibility of prosecution witnesses (see *People v. Lee*, 229 Ill. App. 3d 254, 260 (1992)); and (2) implied that defendant should be penalized for exercising his right to contest extradition (see *People ex rel. Hackler v. Lohman*, 17 Ill. 2d 78, 84 (1959)). Put bluntly, neither argument makes any sense. Knight did not personally vouch for the credibility of any witness, even implicitly, but simply made a comment that was based on the evidence: that the police had worked hard to return defendant to the United States. The comment was especially pertinent because defendant's trial strategy had included attacking the thoroughness and honesty of the police investigation (a theme that Jacobs pursued further in his closing argument). The reference to defendant's attempt to fight extradition was part of a summary of how, after shooting Spoors, defendant fled not only the scene of the crime but the country. As flight is evidence of consciousness of guilt (*People v. Harris*, 225 Ill. 2d 1, 23 (2007)), the comment was proper. Defendant's first group of comments shows no error.

¶ 50 Defendant next attacks the group of comments that include Knight's characterizations of defendant's testimony as "a fairy tale," "a bunch of lies sprinkled with fairy dust," and "the shifting sands of a guilty mind," and Ruggierio's statement that defendant's story was "ridiculous." Defendant contends that these comments improperly impugned the integrity of defendant's attorney (see *People v. Emerson*, 97 Ill. 2d 487, 497 (1983)). Again, defendant's argument simply does not make sense. None of the aforementioned remarks mentioned Jacobs or reasonably implied that Jacobs had committed any fraud. Instead, Knight and Ruggierio argued only that defendant had lied during his testimony. A prosecutor may call the defendant a liar, as long as the characterization is

based on the evidence. *People v. Beltran*, 2011 IL App (2d) 090856, ¶ 69. There was ample reason to contend that defendant had lied in his testimony (and, we note, even defendant's attorney conceded that defendant was prone to lying, except in his trial testimony). There was no error here.

¶ 51 Defendant turns next to the State's comments on Krivoshein's credibility, primarily Knight's statement that Krivoshein's record of criminal offenses involving dishonesty had "absolutely no relevance" to the case and secondarily to Ruggierio's statement that the defense was trying to "muddy up" Krivoshein. Defendant contends that the assertion that Krivoshein's record was irrelevant blatantly misstated the law, since Krivoshein's offenses were highly pertinent to his credibility (see *People v. Myers*, 367 Ill. App. 3d 402, 415 (2006)).

¶ 52 We agree with the State that defendant takes Knight's words "absolutely no relevance" out of context. The full comment that we have quoted demonstrates that Knight was not asserting, as a proposition of law, that Krivoshein's criminal record was irrelevant. Instead, he was arguing that, under the facts of the case, Krivoshein's record did not tend to prove that he had lied at the trial. This was, Knight contended, because Krivoshein's testimony was consistent with what he had told the police in August 1981, long before he committed any of the offenses. Moreover, in rebuttal closing argument, Ruggierio stressed that the impeachment of Krivoshein was insignificant because he had testified consistently with what he had told the police in 1981. He conceded, if grudgingly ("Well, I guess you could make that argument"), that Krivoshein's criminal record was a proper legal basis for impeachment. Thus, seen in context, the challenged comments were not improper. Finally, defendant's contention that Ruggierio acted improperly by saying that the defense had tried to "muddy up" Krivoshein makes no sense. During the trial, Jacobs had attacked Krivoshein's credibility, and he continued to do so in his closing argument, such as by calling Krivoshein a

"Superman." Not only was the "muddy up" comment brief and innocuous, it was invited. See *People v. Kliner*, 185 Ill. 2d 81, 154 (1998). The third set of comments provides no support for defendant's claim of error.

¶ 53 We turn to the fourth set of challenged comments: Ruggierio's statements that defendant committed a "drive-by shooting." Defendant contends that these comments were grossly improper because the trial court had just sustained a defense objection to the statement that defendant had kept the gun in his car "just in case he had a drive-by to commit." Defendant asserts that the subsequent "drive-by" comments violated the court's ruling. We disagree.

¶ 54 Defendant's successful objection did not have a specific basis. However, it strongly appears that the trial court sustained the objection because there was no basis in the evidence to infer that defendant had kept the gun in his car for the nefarious purpose that Ruggierio had suggested. It is, of course, improper to argue assumptions that are not based on the evidence. *People v. Smith*, 141 Ill. 2d 40, 60 (1990). Thus, the initial comment was improper. It does not follow, however, that the subsequent "drive-by" comments were improper. They did not repeat the original infirmity by stating that defendant had kept the gun in his car in order to facilitate a future crime. Instead, they simply characterized the shooting of Spoors as a "drive-by," which was based on the evidence that defendant deliberately confronted Spoors and Krivoshein; that he pulled out the gun before either Spoors or Krivoshein did anything aggressive; and that he departed as soon as he finished shooting Spoors. It was reasonable to argue that this sequence of acts was in essence a drive-by shooting. The fourth set of comments provides no support for defendant's claim of error.

¶ 55 We turn to the fifth set of challenged comments. Defendant contends that they amounted to nothing more than an attempt to play to prejudice against illegal aliens. Defendant does not specify

which comments we should consider improper, and he does little to elaborate on his contention. We see the comments' connotations as debatable; Ruggierio prefaced his remarks by saying that the case was "not about the defendant sneaking into the United States illegally." He appears to have taken a gratuitous swipe at "Juarez or Tijuana where you have got an illegal pistol in your car and you call the shots." We see no relationship between this comment and the issues in the case; the disparaging reference to what allegedly happens routinely in Mexico was a gratuitous bit of emotionalism, the type that, in the interest of justice, is best left unsaid. Nonetheless, the comments in the fifth group were a small part of the overall rebuttal closing argument, although their placement at the end might have amplified their effect. In any event, we decline to hold that the handful of arguably improper comments were "of such gravity that [they threatened] the very integrity of the judicial process." *People v. Blue*, 189 Ill. 2d 99, 138 (2000). We hold that defendant has not satisfied the plain-error rule.

¶ 56 Defendant contends alternatively that Jacobs was ineffective for failing to object to the alleged improprieties and failing to raise the prosecutorial-comment issue in his posttrial motion. We disagree. To succeed on a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance was objectively unreasonable; and (2) it is reasonably probable that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984); *People v. Evans*, 369 Ill. App. 3d 366, 383 (2006).

¶ 57 What we have said in rejecting defendant's plain-error claim explains why we also reject his ineffective-assistance claim. Since almost none of the comments that defendant challenges were improper, counsel's lack of objection to them was neither objectively unreasonable nor prejudicial.

Also, it appears that, at least once, Jacobs' silence was a reasonable strategic choice: rather than object to Knight's statement that Krivoshein's criminal record had no relevance, he chose to let the comment stand, and then responded to it vigorously in his argument. It was reasonable to forgo the chance of making a successful objection in favor of taking the opportunity to excoriate the State for (allegedly) misstating the law and the opportunity to emphasize Krivoshein's weaknesses as a witness. Even if Jacobs acted deficiently in not objecting to the one set of comments that might have contained improprieties, that would not demonstrate prejudice: the comments were limited and the evidence was not close. Thus, defendant cannot show ineffective assistance of counsel.

¶ 58 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 59 Affirmed.