2017 IL App (5th) 140049-U

NO. 5-14-0049

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Madison County.
	)	
v.	)	No. 12-CF-1577
	)	
MARCUS BALDWIN,	)	Honorable
	)	James Hackett,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Presiding Justice Moore and Justice Welch concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant could not show the necessary prejudice to support his claim of ineffective assistance of counsel where counsel failed to object to (1) testimony that a police officer believed one of the witnesses was not being honest with him during an interview at the police station where there was no evidence concerning what that witness said that the officer did not believe; (2) hearsay testimony by one officer concerning the contents of another officer's police report where the facts described could be inferred from other evidence; and (3) improper comments made during the prosecutor's closing argument that would not have been prejudicial enough to warrant reversal had counsel objected. Because the evidence was not closely balanced, these asserted errors could not be reviewed under the plain error doctrine. The trial court incorrectly determined that it was required to impose consecutive sentences on all three charges.

¶ 2 The defendant, Marcus Baldwin, appeals his convictions for murder and two counts of aggravated discharge of a firearm. He argues that trial counsel provided ineffective assistance by failing to object to (1) the testimony of a detective that one of the witnesses exhibited signs of deception during an interview at the police station, (2) the testimony of another detective concerning the contents of a different police officer's report, and (3) several improper remarks during the prosecutor's closing argument. In addition, the defendant contends that the court erroneously concluded that it was required by statute to impose consecutive sentences on all three charges. We affirm the defendant's convictions. However, we agree that the court misconstrued the applicable sentencing provisions. We therefore amend the judgment pursuant to our authority under Illinois Supreme Court Rule 615(b)(1).

¶ 3 The evidence presented at trial showed that on the night of July 28, 2012, two cars drove erratically down Tremont Street in Alton. One of the cars was a blue Chevrolet Caprice driven by 19-year-old Dantavier Thompson (Dan). According to two of the witnesses, the driver of the other car yelled an insult out the window at a group of young men hanging out on the sidewalk in front of a house at the intersection of Tremont Street and Marilla Street. Shots were fired at the passing vehicles, one of which struck Dan Thompson in the back of the head, causing his death.

¶ 4 Police investigating the murder discovered that two bullets struck neighboring homes. Based on the estimated trajectory of one of those bullets, police focused their investigation on a group of young men known to frequent a house at the intersection of Tremont Street and Marilla Street. Within the first few days after the murder, detectives

questioned the young men who were hanging out on Tremont Street that night. Most of these witnesses reluctantly identified the shooter as their friend, Marcus Baldwin, the defendant. The defendant was charged with one count of first-degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 2012)) and two counts of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(1) (West 2012)).

¶ 5 In December 2012, some of these witnesses gave statements to defense counsel recanting their statements to the police and asserting that they were pressured by police officers to implicate the defendant. In October 2013, shortly before the defendant's trial was set to begin, the defendant asked one of his friends to arrange to have the other witnesses present at a specified time so he could call and talk to them about the trial. A recording of the scheduled call was played for the jury. It is difficult to decipher much of the recording. However, it appears that the defendant spoke with three of his friends who were witnesses in the case. One of the friends asked, "Just say if [someone] didn't go, would that hurt you at all or be what?" The defendant replied, "Nah, it's better if [you] show up and just be like shit, the police scared me into saying what they wanted me to say." Later in the recording, one of the witnesses told the defendant that he knew that two of the witnesses were "cool," but he was worried about two other witnesses. The defendant's trial began one week later, in early November 2013.

¶ 6 Before turning to the testimony presented at trial, a description of the intersection where the events at issue transpired would be helpful. Tremont Street runs east to west. Marilla Street runs north to south, and its northern end meets Tremont Street in a "T" intersection. The house where the defendant and his friends regularly hung out—1022

Tremont Street—is located on the northern side of Tremont Street across from Marilla Street. The two houses that were struck by bullets—1910 Marilla Street and 1926 Marilla Street—are located on the western side of Marilla Street, just south of the intersection. They are, respectively, the second and third houses from the corner. The southeastern corner of the intersection is occupied by Lovejoy Elementary School. Dantavier Thompson was found by police in his vehicle in a playground on the grounds of the school.

¶ 7 Mikkel Lumpkins testified that 1022 Tremont Street was his grandmother's house. Although he did not live in that house at the time of the murder, he and a group of other young men hung out together at that house nearly every day. The group included Mikkel, the defendant, Montinez Knight, Immanuel Price, Dearron Price, and Jordaun Stiff. Mikkel also knew Dan Thompson from high school.

¶ 8 Mikkel testified that on the night of the murder, he went to the birthday party of a neighbor named Nakia Stewart. He went to the party with Montinez Knight, Dearron Price, and the defendant. While he was there, Mikkel saw Dan Thompson drive past Nakia's house. He testified that he left the party after 10 minutes and walked back to 1022 Tremont Street alone. He did not know when Montinez, Dearron, and the defendant left the party. Mikkel testified that when he arrived at 1022 Tremont, he went behind the house to borrow a bicycle. While he was behind the house, he heard two cars drive past on Tremont Street at a "high rate of speed." He explained that he could tell there were two cars because he could hear two different engines. Mikkel testified that he then heard gunshots, but he did not see anyone fire the shots. He testified that he saw

people, including Montinez and Dearron, "running and trying to find somewhere to go," and that Dearron ran into him.

¶ 9 Mikkel acknowledged that one week before the trial, the defendant called him and asked him to get Dearron, Immanuel, and Montinez together to talk about the trial and "see what people are going to do." He further acknowledged that the following day the defendant again called him. This time, he testified, Dearron and Montinez were present when the defendant called, and each took turns talking to him. Mikkel was not asked what he told police.

¶ 10 Montinez Knight testified that on the night of the murder, he was hanging out with a group of his friends at 1022 Tremont. Some of the young men left briefly to go to a party taking place in the neighborhood. Montinez went with them, but he waited outside the house where the party was being held. He testified that he walked back to 1022 Tremont Street alone. He then saw two cars drive down the street, swerving. Asked if he saw who was driving the cars, he stated that he "wasn't really paying attention." After the cars passed, Montinez heard gunshots and then ran. The prosecutor asked Montinez if he looked to see where the shots were coming from before running. Montinez replied, "That night I might have said I looked, but shit, once you hear gunshots, you are not looking nowhere. You are just running, you know what I'm saying." He explained that he thought someone was trying to shoot him.

¶ 11 The prosecutor then asked Montinez if he knew who fired the shots. Montinez did not answer. The court asked twice if Montinez had an answer to the question. The first time, he again did not answer. The second time, he replied, "It was dark outside." The

prosecutor again asked if Montinez knew who fired the shots. Montinez replied, "I seen somebody shoot, but it was dark. I don't know quite who it really was."

¶ 12 Montinez admitted that he told Alton police that he did see who fired the gun. He explained, "I told them that I heard [that] Marcus shot the gun because that's what I heard, so I don't know if—I put my imagination together, and I don't know." He further testified that the investigating officers told him that if he did not say that he saw the defendant shooting the gun, "they would say [Montinez] was the one up for felony murder."

¶ 13 Immanuel Price testified that July 28, 2012, was "a bad day." He testified that he was hanging out with his friends that night at 1022 Tremont Street. He left with some of his friends, including the defendant, to go to Nakia's birthday party. He testified that he saw Dan Thompson at the party with someone named Michael Foots. We note that, although it is not entirely clear from the testimony, Michael Foots was apparently the driver of the other car that drove past 1022 Tremont Street before the shooting. Immanuel testified that after he and his friends returned to 1022 Tremont, he saw two cars drive by—a blue Chevy and a gold Buick. He testified that the cars were "pretty much driving crazy." Immanuel then heard gunshots and started to run. Asked if he saw who fired the shots, he stated that he saw both Michael Foots and the defendant shooting, but the defendant shot first. Immanuel admitted that he initially told police that he did not see who fired the shots. Asked why he lied to police, Immanuel replied, "I am not sure."

¶ 14 Immanuel was cross-examined extensively about the various inconsistent statements he made. He testified that the first time he was questioned by police shortly after the murder, he initially told them that he did not see who fired the shots. Police then told him he could be charged with obstruction of justice if he did not tell them the truth, and they told him that he could go home if he did tell them the truth. He then named the defendant as the shooter.

¶ 15 Immanuel testified, however, that he told defense counsel and her investigator that he did not see who fired the shots. He told them that he only told the police that he saw the defendant fire the shots because they told him the defendant fired the shots and he did not want to go to jail.

¶ 16 Immanuel was next asked about a February 2013 interrogation. He was in custody on an unrelated felony drug charge at the time, and police pulled him from his cell and brought him to an interview room to question him regarding his statement to defense counsel. Immanuel testified that he was questioned at length, even though he asked not to speak with the officers who questioned him. In response to defense counsel's questions, Immanuel acknowledged that he told police that he did not see who fired the shots; that no one pressured him into making a statement to that effect to defense counsel; and that he felt that officers conducting the February interrogation were pressuring him. He testified that the officers reminded him that obstruction of justice was a serious offense, told him that one of the officers present was a federal agent, and informed him that lying to a federal agent was a serious crime. It is not clear whether Immanuel eventually gave another statement implicating the defendant during this interrogation.

¶ 17 Jordaun Stiff testified that he and Dearron Price remained at 1022 Tremont Street while some of their friends left to go to the party. He testified that when the others returned, he saw a blue car and a silver car "swerving down the street." He assumed that Dan Thompson was driving the blue car because he knew Dan from school and had seen him drive that car previously. Jordaun testified that Michael Foots yelled at the group of young men from the car, saying " 'You scary,' or something." Jordaun then heard two gunshots and dropped to the ground. He testified that he "looked up before [he] hit the ground and saw that [the defendant] fired the shots."

¶ 18 Jordaun admitted that he initially told police that he was home taking a shower at the time of the murder. On cross-examination, he acknowledged that he continued to maintain this story even after police told him that they already knew what happened because there was surveillance video showing the incident. He admitted that he did not implicate the defendant until he was placed under arrest for obstruction of justice. Jordaun admitted that he received a plea deal in an unrelated case in exchange for his testimony in this case.

¶ 19 Jordaun admitted that his testimony was part of a negotiated plea agreement on unrelated felony charges of aggravated battery and mob action. Pursuant to that agreement, Jordaun was sentenced to 150 days in the county jail. He was aware that the aggravated battery charge carried a possible penalty of two to five years in prison, while the mob action charge carried a possible penalty of one to three years.

¶ 20 Immanuel's brother, Dearron Price, testified that he was standing outside 1022 Tremont Street when the events at issue transpired. Other people were there as well, but

he could not remember who. Dearron saw two cars drive past—a blue car and a silver car. The blue car belonged to someone named Dan. Dearron knew Dan from school but did not know his last name. Dearron testified that after the cars passed, he heard gunshots, but he did not see who fired the shots. He admitted that when he was first questioned by the police a few days after the murder, he told police that he saw the defendant fire the shots. He testified that he told them this after they told him that he could be charged with obstruction of justice or conspiracy to commit murder if he did not tell them the truth. He further testified that he met with defense counsel in December 2012 and told her that he was not present at 1022 Tremont when the shooting occurred.

¶ 21 Finally, Dearron acknowledged that he spoke to the defendant a week before the trial. The prosecutor asked, "And did Marcus Baldwin tell you to come in here and say something other than the truth?" Dearron responded, "He said something like that basically."

¶ 22 Marcus Hughes testified that on the night of the murder, he went with Montinez Knight to the birthday party of his cousin, Nakia Stewart. When he left the party, he drove to 1022 Tremont Street alone. He went inside the house to use the bathroom and then went outside to the front of the house. There, he saw Mikkel Lumpkins, Montinez Knight, Jordaun Stiff, Dearron and Immanuel Price, and the defendant. Shortly thereafter, he saw two cars drive by—a gold car and a blue Chevy Caprice, which he recognized as Dan Thompson's car. The cars were driving recklessly and going fast. As the cars passed, he heard someone in the gold car say, "Bitch-ass niggers." He then heard gunshots, but did not see who fired them. He admitted that he did not tell police the truth

when he was interviewed in August 2012. Asked why, he replied, "I didn't want to be involved in any type of way." Neither Marcus Hughes nor any of the investigating officers testified as to what Marcus told police.

¶ 23 Sergeant (Sgt.) Abigail Keller is the investigator who processed the crime scene. She testified that there was a gap in the fence surrounding the playground at Lovejoy Elementary School, and Dan Thompson's vehicle was parked against a piece of playground equipment. There was a hole in the rear window of the vehicle on the driver's side. Thompson was lying face down with his head leaning on the passenger side door and his feet on the driver's side. There was a hole in the back of the baseball cap he was wearing. A bullet was later removed from his brain during an autopsy.

¶ 24 Sgt. Keller next testified about the bullets that struck two neighboring houses. She explained that she worked with Brian Miller of the forensic diagramming unit to attempt to determine the trajectories of the two bullets. One of the bullets struck a house at 1926 Marilla Street. That bullet lodged in the exterior of the northern wall of the house, which faced towards Tremont Street. Sgt. Keller testified that the bullet had to be extracted from the wall using tools. She explained that this process required the removal of some of the surrounding wood in order to avoid damaging the bullet. The other bullet struck the house next door, at 1910 Marilla. That bullet entered the house, crossed through the living room, and struck an interior wall before falling to the carpet. Sgt. Keller testified that the bullet came "generally from a northeastern direction." She further testified that she and Miller formulated "a range of possible trajectories" for the bullet that "came from the northeast." She was not asked to elaborate, and Brian Miller did not testify.

¶ 25 Sgt. Keller further testified that police returned to the scene the next morning when it was light in order to search for more evidence. She stated that they did not find a murder weapon.

¶ 26 James Hall is a firearm and tool mark examiner for the Illinois State Police Crime Lab. He examined the bullets recovered from the houses on Marilla Street and the bullet removed from Dan Thompson's head. He determined that all three bullets were fired from the same weapon. He was able to determine that they were fired from a .38 caliber weapon, but he was not able to determine who manufactured the weapon or who purchased it.

¶ 27 Detective Mike O'Neill was the lead detective in the investigation of Dan Thompson's murder. He testified that police focused their investigation on the young men who regularly spent time at 1022 Tremont for two reasons. First, officers canvassed the area and learned that those young men were hanging around in front of the house on the night of the murder. Second, Detective O'Neill received Sgt. Keller's report containing her findings as to the trajectory of the bullet that struck 1910 Marilla Street. He testified that based on the trajectory, Sgt. Keller believed that the shots were fired "from somewhere in front of or around 1022 Tremont." Defense counsel objected to O'Neill's testimony about canvassing the neighborhood for potential witnesses, and the court allowed the testimony only for the limited purpose of explaining police procedure. Counsel did not object to the testimony about the contents of Sgt. Keller's report.

¶ 28 Detective O'Neill further testified although the defendant and the other young men who frequented 1022 Tremont Street were all considered possible suspects or witnesses,

police initially did not have a specific suspect. That changed when the defendant, Dearron Price, and Montinez Knight were questioned at the police station on July 31, 2012, three days after the murder. After those interrogations, the defendant was arrested and charged with the crime.

¶ 29 Detective Kurtis McCray testified that on July 31, he went to 1022 Tremont Street to execute a search warrant. He saw the defendant's vehicle leaving the house, and he stopped the vehicle. The defendant had three passengers—Montinez Knight, Dearron Price, and another individual who was not present on the night of the murder. Detective McCray testified that he asked all four individuals to come to the police department to be interviewed.

¶ 30 Detective McCray explained that the Alton police department has four interview rooms, only two of which have video recording equipment. He and another officer placed each of the four individuals in separate rooms and took away their cell phones so they could not communicate with each other. Detective McCray and Detective O'Neill interviewed Montinez Knight in one of the interview rooms, while other officers interviewed the other young men in the other rooms.

¶ 31 The prosecutor asked Detective McCray to describe Montinez Knight's demeanor during the interview. Detective McCray explained that Montinez's demeanor varied throughout the interview—sometimes he seemed somber, sometimes he lowered his head and refused to speak, and sometimes he cried; however, at other times during the interview, he spoke in a "normal" tone of voice and "appeared comfortable."

¶ 32 The following exchange then took place:

"Q. During your training in investigations, are some of these determined to be signs of deception?

A. Yes.

Q. Which ones would those be?

A. Essentially when somebody appears to be hesitating when they are answering a question, and they lower their head or [are] unwilling to look at us or appear to be thinking about an answer they are about ready to give, those are different signs. Also when somebody is crying it usually says that they feel remorse for something that may have happened. "

The prosecutor asked Detective McCray if he determined that Montinez Knight was exhibiting signs of deception at some point during the interrogation. Detective McCray indicated that he did make this determination. Asked what he did in response, Detective McCray testified that he continued to talk to Montinez, and Montinez gave him "more and more information."

¶ 33 Detective McCray testified that Montinez Knight eventually revealed that the defendant was the shooter. After he did so, Detective McCray left the interview room to confer with Detective Pulido, who was monitoring the interview of Dearron Price by video. The prosecutor asked if Detective Pulido already had this information; however, the court sustained an objection to this question.

¶ 34 The jury returned verdicts of guilty on all three charges. The court sentenced the defendant to 45 years on the murder charge, a sentence which included the statutorily mandated 25-year add-on for offenses committed with a firearm. The court also

sentenced the defendant to six years on each charge of aggravated discharge of a firearm. The court ordered all three sentences to be served consecutively, explaining that consecutive sentences were mandated by statute. The defendant filed posttrial motions, which the court denied. This appeal followed.

¶ 35 The defendant argues that (1) the admission of Detective McCray's testimony that Montinez Knight exhibited signs of deception during his interview—*i.e.*, "human lie detector" testimony—constituted plain error; (2) the prosecutor made several remarks during her closing argument that misstated the evidence or referred to inadmissible evidence, and these remarks amounted to plain error; (3) he received ineffective assistance of counsel, and the cumulative effect of counsel's errors deprived him of a fair trial; and (4) the court erred in concluding that consecutive sentences were mandatory for all three charges. We agree with the defendant's argument concerning sentencing. However, we find the remainder of his arguments unavailing.

¶ 36 In support of his ineffective-assistance-of-counsel argument, the defendant argues that Detective O'Neill's testimony concerning Sgt. Keller's determination of the trajectory of the bullets was inadmissible, both because it was hearsay and because his testimony inaccurately characterized Sgt. Keller's determination. The defendant contends that counsel was ineffective for failing to object to this testimony, Detective McCray's "human lie detector" testimony, and the improper remarks in the prosecutor's closing argument.

¶ 37 We do not believe any of the individual errors asserted by the defendant were prejudicial enough to warrant reversal standing alone. We will therefore consider the

defendant's challenges to Detective McCray's testimony and the prosecutor's closing arguments as part of his contention that counsel was ineffective and he was denied a fair trial by the cumulative effect of counsel's asserted errors. For the reasons that follow, we find no merit to this contention.

¶ 38 We evaluate claims of ineffective assistance of counsel under the standard annunciated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984); see also *People v. Albanese*, 104 Ill. 2d 504, 525-28 (1984). To prevail, a defendant claiming he received ineffective assistance of trial counsel must demonstrate that (1) counsel's representation was deficient in that it fell below an objective standard of reasonable performance; and (2) but for counsel's deficient representation, there is a reasonable probability that the defendant would have been acquitted. *People v. Makiel*, 358 Ill. App. 3d 102, 105-06 (2005) (citing *Strickland*, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the trial's outcome." *People v. Tillman*, 226 Ill. App. 3d 1, 14 (1991) (citing *Strickland*, 466 U.S. at 694). If it is easier to dispose of a claim of ineffective assistance on the basis that a defendant has failed to demonstrate sufficient prejudice, we may do so without addressing whether counsel's performance was deficient. *Albanese*, 104 Ill. 2d at 527 (quoting *Strickland*, 466 U.S. at 697). We review claims of ineffective assistance of counsel *de novo*. *Makiel*, 358 Ill. App. 3d at 105.

¶ 39 As stated previously, the defendant's ineffective-assistance argument turns on counsel's failure to object to two pieces of testimony and several of the prosecutor's remarks during closing arguments. The first piece of evidence he challenges is Detective

McCray's testimony that Montinez Knight's behavior while he was being interrogated indicated that he was being deceptive. This type of testimony is referred to as "human lie detector" testimony. That term comes from the case of *United States v. Williams*, 133 F.3d 1048 (7th Cir. 1998). There, a federal agent gave testimony describing the defendant's demeanor when he was told during an interrogation that the police were certain that he had committed the crime. *Id*. at 1052. The agent testified that the defendant denied his guilt. He went on to testify that the defendant " 'had his head held down and he was nodding as if in agreement' " with statements made to him by the agent. *Id*. at 1053.

¶ 40 On appeal, the Seventh Circuit Court of Appeals found this testimony to be troubling, noting that "Special Agent Johnson purports to be a human lie detector in observing Williams' behavior." *Id*. The court found two significant flaws in this type of testimony. First, the court found such testimony irrelevant to the determination of guilt or innocence, noting that *any* individual who has been informed that he or she is the prime suspect in a criminal case would likely be nervous and agitated. *Id*. Second, the court stated that such testimony is likely to be prejudicial. *Id*. The court thus found the testimony to be improper.

¶ 41 Illinois courts have likewise found "human lie detector" testimony to be inadmissible. See *People v. Wilson*, 2015 IL App (4th) 130512, ¶ 62; *People v. Henderson*, 394 Ill. App. 3d 747, 753 (2009). One reason for this is that it is generally impermissible for a witness to comment on the credibility of another witness. See *People v. O'Donnell*, 2015 IL App (4th) 130358, ¶ 33; *People v. Boling*, 2014 IL App (4th)

120634, ¶ 121; *Henderson*, 394 Ill. App. 3d at 753. Such testimony usurps the jury's function in weighing the evidence and determining the credibility of witnesses. *Boling*, 2014 IL App (4th) 120634, ¶ 121.

¶ 42 In addition, a prosecutor can exacerbate the problem by referring to "human lie detector" testimony during closing arguments. *Id*. ¶ 120. By contrast, however, prosecutors may properly comment on the demeanor of witnesses during their trial testimony, and they may properly argue that jurors should consider the demeanor of witnesses in assessing their credibility. *Wilson*, 2015 IL App (4th) 130512, ¶ 69.

¶ 43 The defendant argues that Detective McCray's testimony concerning Montinez Knight's demeanor during his interview was inadmissible "human lie detector" testimony. The State does not dispute this, arguing instead that the testimony was not prejudicial because Detective McCray did not testify concerning what statements Montinez made that he believed were untrue. We agree with the State that this fact greatly reduces the potential for prejudice from the testimony. We acknowledge that the testimony did have the potential to undermine Montinez Knight's general credibility as a witness. However, jurors had other reasons to find his testimony questionable, and his testimony was not particularly helpful to the defendant. As we noted earlier, Montinez testified that he did not know who fired the shots, and he also testified that he implicated the defendant in his statement to police because *he had heard that the defendant was the shooter*. Thus, we find that any potential for prejudice to the defendant from Detective McCray's testimony was minimal.

¶ 44 The defendant also argues, however, that the prosecutor magnified the prejudicial impact of the testimony by commenting on it during her closing argument. The challenged remarks were as follows:

> "You saw what he did [when asked whether he saw who fired the shots]. He put his head down. He turned away. He looks at his friend, the defendant, pleading with him, what he should do. *** Those are the same things he did the night that he was at the Alton Police Station and at first was lying to the police."

She then told jurors that they may take these things into account in deciding how credible to find Montinez Knight's testimony.

¶ 45 The State contends that these remarks were proper commentary on Montinez Knight's demeanor on the witness stand. We disagree. Although the prosecutor began by describing Montinez's demeanor on the stand, she went on to argue that his demeanor on the stand was the same as the demeanor at the police station that led Detective McCray to conclude that Montinez was not being truthful. This was, in essence, an argument that because Detective McCray testified that this behavior was indicative of deceptions, jurors should likewise conclude that Montinez was being deceptive. Nevertheless, for the reasons we have already discussed, we believe that any damage to Montinez Knight's overall credibility had a limited potential to prejudice the defendant.

¶ 46 The defendant next challenges counsel's failure to object when Detective O'Neill testified that Sgt. Keller stated in her report that she had determined that the bullets came from the area in front of 1022 Tremont Street. The defendant argues that this testimony was inadmissible for two reasons. First, he contends that it constitutes inadmissible

hearsay. Second, he argues that it is at odds with Sgt. Keller's own testimony about her conclusions.

¶ 47 Hearsay evidence includes any out-of-court statement offered to prove the truth of the matter asserted. *People v. Temple*, 2014 IL App (1st) 111653, ¶ 58. Police reports themselves are generally not admissible because they are, in essence, summaries of information officers have collected from other sources during their investigations. "Consequently, they are the product of secondhand knowledge as to the reporting officer and, hence, hearsay." *People v. Garrett*, 216 Ill. App. 3d 348, 357 (1991).

¶ 48 The defendant argues that because Detective O'Neill testified to the contents of another officer's report, his testimony constituted double hearsay. In response, the State argues that the testimony was offered for the non-hearsay purpose of explaining the course of Detective O'Neill's investigation. See *Temple*, 2014 IL App (1st) 111653, ¶ 58. We acknowledge that considering Detective O'Neill's testimony in context does provide some support for the State's position. Detective O'Neill testified that he focused his investigation on the group of young men who regularly spent time at 1022 Tremont Street because he read in Sgt. Keller's report that the shots came from the vicinity of that house. Nevertheless, the evidence was not limited to that purpose. We therefore agree with the defendant that the testimony constituted inadmissible hearsay.

¶ 49 In addition, we agree with the defendant that Detective O'Neill's testimony misstated Sgt. Keller's conclusions. Sgt. Keller testified that the bullets came "generally from a northeastern direction" and that there was a "range of possible trajectories" for the bullet that "came from the northeast," while Detective O'Neill testified that Sgt. Keller

concluded the bullets came from the area near 1022 Tremont Street. Although 1022 Tremont Street is indeed located to the northeast of the two houses that were struck by bullets, Detective O'Neill's testimony is far more specific than Sgt. Keller's own testimony about her conclusions. For both of these reasons, we agree with the defendant that the testimony was admitted in error. Counsel therefore should have objected.

¶ 50 However, we do not believe that counsel's failure to object prejudiced the defendant. The evidence showed that the two cars passed by the house at 1022 Tremont Street just before the shots were fired, and, as we have noted, the house was located to the northeast of the Marilla Street houses that were struck by bullets. It is reasonable to infer from this evidence that the bullets came from the vicinity of that house. In addition, the defendant was not the only person at that house on the night of the murder. Thus, the testimony did not serve to firmly establish the defendant as the shooter. We do not believe there is a reasonable probability that the defendant would have been acquitted had counsel objected to the testimony.

¶ 51 Finally, the defendant argues that counsel was ineffective for failing to object to several remarks made during the prosecutor's closing argument. We agree that the remarks were improper, but we do not find them to be sufficiently prejudicial to warrant reversal.

¶ 52 Prosecutors are afforded wide latitude in closing arguments. *People v. Smith*, 141 Ill. 2d 40, 60 (1990). A prosecutor may argue facts in evidence and any reasonable inferences that can be drawn from the evidence. However, a prosecutor may not argue assumptions or facts that are not based on the evidence. *People v. Rivera*, 277 Ill. App.

3d 811, 821 (1996). Improper remarks do not always warrant reversal, however. They require reversal only if the remarks "result in substantial prejudice to the defendant." *Smith*, 141 Ill. 2d at 60. In other words, reversal is required only "if a reviewing court cannot say that the prosecutor's improper comments did not contribute to the defendant's conviction." *Tillman*, 226 Ill. App. 3d at 19. In this case, we can safely say that the challenged remarks—even when viewed cumulatively—did not contribute to the defendant's conviction.

¶ 53 The defendant contends that the prosecutor misrepresented Sgt. Keller's testimony. In relevant part, she argued, "You heard CSI Abby Keller testify that based on the trajectory of the two bullets that were recovered from those two residences that the bullet came from Tremont Street." She later reminded jurors, "Again, CSI Abby Keller confirmed that the bullets came from the direction of Tremont Street." The defendant argues that these statements do not accurately reflect Sgt. Keller's testimony which was purportedly equivocal about the trajectory of the bullets. As we have already explained, we do not believe Sgt. Keller's testimony was "equivocal"—she testified that the bullets came from a northeastern direction and that she and Brian Miller calculated a range of specific possible trajectories for a bullet that came "from the northeast." Nevertheless, we agree with the defendant that the remark mischaracterized the testimony.

¶ 54 Sgt. Keller did not specifically testify that the bullets came from Tremont Street. It is true, as the State contends, that it is reasonable to infer from Sgt. Keller's testimony that the bullets came from Tremont Street. She testified that the bullets came from the northeast—which is the direction of the intersection of Tremont and Marilla. She also

testified that a bullet lodged in the northern wall of one of the homes, and that the northern wall was the wall that faced toward Tremont Street. However, telling jurors that they can infer something from testimony is a far cry from telling them that a witness confirmed it.

¶ 55 Although we agree with the defendant that these remarks were improper, we do not believe they were prejudicial enough to warrant reversal. There was no real dispute in this case that the shots were fired from the direction of Tremont Street. First, as we have discussed, that is a reasonable inference from Abby Keller's testimony. Second, the testimony that the two cars drove down Tremont Street just before the shots were fired was undisputed.

¶ 56 The defendant also challenges the prosecutor's argument that all of his friends identified him as the shooter. She argued, "And we know that it was the defendant that pulled the trigger that night because his friends, his buddies, all said it was." She went on to tell jurors that "every single one of the individuals who testified here admitted that they told police in the days following the shooting that their friend Marcus Baldwin was the shooter. They all admitted that." As the defendant contends, this is not accurate. Two of the defendant's friends who testified at trial did *not* admit to telling the police that the defendant was the shooter. Although Marcus Hughes admitted that he lied to the police, he did not say what he told them, and Mikkel Lumpkins did not testify about what he told police at all.

¶ 57 We find it troubling that a prosecutor would misstate the evidence in this manner. However, we do not find this statement prejudicial enough to warrant reversal under the

facts of this case. There was no evidence that any witness identified anyone other than the defendant as the shooter, and the fact that four of his close friends did identify him as the shooter is powerful evidence of his guilt. Although we do not condone the prosecutor's misstatement of the evidence, we do not believe jurors would have been likely to acquit had the prosecutor correctly told them that four of his friends told police he was the shooter.

¶ 58 In the next remark challenged by the defendant, the prosecutor told jurors that the police did not know who the shooter was until Dearron Price and Montinez Knight were interviewed simultaneously three days after the shooting. She reminded jurors that the two witnesses were in different interview rooms "with no ability to communicate." She then argued that "they both at the same evening, almost at the same time, give up Marcus Baldwin." The defendant contends that this remark was improper because it referred to testimony by Detective McCray that was stricken when an objection to that testimony was sustained. We agree.

¶ 59 As we discussed earlier, Detective McCray testified that he left the interview room to confer with another detective after Montinez identified the defendant as the shooter. The prosecutor then asked what the other detective knew as a result of monitoring the interview with Dearron Price. The court sustained the defendant's hearsay objection, but not before Detective McCray testified that the other detective told him he already knew that the defendant was the shooter. The court struck this testimony. As such, the testimony was not evidence, and the prosecutor could not properly comment on it. Although there was other testimony establishing that both Montinez and Dearron

implicated the defendant during these interviews, there was no evidence that they did so "almost at the same time." However, we find the potential for prejudice from this statement to be negligible. Both Montinez and Dearron admitted telling police that the defendant was the shooter during their initial interview with police. The salient point—that both young men implicated the defendant while they were in separate interview rooms unable to communicate with each other—was supported by the evidence. Whether they did so simultaneously was irrelevant, and we do not believe jurors were likely to be persuaded by the prosecutor's statement that they did so.

¶ 60 Finally, the defendant challenges the prosecutor's remark about Jordaun Stiff's plea bargain. Specifically, she urged jurors to find his testimony implicating the defendant credible even though he got a very favorable plea deal in exchange for his testimony. She reminded jurors that Jordaun told the police the same thing during his interview, and she told them that he gave this interview before the charges involved in the plea bargain were pending. Thus, she argued, he had no motive to lie when he told police that the defendant was the shooter. The defendant correctly points out that there was no evidence in the record establishing when those charges were filed. However, we do not believe this is the type of statement that was likely to have much if any impact on the jury's decision, especially in light of Jordaun's admission that he gave conflicting statements to police. Thus, we do not find the remark to be prejudicial enough to warrant reversal.

¶ 61 Finally, we must consider the cumulative effect of all of the improper comments in the prosecutor's closing argument along with Detective McCray's "human lie detector"

testimony and Detective O'Neill's testimony that Sgt. Keller determined that the bullets came from the vicinity of 1022 Tremont Street. See *Tillman*, 226 Ill. App. 3d at 18. We must decide whether it is reasonably probable that but for counsel's failure to object, the defendant would have been acquitted. See *Strickland*, 466 U.S. at 694. We do not believe that it is reasonably probable.

¶ 62 The evidence in this case showed that at least four of the defendant's close friends implicated him as the shooter. Most of them testified that they did so only because they were pressured by police to name the defendant as the shooter. This testimony was undermined by the recording of the defendant's jailhouse phone call to his friends. As we discussed earlier, the conversation indicated that the defendant and his friends had a plan to say that they were pressured by police to implicate the defendant. Although we do not believe the evidence in this case was overwhelming, we also do not believe that it was a close case. In the face of all of the evidence, we do not believe the minimal prejudice from the asserted errors was sufficient to sway a jury that was otherwise likely to acquit the defendant. Because the defendant cannot show that a different result was reasonably likely, he cannot satisfy the prejudice prong of the *Strickland* test. Therefore, his claim of ineffective assistance of counsel must fail.

¶ 63 As stated previously, the defendant also asks us to consider two of these errors under the plain error doctrine. Specifically, he argues that the admission of Detective McCray's "human lie detector" testimony and the prosecutor's improper remarks during closing arguments rise to the level of plain error. We disagree.

¶ 64 The plain error doctrine allows a defendant, in certain circumstances, to avoid forfeiture, thereby allowing a reviewing court to consider a claim of error that has not been preserved for appeal. The doctrine applies when "the evidence is close, regardless of the seriousness of the error," or "the error is serious, regardless of the closeness of the evidence." *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). Where, as here, a defendant urges review because he alleges that the evidence is close, regardless of the seriousness of the error, "the defendant must prove 'prejudicial error.' " *Id*. at 187. To do so, "the defendant must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice" against the defendant. *Id*. When the defendant fails to meet this burden, a reviewing court must honor the procedural default and the principles of forfeiture. *People v. Bannister*, 232 Ill. 2d 52, 65 (2008). We have already concluded that the evidence in this case was not closely balanced and that the errors did not tip the scales of justice against the defendant. As such, the defendant cannot meet his burden of showing that invocation of the plain error rule is appropriate. Accordingly, we must honor the procedural default and find the asserted errors to be forfeited. See *id*.

¶ 65 The defendant's final contention is that the court erroneously concluded that it was required to impose consecutive sentences for all three offenses. The State concedes this point, and we agree. The pertinent statutory provision is section 5-8-4 of the Unified Code of Corrections. 730 ILCS 5/5-8-4 (West 2012). In pertinent part, that statute provides that a sentencing court must impose consecutive sentences in cases where a defendant is convicted of multiple crimes, and one of those crimes is murder or a Class X

or Class 1 felony that resulted in severe bodily injury to a victim. 730 ILCS 5/5-8-4(d)(1) (West 2012). Here, the defendant was convicted of murder, an offense which triggers this provision. See *People v. Stanford*, 2011 IL App (2d) 090420, ¶ 47. Thus, as the defendant acknowledges, the statute requires that he serve the sentences for the "non-triggering" offenses (the two charges of aggravated discharge of a firearm) consecutively to the sentence for the "triggering" offense of murder. *Id*. ¶¶ 47-48. However, the statute does not require that the sentences for the "non-triggering" offenses be served consecutively to each other. *Id*. ¶ 49. In other words, while these sentences must be served consecutively with the murder sentence, the trial court had the discretion to order that they be served concurrently with each other. *Id*. The court failed to recognize that it had this discretion.

¶ 66 The parties here agree that this court may exercise our authority under Supreme Court Rule 615(b)(1) to amend the judgment of conviction to provide that the two six-year sentences for aggravated discharge of a firearm be served concurrently with each other. The State points out that the court imposed the minimum permissible sentence on each of the three charges, and that, as such, the court could not provide any greater relief if the matter were remanded for a new sentencing hearing. We agree, and we amend the judgment accordingly.

¶ 67 For the foregoing reasons, we affirm the defendant's convictions. However, we amend the judgment to provide that the two sentences for aggravated discharge of a firearm be served concurrently with each other.

¶ 68 Affirmed as modified.