No. 126830

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	Appeal from the Appellate Court of Illinois, First District,
Plaintiff-Appellee,	No. 1-19-0252
v.	There on Appeal from the Circuit Court of Cook County, No. 17 CR 12579
JEREMY MUDD,	The Honorable Charles P. Burns,
Defendant-Appellant.	Judge Presiding.

BRIEF OF PLAINTIFF-APPELLEE PEOPLE OF THE STATE OF ILLINOIS

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E-FILED
9/20/2021 5:13 AM
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POINTS AND AUTHORITIES

NATURE OF THE CASE

Defendant was charged with unlawful use of a weapon by a felon (UUWF) based on the eyewitness testimony of two police officers. During opening statement, trial, and closing argument, the defense emphasized that the officers' testimony was uncorroborated because the prosecution had not tested the handgun for DNA or fingerprints. In rebuttal closing argument, the prosecutor stated that it was the People's burden to prove defendant guilty beyond a reasonable doubt and briefly observed that "both sides" can request that evidence be tested. Defendant appeals from the appellate court's judgment holding that the prosecutor's comment neither misstated the evidence nor shifted the burden of proof. No issue is raised on the pleadings.

ISSUES PRESENTED

1. Whether no plain error occurred during rebuttal argument when, in response to defense counsel's repeated argument that the prosecution failed to present forensic evidence, the prosecutor observed that both sides can request that evidence be tested.

2. Whether defense counsel did not provide ineffective assistance by failing to object to the prosecutor's observation that both sides can request that evidence be tested.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315 and 612. This Court granted defendant's petition for leave to appeal on March 24, 2021.

STATEMENT OF FACTS

A. Defendant's Arrest

In August 2017, police officers in a high-crime area of Chicago went to a local park to investigate a loud disturbance. SR205-06; R20-21.[1] There the officers saw defendant and noticed that he had a bulge on the side of his shorts. SR207-08; R23-24. When defendant saw police, he walked away quickly and ignored orders to stop. SR208-10; R24-26. The officers saw defendant kneel by a van, pull an object from his shorts, and put it on the van's rear wheel. SR214-15; R26-27. They stopped defendant and recovered a loaded handgun from the van's rear wheel. SR215-16; R27-28. Defendant, a four-time felon, was arrested and charged with UUWF. C56; SC116.

B. Defendant's Trial and Conviction

Jury Selection and Opening Statements

At the start of jury selection, the trial court told the entire jury pool that defendant "is presumed to be innocent" and it was the prosecution's burden to prove the charges "beyond a reasonable doubt." SR37. The court explained that it is a "bedrock[] of our system" that defendants are "presumed to be innocent" and it was the jury's job to "hold the State to its burden and decide whether or not the State has proven the case against the defendant beyond a reasonable doubt." SR39, 41. A few moments later, the court again

[1] The common law record and report of proceedings are cited as "C_" and "R_"; the supplemental common law record and supplemental report of proceedings are cited as "SC_" and "SR_."

instructed the jury pool that "the defendant is presumed to be innocent of the charge against him" and this presumption "is not overcome unless a jury is convinced beyond a reasonable doubt that he is guilty." SR42-43.

Then the court asked each potential juror to confirm that he or she understood and accepted "that the defendant is presumed to be innocent." SR47-48. Each potential juror also confirmed that he or she understood and accepted that it was the prosecution's burden to "prove the defendant guilty beyond a reasonable doubt." SR48. And then each potential juror confirmed that he or she understood and accepted "that the defendant is not required to offer any evidence on his behalf." SR48-49.

Immediately after jury selection, the prosecution made a brief opening statement, telling the jury that the prosecution would prove, through the testimony of two police officers, that defendant committed UUWF. SR196-98.

Defense counsel's opening statement noted that defendant was "presumed innocent" and "cloaked with innocence." SR199. The defense emphasized that it was "the State's burden" to prove him guilty "beyond a reasonable doubt." *Id.*; *see also id.* ("They have to overcome that burden."). The defense argued that the prosecution could not carry its burden because it had not conducted any "forensic analysis and testing" of the handgun and would not be presenting any "DNA, gunshot residue, [or] fingerprint" evidence. SR200. The defense argued

> You won't hear that the officers submitted a gun for fingerprints or that [defendant's] fingerprint was on that firearm. You won't hear that they submitted for gunshot residue testing, or that any gunshot residue was on [defendant]. You won't hear that any DNA was swabbed on that firearm or any DNA was recovered.

Id. The defense ended by again telling the jury that it was "the State's burden to prove [defendant's guilt] beyond a reasonable doubt" and the prosecution could not carry that burden because "hard forensic evidence did not exist" to prove defendant's guilt. SR201.

The Evidence at Trial

The People presented the testimony of two witnesses: Officers Gerardo Garcia and Jeremy Rice of the Chicago Police Department. Garcia testified that on August 12, 2017, he was on patrol with several officers, including Rice. SR202-04. At 10:20 p.m., the officers were near Harding Park, which is in a "rough neighborhood." SR205. A crowd in the park was causing a disturbance by playing loud music and drinking alcohol after the park closed. SR205-06. In the park, Garcia and Rice saw defendant, and observed that he kept grabbing a bulge on the right side of the waistband of his shorts. SR208.

When defendant saw the officers, he began walking away "fast." SR208-10. Garcia and Rice followed defendant and told him to stop. SR209. Defendant said, "who me?" and kept walking. SR209-10. The officers followed defendant out of the park and into an alley. SR211-12. Defendant walked up to a blue van, still grabbing the object in his waistband, knelt by the rear driver-side wheel, then got up to walk away. SR214-16. Rice

stopped defendant while Garcia went to the van and, on the rear driver-side wheel, recovered a loaded, semiautomatic handgun, with a bullet in the chamber. SR216-18, 222. There was nothing else on or around the wheel, and no one else in the alley when they entered. SR213, 217. On cross-examination, Garcia testified that he was not wearing gloves when he picked up the gun, he sent the gun to the forensics division, and defendant was not swabbed for DNA, but police did take his fingerprints. SR236, 239, 241.

Rice testified that on the night in question, he and Garcia, along with a few other officers, went to Harding Park, which is in a high-crime area, to investigate a loud disturbance. R20-21. When they arrived, Rice saw approximately 50 people drinking alcohol and playing loud music. R22. Rice and Garcia walked around the park and saw defendant, who had a bulge along the right side of his shorts. R23. As Rice and Garcia approached defendant, he began walking away at "a fast speed." R24-25. Defendant left the park and walked into an alley, and the officers told him to stop. R25. Defendant said, "who me?" and kept walking. R26. Defendant then walked to a blue van, knelt down, pulled an object from his waistband, and placed it on the rear driver-side wheel. *Id.* at 26-28. The officers stopped Rice and recovered a handgun from the van's rear driver-side wheel. R28. There was no one else in the alley when defendant left his gun there. *Id.*

The parties stipulated that defendant was a convicted felon. R51. Defendant neither testified nor called any witnesses. R54-55.

Closing Argument, Jury Instructions, and Verdict

In closing argument, the prosecution told the jury that "the State must prove" each element of UUWF "beyond a reasonable doubt." R71-72. The prosecution summarized the evidence and argued that the People had carried their burden and "proven" each element "beyond a reasonable doubt." R73.

The defense emphasized that the prosecution's case rested entirely on the testimony of the two police officers, which was uncorroborated by forensic evidence. R74-82. After noting the officers' testimony, the defense argued:

> Now, let's talk about what you don't have. What you don't have are fingerprints. As far as we know, that gun was never even submitted for testing for fingerprints. You don't have DNA. Why? Because as far as we know, that gun was never even submitted for DNA. You don't have gunshot residue. Why? Because they never swabbed Mr. Mudd for gunshot residue. . . .
>
> Well, you know, Ladies and Gentleman, usually we don't say, take my word for it. We say, don't take my word for it. Look at this and judge for yourself.
>
> The problem with the case before you [is] there is no this. You have nothing else. And is that really how we want to conduct the criminal justice system in this city? Because if it is, we don't need trials. We don't need prosecutors, or judges, or defense lawyers, or juries. The police can just say, we saw him do it. End of story. That's not how we conduct justice in this city.

R80-81. The defense ended its closing argument by reiterating that the People's case had "no corroboration. The curtain has been pulled back, and all you have are men. . . . Men who have nothing, nothing to back up what they're telling you." R82.

In rebuttal, the prosecution asked jurors to use their "common sense." R83. The prosecution stated that there was no reason for police to test for

fingerprints or DNA because defendant was the only person who could have left the gun on the wheel: "There is nobody else around that van. Nobody else walking in that alley. Nobody else that knelt down next to that tire and put an object there. . . . Common sense tells you he's the person that possessed the gun." R82-83. The following exchange then occurred:

Prosecutor:	And it is our burden of proof, Ladies and Gentleman. It is the State's burden of proof to prove the elements beyond a reasonable doubt. It's a burden we take on every single day.
Defense counsel:	Objection.
Court:	To that line, overruled.
Prosecutor:	And we welcome that burden, Ladies and Gentleman. We welcome that burden. But both sides have access to the evidence. Both sides, if they wanted testing to be done can request testing to be done. Both sides.

R84. The defense did not object to the prosecutor's observation that both sides can request testing. *Id.* The prosecutor then discussed other points for several transcript pages and asked jurors to return a guilty verdict. R84-88.

In the final jury instructions, the court again told the jury that defendant was "presumed innocent" and that presumption is overcome only if the prosecution proved "beyond a reasonable doubt that he is guilty." R96. The court further instructed the jury:

> The State has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden remains on the State throughout the case. The defendant is not required to prove his innocence.

Id. The court then instructed the jury on the elements of UUWF and stated that "the State must prove" each element. R100.

The jury found defendant guilty of UUWF. R112.

Defendant's *Krankel* Motion and First Motion for New Trial

Following trial, defense counsel filed a motion for new trial; it did not allege that the prosecution erred in rebuttal argument. SC128.

Around that same time, defendant filed a pro se motion pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), alleging that his privately retained counsel erred in certain ways. C135-37. During the ensuing preliminary *Krankel* inquiry, defendant alleged in open court that counsel should have tested the gun for fingerprints and DNA. SR278-79. Defense counsel responded that it "was trial strategy to argue to the jury that there was no DNA or fingerprints recovered from that item. I believe that based on my conversations with my client in confidence, that those particular items would have hindered the defense rather than helped." SR279-80. The court denied the *Krankel* motion, finding that counsel's representation was "very vigorous" and "very effective." SR291, 295.

Defendant's Supplemental Motion for New Trial and Sentencing

Following the *Krankel* inquiry, defense counsel withdrew, SR297, and the public defender was appointed to represent defendant, SR321. Appointed counsel filed a supplemental motion for new trial alleging, as relevant here, that the prosecution shifted the burden of proof in rebuttal; the motion did

not argue that the prosecution misstated in the evidence in rebuttal. SC157. The court denied the motions for new trial. SR321-22.

At sentencing, the court noted that defendant had four prior felony convictions, as well as a misdemeanor domestic battery conviction, and sentenced him to five-and-a-half years in prison. SR327-29.

C. Defendant's Appeal

On appeal, defendant argued that the prosecution's observation in rebuttal closing argument that both sides can request that evidence be tested misstated the evidence and shifted the burden of proof. *People v. Mudd*, 2020 IL App (1st) 190252-U, ¶ 12. The appellate court found that defendant forfeited this claim by failing to object at trial and, thus, it could only be reviewed for plain error. *Id.*, ¶¶ 16-17. The appellate court then held that there was no error because the prosecution neither misstated the evidence nor shifted the burden of proof. *Id.*, ¶¶ 20-25. Having found no error in the prosecutor's comment, the court likewise rejected defendant's claim that his counsel provided ineffective assistance by failing to object. *Id.*, ¶ 26.

STANDARD OF REVIEW

Whether a forfeited claim is reviewable as plain error is a question of law that is reviewed de novo. *People v. Johnson*, 238 Ill. 2d 478, 485 (2010).

ARGUMENT

I. Defendant Forfeited His Claim that the Prosecution Erred in Rebuttal Argument.

A. Defendant Forfeited His Claim in Multiple Ways.

The appellate court correctly concluded that defendant forfeited his claim that the prosecutor erred during rebuttal argument because he neither objected at trial, R84, nor sufficiently raised the claim in his post-trial motion, SC157. *E.g., People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (defendant must object both at trial and in his post-trial motion to preserve a claim).

Defendant's contention that he objected to the prosecutor's observation that both sides may request testing, *see* Def. Br. 23, is flatly rebutted by the trial transcript, which reflects the following exchange:

Prosecutor:	And it is our burden of proof, Ladies and Gentleman. It is the State's burden of proof to prove the elements beyond a reasonable doubt. It's a burden we take on every single day.
Defense counsel:	Objection.
Court:	To that line, overruled.
Prosecutor:	And we welcome that burden, Ladies and Gentleman. We welcome that burden. But both sides have access to the evidence. Both sides if they wanted testing to be done can request testing to be done. Both sides. Counsel brings up that these officers were not equipped with body-worn camera and in-car camera at the time of this offense. Well, first off, if there was even in-car camera, it's not going to capture anything, because their car's on Calumet facing north. . . [argument continues without objection].

R84. Therefore, the record is clear: the defense objected to the prosecutor's comment that the People's burden to prove guilt beyond a reasonable doubt is "a burden we take on every single day" (a comment unrelated to forensic testing and that obviously does not shift the burden of proof), but did not object to the comment that both sides can request to test evidence.

Apparently recognizing that he failed to object, defendant argues that this Court should forgive his forfeiture under the "*Sprinkle* doctrine" which provides that "the forfeiture rule may be relaxed when a trial judge oversteps his or her authority in the presence of the jury or when counsel has been effectively prevented from objecting because it would have 'fallen on deaf ears.'" *People v. Thompson*, 238 Ill. 2d 598, 612 (2010) (collecting cases). But, as defendant's authority shows, this Court has emphasized that the *Sprinkle* doctrine applies "only in extraordinary circumstances, . . . such as when a judge makes inappropriate remarks to a jury or relies on social commentary instead of evidence in imposing a death sentence." *Id.* (cited in Def. Br. 24). Defendant's conclusory assertion that "it is likely" that an objection "would have fallen on deaf ears," is unsupported by any argument and is contrary to the record, which shows that throughout trial the court acted fairly and did not ignore defendant's objections. *See, e.g.,* R23 & SR211 (sustaining defense evidentiary objections). Accordingly, defendant fails to show that "extraordinary circumstances" excuse his failure to object at trial.

Defendant also forfeited a portion of his claim in an additional, independent way. In this appeal defendant contends that the prosecutor's comment was error for two distinct (and, indeed, contradictory) reasons: (1) the prosecutor failed to present evidence that both sides may request testing, and (2) telling the jury that both sides may request testing improperly shifts the burden of proof. *E.g.*, Def. Br. 9-10. However, in his post-trial motions, defendant raised only the latter argument, claiming that the prosecutor's comment "shifted the burden to the Defense." SC157. Therefore, defendant has forfeited his argument that the prosecutor erred by arguing facts not in evidence for this second, independent reason. *See, e.g.*, *People v. Hughes*, 2015 IL 117242, ¶ 40 (defendant forfeited coerced confession claim because the coercion claim he raised in the trial court and the coercion claim he raised on appeal "while not factually hostile to one another, are almost wholly distinct"); *see also People v. Cuadrado*, 214 Ill. 2d 79, 89 (2005) ("[A] specific objection waives all other unspecified grounds.").

Defendant's reliance on *People v. Mohr*, 228 Ill. 2d 53, 64-65 (2008) (cited in Def. Br. 23), for his contention that he "did not need to make an objection 'on identical grounds' to preserve it for appeal" is misplaced. In *Mohr*, the defendant objected to a jury instruction at trial and again in a post-trial motion; that opinion addresses the question (not raised here) of how similar a contemporaneous objection made during trial must be to the argument raised in the defendant's post-trial motion to preserve the claim for

appeal. *Id.* *Mohr* is inapposite because here, defendant forfeited his claim for different reasons: (1) he failed to object during rebuttal argument, and (2) his appeal raises a claim that he failed to raise in his post-trial motion.

B. Defendant's Claim May Be Reviewed Only for Plain Error.

Because defendant forfeited his claim, it may not be considered on appeal unless he satisfies the requirements of the plain-error doctrine. *People v. Jackson*, 2020 IL 124112, ¶ 81. The plain-error doctrine "is a narrow and limited exception to the general rule of procedural default." *Id.* It "is not a general saving clause preserving for review all errors affecting substantial rights whether or not they have been brought to the attention of the trial court." *People v. Allen*, 222 Ill. 2d 340, 353 (2006) (collecting cases).

Defendant's burden to establish plain error is a multiple-step process. First, he must show that "clear or obvious" reversible error occurred, because "[i]n addressing an assertion of plain error, it is appropriate to determine whether reversible error occurred at all." *Jackson*, 2020 IL 124112, ¶ 81. That is to say, "[w]ithout reversible error, there can be no plain error." *Id.*, ¶ 88; *see also People v. James Johnson*, 218 Ill. 2d 125, 139 (2005) ("Clearly, there can be no plain error if there is no error[.]"). This is because the plain-error doctrine merely excuses forfeiture, allowing the reviewing court to "consider unpreserved error[s]" in certain situations, *Jackson*, 2020 IL 124112, ¶ 81; it is not an independent substantive basis for relief. Therefore, defendant first must prove that the prosecutor's comment was "clear or

obvious" reversible error, which requires him to prove that the remarks were (1) "improper," and (2) "the verdict would not have been the same had the improper remarks been omitted." *E.g.*, *James Johnson*, 218 Ill. 2d at 143.

Second, if defendant can prove clear and obvious reversible error, he must then establish plain error, *i.e.*, that (1) the evidence was "closely balanced," or (2) the error was so serious that it "affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Jackson*, 2020 IL 124112, ¶ 81.[2]

As shown below, defendant cannot carry his burden because the prosecutor's comment was not reversible error, let alone plain error.

II. Defendant Cannot Show that the Prosecutor's Observation that Both Sides May Request Testing Was Plain Error.

A. The Prosecutor's Comment Did Not Clearly and Obviously Constitute Reversible Error.

Defendant cannot establish that the prosecutor's brief comment in rebuttal was reversible error because it was neither improper nor prejudicial.

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[2] First prong plain error and the prejudice element of reversible error are not duplicative because first prong plain error looks only at whether the evidence is closely balanced, while prejudice under reversible error considers a variety of factors such as whether the comment was brief and curative instructions were given. *E.g., James Johnson*, 218 Ill. 2d at 142-43 (claim failed where evidence was closely balanced, establishing first prong plain error, but remark did not affect outcome of trial because it was brief and cured by other comments, thus failing to show prejudice element of reversible error). That first prong plain error is so narrowly focused is one reason why it is necessary for a defendant raising an unpreserved claim to prove reversible error (in addition to plain error); otherwise, it sometimes would be easier to succeed with an unpreserved claim than a preserved claim.

1. The prosecutor's comment was not clearly and obviously improper.

Prosecutors have "wide latitude" in closing argument, and reviewing courts must consider the closing argument as a whole, rather than focusing on isolated phrases. *E.g., People v. Perry,* 224 Ill. 2d 312, 347 (2007); *People v. Evans,* 209 Ill. 2d 194, 225 (2004). As noted, defendant's claim that the prosecution erred by saying that both sides can request testing is based on two inconsistent arguments: (1) prosecutors may not make such comments without eliciting testimony that the defendant can request testing, and (2) telling the jury that both sides can request testing impermissibly shifts the burden of proof. *See, e.g.*, Def. Br. 9-10. Neither argument is correct.

a. It is undisputed that the prosecutor's comment was an accurate statement of Illinois law.

The prosecutor's comment that "both sides" can "request testing to be done" is indisputably a statement of law. R84. Indeed, defendant repeatedly observes that the prosecutor's comment was a "legal concept" that is enshrined in this Court's rules and precedent. *E.g.,* Def. Br. 19-23 (citing Ill. S. Ct. R. 412); *see also id.* at 21 & 22 (noting the statement was based on "discovery rules"). Because it is undisputed that the prosecutor was making a legal statement, defendant's claim that the prosecutor argued facts not in evidence is misplaced.

This Court has consistently held that prosecutors may make legal statements during closing argument as long as the statements accurately reflect the law. *E.g., People v. Munson*, 206 Ill. 2d 104, 146 (2002) (no error

for the prosecutor to tell the jury that she was prohibited from showing them a statement made by defendant's accomplice because that "was simply an accurate statement of the law"); *People v. Hasprey*, 194 Ill. 2d 84, 86-87 (2000) (no error for prosecutor to tell jury that the defendant could be found guilty if his conduct was either willful or wanton because that was a correct statement of law); *People v. Adams*, 109 Ill. 2d 102, 117-18 (1985) (prosecutors may tell jurors that "circumstantial evidence is sufficient for conviction" and that they "are not required to search out a series of potential explanations compatible with innocence and elevate them to reasonable doubt" because those are correct statements of law).

Defendant does not contend that the prosecutor misstated the law, nor could he credibly do so because it is settled that both sides have the right to test physical evidence. *E.g., People v. Peeples*, 155 Ill. 2d 422, 477 (1993) ("There can be no question that the defendant has a constitutional right to conduct his own tests on physical evidence."); Ill. Sup. Ct. R. 412(e) (defense must be given access to physical evidence for "testing"). Therefore, it was not error for the prosecutor to note that both sides may ask to test evidence.

Defendant nevertheless argues that the prosecutor's comment was "not based on the evidence" at trial because the prosecution "failed to present any *evidence* that [defendant] could have requested the firearm be tested." Def. Br. 9-10, 15 (emphasis added). But this Court has not required that prosecutors, as a condition of making a statement of law, first call a witness

to testify as to what the law is. *E.g., supra* pp. 15-16 (collecting cases). Rather, this Court has distinguished between factual statements (which generally must be supported by testimony or other evidence at trial) and legal statements (which must be accurate statements of the law but which need not be introduced through trial testimony). *E.g., People v. Glasper*, 234 Ill. 2d 173, 211-13 (2009).

For example, the defendant in *Glasper* claimed that the prosecutor erred in closing argument when he (1) said that certain witnesses were friends of the defendant and (2) explained the role of the jury foreperson. *Id.* With respect to the prosecutor's comment that the witnesses were defendant's friends — a factual assertion — this Court examined whether the statement was supported by the trial evidence. *Id.* at 211-12. But with respect to the prosecutor's comment concerning the foreperson's role — a legal concept — the Court examined only whether the prosecutor accurately stated the law. *Id.* at 212-13. Notably, this Court did not consider whether the prosecutor's description of the foreperson's role was supported by trial testimony.

This distinction between legal and factual statements is sensible. Prosecutors must be permitted to make legal statements in closing argument to put the People's case in context and respond to the defendant's argument. Such legal statements are unobjectionable, provided they do not misstate the law. There is nothing to be gained by requiring the prosecution to call a witness to testify to legal principles, such as that circumstantial evidence can

support a guilty verdict or that both sides may ask to test physical evidence. Rather, it would only waste time and judicial resources and could serve to distract the jury, because the prosecution would have to call witnesses to testify to every possible legal concept that it might possibly refer to in closing or rebuttal argument. Moreover, such a rule would often lead to unnecessary disputes about the scope or propriety of such witness testimony. For example, had the People called a witness to testify that both sides could request to test defendant's gun, defendant undoubtedly would be arguing that such testimony impermissibly shifted the burden of proof. *See, e.g.,* Def. Br. 9 (arguing that the "assertion that [defendant] could have tested the firearm was classic burden shifting").

Tellingly, defendant cites no case holding that a prosecutor erred when making a *legal* statement because the prosecutor failed to call a witness to testify about what the law is. Instead, the only cases defendant cites holding that a prosecutor made comments unsupported by the evidence involve *factual* statements. *See* Def. Br. 15-16.[3]

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[3] Citing *People v. Williams*, 333 Ill. App. 3d 204, 214 (1st Dist. 2002) (prosecutor made unsupported assertion that defendant was losing a child support battle with victim); *People v. Dorian Jackson*, 2012 IL App (1st) 102035, ¶¶18-20 (prosecutor incorrectly stated that defendant made certain incriminating comments); *People v. Beier*, 29 Ill. 2d 511, 517 (1963) (prosecutor made unsupported statement that defendant wiped her fingerprints off the murder weapon); *People v. Whitlow*, 89 Ill. 2d 322, 340 (1982) (prosecutor said that defendant stole money though "the State had reason to know its allegation was false"); *People v. Nightengale*, 168 Ill. App. 3d 968, 975 (1st Dist. 1988) (prosecutor incorrectly said that defendant's fingerprints were found at the crime scene).

To be sure, a prosecutor may not make factual arguments that are unsupported by the evidence or reasonable inferences from the evidence, but that is not what occurred here. As noted, defendant acknowledges that the prosecutor's comment was a "legal concept" that is based on "discovery rules"; thus, as defendant concedes, the prosecutor was not making a factual statement. Def. Br. 19-23. Nor is this a case where, as a factual matter, no one could test the gun because it was lost, destroyed, or never recovered. To the contrary, defendant's gun was admitted into evidence, and the officers testified that they secured the gun, took it to the police station, inventoried the gun and its ammunition, and then submitted the gun to the forensics division. *E.g.,* SR216-24, 237-39; R28, 49. Therefore, even if a factual basis were necessary for the prosecutor's comment that both sides could request testing, this testimony established such a basis. *See, e.g., Perry*, 224 Ill. 2d at 347 (prosecutors may argue reasonable inferences from the evidence). Furthermore, any suggestion now that the defense could not test the evidence would be contrary to (1) defendant's *Krankel* motion which alleged that counsel erred by choosing not to test the gun despite its availability, and (2) counsel's response that he made a "strateg[ic]" decision not to test the gun because, "based on my conversations with my client in confidence," testing the gun "would have hindered the defense." SR279-80.

Lastly, one additional issue bears discussion. In connection with assertions defendant made in his appellate briefs about jurors' personal

experience, the appellate court found that it is common knowledge that defendants may ask to test evidence. *Mudd*, 2020 IL App (1st) 190252-U, ¶¶ 21-23. Given the long-established rule that defendants may test evidence, the centrality of that concept to our justice system, and how frequently criminal trials are covered in the media, the appellate court is undoubtedly correct. *Cf. Peeples*, 155 Ill. 2d at 477 (there is "no question" that defendants may test evidence).

Defendant cites no case holding the contrary. Instead, defendant now contends that the common knowledge doctrine is inapplicable because the prosecutor's comment was a legal statement. *See* Def. Br. 19-23. In light of defendant's concession that the comment is a legal statement, the People agree that the common knowledge doctrine is not at issue here. In the context of closing arguments, the "common knowledge" doctrine applies to factual statements, not legal statements; as defendant observes, the doctrine provides that if "a fact is of common knowledge," such as that winters in Chicago are cold, parties may discuss that "fact" in closing argument without introducing any "trial evidence." Def. Br. 21-22 (collecting cases).

Therefore, this Court need not resolve whether it is common knowledge that defendants may ask to test evidence because prosecutors may make legal statements provided they are accurate, regardless of whether that legal concept is commonly known. *E.g., Munson*, 206 Ill. 2d at 146 (no error for the

prosecutor to tell that jury that she was prohibited by law from showing them an accomplice's statement); *see also supra* pp. 15-16 (collecting cases).

b. The prosecution did not shift the burden of proof.

Nor did the prosecutor's accurate statement of the law shift the burden of proof. This Court has consistently held that if a defendant's closing argument faults the prosecution for not introducing or testing certain evidence, prosecutors may argue in rebuttal that defendants have the power to present evidence, call witnesses, and test evidence. *E.g., People v. Hall*, 194 Ill. 2d 305, 348-49 (2000) (where the defendant's closing argument questioned why prosecutors did not test hair evidence, it was proper for the prosecutor to observe in rebuttal that defendant could have hired a DNA expert to test it); *People v. Brown,* 172 Ill. 2d 1, 42-43 (1996) (where the defense argued that a witness framed defendant and faulted prosecutors for not corroborating her testimony, the prosecution did not shift the burden of proof in rebuttal by arguing that "if there was anybody in the world [who could support defendant's theory] you can be sure the defense would have had people up on the stand"); *People v. Richardson*, 123 Ill. 2d 322, 355 (1988) (after the defense faulted prosecutors for not calling certain witnesses, the prosecution did not shift the burden of proof by arguing in rebuttal that it gave the defense a list of people with information about the case and "[t]here is not a single person anywhere involved in this case that is not equally available to both sides").

Similarly, the appellate court, other state high courts, and federal courts have likewise held that if the defense faults the prosecution for not testing certain physical evidence, the prosecution may argue in rebuttal that the defense could have tested that evidence. *E.g., People v. Robinson*, 391 Ill. App. 3d 822, 841 (2d Dist. 2009) ("[A]fter defense counsel discussed the lack of scientific evidence in his closing argument it was not improper for the State to argue that defendant could have produced such evidence."); *State v. Adamcik*, 152 Idaho 445, 482 (Idaho 2012) (where the defense raises "the State's failure to forensically test some of the evidence, it is fair advocacy for the State to note that the defense also failed to test such evidence"); *United States v. Wimbley*, 553 F.3d 455, 461 (6th Cir. 2009) (no error to note that the defense could have tested evidence for DNA and fingerprints).

This case is a textbook example of a defendant faulting the People for failing to test physical evidence, and the prosecutor responding appropriately, without shifting the burden of proof. In closing argument, the defense repeatedly faulted the prosecution for failing to present fingerprint or DNA evidence. *E.g.*, R80 ("What you don't have are fingerprints. . . . You don't have DNA."). The defense argued at length that the prosecution was relying solely on the testimony of the two officers, and had "no corroboration" of that testimony and "nothing to back up what they're telling you." R80-82. The defense argued that relying solely on police officers' testimony is "not how we conduct justice in this city" and that it should find defendant not guilty

because the prosecution had failed to corroborate their testimony with forensic evidence. R81-82. Indeed, during the *Krankel* inquiry defense counsel explained that it was the defense's "trial strategy" to focus on the lack of forensic evidence presented at trial. SR279. And the trial court observed that the defense "argued for an extended period of time" in closing argument that the prosecution did not present "forensic evidence." SR291-92.

In response to the defense's "extended" argument that the People failed to present forensic evidence, the prosecution merely observed, in brief fashion, that "both sides" can ask to test evidence:

Prosecutor:	And it is our burden of proof, Ladies and Gentleman. It is the State's burden of proof to prove the elements beyond a reasonable doubt. It's a burden we take on every single day.
Defense counsel:	Objection.
Court:	To that line, overruled.
Prosecutor:	And we welcome that burden, Ladies and Gentleman. We welcome that burden. But both sides have access to the evidence. Both sides if they wanted testing to be done can request testing to be done. Both sides.

R84. Notably, the prosecution did not state that defendant *should* have tested the gun or was obligated to do so. *Id.* Rather, the prosecution merely observed that both sides "can" request testing. *Id.* And, importantly, the prosecution preceded that observation by emphasizing that it "is the State's burden of proof" to prove defendant guilty "beyond a reasonable doubt." *Id.* Accordingly, the prosecution's comment was an appropriate response to defendant's closing argument and did not shift the burden of proof.

Defendant's assertion that a response is not invited unless the defense argument was "improper," Def. Br. 19, is contrary to this Court's precedent, *supra* pp. 21. The sole case he cites, *United States v. Young*, 470 U.S. 1, 11 (1985), merely holds that if the defense engages in improper argument, such as personal attacks on prosecutors, the prosecution may not "respond in kind" because "two improper arguments — two apparent wrongs — do not make for a right result." The quote defendant attributes to *Young* — that the "invited response doctrine allows a party who is provided by *his opponent's improper argument* to right the scale by fighting fire with fire," Def. Br. 19 (emphasis in defendant's brief) — does not appear in the opinion, *see Young*, 470 U.S. 1.

Defendant's string cites of cases holding that prosecutors may not shift the burden of proof are similarly inapposite. *See* Def. Br. 16. In two of the cases, there was no contention that the defense invited the prosecutor's remark. *People v. McGee*, 2015 IL App (1st) 130367, ¶¶ 69-71; *People v. Giangrande*, 101 Ill. App. 3d 397, 402 (1st Dist. 1981). In two others, the court found that the defendant did not invite the response. *People v. Lopez*, 152 Ill. App. 3d 667, 679-80 (1st Dist. 1987); *People v. Smith*, 402 Ill. App. 3d 538, 543 (1st 2010). And the last two cases are inapt because prosecutors expressly faulted the defense for not presenting evidence. *People v. Euell*, 2012 IL App (2d) 101130, ¶ 20 (prosecution faulted defense for providing "no evidence"); *People v. DeAngelo Johnson*, 208 Ill. 2d 53, 112, 115 (2004) (prosecutor "barely crossed the line" by suggesting defendant "was required

to 'present evidence'" and arguing, "how dare his guy complain about his rights? Now this guy, without presenting any evidence, wants to complain through his lawyer").

Defendant is also incorrect when he argues that "reviewing courts have typically upheld convictions, in the face of a burden-shifting challenge, only where the trial evidence demonstrated that the untested evidence could have been tested 'by any party in the case.'" Def. Br. 16-17. As noted, this Court and others have held that if the defense faults prosecutors for not testing certain evidence, the prosecution may argue that the defense could have tested such evidence if it wished; those opinions do not hold that prosecutors must first elicit testimony about the defense's right to test evidence, and it would not be good policy to adopt such a rule. *Supra* pp. 21-22.

The appellate cases defendant cites are not to the contrary and, in any event, cannot overrule this Court's precedent. *See* Def. Br. 16-17. *Kelley* addresses re-direct examination, not closing argument, and merely holds that when the defense raises an issue on cross-examination it cannot complain if the People ask questions about that issue during re-direct. *People v. Kelley*, 2015 IL App (1st) 132782, ¶¶ 60-67. *Luna* supports the People because it holds that prosecutors "may comment on the defendant's failure to submit any evidence"; it does not hold that prosecutors must prove that both sides may test evidence. *People v. Luna*, 2013 IL App (1st) 072253, ¶ 129. *Beasley* likewise does not hold that prosecutors must prove that the defense could test

evidence. *People v. Beasley*, 384 Ill. App. 3d 1039, 1048 (4th Dist. 2008). Moreover, unlike the present case, the prosecutor in *Beasley* told the jury that the defendant bore the burden of proof by arguing that it was "unconscionable" for the defense not to test evidence and a defendant "can't sit back and say, 'Well, nobody tested it; therefore, the evidence fails.'" *Id.*

In defendant's final case, *Lewis Jackson*, the appellate court combined (and denied) two claims: that (1) prosecutors shifted the burden of proof in re-direct examination "by emphasizing [defendant's] failure to present results of DNA testing," and (2) prosecutors erred by raising the same point in rebuttal. *People v. Lewis Jackson*, 399 Ill. App. 3d 314, 319 (1st Dist. 2010). To the extent that *Lewis Jackson* suggests that prosecutors must prove that the evidence is equally available to both sides before responding in rebuttal, it is contrary to this Court's precedent, *supra* pp. 21-22, and incorrect. The only case *Lewis Jackson* cites for this proposition is *People v. Patterson,* 217 Ill. 2d 407, 446-47 (2005), which addresses re-direct examination, not closing argument. Notably, *Patterson* does not hold that a prosecutor must elicit testimony that evidence is available to both sides; rather, it holds that a prosecutor's re-direct questions about the defendant's ability to test evidence "did not constitute reversible error" because the questions were "brief" and "invited" by defense counsel's cross-examination, and the jury was properly instructed that the prosecution bore the burden of proof. *Id.* Such a holding in no way supports defendant's contention that prosecutors *must* prove that

evidence is available to both sides before responding to an invited argument in rebuttal.

2. Defendant cannot establish prejudice.

a. Defendant cannot show that the prosecutor's comment affected the outcome of trial.

Even if the prosecutor's comment were improper, defendant must still show prejudice, *i.e.*, he must show that the outcome of trial would have been different had the comment not been made. *E.g.*, *James Johnson*, 218 Ill. 2d at 143 (no reversible error because "defendant has failed to persuade us that the verdict would not have been the same had the [prosecutor's] improper remarks been omitted"); *People v. Nieves*, 193 Ill. 2d 513, 533 (2000) (same rule).[4] Defendant cannot carry that burden for four reasons.

First, the evidence of defendant's guilt is strong because two officers testified that he (1) had a bulge in the side of his waistband (consistent with hiding a handgun); (2) ignored orders to stop (showing consciousness of guilt); and (3) knelt near the van's rear wheel, took something from his waistband and put it on the wheel, and police recovered a handgun there (demonstrating defendant's possession of the gun). SR205-18; R20-28. Defendant presented no evidence. On such a record, defendant cannot contend that he would have

[4] Relying on *People v. Thurow*, 203 Ill. 2d 352 (2003) (cited in Def. Br. 24), defendant contends that the People must prove that the prosecutor's alleged error was harmless. But *Thurow* holds that where (as here) the defendant failed to object at trial, "[i]t is the defendant rather than the [People] who bears the burden of persuasion with respect to prejudice." *Id.* at 363; *see also James Johnson*, 218 Ill. 2d at 142-43 (same).

been acquitted but for the prosecutor's comment. *See, e.g.*, *Nieves*, 193 Ill. 2d at 534 (no prejudice where "[t]he evidence of defendant's guilt was substantial enough that the jury would have returned a verdict of guilty even if the prosecutor had not made this argument").

Second, the prosecutor's comment was brief and not repeated, which further shows the lack of prejudice. *E.g., Jackson*, 2020 IL 124112, ¶ 87.

Third, the prosecutor's comment was innocuous in that it neither was false nor directly inculpated defendant. By comparison, this Court has found that a defendant failed to show prejudice even though the prosecutor incorrectly stated that DNA found on the defendant's pants was a "match" for the victim. *Id.*, ¶¶ 84-88. Here the prosecutor's comment is even less likely to have affected the outcome of trial because the prosecutor merely observed (correctly) that "both sides" can request testing.

Fourth, prejudice is cured where the jury is told that (1) the People must prove the defendant's guilt beyond a reasonable doubt and (2) closing arguments are not evidence and the jury should disregard statements not supported by the evidence. *E.g., id.*, ¶ 87; *People v. Flores*, 128 Ill. 2d 66, 95 (1989) (any error "was cured when the jury was properly instructed by the trial court on the State's burden of proof"); *see also Glasper*, 234 Ill. 2d at 214 ("We do not believe that one incorrect comment made by the State during argument would be sufficient to confuse the jury and cause it to ignore the

clear instructions given to it by the court[.]"). Here, the jury was repeatedly given such instructions throughout the two-day trial:

- At the start of trial, and in final instructions, the court told the jury that closing arguments are not evidence and any argument "not based on the evidence should be disregarded." R92; SR194.
- The court instructed the venire that defendant "is presumed to be innocent," it was the prosecution's burden to prove his guilt "beyond a reasonable doubt," and it was the jury's job to "hold the State to its burden and decide whether or not the State has proven the case against the defendant beyond a reasonable doubt." SR37, 39.
- All jurors confirmed that they understood and accepted that (1) "defendant is presumed to be innocent," (2) it is the People's burden to prove his guilt "beyond a reasonable doubt," and (3) "defendant is not required to offer any evidence on his behalf." SR47-49.
- Immediately after jury selection, defense counsel said in his opening statement that defendant was "presumed innocent" and emphasized several times that it was "the State's burden" to prove defendant's guilt "beyond a reasonable doubt." SR199-201.
- The next day, in closing argument, the prosecution told the jury that "the State must prove" each element of UUWF "beyond a reasonable doubt." R71-72.
- And in rebuttal, the prosecution again stated: "And it is our burden of proof, Ladies and Gentleman. It is the State's burden of proof to prove the elements beyond a reasonable doubt." R84.

In addition, the court's final jury instructions — the last thing jurors heard before deliberating — once again emphasized that defendant was "presumed innocent" and it was the People's burden to prove "beyond a reasonable doubt that he is guilty." R96. And the court further instructed:

> The State has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden remains on the State throughout the case. *The defendant is not required to prove his innocence.*

Id. (emphasis added).

Given this record — where eyewitness testimony inculpated defendant, he presented no exculpatory evidence, the prosecutor's comment was brief and innocuous, and the jury received curative instructions — defendant cannot show that he would have been acquitted but for the prosecutor's observation that both sides can request to test evidence.

b. Defendant's alternative arguments are meritless.

Defendant's assertion that he was prejudiced because the challenged remark occurred in the People's rebuttal argument and he "had no opportunity to respond" is meritless. Def. Br. 19. It is the very nature of invited arguments that they are made in rebuttal. *Supra* pp. 21-22 (collecting cases). Moreover, defendant fails to explain what "response" he would have given or how it would have changed the result of trial. Notably, there is no dispute that defendant could have tested the gun — that is settled law and was the basis for his *Krankel* motion — so defense counsel could not have argued to the contrary in any hypothetical sur-rebuttal. And it was unnecessary to respond by telling the jury that the prosecution bore the burden of proof because, as noted, the jury was told that throughout trial, including by the prosecutor in rebuttal and the court in final instructions.

Defendant also is incorrect when he contends that he was prejudiced because he was "prevented" from "asking pertinent questions about the forensic testing (or lack thereof) of the weapon." Def. Br. 23. To begin, defendant fails to provide any basis to believe that he would have been acquitted had he been permitted to ask "pertinent questions" about forensic

testing. Indeed, even absent these "pertinent questions," the jury knew that the People did not have forensic evidence inculpating defendant because: (1) Garcia testified that police took no DNA sample from defendant, SR241; (2) the prosecution did not introduce forensic evidence (and common sense would tell the jury that if defendant's fingerprints or DNA were found on the gun, the prosecution would have introduced that fact), and (3) the defense argued throughout trial that the prosecution had no forensic evidence. For example, defense counsel told the jury in his opening statement: "You won't hear that the officers submitted a gun for fingerprints or that [defendant's] fingerprint was on that firearm . . . . You won't hear that any DNA was swabbed on that firearm or any DNA was recovered." SR200. Then defense counsel repeated those points in closing argument. R80-82.

Moreover, defendant was not improperly prevented from asking questions or making arguments regarding forensic testing. As noted, defense counsel repeatedly told the jury (without objection) about the lack of forensic testing in opening and closing argument. And defendant's suggestion that he was unfairly prevented from asking Garcia about forensic testing is rebutted by the record. Def. Br. 23. On cross-examination, defense counsel asked Garcia, without objection, whether defendant had been fingerprinted (he had) and whether police had taken a DNA sample from defendant (they had not). SR241. Defense counsel also asked Garcia a number of questions about how the gun was secured, confirmed that Garcia submitted the gun "to the

forensics division," and asked a series of questions about the process Garcia followed for doing so. SR236-40. It was only when the defense began to ask Garcia about certain forensics issues without establishing that Garcia had personal knowledge that the court sustained objections to defense counsel's questions. *See, e.g.*, SR241 (court sustaining objection to question about use of fingerprints and explaining, "Again, unless there is personal knowledge here, it would call for a hearsay response."). Defendant does not argue that those rulings were incorrect, and any such argument would be both meritless and forfeited. *See, e.g., People v. Peterson*, 2017 IL 120331, ¶ 17 (the "rule against hearsay provides that 'a witness may testify only as to facts within his personal knowledge and not as to what somebody else told him'"); Ill. Sup. Ct. R. 341(h)(7) (points not argued in appellant's opening brief are forfeited).

* * *

In sum, defendant cannot establish reversible error because he cannot show that the prosecutor's comment was improper or that he would have been acquitted but for the comment.

B. Defendant Cannot Establish Plain Error.

Even if defendant could prove reversible error, his forfeiture must be enforced, and his conviction affirmed, because he cannot prove either prong of plain error, *i.e.*, that (1) the evidence was closely balanced or (2) the error was so serious that it "affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *People v. Adams*, 2012 IL 111168, ¶ 21.

1. The evidence was not closely balanced.

To determine whether a defendant has established the "closely balanced" prong of plain error, the Court must "make a 'commonsense assessment' of the evidence." *Adams*, 2012 IL 111168, ¶ 22; *see also People v. Belknap*, 2014 IL 117094, ¶ 50 (same). This Court's decision in *Adams* aptly demonstrates why the evidence in this case is not closely balanced.

In *Adams*, the only evidence that the defendant was guilty of drug possession was testimony from two police officers that they found a small bag of cocaine in his pocket while arresting him for a traffic offense. 2012 IL 111168, ¶¶ 5, 12. No physical evidence tied the defendant to the drugs, and he testified that (1) the drugs were not his, and (2) the officers found the drugs on the ground near their cruiser, not in his pocket. *Id.*, ¶¶ 7-11. This Court noted that the defendant's version of events required certain coincidences (such as being stopped for a traffic offense next to where someone left a small bag of drugs), and held that the evidence was not closely balanced because "defendant's explanation of events, though not logically impossible, was highly improbable." *Id.*, ¶ 22.

Defendant's contention that he did not possess the gun is equally improbable because it requires the jury to believe that

- the object in defendant's waistband was not a gun (though there was no evidence suggesting it was anything other than a gun);
- defendant evaded police and ignored orders to stop for a reason other than consciousness of guilt (though no evidence was offered of what that reason might be); and

- coincidentally, defendant chose to stop and kneel next to the rear wheel of a van where someone just happened to have left a loaded handgun (though defendant did not explain why he knelt there nor offer a reason to believe that someone else left the gun there).

The evidence in this case cannot be said to be closely balanced because it is highly improbable that all of these things could be true, especially where no evidence was introduced at trial to suggest that any of them *were* true.

Defendant's contention that the evidence is closely balanced because the prosecution presented no forensic evidence, Def. Br. 25, is meritless because this Court has found in multiple cases that evidence is not closely balanced even if no forensic evidence inculpates the defendant. *See, e.g., Adams*, 2012 IL 111168, ¶ 22; *see also Belknap,* 2014 IL 117094, ¶¶ 54-62 (evidence not closely balanced even though no physical evidence inculpated defendant, there were no eyewitnesses, and the prosecution's case rested largely on jailhouse informants). That is to say, if the evidence was not closely balanced in *Adams* — where the prosecution's case rested on testimony from two police officers that was uncorroborated by forensic evidence — then defendant cannot credibly argue that it is closely balanced here, especially given that in this case, unlike in *Adams*, defendant presented no exculpatory testimony.

Defendant's argument that the evidence is closely balanced due to two purported inconsistencies in the evidence fails on both the facts and the law. Defendant first notes that a police report states that the gun was recovered "from" Officer Garcia, Def. Br. 12, but this is obviously an irrelevant

scrivener's error given the rest of the report (which states that the gun belongs to defendant) and the officers' account of how the gun was recovered, *supra* pp. 4-5 (summarizing testimony); SC31 (report). Similarly, defendant's observation that Rice incorrectly said in his grand jury testimony that he recovered the gun on the ground next to the wheel of the van, *see* Def. Br. 12, does not exculpate defendant but rather merely reflects that sometimes witnesses do not perfectly recall minor details.

As this Court has often explained, "minor discrepancies in the evidence, whether between two witnesses or within the testimony of one witness, are not unusual." *E.g., In re M.W.,* 232 Ill. 2d 408, 438 (2009). For that reason, this Court has found that evidence is not closely balanced even if there are discrepancies or contradictions in the evidence. *E.g., id.* (evidence not closely balanced despite lack of forensic evidence and discrepancies in witnesses' testimony about the crime's "sequence of events"); *People v. White,* 2011 IL 109689, ¶¶ 17-121, 134-44 (evidence not closely balanced even though eyewitnesses' testimony was recanted and inconsistent, some eyewitnesses exculpated defendant, and defendant presented alibi witnesses). Thus, while defendant focuses on a few small inconsistencies, what truly matters is that the officers' testimony was consistent on the key points: defendant had a bulge in his waistband consistent with a gun, ignored orders to stop, and knelt near the van's rear wheel, and then police immediately recovered a handgun there.

Defendant's other arguments fare no better. *See* Def. Br. 12-13. Defendant's observation that Garcia picked up the gun without wearing gloves is not exculpatory, and therefore does not show that the evidence is closely balanced. Moreover, Garcia reasonably explained that he did not take the time to put on gloves because a large crowd was beginning to gather behind them during the arrest, they were yelling and "seemed upset," and he therefore thought it prudent to "just grab[] it immediately." SR242-43, 245. And defendant's argument that there were 50 people in the park and it was late at night does not mean the evidence is closely balanced given the officers' unrebutted testimony that they had no problems seeing defendant, observing his actions, and following him out of the park and into the alley where he tried to dispose of his gun. R23-29, SR207-17.

Lastly, defendant's cases are inapposite. Def. Br. 25. In *Sebby*, the defendant presented multiple eyewitnesses who corroborated his testimony that he was innocent. *People v. Sebby,* 2017 IL 119445, ¶ 61. In *Naylor*, the defendant testified to explain his innocence and this Court concluded that his "testimony is credible." *People v. Naylor,* 229 Ill. 2d 584, 607 (2008). In *Herron*, three of the four eyewitnesses did not identify defendant as the perpetrator, and descriptions of the perpetrator "conflicted." *People v. Herron*, 215 Ill. 2d 167, 192-94 (2005). And, in *Piatkowski*, the prosecution's case rested on two witnesses who saw the shooter for only a few seconds, and there were discrepancies in their description of the shooter and defendant's

appearance, race, and age. *People v. Piatkowski,* 225 Ill. 2d 551, 567-70 (2007).

2. The prosecutor's comment did not undermine the integrity of the judicial process.

Nor may defendant's forfeiture be excused as second prong plain error, which requires him to prove that the alleged error resulted in "a total breakdown in the integrity of the judicial process." *Evans,* 209 Ill. 2d at 224.

First, this Court has consistently held that improper comments in closing argument — absent a serious pattern of prosecutorial misconduct in other parts of the trial — do not constitute second prong plain error. *E.g.*, *Adams,* 2012 IL 111168, ¶ 24; *People v. Nicholas,* 218 Ill. 2d 104, 123 (2005). Here, defendant challenges brief, isolated comments in rebuttal argument, not a serious pattern of prosecutorial misconduct throughout trial.

Second, and independently, second prong plain error applies only if the alleged misconduct is so egregious "that the trial court could not cure the error by sustaining an objection or instructing the jury to disregard the error." *E.g., People v. Williams*, 192 Ill. 2d 548, 584 (2000) (collecting cases). Here, if the prosecutor's comment were error, it plainly could have been cured by sustaining an objection, a point defendant himself makes by arguing that "[h]ad counsel objected to these comments, it is reasonably probable that the outcome of in this case could have been different." Def. Br. 26.

Lastly, defendant's cases are inapposite because they are not plain error cases and/or they involve a pervasive course of egregious misconduct.

Def. Br. 25-26. In *DeAngelo Johnson,* prosecutors engaged in a pervasive course of misconduct, such as displaying the victim's "bloodied and brain-splattered" police uniform on a mannequin throughout trial, eliciting inflammatory testimony, suggesting that defense counsel was deceptive, and misstating the law and evidence. *DeAngelo Johnson,* 208 Ill. 2d at 72-85. The companion case, *Blue,* is a cumulative error case that involved widespread errors by the court and prosecution, including the improper admission of evidence, the display (once again) of the victim's "bloodied and brain-splattered" police uniform, and prosecutors who harassed witnesses, cursed defense counsel, and made improper objections "to introduce contrary evidence through themselves." *People v. Blue,* 189 Ill. 2d 99, 120-41 (2000).

III. Defendant's Ineffective Assistance Claim Is Meritless.

Defendant's derivative claim that his counsel erred by failing to object to the prosecutor's comment in rebuttal is also meritless. Def. Br. 26. To prevail, defendant must prove that (1) counsel's performance was deficient, and (2) there is a reasonable probability that, had counsel objected, defendant would have been found not guilty. *Strickland v. Washington,* 466 U.S. 668, 687, 694 (1984). As discussed, the prosecutor's comment was proper and did not affect the outcome of trial. Therefore, defendant cannot show that counsel was deficient for failing to object or that there is a reasonable probability defendant would have been acquitted had counsel objected.

CONCLUSION

This Court should affirm defendant's conviction.

September 20, 2021

Respectfully submitted,

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RULE 341(c) CERTIFICATE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance and the certificate of service, is 39 pages.

/s/ Michael L. Cebula
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PROOF OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On September 20, 2021, the foregoing **Brief of Plaintiff-Appellee People of the State of Illinois** was (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served by transmitting a copy from my email address to the email address below:

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Additionally, upon its acceptance by the court's electronic filing system, the undersigned will mail thirteen copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701.

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