Illinois Official Reports

Appellate Court

People v. Rios, 2022 IL App (1st) 171509

Appellate Court Caption	THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOSE RIOS, Defendant-Appellant.
District & No.	First District, Sixth Division No. 1-17-1509
Filed Rehearing denied	June 24, 2022 August 1, 2022
Decision Under Review	Appeal from the Circuit Court of Cook County, No. 12-CR-17598; the Hon. Michael B. McHale, Judge, presiding.
Judgment	Affirmed in part and vacated in part; mittimus corrected.
Counsel on Appeal	James E. Chadd, Thomas A. Lilien, and Drew A. Wallenstein, of State Appellate Defender's Office, of Elgin, for appellant. Kimberly M. Foxx, State's Attorney, of Chicago (Enrique Abraham, Douglas P. Harvath, Daniel Piwowarczy, and Joseph Alexander, Assistant State's Attorneys, of counsel), for the People.
Panel	JUSTICE ODEN JOHNSON delivered the judgment of the court, with opinion. Justices Harris and Mikva concurred in the judgment and opinion.

OPINION

¶ 1 Following a jury trial, defendant Jose Rios was convicted of two counts of aggravated discharge of a firearm toward a police officer, found to be an armed habitual criminal (AHC), and was sentenced to concurrent terms of 30 years' imprisonment for each offense. On appeal, defendant contends that (1) the trial court erred in several of its evidentiary rulings, (2) he was not proven guilty beyond a reasonable doubt, (3) the trial court improperly denied trial counsel a continuance that prohibited her trial preparation, and (4) the State made improper comments during closing argument. For the following reasons, we vacate one of defendant's convictions for aggravated discharge of a firearm toward a police officer pursuant to our supreme court's recent decision in *People v. Hartfield*, 2022 IL 126729, and affirm the remaining convictions and sentences in all other respects.

¶ 2 I. BACKGROUND

¶ 3 Defendant's arrest and subsequent trial stem from events that occurred on September 6, 2012, when he was arrested and charged with attempted murder of a police officer, aggravated discharge of a firearm toward a police officer, and AHC.

¶ 4 A. Pretrial Proceedings

¶ 5 Prior to trial, defendant moved to suppress statements because he was not Mirandized (see *Miranda v. Arizona*, 384 U.S. 436 (1966)) and questioning did not stop when he requested an attorney. He also argued that the statements he made were the product of physical coercion and intimidation. A hearing was had on September 10, 2015.

¶ 6 At the hearing, Chicago police officer Clarence Hubbard testified that he was working on September 6, 2012, with Officer Lara and Officer Kashif Khan on an anti-violence mission. All three officers were in plain clothes and patrolling in an unmarked police vehicle. Hubbard testified that he wore a T-shirt, tan cargo pants, and a bulletproof vest with his star and last name embroidered on the front and his unit of assignment and "police" embroidered on the back. Each of the officers were dressed similarly. Shortly before 10 p.m., Officer Khan was driving and turned from Milwaukee Avenue onto Allen Avenue, which was a one-way street that ran northeast and was near 2917 North Allen Avenue. Officer Lara was in the front passenger seat while Officer Hubbard was in the rear behind him. Officer Hubbard stated that Allen Avenue was a well-lit street with artificial lighting. He identified defendant in court as the person he saw standing near the alley near Allen Avenue and Milwaukee Avenue. Defendant was alone and had a shiny object in his hand that appeared to be a handgun, based on what Officer Hubbard believed to be the barrel of the gun showing. Officers Hubbard and Lara then exited the vehicle and announced their office, and defendant raised the object and fired one round in their direction. Officer Hubbard stated that defendant was looking in their direction when the shot was fired and he was approximately 10 to 15 feet away from them. Defendant then threw the gun to the ground and ran northeast on Allen Avenue. Officers Hubbard and Lara subsequently caught and detained him. By this time, Officer Khan parked and exited the vehicle. Officer Hubbard handcuffed defendant and placed him in the back of the vehicle. There was no struggle, and he observed no injuries to defendant. Meanwhile, Officer Lara went back and recovered the gun and "made it safe." Officer Hubbard was unsure if Officer Lara kept it in his hand or secured it in his vest, but he maintained custody of the

gun. Officer Hubbard testified that he did not have any conversation with defendant and that defendant was not Mirandized on the scene, nor did he hear any conversation between his partners and defendant. Officer Hubbard never grabbed defendant's gun and pointed it at him, nor did he ever shout at defendant after recovering the gun. Officer Hubbard remained on the scene after defendant was placed in the vehicle, and defendant was subsequently picked up by another police vehicle and taken to the station. Officer Hubbard stayed at the scene until detectives arrived to process the scene. He later went to the police station but never saw defendant again. Officer Hubbard identified photos of himself and Officers Lara and Khan dressed in their duty vests and plain clothes from September 6, 2012.

¶ 7 On cross-examination, Officer Hubbard stated that neither he nor his partners called or radioed dispatch prior to exiting the vehicle and reiterated that there was no one else on the street with defendant. Defendant was holding the gun in his right hand, and when the officers exited their vehicle, Officer Hubbard said "stop. Police." Officer Hubbard had unholstered his handgun and was holding it at "low ready," meaning that it was drawn, held near the body but pointed down low in the ready position in case he had to raise and fire it. He was unsure whether Officer Lara's gun was unholstered, as Officer Lara was to his left. Officer Hubbard stated that no one was hit by defendant's gunshot, but defendant fired in their direction before throwing the gun to the ground near the curb, underneath a vehicle. Officer Hubbard did not fire his gun and did not say anything to defendant because he was in shock and had to "gather [him]self." Officer Hubbard did not call dispatch after the weapon was fired but believed that Officer Khan did. He also stated that he was familiar with defendant and might have arrested him before.

¶ 8 On redirect, Officer Hubbard testified that the recovered gun was a .25-caliber semiautomatic with eight live rounds.

¶ 9 Detective Greg Swiderek testified that he was assigned to a shooting involving police officers on September 6, 2012, as part of a six-person team, but he did not go to the scene. Instead, Detectives Korolis and Wood went to the scene. Detective Swiderek identified defendant in court as the offender, who was transported to the station at approximately 10:30 p.m. that night. He was given an overview of what occurred, and he and his partner subsequently spoke with defendant in an interview room at the station. Detective Swiderek Mirandized defendant, who agreed to speak with the officers but never requested an attorney. Defendant gave a 10-minute statement before an evidence technician was called to administer a gunshot residue (GSR) test to defendant and collect defendant's clothing for GSR testing. The evidence technician took photos of defendant fully clothed as well as of defendant's tattoos, all of which Detective Swiderek identified as representative of how defendant appeared that night. At approximately 4:45 a.m. on September 7, 2012, Assistant State's Attorney (ASA) Crowe interviewed defendant after advising him of his *Miranda* rights. Defendant gave another statement during a 45-minute interview with ASA Crowe.

¶ 10 Officer Theodore Delis, an evidence technician, testified to the procedures used in administering a GSR test and stated that he was assigned to administer a GSR test on September 6, 2012. He identified defendant in court as the arrestee that he administered the test to. Officer Delis performed the GSR test on both of defendant's hands and then took photos of defendant. He also collected defendant's clothing for GSR testing. On cross-examination, Officer Delis stated that he took the samples and clothing to his office and inventoried them. He never saw defendant again after that.

¶ 11 Defendant testified that he was arrested on September 6, 2012, and that Officer Hubbard grabbed him first before demanding that defendant tell them "who they were." The other officer grabbed the gun off the ground, pointed it at defendant, and also demanded that defendant tell them "who they were." He was subsequently taken to the police station where he was handcuffed and interviewed by other officers who did not Mirandize him. Defendant stated that he requested an attorney but was not given one and that the officers got angry and left the room. Later, defendant stated that the officers came back to the room and ordered him to take all of his clothes off and, when he did not remove his underwear, he was slammed to the floor. He also stated that he was subjected to a body cavity search and his hair was pulled before he was allowed to put his clothes back on. On cross-examination, defendant denied having a gun that night while he stood on Allen Avenue. He also stated the officers wanted to know who ran away.

¶ 12 The photos were admitted into evidence without objection, and the parties stipulated to defendant's prior 2009 conviction for unlawful use of a weapon (UUW) by a felon. There was also a discussion about a 2002 armed robbery conviction, which defense counsel stipulated to for purposes of the motion to suppress. During argument on the motion, defense counsel first argued that the officers' behavior, after the alleged shooting, of just handcuffing defendant without yelling at him was "absolutely unbelievable" and that it was "absolutely unbelievable for a police officer or for anyone to behave that way after they have just been shot at." The trial court found the officers to be credible witnesses and declined to accept defendant's argument that they were not believable because they remained calm after being shot at. The court noted that if the officers were hostile and angry, defendant would likely argue that as a reason not to believe their testimony. The court found that the photos did not corroborate defendant's testimony, namely that there was no bruising to his face after allegedly being slammed on a ceramic tile floor nor were any other injuries shown in the photos. The court subsequently denied the motion.

¶ 13 The next pretrial motion was a motion *in limine* filed by defendant on January 28, 2016, which sought to bar any mention of defendant's convictions prior to January 28, 2006; any mention of defendant's conviction for UUW; any alleged statement attributable to defendant that was not previously tendered in discovery; admission of other crimes evidence; admission of the four-page July 2014 letter that was confiscated by the jail; admission of defendant's telephone calls that were recorded at the jail; and any mention or argument or publishing of photos showing defendant's tattoos and purported gang affiliation. The motion also sought production of the English translation of the two-page letter the jail confiscated from defendant in July 2014 that was written in Spanish to his mother.

¶ 14 The State moved to admit and exclude certain evidentiary items pursuant to a motion *in limine* filed on March 21, 2016. The State moved to admit evidence of defendant's tattoos (a pitchfork, an upside down A, the letters K, B, S, and the word "nikka"), defendant's inconsistent statements to police, and four letters written by defendant that were confiscated at the Cook County Jail (jail). It sought to exclude comments or evidence pertaining to defendant's prior consistent statements to police, alleged acts of police or prosecutorial misconduct unrelated to the case, or comments on counts that were nol-prossed prior to trial.

¶ 15 With respect to defendant's statements to police, the State sought to admit defendant's initial statement to Detective Swiderek and his partner that he was walking home, carrying a .25-caliber, semiautomatic gun for protection; a red van chased him; he ran onto Allen Avenue

and fired the gun to scare the van away; police arrived; he threw the gun near a parked car and then he was arrested. In the statement made to ASA Crowe, defendant stated that he was walking on Milwaukee Avenue when a red van began chasing him and missed hitting him before turning into the alley on Allen Avenue; he ran to Allen Avenue and threw the .25-caliber gun when he saw police approaching; the gun discharged when it hit the ground; police yelled for him to stop from approximately 10 feet away; and defendant bought the gun for protection, knew it was loaded, and carried it in his waistband.

¶ 16 With respect to the letters, the State's motion alleged the following. On July 14, 2014, Investigator Kevin Meller of the Cook County Sheriff's Department (Sheriff's Department) intercepted a single letter in the mail room that was sealed contrary to jail rules. The envelope had defendant's Cook County Department of Corrections number and was addressed to a female at defendant's home address. Two letters were in the sealed envelope, one in English and one in Spanish, and the State planned to send the Spanish letter for translation. The State noted that it referenced a July 29, 2014, court date, and the letters were attached to the motion.

¶ 17 On August 19, 2014, Investigator Lombardi of the Sheriff's Department intercepted a single letter in the mail room that was sealed contrary to jail rules. The envelope had the name of inmate Joel Vanegas, who was a fellow resident in Division 9, Tier 3-A, where defendant was housed at the time of mailing. Both this letter and the July 14, 2014, letter have three dots after some names or addresses.

¶ 18 The trial court held that the letters were admissible because they had "distinctive characteristics" that included references to defendant's court date, his public defender, the amount of time he was in custody, a "unique" use of ellipses, and "very specific" statements about the facts and evidence, all of which led to the reasonable conclusion that defendant wrote them. Defendant's tattoos were admitted because they were offered to tie him to the letters and not for gang affiliation.

¶ 19 The record reveals that the trial court allowed both parties to make redactions to the letters, removing references to defendant's public defender, potential jail sentences, and defendant's criminal background from the second, third, and fourth letters. Over defense counsel's objection, the trial court admitted portions of those letters that referenced defendant's attempts to solicit false testimony from various people because they were relevant as evidence of defendant's consciousness of guilt. No redactions were made by either party to the first letter, which was originally written in Spanish to defendant's mother.

¶ 20 In the second letter, dated August 19, 2014, the word "PIGGS" was admitted because it was not inflammatory and was a commonly used word for police. References to defendant's offer to testify at someone's trial if that person took responsibility for defendant's gun and was subsequently charged was admitted because it referred to the charged offense. Statements about defendant filing a lawsuit and splitting the money was admitted to show consciousness of guilt as an incentive or payment for false testimony. References to the "birds," the Eagles street gang, were admitted because they were made in the context of the solicitation of false testimony and showed consciousness of guilt.

¶ 21 The third letter, dated October 9, 2014, included defendant's statements about the gun discharging when it fell from his shorts and hit the ground that were admissible as evidence of consciousness of guilt. Statements explaining defendant's reasons for having the gun were also admitted to show consciousness of guilt and as a party admission to possession of the gun.

¶ 22 The fourth letter, which was undated, included a statement about "lawsuit money" that was admitted to show defendant's incentive for false testimony.

¶ 23 B. Trial

¶ 24 Just prior to beginning jury selection on September 12, 2016, defense counsel requested a continuance because subpoenaed witnesses, namely various police officers, were not present. As an offer of proof for Nicholas Schrag, defense counsel stated that he was needed "[r]egarding a fact in issue that he would make more or less probative for possible impeachment." When the trial court indicated that the response was too general and requested more specificity, defense counsel stated that Schrag was an occurrence witness on the scene that could provide possible impeachment or possible corroboration. As to the other necessary subpoenaed witnesses, defense counsel stated that they were all on the scene, participated in the investigation, and were present when the evidence was collected and when people were interviewed. Counsel indicated that the witnesses were helpful because counsel anticipated possible impeachment of the State's witnesses but never provided any specific offer of proof.

¶ 25 Defense counsel also stated that the police dispatch tapes were relevant to defendant's theory; however, on the day of trial, defense counsel had not identified the officer making the statements despite having possession of the tapes for some time prior to trial. When the trial court requested a specific answer on the relevancy of the tapes, defense counsel stated that they were relevant to the defense theory and that counsel wanted to interview the sergeant who called in "shots fired" regarding the sergeant's interview with the victim officers. The trial court denied defense counsel's request for continuance because counsel did not provide specificity for the offers of proof.

¶ 26 The following day, defense counsel asked the trial court to reconsider its ruling about admission of the letters that was denied. Defense counsel again requested a continuance and provided the subpoenas that were sent. The trial court denied the request, stating that counsel was already given an opportunity to make specific offers of proof.

¶ 27 At trial, Officer Hubbard testified consistently with his testimony at the motion to suppress, identified defendant in court, and stated that he was startled by the gunshot. He also testified that Officer Lara placed the gun in his vest after its recovery.

¶ 28 Officer Lara's trial testimony was consistent with Officer Hubbard's testimony, and he identified defendant in court. He stated that when he saw defendant with a gun, he exited the car before it stopped completely, yelled for defendant to stop, and announced his office. After firing the gun, defendant threw it down toward the street. Officer Lara retrieved the gun, removed the magazine from it, cleared one round from the chamber, and place the gun in his vest to secure it. The gun was a Mauser .25-caliber, semiautomatic weapon, which was given to an evidence technician who later arrived at the scene. On cross-examination, Officer Lara stated that everything happened so fast he did not have a chance to say anything to his partners, nor did he radio it in or use gloves to retrieve the gun. He was also dressed in plain clothes—jeans, sneakers, and a blue T-shirt with his police vest over it.

¶ 29 Officer Khan's testimony corroborated Officer Hubbard's and Officer Lara's sequence of events. He was dressed in plain clothes—cargo pants, black T-shirt, and his police vest. He was driving the unmarked police vehicle, a Ford Crown Victoria, that was equipped with emergency equipment, lights, and sirens. When he turned onto Allen Avenue, he saw defendant standing 20 to 25 feet away holding a gun in his right hand, and he identified defendant in

court. Officer Khan accelerated and stopped the vehicle adjacent to where defendant was standing. Officers Hubbard and Lara both jumped out of the vehicle, and Officer Khan heard them both loudly and aggressively say "Stop, police." After parking the vehicle, Officer Khan heard a gunshot. When he saw Officer Hubbard chasing defendant, Officer Khan ran toward them and assisted in apprehending defendant and placing him in handcuffs. At some point, Officer Khan radioed in that shots were fired, stating "loud reports." On cross-examination, he testified that he did not inform dispatch of a man with a gun when he first saw defendant, he did not see what defendant did with the gun, nor did he see the gun being recovered. Officer Khan also stated that he was focused on parking, so he did not initially see where defendant went or what he did. He restated that he heard the gunshot as he was exiting the car.

¶ 30 Detective Swiderek also testified consistently with his testimony at the suppression hearing, and he identified defendant in court. He and his partner Detective Marco Garcia interviewed defendant at approximately 10:50 p.m. Defendant waived his *Miranda* rights and stated that he was carrying a gray .25-caliber, semiautomatic pistol for his protection. Defendant told the detectives that a red van was chasing him and that he ran onto Allen Avenue before firing a shot to scare off the van. He threw the gun by a parked car when he saw the police coming. In a subsequent interview at 4:45 a.m. on September 7, 2012, with ASA Crowe, defendant again waived his *Miranda* rights and stated that he was walking southbound on Milwaukee Avenue when a red van began chasing him and he ran onto Allen Avenue while carrying a gray .25-caliber, semiautomatic pistol. Defendant saw police coming, heard them say "stop," and he threw the gun, which he knew was loaded. Defendant's statement was not recorded. No fingerprints found on the gun were suitable for comparison; a mixture of three DNA profiles was found on the gun, but they were incomplete and unsuitable for comparison. That made it impossible to include or exclude defendant from the mixture of DNA. The spent cartridge found on the scene was fired from the gun recovered from the scene, and defendant's right hand tested positive for GSR, meaning that he either discharged a firearm, contacted an item with GSR, or was in close proximity to a firearm when it was discharged. Defendant's left hand did not test positive for GSR.

¶ 31 Detective Swiderek reviewed photos of defendant and his tattoos that were published to the jury. Defendant's tattoos included an upside down A and a K on his right cheek; a B and an S on his left cheek; "fukka nikka" with upside down As on his right forearm; "fukka b***" with an upside down A and a pitchfork for the T in b*** on his left wrist; Kimball Street and a pitchfork on his left arm near the wrist area on the bottom; and Allen and a pitchfork on the top of his right wrist.

¶ 32 Cook County sheriff investigator Meller testified that his job duties include reading mail of the arrestees to maintain the safety and security of the jail. On July 14, 2014, Meller found a sealed letter with several ellipses[1] after several items on the envelope. Defendant's name and inmate number were also on the envelope with the jail's post office box number. The letter inside was written in Spanish but was translated to English for the trial. In the letter, defendant stated that the gun belonged to "Julio," who was going to take responsibility and testify for defendant. Meller saw the same ellipses after most lines of the letter.

[1]The witnesses at defendant's trial referenced "three dots" in the letters; we will refer to them as ellipses based on the trial court's discussion and ruling at the pretrial hearing.

¶ 33 Cook County sheriff investigator Brendon Lombardi testified that he was also responsible for reading inmates' outgoing mail. On August 22, 2014, he found a sealed envelope with defendant's name and inmate number and ellipses after "certain names or addresses." At the time, defendant was housed in Division 9 on Tier 3-A. Lombardi opened the letter and read it. In the letter, defendant said he was "twerkkalatin the s*** out of Division 9" and mentioned that he had been trying to get people from the "S" to help out for 23 months. Defendant stated in the letter that "Lil Blue" and "Sharkky" were going to do it but then said that they wanted nothing to do with it and that defendant was on his own. The letter also said that people discouraged Lil Blue from helping him out by taking the "weight for the banger." The letter also stated that Lil Blue would not be charged if he stepped up and took the weight for the gun.

¶ 34 Additionally, the letter explained what really happened as follows:

> "I told Sharkky and Lil Blue that I had already gotten it in twice since that s*** happened to Jujo and Troubles. But nobody else in the hood ain't on s***. So I told them let's go. Get the banger and get on some ganga. But neither one of them wanted to get the banger. So I said f*** it. I got this. I'll pack it. Just watch my back."

The letter further explained how defendant ended up on Allen Avenue and that he saw a dark gray "Crown Vic" that he thought was the "Snakes," so he pulled out the "banger" and when he saw they were "narkkos," he threw the "banger" and it "busted" when it hit the ground. The letter then stated:

> "Now, look, folks, this is the business. I have got a good chance of beating this case, but I will need your help. I been begging the folks for the longest, but they rather see me get cracked for this bulls***. *** If I get a lot of time for something that I didn't even do *** I'm probably going to take myself out this s*** and kill myself *** All you got to do to help me out is say that you and I were on the block, Allen, … and that you had the .25 on you *** All you got to say is that you saw 5-0 gray Crown *** And that as soon as you saw them, you took off running, threw the gun and got low. You hit a gangway and got away. You didn't stick around to see who the cops in the gray Crown were."

¶ 35 Defendant also wrote that if he beat the case, he was going to sue the Chicago Police Department and was willing to split his lawsuit money. The letter said that "they have no love for me despite everything I did for AK BS. I walk around with that s*** on my face." The letter also stated that the "Birds" were going to get "one of the shorties from Kostner" to step up and that his plan had worked for someone else. The letter pleaded with the recipient to "get me out of here. If you do, I'll clap any nikka for you. I'm with it. Plus we gonna be rich." Additionally, defendant used another inmate's information to send the letter in case it got intercepted.

¶ 36 On October 17, 2014, Lombardi intercepted another letter that had the ellipsis on the envelope. The envelope was destroyed but contents of the letter also included the ellipsis and discussed the charged offense as follows:

> "And what's up with Jujo? He's from the hood again. Well, when he was Bird, he said he was going to take the weight for the u-digg. If he takes the weight for the u-digg, he is not even going to get charged for it because the po-po's are already saying that they seen me with it, not him. 5-0 can't change their statements. *** Jujo or Blue will not get charged for the yomper. *** I don't want money from y'all. I want y'all to help me get out of here, PW. *** Y'all need some hitters out there. *** Skee told me

> if y'all don't decide to take the weight for the slammer, he said he will have one of his shorties do it. *** he is well aware that whoever takes the weight for the slammer, they are not even going to get charged. He said that he done it before and it works, D.
>
> The only problem is that his shorties don't know Allen like that, and they are not familiar with that area. So it is going to be kind of hard for one of the Birds to take the stand and finesse some s***. *** He said my folks have a better chance because they know that area. *** I don't want the Birds to step up because they shouldn't have to. That's why I have my nikkas. *** I know the folks from BS don't like me because I always be on some AK s***, but y'all know that I am and what I'm about. *** It's tatted all over me *** So y'all need to holler at Jujo and Blue and figure out who's going to do this because if not *** [that] leaves me with no choice but to see if Skee still wants to help me.
>
> This is why I need y'all help. Jujo and Blue, even if they were to get charged, which they are not, they would only face a three to seven-year charge. But if they get charged… and that means I'm gonna beat my case, and that means I'm going to get this lawsuit money. We're gonna be Gucci. Racks on racks on racks."

Defendant also discussed the facts and evidence of his case and explained that he sent the letter through another name because his mail was being opened.

¶ 37 Cook County sheriff sergeant Erik Velez testified that on October 15, 2014, he was examining mail at the jail when he observed a sealed letter with the name Everado Rosales on the envelope and learned that Rosales was housed in Division 9, Tier 3-A, where defendant was also housed. The date on the letter in the envelope was "10/09/14," and there was an ellipsis after the name "Sharkky Flockka," which was spelled with upside down As. The letter read:

> "I know you and Blue both don't want to step up and say that y'all had the u-digg and threw it. Y'all will not get charged if y'all do. And since y'all don't want to help me get out of this jam, it leaves me with no choice to have you and Lil' Blue testify on my behalf and say that I had the u-digg on my waist and that the d*** in the gray Crown bent on us *** I spinned and walked away. That's when they reached for my waist, and the gun fell through my shorts, hit the ground, and blew on its own. Then y'all are going to say y'all took off running and didn't stick around to see what else happened after that."

Defendant further stated that they needed to say it was the "black bald narkko" that grabbed him. The letter also stated:

> "Also I want y'all to say that the reason why I had Blue's gun in the first place is because he was arguing with you and y'all were going to fight. So I took his .25 from him to prevent him from doing something stupid with it. After I took it from him, about five to ten minutes later, that's when 5-0 bent on me without probable cause. I need y'all to say this so if I get found guilty, hopefully they won't slam me, D."

The letter ended with defendant explaining that he wrote "through this info because these peoples on [his] heels, PW."

¶ 38 The parties stipulated that defendant had two prior qualifying felony convictions for the purpose of sustaining the AHC charge. The State's exhibits were admitted into evidence, and the State rested. Defendant's motion for directed finding was denied.

¶ 39 Defendant called Nicholas Schrag, who lived on the 2900 block of North Allen Avenue, who testified that on September 6, 2012, at around 10 p.m., he was in his basement when he heard a gunshot and ran upstairs. He looked outside and saw an officer on the scene looking in trash cans and under vehicles and retrieve a handgun from under a vehicle. Schrag stated that it was a very short amount of time from when he heard the gunshot, ran upstairs, and saw the gun recovered. He also stated that the car where the gun was found was out on the street and the trash cans that were searched were in the alley.

¶ 40 Detective John Korolis testified that he went to the scene of the shooting and Officers Khan, Lara, and Hubbard were still there when he arrived. He spoke with the officers as well as Sergeant William Bentancourt, listened to the dispatch recording related to the shooting, and wrote a report that summarized the investigation and interviews he conducted. Additionally, Detective Korolis canvassed the area but did not remember locating any witnesses other than Officer Khan. The gun had already been recovered when he arrived, so he received information about the gun from Officer Lara. Detective Korolis did not recover any bullets at the scene and did not see any bullet holes in cars or buildings.

¶ 41 Sergeant Bentancourt testified that he responded to the scene at approximately 9:59 p.m. and spoke with Officers Lara and Hubbard. He stated that Officer Hubbard notified him by radio, stating "shots fired, loud reports."

¶ 42 The parties stipulated that 6½ minutes after the 911 dispatch call, in which Officer Khan called in loud reports at Milwaukee Avenue and Allen Avenue, Sergeant Bentancourt responded to dispatch regarding the event. The defense's exhibits were admitted into evidence, and the defense rested.

¶ 43 Following closing arguments, the jury found defendant guilty of two counts of aggravated discharge of a firearm toward a police officer and guilty of being an AHC. Defendant's motion for new trial was denied, and the trial court subsequently sentenced him to concurrent 30-year terms for each offense. Defendant's motion to reconsider sentence was denied, and defendant's timely notice of appeal was filed on May 22, 2017. Defendant subsequently filed several *pro se* motions in 2018 that were denied by the trial court for lack of jurisdiction.

¶ 44 II. ANALYSIS

¶ 45 On appeal, defendant contends that (1) the State did not prove him guilty of aggravated discharge of a firearm toward an officer, (2) the trial court admitted highly prejudicial other crimes evidence and inflammatory character evidence when it allowed four letters into evidence without proper redaction and allowed defendant's tattoos to authenticate the letters, (3) the trial court erred in excluding a police dispatch recording that was relevant and fit two hearsay exceptions, (4) the trial court improperly denied trial counsel a continuance, preventing counsel from properly preparing for trial, and (5) the State made improper remarks during closing.

¶ 46 A. Reasonable Doubt

¶ 47 Defendant contends that the State failed to prove him guilty beyond a reasonable doubt of aggravated discharge of a firearm toward a police officer because it did not establish that he knowingly discharged a firearm toward a person or an officer. He argues that the officers' testimonies were improbable, contradicted common sense, and were impeached. While

conceding that his statements to police after his arrest confirmed that he fired the gun to scare the occupants of a vehicle or that the gun discharged accidentally, defendant maintains that he did not fire a gun toward any person and not toward Officers Lara or Hubbard. Defendant further contends that the fact that the officers' conduct did not "comport" with that of officers dealing with an armed man, namely as it relates to their safety and that they did not inform dispatch that a gun was fired in their direction, makes their statements unbelievable.

¶ 48 When reviewing the sufficiency of the evidence, it is not the function of the reviewing court to retry the defendant. *People v. Hall*, 194 Ill. 2d 305, 329-30 (2000). Rather, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). This standard of review applies in cases whether the evidence is direct or circumstantial. *People v. Saxon*, 374 Ill. App. 3d 409, 416 (2007). The credibility of the witnesses, the weight to be given their testimony, and the resolution of any conflicts in the evidence are within the province of the trier of fact, and a reviewing court will not substitute its judgment for that of the trier of fact on these matters. *People v. Brooks*, 187 Ill. 2d 91, 132 (1999). The testimony of a single witness, if positive and credible, is sufficient to convict. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). Reversal is justified only where the evidence is so unsatisfactory, improbable, or implausible that it raises a reasonable doubt of defendant's guilt. *People v. Slim*, 127 Ill. 2d 302, 307 (1989).

¶ 49 Circumstantial evidence is sufficient to sustain a criminal conviction, provided that such evidence satisfies proof beyond a reasonable doubt of the elements of the crime charged. *Hall*, 194 Ill. 2d at 330. The trier of fact need not be satisfied beyond a reasonable doubt as to each link in the chain of circumstances; it is sufficient if all of the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt. *Id.* To prove guilt beyond a reasonable doubt does not mean that a jury must disregard the inferences that flow normally from the evidence before it. *Saxon*, 374 Ill. App. 3d at 417.

¶ 50 Here, defendant was convicted of aggravated discharge of a firearm toward a police officer under section 24-1.2(a)(3) of the Criminal Code of 2012 (Code) (720 ILCS 5/24-1.2(a)(3) (West 2012)). In order to convict defendant, the jury was required to find that the State proved all of the elements of the offense beyond a reasonable doubt: defendant intentionally or knowingly discharged a firearm in the direction of a person he knew to be a police officer while that officer was executing his official duties. *People v. Meyers*, 2018 IL App (1st) 140891, ¶ 25.

¶ 51 In this case, the State presented evidence that defendant was armed with a gun on September 6, 2012, as he stood near the alley between Allen Avenue and Milwaukee Avenue. All three officers on the scene testified that they saw defendant with a gun in his right hand. Additionally, Officers Hubbard and Lara testified that defendant fired in their direction as they emerged from their unmarked police vehicle, announced their office, and ordered him to stop. Defendant then tossed the gun and fled. Officers Khan and Hubbard chased defendant and caught him before he ran far, while Officer Lara retrieved the gun from near a parked vehicle. This was corroborated by defense witness Schrag, who testified that the gun was recovered from under a vehicle. Although Schrag also testified that he saw police searching trash cans before finding the gun under the vehicle, it was the jury's responsibility to weigh the evidence and resolve any conflicts in the evidence. *Id.* ¶ 24.

¶ 52 The evidence established that a spent shell casing was recovered from the scene and was fired from the recovered gun. Moreover, the results of defendant's GSR test conducted after his arrest revealed that defendant's right hand tested positive for gunpowder residue. Defendant's initial statement to Detective Swiderek indicated that he fired a shot at the red van that was chasing him, and in the second statement, defendant stated that he saw the police, heard them say stop and threw the gun and it accidentally discharged. However, in one of his letters, defendant stated that he thought the gray police vehicle belonged to rival gang members and that is why he fired the shot. Other letters acknowledged knowing that the vehicle was a police vehicle.

¶ 53 Other evidence before the jury included photos of Officers Hubbard, Lara, and Khan from September 6, 2012, when they were dressed in plain clothes. The photos clearly showed each officer in a police vest with a star over it and guns and other police gear. A jury could have reasonably determined from the photos that when the officers emerged from the vehicle, defendant should have known that they were police officers prior to firing a shot in their direction.

¶ 54 Both Officer Hubbard and Lara testified that things happened very quickly and they did not radio the gunshot in; instead, they focused on stopping defendant and recovering the gun. Officer Khan radioed dispatch that shots were fired, using the term "loud reports." This was corroborated by defense witness Sergeant Bentancourt that he responded to a dispatch call of "shots fired, loud reports." Although Sergeant Bentancourt stated that Officer Hubbard made the dispatch call, the parties stipulated that it was Officer Khan that made the dispatch call. Again, it was the jury's responsibility to weigh the evidence and resolve any conflicts in the evidence, and the jury apparently resolved those conflicts against defendant.

¶ 55 Viewing the evidence in the light most favorable to the State as we must, we hold that the evidence was sufficient to find defendant guilty of aggravated discharge of a firearm toward a police officer. The evidence on which the jury based its decision was not unreasonable, improbable, or unsatisfactory and did not raise a reasonable doubt of defendant's guilt.

¶ 56 B. Evidentiary Issues

¶ 57 Defendant makes two main evidentiary arguments: namely, that the trial court erred in admitting certain evidence and erred in excluding other evidence.

¶ 58 Typically, evidentiary rulings are within the trial court's sound discretion and will not be disturbed on review unless the court has abused that discretion. *People v. Risper*, 2015 IL App (1st) 130993, ¶ 32 (citing *People v. Caffey*, 205 Ill. 2d 52, 89 (2001)). This is a highly deferential standard, where error is only found if the trial court's ruling is so arbitrary or fanciful that no reasonable person would agree with the view adopted by the court. *Id.* The reason for this deferential standard is that the trial court's decision to admit evidence is often not made in isolation but, rather, made after consideration of many circumstances, including questions of prejudice and reliability, which the trial court is in a more suitable position to analyze than a reviewing court. *Id.*

¶ 59 Relevance is a threshold requirement that must be met by every item of evidence. *People v. Dabbs*, 239 Ill. 2d 277, 289 (2010). All relevant evidence is admissible, except as otherwise provided by law. *Id.* Evidence that is not relevant is not admissible. *Id.*; Ill. R. Evid. 402 (eff. Jan. 1, 2011). Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable

than it would be without the evidence. Ill. R. Evid. 401 (eff. Jan. 1, 2011). Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the jury, or considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Ill. R. Evid. 403 (eff. Jan. 1, 2011).

¶ 60 With those general principles concerning the admissibility of evidence in mind, we turn our attention to consideration of defendant's specific arguments on appeal.

¶ 61 1. Admission of the Letters

¶ 62 Defendant first contends that the trial court erred by admitting highly prejudicial other crimes evidence and inflammatory character evidence when it allowed four letters to be admitted into evidence without proper redaction of portions of the letters. He maintains that the letters were highly prejudicial because they contained evidence of gang activity, other crimes, slang, and gang language that suggested violent crimes, his presence in jail, and inflammatory language. While the trial court admitted the letters under the theory of "consciousness of guilt," defendant argues that the irrelevant portions of the letters were not eliminated and as a result thereof he was prejudiced. Defendant further contends that the letters were prejudicial because the letters implied that he was involved in violent crimes, that he would commit suicide, and the quantity of material admitted through the letters led to a "mini-trial."

¶ 63 As a general rule, a trial court's rulings on a motion *in limine* regarding the introduction or exclusion of evidence is reviewed under an abuse of discretion standard. *People v. Kirchner*, 194 Ill. 2d 502, 539 (2000). A prisoner's letters may be admitted into evidence if the letters were taken pursuant to reasonable regulations and the prisoner had knowledge that prison officials might scrutinize them. *People v. Oaks*, 216 Ill. App. 3d 1072, 1074 (1991). As to the admission of the letters in the case at bar, the question is whether they were relevant and, if so, whether they were more prejudicial than probative. *People v. Gregory*, 2016 IL App (2d) 140294, ¶ 21. To establish the relevance of a piece of evidence, the proponent must (1) identify the fact that it is seeking to prove with the evidence, (2) explain how that fact is of consequence, and (3) show how the evidence tends to make the existence of this fact more or less probable than it would be without it. *People v. Maldonado*, 402 Ill. App. 3d 411, 418 (2010).

¶ 64 Other crimes evidence includes misconduct or criminal acts that occurred either before or after the alleged criminal conduct for which the defendant is standing trial. *People v. Johnson*, 2013 IL App (2d) 110535, ¶ 61. Other crimes evidence is not just prior convictions; it encompasses bad acts, and the standard for the admissibility of such evidence is more than mere suspicion, but less than beyond a reasonable doubt. *People v. Colin*, 344 Ill. App. 3d 119, 126 n.2 (2003). Other crimes evidence is admissible to prove any material fact relevant to the case but is inadmissible if it is relevant only to show the defendant's propensity to engage in criminal activity. *Johnson*, 2013 IL App (2d) 110535, ¶ 61. Although other crimes evidence is prejudicial, the erroneous admission of other crimes evidence calls for reversal only if such evidence was a material factor in the defendant's conviction such that, without the evidence, the verdict likely would have been different. *People v. Cavazos*, 2022 IL App (2d) 120444-B, ¶ 71. Other crimes evidence is admissible to show consciousness of guilt. *People v. Robinson*, 2013 IL App (1st) 102476, ¶ 93. Additionally, evidence that a defendant attempted to influence the testimony of a witness to establish a false alibi is admissible to show consciousness of guilt.

People v. Hansen, 327 Ill. App. 3d 1012, 1018 (2002); *People v. Barrow*, 133 Ill. 2d 226, 261 (1989).

¶ 65 In this case, the trial court allowed the State to introduce letters written by defendant while he was in jail awaiting trial. Among other things, the letters indicated that defendant sought assistance from people presumed to be his fellow gang members (based on references to gangs as well as his tattoos) in the form of their testimony at his trial either taking all responsibility for the gun or partial responsibility. In seeking such assistance, defendant offered scenarios where he believed the persons assisting him would not be charged with a crime, explanations for why he had the gun, and various scenarios to explain his presence. Defendant also gave conflicting accounts in the letters about what occurred. In one letter, he stated that he was on Allen Avenue looking for rival gang members because no one would do it and he shot at police because he thought they were rival gang members. In another letter, defendant claimed that he dropped the gun and it went off accidentally. The theme of each of the letters was defendant's acknowledgement of the offense and attempting to find a way to get someone else to take responsibility for it or to minimize his involvement in it.

¶ 66 We note that contrary to the allegations raised in defendant's brief, the record indicates that both sides were allowed to redact the letters. The trial court simply denied defense counsel's request to redact information relevant to defendant's consciousness of guilt, inclusive of the statement in one of the letters that defendant would commit suicide if he had to stay in jail. The references to defendant's tattoos, particularly the ones on his face, were at best harmless error as defendant was present in court and his tattoos were visible to the jury. Similarly, the gang references in the letters did not outweigh the probative value of the letters, and again, defendant's probable gang membership could have been inferred by the jury from his visible tattoos at trial.

¶ 67 Additionally, the record reveals that in admonishing the jury, the trial court gave the jury a limiting instruction with reference to the letters as follows:

> "[e]vidence has been received that the defendant has been involved in conduct other than that charged in the indictment. This evidence has been received on the issues of the defendant's intent, motive, and consciousness of guilt and may be considered by you only for that limited purpose. It is for you to determine whether the defendant was involved in the conduct and if so, what weight should be given to this evidence on the issues of intent, motive, and consciousness of guilt."

¶ 68 We conclude that the letters established a connection between defendant and the events of September 6, 2012, and were properly admitted as relevant evidence to show a consciousness of guilt. Accordingly, the trial court did not abuse its discretion in admitting the letters without further redaction.

¶ 69 2. Admission of Tattoo Evidence

¶ 70 Next, defendant contends that the trial court erroneously permitted photos of his face and body tattoos to be admitted for authentication of the letters. He argues that the photos were irrelevant and prejudicial because they prejudiced the jury into thinking he was a violent gang member, which was emphasized by the State during closing argument. Defendant contends that the error was compounded by the trial court allowing Detective Swiderek to testify in detail as to each of his tattoos, including what the designs looked like and wording. He maintains that the tattoo evidence was not probative because it had no bearing on his guilt or

innocence nor did they support or argue any motive for the offense. Further, defendant argues that the alleged connection between the letters and the tattoos was insufficient to overcome the prejudice of the tattoo evidence. According to defendant, the prejudicial value of such evidence outweighed any possible probative value.

¶ 71 As noted above, defendant had facial tattoos that were visible to the jury during trial. The tattoos included letters and symbols that were present in the letters that defendant wrote from jail while awaiting trial. Defendant also had tattoos on his hands and arms; it is unclear whether those were visible to the jury during the trial, but the photos of defendant's tattoos were published to the jury as well as the corresponding testimony describing the tattoos.

¶ 72 We recognize that there may be strong prejudice against street gangs in the Chicago area. *People v. Hamilton*, 328 Ill. App. 3d 195, 202 (2002). However, relevant evidence that the defendant was a member of a gang or participated in gang-related activities is not excluded simply because it may tend to prejudice the defendant. *Id.* Moreover, such evidence of gang affiliation is relevant if it tends to make the existence of a fact of consequence to the determination of the case more or less probable than it would be without the evidence. *People v. Johnson*, 208 Ill. 2d 53, 102 (2003). Gang-related tattoo evidence has been admitted as probative evidence to show a nexus between two defendants. See *People v. Carroll*, 257 Ill. App. 3d 663, 667 (1993).

¶ 73 Here, the trial court admitted the photos of defendant's tattoos that allegedly depicted gang-related symbols to establish a nexus between the letters attributed to defendant that were written from jail after defendant's arrest, but prior to his trial, that contained the same symbols. Such evidence was relevant because it tended to establish that defendant authored the letters, which, as we noted above, was relevant to the determination of whether defendant committed the offense. Evidentiary rulings of this nature will not be overturned on appeal unless a clear abuse of discretion is shown. *People v. Suastegui*, 374 Ill. App. 3d 635, 645 (2007). The record indicates that the trial court balanced the probative value of the photos against the potential prejudice and determined that the evidence was admissible. We cannot say that the trial court abused its discretion.

¶ 74 3. Denial of Request to Admit the Dispatch Recording

¶ 75 Additionally, defendant contends that the trial court erred in excluding a police dispatch recording that was not only relevant, but fit two hearsay exceptions, which prejudiced him because such evidence was critical to support his defense. Specifically, he argues that the dispatch recording met the course-of-conduct exception and the business records exception to hearsay and accordingly was admissible. Defendant claims that the dispatch recording was relevant because it supported his allegations that the police testimony was inaccurate and "suspect."

¶ 76 As previously stated, the admissibility of trial evidence rests in the trial court's sound discretion, and we will not reverse its ruling absent an abuse of that discretion. *People v. Montes*, 2013 IL App (2d) 111132, ¶ 61. There is no doubt that sound recordings are admissible if they are otherwise competent, material, and relevant and where a proper foundation is laid. *Id.* Generally, an audio recording is authenticated when a participant to the conversation or a person who heard the conversation while it was taking place identifies the voices of the people in the conversation and testifies that the recording accurately portrays the conversation. *People v. Reynolds*, 2021 IL App (1st) 181227, ¶ 49.

¶ 77 Hearsay evidence is an out-of-court statement offered to prove the truth of the matter asserted and is generally inadmissible unless it falls within a recognized exception, including the business records exception. *People v. Alsup*, 373 Ill. App. 3d 745, 755 (2007).

¶ 78 The business records exception to the rule against hearsay recognizes that when made as a matter of routine in the regular course of business, records or reports of events or occurrences are generally trustworthy. *Id.* In criminal cases, the business records exception to the rule against hearsay is codified in section 115-5 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-5 (West 2012)). In relevant part, section 115-5 provides that:

> "(a) Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
>
> All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.
>
> The term 'business,' as used in this Section, includes business, profession, occupation, and calling of every kind.
>
> ***
>
> (c) No writing or record made in the regular course of any business shall become admissible as evidence by the application of this Section if:
>
> ***
>
> (2) Such writing or record has been made by anyone during an investigation of an alleged offense or during any investigation relating to pending or anticipated litigation of any kind ***." *Id.*

¶ 79 Our supreme court has held that writings or records relating to a police investigation are generally excluded from the business records exception because the information contained therein may well call into question the motivation, the recall, or the soundness of conclusions of the author of the report or the person providing the information contained in the report. *People v. Smith*, 141 Ill. 2d 40, 72-73 (1990); see also *Camco, Inc. v. Lowery*, 362 Ill. App. 3d 421, 434 (2005) (police reports are generally inadmissible because they state conclusions or contain inadmissible hearsay).

¶ 80 Here, the police dispatch recording is precisely the type of record or report described in *Smith* and expressly disallowed under section 115-5—one based on the conclusion of the person making the dispatch call and made during an investigation of an alleged offense. As such, the trial court properly excluded the dispatch recording because it was not admissible as a business record exception to hearsay.

¶ 81 Defendant also contends that the police dispatch recording was admissible to show the officers' course of conduct. We disagree.

¶ 82 When an out-of-court statement is offered not to prove the matter asserted but rather to explain why the police investigation was conducted in the manner it was (*People v. Wallace*, 210 Ill. App. 3d 325, 343 (1991)), and such testimony is necessary to fully explain the State's

case to the trier of fact, such testimony is not hearsay (*People v. Temple*, 2014 IL App (1st) 111653, ¶ 58).

¶ 83 We initially note that the State did not seek to admit such recording to explain the officers' conduct during the course of their investigation. Rather, defendant sought to use the dispatch recording to support his theory regarding the officers' trial testimony, that the officers made "loud reports" as opposed to "shots fired." Based on the record, these statements mean the same thing, therefore such information was not impeaching Additionally, the purpose for which defendant sought to have the recording admitted was to prove the truth of the matter asserted and not to explain the officers' course of conduct. Defendant specifically sought to admit the dispatch recording to establish the truth of what was contained on such recording, which was hearsay. The officers who made the dispatch calls testified at defendant's trial and were available to the defense for cross-examination. Thus, it was unnecessary for the dispatch recording to be admitted into evidence. We find that the trial court did not abuse its discretion in barring the dispatch recording as hearsay evidence.

¶ 84 C. Denial of Trial Counsel's Motion for Continuance

¶ 85 Next, defendant contends that the trial court erred by denying his trial counsel's motion for a continuance that prevented counsel from properly preparing for trial. Specifically, defendant argues that when trial counsel informed the trial court on the day of jury selection that multiple witnesses failed to response to subpoenas and that a continuance was needed for trial preparation, the trial court required an offer of proof but indicated that the purported offer was not specific enough and consequently denied the motion. The following day, trial counsel again requested a continuance which was denied. Defendant asserts that the trial court failed to properly inquire into the need for a continuance that prevented counsel from being properly prepared and a new trial is warranted.

¶ 86 Whether to grant or deny a motion for continuance to secure the presence of a witness is within the sound discretion of the trial court, and its ruling will not be reversed on appeal in the absence of a clear abuse of discretion. *People v. James*, 348 Ill. App. 3d 498, 504 (2004). Upon the review of a denial of such motion, the factors to be considered are (1) whether the defendant was diligent in attempting to secure the witness for trial, (2) whether the defendant has shown the testimony was material and might have affected the jury's verdict, and (3) whether the defendant was prejudiced by the denial of the motion for continuance. *Id.* at 504-05. The right to a continuance is not absolute, and the circumstances regarding the continuance motion must be evaluated on a case-by-case basis, including the reasons presented to the trial court at the time the request is denied. *People v. Davenport*, 133 Ill. App. 3d 553, 556 (1985).

¶ 87 A motion for continuance is required to be written and supported by an affidavit. 725 ILCS 5/114-4(a) (West 2012). There is no evidence of a written motion for continuance or supporting affidavit contained in the record. This was reason enough to deny defense counsel's motion and was not an abuse of discretion.

¶ 88 Additionally, the record indicates that the trial court gave defense counsel several opportunities to provide a specific offer of proof to show that a continuance was needed. As noted by defendant, defense counsel informed the trial court on the day of *voir dire* that several witnesses that were subpoenaed by defendant failed to appear. The trial court asked defense counsel to provide a specific offer of proof for each of the witnesses. The court inquired why

defense counsel needed to call Sergeant William Bentancourt, and counsel responded that he was the sergeant who was on the scene and participated in the investigation. Defense counsel stated that the credibility of the investigation was critical to defendant's case, but the trial court found that defense counsel's response was not specific. Defense counsel also stated that information on the dispatch recording was necessary and that officers at the scene were subpoenaed relevant to the call. We find that such statements by defense counsel were general and nonspecific statements that did not establish that such witnesses' testimony was material nor has defendant established prejudice from the denial of the continuance motion. Accordingly, we conclude that the trial court did not abuse its discretion in denying the continuance motion.

¶ 89 D. Improper Closing Argument

¶ 90 Finally, defendant contends that the State made improper arguments during its closing argument that invited the jury to convict him based on his appearance and felony status and due to propensity. Specifically, defendant takes issue with the State's description of him as "a gun-toting, face-tattooed, multi-time convicted felon," and its statement to the jury that "[j]ustice in this case comes when you tell this multi-time convicted felon he is done shooting up our streets." He argues that the statements were improper because they were based on defendant's character, and an improper appeal to the jury's potential biases and passions. Defendant contends that the closing argument was substantially prejudicial because the evidence was so closely balanced. He acknowledges that this issue was not properly preserved for review but argues that the plain error doctrine applies here because the evidence was closely balanced and because his right to a fair trial was impacted.

¶ 91 In general, a defendant preserves an issue for review by timely objecting to it and including it in a written posttrial motion. *People v. Colyar*, 2013 IL 111835, ¶ 27; *People v. Marzonie*, 2018 IL App (4th) 160107, ¶ 51. Because defendant failed to include these matters in his motion for new trial or to even object to the now complained-of statements during trial, they are forfeited. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). We note that waiver is the intentional relinquishment of a known right, whereas forfeiture is the failure to make a timely assertion of a known right. *People v. Dunlap*, 2013 IL App (4th) 110892, ¶ 9; *People v. Hibbler*, 2019 IL App (4th) 160897, ¶ 51.

¶ 92 The plain error doctrine allows a reviewing court to address defects affecting substantial rights (a) if the evidence is closely balanced or (b) if fundamental fairness so requires it rather than finding the claims forfeited. *People v. Woods*, 214 Ill. 2d 455, 471 (2005). A defendant raising a plain error argument bears the burden of persuasion. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). The first step in a plain error review generally is to determine whether any error occurred, which is defendant's burden to establish. *Id.* Accordingly, to establish plain error, a defendant must first show that a clear or obvious error occurred. *Id.* Next, he must show that the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error (*People v. Naylor*, 229 Ill. 2d 584, 593 (2008)), or that the error was sufficiently grave that it deprived defendant of a fair trial (*People v. Herron*, 215 Ill. 2d 167, 187 (2005)).

¶ 93 In determining if the evidence was close, a reviewing court must evaluate the totality of the evidence and conduct a qualitative, commonsense assessment of the evidence within the context of the case. *Marzonie*, 2018 IL App (4th) 160107, ¶ 53 (citing *People v. Sebby*, 2017

IL 119445, ¶ 53). If the defendant meets his burden, he has demonstrated actual prejudice and his conviction should be reversed. *Id.* (citing *Sebby*, 2017 IL 119445, ¶ 51).

¶ 94 When a defendant claims second-prong error under fundamental fairness, he must prove that a structural error occurred. *Id.* ¶ 54 (citing *Thompson*, 238 Ill. 2d at 613). A structural error is one that renders a criminal trial fundamentally unfair or unreliable in determining a defendant's guilt or innocence. *People v. Bowens*, 407 Ill. App. 3d 1094, 1101 (2011). Structural errors occur in very limited circumstances, such as the complete denial of counsel, denial of self-representation at trial, trial before a biased judge, denial of a public trial, racial discrimination in the selection of a grand jury, or a defective reasonable doubt instruction. *Marzonie*, 2018 IL App (4th) 160107, ¶ 54. If the defendant fails to meet his burden of persuasion, the issue is forfeited, and the reviewing court will honor the procedural default. *Id.* ¶ 55.

¶ 95 We must first determine if any error occurred during the State's closing argument when the prosecutor referred to defendant as "a gun-toting, face-tattooed, multi-time convicted felon." The State has wide latitude in both its opening statements and closing arguments and may comment on the evidence and any fair, reasonable inferences it yields. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). Prosecutors may not argue assumptions or facts not contained in the record. *Id.* However, the State is entitled to comment on the evidence and any reasonable inferences drawn therefrom (*People v. Cruz*, 2019 IL App (1st) 170886, ¶ 41), even if the inference is unfavorable to the defendant (*People v. Tolliver*, 347 Ill. App. 3d 203, 224-25 (2004), and it may assume the truth of the State's evidence (*People v. Green*, 2017 IL App (1st) 152513, ¶ 77). A closing argument must be viewed in its entirety, and the challenged remarks must be viewed in their context. *Glasper*, 234 Ill. 2d at 204. Statements will not be held improper if they were provoked or invited by the defense counsel's argument. *Id.* It is also improper for the State to make comments that have no other purpose but to arouse the prejudices and passions of the jury. *People v. Guerrero*, 2020 IL App (1st) 172156, ¶ 10. A prosecutor may not misstate the law or attempt to shift the burden of proof to defendant. *People v. Carbajal*, 2013 IL App (2d) 111018, ¶¶ 29, 31. Even if remarks were inappropriate, reversal is only required if they engendered substantial prejudice against the defendant such that it is impossible to tell whether the verdict of guilt resulted from them. *Guerrero*, 2020 IL App (1st) 172156, ¶ 10.

¶ 96 The record reveals that the parties stipulated that defendant had two prior qualifying felony convictions for purposes of the AHC charge. Additionally, there was testimony presented about defendant's tattoos, including his face tattoos, that the jury observed in court. The gist of defendant's multiple statements to police admitted that he had a gun on the date in question. We find that the State's comments were proper comments on the evidence presented at trial and were not error. Our finding that the State's comments during closing argument were not error ends our inquiry for purposes of plain error review, and we therefore honor the procedural default of defendant's claim. See *Marzonie*, 2018 IL App (4th) 160107, ¶ 54.

¶ 97 In the alternative, defendant argues that trial counsel's failure to include this issue in the posttrial motions was ineffective assistance of counsel. We disagree.

¶ 98 The standard for reviewing an ineffective assistance of counsel claim is whether the attorney's conduct fell below an objective standard of reasonableness and whether defendant was prejudiced by counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). To demonstrate prejudice, defendant must show that there is a reasonable probability that, but

for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 694. If either prong of the *Strickland* test cannot be shown, then the defendant has not established ineffective assistance of counsel. *Id.* at 697.

¶ 99 We find that defendant's claim of ineffective assistance of counsel fails because counsel was not deficient where any objection to the challenged remarks would have been unsuccessful because, as discussed above, those remarks were based on the prosecutor's reasonable inferences and assumptions from the State's evidence. Accordingly, defendant cannot meet his burden of establishing prejudice as there is no reasonable probability that the outcome of the trial would have been different if counsel had made futile objections to the prosecutor's challenged closing argument remarks.

¶ 100 E. Vacatur of One Aggravated Discharge of a Firearm

¶ 101 We *sua sponte* raise the issue of whether defendant's two convictions for aggravated discharge of a firearm toward a police officer violates the one-act, one-crime doctrine because there was only a single shot fired. Defendant was convicted of two counts of aggravated discharge of a firearm toward a police officer under section 24-1.2(a)(3) of the Code (720 ILCS 5/24-1.2(a)(3) (West 2012)), as well as being an AHC, and accordingly was sentenced to concurrent 30-year prison terms for each count.

¶ 102 Multiple convictions are improper if they are based on precisely the same physical act. *People v. Rodriguez*, 169 Ill. 2d 183, 186 (1996). The issue of whether one gunshot fired in the direction of multiple police officers was recently addressed by our supreme court in its April 21, 2022, decision in *Hartfield*, 2022 IL 126729. In that case, the court reviewed a single shot fired toward four police officers and found that a single discharge in the direction of multiple peace officers constitutes a single offense. *Id.* ¶ 94. In cases where we find a one-act, one-crime violation, multiple convictions constitute plain error, and the proper remedy is to vacate the less serious conviction. *People v. Harvey*, 211 Ill. 2d 368, 391 (2004). However, when there are multiple convictions for aggravated discharge of a firearm toward a police officer based on the same act of firing one shot, none of the offenses are more serious than the other. See *People v. Artis*, 232 Ill. 2d 156, 172 (2009). Accordingly, we vacate one of defendant's convictions for aggravated discharge of a firearm toward a police officer and the corresponding sentence. We direct the clerk of the circuit court to correct defendant's mittimus by vacating one of the aggravated discharge of a firearm convictions. *People v. West*, 2017 IL App (1st) 143632, ¶ 25.

¶ 103 Additionally, although not raised on appeal, defendant's conviction and sentence for AHC stands based on his background as stipulated by the parties at trial.

¶ 104 III. CONCLUSION

¶ 105 Based on the foregoing, we vacate one of defendant's convictions and the corresponding sentence for aggravated discharge of a firearm toward a police officer and order the mittimus corrected accordingly. We affirm defendant's convictions and sentences in all other respects.

¶ 106 Affirmed in part and vacated in part; mittimus corrected.