

NOTICE
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2026 IL App (5th) 250537-U
NO. 5-25-0537
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Champaign County.
	)	
v.	)	No. 21-CF-1184
	)	
KIN CONERLY,	)	Honorable
	)	Randall B. Rosenbaum,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE SHOLAR delivered the judgment of the court.
Justices McHaney and Clarke concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant’s reckless discharge of a firearm conviction is affirmed where defendant failed to demonstrate that he was prejudiced by any alleged ineffective assistance of counsel.
- ¶ 2 Following a jury trial, defendant, Kin Conerly, was convicted of two counts of armed habitual criminal and one count of reckless discharge of a firearm in Champaign County circuit court case No. 21-CF-1184. On direct appeal, this court reversed the armed habitual criminal convictions, finding defense counsel was ineffective for stipulating to defendant’s previous aggravated battery conviction as a qualifying predicate offense. *People v. Conerly*, 2024 IL App (5th) 220779-U, ¶¶ 42-43. Regarding the other ineffective assistance of counsel claims raised on direct appeal, this court remanded the matter for the appointment of new counsel and full hearing

on defendant's claims pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984). *Conerly*, 2024 IL App (5th) 220779-U, ¶ 51.

¶ 3 On remand, the trial court appointed counsel who filed a motion for a new trial based upon several claims that trial counsel provided ineffective assistance. On July 1, 2025, the trial court held an evidentiary *Krankel* hearing. After hearing testimony from trial counsel and arguments from the State and *Krankel* counsel, the court found that defendant's ineffective assistance of counsel claims did not satisfy the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and found that there was no reasonable probability that the outcome would have been different based upon defendant's claims. Therefore, the trial court denied defendant's ineffective assistance claims.

¶ 4 Back before us on appeal, defendant argues that the trial court erred by denying his claim of ineffective assistance of counsel. Specifically, defendant argues that (1) the court erred by finding trial counsel was not ineffective for failing to object to the substantive admission of the compilation video; (2) he was prejudiced by trial counsel's failure to object to a police officer's identification of defendant in the compilation video; (3) he was prejudiced by trial counsel's failure to object to the State's improper closing argument; and (4) he was prejudiced by trial counsel eliciting testimony that damaged the defense case. Finally, defendant argues he was prejudiced by the cumulative effect of these errors. For the following reasons, we affirm.

¶ 5 I. BACKGROUND

¶ 6 The details of the defendant's conviction were set forth in *Conerly*, 2024 IL App (5th) 220779-U. For context, we repeat and summarize the facts and procedural history that are relevant to this appeal.

¶ 7

A. Pretrial

¶ 8 On October 4, 2021, the State charged defendant by information with several offenses related to an incident that occurred on September 30, 2021. Counts I, II, and IV alleged that defendant committed the offenses of armed habitual criminal, Class X felonies in violation of section 24-1.7(a) of the Criminal Code of 2012 (Code) (720 ILCS 5/24-1.7(a) (West 2020)); count III alleged the offense of reckless discharge of a firearm, a Class 4 felony, in violation of section 24-1.5(a) of the Code¹ (*id.* § 24-1.5(a)).

¶ 9 On January 21, 2022, appointed counsel filed a motion for forensic testing. According to the motion, because the Champaign Police Department informed the crime lab that defendant was seen discharging the weapon, the Illinois State Police Crime Lab declined to analyze gunshot residue (GSR) swabs taken from the defendant. On February 23, 2022, the public defender withdrew as counsel, and James Dedman entered his appearance as defense counsel. Because the motion for forensic testing filed by the public defender had yet to be heard, on April 27, 2022, the State filed a motion *in limine* regarding the GSR kit. The State argued that Dedman informed the State that he did not want the previously filed motion for forensic testing heard or withdrawn, because part of his trial strategy was to argue that the State's failure to test the GSR kit "is a pillar of reasonable doubt." As relief, the State asked that, should the defense mention the lack of GSR testing during the trial, (1) it be permitted to tell the jury that defendant sought the GSR testing and abandoned that request, and (2) the jury be instructed that defendant had the right to have the testing completed and that the testing would have been completed if the defendant so requested. The State relied on *People v. Mudd*, 2022 IL 126830, for this request.

¹The State dismissed count IV prior to the start of the trial.

¶ 10 Following a hearing on the motion, the trial court offered to have an order entered directing the ISP Crime Lab to conduct the testing. After consultation with defendant, the defense declined to have the court enter an order for the testing. The court noted that it believed *Mudd* to be applicable, and that should this become an issue at trial, the State could mention that defendant had the ability to have the testing completed.

¶ 11 Prior to the start of the trial, the parties stipulated that defendant had previously been convicted of forcible felonies that served as predicate offenses for defendant's armed habitual criminal charges.

¶ 12 B. Jury Trial

¶ 13 This matter proceeded to a jury trial on May 24, 2022. The State's first witness was Gabriel Lafountain. Lafountain testified that on September 30, 2021, he parked outside his apartment at Gramercy Park and sat in his car with a friend. A man walked up and looked in the car. A woman walked up, and as they walked past, the man fired a gun into the air. Lafountain identified a video of the shooting and testified that the video "truly and fairly and accurately depict[ed] the events as [he] remember[ed] them on that evening."

¶ 14 The video was admitted without objection from trial counsel and was published to the jury.² During playback, the State paused the video at various points and Lafountain described what was happening in the video.

¶ 15 Our review of the video reveals that a white Jeep pulled into the parking lot and parked five spaces away from Lafountain's car. A man in a white shirt, later identified as defendant, exited

²The video, which is part of the record on appeal, is a compilation video that appears to have been created using eight film clips captured by three different cameras at the apartment complex. Certain parts of the video are slowed down or sped up, depending upon what is occurring in the video. The time stamps from one segment to the next appear seamless, running from 22:48:38 to 22:59:10. The entire video played for the jury is 5:07 long (excluding the introduction and the conclusion), meaning that 10:22 of real time video was condensed into 5:07 for the jury. The video does not have audio.

the Jeep and walked behind the other parked cars until he stopped behind the car next to Lafountain's car. He appeared to be carrying a drink. After pausing for a moment, the man in the white shirt walked alongside the driver's side of Lafountain's car and looked in the passenger compartment. Once he was toward the front of Lafountain's car, the man in the white shirt set what appeared to be the drink on the hood of the car next to Lafountain's car. The female passenger from the Jeep joined the man in the white shirt at the front of Lafountain's car.³ The man in the white shirt picked up the item that he had set on the hood of the other car, and both he and the woman walked in front of Lafountain's car. As he walked in front of Lafountain's car, the man in the white shirt appeared to look in Lafountain's direction before he pointed his right arm into the sky. Two flashes of light appeared at the end of the right hand of the man in the white shirt, followed by a third flash of light a moment later. The man in the white shirt and the woman walked away from Lafountain's car and entered an apartment building. Through a lit window, the pair appeared to enter an apartment. A short time later, the man in the white shirt and the woman exited the apartment and returned to the parking lot. The man in the white shirt briefly engaged in conversation with Lafountain. The police arrived shortly thereafter, and the man in the white shirt and the woman again walked toward the apartment building. Lafountain approached the police and pointed them to the man in the white shirt. The video ended with the police approaching the man in the white shirt outside his apartment building.

¶ 16 On cross-examination, Lafountain admitted that he could not identify defendant as the shooter. Lafountain explained that he was not paying attention to defendant until after the shots fired, and at that point the shooter walked away from him. He also explained that the person who fired the gun and the person that he pointed out to the police was wearing the same clothes and

³This woman was later identified as Skylar and was referred to as defendant's girlfriend. Her last name does not appear in the record.

was with the same woman. Lafountain also explained that, when asked to identify the defendant, he “didn’t want to get close.” Regarding the fact that the video he just watched appeared to speed up in portions, Lafountain said, “This is exactly what happened that night.”

¶ 17 Timothy Atteberry testified that he was a patrol officer for the City of Champaign, and that he responded to the call that night. After he arrived, he met with Lafountain. Lafountain pointed to the person who discharged the firearm. Atteberry testified that the person Lafountain pointed out was the defendant, who Atteberry identified in court.

¶ 18 Benjamin Newell testified that he was a patrol sergeant with the Champaign Police Department. After he arrived, Newell spoke with defendant. They spoke outside defendant’s apartment building, later identified as being in building 301 of the apartment complex. They also spoke in Newell’s squad car. Defendant initially stated that he heard gunshots, but that he had nothing to do with the shooting. Defendant later told Newell that it was Skylar who fired the gun. Back at the station, they spoke some more. On cross-examination, Newell testified that when the police told defendant that they were going to complete a gunshot residue test (GSR test), defendant did not want to comply. Once Newell explained that he had to complete the GSR test, defendant did not resist the efforts. Newell admitted that Skylar was not subjected to GSR testing. On redirect, Newell explained that they did not ask Skylar to take a GSR test because there was no evidence to corroborate defendant’s claim that Skylar was the person who fired the gun.

¶ 19 Blake Wheling testified that he was a patrol officer for the Champaign Police Department, and that he responded to the scene of the investigation. One of Wheling’s roles was to collect evidence. Wheling found three 9-millimeter shell casings on the ground near Lafountain’s car. Wheling also participated in the search of defendant’s apartment. During the search, he found a Smith & Wesson revolver in a laundry basket in a child’s room. He photographed the revolver and

waited for Sergeant Warren to swab the pistol for deoxyribonucleic acid (DNA) evidence before removing the firearm from the basket. Wheling also recovered mail addressed to defendant at that address.

¶ 20 James Warren testified that he was a patrol sergeant for the Champaign Police Department. He was on scene the night of the incident and reviewed the video of the incident. Warren explained that the video security system at the apartment complex was provided by Watchtower Security (Watchtower). Using a computer in his squad car, he accessed a live feed from the cameras. He further explained that every 30 minutes, the videos are placed on a server, and that “historical data” can be accessed from his squad car computer for a period of four days. For any video more than four days old, the police have to request the footage from the company. Warren testified that the footage fairly and accurately depicted what the cameras were able to capture. Warren identified the video compilation previously played for the jury. Warren explained that by using software, he was able to create an “event” that is reviewed by Watchtower personnel. Warren provided Watchtower with a description of what he wanted, *e.g.*, the cameras and the time frames, and Watchtower subsequently provided Warren with a link to download the requested footage. On cross-examination, Warren admitted that he did not know who at Watchtower was responsible for putting the video compilation together.

¶ 21 The video footage was again published to the jury, and this time Sergeant Warren narrated the video for the jury. Trial counsel did not object to Warren’s narration of the events that occurred on the video, and no limiting instruction was requested or given. Warren described the location of the cameras within the apartment complex and the direction in which they pointed. Warren explained that the video may speed up when nothing of significance occurs, and it may slow down at critical moments. Warren testified that when a firearm is discharged, there is generally a muzzle

flash. After a portion of the video played, Warren testified that he saw “two very distinct muzzle flashes, and a third that [was] mostly viewable, but not as clear as the first two.” The prosecutor asked Warren, “there were two individuals you could see [on the video], one wearing a white shirt and one wearing dark clothes. Who did you observe discharging the firearm?” Warren answered, “Mr. Conerly.” Warren also testified that part of the video showed shadows of two people who he believed to be defendant and Skylar walking toward building 301. Warren believed that one of the shadows appeared to be holding a handgun in the right hand, and that he believed this was defendant’s shadow. A screenshot of this shadow was introduced into evidence. Warren also participated in the search of defendant’s residence in building 301. During the search, he found a Beretta pistol hidden underneath the drawer of the stove. An aftermarket laser was attached to the pistol. Warren personally collected DNA swabs from the weapons before they were packaged as evidence.

¶ 22 Various police officers testified regarding chain of custody and the forensic testing of the evidence seized. Other testimony elicited at trial established: (1) that the GSR test was never analyzed by the crime lab, because the science does not allow the examiner to differentiate between someone who fired a gun and someone who was in close proximity to a firearm when it was discharged; (2) that the shell casings recovered from the ground near Lafountain’s car were fired from the Beretta pistol that was recovered from under the stove in defendant’s residence; (3) that the DNA swab taken from the grip of the Beretta revealed the presence of DNA from three individuals, and that the statistical support for this profile belonging to defendant and two unknown individuals as one in 23 quadrillion; (4) that the DNA swab taken from the grip of the Smith & Wesson likewise revealed the presence of DNA from three individuals and that the statistical support for this profile belonging to defendant and two unknown individuals as one in 73 septillion;

and (5) that no fingerprints suitable for comparison were found on either firearm, which is not unusual due to the curved, uneven, and textured surfaces of firearms.

¶ 23 Detective Lance Carpenter from the Champaign Police Department testified that he reviewed some of the phone calls that defendant made from the county jail shortly after his arrest. The State played for the jury two of the calls that defendant made the morning after his arrest. During one of the calls, defendant said, “How they going to try to accuse me of something that *** mother f*** told them. They didn’t even—they didn’t see me do nothing.”

¶ 24 The State rested. The trial court denied defendant’s motion for a directed verdict. Defendant rested without presenting any evidence.

¶ 25 During closing argument, the prosecutor argued that “[t]he defendant’s only contention when he talks to the police is that he wasn’t the one shooting. And that’s not supported by any other evidence.” The State also argued that consciousness of guilt could be inferred from both statements and omissions made by defendant during the calls he made from the jail the morning after his arrest, relying specifically on defendant’s statement that “[t]hey didn’t see me do it. They are relying on the word of a witness” and defendant’s failure to ask Skylar why she did not “tell the police what you did” and “[w]hy didn’t you own up to your guns?”

¶ 26 During his closing argument, Dedman argued that defendant’s DNA being part of the mixed DNA on the firearms could have been transferred to the firearms by another person who had contact with defendant, thus suggesting that this other person could have been responsible for defendant’s DNA appearing on the firearms.

¶ 27 On rebuttal, the prosecutor argued that defendant had not questioned the DNA experts on whether transfer DNA was possible in this case. The prosecutor also noted that the State had the burden of proof, but that the defense had “the same ability [as the State] to subpoena witnesses,

call witnesses, [and] have the evidence tested.” The State also argued, on rebuttal, that defendant initially refused to be swabbed for GSR testing, and that this refusal indicated defendant’s consciousness of guilt. Dedman did not object to any of these statements. The jury found defendant guilty of all three counts.

¶ 28

C. Posttrial

¶ 29 On the date of the sentencing hearing, Dedman filed a motion to withdraw as counsel. The motion noted that defendant expressed dissatisfaction with Dedman and believed that he was ineffective. The trial court noted that defendant expressed some dissatisfaction with Dedman in the presentence report and asked defendant about his complaints. Defendant echoed his complaints from the presentence report, telling the court that he had never seen the discovery in the case, including the video, that he had to have family members and friends tell Dedman to call him, and that they never sat down to “come up with a strategy for trial.” Defendant also told the court that he preferred to proceed with the sentencing and to put this behind him. The court did not make any further inquiries of defendant, and asked Dedman whether he believed that he could effectively represent defendant at sentencing. The court did not ask Dedman about defendant’s accusations. Dedman expressed concern about representing defendant at the sentencing. Characterizing the problems as a breakdown in the attorney-client relationship, the court granted the motion to withdraw as counsel. The public defender was reappointed to represent defendant.

¶ 30 It does not appear that defendant filed any *pro se* motions prior to the sentencing hearing. However, at the sentencing hearing, the public defender provided the court with letters written on defendant’s behalf, and noted that one of the letters, a letter from a Michael Woolf, contained a document entitled “Motion to Reconsider Sentence.” The letter stated that the document had not yet been filed, but that defendant wanted the court “to be apprised of this.” The unfiled motion

contained allegations of ineffective assistance of counsel. Defense counsel and the trial court considered the motion to be premature since defendant had not yet been sentenced. In his allocution, defendant noted that his prior aggravated battery conviction should not count as a predicate offense for the armed habitual criminal charges. The trial court sentenced defendant to 25 years in the Illinois Department of Corrections on the armed habitual criminal charges and 3 years in prison on the reckless discharge of a firearm offense.

¶ 31 After sentencing, defendant filed a motion to proceed *pro se* on his newly filed *pro se* motion to reconsider sentence. Although defendant's motion to reconsider sentence claimed that his sentence was excessive, the motion primarily focused on defendant's claim that Dedman was ineffective. Defendant again raised the use of defendant's prior convictions as predicate offenses for the armed habitual criminal charges. In addition to claims regarding the use of the predicate offenses and the use of the stipulation, defendant alleged Dedman was ineffective for failing to file a motion to "quash arrest and suppress evidence" and for "accusing defendant of shooting a gun" during closing argument. At a hearing on defendant's motion to proceed *pro se*, defendant told the court that he believed he was being forced to proceed *pro se*, because appointed counsel would not present his motion in its entirety. Appointed counsel explained that she told defendant that some of the issues he wanted to raise were not appropriate for a motion to reconsider the sentence. Since defendant told the trial court that he preferred representation on a motion to reconsider sentence, defendant's motion to proceed *pro se* was denied. Thereafter, the public defender filed a motion to reconsider sentence. It did not raise defendant's claims of ineffective assistance of trial counsel. The court denied the motion to reconsider sentence.

¶ 32

D. First Appeal

¶ 33 In his first appeal to this court, defendant argued that the State failed to prove him guilty, beyond a reasonable doubt, of the two counts of armed habitual criminal. *Conerly*, 2024 IL App (5th) 220779-U, ¶ 28. Defendant's argument centered on his contention that one of the two offenses used to prove armed habitual criminal did not qualify as a predicate offense for armed habitual criminal. *Id.* Because Dedman stipulated to the use of defendant's prior convictions, this court found that defendant could not challenge the sufficiency of the evidence. *Id.* ¶ 35. This court then considered defendant's alternative argument that Dedman was ineffective for stipulating to the predicate offenses where one of the offenses could not, by law, function as a predicate offense for armed habitual criminal. *Id.* ¶ 36. We found that Dedman was ineffective for making the stipulation, and that defendant was prejudiced as a result. *Id.* ¶ 53. Accordingly, defendant's armed habitual criminal convictions were reversed. *Id.*

¶ 34 Defendant also made several other allegations of ineffective assistance of counsel. This court found that the trial court's failure to address these issues left an insufficient record precluding appellate review. For this reason, the matter was remanded for the appointment of new counsel and an evidentiary hearing pursuant to *Krankel*.

¶ 35

E. Evidentiary *Krankel* Hearing on Remand

¶ 36 On remand, new counsel was appointed for defendant. She filed a motion for a new trial. Relevant to this appeal, she alleged that Dedman was ineffective for (1) failing to object to the admission of a compilation video, on foundational grounds, that showed defendant discharging a firearm; (2) failing to object to a police officer's narration of the compilation video; (3) failing to investigate or call defendant's then girlfriend, Skylar, as a witness at trial; (4) failing to object to improper closing argument by the State; (5) asking the State's DNA expert about a defendant's

costs to have DNA testing completed; and, (6) withdrawing a written motion for testing of gunshot residue (GSR) swabs taken at the time of defendant's arrest.

¶ 37 On July 1, 2025, the trial court held an evidentiary hearing. Defendant presented no evidence. The State called Dedman as its only witness. Regarding the foundation for the compilation video, Dedman testified that he believed Lafountain's testimony that he watched the video and that it was an accurate representation of what occurred that night was a sufficient foundation. Dedman drew a distinction between a surveillance video made in the absence of a witness (silent witness video) and a surveillance video where a witness could testify that the video was an accurate description of what occurred.

¶ 38 Dedman testified that he did not object to Sergeant Warren's narration regarding the existence of the muzzle flashes. He explained that he feared that the objection would be overruled and that would serve to "imprint on the jury that maybe" the difficult-to-see flashes of light were indeed muzzle flashes. Dedman hoped that he could get the jury to focus on the video and conclude that the flashes were not gunshots. Dedman noted that muzzle flashes on television tend to be dramatic and that the flashes seen on the video were "not in any way dramatic." Although Dedman was not asked any questions about Warren's identification of the shooter as the defendant, he was asked about it on cross-examination. Dedman admitted that he had not requested a pretrial hearing to determine whether Warren's identification of defendant on the video was admissible and further acknowledged that a police officer's identification of a defendant on a video is "powerful evidence that a jury considers."

¶ 39 Regarding defendant's claim that he was ineffective for failing to interview and call Skylar as a witness, Dedman testified that defendant made it clear that he did not want Dedman to call or contact her. Dedman further testified that he did not think calling Skylar as a witness would have

been a good idea, explaining that defendant told the police that Skylar had fired the gun, but that “[t]he video didn’t give much wiggle room for that interpretation of events.”

¶ 40 The next claim addressed was defendant’s claim that Dedman was ineffective for failing to object to portions of the State’s closing argument wherein “the State argued that it was [defendant’s] responsibility to present forensic evidence disproving the State’s theory of the case, and that [defendant’s] failure to present exculpatory evidence should be held against him.” Dedman explained that the trial court had already ruled, with regard to the failure of the State to test the GSR swabs and pursuant to *People v. Mudd*, 2022 IL 126830, that the jury be instructed that defendant had the right to have the testing completed and that the testing would have been completed if the defendant so requested. Dedman noted that he objected to that instruction and further noted that the State repeatedly acknowledged that it had the burden of proof.

¶ 41 Dedman testified regarding defendant’s argument that he was ineffective for asking the State’s DNA analyst what it would cost him to have DNA testing done, and her answer that it would be “free.” Dedman stated that he knew it would not have cost him anything if he requested further analysis, and that he considered the question to be “theater.” Dedman explained, “[M]y comments were *** ironical, and intended to—like, oh, yeah, the government always takes care of you, you know? I want them to—I wanted to nurture any feelings they had about the government helping people, and knowing that they don’t.” On cross-examination, Dedman further explained that during closing argument, he “was talking about, yes, we could do that, but I didn’t have people to go out there and collect any DNA. It’s a—an exercise in nothing. It’s a right you don’t have because you don’t have the means to it—exercise it.”

¶ 42 With regard to the claim that he was ineffective for withdrawing the request for GSR testing, Dedman stated that he explained the limitations of GSR evidence to defendant and that it

would take about a year to get the testing done. Defendant did not want to wait a year but instead wanted to have his trial “right now.” For these reasons, “we decided to withdraw the motion.”

¶ 43 After hearing argument from counsel, the trial court took a recess before ruling from the bench. The court first noted that it found Dedman’s testimony credible, and that he was the only witness that testified.

¶ 44 The court first addressed Dedman’s failure to object to the admission of the compilation video. The court found that it was a “close call” and that not every foundational requirement was met, but that Dedman’s failure to object was not objectively unreasonable. With regard to Dedman’s failure to object to the narration of the video, the court also found that Dedman’s performance was not objectively unreasonable with regard to what he observed on the video with one exception: Warren’s identification of defendant as the shooter. The court found that an objectively reasonable attorney would have requested a pretrial hearing on this specific issue pursuant to *People v. Thompson*, 2016 IL 118667, or at least would have objected to the testimony.

¶ 45 The trial court next discussed the allegation that Dedman was ineffective for failing to investigate Skylar. The court noted that defendant had not testified, and that neither he nor Skylar provided an affidavit, and that it was speculative as to what she would have said had she spoken to Dedman or testified. The court further noted that Dedman credibly testified that defendant told him that he did not want Skylar involved. Accordingly, Dedman was not ineffective for this reason.

¶ 46 With regard to defendant’s allegation that Dedman was ineffective for failing to object to the State’s closing argument, the trial court characterized some of the State’s comments during closing argument as “improper” before noting that “they are somewhat taken out of context” and were made on rebuttal. The court noted that “probably at least half [of most defense attorneys], if not more, probably would have objected” and characterized this issue as “a very, very close call.”

¶ 47 Turning to Dedman’s cross-examination of the State’s DNA analyst, while noting that attorneys often engage in theatrics, the trial court stated that it was concerned that the question “could potentially harm the Defendant” and “would be something that would not normally be done by counsel.” The court considered defendant’s argument that Dedman was ineffective for withdrawing the request to have the GSR swabs tested. The court noted Dedman’s testimony about the limited relevance of GSR test in determining who fired a gun, and also found, “more importantly,” that defendant indicated a desire to have his trial before the GSR test results would be available.

¶ 48 The trial court ultimately concluded that Dedman’s performance fell below an objective standard of reasonableness with regard to three issues: (1) for not requesting a *Thompson* hearing before Sergeant Warren testified and for not objecting to Warren’s testimony identifying defendant from the video, (2) “arguably” for “not objecting to the State’s arguments in rebuttal about the defense having the same ability to call witnesses,” and (3) for “asking the question about the fee for the DNA results.”

¶ 49 The trial court then noted that “[e]ven if all three of those performances fell below the level of a reasonable attorney, I have to find prejudice. That there’s a likely outcome different [*sic*]. That there would have been some change in the verdicts by the jury.” After summarizing the evidence presented at trial, the court failed to find that “there was any reasonable likelihood that it would have changed the outcome.” Accordingly, the court ruled that Dedman had not committed ineffective assistance of counsel and denied defendant’s motion for a new trial.

¶ 50 A timely notice of appeal followed.

¶ 51

II. ANALYSIS

¶ 52 On appeal, defendant argues that the trial court erred by denying *Krankel* counsel's motion for a new trial. Specifically, defendant argues that the court erred by finding that Dedman's failure to object to the admissibility of the compilation video did not constitute ineffective assistance of counsel. Defendant also argues the court erred by finding that defendant was not prejudiced by Dedman's (1) failure to object to Sergeant Warren's improper identification testimony, (2) failure to object to the State's improper closing argument, and (3) eliciting testimony damaging to defendant's case. Finally, defendant contends that the cumulative effect of these errors warrants reversal of defendant's conviction. For the reasons that follow, we affirm and address each argument in turn.

¶ 53

A. *Strickland*

¶ 54 Initially, we note that our review of ineffective assistance of counsel claims is guided by the standards set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504, 526 (1984). To succeed on a claim of ineffective assistance of counsel under the *Strickland* standard, one must show both that (1) counsel's representation fell below an objective standard of reasonableness (deficient performance prong) and (2) a reasonable probability exists that, but for the error, the result would have been different (prejudice prong). *People v. Manning*, 241 Ill. 2d 319, 326-27 (2011). A defendant must satisfy both prongs of the *Strickland* test to succeed on a claim of ineffective assistance of counsel. *People v. Evans*, 209 Ill. 2d 194, 220 (2004). Thus, defendant's failure to establish either deficient performance or prejudice will be fatal to the claim. *People v. Richardson*, 189 Ill. 2d 401, 411 (2000). "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result

of the alleged deficiencies. *** If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.’ ” *Albanese*, 104 Ill. 2d at 527 (quoting *Strickland*, 466 U.S. at 697).

¶ 55 To establish deficiency under the first prong of the *Strickland* test, defendant must overcome the strong presumption that the complained-of action or inaction might have been the product of counsel’s sound trial strategy. *Manning*, 241 Ill. 2d at 327. The reviewing court must evaluate counsel’s performance from his perspective at the time rather than “through the lens of hindsight.” *People v. Perry*, 224 Ill. 2d 312, 344 (2007). An evaluation of counsel’s actions cannot extend into matters involving the exercise of judgment, strategy, or trial tactics. *People v. Penrod*, 316 Ill. App. 3d 713, 722 (2000). “Reviewing courts should hesitate to second-guess counsel’s strategic decisions, even where those decisions seem questionable.” *Manning*, 241 Ill. 2d at 335.

¶ 56 To establish prejudice, “defendant must show that counsel’s deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair.” *Richardson*, 189 Ill. 2d at 411. If defendant’s claim can be disposed of on the basis that he suffered no prejudice, then a court should not decide whether counsel’s performance was deficient. *People v. Villanueva*, 382 Ill. App. 3d 301, 308 (2008).

¶ 57 B. Admissibility of the Compilation Video

¶ 58 Turning to the merits of defendant’s claims, we first consider the admissibility of the compilation video. Defendant argues that the video “did not accurately depict what Gabriel LaFountain saw, Sergeant Warren had no firsthand knowledge of what was depicted in the video, and neither witness could testify about what changes were made to the original recordings in producing the compilation video played in court, or the video’s chain of custody.” In support of his argument that trial counsel was ineffective for failing to object to the admission of the

compilation video, defendant invokes the “silent witness” rule. The State contends that a sufficient foundation was laid for the admission of the video.

¶ 59 A foundation for the admission of a video as demonstrative evidence is sufficient when “a witness with personal knowledge of the filmed object testifies that the film is an accurate portrayal of what it purports to show.” *People v. Smith*, 321 Ill. App. 3d 669, 675 (2001). A proper foundation requires that the testifying witness was present when the recording was made. *Id.* “ ‘Demonstrative evidence has no probative value in itself. It serves, rather, as a visual aid to the jury in comprehending the verbal testimony of a witness.’ ” *People v. Flores*, 406 Ill. App. 3d 566, 573 (2010) (quoting *Cisarik v. Palos Community Hospital*, 144 Ill. 2d 339, 341 (1991)).

¶ 60 Photographs and video recordings may be admitted “as substantive evidence so long as a proper foundation is laid.” *People v. Taylor*, 2011 IL 110067, ¶ 32. Surveillance videos are “generally admitted under the ‘silent witness’ theory.” *Id.* “Under this theory, a witness need not testify to the accuracy of the image depicted in the photographic or videotape evidence if the accuracy of the process that produced the evidence is established with an adequate foundation.” *Id.* Such evidence “is received as a so-called silent witness or as a witness which speaks for itself.” (Internal quotation marks omitted.) *Id.*

¶ 61 The *Taylor* court discussed the foundational requirements for the admission of surveillance videos as substantive evidence under the silent witness rule. *Id.* The silent witness rule allows for admissibility of surveillance videos without the requirement that a witness testify to the accuracy of the video, so long as the accuracy of the process that produced the evidence is laid with an adequate foundation. *Id.* The party seeking to admit the video into evidence must establish the accuracy and the reliability of the recording process. *Id.* ¶ 35.

¶ 62 When determining whether a proper foundation has been laid for the admission of a surveillance video under the silent witness rule, there are several factors to be considered, including: “(1) the device’s capability for recording and general reliability; (2) competency of the operator; (3) proper operation of the device; (4) showing the manner in which the recording was preserved (chain of custody); (5) identification of the persons, locale, or objects depicted; and (6) explanation of any copying or duplication process.” *Id.* This list of factors is not exclusive. Rather, “[e]ach case must be evaluated on its own and depending on the facts of the case, some of the factors may not be relevant or additional factors may need to be considered. The dispositive issue in every case is the *accuracy and reliability of the process that produced the recording.*” (Emphasis added.) *Id.* Because the practice of selectively editing videos could lead to bad behavior by parties attempting to gain an advantage at trial, trial courts should consider gamesmanship by the offering party in analyzing whether an edited video should be admitted as evidence. *People v. Smith*, 2022 IL 127946, ¶ 50.

¶ 63 For the reasons that follow, we find that the State laid a sufficient foundation for the admission of the compilation video. It necessarily follows, therefore, that trial counsel was not ineffective for failing to object to the foundation of the video.

¶ 64 Defendant’s argument against the admissibility of the compilation video is based on his characterization of the video as a “silent witness” video. A review of the video demonstrates that the compilation video is not purely a “silent witness” video. Portions of the video show events that were *actually* witnessed by people on the scene. For example, Lafountain was present during the shooting and agreed, when shown the video, that “it truly and fairly and accurately” depicted the events as he remembered them. On cross-examination, Lafountain testified that the video “shows exactly what happened that night.”

¶ 65 Likewise, Sergeant Warren testified that he saw himself in the video, and that portion of the video truly and accurately depicted the scene as it existed at the time. Warren also testified that he was able to access a live feed from the cameras while on the scene and that he had viewed live and recorded footage on multiple occasions. Warren further stated that when he has viewed the footage, it truly and accurately depicted what the cameras were able to capture.

¶ 66 “Absent the ‘silent witness’ theory, sufficient foundation for the admission of a videotape is laid when a witness with personal knowledge of the filmed object testifies that the film is an accurate portrayal of what it purports to show.” *People v. Vaden*, 336 Ill. App. 3d 893, 899 (2003). That is precisely what happened here, at least regarding the portions of the video where Lafountain and Warren identified themselves on the video and testified as to the accuracy of the video. We note that this includes the portion of the video where defendant is seen discharging a firearm into the air three times as well as the portion of the video where defendant, after exiting his apartment, engages in a conversation with Lafountain. Those portions of the video where witnesses were able to identify themselves and able to testify as to the accuracy of the video were unquestionably admissible.

¶ 67 We also find that the compilation video as a whole was properly admitted as substantive evidence. Considering the factors enumerated in *Taylor*, the fact that the video exists at all is evidence that the recording equipment was functional, and that the operator knew how to operate the equipment. *Taylor*, 2011 IL 110067, ¶ 39. Moreover, the fact that Lafountain and others were able to identify themselves, their location, and the events that occurred also demonstrated that the camera was working. *Id.* Sergeant Warren testified that he was familiar with the Watchtower Security video surveillance system in use at the Gramercy Park apartment complex, and that he used it dozens of times. He explained that he could log into the software from his squad car and

watch the live feed from the cameras. Every 30 minutes, the footage was backed up to a server, and one could access that footage from the squad car for a period of four days; if the footage was more than four days old, he would have to request it from Watchtower. Warren testified that when he viewed the footage in the past, it has truly and accurately reflected what the cameras were able to capture.

¶ 68 Warren also explained how the compilation video was made. After reviewing footage from an incident, the person requesting the video would use the software to create an event. The requestor then contacts Watchtower and gives them a description of the footage to be reviewed, including which cameras and the time frame for the event. Watchtower then used this information to compile a video that is then delivered to the requesting party via a link, and the video can then be downloaded. Warren testified that the compilation video is the video that he downloaded to a DVD-R after receiving the link from Watchtower.

¶ 69 Defendant also argues that the State did not prove a chain of custody for the compilation video. Defendant argues that there are several gaps in the chain of custody in that the “State presented no evidence about who retrieved, preserved, and inventoried the original surveillance videos.” The State argues that a perfect chain of custody is unnecessary if other existing factors demonstrate the authenticity of the video. We agree with the State.

¶ 70 In *Taylor*, the court stated that “if there are other factors demonstrating the authenticity of the recording, a strict proof of chain of custody is not necessary.” *Taylor*, 2011 IL 110067, ¶ 41. The *Taylor* court further noted that “gaps in the chain of custody go to the weight of the evidence, not its admissibility.” *Id.* In the case before this court, there are other factors demonstrating the authenticity of the video. Specifically, and as noted above, Lafountain testified that “[t]his is exactly what happened the night” and Sergeant Warren testified that he saw himself on the video,

and agreed that the video “truly and fairly and accurately” depicted the events as he remembered them. Furthermore, Warren testified that he had viewed live footage multiple times and that the footage has, at all times, truly and accurately depicted what the cameras are able to capture. This is in addition to the fact that Warren testified regarding how the video was created and how he came to be in possession of the video. Accordingly, we find that any alleged gaps in the chain of custody only impact the weight the video evidence and not its admissibility.

¶ 71 Defendant’s next argues the compilation video was an inadmissible duplicate of the original video. Illinois Rule of Evidence 1003 provides: “A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.” Ill. R. Evid. 1003 (eff. Jan. 1, 2011). In *People v. Smith*, 2022 IL 127946, ¶ 50, the Illinois Supreme Court noted that, because the practice of selectively editing videos could lead to bad behavior by parties attempting to gain an advantage at trial, trial courts should consider gamesmanship by the offering party in analyzing whether an edited video should be admitted as evidence. Defendant notes that Sergeant Warren acknowledged that the video did speed up during the portions where “nothing appear[ed] to be going on.” According to defendant, the editing that occurred in the compilation video is “the precise type of harmful selective editing contemplated by the *Smith* Court.” See *id.* ¶ 50.

¶ 72 “In general, most editing will not render evidence inadmissible but rather will go to the weight of that evidence.” *Taylor*, 2011 IL 110067, ¶ 44. “The more important criteria is that the edits cannot affect the reliability or trustworthiness of the recording.” *Id.* Although the compilation video shown at trial sped up during portions where nothing appeared to be going on, defendant fails to explain *how* this editing affected the reliability or the trustworthiness of the recording.

Rather, this court's review of the compilation video shows that the most critical portion of the video, that portion where defendant appears to fire a gun into the air, was neither sped up nor slowed down, but rather played back in real time. We fail to see how the changes in the speed of the playback impacted the trustworthiness of the video.

¶ 73 Defendant's other argument regarding the allegedly improper editing of the compilation is that "the compilation video was produced to show Warren's version of events." We disagree with this characterization. It is apparent that several videos from different cameras were spliced together to show a continuous narrative of defendant's movement from the time that he drove into the parking lot until the police contacted him. We fail to see how this editing qualifies as gamesmanship or is the type of harm discussed in *Smith*. Under the circumstances presented here, we find that the editing done to the compilation video goes to its weight and not its admissibility.

¶ 74 Under these facts, we conclude that the State laid a sufficient foundation for the admission of the compilation video as substantive evidence. Accordingly, we conclude that trial counsel's failure to object to the admission of the compilation video neither fell below an objective standard of reasonableness nor prejudiced the defendant. "Counsel cannot be considered ineffective for failing to make or pursue what would have been a meritless objection." *People v. Edwards*, 195 Ill. 2d 142, 165 (2001).

¶ 75 C. Sergeant Warren's Narration of the Video

¶ 76 As noted above, on remand, defendant argued that Dedman was ineffective for failing to object to Sergeant Warren's narration of the video as it was played for the jury. Specifically, defendant argued that Dedman was ineffective for failing to object to Warren's "conclusions about *what* and *who* he saw in the video, *and* to conclude that he saw a firearm." (Emphases in original.) The trial court noted that lay witnesses are allowed to describe what they saw but also noted

Warren’s testimony about seeing what he believed to be a weapon and muzzle flashes “which is outside the scope of many people.” The trial court ultimately found, however, that Dedman’s performance fell below an objective standard of reasonableness for failing to request a *Thompson* hearing before Sergeant Warren testified and for failing to object to Warren’s identification testimony of defendant. The trial court also found, however, that defendant was not prejudiced by these failures. On appeal, defendant argues that the court erred in finding a lack of prejudice.

¶ 77 Defendant argues three contentions of error related to Sergeant Warren’s testimony: (1) Warren’s identification of defendant, (2) Warren’s testimony regarding the flashes of light that he characterized as muzzle flashes, and (3) Warren’s testimony that he believed that the portion of the video that appears to be defendant’s shadow showed a silhouette of a firearm in defendant’s right hand. Defendant’s argument is that Warren’s narration and the opinions he offered were lay opinions that invaded the province of the jury in that they went to the ultimate issues of the identification of the shooter and the possession of the Beretta handgun.

¶ 78 The admissibility of lay opinion identification testimony is governed by Illinois Rule of Evidence 701. Rule 701 provides:

“If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.” Ill. R. Evid. 701 (eff. Jan. 1, 2011).

¶ 79 First, we address defendant’s argument that it was error for Sergeant Warren to testify that the person discharging the firearm on the video was the defendant. Defendant contends that the only question for the jury regarding the reckless discharge of a firearm charge was whether the evidence was sufficient to prove defendant’s identity as the man who fired the gun. During Warren’s direct testimony, the State played the compilation video. While the video was paused,

the State asked Warren what comes out of a firearm when it is discharged. Warren explained that a projectile and a muzzle flash will come out of the barrel of the firearm and further testified the muzzle flash is a “bright burst of light.” Warren described the duration of a muzzle flash as “very quick,” and testified he had handled and fired many weapons as a police officer. The following exchange then occurred:

“Q. [ASSISTANT STATE’S ATTORNEY] And have you reviewed [the compilation video]?”

A. I have.

Q. And do you see what you have described as a muzzle flash in what’s going to be [in] the next ten to 15 seconds of the video?

A. Yes.

(Video played for the jury.)

Q. *** In the period of time that was just played in a slightly slower manner, what did you observe?

A. I observed two very distinct muzzle flashes, and the third that is mostly viewable, but not as clear as the first two.

Q. And which of the—there were two individuals you could see, one wearing a white shirt and one wearing dark clothes. Who did you observe discharging the firearm?

A. Mr. Conerly.

Q. And that light that you see, is that consistent with your experience of what comes out of the barrel of a handgun when it is discharged?

A. Yes.”

¶ 80 The admissibility of lay opinion identification testimony under Rule 701 was addressed by the Illinois Supreme Court in *People v. Thompson*, 2016 IL 118667. The *Thompson* court held “that opinion identification testimony is admissible under Rule of Evidence 701 if (a) the

testimony is rationally based on the perception of the witness and (b) the testimony is helpful to a clear understanding of the witness's testimony or a determination of a fact in issue.” *Id.* ¶ 50. The court noted that “[l]ay opinion identification is helpful where there is some basis for concluding the witness is more likely to correctly identify the defendant from the surveillance recording than the jury.” *Id.*

¶ 81 The *Thompson* court discussed a variety of factors that should be considered by the trial court in determining whether there is a basis for the concluding that the witness is more likely to correctly identify the defendant, and adopted a “totality of the circumstances approach” that included “the witnesses’ familiarity with the defendant at the time the recording was made or where the witness observed the defendant dressed in a manner similar to the individual depicted in the recording.” *Id.* ¶ 51. The *Thompson* court noted special concern, however, when the lay person identifying the defendant is a law enforcement officer. The court held that there “is no *per se* rule against admission of a law enforcement officer’s identification testimony” (*id.* ¶ 56) but determined that when “the State seeks to introduce lay opinion identification testimony from a law enforcement officer, the circuit court should afford the defendant an opportunity to examine the officer outside the presence of the jury.”⁴ *Id.* ¶ 59.

¶ 82 As noted above, the trial court found, on remand, that trial counsel’s representation fell below a reasonable standard of reasonableness as it related to the identification of defendant on the video. We agree with the trial court that, when a police officer is going to identify a defendant on a video recording, an objectively reasonable attorney would file a pretrial motion pursuant to *Thompson*. We also agree that defendant suffered no undue prejudice from trial counsel’s failure

⁴The rationale for offering defense counsel an opportunity to cross-examine a police officer is due to concerns that the defendant could be unfairly prejudiced by the testimony when the identification is based upon the officer’s prior contacts with the defendant. See *Thompson*, 2016 IL 118667, ¶¶ 58-59. That concern is not present here since Warren identified and interacted with defendant while on the scene.

to follow this procedure, as we find that Sergeant Warren's identification of defendant in the video was admissible under Illinois Rule of Evidence 701.

¶ 83 As both parties noted, the picture quality of the video is suboptimal. Our review of the video demonstrates that while the man in the video is wearing a white shirt, the video quality is not sufficient enough to allow for the identification of, for example, facial features. Defendant also noted that Lafountain testified that he could not identify the shooter, because he was not paying attention to the defendant until after the shots were fired. Moreover, the shooter walked away from him at that point in time. Lafountain's identification of defendant after the police arrived was from a distance, as he did not want to get close to the defendant. However, after the police arrived on the scene, Lafountain told police that the man who fired the shots was wearing a big white T-shirt and a cap and was able to point that man out to the police. Officer Atteberry testified that he arrived on the scene and spoke with Lafountain, and that Lafountain pointed to the person who had shot a firearm. Another officer, Tyler Darling, testified that when he arrived on the scene, a male and a female were walking past him, and Atteberry alerted him that the male had been identified as the shooter. Darling, along with Sergeant Warren, spoke with the man on the scene. Darling identified defendant in court as the man that he spoke with that night. Warren testified that he and Darling stopped the person identified as a suspect in the shooting, and that the person he stopped was defendant.

¶ 84 Warren's testimony regarding the identification of defendant in the video was based upon his personal perception of the events that occurred after he arrived on the scene, but while defendant was still present. It served the purpose of explaining how the suspect was identified at the scene and further served the purpose of explaining the in-court identification of defendant as that suspect. While Warren's testimony identifying defendant in the video went to an ultimate issue

that was to be determined by the jury, such testimony is not prohibited by the rules of evidence. Ill. R. Evid. 704 (eff. Jan. 1, 2011).

¶ 85 We further note that Warren’s identification of defendant in the video is not strictly an opinion. Warren’s testimony explained the factual events that led to the identification of a suspect and his arrest. Warren was the link between Lafountain’s on-scene identification of the man in the white shirt and the defendant sitting in the courtroom. We are not convinced this would be an issue on appeal had Sergeant Warren’s answer to the question of who, between the person wearing the dark clothes and the person wearing the white shirt, fired the gun had been, “The person in the white shirt.” This is especially true given that Warren testified that he spoke with the man in the white shirt while on the scene, and that the person in the white shirt was identified as defendant.

¶ 86 For these reasons, we do not find that trial counsel’s failure to seek a pretrial ruling or to object to the testimony identifying defendant prejudiced defendant, as the objection would have ultimately been futile. “ ‘Defense counsel is not required to make futile motions or objections in order to provide effective assistance.’ ” *People v. Mister*, 2016 IL App (4th) 130180-B, ¶ 95 (quoting *People v. Smith*, 2014 IL App (1st) 103436, ¶ 64).

¶ 87 Defendant also argues that Sergeant Warren’s narration testimony regarding muzzle flashes and the silhouette of defendant carrying a firearm was lay opinion testimony that invaded the province of the jury. In support of this position, defendant relies on *People v. Sykes*, 2012 IL App (4th) 111110. In *Sykes*, the defendant was an employee who was charged with the theft of money from a department store cash register. *Id.* ¶ 4. The entirety of the State’s case in *Sykes* was based on the testimony of the store’s loss prevention manager and a copy of a surveillance video that purported to show the defendant steal the money. *Id.* ¶¶ 6-10. The loss prevention manager had not personally witnessed the crime. *Id.* ¶ 10. The loss prevention manager testified that, in the original

video, the defendant removed what “looked like a bill” from the cash register. *Id.* ¶ 6. After a copy of the original video was published to the jury, the loss prevention manager testified that the quality of the original video was “much better” and that it had a “clear picture,” as opposed to the “grainy” copy that was admitted into evidence. *Id.* ¶ 9.

¶ 88 The *Sykes* court noted that it had reviewed the video and that it “was unable to ascertain whether defendant actually removed anything from the from the register, let alone” the \$100 that was missing. *Id.* ¶ 55. The *Sykes* court found that the loss prevention manager “was in no better position, *based on the video admitted into evidence and published to the jury*, to determine whether defendant removed money from the register.” (Emphasis added.) *Id.* ¶ 42. Accordingly, the *Sykes* court concluded that his opinion testimony invaded the province of the jury. During closing argument, the prosecutor admitted that the video quality “was not wonderful,” but argued that the loss prevention manager had “watched the clearer [original] on which ‘you can see the defendant take the money, put it in his hand, put in in his pocket and walked away.’ ” *Id.* ¶ 46. The prosecutor also improperly told the jury that it could rely on the loss prevention manager’s testimony “because he viewed the original, clearer VHS during which [he] clearly saw defendant take the money from the register.” *Id.* ¶ 53. The *Sykes* court reversed the defendant’s conviction, finding that “the improper lay opinion testimony coupled with the State’s improper closing arguments resulted in plain error under the closely balanced prong of the analysis.” *Id.* ¶ 56.

¶ 89 *Sykes* is distinguishable from the case before us. Although the *Sykes* court found the loss prevention manager’s lay opinion testimony was error because it invaded the province of the jury, its finding was based on its conclusion that the loss prevention manager “was in no better position, based on the video admitted into evidence and published to the jury, to determine whether defendant removed the money from the register.” *Id.* ¶ 42. The video admitted into evidence was

a poor copy of the better original, and the loss prevention manager had based his opinion on the clearer video that was not admitted into evidence. *Id.* ¶ 41. Additionally, the *Sykes* court found that the evidence was closely balanced. *Id.* ¶ 55.

¶ 90 Unlike the evidence in *Sykes*, here, the evidence is not closely balanced. Lafountain testified that a man in a white shirt discharged a gun outside of his car. Lafountain later directed the police to the man in the white shirt. The police confronted the man in the white shirt and identified him as the defendant. After defendant's arrest, the police searched his apartment and found a 9-millimeter Beretta that was later determined to have fired the shell casings found near Lafountain's car. The State presented strong statistical evidence that defendant's DNA was found on the Beretta recovered from his apartment. Although defendant denied involvement in the shooting when initially confronted by the police, he later told them that Skylar was the one who discharged the firearm, placing himself at the scene of the crime. In short, the evidence of guilt is overwhelming.

¶ 91 We find *People v. Gharrett*, 2016 IL App (4th) 140315, instructive. In *Gharrett*, the defendant was accused of stealing a bundle of money and checks from a desk drawer. *Id.* ¶ 27. The theft was caught on video, and the video showed the defendant exiting the office where the desk was located with an object in his hand. *Id.* ¶ 12. After playing the video for one of the State's witnesses, the witness testified that the object that appeared in the defendant's hand was " 'consistent with the pile or wad of cash and checks' that [the witness] had placed in the desk drawer." *Id.* ¶ 69. Applying the rationale in *Thompson* regarding the admissibility of lay opinion identification testimony, the *Gharrett* court determined that lay opinion testimony regarding the identity of an object in a video is permissible (*id.* ¶ 79), provided that the opinion is rationally

based on the witness's perception of the video (*id.* ¶ 72) and is also helpful to the clear understanding of a fact in issue. *Id.* ¶ 79.

¶ 92 Although the issue in *Thompson* was the identity of the defendant and the issue in *Gharrett* was the identity of an object, we see no reason to distinguish between the identity of a person, an object, or as the case may be, the identity of muzzle flashes or a shadow that may be a firearm. *Gharrett*, 2016 IL App (4th) 140315, ¶ 73 (“Whether [the witness’s] testimony was rationally based on her perception does not depend on whether [she] had personal knowledge of the actual objects *or actions* depicted by the video.” (Emphasis added.)). Rule 701 itself does not limit a lay witness’s opinion to the identity of people or objects. Ill. R. Evid. 701.

¶ 93 Applying the rationale from *Gharrett*, we find no unfair prejudice to defendant from the admission of Sergeant Warren’s testimony regarding the muzzle flashes or the silhouette. “An opinion is rationally based on a witness’s perception if the opinion is ‘one that a layperson could normally form from observed facts.’ ” *Gharrett*, 2016 IL App (4th) 140315, ¶ 72 (quoting Michael H. Graham, *Graham’s Handbook of Illinois Evidence* § 701.1, at 618 (10th ed. 2010)). Whether Warren’s testimony was rationally based on his perception does not depend on whether Warren had personal knowledge of the actual objects or actions depicted by the video. *Id.* ¶ 73. For this prong of the analysis, all that is relevant is whether Warren’s opinion—that the video depicted muzzle flashes and the silhouette of a firearm—was the kind of opinion that a layperson could draw. *Id.*

¶ 94 Having determined that Warren’s testimony was rationally based on his perception of the video, we must next consider whether his testimony was helpful to the jury’s determination of a fact at issue. In making this determination, we apply a totality of the circumstances approach. *Thompson*, 2016 IL 118667, ¶ 51; *Gharrett*, 2016 IL App (4th) 140315, ¶ 77. The *Thompson* court

identified several factors that are relevant to a determination of whether a lay witness is more likely than the jury to identify the defendant correctly. *Thompson*, 2016 IL 118667, ¶¶ 43-48. “[T]he absence of any particular factor does not render the testimony inadmissible.” *Id.* ¶ 51. The following *Thompson* factors are relevant to this case: (1) the witness’s general familiarity with firearms; and (2) the clarity of the recording and the extent to which the objects or actions are depicted. See *id.*

¶ 95 In this case, Sergeant Warren’s testimony was helpful to the jury because: (1) Warren was familiar with firearms and their operation, and (2) the quality of the video was relatively poor. Warren was familiar with muzzle flashes and firearms due to his life experiences in the military and as a police officer. In the video, each flash of light lasts only a split second, and the shadow appears in the video only for a few seconds. Additionally, the video is somewhat grainy or blurry. Accordingly, Warren’s testimony was helpful to the jury because he was able to identify portions of the video that related to facts in issue.

¶ 96 Because we conclude that Sergeant Warren’s testimony narrating the compilation video did not cause defendant unfair prejudice, defendant cannot meet the second prong of the *Strickland* test and, accordingly, defendant cannot establish that Dedman’s failure to object to the testimony established ineffective assistance of counsel. Again, “[a] defendant’s trial attorney cannot be considered ineffective for failing to raise or pursue what would have been a meritless motion or objection.” *People v. Pingleton*, 2022 IL 127680, ¶ 60.

¶ 97 D. Closing Argument

¶ 98 Defendant contends that the State made improper statements during closing argument and that the effect of these statements was that defendant was denied a fair trial. Specifically, defendant maintains that the State shifted the burden of proof by arguing that (1) the defense theory—that

defendant was not the shooter—was “not supported by any other evidence”; (2) defendant’s refusal to take the GSR test demonstrated consciousness of guilt; (3) jurors should hold the absence of exculpatory DNA evidence against the defendant by asserting that the jury “heard no evidence to suggest that transfer DNA evidence is the reason” why defendant’s DNA evidence was on the firearms; (4) defendant “had the same ability to subpoena witnesses, call witnesses, [and] have evidence tested as the State”; and, (5) the absence of an exculpatory statement from defendant was indicative of guilt. The State responds that the prosecutor repeatedly reminded the jury that it had the burden of proof and that the complained-of arguments were isolated.

¶ 99 In explaining its decision, the trial court did not address each of defendant’s individual claims regarding the State’s closing argument, but found that “although the State made some comments that weren’t completely proper, they were isolated, they were taken out of context.” The trial court later stated that “there was fairly significant evidence pointing to the Defendant, and those deficiencies by Mr. Dedman would not have changed the outcome.” In other words, defendant did not demonstrate prejudice, thereby failing to meet the second prong of *Strickland*. We agree that defendant had not established that he suffered substantial prejudice from the claimed errors.

¶ 100 “Prosecutors are afforded wide latitude in closing argument.” *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007) (citing *People v. Caffey*, 205 Ill. 2d 52, 131 (2001)). “In reviewing comments made at closing arguments, this court asks whether or not the comments engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from them.” *Id.* (citing *People v. Nieves*, 193 Ill. 2d 513, 533 (2000)). “Misconduct in closing argument is substantial and warrants reversal and a new trial if the improper remarks constituted a material factor in a defendant’s conviction.” *Id.* (citing *People v. Linscott*, 142 Ill. 2d

22, 28 (1991)). “If the jury could have reached a contrary verdict had the improper remarks not been made, or the reviewing court cannot say that the prosecutor’s improper remarks did not contribute to the defendant’s conviction, a new trial should be granted.” *Id.* (citing *Linscott*, 142 Ill. 2d at 28).

¶ 101 We first consider defendant’s argument that the State shifted the burden of proof by arguing that the defense theory—that defendant was not the shooter—was “not supported by any other evidence.” Defendant argues that this comment insinuated that defendant was responsible for presenting evidence to disprove the State’s claim that he was the one who discharged the gun that night. When considered in context, we disagree with defendant.

¶ 102 During closing argument, the prosecutor first noted that the evidence demonstrated that a shooting occurred. The State’s argument was based on Lafountain’s testimony, the compilation video, and the recovery of three spent cartridges. The State then discussed that defendant’s statement to the police included “multiple versions” of the event:

“First [defendant] said that was no shooting. Then it was there was a shooting, but it wasn’t anywhere near me. And finally his third version that he tried to give the police is yes, there was a shooting, yes, I was there, but Skylar, my girlfriend, shot.

There’s no dispute that a gun was discharged, everybody agrees with that. The defendant’s only contention when he talks to the police is that he wasn’t the one shooting.

And that’s not supported by any other evidence.”

To the extent that Mr. Dedman’s failure to object could be considered deficient performance, we find the State’s argument to be reasonable in light of the facts presented in this case. The State was simply pointing out that the evidence presented did not support defendant’s claim to the police that he was not the shooter. The prosecution has wide latitude in making closing arguments and is

permitted to comment on the evidence and any fair, reasonable inference it yields. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009) (citing *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005)).

¶ 103 We next consider defendant’s argument that he suffered prejudice because the State, on rebuttal, shifted the burden of proof by arguing that defendant refused to have his hands tested for GSR until he was “forced” to so and by condemning defendant’s failure to obtain and present GSR evidence. That defendant initially indicated that he did not want to comply with the taking of the GSR test was first interjected into the trial by defense counsel during cross-examination of a State’s witness. The fact that defendant eventually complied with the officers’ efforts to collect GSR evidence does not change the fact that defendant initially indicated that he did not want to comply with the GSR test. During rebuttal, the State simply argued that defendant’s initial refusal to submit to the GSR swab was evidence of defendant’s consciousness of guilt.⁵ “Evidence of refusal to take a potentially incriminating test is similar to other circumstantial evidence of consciousness of guilt which may be inferred from a defendant’s conduct.” *People v. Roberts*, 115 Ill. App. 3d 384, 387 (1983); see also *People v. Johnson*, 218 Ill. 2d 125 (2005). To the extent that Mr. Dedman’s failure to object to this argument can be considered deficient, we again find that defendant did not suffer substantial prejudice in light of the overwhelming evidence of his guilt.

¶ 104 Indeed, we find this to be true as it relates to all defendant’s contentions regarding the State’s rebuttal argument. With regard to his complaint that the State shifted the burden of proof to the defense to present forensic evidence to disprove the allegation that defendant was the person who discharged the firearm, we note that the State filed a motion *in limine* regarding the GSR swab that was taken from defendant and never tested by the forensic lab. The court ruled, pursuant to

⁵Defendant takes issue with the State’s argument that defendant was “forced” into taking the GSR test when the testimony was that defendant initially did not want to comply, but then did not resist when told that “it’s an exigent type of evidence” and the police had to collect it. We find that this is the type of wide latitude “[p]rosecutors are afforded *** in closing argument.” *Wheeler*, 226 Ill. 2d at 123.

People v. Mudd, 2022 IL 126830 (2022), that if defendant argued that the GSR swabs had not been tested, the State could note that defendant could have had the swabs submitted for testing. Not only did the Mr. Dedman argue the lack of GSR testing results, the GSR was not tested because defendant did not want to wait for the results.

¶ 105 Defendant also contends that the State shifted the burden of proof by asking, during rebuttal, why the defense had not asked the DNA experts about whether transfer DNA could be responsible for defendant's DNA being on the firearms recovered from his apartment. The State's argument was in response to defense counsel's argument that defendant's DNA could have been mixed into the samples through kissing, hugging or hold hands with someone who later possessed the guns. We agree with defendant that this argument was improper. See *People v. Euell*, 2012 IL App (2d) 101130, ¶ 20 ("By commenting on the questions that defense counsel should have asked but did not, the State effectively shifted the burden to defendant to elicit exculpatory evidence."). However, given the overwhelming evidence of defendant's guilt, we agree with the trial court that defendant cannot prove that he was prejudiced by Mr. Dedman's failure to object to this argument. Simply stated, we cannot conclude that the prosecutor's remarks "constituted a material factor in a defendant's conviction," and as such, do not warrant a new trial. *Wheeler*, 226 Ill. 2d at 123.

¶ 106 Defendant argues that the State also shifted the burden of proof by arguing that the absence of exculpatory statements from defendant during the recorded jail calls was indicative of guilt. During closing argument, the State noted that, during one portion of a call, defendant stated, "They didn't see me do it. They are relying on the word of a witness." The State then argued that defendant's statement was "distinctively different than saying, I didn't do it. They didn't see me do it. The cops didn't see me shoot the gun. The cops didn't see me with the gun, therefore I shouldn't be in jail. It's a very different phrasing than I didn't do it." The State also argued that

during defendant's call with Skylar, defendant never asked Sklyar "why didn't you tell the police what you did? Why didn't you own up to your guns? Why am I in here for something that you did?" We find that State's argument regarding the first statement is a reasonable inference based upon the evidence and was indicative of consciousness of guilt. Under these circumstances, this was permissible argument.

¶ 107 However, the prosecutor's argument with regard to the second statement is problematic. Here, the prosecutor was not commenting on defendant's choice of words, but rather the absence of a what would be tantamount to a declaration of innocence. We find this argument improper, and Dedman should have raised an objection. Again, however, in light of the overwhelming evidence of defendant's guilt, the comment was not so serious that it denied defendant a fair trial or casts doubt on the reliability of the judicial process. *People v. Jackson*, 2017 IL App (1st) 142879, ¶ 75. Stated another way, defendant did not suffer substantial prejudice as a result of Dedman's failure to object to this argument.

¶ 108 Given the overwhelming evidence of defendant's guilt, the State's repeated acknowledgement that it had the burden proof, and the fact that the jury was properly instructed as to the burden of proof, we find that defendant cannot establish substantial prejudice. Accordingly, defendant cannot meet the second prong of the *Strickland* standard.

¶ 109 E. DNA Question

¶ 110 Defendant next contends that the trial court erred by finding that defendant was not prejudiced by Mr. Dedman eliciting testimony from the State's DNA expert that the defense could have had DNA testing done for free. During cross-examination, the following exchange occurred:

“[Mr. Dedman]: What does it cost? If I wanted you to do an analysis and sent it to you, what's it cost me?”

[DNA Expert]: We provide—we provide our work to the State of Illinois and it wouldn't cost anything.

[Mr. Dedman]: So that's—

[DNA Expert]: Just your phone call request to the lab.

[Mr. Dedman]: —if I just sent you a DNA request, you'd do it and not charge me anything?

[DNA Expert]: Correct.”

¶ 111 As noted, the trial court found that this line of questioning by Mr. Dedman fell below an objective standard of reasonableness, stating, “I’m not quite sure what the benefit was for the defense to do that. If anything, it probably could have cut the other way of having the jury think, well, you could have had it done for free if you asked for it.” The court also found, however, that in light of the significant evidence, the deficiency would not have changed the outcome of the trial. We agree.

¶ 112 The evidence demonstrated that there was a mixture of DNA on the seized firearms and that there was very strong support (1 in 23 quadrillion) for the proposition that defendant’s DNA was on the Beretta firearm seized from his apartment. The Beretta was tested and matched the spent cartridges found near Lafountain’s car. Lafountain testified that a man in a white shirt fired the gun and pointed the man in the white shirt out to police after they arrived on the scene. The police interacted with the man in the white shirt and identified him as defendant, both on the scene and in court. The video supported Lafountain’s testimony and showed that Skylar did not fire a gun. In light of the overwhelming evidence, we fail to see how counsel’s error in asking the question caused defendant any significant prejudice.

¶ 114 Next, we address defendant's contention that the cumulative effect of Dedman's errors requires reversal. "[W]here errors are not individually considered sufficiently egregious for an appellate court to grant the defendant a new trial, but the errors, nevertheless, create a pervasive pattern of unfair prejudice to the defendant's case, a new trial may be granted on the ground of cumulative error." *People v. Sims*, 2019 IL App (3d) 170417, ¶ 55; see also *People v. Blue*, 189 Ill. 2d 99, 139, (2000) (finding each alleged error in the case cast "doubt upon the reliability of the judicial process" and "[c]umulatively, *** created a pervasive pattern of unfair prejudice to defendant's case"). "There generally is no cumulative error where the alleged errors do not amount to reversible error on any individual issue." *People v. Green*, 2017 IL App (1st) 152513, ¶ 118.

¶ 115 In this case, some of the alleged errors identified by defendant were not errors. The remaining errors failed to cause defendant substantial prejudice considering the strong evidence presented against him. Therefore, none of his claimed errors, either alone or taken together, entitle him to a new trial. See *People v. Caffey*, 205 Ill. 2d 52, 118 (2001) (concluding that where "no error occurred at all, or any error that may have occurred did not rise to the level of plain error," "[a] defendant is not entitled to a new trial on the basis of cumulative error"); *Perry*, 224 Ill. 2d at 356 (finding a cumulative-error analysis unnecessary where the defendant's ineffective-assistance-of-counsel claims had been rejected on the basis "that counsel's performance was not deficient or, even if deficient, did not result in prejudice under *Strickland*"). Here, having found that none of the errors alleged by defendant constituted reversible error, there is no cumulative error. See *Green*, 2017 IL App (1st) 152513, ¶ 118.

¶ 116

III. CONCLUSION

¶ 117 For the foregoing reasons, we affirm defendant's conviction for reckless discharge of a firearm.

¶ 118 Affirmed.