

2019 IL App (1st) 163135-U  
No. 1-16-3135  
Order filed September 20, 2019

Fifth Division

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 10421
	)	
MARKUS MANNIE,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge, presiding.

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PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.  
Justices Hall and Rochford concurred in the judgment.

**ORDER**

¶ 1 *Held:* The State did not engage in prosecutorial misconduct in its comments during opening and closing arguments, or by providing the jury with two exhibits containing defendant's mug shot. Where the trial court relied on a void *ab initio* prior conviction when imposing a term of years above the minimum possible sentence, the cause is remanded for resentencing.

¶ 2 Following a jury trial, defendant Markus Mannie was found guilty of attempted first degree murder (720 ILCS 5/8-4, 9-1(a)(1) (West 2014)) and aggravated battery with a firearm (720 ILCS 5/12-3.05(e)(1) (West 2014)). The trial court merged the guilty findings and imposed

a sentence of 28 years in prison for attempted first degree murder. On appeal, defendant contends he is entitled to a new trial due to four categories of prosecutorial misconduct. He asserts that the State (1) provided the jury with two labeled mug shots, thus improperly suggesting he had a criminal record; (2) in opening and closing arguments, improperly compared his character to the victim's; (3) in rebuttal closing argument, improperly shifted the burden of proof; and (4) in opening closing argument, argued prejudicial facts not in evidence. In the alternative, defendant contends that his sentence should be vacated and his case remanded for resentencing because the trial court expressly relied on a void *ab initio* prior conviction when imposing a term of years above the minimum possible sentence, and that the mittimus should be corrected to reflect the actual number of days he spent in presentence custody.

¶ 3 For the reasons that follow, we affirm defendant's conviction, vacate his sentence, and remand for resentencing.

¶ 4 Defendant's conviction arose from the April 9, 2014, shooting of Bianca Smith in Chicago. Following his arrest, defendant was charged by information with six counts of attempted first degree murder, one count of aggravated battery, one count of aggravated discharge of a firearm, and four counts of aggravated unlawful use of a weapon (AUUW). Prior to trial, the State nol-prossed all but one count of attempted first degree murder and one count of aggravated battery with a firearm.

¶ 5 At trial, Bianca Smith acknowledged that she had been convicted of identity theft in 2015 and possession of a controlled substance and aggravated identity theft in 2007. She testified that sometime after 5 p.m. on the day in question, she got into a friend's car in front of her house. Smith happened to look southward down her block and saw defendant in front of his

grandmother's house, where he lived. Defendant was with a man Smith knew as "Haji." Smith identified defendant in court and explained that she had known him most of his life, as his father was her niece's uncle. However, she also stated that, in the weeks leading up to the day in question, she did not have a good relationship with defendant.

¶ 6 Smith's friend drove south on the one-way street, toward defendant's grandmother's house. As they neared the house, Smith noticed defendant was standing "by the tree," which was on the driver's side of the street. At this point, Smith's concern was "[w]hy was he standing by the tree." Just as the car was going over a speed bump, about six or seven feet from defendant, Smith saw defendant pull a gun from the rear of his waist area, point the gun at the car, and start shooting. Defendant was the only person Smith saw with a gun, and the only person she saw shooting at the car. Smith's friend told her to put her head down. Smith "scrunched down" briefly, with her head between her legs. When she lifted her head, a bullet hit her left thigh. Smith's friend sped off.

¶ 7 At first, Smith thought she had only been grazed. But after she realized there was a "hole" in her thigh, she went to the hospital. While Smith was at the hospital, the police arrived. She gave them a false name, Marcella Smith, because she was "afraid for [her] life," and told them who shot her. The police left, but then came back and had her view a black and white printout of a photo array depicting the faces of six men. She identified defendant in the array as the person who shot her. Smith circled defendant's photo, signed the circle with the name "Marcella Smith," and wrote on the bottom of the page, "That's Mannie in the photo he's the one who did the actual shooting on 4-9-2014."

¶ 8 On cross-examination, Smith stated that her friend's name was Tony, and admitted that she never gave the police Tony's information. She also clarified that immediately after the shooting, Tony dropped her off at her apartment, and then a neighbor took her to the hospital. She did not give the police the neighbor's information. Smith related that when she first spoke to the police at the hospital, she told them the shooter was "a Mannie boy," but did not give them defendant's first name because "[i]t's two of them whose names are similar, but I know his face and I know him." Smith agreed that the photo array only included one "Mannie boy." She also admitted that the police learned her real name from a member of defendant's family, and that she had been convicted of retail theft in 2010.

¶ 9 On redirect examination, Smith clarified that she gave the police a false name because she was afraid that if anyone knew she was leaving the hospital, "more shooting towards me -- harm to my life would follow." She also testified that Tony's car was severely damaged in the shooting and that she did not talk to Tony again after that day.

¶ 10 Earline Carson testified that she was defendant's grandmother. Although she could not "see really good," she identified defendant in court. Carson stated that "a lot of children" were present outside her house on the date in question. When asked if defendant was among the group, she answered, "I guess he was out there. They usually be out there in the driveway, gangway every day." Carson stated that she called the police that day because there was some shooting going on. She could not recall whether she mentioned defendant's name to the 911 operator and stated that she could not tell the operator what she saw defendant doing "because it was too many other guys out there in the driveway."

¶ 11 When asked whether she spoke with a specific assistant state's attorney on May 24, 2014, Carson said she could not recall the name but did have a conversation "with a couple people." The State pressed on the details of the conversation. Carson stated, "Listen, I heard the shooting and I seen the pop. I seen the tip end of the gun outside this way, but I don't know who was shooting. I couldn't see just exactly who was shooting." She asserted that if she told the people with whom she spoke that defendant was shooting on the day in question, she did not remember doing so. She acknowledged signing seven separate pages of a written statement, as well as a printout of a photograph of defendant, but denied writing "this is my grandson Markus" underneath the picture, and insisted that the statement was never read to her.

¶ 12 The prosecutor asked Carson whether, in the written statement she signed, she stated that on the date in question, she looked out her living room window and saw defendant in the driveway with Haji and another person; that she heard defendant say "there is those son of a bitches"; that he raised his hand, in which he was holding a gun; that he fired the gun about five or six times at a passing car; that he was the only person she saw with a gun; that defendant ran to the back of the house and then returned, wearing a different shirt; and that she called 911 and reported she had seen defendant shoot at a car. Carson indicated that she did not recall making the statements, did not know if she made the statements, or did not make the statements. She testified that there had been a "gang of boys" in the driveway, that she could not see "all the way in that driveway," that she heard somebody say "there is those son of a bitches," that she saw a car come across the speed bump, that she heard five or six shots, and that she called 911 and reported some shooting in front of her house.

¶ 13 Carson did not recall whether, on the day of the shooting, she spoke with the police about her observations. However, she agreed that, on that day, the police showed her a printout of a black and white photograph. When shown the printout in court, and asked whether it depicted defendant, Carson answered, “Yes, I guess. \*\*\* Yeah, it look like -- look like his brother. I guess so, yes.” Carson acknowledged signing the printout and having written on the bottom of page, “That Markus I saw him shoot down my driveway at a black car.”

¶ 14 Carson identified her voice on a recording of a 911 call, which was played for the jury. In the recording, Carson gave her name and address, reported that some shooting had occurred about 30 minutes prior, identified “my grandson” as “one of them boys that was shooting,” stated she found out about “this” because she was sitting in her window looking at him, clarified that her grandson shot at a passing black car, and gave defendant’s physical description and name.

¶ 15 On cross-examination, Carson stated that when she was looking out her window on the day in question, she did not have a clear view of the numerous boys in her driveway. Carson did not see defendant with a gun and did not see him shoot at anyone. While she saw “the point of the gun,” she could not remember who was holding it. She testified that she did not remember making the written statement that was presented to her in court, and insisted that no one read the statement to her. Carson also stated that she had several grandsons, and that defendant looked like one of his brothers, although she could not remember which one.

¶ 16 Assistant State’s Attorney April Gonzalez testified that on May 24, 2014, she and Chicago police detective Thomas Krob went to Carson’s house to interview her. After Gonzalez introduced herself and explained her role, Carson agreed to speak with her. Carson related that on April 9, 2014, she looked out her living room window and saw defendant, who was her

grandson, take a gun from his pocket and shoot at a car that was driving by. Gonzalez asked Carson if they could memorialize her statement in writing, explained the process to Carson, and obtained Carson's consent to do so. In court, Gonzalez identified the statement she wrote out. Gonzalez stated that she had reviewed the written statement with Carson, that Carson had made changes that were initialed, and that Carson had signed each page.

¶ 17 In the statement, which was published to the jury, Carson stated that around 6 p.m. on April 9, 2014, she looked out her living room window and saw defendant standing in the driveway with "Haji" and another person she did not know. She heard defendant say, "There are those sons of bitches." She saw him raise his hand, in which he was holding a silver gun, and shoot. When Carson heard the gunshot, she looked toward the street and saw a black car driving by. Carson saw defendant fire about five or six times at the black car, which kept driving. Defendant was the only person she saw with a gun. After the shooting, defendant ran to the back of the house. When he returned, he had changed from a black shirt to a white one, and was carrying a jacket. Defendant ran across the street and into another house. Carson called 911 and told the operator that she saw her grandson, defendant, shoot a gun at a car.

¶ 18 Chicago police detective Michael Demcak testified that he responded to the scene of the shooting. He observed five expended shell casings on the ground, which were subsequently collected by an evidence technician. Demcak also spoke with Carson, as she had called 911. Demcak then spoke with two other detectives, who left the area and returned with a photograph. The three detectives showed Carson the photograph, which she signed. In court, Demcak identified defendant as the person in the photograph.

¶ 19 Chicago police detective Joe Madden testified that on the day of the shooting, he spoke with Smith at the hospital. At the time, she said her first name was Marcella, but later, he learned it was Bianca. During his conversation with Smith, Madden learned the “partial name of a possible suspect.” Madden went to the police station and compiled an array containing photographs of defendant and five other men. Madden and some other detectives brought the array to Smith at the hospital. She viewed it and immediately picked out defendant, whom she “knew by the last name of Mannie,” as the individual who shot her. She circled defendant’s photograph, wrote her name on the photograph, and wrote on the bottom of the page, “That’s Mannie in the photo he’s the one who did the actual shooting on 4-9-2014.” In court, Madden identified defendant as the person whose photograph Smith selected.

¶ 20 On cross-examination, Madden agreed that Smith had only given him defendant’s last name, Mannie, and that he did not include “any of the other Mannie brothers” in the array. On redirect examination, Madden testified that when he was compiling the array, he relied on his own investigation as well as investigation conducted by Detective Demcak, who had spoken with Carson. Prior to compiling the array, Madden had learned defendant’s full name.

¶ 21 Chicago police officer Stephen Balcerzak, an evidence technician, testified that when he searched the scene of the shooting, he discovered five expended shell casings. The casings were photographed, recovered, and inventoried. Balcerzak examined the casings and determined they were all of the same manufacturer and caliber. Michael Cox, a forensic scientist and fingerprint identification expert, testified that no latent prints suitable for comparison were found on any of the casings. Cox also stated that he had tested thousands of shell casings in his career, but only

found fingerprints on shell casings “a couple of times.” Gregory Brate, an expert in firearms identification, testified that all five casings were fired from the same gun.

¶ 22 At the close of its case, the State moved to enter all but one of its exhibits into evidence. Defense counsel indicated the defense had no objection, and the trial court allowed the motion.

¶ 23 Defendant made a motion for a directed verdict, which the trial court denied. Defendant did not testify or present any evidence.

¶ 24 Following closing arguments and instructions, the jury found defendant guilty of attempted first degree murder and aggravated battery with a firearm. The trial court entered judgment on the verdict. Defendant thereafter filed a motion for a new trial and an amended motion for a new trial. After hearing arguments, the trial court denied the motion.

¶ 25 At sentencing, the State noted that defendant had a prior conviction for aggravated unlawful use of a weapon (AUUW) and relied on that prior conviction in arguing for a sentence “substantially over the minimum.” In explaining the sentence it was fashioning, the trial court also mentioned the prior AUUW conviction and specifically stated it had “factored in” that criminal history. The court merged the guilty findings and sentenced defendant to 8 years’ imprisonment for attempted first degree murder, plus a 20-year firearm enhancement, for a total sentence of 28 years in prison. Defendant’s motion to reconsider sentence was denied.

¶ 26 On appeal, defendant first contends that he is entitled to a new trial due to four categories of prosecutorial misconduct. We address these arguments in turn.

¶ 27 First, noting that prior to trial the trial court granted a defense motion *in limine* barring evidence of any past criminal activity, defendant contends that the State violated this order and improperly provided the jury with his labeled mug shot from a prior arrest, thus suggesting he

had a criminal record. Specifically, defendant objects to (1) the printout of the photo array viewed by Smith, as the bottom of the printout included the URL “http://mugshot.chicagopolice.local/mod\_lineup/new\_display.shtml?size=print&time=59,” and (2) the printout viewed by Carson, as the bottom of the printout included the URL “http://167.165.43.108/scripts\_test/image\_mug1.asp?cb=18848862&itype=1.” Defendant argues that the jury would have known that these images, with the URLs containing the words “mugshot” and “mug,” were not related to his arrest for the instant offense, as they were shown to Smith and Carson on the day of the shooting, well before he was taken into custody. As such, defendant asserts that the State indirectly informed the jury what it could not say directly: that he had a criminal background. Defendant argues that the State’s conduct was prejudicial because the evidence in the case was closely balanced and the images suggested to the jury that it should convict him because he was a bad person who deserved punishment.

¶ 28 Defendant acknowledges that he did not object to the mug shot exhibits at trial or in a posttrial motion, but nevertheless argues that this court may review the issue as plain error. Ordinarily, a defendant must both object at trial and include the alleged error in a written posttrial motion in order to preserve an issue for appeal. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). However, under the plain error doctrine, this court may reach an unpreserved issue when “(1) a clear or obvious error occurred and 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,” or when “(2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant’s trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.” *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The first

step in plain error analysis is determining whether an error actually occurred. *People v. Cosby*, 231 Ill. 2d 262, 273 (2008). This is because, absent error, there can be no plain error. *People v. Wooden*, 2014 IL App (1st) 130907, ¶ 10.

¶ 29 Defendant's contention regarding the mug shots is more accurately characterized as an assertion that the trial court erred in admitting the printouts into evidence than as an argument that the State committed prosecutorial misconduct. Mug shots, although suggestive of other criminal activity, may be admitted into evidence if they are probative of the issue of the defendant's identity and the manner in which the identification was made. *People v. Oliver*, 306 Ill. App. 3d 59, 73 (1999); *People v. Champs*, 273 Ill. App. 3d 502, 509 (1995); *People v. Robinson*, 125 Ill. App. 3d 1077, 1079 (1984). A trial court's decision to submit mug shot exhibits to the jury will not be reversed absent an abuse of discretion. *Robinson*, 125 Ill. App. 3d at 1079.

¶ 30 Here, identification was a material issue at trial, and the printouts containing defendant's mug shots were relevant to show how he was identified by Carson and Smith. Carson not only signed the printout shown to her, but also wrote on it, "That Markus I saw him shoot down my driveway at a black car." Similarly, Smith wrote on the printout shown to her, "That's Mannie in the photo he's the one who did the actual shooting on 4-9-2014." Moreover, we note that Smith signed the printout shown to her with a false name, a fact used by the defense in making its case that she was not a credible witness. In these circumstances, we find that the printouts were particularly probative, primarily for the State, but also for the defense. In our view, the probative value of the printouts outweighs any prejudicial effect, and therefore, we find no abuse of discretion in submitting them to the jury. See *id.* There being no error, the plain error doctrine

does not apply to excuse defendant's forfeiture of the issue. See *Wooden*, 2014 IL App (1st) 130907, ¶ 10.

¶ 31 As an alternative path for avoiding the effect of his forfeiture, defendant suggests that his trial counsel was ineffective for agreeing to the submission of the printouts to the jury. We have found that the trial court did not err in submitting the mug shot exhibits to the jury. As such, any objection made by defense counsel would have been futile (see *People v. Wilson*, 2017 IL App (1st) 143183, ¶ 34), and therefore, defendant's claim of ineffective assistance of counsel is meritless (see *People v. Holmes*, 397 Ill. App. 3d 737, 745 (2010) ("It is axiomatic that a defense counsel will not be deemed ineffective for failing to make a futile objection.")).

¶ 32 Defendant's second contention of prosecutorial misconduct is that in opening and closing arguments, the State improperly compared his character to Smith's. He argues that the prosecutor's first and last words of opening argument suggested to the jury that the case was about a choice between a good person (Smith) and a bad person who represented the violence in all of Chicago (defendant). Defendant further argues that in closing, the prosecutors continued to link him to the violence in all of Chicago and his "bad" character. Defendant asserts that where character was not raised by the defense, it was improper for the State to comment to the jury on his character; that when the State used the word "callous" to describe him, it diverted the jury's attention from the issue of whether it had proved him guilty beyond a reasonable doubt; that the prosecutors' comments set up a choice between good/innocent and bad/callous that was irrelevant to the proof of the crime; that the State improperly speculated regarding his motive; and that the prosecutor's comment that Carson was fed up with defendant's violence was

unsupported by the evidence and improperly suggested defendant had committed violent acts in the past.

¶ 33 Again, defendant acknowledges that he did not preserve these arguments for appeal, but asserts we may address them as plain error or because counsel was ineffective in not objecting at trial and including the arguments in a posttrial motion. As above, we must first determine whether any error occurred before considering application of the plain error doctrine or whether there was ineffective assistance of counsel.

¶ 34 A defendant has a right to a trial free from improper prejudicial comments or arguments by the prosecution. *People v. Pasch*, 152 Ill. 2d 133, 184 (1992). Whether comments or arguments made by a prosecutor constitute prejudicial error is evaluated according to the language used, its relation to the evidence, and its effect on the defendant's right to a fair and impartial trial. *Id.* Prosecutors are allowed a great deal of latitude in making opening statements and closing arguments. *Id.* A prosecutor has the right to comment on the evidence and draw all legitimate inferences deducible therefrom, even if those inferences are unfavorable to the defendant. *Id.* Moreover, even if a prosecutor's remarks exceed the bounds of proper comment, a jury's verdict will not be disturbed unless it can be said that the remarks resulted in substantial prejudice to the accused, such that absent those remarks the verdict would have been different. *Id.* at 185.

¶ 35 Here, defendant takes issue with the first and last utterances made by the prosecutor in opening statements and a series of comments made by the prosecutors in closing arguments. Specifically, the first statements made by the prosecutor in opening were as follows:

“Violence and a callous disregard for human life is one of the critical issues faced in the City of Chicago. It’s such an issue that sometimes hand-working, innocent people[’s] lives are caught up in a wave of violence and their lives are put at risk as well. Today you will hear from one such victim.”

The final statements made in opening were these:

“My partner and I at the end of this case [are] going to ask you to hold [defendant] responsible and to stand with Bianca Smith and let him know that his violence and callous disregard for human life will not be tolerated. Find him guilty of attempt first degree murder and find him guilty of aggravated battery with a firearm. Thank you.”

The statements made in closing arguments which defendant asserts were improper were as follows:

“And you heard how [defendant] and Bianca -- they don’t have a good relationship; that their relationship is not a good one. His intent was to kill her that day no matter what the expense would be. His intent was very clear by his actions that day.

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[Defense] counsel argues that Bianca Smith gave a false name, so therefore her whole testimony must be false. She gave Marcella Smith. Well, she told you why she gave Marcella Smith. She just got shot at by a guy she’s been knowing her whole life. She was afraid that he or anyone else from the neighborhood might come and find her if they knew that she was at that hospital and finish what they started.

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And on the date in question, April 9th, 2014, [Carson] did the right thing. Apparently she was fed up with the violence, and she called the police and she turned her grandson in and did the right thing.

\*\*\*

And I think one of the most important facts to remember is when your grandmother is fed up with your violence and calls the police on you, that says something.”

¶ 36 Having reviewed the entirety of the opening statements and closing arguments, we cannot agree with defendant that the State improperly compared defendant’s character to Smith’s, or inappropriately set up the jury to make a choice between good (Smith) and bad (defendant). With regard to the prosecutor’s use of the word “callous,” the first time the prosecutor uttered the term, it was to describe general violence in Chicago. Then, after the prosecutor had told the jury it would be hearing evidence that defendant shot at Smith several times, hitting her once in the leg, the prosecutor used the word “callous” a second time to characterize defendant’s actions. In our view, this is a legitimate inference from the evidence. Further, the prosecutor’s statement that Smith and defendant’s relationship was “not a good one” was an accurate summary of Smith’s testimony on the subject. We cannot agree that the comment was improper speculation regarding motive. Similarly, we find no improper comment on motive in the prosecutor’s statement regarding Smith’s giving of a false name at the hospital. Rather, the remark was made in response to defense counsel’s questioning of Smith’s credibility due to using the name Marcella instead of Bianca, and explained why she did so. See *People v. Glasper*, 234 Ill. 2d 173, 204

(2009) (rebuttal statements provoked or invited by defense counsel’s argument are not improper).

¶ 37 The prosecutor’s comment, “when your grandmother is fed up with your violence and calls the police on you, that says something,” is more questionable. As defendant observes, the record does not reflect that Carson called 911 on the day of the shooting because she had reached a tipping point with regard to defendant’s behavior. However, even if this passing comment could be considered improper, it was subsequently cured by the trial court, which gave the jury proper instructions on the law to be applied, informed the jury that opening statements and closing arguments are not evidence, and advised the jury to disregard any remarks not supported by the evidence. *Pasch*, 152 Ill. 2d at 185. Defendant was not deprived of a fair trial as a result of this remark. *Id.*

¶ 38 Where there was no error in the remarks identified by defendant, the plain error doctrine does not apply (see *Wooden*, 2014 IL App (1st) 130907, ¶ 10) and defense counsel was not ineffective for failing to object and include the issue in a posttrial motion (see *Holmes*, 397 Ill. App. 3d at 745). Defendant’s contention remains forfeited.

¶ 39 Defendant’s third contention of prosecutorial misconduct is that in rebuttal closing arguments, the State improperly shifted the burden of proof to him to raise a defense. The remarks at issue were as follows:

“Throughout the last few days of this trial as I was sitting here, I was wondering what exactly is going to be the defense in this case. And after hearing the argument just now, I still wonder what exactly is the defense -- what exactly is the defense --

[DEFENSE COUNSEL]: Objection, your Honor.

THE COURT: Overruled. Go on.”

The prosecutor did not complete his thought, but went on to address the defense argument that Smith was not credible because she gave a false name at the hospital. Defendant argues that the State improperly suggested to the jury that he had an obligation to present a defense and that his choice not to present evidence should play a factor in its deliberations. Defendant included this issue in his posttrial motion. As such, it is preserved for review.

¶ 40 As discussed above, a prosecutor has wide latitude in making closing arguments and is permitted to comment on the evidence and any fair and reasonable inferences it yields. *Glasper*, 234 Ill. 2d at 204. Remarks made during closing arguments will result in reversible error only when they “engender ‘substantial prejudice’ against the defendant to the extent that it is impossible to determine whether the verdict of the jury was caused by the comments or the evidence.” *Kirchner*, 194 Ill. 2d at 549 (quoting *People v. Macri*, 185 Ill. 2d 1, 62 (1998)). Challenged comments must be viewed in the context of the closing arguments as a whole. *Id.* Preserved claims of prosecutorial misconduct in closing arguments are reviewed for an abuse of discretion. *People v. Phagan*, 2019 IL App (1st) 153031, ¶ 54.

¶ 41 After carefully reviewing the prosecutor’s remark in context, we find that it was a proper comment on defendant’s theory of defense rather than an impermissible shifting of the burden of proof. Defendant’s theory of the case, as set forth by defense counsel in closing arguments, was that the State failed to prove him guilty beyond a reasonable doubt. Counsel noted flaws in Smith’s testimony and highlighted that she had given a false name at the hospital. Counsel also remarked that defendant had multiple brothers, at least one of whom looked like him; suggested that Carson was a “confused” witness who had trouble seeing; and observed that no extrinsic

evidence, such as a gun or fingerprints on shell casings, linked defendant to the shooting. In rebuttal, the prosecutor began by making the quoted comment above. He then went on to recount Smith's stated reasons for giving a false name, to argue that Carson was a "great 911 witness," and to relate that fingerprints are rarely found on shell casings. The prosecutor reviewed the evidence presented at trial and gave reasons as to why defendant's challenges to the evidence were meritless.

¶ 42 Taken in the context of defense counsel's argument and the prosecutor's rebuttal as a whole, we find that the challenged comments did not suggest that defendant had to present an affirmative case for acquittal. Instead, we agree with the State that the prosecutor's references to defendant's "defense" were permissible commentary on defendant's trial theory. See *People v. Phillips*, 127 Ill. 2d 499, 526 (1989) (an attack on a particular theory of defense generally does not indicate an improper shift of the burden of proof); *People v. Chaban*, 2013 IL App (1st) 112588, ¶ 63 (in closing arguments, a prosecutor may challenge the defense's characterizations of the evidence, and comment on the persuasiveness of the defense); *People v. Doyle*, 328 Ill. App. 3d 1, 12 (2002) ("The prosecution may attack a defendant's theory of defense during closing arguments and may respond to any statements by defense counsel that invite a response."). Here, the prosecutor's comments did not indicate an improper shifting of the burden of proof. As such, we cannot find that the trial court abused its discretion in overruling defendant's objection.

¶ 43 Defendant's final contention of prosecutorial misconduct is that in closing, the prosecutor argued prejudicial facts not in evidence when he said defendant tried to "hide" behind a tree to

“ambush” Smith. Specifically, in the course of his argument, the prosecutor made the following statements:

“And the defendant tried to hide behind a tree. \*\*\* And as they are speeding off trying to escape the ambush of this defendant, they ultimately end -- [Smith] ends up at the hospital. \*\*\* [A]s they were driving down the street, [Smith] saw this defendant attempting to hide behind a tree. \*\*\* The fact that he was hiding behind a tree, kind of obscured his presence, trying to hide. And he waited, and he laid there. And he ambushed the car as it was driving by.”

Defendant argues that the prosecutor’s comments were directly contradicted by Smith, who testified at trial that as she approached Carson’s house, she could see defendant standing by the tree on the driver’s side of the street. Defendant asserts that the prosecutor’s “vivid recasting of Smith’s testimony invited the jury to believe that [defendant] was an experienced ‘bad actor’ ” and was unsupported by any evidence.

¶ 44 Defendant did not object at trial to any of the prosecutor’s statements about him hiding behind the tree or ambushing Smith. Again, he argues that this court may nevertheless reach the issue via plain error or because counsel was ineffective for failing to object.

¶ 45 As discussed above, a prosecutor is afforded wide latitude in closing arguments and is permitted to comment on the evidence and any fair and reasonable inferences it yields. *Glasper*, 234 Ill. 2d at 204. In our view, the prosecutor’s statements that defendant was trying to hide behind a tree and ambushed Smith fairly described the logistics of the shooting. Smith testified that while she and her friend were driving toward Carson’s house, she could see defendant standing “by the tree,” and that she was concerned as to why he was standing there. Then, as

they went over a speed bump only six or seven feet from defendant, he pulled a gun and started shooting at the car. We agree with the State that although Smith could see defendant as she approached, it was reasonable for the prosecutor to infer that defendant was using the tree as some type of cover or point from which to attack. Further, it was reasonable for the prosecutor to describe the shooting as an ambush, as defendant concealed the gun until the car Smith was riding in was a few feet from him, proceeding slowly over a speed bump, and only then drew the weapon and shot her. After carefully reviewing the record, we conclude that the prosecutor's comments constituted reasonable characterizations of the evidence and logical inferences drawn therefrom. See *People v. Smith*, 177 Ill. 2d 53, 81 (1997).

¶ 46 Where there was no error in the remarks identified by defendant, the plain error doctrine does not apply. See *Wooden*, 2014 IL App (1st) 130907, ¶ 10. Moreover, defense counsel was not ineffective for failing to preserve the issue for appeal. See *Holmes*, 397 Ill. App. 3d at 745. Defendant's contention is forfeited.

¶ 47 Finally, with regard to defendant's contentions of prosecutorial misconduct, we note his argument that the State's introduction of the mug shot evidence, combined with all the identified comments in opening and closing arguments, had the cumulative effect of denying him a fair trial. We reject this argument, as we have found no individual errors. A new trial is not warranted where a defendant raises several contentions of error, none of which rise to the level of reversible error, because “ [t]he whole can be no greater than the sum of its parts. ” *People v. Irwin*, 2017 IL App (1st) 150054, ¶ 57 (quoting *People v. Albanese*, 102 Ill. 2d 54, 82-83 (1984), *abrogated on other grounds by People v. Gacho*, 122 Ill. 2d 221 (1988)).

¶ 48 Defendant's next contention on appeal is that that his sentence should be vacated and his case remanded for resentencing because the trial court expressly relied on a void *ab initio* prior conviction for AUUW when imposing a term of years above the minimum possible sentence. The State concedes the issue and we agree.

¶ 49 Defendant acknowledges that he failed to preserve this issue for appeal, but maintains it may be reviewed as second prong plain error, or, alternatively, because defense counsel was ineffective. We elect to consider the issue as a matter of ineffective assistance of trial counsel, and find that counsel was ineffective for failing to object to the trial court's consideration of the AUUW conviction in aggravation at sentencing.

¶ 50 To succeed on a claim of ineffective assistance, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that " 'but for counsel's incompetence, the defendant stood a reasonable chance of achieving a better result.' " *People v. Billups*, 2016 IL App (1st) 134006, ¶ 14 (quoting *People v. Burnett*, 385 Ill. App. 3d 610, 614 (2008)). The defendant must overcome the presumption that his counsel's acts might have resulted from sound defensive strategy. *Id.*

¶ 51 The prior conviction at issue in the instant case was for AUUW under then-section 24-1.6(a)(1), (a)(3)(A) of the Criminal Code of 1961. 720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2010). This statute was found unconstitutional in *People v. Aguilar*, 2013 IL 112116, ¶ 22. See also *People v. Burns*, 2015 IL 117387, ¶ 22 (clarifying *Aguilar*). At sentencing, a court may not consider in aggravation prior convictions for violating unconstitutional statutes. *Billups*, 2016 IL App (1st) 134006, ¶¶ 11-16; *People v. Smith*, 2016 IL App (2d) 130997, ¶ 26.

¶ 52 The trial court specifically stated it had “factored in” defendant’s prior AUUW conviction when fashioning the sentence in this case. Defendant was sentenced on November 4, 2016, well after *Aguilar* and *Burns* were decided. Competent counsel should have known that defendant’s prior AUUW conviction was void under *Aguilar* and *Burns*, and counsel’s failure to object to the use of that prior conviction in aggravation cannot have served any strategic purpose. *Billups*, 2016 IL App (1st) 134006, ¶ 15. As such, we find that counsel’s performance fell below an objective standard of reasonableness. *Id.*

¶ 53 To establish prejudice in this context, there need only be a “reasonable probability” that the trial court would have imposed a lesser sentence if counsel had not erred. *Id.* ¶ 16. As noted above, the trial court expressly considered the unconstitutional AUUW conviction in aggravation at sentencing. We find there is a reasonable probability that the court would have imposed a lesser sentence if defense counsel had alerted the court to the unconstitutionality of the AUUW conviction. See *id.* Given the substantial weight the trial court gave to the AUUW conviction, we vacate defendant’s sentence and remand for a new sentencing hearing. See *id.* ¶ 18; *Smith*, 2016 IL App (2d) 130997, ¶ 29.

¶ 54 Defendant’s final contention on appeal is that the mittimus should be corrected to reflect the actual number of days he spent in presentence custody. We need not address this contention, as a new mittimus will issue following resentencing.

¶ 55 For the reasons explained above, we affirm defendant’s conviction, vacate his sentence, and remand the cause for resentencing.

¶ 56 Affirmed in part, vacated in part; cause remanded.