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SECOND DIVISION
August 2, 2011

**IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT**

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 08 C661315
)	
JERRY LOFTON,)	The Honorable
)	Brian Flaherty,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Cunningham and Justice Karnezis concurred in the judgment.

ORDER

Held: Chain of custody testimony adequately established that the substances recovered were the same substances tested for the presence of narcotics; prosecutor's comments in rebuttal did not improperly focus attention on Lofton's exercise of his constitutional right to remain silent, or unfairly bolster the credibility of the police witnesses who testified; defense counsel's decision not to file a motion *in limine* to exclude evidence of cannabis was proper trial strategy not subject to a claim of ineffective assistance; and the trial court complied with Rule 431(b) when it questioned the entire venire about the four *Zehr* principles.

¶ 1 Defendant Jerry Lofton appeals his conviction after a jury trial of possession of a controlled substance, and his sentence of 8 years' imprisonment. On appeal, Lofton contends he was denied his right to a fair trial and his conviction must be reversed because (1) the State failed to establish a proper chain of custody to show that the substances recovered from the residence were the same substances that were tested for the presence of a controlled substance; (2) during closing argument the State improperly commented on Lofton's exercise of his right to remain silent, and improperly bolstered the credibility of police witnesses; (3) his trial counsel was ineffective for failing to file a motion *in limine* to exclude evidence that police recovered cannabis from the residence; and (4) the trial court failed to ask prospective jurors whether they understood and accepted each of the *Zehr* principles as required by Supreme Court Rule 431(b) (Ill. S. Ct. R. 431(b) (eff. May 1, 2007)). We affirm.

¶ 2 JURISDICTION

¶ 3 The trial court sentenced Lofton on November 20, 2009, and he filed a timely notice of appeal on December 2, 2009. Accordingly, this court has jurisdiction pursuant to article VI, section 6, of the Illinois Constitution and Illinois Supreme Court Rules 603 and 606, governing appeals from a final judgment of conviction in a criminal case entered below. Ill. Const. 1970, art. VI, §6; Ill. S. Ct. R. 603 (eff. Oct. 1, 2010); R. 606 (eff. Mar. 20, 2009).

¶ 4 BACKGROUND

¶ 5 Lofton was charged with two counts of possession of a controlled substance with intent to deliver more than 15 but less than 100 grams of cocaine, and two counts of possession of the same amount of cocaine. At his jury trial, Investigator Christopher Imhof stated that he had

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participated in hundreds of narcotics investigations as a member of the Cook County Sheriff's Police Department. Imhof testified as an expert in narcotics policing. On July 23, 2008, Imhof worked in a unit sent to execute a search warrant on a residence located at 1027 Lexington Circle in Ford Heights, Illinois. When he entered the residence, he saw Lofton and prior to conversing with him, Imhof advised him of his *Miranda* rights. Imhof asked Lofton whether anything illegal was going on inside the residence, and Lofton responded that upstairs in the bedroom closet there was some crack cocaine on a shelf and that some cannabis and cocaine could be found in a dresser drawer. Imhof related this information to his partner, Investigator Hernandez.

¶ 6 When Hernandez informed him that he had found the items, Imhof proceeded to the upstairs bedroom and saw in the closet on a shelf a measuring cup which contained "several large chunks of off white rock like substance which field tested positive for crack cocaine." The cup also contained a mixer, or fork, used for stirring. On the dresser drawer, there were "a couple of bags of green leafy substance and also another bag with a chunk of white rock-like substance which also field tested positive for crack cocaine." A digital scale was also recovered from the dresser, as well as unused Ziploc bags. When presented at trial with the items recovered, Imhof stated that he recognized the items as those taken from the residence and they were in the same or substantially the same condition as when he first observed them on July 23, 2008.

¶ 7 On cross-examination, Imhof stated that Lofton told him he lived at the residence with his girlfriend, Tammy, and some children. Imhof acknowledged that Lofton was not in the bedroom where the drugs were found, and he did not have drugs, paraphernalia, or ziploc baggies on his person. Imhof stated that the bedroom closet contained men's clothing although he did not

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examine the clothing to see if it could belong to Lofton. Imhof also testified that the dresser in the bedroom contained both men's and women's clothing. Imhof did not see any mail addressed to Lofton in the residence. Imhof also acknowledged that he did not obtain a written statement from Lofton, nor did he obtain a videotaped or recorded statement. After gathering the evidence, Imhof and Hernandez placed Lofton in handcuffs and walked him to the police car. In response to counsel's question of what the other officers were doing in the residence at the time, Imhof stated that he did not know.

¶ 8 On re-direct examination, Imhof stated that after Lofton told him the location of the drugs, he did not want to talk anymore about the drugs. He continued to converse with Lofton, however, but not about the drugs. The prosecutor again asked Imhof, "But he didn't want to talk to you anymore about the drugs?" Imhof responded, "No, not really, not particularly." On re-cross, Imhof stated that when he relayed the location of the drugs to Hernandez, Hernandez was already upstairs.

¶ 9 Investigator Hernandez testified that on July 23, 2008, he was the case officer on a search warrant for a residence in a Cook County Housing Authority building at 1027 Lexington Circle in Ford Heights. He was also to gather any evidence at the scene. When he arrived, Lofton was standing in the living room and officers were already present. Hernandez spoke to Imhof who informed him that there was evidence to gather in the second floor bedroom across from the stairs. On information from Imhof, Hernandez went to the bedroom closet and on the right-hand side shelf he observed a glass measuring cup containing a plastic bag which held an off white chunk of substance. The substance later field tested positive for the presence of cocaine. He

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testified that in the bedroom closet he also observed adult male and female clothing. Hernandez next investigated the dresser in the bedroom. On top, he found a black digital scale, ziploc baggies, two baggies containing a green leafy substance which field tested positive for cannabis, and another clear plastic bag containing a chunk of off white substance which field tested positive for cocaine. Inside a drawer Hernandez found a clear plastic bag containing 32 ziploc baggies. Each baggie contained an off white substance which field tested positive for cocaine. He stated that in the dresser drawers, he also observed women's clothing but he could not recall if he saw any men's clothing.

¶ 10 The prosecutor then presented Hernandez with their Exhibits 1 through 6, which included the plastic bag containing cocaine found in the closet, the plastic bag containing cocaine found on top of the dresser, the plastic baggies containing cannabis, and the plastic bag containing 32 plastic bags of cocaine recovered from the dresser drawer. Hernandez identified each item as the same one he recovered from the residence. He brought the items back to the Markham courthouse where they were sealed in evidence bags. He testified that each bag was marked with "all information that pertains to the evidence, the case number, inventory number, who the arrest – well it says suspect on here, the arrestee, my name, and a description of the items in the bag." He then gave the sealed bags to his "supervisor who looks over them, make[s] sure they are done correctly, and then they are placed in an evidence locker to be later sent to the Illinois State Lab." Hernandez confirmed that the items are placed in a sealed vault from which the Illinois State Police Crime Lab takes them for testing.

¶ 11 On cross-examination, Hernandez acknowledged that he did not inventory any pieces of

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clothing from the bedroom. He also responded that he saw male clothing only in the closet, not in the dresser. Hernandez also prepared a police report on July 23, 2008, but the report did not indicate that adult male clothing was found in the bedroom closet. When he arrived at the residence, other officers were present as well as Lofton, his girlfriend, and possibly some children. Hernandez stated that he did not recover anything indicating Lofton lived at the residence. He also did not ask the lab to perform fingerprint analysis on the items recovered, nor did he recover any drugs, paraphernalia, or money from Lofton's person.

¶ 12 Angela Nealand testified that she is employed by the Illinois State Police as a forensic scientist in the area of drug chemistry. She stated that she received the evidence in the case from Sergeant Doyle of the Cook County Sheriff's Department. Nealand described the procedure she followed after receiving evidence. She testified that she first checked to make sure the bags were sealed and then she placed the items in a locked location for later analysis. When she retrieved the items for analysis, she again checked to make sure the seals were intact and then she opened the bags for testing. She weighed and performed two tests on the substances. Nealand opined with a reasonable degree of scientific certainty that the substances were cocaine. She stated that exhibit 2, the plastic bag containing an off white substance found in the glass measuring cup, contained 25 grams of cocaine. Exhibit 3, the plastic bag containing an off white substance found on top of the dresser, contained 2.9 grams of cocaine. After weighing and testing the items, she resealed the bags and returned them to a locked location until she could take them back to the agency.

¶ 13 The prosecutor then presented Nealand with exhibit 2 and exhibit 3. For each item, she

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testified that it was in the same or substantially the same condition, except that it was still sealed when she last saw the item. On cross-examination, she acknowledged that if the police put in a request for fingerprint analysis, her agency could perform the testing.

¶ 14 The State rested and defense counsel moved for a directed verdict. Counsel argued that the State did not present any evidence that Lofton had either the “power or intention to exercise control over” the drugs and items recovered. Furthermore, no other officers testified as to the verbal statement Lofton allegedly made to Imhof. The trial court denied counsel’s motion.

¶ 15 The jury found Lofton guilty of possession of a controlled substance, and not guilty of possession of a controlled substance with intent to deliver. Defense counsel filed a motion for a new trial which the trial court denied. The trial court sentenced Lofton to 8 years’ imprisonment.

¶ 16 ANALYSIS

¶ 17 Lofton first contends his conviction must be reversed because the State failed to establish a sufficient chain of custody proving that the substances recovered were the same tested for the presence of a controlled substance. Lofton acknowledges that he did not preserve this issue for review. A contention that the chain of custody for evidence is deficient is a claim that the State did not establish an adequate foundation for admitting the evidence. *People v. Woods*, 214 Ill. 2d 455, 471 (2005). Since such an attack goes to the admissibility of the evidence, rather than to proof of the existence of an element of the crime, it is subject to ordinary rules of forfeiture. *People v. Alsup*, 241 Ill. 2d 266, 275 (2011). The plain error doctrine allows review of waived issues affecting substantial rights if the evidence is closely balanced or if fundamental fairness so

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requires. *People v. Donoho*, 204 Ill. 2d 159, 187 (2003). However, before invoking the plain error exception, we must first determine whether any error occurred at all. *People v. Herron*, 215 Ill. 2d 167, 184 (2005).

¶ 18 When the State seeks to introduce contraband into evidence, it has the burden of establishing a chain of custody sufficient “to render it improbable that the evidence has been tampered with, exchanged, or contaminated.” *People v. Harris*, 352 Ill. App. 3d 63, 68 (2004). If the defendant does not present actual evidence of tampering, substitution, or contamination, the State satisfies its burden by showing that reasonable measures were used such that it was improbable the evidence was altered. *Harris*, 352 Ill. App. 3d at 69; *People v. Pettis*, 184 Ill. App. 3d 743, 753 (1989). The State need not exclude all possibility of tampering or contamination, nor does every person in the chain of custody need to testify. *People v. Irpino*, 122 Ill. App. 3d 767, 775 (1984). Even if there is a missing link in the chain, evidence is properly admitted if the testimony describing the condition of the evidence when delivered matches the description of the evidence when examined. *Irpino*, 122 Ill. App. 3d at 775. Any deficiencies in the chain of custody go to the weight, not admissibility, of the evidence. *Woods*, 214 Ill. 2d at 467.

¶ 19 Here, Investigator Hernandez testified that he recovered the plastic bag containing an off white substance from the bedroom closet shelf, and the bag containing an off white substance found on top of the dresser, from the residence (State’s Exhibits 2 and 3). He further stated that the items presented to him at trial were the same items he recovered. He testified that each item was placed in a sealed evidence bag marked with “all information that pertains to the evidence,

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the case number, inventory number, *** the arrestee, my name, and a description of the items in the bag.” Hernandez then gave the sealed bags to his supervisor who looked them over to make sure they were “done correctly.” The bags were then placed in a sealed vault until delivery to the lab.

¶ 20 Nealand testified that she received the sealed bags from Sergeant Doyle and checked to make sure the seals were still intact. After weighing and testing the items, she resealed the bags and returned them to a locked location. For each item contained in Exhibit 2 and 3, she stated at trial that it was in the same or substantially the same condition, except that it was still sealed when she last saw the item. Based on the foregoing testimony, we find that the State’s witnesses adequately established that reasonable measures were used such that it was improbable the evidence was altered. Furthermore, since Lofton presented no actual evidence of tampering, substitution, or contamination at trial, any deficiencies properly went to the weight of the evidence. *Woods*, 214 Ill. 2d at 467. Admission of the evidence was not error.

¶ 21 Lofton disagrees, arguing that the admission of the evidence was error, and such error rose to the level of plain error. He contends that Hernandez’s unnamed supervisor and Sergeant Doyle never testified as to the chain of custody. Therefore, in order to remedy the missing links, the State must show that “the evidence left the hands of one testifying custodian in a sealed envelope or other container and arrived in the hands of the next testifying custodian still in a sealed container, and that the identifying number or code on the container sent out matches that on the container received.” *People v. Johnson*, 361 Ill. App. 3d 430, 441-42 (2005).

Furthermore, he contends the identifying testimony must be more than a general description of

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the items, citing *People v. Howard*, 387 Ill. App. 3d 997, 1004 (2009). He argues that the “State failed to meet the second part of this requirement because there was no showing that a unique identifier connected the bags Hernandez recovered and the bags Nealand tested” which runs afoul of *Johnson* and *Howard*. He claims such error rises to the level of plain error because it constitutes “a complete breakdown in the chain of custody.”

¶ 22 We are not persuaded by Lofton’s argument. Lofton cites to *Howard* as support for his contention that failure to present testimony regarding an inventory number or unique identifier on each evidence bag is reversible error. In *Howard*, a panel in the second district found the absence of a unique identifier on the evidence package significant and held that “as a matter of law” the use of general identifiers such as an officer’s initials, badge number, and date did not satisfy the State’s burden. *Howard*, 387 Ill. App. 3d at 1004-06. However, unlike Lofton here the defendant in *Howard* properly preserved the chain of custody issue for review. Furthermore, in requiring testimony on an inventory number or unique identifier to satisfy the State’s burden, the holding in *Howard* appears to run counter to first district cases such as *Bishop* and *Harris* that endorse the matching descriptions method in determining the admissibility of chain of custody evidence. We note that another panel in the second district declined to follow *Howard*, finding that the rule espoused therein “would curb the flexibility that the case law consistently grants the State in establishing a *prima facie* case.” See *People v. Blankenship*, 406 Ill. App. 3d 578, 593 (2010). We decline to follow *Howard* and find that although the evidence bags had no inventory number or unique identifier attached, admitting the evidence was not reversible error.

¶ 23 Even if error occurred here, it did not rise to the level of plain error. First, the evidence

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in this case is not closely balanced. To prove Lofton guilty of possession of a controlled substance, the State must show that he knew of the presence of the drugs and that they were in his immediate and exclusive control. *People v. Freeman*, 241 Ill. App. 3d 682, 691 (1992). Evidence that Lofton knew that drugs were present and exercised control over them establishes constructive possession. *People v. Smith*, 288 Ill. App. 3d 820, 824 (1997). Officers entered the residence pursuant to a search warrant and found Lofton in the living room. Lofton's girlfriend and some children were also present. After giving him *Miranda* warnings, Imhof asked Lofton whether anything illegal was inside the house, and Lofton told him that there was crack cocaine and cannabis in a bedroom upstairs. Hernandez found the items precisely where Lofton said they were located. Hernandez also testified that he found adult male clothing in the bedroom closet, further supporting the inference that Lofton lived at the residence and had control over the drugs found in the bedroom. See *People v. Herron*, 218 Ill. App. 3d 561, 570 (1991) (court found constructive possession where defendant was present at the house where his estranged wife lived when drugs were recovered, and adult male clothing and accessories were discovered in upstairs bedroom).

¶ 24 Furthermore, the error alleged here is not of such serious nature that it must be addressed in order to preserve the integrity and reputation of the judicial process. A challenge to the chain of custody may be brought under the plain error doctrine "in those rare instances where a complete breakdown in the chain of custody occurs ***." *Woods*, 214 Ill. 2d at 471-72. The lack of corroborating testimony as to a unique identifier or inventory number does not represent a complete breakdown in the chain of custody constituting plain error. In fact, in *Johnson* this

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court indicated that a discrepancy in the inventory number does not rise to the level of plain error when the defendant has waived the issue. In *Johnson* the officer who preserved the evidence and the technician who tested it actually testified as to slightly different case numbers on the label. *Johnson*, 361 Ill. App. 3d at 433-34. Although the defendant did not raise the issue on appeal, the *Johnson* court found that even if he had the issue was waived because he did not object to the evidence at trial. *Johnson*, 361 Ill. App. 3d at 443.

¶ 25 Our supreme court has also dealt directly with the issue of waiver and plain error as they pertain to chain of custody challenges. In *Woods*, the court stated that such challenges may be brought under the plain error doctrine under “limited circumstances.” *Woods*, 214 Ill. 2d at 471. An example of a “rare instance[] where a complete breakdown in the chain of custody occurs” amounting to plain error is when “the inventory number or description of the recovered and tested items do not match.” *Woods*, 214 Ill. 2d at 471-72. In such a case, there exists “a complete failure of proof” linking the substance tested to the substance recovered at the time of the arrest. *Woods*, 214 Ill. 2d at 472.

¶ 26 In *Alsup*, the supreme court clarified its statement in *Woods*. It explained that one must look at “the context of the case” before determining whether a conflict in the inventory number or description of the recovered and tested items constitutes a “complete breakdown” in the chain of custody evidence. *Alsup*, 241 Ill. 2d at 280. It noted that in *Woods*, the only common features in the evidence that described the evidence seized and the evidence tested were the number of items and the assigned inventory numbers. *Alsup*, 241 Ill. 2d at 280. The State presented no testimony as to the procedures used to secure and transport the evidence, or that the “items were

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in the same or substantially the same condition” as when they were recovered. *Alsup*, 241 Ill. 2d at 280. The *Alsup* court reasoned that “[i]t was in the context of this dearth of links in the chain of custody that a mismatch of inventory numbers or tested items could be hypothetically reviewable under plain error.” *Alsup*, 241 Ill. 2d at 280. As discussed above, although there was no evidence of matching inventory numbers or identifiers here, the testimony of Hernandez and Nealand sufficiently established that the condition of the evidence when delivered matched the description of the evidence when examined. See *Harris*, 352 Ill. App. 3d at 69; *People v. Bishop*, 354 Ill. App. 3d 549, 560 (2004). This is not a situation where there was a complete failure of proof linking the substances recovered to those tested. Even if error occurred here the issue is not reviewable as plain error.

¶ 27 Lofton next contends that the prosecutor improperly commented on his exercise of the right to remain silent at trial and in rebuttal closing argument in violation of *People v. Doyle*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). *Doyle* held that commenting on a defendant’s silence for impeachment purposes is impermissible because such silence “may be nothing more than the arrestee’s exercise of [his] *Miranda* rights.” *Doyle*, 426 U.S. at 617-18, S.Ct. At 2244-2245, 45 L.Ed.2d at 97-98. This issue is not preserved for review because Lofton failed to object to the comments at trial. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Before invoking the plain error exception, however, we must first determine whether any error occurred at all. *Herron*, 215 Ill. 2d at 184.

¶ 28 Prosecutors are given wide latitude to comment on the evidence in closing arguments, and the remarks are proper if “based upon facts in the record or reasonable inferences therefrom.”

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People v. Batson, 225 Ill. App. 3d 157, 166 (1992). If a defendant initially agrees to speak after being advised of his *Miranda* rights, but then requests an end to the interview, comments regarding this fact alone without further exploitation by the State is not a *Doyle* violation. *People v. Martinez*, 86 Ill. App. 3d 486, 489 (1980). Furthermore, a “defendant may not predicate error on a response by the prosecutor which he himself provoked.” *People v. Wilson*, 257 Ill. App. 3d 670, 696 (1993) quoting *People v. Carruthers*, 18 Ill. App. 3d 255, 267 (1974).

¶ 29 At trial, Imhof stated that he continued to converse with Lofton, but not about the drugs. The prosecutor asked Imhof, “But he didn’t want to talk to you anymore about the drugs?” Imhof responded, “No, not really, not particularly.” In closing argument, defense counsel stated:

“Now, again as it relates to this oral statement, when I was growing up, my mom used to say believe none of what you hear; half of what you see. As relates to this statement, it’s just a verbal statement that they want you to believe because this officer heard it. Take my mom’s advice, you can infer that you can’t believe it because if it were true, he would have signed a statement. The officer in his training knows, I got to get a statement, and I got to get a signature on it. There is no written statement, therefore, you can infer there was no statement.

If there were a statement at least one of the officers would have corroborated it.”

In rebuttal, the prosecutor commented:

“Now, the Defense Attorney brought up a fact that we don’t have a handwritten statement in this case; that we just have the oral statement of the defendant. Which again I submit to you, ladies and gentlemen, when he knew the police were at his house and he

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knew he was done. That is why he told the police where the drugs were.

But think about this. Who controls the evidence in this case? Well, it's the defendant's drugs. It's the defendant's scale and Ziploc baggies. He's the one that decided

not to talk to the police. He's the one that chose not to give a handwritten statement in this case. It's his choice.

* * *

You folks as members of the community now have a chance to tell this defendant to take responsibility for his actions, actions which he initially fessed up to when the police came, but has been hiding from responsibility since then. You hold him responsible by finding him guilty on both counts.”

Lofton argues that the prosecutor's statements improperly suggested to the jury that his silence is evidence of his guilt, and violated his due process right to remain silent.

¶ 30 The prosecutor's reference at trial that Lofton no longer wanted to talk to Imhof about the drugs was not error. When he first encountered Lofton, Imhof advised him of his *Miranda* rights after which he voluntarily answered Imhof's questions about the presence and location of drugs in the residence. After asking Imhof at trial about Lofton's subsequent refusal to talk any further about the drugs, the State did not mention the incident again in its case-in-chief, or in closing argument. See *People v. Martinez*, 86 Ill. App. 3d 486, 489 (1980) (court found “the fact that [] an interview ended at defendant's request, without exploitation by the State” was not an

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impermissible remark on his silence). In fact, the prosecutor here made the other comments about his refusal to talk only in rebuttal. In asking why the police did not obtain a written statement from Lofton, defense counsel invited the prosecutor's response that Lofton refused to talk any further about the drugs and as such, the police could not obtain a signed statement from him. Lofton cannot complain of error when his counsel's argument invited the prosecutor's comments.

¶ 31 Lofton, however, contends that the prosecutor's comments constituted a *Doyle* violation and cites as support *People v. Earl*, 89 Ill. App. 3d 980 (1980), *People v. Nolan*, 152 Ill. App. 3d 260 (1987), and *People v. Robinson*, 44 Ill. App. 3d 447 (1976). *Earl* and *Nolan* are distinguishable from the case at bar. In *Earl*, the court found a *Doyle* violation when the prosecutor's examination of a police witness at trial brought out the fact that defendant remained silent when questioned by police. *Earl*, 89 Ill. App. 3d at 983. *Earl* is distinguishable because the defendant in that case exercised his right to remain silent from the beginning and never offered to speak with police. Here, Lofton was given *Miranda* warnings and then proceeded to answer Imhof's questions about the drugs before indicating he no longer wanted to speak about the drugs. In *Nolan*, the court found that evidence of the defendant's silence "was elicited by the prosecution and intentionally exploited in closing argument." *Nolan*, 152 Ill. App. 3d at 266. As discussed above, the prosecutor here did not improperly elicit the evidence and commented on Lofton's refusal to speak any further only in rebuttal in response to defense counsel's argument. As for *Robinson*, our supreme court in *People v. Freiburg*, 147 Ill. 2d 326, 356 (1992), recognized that *Robinson*'s holding was abrogated by *Anderson v. Charles*, 447 U.S. 404, 100

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S.Ct. 2180, 65 L.Ed.2d 222 (1980), and *People v. Rehbein*, 74 Ill. 2d 435 (1978). Even if error occurred, it did not rise to the level of plain error prompting review by this court. As discussed before, the evidence is not closely balanced. Also, our supreme court has held “that a comment upon a defendant’s post-arrest silence, while improper, is not an error of such magnitude as to clearly deprive the defendant of a fair trial.” *People v. Herrett*, 137 Ill. 2d 195, 215 (1990).

¶ 32 Lofton also challenges the following prosecutor comments made during rebuttal closing argument as improperly bolstering the credibility of the police witnesses:

“He then points out that you shouldn’t believe the police officers. What he’s basically trying to tell you folks is that the police are lying to you; that there was no male clothing in that closet. Well, let’s think about that. Think about what he’s trying to tell you folks.

Are these police officers going to come in, and are they going to take an oath and perjure themselves to risk their careers, their police pension all for this guy? All for Jerry Lofton? Who is this guy? No, the police are not going to do that. They are not going to go out and just put a case on some guy in Ford Heights just because they want to say there is male clothing. That doesn’t make sense to me.”

The prosecutor, however, made these statements in response to the following in defense counsel’s closing argument:

“Ladies and gentlemen, *** in order for you to find [Lofton] not guilty, you have to believe the police officers who testified from this witness stand in order to say those were his drugs, and he intended to sell them.”

* * *

Now, I want to talk just briefly about Officer – investigator Hernandez’s testimony. He made mention of the fact that when they investigated it or searched this home, they found male clothing in the closet. ***

But when his memory as he concedes was fresher on July 23, 2008, did he put it in his police report, his important police report that summarizes and gathers all the pertinent, relevant, and important facts. Did he put that important fact that he testified to about today in that? No, he did not. And you can infer the reason why he didn’t put it in the police report is because he didn’t find any male clothing in the closet..

Now, when he’s preparing for testimony today, you can infer that he realized, you know what, we got a problem, we made an arrest and you said [Lofton] had this or all these items, but, you know what, we have nothing conclusive. I will say that we found male clothing. That is how they are trying to tighten up their story.”

¶ 33 Lofton is correct that there is no presumption that a police officer is more credible than any other witness. See *People v. Killen*, 217 Ill. App. 3d 473, 481 (1991). However, the prosecutor’s comments here clearly were invited by defense counsel’s argument. Lofton cannot complain of comments made in rebuttal if his counsel provoked the response. *People v. Evans*, 209 Ill. 2d 194, 225 (2004). Moreover, comments that a police officer would not risk his career to commit perjury have been upheld as proper if they “can be characterized as comment on, or discussion of, the credibility of the defendant and other witnesses, and when it is based on the

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evidence and reasonable inferences drawn therefrom.” *Killen*, 217 Ill. App. 3d at 481. Lofton’s theory of the case was that the police had no forensic or physical proof, and no written statement, showing that he had possession of the cocaine found in the bedroom so they had to come up with a story to “tighten up” their case. The officers’ credibility as witnesses was central to the case, and a direct conflict existed between their testimony and defendant’s theory of the case.

Therefore, the prosecutor engaged in proper argument based on the facts in evidence and inferences drawn from those facts.

¶ 34 Cases cited by Lofton to the contrary, *People v. Ford*, 113 Ill. App. 3d 659 (1983), *People v. Clark*, 186 Ill. App. 3d 109 (1989), *People v. Rogers*, 172 Ill. App. 3d 471 (1988), and *People v. Fields*, 258 Ill. App. 3d 912 (1994), are distinguishable from the case at bar. All of the cases involved a situation where the prosecutor made the remarks in closing argument rather than in rebuttal, or the comments did not respond to a specific argument by the defendant. Furthermore, in *People v. Bennett*, 304 Ill. App. 3d 69, 72-73 (1999), this court recognized that to the extent *Ford* and *Clark* hold that remarks about a police officer’s credibility is never a proper subject in closing argument, those cases are inconsistent with our supreme court’s holding in *People v. Flores*, 128 Ill. 2d 66, 94 (1989), that the credibility of witnesses is a proper subject for closing argument if based on “the facts in the record or inferences drawn from those facts.” See also *Killen*, 217 Ill. App. 3d at 481. Since we find no error regarding the prosecutor’s comments, we need not address Lofton’s argument that the cumulative effect of the errors prejudiced him.

¶ 35 Next, Lofton contends his trial counsel was ineffective for failing to file a motion *in limine* to exclude evidence that police also recovered cannabis from the residence. He argues

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that such evidence was irrelevant to the charge of possession of cocaine and served only to prejudice him in the eyes of the jury. To establish a claim of ineffective assistance, defendant must show that his counsel's representation fell below an objective standard of reasonableness, and the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984). There is a strong presumption that counsel's actions indicate trial strategy as opposed to ineffective assistance. *People v. Steward*, 295 Ill. App. 3d 735, 742 (1998). In general, a reviewing court will not second-guess "the exercise of judgment, discretion, trial tactics or strategy even where appellate counsel or the reviewing court might have handled the matter differently." *People v. Schmidt*, 168 Ill. App. 3d 873, 882 (1988). Counsel's competence is determined by the totality of his conduct at trial. *People v. Ruple*, 82 Ill. App. 3d 781, 786 (1980). Whether to file a motion is considered a matter of trial strategy within the sound discretion of counsel. *People v. Bryant*, 128 Ill. 2d 448, 458 (1989).

¶ 36 Here, defense counsel did not file a motion *in limine* to exclude the cannabis because his strategy was to argue that none of the drugs found in the residence belonged to Lofton. Counsel thoroughly cross-examined Imhof and Hernandez, who acknowledged that other than the adult male clothing found in the bedroom closet, no other physical evidence such as mail addressed to Lofton or a lease in his name linked him to the residence. He cross-examined witnesses regarding the lack of fingerprint evidence tying Lofton to the drugs. He questioned the credibility of the police witnesses where Lofton did not give a written statement indicating he had possession of the drugs. Moreover, counsel did file a motion to exclude any reference to gangs believing that it "might cause the jury to infer that my client is a gang member." Trial

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counsel here provided competent representation. The fact that his tactical decision ultimately proved unsuccessful does not render his representation ineffective. *People v. Skillom*, 361 Ill. App. 3d 901, 913-14 (2005). A defendant is entitled to competent, not perfect, representation. *People v. Palmer*, 162 Ill. 2d 465, 476 (1994).

¶ 37 Lofton's final contention is that he was denied a fair trial because the trial court failed to ask each potential juror whether they understood and accepted the four *Zehr* principles as required by Supreme Court Rule 431(b) (Ill. S. Ct. R. 431(b) (eff. May 1, 2007)). He has forfeited review of this issue by failing to object to the error at trial and include the issue in a posttrial motion. *Enoch*, 122 Ill. 2d at 186. He asks, however, that we review his claim as plain error. Before reviewing a claim under the plain error rule, we must first determine whether any error actually occurred. *Herron*, 215 Ill. 2d at 184.

¶ 38 Rule 431(b) provides:

“The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects.”

The court's method of inquiry shall provide each juror an opportunity to respond

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to specific questions concerning the principles set out in this section.” R. 431(b) (eff.

May

1, 2007).

¶ 39 Our supreme court held that in order to comply with Rule 431(b), “[t]he trial court must ask each potential juror whether he or she understands and accepts each of the principles in the rule.” *People v. Thompson*, 238 Ill. 2d 598, 607 (2010). Although questioning may be done either individually or in a group, each prospective juror must have an opportunity to respond concerning his or her understanding and acceptance of those principles. *Thompson*, 238 Ill. 2d at 607. Inquiring whether prospective jurors understand the principles, without asking whether they also accept the principles, violates Rule 431(b). *Thompson*, 238 Ill. 2d at 607. Rule 431(b) however, does not dictate that the trial court may only use the words “understands and accepts” in its inquiry of prospective jurors. See *Blankenship*, 406 Ill. App. 3d at 583. In *People v. Magallanes*, 409 Ill. App. 3d 720, 752-53 (2011), this court held that asking whether prospective jurors “disagreed” with the principles was sufficient to confirm whether they understood and accepted the *Zehr* principles. See also *Blankenship*, 406 Ill. App. 3d at 583 (asking whether jurors “agreed” with the *Zehr* principles was proper).

¶ 40 During jury selection, the trial court addressed the entire venire by stating that he would be asking them questions, and “[i]f your answer to any of these questions is yes, I want you to raise your hand again and I will ask you your name.” The trial court then asked:

“A defendant in a case like this is presumed to be innocent until a jury determines

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after deliberation that the person is guilty beyond a reasonable doubt. Does anybody disagree with this rule of law? No one raised their hand.

The State has the burden of proving a defendant guilty beyond a reasonable doubt. Does anybody disagree with this rule of law? No one raised their hand.

A defendant does not have to present any evidence at all and may rely upon the presumption of innocence. Does anybody disagree with this rule of law? No one raised their hand.

A defendant does not have to testify. Would any of you hold the fact the defendant did not testify against that person. No one raised their hand.”

¶ 41 The trial court here complied with Rule 431(b) as to the first three principles by asking the venire whether anyone disagreed with each principle, and giving each potential juror the opportunity to respond by raising his or her hand. Regarding the fourth principle, the trial court stated that a defendant does not have to testify, and asked if he does not testify would anyone hold that fact against him. No one raised their hand. The words used by the trial court “clearly indicated” to the jurors that it was asking whether they understood and accepted the principle. *People v. Digby*, 405 Ill. App. 3d 544, 548 (2010) (trial court complied with the rule when it asked whether jurors would hold defendant’s failure to testify against him). The trial court here also complied with Rule 431(b) as to the fourth principle.

¶ 42 Lofton contends, however, that when the trial court subsequently addressed the chosen jurors individually it failed to ask whether each person understood and accepted the third principle, but instead asked two questions about the fourth principle. The trial court complies

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with Rule 431(b) when it addresses the venire as a group as long as each person has an opportunity to respond. See *Thompson*, 238 Ill. 2d at 607. There is no requirement that the court address each juror individually. In the case at bar, the trial court complied with the rule when it initially addressed the entire venire and asked potential jurors to raise his or her hand if they disagreed with the stated principle. No error occurred here.

¶ 43 Even if there was error, it did not rise to the level of plain error. First, as discussed above, the evidence is not so closely balanced that the guilty verdict may have resulted from the error. Second, Lofton has not satisfied the second prong of plain error analysis. Under this prong, “[p]rejudice to the defendant is presumed because of the importance of the right involved.” *Herron*, 215 Ill. 2d at 187. Rule 431(b) violations, however, do not affect such substantial rights. Although the rule requires mandatory questioning, a trial court’s failure to comply with the rule does not necessarily result in a biased jury. *Thompson*, 238 Ill. 2d at 610. “Rule 431(b) questioning is simply one way of helping to ensure a fair and impartial jury.” *Id.* Therefore, in order for this court to review Lofton’s claim under this prong, he must present evidence that errors in the trial court’s questioning resulted in a biased jury. See *Thompson*, 238 Ill. 2d at 614. He acknowledges that he did not satisfy his burden as to this prong of plain error analysis; therefore, his claim is not reviewable under the plain error rule.

¶ 44 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 45 Affirmed.