

No. 1-08-3493

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FIRST DIVISION
June 13, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,) Appeal from the
) Circuit Court of
Plaintiff-Appellee,) Cook County.
)
v.) No. 07 CR 10824
)
JABER WILSON,) Honorable
) Joseph G. Kazmierski,
Defendant-Appellant.) Judge Presiding.

PRESIDING JUSTICE HALL delivered the judgment of the court.
Justice Lampkin concurred in the judgment.
Justice Rochford specially concurred in the judgment.

O R D E R

HELD: Admission into evidence of the defendant's videotaped interview with authorities was not an abuse of discretion. Prosecutors' closing argument and rebuttal remarks, which were

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preserved for review, were proper; remarks, which were not preserved for review, did not constitute plain error and were forfeited. In the absence of plain error, the defendant forfeited his claim that the trial court failed to comply with Supreme Court Rule 431(b).

Following a jury trial, the defendant, Jaber Wilson, was found guilty of first degree murder in connection with the death of Geno Moffett. The trial court sentenced the defendant to 65 years' imprisonment in the Department of Corrections. On appeal, the defendant contends: (1) the admission of the videotape of the defendant's interview with authorities into evidence was error or, in the alternative, defense counsel was ineffective for failing to raise a proper objection to the admission of the videotape; (2) the prosecutors' closing and rebuttal arguments deprived the defendant of a fair trial; and (3) the trial court's failure to comply with Supreme Court Rule 431(b) was reversible error.

In the late evening hours of September 20, 2006, Mr. Moffett was inside the Buchanan Barbershop, located at 430 East 75th Street, when he was fatally shot. Police recovered a fired bullet from the floor in the front part of the barbershop. The assistant medical examiner testified that two bullets were

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recovered from Mr. Moffett's body. According to the ballistics expert, the bullets were all fired from the same gun, most likely a Colt revolver: probably a .357 or .38 special caliber.

At the time of the shooting, several individuals were in the barbershop, including eyewitnesses, Markis Robinson and Jamique Walker. Their testimony is summarized below.

Mr. Robinson testified that he had known Mr. Moffett for ten years and that they were friends. On the evening of September 20, 2006, he was in the barbershop having his hair cut by Mr. Walker when Mr. Moffett arrived. Shortly after 11 p.m., three men arrived: Eric, Reese and J. Bird. Mr. Robinson identified the defendant as J. Bird. Mr. Walker began cutting Eric's hair while Mr. Moffett sat on the counter behind the barber chair. Mr. Robinson was sitting in a dryer chair. The defendant began to argue with Mr. Robinson, accusing him of a robbery. When Mr. Robinson refused to continue the argument, the defendant pulled a black revolver from his waist and stood up. Mr. Moffett approached the defendant, who warned him off. When Mr. Moffett continued to walk toward the defendant, the defendant shot him in the stomach. Mr. Moffett stepped back, saying it was okay. The defendant then shot Mr. Moffett a second time. Mr. Moffett fell

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to the floor. The defendant then shot him a third time.

Mr. Robinson testified further that he remained in the dryer chair during the shooting. Mr. Walker and he then ran to the back of the barbershop. The defendant remained standing over Mr. Moffett's body. Mr. Robinson then saw the defendant run out of the barbershop. After a minute or two, Mr. Robinson ran out of the barbershop and drove away in Mr. Moffett's Range Rover.

Mr. Robinson further testified that he was then stopped by police on 79th Street and questioned about the shooting at the barbershop. He was taken to the police station where he viewed a photo array. Mr. Robinson identified the defendant's photograph and told the police that the defendant was the shooter.

On cross-examination, Mr. Robinson acknowledged that he did not know the defendant and could not recall what the defendant was wearing the night of the shooting. He admitted that when the police stopped him, he denied that he was at the scene of the shooting. On redirect examination, Mr. Robinson testified that, prior to the shooting, he had seen the defendant once before and knew him by the nickname of J. Bird. He explained that when the police pulled him over, he was confused and scared.

Mr. Walker testified that he had been convicted of burglary

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in 2001. He knew the defendant from cutting his hair. Mr. Walker's testimony as to the events surrounding the shooting of Mr. Moffett was consistent with that of Mr. Robinson. He confirmed Mr. Robinson's testimony that Mr. Moffett was shot by the defendant while attempting to intervene in the argument between Mr. Robinson and the defendant. When the police arrived, Mr. Walker told them that the defendant was the shooter.

Mr. Walker testified that he had viewed a surveillance video from the real estate office next door to the barbershop; the video showed the entrance to the barbershop. He testified that the surveillance tape truly and accurately depicted the scene. Viewing the videotape, Mr. Walker saw the defendant, Eric and an unknown man enter the barbershop. Some kids also entered the barbershop around the same time. He also viewed the defendant, Mr. Robinson and Eric, still wearing the barber cape, exit the barbershop.

Mr. Walker further testified that in the early morning hours of September 21, 2006, he viewed two photo arrays at the police station. He was not able to make an identification from the first photo array. Mr. Walker mentioned to police that J. Bird had been shot in a previous incident and described where the

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incident took place. He was shown a second photo array in which he identified the defendant's photograph and told police he was the shooter.

Over the defendant's objection, the surveillance video was then shown to the jury. Mr. Walker pointed out Eric, the unknown man and the defendant as they entered the barbershop. He pointed out the unknown man exiting the barbershop. Next, he pointed out another unknown man exiting the shop followed by the kids. Then he pointed out the defendant exiting the barbershop. The defendant had a dark object in his right hand, which Mr. Walker stated was a gun. Next, he pointed out Eric, still wearing the barber cape, and Mr. Robinson exiting the barbershop. Finally, he identified himself, as he exited the shop.

On cross-examination, Mr. Walker denied telling police at the scene anything other than the defendant was the shooter. He denied telling the detectives at the police station that there was a struggle between the defendant and Mr. Moffett. He did not recall telling Detective Golab that Eric was wearing a red shirt, rather than the white one he had earlier described him wearing. He stated that the defendant used his right hand to fire the gun. After defense counsel asked if he knew that the defendant's right

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hand was injured, Mr. Walker explained that the defendant used both hands to fire the gun. He acknowledged that a charge of forgery was pending against him.

On redirect examination, Mr. Walker testified that he knew the defendant had injured his right hand prior to the shooting. He was already a witness in this case when he was charged with forgery. No promises or threats were made to him to secure his testimony.

Detective Wade Golab testified that on November 3, 2006, assistant state's Attorney Art Heill (ASA Heill) and he had a conversation with the defendant. The conversation was videotaped. Detective Golab had viewed the videotape and testified that it truly and accurately depicted the sound and video of the conversation. Over the defendant's objection, the videotape was then played for the jury. On cross-examination, Detective Golab testified that, according to his notes, Mr. Walker described Eric as wearing an orange or red shirt.

The defense presented the testimony of Officer Michael Edens. Officer Edens testified that at 11:34 p.m., on September 20, 2006, he and his partner, Officer Williems, were on patrol in the area of 5428 West Madison Street. Responding to a call, they

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observed a group of people. They stopped and interviewed a individual named John Adams. A pat-down of Mr. Adams revealed a nine millimeter Colt Python 357 revolver. Mr. Adams was then arrested. On cross-examination, Officer Edens testified that 5400 West Madison is on the west side of the City of Chicago and was approximately 15 to 16 miles from the barbershop location at 430 East 75th Street. There was no evidence that Mr. Adams had access to a car; he was waiting for a bus when police questioned him. The revolver recovered from him was chrome with rust on it.

Officer Christopher Doherty testified that on September 20, 2006, he had a conversation with Mr. Walker about the shooting. Mr. Walker told him that Mr. Moffett and the "offender" were wrestling on the floor and that Mr. Walker was running to the basement when he heard the shots. On cross-examination, Officer Doherty testified that Mr. Walker told him the identify of the offender.

During deliberations, the trial court granted the jury's request to view the surveillance video and the interview videotape. Later, the jurors sent a note asking what happened if they could not agree on a verdict. The trial court advised them to keep deliberating. The jury returned a verdict finding the

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defendant guilty of first degree murder. The jury further found that he personally discharged a firearm that caused death to another person. The trial court imposed a 65-year sentence. This appeal followed.

ANALYSIS

I. Admission of the Videotaped Interview

The defendant contends that his constitutional rights to a fair trial and to confront the witnesses against him were violated when the trial court allowed the videotape of his interview with authorities to be admitted into evidence and published to the jury during the trial and viewed again by the jury during deliberations. The defendant maintains that the videotape contained inadmissible opinion evidence, hearsay statements and evidence that the defendant had committed other crimes unrelated to the present offense.

A. Facts

Prior to playing the videotape, the prosecutor informed the trial court that the video had been redacted to remove the defendant's references to his prior criminal activity. The prosecutor also drafted an instruction to be given to the jury prior to showing them the videotape. Defense counsel objected to

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showing the videotape, even with the redactions. He pointed out that the videotape showed the defendant wearing a yellow Illinois Department of Corrections uniform with the "IDOC" logo on it and that, during the interview, Detective Golab mentioned that he (the detective) was in Joliet. After the court and the attorneys viewed a portion of the videotape, the court concluded that the defendant appeared to be wearing a yellow shirt and that nothing in the videotape indicated that the defendant was in a penitentiary.

Prior to the jury viewing the videotape, the trial court instructed the jury as follows:

"Members of the jury, I am going to instruct you now that you are going to view this video recording concerning the matter on trial. That has been edited with the participation and consent of the parties involved. You should not question the reason for this procedure nor should you speculate about the possible content of the original video or the portions that have been edited."

Pertinent to the defendant's claims of error, on the videotape, the defendant initially denied being in the barbershop on the night of September 20, 2006. Detective Golab told the

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defendant that the surveillance video and the witnesses identified him as the shooter. At one point, another individual entered the interview room:

"ASA HEIL: All right you just - uh- there is a sheriff - Cook County Illinois Department of Corrections Sheriff here in the room. Why don't you come in and introduce yourself so that you can make yourself a witness now.

OFFICER PORTERS: Okay. I'm officer Don Porters. I work for the Investigations Unit here in Statesville."

As the interview continued, the defendant admitted he was in the barbershop that night but denied killing the victim. He maintained that he had a close relationship with the victim. According to the defendant, a few days prior to September 20, 2006, someone tried to break into the house where he was staying. He decided to flee, thinking it was the police. When he realized it was not the police, he opened the door, and a man put a gun to his head. The defendant and a friend wrestled the man to the floor and got his gun. The man then fled the house. The defendant recognized the man as "Mark."

The interview continued with the defendant explaining that on the night of September 20, 2006, he was walking by the

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barbershop when he recognized "Mark" (Mr. Robinson) as one of the men in the barbershop. The defendant went inside and started talking to Mr. Moffett, who told him he had a car for sale. The defendant then turned his attention to Mr. Robinson, telling him he had a gun for sale. The defendant denied that he had a gun in his possession that night; he was only telling Mr. Robinson that because he was referring to the gun he had taken from him. As the defendant and Mr. Robinson continued to argue, another man entered the shop and started to argue with Mr. Moffett. The defendant heard a shot and ran to the back of the barbershop with everyone else. The only description of the man the defendant could give was that he was black.

The defendant stated that a friend of his accompanied him to the barbershop that night, but he refused to reveal his name. The defendant also stated that, after the shooting, he ran to his house at 7526 South Eberhardt Street and told his uncle, Alexis Harris, that Mr. Moffett had been shot. He then went to his grandmother's residence; he had already planned to go there prior to the shooting.

The defendant admitted that he had lied about not being in the barbershop but continued to deny killing Mr. Moffett. When

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the defendant stated that he knew that the detective did not believe him, the following exchange took place:

"DETECTIVE GOLAB: Yes, you know and you know why I don't believe you, Jaber.

JABER: Why?

DETECTIVE GOLAB: You know why I don't believe you. In your heart and in your mind, you know why I don't believe you, don't you?

JABER: No."

After the jury viewed the videotape, defense counsel objected to the expressions of opinion by the detective and the ASA, particularly as to their belief that the defendant was lying about the shooting. Defense counsel also noted that when the defendant stood up, it was clear he was wearing a yellow jumpsuit and the "IDOC" logo was visible. Defense counsel pointed out that from Officer Porters' statement on the videotape, the jury knew that the interview was taking place at the Statesville correctional facility. Finally, he noted that the defendant admitted to the illegal act of selling a gun. The trial court denied defendant's motion for a mistrial, commenting that "all of you knew what was on the tape. I didn't. *** you could have told

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me about that and I would have taken a look at it. I am not a mind reader."

B. Standard of Review

The court applies a de novo standard of review to determine if an individual's constitutional rights have been violated. *People v. Burns*, 209 Ill. 2d 551, 560, 809 N.E.2d 107 (2004). The admission of a videotaped police interview with a defendant is reviewed for an abuse of discretion. *People v. Bryant*, 391 Ill. App. 3d 228, 245, 907 N.E.2d 862 (2009). " 'An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court.' " *People v. Patrick*, 233 Ill. 2d 62, 68, 908 N.E.2d 1 (2009) (quoting *People v. Hall*, 195 Ill. 2d 1, 20, 743 N.E.2d 126 (2000)).

C. Discussion

As a general rule, if the evidence is relevant, it is admissible. *Bryant*, 391 Ill. App. 3d at 244. Evidence is relevant if it tends to make the existence of any fact in consequence more or less probable than it would be without the evidence. *Bryant*, 391 Ill. App. 3d at 244. However, even if

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relevant, evidence should be excluded if its prejudicial impact substantially outweighs its probative value. *Bryant*, 391 Ill. App. 3d at 244.

1. Opinion and Hearsay Statements on the Videotape

The defendant argues that it was error to allow the jury to hear Detective Golab's and ASA Heil's opinions and hearsay statements that the defendant was lying, that the defendant was the shooter and that they had witnesses and evidence to prove that the defendant was the shooter. The defendant relies on *People v. Munoz*, 398 Ill. App. 3d 455, 923 N.E.2d 898 (2010).

In *Munoz*, a detective testified that he did not believe the defendant's versions of the offense and did not believe that the defendant ever told him the truth. The reviewing court held that the officer's testimony was an impermissible comment on the ultimate issue of the defendant's credibility. Therefore, its admission was error. *Munoz*, 398 Ill. App. 3d at 488-89. Such opinion evidence is impermissible because it usurps the province of the jury as the fact-finder. *Munoz*, 398 Ill. App. 2d at 489. *Munoz* is distinguishable from the present case, because Detective Golab and ASA Heil were not testifying; they voiced their opinions to the defendant, not to the jury. See *People v.*

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Hanson, 238 Ill. 2d 74, 101, 939 N.E.2d 238 (2010).

In order to constitute hearsay, the statement must be offered to establish the truth of the matter asserted in the statement. *People v. Gonzalez*, 379 Ill. App. 3d 941, 954, 884 N.E.2d 228 (2008). "The primary rationale for the exclusion of hearsay testimony is the inability of the opposition to test the testimony's reliability through cross-examination of the out-of-court declarant." *People v. Weatherspoon*, 394 Ill. App. 3d 839, 850, 915 N.E.2d 761 (2009). Where the out-of-court statement is offered to prove its effect on the listener's mind or to show why the listener subsequently acted as he did, the statement does not constitute hearsay and is admissible. *Gonzalez*, 379 Ill. App. 3d at 941.

The defendant was repeatedly urged to tell the detective and the ASA his version of the events. By telling the defendant that they had witnesses and evidence identifying him as the shooter, Detective Golab and ASA Heil intended to provoke a response from the defendant to that question. Therefore, the statements in this case were not hearsay.

The defendant argues that the prejudicial impact of the statements was greater than their probative value, as the

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statements portrayed him to the jury as a liar and a murderer. However, it was the defendant who acknowledged that he lied when he denied being in the barbershop on the night of September 20, 2006. Moreover, the defendant's statements in the interview established his presence in the barbershop at the time of the shooting and confirmed the testimony of the eyewitnesses as to the events immediately proceeding the shooting. Therefore, the probative value of the statements was not outweighed by any prejudice to the defendant.

2. Other Crimes Evidence

The defendant argues that the admission of the videotape was also error because it contained evidence that the defendant had committed other crimes. The defendant points out that the jury could see that the defendant was attired in a prison uniform. The jury also heard Officer Porters state that he was a corrections officer in charge of investigations "here in Statesville." The jury also heard the defendant say that he wanted to sell a gun, which belonged to Mr. Robinson, and that the defendant had attempted to flee when he thought it was the police, rather than Mr. Robinson, trying to enter the residence where he was staying.

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Evidence of crimes for which the defendant is not on trial is not admissible to establish his propensity to commit crime. *People v. Jackson*, 399 Ill. App. 3d 314, 321, 926 N.E.2d 786 (2010). Such evidence " 'overpersuades the jury, which might convict the defendant only because it feels he or she is a bad person deserving punishment.' " *Jackson*, 399 Ill. App. 3d at 322 (quoting *People v. Lindgren*, 79 Ill. 2d 129, 137, 402 N.E.2d 238 (1980)).

We agree with the State that the defendant's reference to selling the gun was not evidence of other crimes. It is clear from the defendant's statement that he was attempting to get a reaction from Mr. Robinson by reminding him that he had taken Mr. Robinson's gun away from him.

However, the fact that the defendant was seen in prison attire coupled with Officer Porters' comment about being in Statesville, the jury could reasonably infer that the defendant was in prison. We are not persuaded by the State's explanation that the jury would likely have believed that he was in custody for the Moffett shooting. Detective Golab's initial comments indicated that the defendant had yet to be charged with Mr. Moffett's murder. We also disagree that the defendant appeared

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to be wearing a yellow shirt. On the videotape, the defendant could be seen standing up and turning, making it clear that he was wearing a yellow jump suit with a logo on the back. Finally, it was a reasonable inference that the defendant's need to avoid apprehension by the police was because he had committed a criminal offense.

The erroneous admission of other crimes evidence does not always require that the defendant receive a new trial. *People v. Adkins*, 239 Ill. 2d 1, 33, 940 N.E.2d 11 (2010). Where the improperly-admitted other-crimes evidence was not a material factor in the defendant's conviction, reversal is not required. *Atkins*, 239 Ill. 2d at 34. The evidence against the defendant included his identification as the shooter by two eyewitnesses and the presence of the defendant on the surveillance video.

Moreover, the probative value of the videotape outweighed any prejudice to the defendant. The defendant's statements on the videotape confirmed his presence at the barbershop on the night of the shooting and confirmed the testimony of the eyewitnesses as to the events immediately prior to the shooting of Mr. Moffett.

The defendant argues that the jury's note asking what would

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happen if it could not reach an agreement indicated that the evidence was closely balanced. Therefore, he was prejudiced by the admission of the other-crimes evidence. The defendant's reliance on *People v. Ehlert*, 274 Ill. App. 3d 1026, 654 N.E.2d 705 (1995), is misplaced. In that case, the jury had deliberated over a three-day period before advising the trial court it could not reach an agreement. The reviewing court's determination that the evidence was closely balanced was based not only on the jury's note, but on the fact that the evidence against the defendant was not overwhelming and that the State virtually conceded in closing argument that proof beyond a reasonable doubt was lacking. *Ehlert*, 274 Ill. App. 3d at 1035.

At best, a jury's difficulty in reaching a verdict is but one factor in determining whether the evidence is closely balanced. *People v. Smith*, 341 Ill. App. 3d 530, 543, 794 N.E.2d 367 (2003). The defendant does not state how long the jury deliberated prior to sending the note to the trial judge. The record reflects that the jury reached a verdict on the same day as the trial. Moreover, the note from the jurors did not indicate the reason they could not reach an agreement. See *Smith*, 341 Ill. App. 3d at 543. Finally, the evidence against

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the defendant was overwhelming.

We conclude that the trial court did not abuse its discretion by admitting the videotape recording into evidence. The videotape was relevant and its probative value outweighed any prejudice to the defendant. Moreover, we find no abuse of discretion in granting the jury's request to view the videotape during deliberations. We note that the jury's viewing of the videotape during deliberations took place in the courtroom, not in the jury room. The record indicates that the parties and the court reporter were not present for the viewing.

Generally, all admitted evidence that is relevant to any material issue may be taken into the jury room unless it is so prejudicial that its only purpose is to inflame the emotions of the jury. *People v. Burrell*, 228 Ill. App. 3d 133, 144, 592 N.E.2d 453 (1992). The videotape was properly admitted into evidence, and we cannot say that allowing the jury to view the videotape a second time was purely to arouse the jury's emotions so as to prejudice the defendant.

Finally, the defendant alleged that defense counsel was ineffective because counsel failed to preserve the error in admitting the videotape into evidence for review. As we have

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reviewed the alleged error on its merits, defense counsel was not ineffective.

II. Closing Argument

The defendant contends that the prosecutors' remarks in closing and rebuttal argument denied him a fair trial.

A. Standard of Review

There is a conflict as to whether the proper standard of review for closing arguments is de novo (*People v. Wheeler*, 226 Ill. 2d 92, 871 N.E.2d 728 (2007)) or abuse of discretion (*People v. Blue*, 189 Ill. 2d 99, 724 N.E.2d 920 (2000)). In this case, we would reach the same conclusion under either standard. See *People v. Maldonado*, 402 Ill. App. 3d 411, 422, 930 N.E.2d 1104 (2010).

B. Forfeiture

Initially, we must determine whether the defendant has preserved the error as to the complained of remarks by both an objection at trial and by raising the error in a posttrial motion. *People v. Johnson*, 385 Ill. App. 3d 585, 604, 898 N.E.2d 658 (2008). The following complained-of remarks were preserved for our review because they were both objected to at trial and raised in the defendant's posttrial motion: (1) a defense of

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desperation; (2) the defendant came up with the worst defense; (3) defense counsel could have asked Mr. Walker about his interaction with police when he identified the defendant's photograph; and (4) requesting the jury to teach the defendant a lesson. The remaining remarks claimed as error in the defendant's brief on appeal were not properly preserved for review and are forfeited.

The defendant has requested that we review the forfeited remarks for plain error. Ill. R. St. 615(a). We will first consider the remarks preserved for review.

C. Discussion

A "defendant faces a substantial burden in attempting to achieve reversal based upon improper remarks made during closing argument." *People v. Williams*, 332 Ill. App. 3d 254, 266, 773 N.E.2d 143 (2002). In reviewing a defendant's claims of prosecutorial misconduct in closing argument, we consider the closing argument in its entirety in order to place the complained-of remarks in context. *Johnson*, 385 Ill. App. 3d at 604.

Even if improper, a prosecutor's remarks in closing arguments require reversal only if the remarks created

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substantial prejudice. Wheeler, 226 Ill. 2d at 123. Substantial prejudice occurs "if the improper remarks constitute a material factor in a defendant's conviction." Wheeler, 226 Ill. 2d at 123.

I. Remarks Preserved for Review

The record reveals that the trial court sustained the defendant's objections to the prosecutor's characterization of his defense as "the defense of desperation," and to the prosecutor's remark to the jury that it was "time to teach the defendant his own lesson." Error in a prosecutor's closing argument is usually cured when the court sustains the objection or admonishes the jury. *People v. Perkins*, 247 Ill. App. 3d 778, 786, 617 N.E.2d 903 (1993). The error may also be cured by a proper explanation of the law given by the court in its instructions. *Perkins*, 247 Ill. App. 3d at 786.

In the present case, the trial court sustained the objections but did not immediately instruct the jury to disregard the prosecutors' remarks. However, prior to closing arguments, the trial court verbally instructed the jurors that they should disregard any arguments or statements by the attorneys in closing arguments not based on the evidence. In addition, the jury

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received a written instruction to disregard remarks not based on the evidence.

We conclude that the trial court's sustaining the objections to the prosecutors' remarks and its oral and written instructions to the jury were sufficient to prevent prejudice to the defendant.

Next, the defendant argues that the prosecutor improperly shifted the burden of proof to the defendant by arguing that defense counsel could have questioned Mr. Walker about what the police told Mr. Walker when he identified the defendant's photograph. A prosecutor may comment on the evidence presented and the reasonable inferences from that evidence, even if the inferences are unfavorable to the defendant, and may respond to comments made by defense counsel, which clearly invited a response. *People v. Hudson*, 157 Ill. 2d 401, 441, 626 N.E.2d 161 (1993).

The prosecutor's remark was in response to defense counsel's argument that there was no evidence as to what the detectives said to Mr. Walker or Mr. Robinson when they were taken to the police station. The prosecutor's remark was proper and did not amount to shifting the burden of proof to the defendant.

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Moreover, the prosecutor's comment that the defendant had put forth the worst defense was not improper. It was in response to defense counsel's argument that there were unknown individuals in the barbershop that night, who had not been accounted for by the State's evidence. It was also a comment on the evidence that the defendant refused to identify the man who accompanied him to the barbershop on the night of the shooting.

We conclude that the prosecutor's remarks were not improper and the objections thereto were properly overruled.

2. Remarks Not Preserved for Review

The defendant contends that the prosecutor improperly directed the jury's attention to the pain and suffering of Mr. Moffett's family and made an emotional appeal to the jury in arguing that Mr. Walker and Mr. Robinson were meant to be in the barbershop that night. He maintains that the prosecutor improperly argued that the defendant intended to kill Mr. Robinson and Mr. Walker and that the witnesses were fearful of testifying, as there was no evidence to support those arguments. The defendant further argues that the prosecutor improperly commented on the defendant's failure to testify when he referred to the defendant's lack of protest when he was told he would be

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charged with Mr. Moffett's murder. Finally, the defendant argues that the prosecutor personally attacked defense counsel by arguing that the defense was trying to distract the jurors from the "truth" and trying to "sell" the jury a defense.

The first step in a plain error analysis is to determine if error occurred. *People v. Hudson*, 228 Ill. 2d 181, 191, 886 N.E.2d 964 (2008). If we determine that error was committed, we may consider the forfeited error in either of two circumstances: (1) when the evidence is closely balanced, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 186-87, 830 N.E.2d 467 (2005).

We have considered the complained-of remarks in the context of the entire closing argument. On balance, the prosecutor's remarks were based on the evidence, the reasonable inferences from the evidence, or were in response to defense counsel's argument. For example, the references to Mr. Moffett's family were based on the testimony of his grandmother. See *People v. Figueroa*, 381 Ill. App. 3d 828, 886 N.E.2d 455 (2008). The prosecutor's rebuttal argument that Mr. Walker did not wish to be a witness did not suggest that he was afraid that the defendant

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intended to kill or intimidate him, but rather the difficulty he faced in confronting the defendant in light of the shooting. The remark was in response to defense counsel's comments describing Mr. Walker's demeanor while testifying as "mumbling," "yawning," "just unbelievable" and "not a good witness." The prosecutor's comments that the defense was trying avoid the truth and sell the jury a defense, was not a personal attack on defense counsel but on putting forth a defense directly contradicted by the eyewitness testimony.

Finally, it is improper for a prosecutor to directly or indirectly comment on the defendant's failure to testify because it violates the defendant's constitutional right to remain silent. *People v. Wilson*, 257 Ill. App. 3d 670, 695, 628 N.E.2d 472 (1993). "The test is whether the prosecutor's comment 'was intended or calculated to direct the attention of the jury to defendant's failure to testify.' " *Wilson*, 257 Ill. App. 3d at 695 (quoting *People v. Benoit*, 240 Ill. App. 3d 185, 189, 608 N.E.2d 250 (1992)). The prosecutor's remark did draw the jury's attention to the fact that the defendant did not react when told he was being charged with Mr. Moffett's murder. In *People v. Balderas*, 241 Ill. App. 3d 845, 858, 609 N.E.2d 936 (1993), the

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reviewing court concluded that the prosecutor's comment on the defendant's lack of outcry when he was identified as the gunman was improper but not plain error. The court noted that the supreme court had held that even though the error involved constitutional rights, "it is 'not of such a character that the second prong of the plain error rule must be invoked to preserve the integrity and reputation of the judicial process.' " Balderas, 241 Ill. App. 3d at 858 (quoting People v. Herrett, 137 Ill. 2d 195, 215, 561 N.E.2d 1 (1990)).

Finally, we reject the defendant's argument that the cumulative effect of the prosecutor's comments requires a new trial. Even if some of the comments were improper, in light of the overwhelming evidence, they were not a material factor in the defendant's conviction and did not deny him a fair trial.

The defendant has failed to establish either prong of the plain-error analysis. The evidence in this case was overwhelming, and the prosecutor's comments did not deprive him of a fair trial. Our courts recognize that the plain-error rule is a limited exception to the forfeiture rule and is not a general savings clause for errors affecting a defendant's rights, which were not brought to the trial court's attention. See

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Balderas, 241 Ill. App. 3d at 858 (citing Herrett, 137 Ill. 2d at 215-16). Therefore, the defendant has forfeited his claim of error as to the complained-of remarks he failed to preserve for review.

III. Voir Dire

The defendant contends that the trial court's failure to comply with Supreme Court Rule 431(b) (eff. May 1, 2007), requires that he receive a new trial.

A. Standard of Review

We review an issue as to compliance with a supreme court rule de novo. *People v. Lloyd*, 338 Ill. App. 3d 379, 384, 788 N.E.2d 1169 (2003).

B. Discussion

Our review of the record confirms the defendant's contention that the trial court failed to ascertain from three of the jurors in this case whether they understood and accepted the Rule 431(b) principle that the defendant's failure to testify may not be held against him. The record also refutes the State's contention that defense counsel questioned these jurors as to whether they understood and accepted that principle. Other courts have held that the trial court need not use the terms "understand" and

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"accept" to comply with the rule. See *People v. Digby*, 405 Ill. App. 3d 544, 939 N.E.2d 581 (2010). We have chosen to be guided by our supreme court's decision in *People v. Thompson*, 238 Ill. 2d 598, 939 N.E.2d 403 (2010), which we read as discouraging divergence from the actual language used in the rule. See *People v. Fountain*, No. 1-08-3459, slip op. at 19 (Ill. App. Feb. 25, 2011).

While acknowledging that he failed to preserve the error for review, the defendant maintains that the forfeiture rule should be relaxed because the judge's conduct is involved. We disagree. Only the most compelling situations require relaxation of the forfeiture rule. *People v. McLaurin*, 235 Ill. 2d 478, 488, 922 N.E.2d 344 (2009). If defense counsel believed that the trial court had not fully complied with Rule 431(b), counsel could have requested to be heard on the issue outside the presence of the jury. Nothing in the record suggests that such a solution would have been impractical in this case.

The forfeited error may be reviewed for plain error. We have already determined that error occurred. We may consider the error in either of two situations: (1) where the evidence is close, regardless of the seriousness of the error, or (2) where

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the error is serious, regardless of the closeness of the evidence. *Herron*, 215 Ill. 2d at 186-87.

The defendant cannot satisfy the first prong of the analysis. As we have previously stated, the evidence against the defendant was overwhelming. As for the second-prong, a violation of Rule 431(b) is not a structural error requiring automatic reversal. *Thompson*, 238 Ill. 2d at 611. Reversal is required only if the defendant established that the error resulted in a biased jury. *Thompson*, 238 Ill. 2d at 614-15. The defendant has presented no evidence establishing that he was tried by a biased jury.

In the absence of plain error, there is no basis for excusing the defendant's procedural default. The claim of error is forfeited.

CONCLUSION

The trial court did not abuse its discretion in admitting the videotape of the defendant's interview with Detective Golab and ASA Heil into evidence. The prosecutors' remarks in closing and rebuttal arguments were proper, and the defendant failed to establish plain error as to remarks not preserved for review. The defendant failed to establish plain error with respect to his

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forfeited claim of Rule 431(b) error.

The defendant's conviction and sentence are affirmed.

Affirmed.

JUSTICE ROCHFORD specially concurs with the judgment of the court:

I concur in the judgment affirming defendant's conviction because the evidence against him was overwhelming. However, I respectfully write separately to indicate my concern with the admission of the videotape of defendant's interview with authorities. The videotape consisted of more than just defendant's relevant admissions. The videotape also contained hearsay statements from ASA Heil, irrelevant expressions of personal opinions regarding defendant's credibility from ASA Heil and Detective Golab, and other-crimes evidence (including a depiction of defendant in his prison uniform.) The jury reviewed the videotape twice. The trial court gave no limiting instruction regarding the videotape's content. I do not agree with the majority that the probative value of the videotape outweighed any prejudice to defendant, and, thus, I would hold that the admission of the videotape was error.

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