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FIRST DIVISION
FILED: JUNE 17, 2013

No. 1-11-0591

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. 09 CR 1742 |
| |) | |
| JOSEPH ZMUDA, |) | Honorable |
| |) | Stanley J. Sacks, |
| Defendant-Appellant. |) | Judge Presiding. |

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

ORDER

- ¶ 1 Held: The defendant forfeited his objections to improper closing argument and waived his objection to the trial court's submitting physical evidence to the jury, and he did not receive ineffective assistance of counsel.
- ¶ 2 The defendant, Joseph Zmuda, appeals from his jury trial conviction and 30-year prison sentence for attempt first degree murder of a peace officer. On appeal, he argues that (1) the State's improper closing argument deprived him of a fair trial; (2) the trial court committed reversible error by allowing a handgun that was placed into evidence to be sent to the jury room; and (3) his counsel was ineffective for failing to object to these issues. For the reasons that follow, we affirm the trial court's judgment.
- ¶ 3 The State's first witness at trial, Sergeant Michael O'Malley, testified that, on the night of

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December 18, 2008, he was supervising a team of officers when he heard a call that police had spotted a suspicious person in the area. O'Malley, who said that he was wearing jeans, a bullet-proof vest over a grey sweatshirt, and a duty belt with his badge clipped to it, drove his "unmarked vehicle with M plates" to search for the suspicious person. He testified that he eventually came upon the defendant, who matched the description he had been given. O'Malley said that he stopped his car and opened his door as the defendant walked past, and that he then said, "Police, come here." At that point, the defendant "stopped," "turned to" O'Malley, and "removed a gun from his waistband and fired it" from approximately "ten to twelve feet away." O'Malley recalled that the defendant initially fired three times at him. He said the first shot struck him in the abdomen and the second hit the turn signal stalk inside his car. O'Malley said that he returned fire as the defendant continued to shoot at him. During the firefight, the defendant was hit, "fell to the ground," and appeared to try to unjam his weapon until O'Malley ordered him to drop it. O'Malley testified that, at that point, the defendant became compliant and that he swept the defendant's gun away once the defendant dropped it. O'Malley said that he suffered no permanent injuries from the firefight because the defendant's first shot ricocheted off of his handcuff case. During his testimony, O'Malley identified his damaged handcuffs and case, as well as the .40-caliber semi-automatic pistol that he said the defendant used during their firefight. On cross-examination, O'Malley testified that he did not activate his car's police lights when he approached the defendant.

¶ 4 Although she identified neither participant in the altercation, Jennifer Quadri testified that she witnessed O'Malley's confrontation with the defendant from a nearby van with an unobstructed view. She said that she noticed O'Malley's car drive by and that she identified it as a police car by virtue of its license plate and vehicle make. According to Quadri, O'Malley got out of his car and "yelled to [the defendant], 'Hey you' " or something similar. At that point, "the guy turned," and "[a]s he turned he pulled his hand up and shot." Quadri said that O'Malley appeared to have been shot before a firefight ensued. She testified that both men fired shots, that she could distinguish the sound of their shots, and that she saw muzzle flashes from the defendant's gun. After the defendant was

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hit by a shot and fell to the ground, O'Malley approached him and ordered him not to reach for his gun. Soon after, Quadri left the van and ran to her home. She said that she agreed to speak with police later that night. On cross-examination, she agreed that three other people were with her in the van and that she did not disclose the identity of those three people to police. Quadri explained that she withheld that information because the other people were gang members who did not want to be involved with police. She also agreed on cross-examination that she never heard O'Malley use the word "police" when he called out to the defendant.

¶ 5 Another eyewitness, Charles Blue, testified that he heard gunshots from his second-floor apartment and went to the window, where he saw the officer taking cover behind a parked car. Blue said that he rushed downstairs to see if the officer was hurt but that additional officers arrived very quickly to address the situation. On cross-examination, Blue agreed that, from his window vantage point, he could not see whom the officer was firing at.

¶ 6 Officer Michael Malinowski testified that he arrived on the scene just after the end of the gunfight and saw a handgun "4 to 5 feet in front of [the defendant] on the ground." Malinowski also noted that the turn-signal stalk in O'Malley's car had been blown apart, and he saw a bullet fragment on the floor of the car. On cross-examination, Malinowski agreed that the handgun appeared to be intact and that he never saw the defendant handle the weapon.

¶ 7 Forensic investigator John Miller testified that, at the scene of the shooting, he found three bullet cartridge cases from a .40-caliber handgun and seven from a 9-millimeter handgun of the type that O'Malley was carrying. He also identified the handgun he recovered from the scene, which had been secured by police, and fragments of the turn signal shaft of O'Malley's car.

¶ 8 After the testimony of a police officer who observed three live .40-caliber cartridges, one expended .40-caliber cartridge, and one each live and expended 9-millimeter cartridges at the scene of the incident, Detective Stan Kalicki described his investigation of the incident. Kalicki said that he interviewed several witnesses and then, following a thaw in the snow nine days after the shooting, returned to the scene and discovered additional bullets and bullet casings.

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¶ 9 The parties stipulated that the gun "recovered from the defendant" had been reported stolen, that examiners found no fingerprints or DNA on the gun or cartridges, and that ballistics examination revealed that bullets fired at the scene had been fired from the defendant's alleged gun. The parties further stipulated that no gunshot residue was found on the defendant's hands after the incident and that an expert would thus testify that the defendant "may not have discharged a firearm" or that, if he did, gunshot residue had been removed or was not detected.

¶ 10 During a conference, the trial judge indicated that he intended to allow the defendant's alleged handgun into the jury room during deliberations, and defense counsel indicated that he had no objection.

¶ 11 During closing arguments, defense counsel argued that "[t]here [was] so much missing from this investigation it's pathetic" that the investigation was the "crappy" result of "a police screw-up." In rebuttal, the prosecutor defended the police investigation and labeled defense counsel's characterization "insulting" and parts of his argument "ridiculous" several times. The prosecutor also noted that police called an ambulance for the defendant, and he twice noted that the shooting took place in a residential neighborhood. In response to the defense argument that the defendant did not recognize O'Malley as a police officer, the prosecutor argued that the make of O'Malley's car identified him as a policeman, that the defendant would have noticed light from O'Malley's headlights, and that the illumination of O'Malley's interior cab light would have allowed the defendant to recognize him as an officer. Defense counsel objected to none of these comments.

¶ 12 After deliberating, the jury returned a verdict finding the defendant guilty of attempt first degree murder of a peace officer and aggravated battery with a firearm to a peace officer. The court sentenced the defendant to 30 years' imprisonment on the attempt murder conviction, and he now timely appeals.

¶ 13 The defendant's first argument on appeal is that the State's improper closing argument deprived him of a fair trial. The State observes that the defendant failed to raise this objection at trial or in a post-trial motion, and it asks that we consider the argument to be forfeited. In his reply brief,

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the defendant asks that we consider his argument as plain error. Although a defendant's failure to raise both a contemporaneous objection and a post-trial objection normally results in his forfeiture of the same objection on appeal (*People v. Enoch*, 122 Ill.2d 176, 186, 522 N.E.2d 1124 (1988)), Supreme Court Rule 615(a) (eff. Aug. 27, 1999) lays out a plain-error exception to this rule. “[T]he plain-error doctrine allows a reviewing court to consider unpreserved error 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 (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, 870 N.E.2d 403 (2007). Because plain error is a response to a forfeiture argument, a defendant may raise it for the first time in his reply brief. *People v. Williams*, 193 Ill. 2d 306, 347-48, 739 N.E.2d 455 (2000).

¶ 14 In this case, however, the defendant cannot establish either prong of the plain-error doctrine. The defendant offers no argument that improper closing argument falls within the “very limited class” of “structural” errors (*People v. Glasper*, 234 Ill. 2d 173, 197-98, 917 N.E.2d 401 (2009)) that satisfy the second prong of the plain-error test, and we do not independently reach the conclusion that the comments here meet that high standard.

¶ 15 As for the first prong, we conclude that the evidence here was not closely balanced and that, in fact, the evidence of the defendant's guilt was overwhelming. The State presented two witnesses, O'Malley and Quadri, who saw the defendant shoot at O'Malley. It also produced physical evidence, in the form of bullet fragments and O'Malley's damaged car and handcuffs case, to corroborate its witnesses' testimony. The defendant now argues that this corroborated testimony is nonetheless incredible, for several reasons. He notes that, as a participant in the firefight, O'Malley is not an objective witness, and he argues that O'Malley's explanation for his presence in the area was uncorroborated, that evidence showed that O'Malley fired more shots than the defendant, and that O'Malley was wrong about the defendant's actions with the gun after the defendant fell. He also

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argues that Quadri is not a credible witness, largely because she refused to give police the identities of the people who were in the nearby van with her. These matters, however, are all collateral to the primary issue—whether the defendant fired at O'Malley—and the eyewitness evidence on that issue was clear and corroborated. The defendant also emphasizes that no fingerprint, DNA, or gun-residue evidence tied him to the firearm used to shoot at O'Malley, but, in light of the strong eyewitness accounts establishing that he fired at O'Malley, such scientific evidence was hardly necessary to prove his guilt.

¶ 16 The defendant also argues that there was conflicting evidence as to whether he knew or should have known that O'Malley was a police officer, a necessary element for a conviction of attempt murder of a peace officer. See 720 ILCS 5/8-4(c)(1)(A) (West 2010); 720 ILCS 5/9-1(b)(1) (West 2010). However, as with the other elements of its case, the State marshaled overwhelming evidence on this point. The testimony uniformly established that O'Malley appeared to the defendant from an unmarked but conspicuous police vehicle, wearing a bulletproof vest and a police utility belt. O'Malley testified that he announced his office when he asked the defendant to stop. Although Quadri testified that she did not hear O'Malley announce his office, the defendant offered no feasible alternative explanation for his reaction to O'Malley's arrival. Further, both Quadri and Blue, two civilian eyewitnesses to the encounter, immediately identified O'Malley as a police officer. Based on that evidence, we agree with the State that the evidence of the defendant's guilt is overwhelming. Thus, we cannot consider the evidence so closely balanced that it allows review under the first prong of the plain-error doctrine. Because the defendant meets neither prong of the plain-error test, we must honor his forfeiture of his contentions regarding the State's closing argument.

¶ 17 The defendant's second argument on appeal is that the trial court committed reversible error by allowing his alleged handgun to be sent to the jury room. As with the defendant's first argument, the State asks us to declare the defendant's contention forfeited, on the ground that he raised no objection to the court's decision, and, in fact, affirmatively consented to the decision. In response, the defendant asks us to review his objection as plain error. The plain error doctrine, however,

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allows us to excuse a forfeiture; it does not apply where a defendant affirmatively waives an argument. *People v. Bowens*, 407 Ill App 3d 1094, 1101, 943 N.E.2d 1249 (2011). Because the defendant affirmatively consented to the court's decision to send the gun to the jury room, we deem his objection waived for purposes of appeal.

¶ 18 The defendant's final argument on appeal is that his counsel was ineffective for failing to raise objections to the above problems, stipulating that the handgun was "recovered from" him and had been stolen, and failing to present evidence that the defendant was paralyzed during the firefight with O'Malley. An accused is entitled to capable legal representation at trial. *People v. Wiley*, 165 Ill.2d 259, 284, 651 N.E.2d 189 (1995). Under the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant alleging ineffective assistance of counsel will prevail only where he is able to show that (1) counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Albanese*, 104 Ill.2d 504, 525, 473 N.E.2d 1246 (1984) (adopting *Strickland*).

¶ 19 Here, even if we were to assume that the defendant's trial counsel provided substandard assistance for the reasons he states, we see no reasonable probability that, but for those errors, the result of his trial would have differed. For the reasons discussed above, we conclude that the evidence of the defendant's guilt was overwhelming. Thus, we have no difficulty concluding that there is no reasonable probability that the defendant would have been acquitted if counsel had raised objections during closing argument, objected to the gun's being sent back to the jury room, or refused to stipulate that the gun "had been recovered" from him and had been stolen. As for the defendant's argument that counsel should have introduced evidence to inform the jury that the shooting had left him partly paralyzed, the only value of that evidence (aside from its tendency to elicit sympathy for the defendant) is that it might have established that he was not a threat after O'Malley shot him. However, this case turned on what the defendant did before O'Malley shot him, not after. Accordingly, given that the defendant's proposed evidence had only limited relevance to a tertiary

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issue, we see no prejudice in counsel's failure to present it.

¶ 20 For the foregoing reasons, we affirm the circuit court's judgment.

¶ 21 Affirmed.