

No. 1-11-1569

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 2946
	)	
CYRUS WESTBROOK,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE HYMAN delivered the judgment of the court.  
Presiding Justice Neville and Justice Sterba concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Defendant failed to properly preserve claim of error for the admission by the trial court of an anonymous tipster's out-of-court statement to a non-testifying detective, which statement the State made use of in its closing argument. No plain error was established on a claim of error that does not amount to a serious or structural error and where evidence of defendant's guilt is not closely balanced.
- ¶ 2 A jury convicted defendant Cyrus Westbrook of three counts of attempted first degree murder. The trial judge sentenced Westbrook to consecutive prison terms of seven, seven, and six years. Defendant claims denial of his right to a fair trial when the State presented at trial, and

argued in closing, hearsay evidence from an anonymous caller that partially identified defendant as the shooter to a police detective who did not testify at trial.

¶ 3 Defendant was charged with multiple counts of attempted first degree murder for shooting Perfecto Talavera and his brother, Jose Talavera, and shooting at Hugo Rogel, on January 9, 2010.

¶ 4 At trial, Perfecto and Jose Talavera both testified that on that morning, they were at the home they shared with their brother, Zefarino Talavera, and Rogel, who lived on the first floor. As Jose "warm[ed] up" his parked car, Perfecto came outside. Suddenly, a fast-moving red Jeep Cherokee side-swiped Jose's car. The Jeep stopped. The defendant got out of the driver's door; his passenger also exited. Although defendant wore a hooded sweatshirt, the hood did not cover his head. Defendant argued with Jose for several minutes, demanding money for damage to the Jeep. Defendant's passenger tried to persuade defendant to leave. Although Perfecto could see that no damage was done to the Jeep, he "didn't want any problems," and urged Jose to placate the yelling and cursing defendant by paying him. But, Jose balked, refusing to pay when the Jeep struck his parked car. Defendant's passenger got into the Jeep, waited for about two minutes, and, without defendant, drove away. Defendant then walked away.

¶ 5 Defendant returned a couple minutes later with his hood up and a hand concealed by his sleeve. Jose and Perfecto were examining Jose's car. Defendant raised his hand, and Perfecto saw defendant holding a black gun. Perfecto tried to warn Jose, but just then defendant pointed the gun at Jose and fired several shots. Jose fell to the ground wounded by three of the shots. Next, defendant pointed the gun at Perfecto, and fired again. Three bullets struck Perfecto and dropped him to the ground. As he lay there, Perfecto could see defendant shooting at Rogel who was standing in the doorway of their house. Then, defendant fled.

¶ 6 A few days after the shooting, Perfecto identified defendant as the shooter from an array of five photographs. Jose identified defendant from the same array as the driver of the Jeep that struck his car. Later that month, Perfecto and Jose viewed a lineup of five men from which Perfecto identified defendant as the shooter. Jose also identified defendant as the Jeep's driver with whom he had argued that day.

¶ 7 On cross-examination, Perfecto could not recall stating earlier that he drove Jose's car that morning or that defendant's gun was silver. Also, Perfecto denied that the car was pulling out into traffic when struck by defendant's Jeep. Jose reiterated on cross-examination that he, not Perfecto, was behind the wheel of his car that morning. Perfecto admitted that he was still taking pain pills for his wounds when he made his photo-array identification. Jose, though, was no longer on pain medication by the time of the identification.

¶ 8 The other brother, Zefarino, testified that on the morning of January 9th, from his bedroom window, he saw Perfecto and Jose talking with defendant near a red Jeep, then saw defendant's passenger drive away in the Jeep, followed by defendant on foot. A short time later defendant returned with his head covered by the hood. Defendant fired several shots at Jose, then at Perfecto, then at the home, before fleeing. Zefarino viewed the lineup, from which he identified defendant as the shooter. On cross-examination, Zefarino admitted that he had hung a Christmas wreath on his bedroom window, but denied that it obstructed his view. Zefarino did not hear the crash. Nevertheless, after someone else in the room looked out the window, he went to the window. He denied telling police that the gun was silver.

¶ 9 Hugo Rogel testified that when he looked out the window he saw Perfecto and Jose speaking with a man in a red Jeep. The Jeep had two occupants. Rogel decided to go outside to see what was happening, but by the time he went to get his coat, the Jeep left. From the doorway of the house, Rogel saw Perfecto and Jose inspecting Jose's car when a man, whom Rogel

believed to be the driver of the red Jeep, approached the two brothers. He had never seen the man before that day. The man, with a hood over his head, carried a black gun. The man fired several shots at Jose, and then Perfecto. Still standing in the doorway, Rogel saw the man walk towards him and fire shots. None hit Rogel. The man then ran away. Rogel later viewed the same lineup as Perfecto and Jose but could not make an identification, he said, because the man's hood obscured his view and his fear of being shot clouded his perception. On cross-examination, Rogel denied telling police that the shooter's gun was silver.

¶ 10 Police officer Timothy Philbin testified that when he arrived at the crime scene, he saw Perfecto and Jose wounded on the pavement with spent shell casings nearby. He briefly interviewed Perfecto, Jose, and Rogel, speaking with them through a relative of the victims who spoke Spanish and English. Philbin's report stated that Jose was "pulling out of a parking space" and the shooter used a silver gun.

¶ 11 Police detective Roland Rios testified that he interviewed Jose and Perfecto in the hospital on the day of the shooting, and conducted the lineups later that month at which Jose, Perfecto, Zefarino, and Rogel separately participated. Rogel could not identify anyone. But the others identified defendant as the man who argued with and shot Jose and Perfecto.

¶ 12 Detective Gregory Andras investigated the shooting, and testified that on the day after the shooting, his partner received an anonymous telephone call. Defense counsel objected, but the court ruled that "this is obviously not going to be for the truth of the matter asserted [but] to indicate why the police may have done what they did thereafter. \*\*\* You may continue with that understanding." The caller gave a physical description of the shooter, that his name was Cyrus, and Cyrus lived in the neighborhood of the shooting. Defense counsel did not renew his objection when the State elicited the content of the telephone call. Detective Andras and his partner then compiled a list of people in the area with the name Cyrus and matching the

description. In turn, they compiled the photographic array from which Perfecto and Jose identified defendant. He testified that both Perfecto and Jose were awake and alert as they viewed the array. During the investigation, Perfecto gave Andras a bullet that was found embedded in a car at the scene. On cross-examination, Andras testified that the anonymous caller did not give a reason he wanted to remain anonymous.

¶ 13 Dominic Sarlo, police evidence technician, testified that he photographed the crime scene and recovered five spent shell casings there. Forensic scientist Diana Pratt testified that the five 9-millimeter shell casings found at the scene were all fired from one gun and that a spent bullet found at the scene was a .38 caliber or 9-millimeter bullet.

¶ 14 Defendant's motion for a directed verdict was denied.

¶ 15 Officer Fontaine, the first officer responding to the shooting, testified for the defense that he stated in his initial radio report that there were three suspects. On cross-examination, however, Fontaine clarified that his later radio dispatch described the red Jeep and only two suspects, attributing his earlier report to "a little bit of a language barrier of the witnesses on the scene."

¶ 16 During closing arguments, the State argued in relevant part, without objection, that:

"In the course of this investigation, at that time, detectives had no leads, they had no names, an anonymous caller, an angel called and said the individual who did this, his name is Cyrus, and he lives in the neighborhood, and that person weighs approximately 150 pounds, and is approximately five-eight. Imagine that, the same description as all of the victims and witnesses who testified here in court today. That angel gave the first big lead in this case to the detectives,"

who then conducted the photographic array based on this information.

¶ 17 Following instructions and deliberation, the jury found defendant guilty of the attempted first degree murders of Perfecto, Jose, and Rogel.

¶ 18 In his post-trial motion, defendant did not raise the claim except by generally challenging "all objections to evidence made during the course of trial which were overruled." The motion was denied without argument or findings.

¶ 19 This timely appeal followed the denial of defendant's post-sentencing motion.

¶ 20 Defendant contends the denial of his right to a fair trial when the State presented at trial, and then reiterated in closing argument, hearsay evidence partially identifying defendant as the shooter that an anonymous caller had given a detective who did not testify at trial.

¶ 21 Hearsay – a statement, other than one made by a witness during his or her trial testimony, offered in evidence to prove the truth of the matter asserted – is generally inadmissible as trial evidence. Ill. Rs. Evid. 801(c), 802 (eff. Jan. 1, 2011). A police officer may establish a course of conduct or investigation by testifying to a conversation with an individual and subsequently acting on the information received, but testimony as to the substance of the conversation constitutes inadmissible hearsay. *People v. Bowman*, 2012 IL App (1st) 102010, ¶ 50.

¶ 22 The State argues, and we agree, that defendant did not preserve this claim of error. His post-trial motion lacked any specificity. While defendant objected generally just before the testimony regarding the statement, he did not object once the State actually elicited the content of the telephone call, contrary to the spirit, if not the letter, of the court's ruling, nor did he object to the substantive use of the statement in closing argument. Thus, this claim must rise to the level of plain error to survive forfeiture. *People v. Rinehart*, 2012 IL 111719, ¶ 15.

¶ 23 Plain error exists when a clear or obvious error occurred and either (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant,

or (2) the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). Defendant bears the burden of persuasion in a plain error review. *Id.*; *People v. Thurow*, 203 Ill. 2d 352, 363 (2003) (harmless error review applies where issue has been properly preserved).

¶ 24 The first step in plain error analysis is determining whether there was an error at all. *Rinehart*, ¶ 15. Assuming *arguendo* that the admission of the content of the anonymous tip, and the State's reference in argument, were erroneous, we conclude that they do not constitute plain error and, thus, are forfeited.

¶ 25 Regarding the first prong, we find that the evidence of defendant's guilt was not closely balanced. Ample unchallenged evidence remains to convict defendant. Despite a few minor discrepancies in their testimony, Perfecto, Jose, Zefarino, and Rogel gave consistent accounts of the events surrounding the shooting, and three of the four witnesses identified defendant before and during trial.

¶ 26 Nor has defendant met his burden of persuasion on the second prong of plain error. A structural error is "a systemic error which serves to erode the integrity of the judicial process and undermine the fairness of the defendant's trial." *People v. Thompson*, 238 Ill. 2d 598, 614 (2010) (quoting *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009), quoting *People v. Herron*, 215 Ill. 2d 167, 186 (2005)) (internal quotation marks omitted). Examples of structural error include a complete denial of counsel, trial by a biased judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, or a defective reasonable-doubt instruction. *Thompson*, 238 Ill. 2d at 609, 613-14. Defendant's conviction was not founded, to any appreciable degree, on the now-challenged evidence or argument so as to deprive him of a fair trial or challenge the integrity of the trial process. We conclude, after reviewing the

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record, that the disputed admission and argument, even if improper, do not constitute serious or structural error.

¶ 27 Accordingly, the judgment of the circuit court is affirmed.

¶ 28 Affirmed.