FOURTH DIVISION
May 26, 2016

No. 1-14-0315

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. 13 CR 14888
	)	
LAMAR McGOWIN,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE COBBS delivered the judgment of the court.
Justices Howse and Ellis concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's contentions that the trial court erred in admonishing the venire regarding the principles outlined in *People v. Zehr*, 103 Ill. 2d 472 (1984), that the prosecutor improperly characterized codefendant as defendant's "girl" in rebuttal closing argument even though there was no evidence they were romantically involved, and that the trial court erred in permitting two officers to offer hearsay testimony regarding the contents of a radio dispatch message are forfeited and do not constitute plain error.

¶ 2 Defendant Lamar McGowin was convicted of delivery of a controlled substance and sentenced to nine years in prison. On appeal, defendant contends that his conviction must be reversed and remanded for a new trial where the trial court erred in questioning the venire;

where, during rebuttal closing argument, the prosecutor characterized codefendant as defendant's "girl," though there was no evidence they were romantically involved; and where the trial court erred in permitting two officers to offer hearsay testimony regarding the contents of a radio dispatch message.

¶ 3 For the reasons that follow, we affirm.

¶ 4 Defendant's conviction arose from the events of July 15, 2013. On that date, Chicago police officers Edwin Utreras, Angela Pittman, and Paul Sznura were working as part of a narcotics unit. They were, respectively, a surveillance officer, an undercover narcotics purchasing officer, and an enforcement officer. After Officer Pittman participated in a narcotics transaction that day, defendant and his codefendant, Gwendolyn Harris, were arrested.

¶ 5 At trial, Officer Utreras testified that around 12:30 p.m. on the day in question, he and his team set up an undercover narcotics purchase near the 5700 block of West Huron Street. Officer Utreras drove around the area, looking for possible targets. When he spotted a group of three men and two women standing on the sidewalk at the corner of West Huron Street and Waller Avenue, he parked about 50 to 100 feet away to set up surveillance. Officer Utreras signaled the location to his fellow officers and asked for Officer Pittman, who was working undercover, to attempt to make a purchase.

¶ 6 Officer Utreras testified that he watched as Officer Pittman drove up in a covert vehicle and motioned to the people on the sidewalk. Defendant, who was wearing green shorts, white gym shoes, and no shirt, went up to the passenger side of the vehicle. Defendant leaned in and appeared to have a brief conversation with Officer Pittman. Defendant then turned sideways and codefendant, who was wearing a blue top and leg bands, had "goldish long hair," and was

carrying an infant, approached the vehicle. When codefendant arrived at the vehicle, defendant walked back to the group of people on the corner. Codefendant leaned into the vehicle and Officer Utreras believed that a hand-to-hand transaction took place. Codefendant walked away from the vehicle and Officer Pittman drove off. Officer Pittman then communicated to the other officers via radio that she had conducted a narcotics purchase. Officer Utreras testified that he continued to observe the area from his position and saw enforcement officers arrive on the scene and detain defendant and codefendant. Officer Pittman then returned to the area and positively identified defendant and codefendant as the two individuals who facilitated the narcotics transaction. Before defendant was taken from the area, he put on a shirt that had either been draped over or was hanging on a nearby fence.

¶ 7 Officer Angela Pittman testified that on the day in question, Officer Utreras directed her to drive to an address on West Huron Street to attempt to purchase narcotics. Upon arrival at the location, Officer Pittman saw a group of people, including defendant, standing on the corner. She pulled over and waived her hand at defendant, who was wearing green shorts, white gym shoes, and no shirt. When defendant came up to the passenger side window, Officer Pittman asked him if he knew where she could get a "rock," which she explained is street terminology for crack cocaine. Defendant responded, "[Y]eah, how many do you want?" Officer Pittman said "two" and defendant turned away from the vehicle, looked toward "a female," and said, "baby come on two." Officer Pittman testified that a woman with long golden braids, wearing a blue top, and holding a baby approached the vehicle. When she arrived at the window, she reached in her right pocket and removed a plastic bag. Defendant walked away from the car. The woman pulled out the plastic bag, which contained numerous small Ziploc bags, removed two of the small bags,

and handed them to Officer Pittman. In exchange, Officer Pittman gave her $20 in prerecorded funds.

¶ 8 Officer Pittman testified that as she drove away, she sent her team radio notification that a narcotics purchase had taken place. She related to the other officers that two individuals were involved in the sale: "the male wearing no t-shirt, lime green shorts, and the female wearing the blue top with the black pants holding the baby, and she had long golden braids." After she heard over the radio that the enforcement unit had stopped two suspects, she drove by the scene and positively identified defendant and codefendant as the people who had been involved in selling drugs. Later, she gave the narcotics she had purchased to Officer Sznura. On cross-examination, Officer Pittman stated that defendant did not have an Afro, but acknowledged that in her police report, she wrote down that he did. On re-direct, she stated that none of the people on the scene had an Afro and agreed that she had written "lots" of police reports and had made typographical errors before.

¶ 9 Officer Paul Sznura testified that on the day in question, he and three other enforcement officers were parked a few blocks away from the identified location, monitoring the operation on the radio. He received a communication from Officer Pittman describing two suspects. When the prosecutor asked what description was given, defense counsel objected on hearsay grounds. The trial court overruled the objection, and Officer Sznura testified that the description "was a male black, wearing green shorts, no shirt, and white shoes, and a female black with long braids with gold braids in her hair." After this testimony, the trial court stated, "Let me just tell the jury that information that you received was given not for the truth of the matter asserted, it just indicates why [the] officer may have done what he accordingly [did] after hearing that information."

¶ 10 Officer Sznura testified that after he received the descriptions, he and the other enforcement officers went to the given location. There, Officer Sznura saw defendant, who was wearing green shorts, white gym shoes, and no shirt, and codefendant, who had long black dreadlocks with gold in them, was wearing a blue shirt, and was holding a baby. Both defendant and codefendant were detained. Codefendant had a black plastic bag protruding from her pocket. Officer Sznura could see small Ziploc baggies of suspect crack cocaine in the bag. He had her take the bag out of her pocket and give it to him, at which point he could see that there were four smaller bags in the larger bag. At the officer's direction, codefendant emptied her pockets and gave him a $20 bill. At some point, Officer Pittman returned to the scene and Officer Sznura was informed that she had identified defendant and codefendant. Before everyone left for the police station, one of codefendant's family members picked up the baby, and defendant put on a t-shirt that Officer Sznura had retrieved from a nearby fence post.

¶ 11 Officer Sznura testified that he inventoried the bags and $20 bill he recovered from codefendant and the bags he was given by Officer Pittman. A check of the serial number of the $20 bill indicated that it was the same one Officer Pittman had used to buy the narcotics. The small bags were sent to the Illinois State Police Laboratory for testing.

¶ 12 The parties stipulated as to a proper chain of custody for the narcotics evidence. They also stipulated that the two items Officer Pittman bought tested positive for cocaine and weighed 0.2 grams; that one of the four items Officer Sznura recovered from codefendant tested positive for cocaine and weighed less than 0.1 grams; and that the other three items Officer Sznura recovered from codefendant were not tested but weighed 0.2 grams.

¶ 13 The jury found defendant guilty of delivery of a controlled substance and possession of a controlled substance with intent to deliver. The trial court entered judgment on the verdict, merged the counts, and sentenced defendant to nine years in prison.

¶ 14 On appeal, defendant first contends that his conviction must be reversed and remanded for a new trial because the trial court violated Supreme Court Rule 431(b) (eff. July 1, 2012) in questioning the venire. Pursuant to Rule 431(b), the trial court must question prospective jurors, individually or in a group, if they understand and accept the principles outlined in *People v. Zehr*, 103 Ill. 2d 472, 477 (1984). Specifically, the court must ask prospective jurors if they understand and accept that (1) a defendant is presumed innocent; (2) the defendant must be proved guilty beyond a reasonable doubt; (3) the defendant is not required to offer any evidence in his own behalf; and (4) if a defendant does not testify on his own behalf, it cannot be held against him. Ill. S. Ct. R. 431(b) (eff. July 1, 2012).

¶ 15 At the outset of *voir dire*, the trial court admonished the venire regarding the first *Zehr* principle as follows:

> "[A] criminal trial begins with a person accused of a crime presumed to be innocent. This is how a criminal trial starts. Whoever walks into court accused of a crime is presumed to be innocent. *** Is there anybody here who has a problem with that most fundamental proposition of American justice, that when a criminal trial begins we presume the accused to be innocent? No hands are raised."

Later, the trial court made the following statements with regard to the second *Zehr* principle:

> "[T]he only way someone can be guilty of a crime is if the government who brought the charges against the accused can prove their case beyond a reasonable

> doubt. *** They have the burden of proof and must prove the case beyond a reasonable doubt. Is there anyone here who has a problem with that proposition that the only way someone can be guilty in a criminal case is if the government who has the burden of proof can prove their case beyond a reasonable doubt? If you have a problem with that, please raise your hand. No hands are raised."

Finally, the trial court advised the venire on the third and fourth *Zehr* principles as follows:

> "In a criminal case, the accused does not have to prove their innocence. The burden of proof is on the government and an accused doesn't have to prove anything at all. An accused does not have to testify. It is their perfect right not to testify and it's their perfect right not to call any witnesses on their own behalf should they choose not to. *** With that said, is there anybody here who would hold it against the accused if they did not testify, which is their perfect right? Or didn't call witnesses? Anybody who thinks, well, I heard the government's side of the story, you better give me your version. Anybody hold it against the accused if they did not testify or call any witnesses in their own behalf? If you have feelings like that, please raise your hand. No hands are raised."

¶ 16 Defendant argues that the trial court erred when it failed to ask the potential jurors whether they understood any of the *Zehr* principles, but instead asked whether potential jurors had "a problem with" the first two principles, and only asked whether they would "hold it against" defendant if he did not testify or present witnesses. Defendant further argues that the court compounded its error by collapsing and blurring the distinction between the last two principles, rather than asking about each principle individually. Defendant acknowledges that he

failed to preserve this issue on appeal because he failed to object to the remarks during *voir dire*. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (a defendant must both object at trial and include the alleged error in a written posttrial motion in order to preserve an issue for appeal). However, defendant maintains that the issue should be reviewed under the plain error doctrine because the evidence against him was closely balanced.

¶ 17 Under the plain error doctrine, this court may reach an unpreserved issue when "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The first step in plain error analysis is determining whether an error actually occurred. *People v. Cosby*, 231 Ill. 2d 262, 273 (2008).

¶ 18 In the instant case, the State concedes that the trial court erred by not asking the potential jurors whether they understood the *Zehr* principles. See *People v. Belknap*, 2014 IL 117094, ¶ 46 (a trial court must ask prospective jurors both whether they understand and whether they accept the principles set forth in Rule 431(b)). We accept the State's concession. Accordingly, we must determine whether the error necessitates reversal under the plain error rule. Because Rule 431(b) errors are not recognized under the second prong of plain error analysis (see *id*. ¶ 47), defendant is entitled to reversal only if he satisfies the first prong of the plain error doctrine, that is, if the evidence is so closely balanced that the error alone threatened to tip the scales of justice against him (see *People v. Wilmington*, 2013 IL 112938, ¶ 34). When reviewing a claim pursuant to the

first prong of the plain error doctrine, "a reviewing court must undertake a commonsense analysis of all the evidence in context." *Belknap*, 2014 IL 117094, ¶ 50. The defendant has the burden of persuasion to demonstrate that the evidence was closely balanced. *Wilmington*, 2013 IL 112938, ¶ 43.

¶ 19 Here, Officer Pittman testified that when defendant approached her car and she asked him if he knew where she could get a rock, he responded, "[Y]eah, how many do you want?" After she told him she wanted two, he turned away from the car, looked toward codefendant, and said, "baby come on two." Codefendant walked up to the car and pulled out a plastic bag, at which point defendant walked away. Officer Pittman then gave codefendant a prerecorded $20 bill in exchange for two small bags containing what was eventually determined to be cocaine. Shortly after the transaction, Officer Pittman drove back by the scene and confirmed defendant's and codefendant's identities. Officer Utreras testified that he witnessed these events. He saw Officer Pittman drive up to the group of people on the corner and motion to them. After defendant approached the car and appeared to have a brief conversation with Officer Pittman, he turned sideways and codefendant approached the vehicle. Officer Utreras saw defendant walk away as codefendant and the undercover officer appeared to engage in a hand-to-hand transaction. Officer Utreras continued to watch defendant and codefendant until they were detained by enforcement officers. One of those enforcement officers, Officer Sznura, testified that cocaine and a prerecorded $20 bill were recovered from codefendant.

¶ 20 Defendant maintains that the evidence of his guilt was closely balanced because no witnesses saw him touch any narcotics or money, engage in any hand-to-hand transactions, or converse with or touch codefendant, and because there was no evidence that he would be sharing

in the profits of codefendant's transaction or had any access to the narcotics in her possession. We reject defendant's position. To sustain a conviction of delivery of a controlled substance based on a theory of accountability, the State must establish that (1) the defendant solicited, ordered, abetted, agreed or attempted to aid another in the planning or commission of the delivery; (2) the defendant's participation took place before or during the commission of the delivery; and (3) the defendant had the concurrent, specific intent to promote or to facilitate the commission of the offense. *People v. Martinez*, 278 Ill. App. 3d 218, 223 (1996). In our view, the evidence against defendant in this case was more than sufficient to establish defendant's accountability. When Officer Pittman asked defendant about obtaining rocks, he asked her how many she wanted and related her answer to codefendant, who then conducted the sale. Officer Utreras, who witnessed the interactions between Officer Pittman, defendant, and codefendant, corroborated Officer Pittman's version of events. In addition, Officer Utreras never lost sight of defendant prior to his arrest, and Officer Pittman returned to the scene and identified defendant, so there was no question of mistaken identity. Here, the State presented evidence establishing that defendant ordered and aided the commission of the delivery to Officer Pittman, that defendant's participation took place during the delivery, and that he had the intent to facilitate the delivery. We cannot find that the evidence in this case was closely balanced.

¶ 21 Defendant has not met his burden of demonstrating that the evidence in his case was so closely balanced that the trial court's error in failing to ask the venire members whether they understood the *Zehr* principles, in and of itself, resulted in his conviction. Accordingly, plain error review is unwarranted and defendant's contention remains procedurally defaulted. See *Belknap*, 2014 IL 117094, ¶¶ 48, 70.

¶ 22 We next address defendant's argument that the trial court erred in "collapsing" its admonitions regarding the last two *Zehr* principles, rather than asking about each principle individually. In *People v. Thompson*, 238 Ill. 2d 598, 607 (2010), relied upon by defendant, our supreme court held that Rule 431(b) mandates a specific question and response process in that the trial court must ask each potential juror whether he or she understands and accepts each of the principles in the rule. The *Thompson* also court noted that the rule "requires an opportunity for a response from each prospective juror on their understanding and acceptance of those principles." *Id*.; see also *People v. McCovins*, 2011 IL App (1st) 081805, ¶¶ 36-37 (Rule 431(b) is not satisfied where a trial court makes a broad statement of legal principles interspersed with commentary on courtroom procedure and the trial schedule, and then concludes with a general question about the venire's willingness to follow the law). However, *Thompson* does not hold that a trial court is required to address each Rule 431(b) principle individually when questioning prospective jurors. As this court observed in *People v. Smith*, 2012 IL App (1st) 102354, ¶ 105, there is no "special magic language" that a trial court must use in relaying the Rule 431(b) principles, and while "[i]deally, it may be appropriate to question the venire about each *Zehr* principle in a piece-meal fashion, *** separate questions are not mandated."

¶ 23 Here, the trial court admonished the potential jurors regarding the last two *Zehr* principles and then gave the venire an opportunity to disagree with them. The court emphasized that the defendant had the right not to testify and the right not to call any witnesses, asked several times whether any of the potential jurors would hold it against defendant if he exercised those rights, and concluded by requesting, "If you have feelings like that, please raise your hand." We find that the trial court's questioning was sufficiently broad so that if any member of the venire had

raised a hand, it would have shown his or her failure to accept one of the principles and thereby prompted the trial court to inquire further. *Smith*, 2012 IL App (1st) 102354, ¶ 105. In these circumstances, we find no error in the trial court's "collapsing" of the final two *Zehr* principles. Accordingly, the plain error doctrine does not apply. See *People v. Wooden*, 2014 IL App (1st) 130907, ¶ 10 (without error, there can be no plain error).

¶ 24 Defendant's second contention on appeal is that he was denied a fair trial because the prosecutor, during rebuttal closing argument, characterized codefendant as defendant's "girl" and compared their relationship to a marriage, even though there was no evidence the two were romantically involved. Defendant argues that the prosecutor crafted this unsubstantiated narrative in order to strengthen the connection between defendant and codefendant and unfairly bolster the State's "otherwise weak" theory of accountability. Defendant acknowledges that this issue is unpreserved for review, as there was no objection at trial and the argument was not included in a posttrial motion, but argues that it may be reached under the first prong of the plain error doctrine.

¶ 25 As noted above, under the first prong of the plain error doctrine, this court may reach an unpreserved issue when 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. *Piatkowski*, 225 Ill. 2d at 565. We first consider whether any error occurred, because without error, there can be no plain error. *Wooden*, 2014 IL App (1st) 130907, ¶ 10.

¶ 26 Defendant takes issue with the following statements made by the prosecutor:

"Now the defendant then very clearly waved over his girl and says, baby, come on, two. The defendant doesn't have to explain to her what he means. People that are married or have significant others you know half the time your spouse is saying something like what are you talking about because you don't even know.

In this situation you've got two people who have an understanding. Two people who know what two means. She's not saying, hey, what do you mean. Are you talking heroin. Are you talking about coke. What are you talking about. She just says -- all right and she comes right over. She doesn't say get lost. Who are you.

No, she comes right over and that's exactly what he just directed her to do. She gives the officer two, two tiny little bags of crack cocaine that are sitting her[e] in this inventory today. The officer said she took them from her right after the defendant walked away because his girl is doing his job for him at that point and Officer Pittman leaves.

***

He called over his girl. She gives the drugs to the officer and she had the other stuff on her. He was using her to take the fall for this so that he was just the guy that talked doesn't actually do anything. So he thinks. He didn't know the law."

¶ 27 The State maintains that enough evidence was presented at trial for the prosecutor to suggest that defendant and codefendant were in a dating relationship, as the two were seen together during and after the drug transaction with an infant, and defendant referred to codefendant as "baby," a term of endearment. In addition, the State asserts that throughout the

prosecutor's rebuttal argument, she argued the theory of accountability. The State argues that "girl" may simply have been the language the prosecutor chose in referring to defendant's partner in crime.

¶ 28 Here, no evidence was presented at trial as to whose infant codefendant was holding, and while "baby" may fairly be characterized as a term of endearment, we cannot find that the utterance of that word alone provided enough evidence for the prosecutor to suggest that defendant and codefendant were in a dating relationship. However, having reviewed the above-quoted comments in the context of the entire rebuttal closing argument, we cannot find clear and obvious error. See *People v. Meeks*, 382 Ill. App. 3d 81, 84 (2008) (questioned comments must be considered in the context of the closing argument as a whole). As noted by the State, the prosecutor began her argument by emphasizing that defendant and codefendant worked together in committing the charged crimes. The prosecutor first reviewed the actions taken by defendant and codefendant, as described by Officer Pittman and Officer Utreras. She then characterized codefendant as defendant's teammate; referred to codefendant as defendant's partner; argued that defendant and codefendant had an "understanding"; compared defendant and codefendant to two workers at a fast food drive-thru, one taking a customer's order and the other exchanging food for money; and asserted that the law of accountability applied in that "you're responsible for these people you make these plans with." When the prosecutor's rebuttal argument is viewed in its entirety, it is clear that her emphasis was not on the fact of a dating relationship between defendant and codefendant. Rather, the prosecutor used her argument to show that defendant and codefendant were working together in concert and that therefore, defendant was accountable for codefendant's actions. We find no error.

¶ 29 Moreover, as discussed above, the evidence in the instant case was not closely balanced. Therefore, even if we were to find error, the first prong of the plain error doctrine would not allow appellate review. Defendant's contention remains procedurally defaulted. See *Belknap*, 2014 IL 117094, ¶¶ 48, 70.

¶ 30 Defendant's final contention on appeal is that the trial court erred in permitting Officer Pittman and Officer Sznura to offer hearsay testimony regarding the contents of Officer Pittman's radio dispatch message describing defendant, which defendant argues unfairly bolstered Officer Pittman's identification testimony and therefore was highly prejudicial to the defense. Defendant asserts that the substance of the radio dispatch was inadmissible because it went beyond what was necessary to explain the officers' course of conduct, and spoke to one of the main issues in dispute at trial: the identity of the man who approached Officer Pittman's car. He maintains that identity was an issue at trial because defense counsel's principal argument in closing was misidentification, based on Officer Pittman's notation in her police report that the suspect had an Afro. He further argues that the hearsay testimony was particularly prejudicial where the prosecutor argued in rebuttal closing that Officer Pittman's radio description of "the guy with no shirt on and the lime green shorts and the white gym shoes" showed there was no misidentification despite her mention of an Afro in the police report.

¶ 31 Once again, defendant acknowledges that his contention is procedurally defaulted because he did not object at trial to Officer Pittman's testimony, and did not include arguments regarding either Officer Pittman's or Officer Sznura's testimony in his posttrial motion. Defendant argues, however, that the hearsay issue should be addressed under the first prong of the plain error doctrine because the evidence in his case was closely balanced. As discussed

above, this court may reach an unpreserved issue under the first prong of the plain error doctrine when 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. *Piatkowski*, 225 Ill. 2d at 565. Because there can be no plain error absent error, we first consider whether any error occurred. *Wooden*, 2014 IL App (1st) 130907, ¶ 10.

¶ 32 A statement that is offered for a reason other than for the truth of the matter asserted is generally admissible because it is not hearsay. *People v. Hammonds*, 409 Ill. App. 3d 838, 854 (2011). For example, a statement is not hearsay if it is offered to prove its effect on the listener's state of mind or to show why the listener subsequently acted as he or she did. *Id*. As relevant in the instant case, if a statement is offered to explain the actions or steps that a police officer took during the course of an investigation, then the statement is not hearsay. *Id*. at 854-55.

¶ 33 Here, the State elicited testimony from Officer Pittman about her radio notification to her fellow officers. This testimony was not elicited to place substantive information about defendant's appearance in front of the jury, but to help explain why the receiving officers took the actions they did. See *Hammonds*, 409 Ill. App. 3d at 856. As the purchasing officer, Officer Pittman gave her team physical descriptions of the people involved in the sale. Then, as the enforcement officer, Officer Sznura testified as to the descriptions he received because he needed to explain how he came to detain defendant and codefendant, as opposed to other individuals who were standing on the corner. Thus, the radio messages had the nonhearsay purpose of establishing their effect on the listener, rather than being admitted for the truth of the matter asserted. See *id*. Defendant's argument fails.

¶ 34 Moreover, even if we were to find that the content of the radio transmissions was inadmissible hearsay and should not have been admitted, the evidence in this case, as discussed above, was not closely balanced. Therefore, the issue could not be reached via plain error analysis. See *Belknap*, 2014 IL 117094, ¶¶ 48, 70. Defendant's contentions regarding hearsay are forfeited.

¶ 35 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 36 Affirmed.