2017 IL App (1st) 150399-U

No. 1-15-0399

Order filed December 22, 2017

Fifth Division

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. 11 CR 3750
	)	
SHAWN RUDOLPH,	)	Honorable
	)	Diane Cannon,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Reyes and Justice Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Although the trial court failed to properly admonish the venire members regarding constitutional *Zehr* principles about the presumption of innocence and the defendant's decision not to offer any evidence or testify, the evidence identifying him as one of the shooters was not closely balanced, and, thus, he is held to his forfeiture of this issue.
(2) The trial court did not abuse its discretion by overruling defendant's objection to the State's closing argument remark about a witness's failure to initially cooperate with the police investigation due to fear of reprisals.
(3) Defendant waived his relevance argument and forfeited his improper bolstering argument to a State witness's testimony about the certainty of her identification of defendant as one of the shooters.

¶ 2 A jury found defendant Shawn Rudolph guilty of first degree murder and attempted first degree murder, and the trial court sentenced him to consecutive prison terms of 45 years and 15 years, respectively. On appeal, defendant argues that a new trial is warranted because (1) the evidence identifying him as the shooter was closely balanced and the trial court's failure to properly admonish the venire about constitutional *Zehr* principles—specifically, the presumption of defendant's innocence, no requirement that he offer any evidence, and his decision not to testify—threatened to tip the scales of justice against him, (2) the State's closing argument improperly suggested that a witness was rightfully afraid to initially cooperate with the murder investigation because defendant was involved in the subsequent death of a potential occurrence witness, and (3) a State witness's repeated testimony about the certainty of her identification of defendant was irrelevant and unduly prejudicial.

¶ 3 For the reasons that follow, we affirm the judgment of the trial court.

¶ 4 I. BACKGROUND

¶ 5 Defendant was arrested in February 2011 and charged with multiple counts of first degree murder, attempted first degree murder, and aggravated discharge of a firearm. These charges arose from the fatal shooting of the victim, Andrew Powell, on the evening of September 30, 2010, while he was in front of his house with several people, including Maurice McArthur.

¶ 6 At the September 2013 jury trial, the State's evidence showed that the 15-year-old victim resided at 7233 South Hermitage Avenue in Chicago with several family members, including his cousins Cherchez and Quenita Johnson, and his sister Desiree Reed.

¶ 7 Cherchez Johnson testified that, on the evening of the offense, the victim was outside and in front of his home, helping a friend with a friend's bike. Cherchez went outside, told the victim to prepare for school the next day, and went back inside the house. About 11:55 p.m., Cherchez

was upstairs by a front window when she heard a gunshot. She immediately got down on the floor and heard 10 to 15 more gunshots being fired at her home. After the gunshots stopped, she checked on her grandmother downstairs and then went outside onto the front porch. She found the victim, who had a gunshot wound to his head. The scene was chaotic and people were screaming and hollering. Cherchez held the victim until an ambulance arrived about 10 to 20 minutes later and rode with him to the hospital. Several family members also traveled to the hospital. The victim was pronounced dead at about 1:30 p.m. the next day. The victim's family remained at the hospital a while to handle organ donation paperwork and other matters. Sometime thereafter, the victim's family returned home.

¶ 8 Maurice McArthur acknowledged that he was convicted of robbery in 2011 and unlawful use of a weapon by a felon in 2012. He appeared at the trial in a prisoner's jumpsuit and testified that prior to 11:30 p.m. on the date of the shooting, he was on the 7200 block of South Honore Street with Frank Hart, Rory Allen, and Courtney Taylor. There was a fight between the S-Dub street gang, which included Hart, and the H-Block street gang, which included the "crew" of a man known by the nickname Bone. After the fight, McArthur, Hart, Allen, and Taylor eventually walked to the victim's house and went inside. After a few minutes, McArthur, Hart, Allen, and the victim went outside onto the front porch. McArthur sat on the porch, Hart and Allen stood on the steps, and the victim stood on the sidewalk. They talked about the fight on Honore Street.

¶ 9 McArthur testified that he heard a voice across the street say, "Yeah, n***er," and saw defendant, Bone, and two other males in a gangway across the street. The area was illuminated by street lights and a porch light from the house adjacent to the gangway. That house also had a lamppost on its front lawn. McArthur knew both defendant and Bone. The two other males stayed farther back in the gangway, so McArthur could not identify them. Defendant and Bone

went further out of the gangway near the sidewalk. Their guns were drawn and pointed at the group in front of the victim's house. Defendant and Bone began firing at the group. Hart and Allen ran around to the back of the house. The victim was hit and fell to the ground. McArthur heard about 16 gunshots and saw defendant and Bone run back into the gangway from which they had emerged. McArthur then ran inside the house. McArthur did not notice any woman on the street during the shooting because he was focused initially on defendant and Bone and then on Hart, Allen, and the victim.

¶ 10 When the police arrived at the scene, McArthur spoke to them but gave his name as Maurice Burden. He told the police that there were four offenders, including two shooters, they all wore hooded sweatshirts, and McArthur did not see their faces. He testified that he lied to the police about his name and what he saw because he was affiliated with a street gang at the time and did not want to be labeled as a snitch, which would require him to be "violated," meaning "beat up."

¶ 11 After defendant was arrested, the police contacted McArthur about this shooting on February 12, 2011, but McArthur did not tell them that defendant and Bone were the shooters. The police contacted McArthur about this shooting again on February 25, 2011. At that point, McArthur knew that defendant was in custody. When McArthur spoke to a detective and an assistant State's Attorney (ASA), McArthur initially lied by saying that he did not see the shooters' faces. McArthur testified, however, that he decided to tell the detective and ASA the truth because the victim's family should receive justice and it was wrong to withhold information. Also, McArthur was not worried about getting "violated" because he was in jail and no longer in a street gang. McArthur identified defendant and Bone as the shooters in photo

arrays presented by the police. In March 2011, McArthur identified Bone in a lineup. McArthur testified that Hart had died on December 12, 2010.

¶ 12 Quenita Johnson, the victim's cousin, acknowledged that she pled guilty in 2006 to aggravated battery of a police officer. Quenita testified that at the time of the offense, she was walking on Hermitage Avenue, returning home from work. For safety reasons, she walked down the middle of the street. The area was illuminated by street lights and the porch lights and motion-detector lighting of various homes. When she was about three and one-half car lengths from her home, she saw the victim, McArthur, and Hart on the porch. She also saw "approximately" two males come out of a gangway across the street from her house and towards a grassy area by the sidewalk. From her vantage point, Quenita could not see into the gangway. One of the men was a light-skinned African American, who wore a black hooded sweatshirt and white t-shirt. He had a cornrow hairstyle and script tattoos covering his neck. He was about the same height as Quenita. The hood of his sweatshirt was "down" and did not conceal his face. Quenita recognized him as defendant, whom she knew from the neighborhood. She did not know his name but had previously purchased marijuana from him and recognized his distinctive neck tattoos.

¶ 13 Quenita initially testified that both defendant and the other man raised their arms, pointed their guns at the group of people on the porch, and fired 4 to 10 gunshots in rapid succession. However, Quenita later testified that she really did not see the other man very well and was not sure whether he fired any gun. Quenita was shocked, terrified and just "froze." After the shooting stopped, defendant and the other man ran back into the gangway. Quenita ran to the porch where the victim lay bleeding. The scene was "just chaos" with people screaming and running into the

house to check on other family members. After the ambulance transported the victim to the hospital, Quenita and other family members and friends drove to the hospital.

¶ 14 When Chicago Police Detective Roger Murphy went to the victim's house the day after the shooting, the family was grieving but Quenita gave him the description of defendant and stated that she did not know his name but had bought marijuana from him in the past. Later that evening, the detective returned to conduct a photo array and Quenita identified defendant as one of the shooters. On February 11, 2011, the police took Quenita and her cousin Desiree Reed to the police station to view separate lineups. The lineup participants' necks were covered to hide defendant's neck tattoos. Quenita identified defendant as one of the shooters. Quenita told Detective Murphy that she had heard that McArthur had argued with some boys from Honore Street about marijuana. On March 2, 2011, Quenita and Reed again went to the police station to view separate lineups. Quenita recognized Bone as an associate of defendant and someone from the neighborhood from whom she had bought marijuana. Quenita testified that she was 100% certain when she identified defendant as one of the shooters initially in the photo array, later in the February 2011 lineup, and again that day in court.

¶ 15 On cross-examination, Quenita denied testifying at the grand jury proceeding that "Shawn was directly under a street light" and that she was about 10 feet away from the shooters during the shooting. She testified that she was close to her family but their schedules varied and they were not always home together. Quenita worked from 2 p.m. to 10 p.m. five days a week. Consequently, she did not know the neighborhood gossip about conflicts between the victim and his friends and defendant. Quenita testified that she did not speak with the police officers who immediately responded to the shooting because she was scared and those officers were securing the scene and not providing any medical assistance to the victim, who was bleeding and dying.

¶ 16 Desiree Reed, the victim's sister, testified that she was inside the house at the time of the offense. She was sitting on a couch with her boyfriend Courtney Taylor and playing a game on his cell phone. Reed sat at the end of the couch closest to the front door and Taylor sat in the middle of the couch. The back of the couch was against the three front windows. The middle picture window was covered by a plywood board because the glass was broken. The two side windows were not broken or covered by any board. The window curtains were open at the time. The victim had gone out the front door to join McArthur, Hart and Allen outside. Reed heard gunshots outside and turned to look out the side window for a few seconds. She saw "like three people" standing across the street. One person was firing a gun at her house and Reed saw his face before Taylor pulled her off the couch and onto the floor, which was toward the end of the shooting. Reed heard about 6 to 10 gunshots.

¶ 17 After the shooting stopped, Reed panicked and tried to go out the front door but Cherchez stopped her. Reed then ran out the back exit and to a friend's house. She was shocked and very frightened. Reed returned home about 20 minutes later. She did not go to the hospital that evening because she did not want to see her brother "like that." She went to the hospital the next day. Although police photographs of the scene after the shooting showed that the front window curtains were closed, the photographs showed that the side window closest to the front door sustained a bullet hole but there was no bullet hole in the drawn curtain, indicating that the curtain was open during the shooting.

¶ 18 Reed identified defendant in court as the shooter and testified that she knew him and his name before the date of the shooting. However, she did not tell the police at the scene that defendant shot her brother because she was afraid that the offenders "would come back and do something else." When the police came to her home on February 11, 2011, she told them that she

saw the shooter because it was "the right thing to do." She went to the police station with Quenita and indentified defendant as the shooter in a separate lineup. When she viewed another lineup on March 2, 2011, she recognized Bone as someone from the neighborhood. Reed asserted that Quenita never told her that she needed to lie and identify defendant as the shooter. Even though Reed and Quenita lived in the same house, they did not talk about the fatal shooting.

¶ 19 The police recovered from the scene 14 fired cartridge cases in and around the gangway between the houses at 7230 and 7232 South Hermitage Avenue. Six cartridge cases were fired from one gun and eight were fired from another. One fired bullet was recovered from the porch of the victim's house. A second fired bullet was recovered from a truck parked on the street. Forensic testing established that those bullets were fired from different guns. Blood that was found in the gangway used by the offenders was insufficient for DNA analysis.

¶ 20 The defense's witness Courtney Taylor acknowledged that he was convicted of aggravated battery in 2011. He testified that at the time of the shooting he was sitting on the couch and Reed was sitting to his right. He did not remember whether the front window curtains were open or closed. When he heard gunshots, he immediately ducked down on the floor. He noticed that Reed was still on the couch "balled up at the time as the shots were going off." He did not see her stand up or look out the window. He pulled her to the floor and saw McArthur, Hart, and "everybody trying to scatter to get inside the house." He heard the gunshots bust through the plywood in the center window. The gunshots sounded like they were getting closer, and McArthur and others ran to the back of the house. Taylor stood up before the shooting stopped and ran to the back of the house without Reed. Taylor left the scene before the responding police officers arrived. Taylor initially testified that when he talked to detectives

about the shooting, he was certain that he told them Reed was balled up on the couch; however, he later acknowledged that he may not have said that to the detectives.

¶ 21 Taylor testified that he was not in a street gang (neither the Gangster Disciples, S-Dub, nor Small World Faction) at the time of the shooting and asserted that he had never even heard of them. He also testified that he was driven to court for the trial by his "friend" Bone. Taylor testified that Hart died a month or two after the victim's fatal shooting.

¶ 22 In rebuttal, Chicago police officer Gerald Lau testified that Taylor told him during an October 10, 2012 conversation that Taylor was a Gangster Disciple, Small World Faction, also known as S-Dub.

¶ 23 The jury found defendant guilty of first degree murder and the attempted first degree murder of McArthur.

¶ 24 In November 2013, the defense filed a posttrial motion to set aside the verdict or grant a new trial. Thereafter, the defense informed the court that McArthur recanted his testimony in a letter dated November 21, 2013, that was sent to defendant's home. The ASA indicated that he had been in contact with McArthur after the trial and McArthur said he was being threatened by defendant's associates, including Twitter posts that called McArthur a snitch.

¶ 25 At the December 2014 hearing on the posttrial motion, McArthur testified that he did not write the letter to defendant recanting his testimony. Rather, McArthur's brother took the initiative to write the letter based on a conversation between McArthur and his brother wherein McArthur said he did not see the shooters' faces. McArthur testified that he lied under oath when he testified at the September 2013 trial that he saw the shooters' faces and one of them was defendant. According to McArthur, the police had pressured him by repeatedly stating that someone had said McArthur saw a face, so McArthur "went off what the neighborhood was

saying" and falsely claimed that he saw defendant's face. The victim's family also pressured McArthur somewhat to ensure that somebody got convicted for the crime.

¶ 26 The trial court stopped the hearing, struck McArthur's posttrial hearing testimony, and appointed counsel to represent him. Thereafter, McArthur indicated that he was invoking his fifth amendment right and declined to answer further questions.

¶ 27 When the posttrial motion hearing resumed in January 2015, the trial court determined that McArthur could not assert a fifth amendment right under the circumstances. McArthur testified that his September 2013 trial testimony was true but his testimony at the December 2014 posttrial motion hearing—that he did not see the shooters' faces—was false. McArthur testified that he did see the shooters' faces and defendant and Bone were the shooters. McArthur acknowledged that he told the ASA after the trial that he lied about seeing the shooters' faces. However, McArthur's picture had been posted on an Instagram account with comments criticizing him for snitching on defendant. McArthur testified that his brother, on his own initiative, wrote the letter to defendant due to the threats McArthur's "people" were receiving.

¶ 28 McArthur also admitted that he wrote a letter in February 2014 to Tynicka Hart, the mother of his children, wherein McArthur indicated that his identification testimony at the trial was a lie. However, McArthur explained that he was being threatened and "made up the letter" so that Tynicka could tell her friends about it because McArthur knew that "her friends hang with [the people threatening McArthur]." Also, McArthur stated that his sisters had received threats from defendant's friends about being shot.

¶ 29 The trial court denied defendant's motion for a new trial and sentenced him to consecutive prison terms of 45 years for first degree murder and 15 years for the attempted first degree murder of McArthur.

¶ 30 Defendant timely appealed.

¶ 31 II. ANALYSIS

¶ 32 On appeal, defendant argues that a new trial is warranted because (1) the evidence identifying him as the shooter was closely balanced and the trial court's failure to properly admonish the venire members about constitutional *Zehr* principles—specifically, the presumption of defendant's innocence, no requirement that he offer any evidence, and his decision not to testify—threatened to tip the scales of justice against him; (2) the prosecutor's closing argument improperly suggested that Reed was rightfully afraid about initially cooperating with the police investigation because defendant was involved in the subsequent death of Frank Hart, who could have been an occurrence witness; and (3) Quenita's repeated testimony about the certainty of her identification of defendant was irrelevant and unduly prejudicial.

¶ 33 A. Plain Error in Admonishing the Venire Members

¶ 34 Defendant contends that he should receive a new trial because the trial court failed to comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012), which requires the court to ask the venire members if they understand and accept four principles about the presumption of innocence, the burden of proof, and the defendant's decision not to offer evidence or testify. Defendant acknowledges that he has forfeited review of this issue by failing to both timely object and include this issue in his motion for a new trial. *People v. Denson*, 2014 IL 116231, ¶ 11. However, he asks us to review this issue under the plain error doctrine, arguing that the evidence identifying him as one of the shooters was so closely balanced that the trial court's error threatened to tip the scales of justice against him.

¶ 35 We may review forfeited claims of error under the plain error rule, which is a narrow and limited exception to forfeiture. *People v. Hiller*, 237 Ill. 2d 539, 545 (2010); Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). To obtain relief under this rule, a defendant must show that a clear or obvious error occurred. *Id.* The defendant bears the burden of persuading the court that either (1) the evidence at the hearing was so closely balanced (regardless of the seriousness of the error) as to severely threaten to tip the scales of justice against the defendant, or (2) the error was so serious (regardless of the closeness of the evidence) as to deny the defendant a fair trial and challenge the integrity of the judicial process. *People v. Herron*, 215 Ill. 2d 167, 187 (2005). If the defendant cannot meet this burden of persuasion, the "procedural default must be honored." *People v. Walker*, 232 Ill. 2d 113, 124 (2009). In order to determine whether the plain error doctrine should be applied, we must first determine whether any error occurred. *Herron*, 215 Ill. 2d at 187.

¶ 36 Rule 431(b) requires the trial court to ask prospective jurors if they understand and accept that (1) a defendant is presumed innocent of the charges against him; (2) the State must prove the defendant guilty beyond a reasonable doubt before he can be convicted; (3) the defendant is not required to offer any evidence on his own behalf; and (4) if a defendant does not testify, it cannot be held against him. "The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in [Rule 431(b)]." *Id*. The trial court's questioning of the venire concerning these four principles, which are commonly referred to as the *Zehr* principles, is intended to ensure compliance with *People v. Zehr*, 103 Ill. 2d 472, 477 (1984), which sought to end the practice where the judge made a broad statement of the

applicable law followed by a general question concerning the juror's willingness to follow the law. Ill. S. Ct. R. 431, Committee Comments.

¶ 37 According to the record, the trial judge told the first panel of venire members that the State had the burden of proving defendant guilty beyond a reasonable doubt and defendant was "not required to prove his innocence." The judge asked if anybody did not "understand and accept that principle of law." The judge told the panel that defendant had "a right to testify" and "a right not to testify." The judge asked if defendant "exercises his right not to testify," would anybody "hold that against him." Next, the judge asked whether anybody could not or would not sign a guilty verdict form if the State met its burden of proof beyond a reasonable doubt, and whether anybody could not or would not sign a not guilty verdict form if the State failed to meet its burden.

¶ 38 The judge told the second panel that "defendant is presumed innocent of the charges against him" and the "State has the burden of proving him guilty beyond a reasonable doubt." The judge asked if anyone did not "understand and accept that proposition of law." The judge told the panel that defendant "was not required to prove his innocence" and "not required to testify." The judge asked if defendant elected not to testify, would anybody "hold that against" him. The judge asked if the State met its burden of proof whether anybody could not or would not sign a verdict form of guilty. Finally, the judge asked if the State failed to meet its burden of proof, whether anybody could not or would not sign a verdict form of not guilty.

¶ 39 The record establishes that the trial court failed to ask all the venire members whether they understood and accepted the first, third, and fourth *Zehr* principles. A trial court's questions about the *Zehr* principles "constitute preliminary instructions to potential jurors on how they

must evaluate the evidence" (*People v. Sebby*, 2017 IL 119445, ¶ 67), and "an instruction given at the end of the trial will have little curative effect" (*Zehr*, 103 Ill. 2d at 477). The *Zehr* principles were directly implicated in this case where defendant did not testify and presented evidence only of Courtney Taylor's testimony and a map of the scene that showed the locations of the streetlights. The trial court's failure to properly admonish the venire regarding these principles was clear error. *Sebby*, 2017 IL 119445, ¶ 49.

¶ 40 B. The Closeness of the Identification Evidence

¶ 41 "The only question in a first-prong case, once clear error had been established, is whether the evidence is closely balanced." *Id*. ¶ 69. Defendant must show that the quantum of evidence presented by the State against him rendered the evidence closely balanced. *Id*. ¶ 51. "Whether the evidence is closely balanced is, of course, a separate question from whether the evidence is sufficient to sustain a conviction on review against a reasonable doubt challenge." *People v. Piatkowski*, 225 Ill. 2d 551, 566 (2007). In order to determine whether the evidence was closely balanced, "a reviewing court must evaluate the totality of the evidence and conduct a qualitative, commonsense assessment within the context of the case." *Sebby*, 2017 IL 119445, ¶ 53. This "inquiry involves an assessment of the evidence on the elements of the charged offense or offenses, along with any evidence regarding the witnesses' credibility." *Id*.

¶ 42 Defendant argues that the evidence identifying him as one of the shooters was closely balanced because no forensic evidence linked him to the shooting and he did not make an inculpatory statement. Also, defendant argues that "[e]yewitness identifications are notoriously and inherently unreliable," and the testimony of the three identification witnesses here—McArthur, Quenita, and Reed—was unreliable due to poor lighting conditions, their limited

opportunity to view the shooters and the stressful situation, and their failure to identify defendant when initially questioned by the police.

¶ 43 In determining whether a witness's identification is reliable, courts have considered the witness's opportunity to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). Courts also consider whether the witness was acquainted with the suspect before the crime, and whether there was any pressure on the witness to make a certain identification. *People v. Brooks*, 187 Ill. 2d 91, 130 (1999).

¶ 44 After reviewing the record in this case, we do not find the evidence to be closely balanced. McArthur, Quenita, and Reed all knew defendant and Bone prior to the shooting and reliably and credibly identified defendant as one of the shooters with no significant discrepancies. The testimony and pictorial evidence established that the scene was well lit with streetlights, a lamppost on the lawn of the house adjacent to the gangway used by the shooters, and porch lights and motion-detector lighting from various houses. Quenita viewed the shooters from about three and one-half car lengths away and recognized defendant from the neighborhood. She explained that she had bought marijuana from him before and that he had distinctive tattoos on his neck. Also, she explained that she did not speak to the officers who initially arrived on the scene because it was chaotic, her cousin was bleeding and dying, and those officers were trying to secure the area and were not providing medical assistance to her cousin. Quenita explained that people were running around and screaming while they tried to ascertain whether anyone else was shot or missing.

¶ 45 Furthermore, Quenita and her friends and family members followed the ambulance to the hospital, where they remained until the next day when the victim died. When the grieving family returned home in the late afternoon or early evening hours, the detectives came to the house. This was Quenita's first opportunity to speak to them, and she accurately described defendant, told the detectives how she was familiar with him, and picked him out of a photo array. Although McArthur did not notice any woman on the street at the time of the shooting, he explained that his attention was focused initially on the shooters, and then on Hart, Allen, and the victim before McArthur turned and ran into the house.

¶ 46 Quenita and McArthur testified consistently that defendant and Bone came out of the gangway and towards a grassy area by the sidewalk. Quenita and McArthur viewed the scene until the shooting stopped, whereas Reed saw the shooter fire the gun toward her house for a few seconds before Taylor pulled her from the couch to the floor. Nevertheless, Reed's attention was focused on the shooter, who stood across the street from her house, and Reed's view was not obstructed by a board or curtain. Furthermore, Reed explained that her fear the offenders would return and do something else kept her from telling the police that she saw defendant shoot the victim until about three and one-half months after the shooting, when defendant was in police custody. Reed's initial reluctance to tell the police the identity of the shooter was understandable because she lived in a neighborhood subjected to gang violence and crime and had experienced the trauma of surviving the same outburst of gunfire that killed her younger brother right in front of their house.

¶ 47 Although Taylor testified that he did not see Reed look out the window during the shooting, he ducked down onto the floor first and then pulled Reed off the couch and down to the floor, indicating that his attention was not on Reed when the shooting started. Furthermore,

Taylor's testimony was highly suspect; he was caught lying under oath about his gang affiliation and the State established that he was driven to court for trial by his "friend" Bone, the other suspected shooter in this matter.

¶ 48 Defendant argues that the "ever-changing nature" of McArthur's identification renders it "worthless." McArthur, however, explained that he initially lied to the police when he said he did not see the shooters' faces because he was in a gang and would have been "violated" for being a snitch. After McArthur knew that defendant was in custody, McArthur told the police the truth—that defendant and Bone were the shooters—because McArthur was in prison and no longer in a gang and realized that he should not withhold information that could bring the victim's family justice. McArthur's fear of reprisals was borne out by the events after the trial. He was immediately labeled a snitch on social media and his family was threatened with being shot due to his cooperation in this case. Although letters were sent to defendant and Tynicka Hart after the trial wherein McArthur allegedly recanted his trial testimony, "recantation evidence is generally regarded as unreliable." *People v. Deloney*, 341 Ill. App. 3d 621, 632 (2003). Furthermore, McArthur explained that his brother wrote the letter to defendant because their family was being threatened, and McArthur "made up" the recantation in his letter to Tynicka so that she would talk about it to her friends, who associated with the people threatening McArthur's family. McArthur's identification of defendant as one of the shooters was corroborated by the testimony of Quenita and Reed, and the physical evidence corroborated the testimony of all three eyewitnesses that two shooters emerged from a particular gangway and fired their guns multiple times in the direction of the victim's house.

¶ 49 The present case is distinguishable from *Sebby*, 2017 IL 119445 at ¶ 63, where the court concluded that the evidence was closely balanced because the State and defense eyewitnesses

presented two conflicting yet credible versions of the events without extrinsic evidence to corroborate or contradict either version. Specifically, the defendant was convicted of resisting a peace officer after three deputies went to a residence to serve a court order regarding the custody of a minor. *Id*. ¶¶ 3, 5. The three deputies testified that the defendant became agitated, yelled, poked one of the deputies and then struggled and fell when the deputies attempted to handcuff him. *Id*. ¶¶ 10-21. The defendant and two other occupants of the house testified that the defendant remained calm and did not make any contact with the deputies, who were belligerent, cursed and threatened the defendant, and then grabbed and pulled him, which caused him to fall on his face onto the gravel covered ground. *Id*. ¶¶ 22-36.

¶ 50 Here, in contrast, three eyewitnesses identified defendant as the shooter, and no opposing witness testified otherwise. Although Taylor testified that he did not see Reed look out the window, his credibility was severely diminished and did not conflict with the testimony of McArthur and Quenita. Furthermore, the photographs of the scene and fired cartridge cases and bullets recovered at the scene corroborated the testimony of the State's three eyewitnesses.

¶ 51 Given the totality of the evidence, the evidence finding defendant guilty of murder and attempted murder was not closely balanced. Because defendant failed to prove that the evidence at trial was closely balanced, his plain error claim fails.

¶ 52 C. The State's Closing Argument

¶ 53 Next, defendant argues that he was denied a fair trial because the State's closing argument improperly suggested that Reed was right to be afraid to talk to the police because defendant was involved in the death of Frank Hart, who was in front of the house with the victim at the time of the shooting and died a few months thereafter. Defendant contends this court

should review this issue *de novo* because "there is no question that the State made the remarks in question and only the application of the law to these undisputed facts remains at issue.

¶ 54 "The regulation of the substance and style of closing argument lies within the trial court's discretion; the court's determination of the propriety of the remarks will not be disturbed absent a clear abuse of discretion." *People v. Caffey*, 205 Ill. 2d 52, 128 (2001). A prosecutor is allowed wide latitude during closing arguments. *People v. Nieves,* 193 Ill. 2d 513, 532–33 (2000). A prosecutor may comment on the evidence presented at trial, as well as any fair, reasonable inferences therefrom, even if such inferences reflect negatively on the defendant. *People v. Nicholas,* 218 Ill. 2d 104, 121 (2005). Remarks made during closing arguments must be examined in the context of those made by both the defense and the prosecution, and must always be based upon the evidence presented or reasonable inferences drawn therefrom. *People v. Coleman,* 201 Ill. App. 3d 803, 807 (1990).

¶ 55 The court reviews *de novo* the legal issue of whether a prosecutor's misconduct, like improper statements at closing argument, was so egregious that it warrants a new trial. *People v. Wheeler,* 226 Ill. 2d 92, 121 (2007). The reviewing court asks whether the comments made at closing argument "engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from them." *Id*. at 123. "Misconduct in closing argument is substantial and warrants reversal and a new trial if the improper remarks constituted a material factor in a defendant's conviction." *Id.*

¶ 56 This court has remarked multiple times that a conflict exists concerning whether a reviewing court should apply an abuse of discretion analysis or *de novo* review to allegations challenging a prosecutor's remarks during closing argument. See, *e.g.*, *People v. Deramus*, 2014

IL App (1st) 130995, ¶ 35; *People v. Hayes*, 409 Ill. App. 3d 612, 624 (2011); *People v. Raymond*, 404 Ill. App. 3d 1028, 1059-60 (2010). However, a careful review of supreme court precedent establishes that no such conflict exists. Specifically, supreme court decisions have applied the two standards of review separately to the appropriate issue addressed on appeal.

¶ 57 In *People v. Blue*, 189 Ill. 2d 99, 128-134 (2000), the court held that the trial court abused its discretion by permitting the jury to hear the prosecutor's arguments that the jury needed to tell the police it supported them and tell the victim's family that he did not die in vain and would receive justice. In *People v. Hudson*, 157 Ill. 2d 401, 441-46 (1993), the court found under the abuse of discretion standard that the prosecutor's closing argument remarks about the defendant's concocted insanity defense and his expert's lack of credibility did not exceed the scope of the latitude extended to a prosecutor. In contrast, in *Wheeler*, 226 Ill. 2d at 121-31, the supreme court reviewed *de novo* whether a new trial was warranted based on the prosecutor's repeated and intentional misconduct during closing argument, which involved vouching for police credibility, attacking defense counsel's tactics and integrity, disparaging former defense counsel, and persistently stating that the prosecution was representing the victims. Whereas a reviewing court applies an abuse of discretion analysis to determinations about the propriety of a prosecutor's remarks during argument (*Blue*, 189 Ill. 2d at 128; *Hudson*, 157 Ill. 2d at 441), a court reviews *de novo* the legal issue of whether a prosecutor's misconduct, like improper remarks during argument, was so egregious that it warrants a new trial (*Wheeler*, 226 Ill. 2d at 121). Our supreme court has not created any conflict about the appropriate standard of review to be applied to these two different issues.

¶ 58 At closing argument, the prosecutor was responding to defense counsel's argument that Quenita was leading a family conspiracy to pin the victim's murder on Quenita's weed dealer and Quenita somehow strong-armed Reed into naming defendant as the shooter. The prosecutor stated that when Quenita was getting ready to go to the lineup, the detective told the other family members that anyone who saw anything should speak up now, and Reed finally found her voice, raised her hand and said she saw what happened. The prosecutor discussed Reed's demeanor when she testified and urged the jurors to use their common life experiences to judge whether she was telling the truth or lying. Then the prosecutor stated:

> "[The defense] wants you to believe that - -well, if [Reed] said she was scared and she was so frightened, the police are there. Why not talk to the police? They are right there. Why wouldn't you talk to the police? Remember, from their own witness that they called, Frank Hart. Tell that to Frank Hart."

¶ 59 The trial court sustained the defense's objection, and the prosecutor argued "Okay. You heard from their witness Courtney Taylor that Frank Hart died a month after this." The trial court overruled the defense objection, stating that the jury heard the evidence.

¶ 60 The prosecutor then said, "That's the witness they called. That poor girl, [Reed] sees her little brother get gunned down on the front of her, get gunned down on that porch on the stairs, sees who does it and she lies." The prosecutor argued that Reed:

> "has very good reason to be afraid. These guys come out in a residential street just before midnight and lit that block up, lit that house up. Fourteen shots fired at this house, fourteen. She had every reason to be afraid and she sat there and she had to live with the fact that she knew the person that did it, or at least one of the people

> that did it, was walking out there. The person that was responsible for killing her little brother, she had information about and she didn't tell the police. Think about how that's eating her alive."

¶ 61 According to defendant, the prosecutor's obvious intent was to have the jury connect the dots between Reed's fear about cooperating with the murder investigation and Hart's death shortly after the shooting to conclude that defendant and his friends murdered Hart so he would not testify.

¶ 62 We find no abuse of discretion because the trial court properly sustained the defense's first objection where there was no evidence about the cause of Hart's death, and properly overruled the second objection where the jury heard the evidence that Hart, who was among the group with the victim in front of the house at the time of the shooting, died about two months after the victim's fatal shooting.

¶ 63 Furthermore, applying *de novo* review, we find that any impropriety in the prosecutor's argument was not so egregious that a new trial is warranted. The jury heard evidence about street gang violence, gang membership, gun violence, and drug selling in Reed's neighborhood. The evidence showed that Hart was involved in a fight between his gang faction and Bone's rival "crew" shortly before the fatal shooting, and McArthur, Allen and Taylor were present at that fight. Moreover, witnesses told the police that the fight had something to do with some group taking another group's marijuana. Furthermore, the evidence showed that witnesses feared violent reprisals for testifying against gang members. There was also some evidence of witness intimidation or coercion where Taylor, who survived the shooting, was driven to the trial to

testify for defendant by Bone, who was one of the identified shooters and was associated with defendant.

¶ 64 Clearly, the gist and emphasis of the prosecutor's argument was not to suggest that defendant was responsible for killing Hart to eliminate him as a witness but, rather, to show that there "were two Chicagos" and the witnesses who identified defendant and Bone as the shooters had to live and survive in the Chicago dominated by gang violence and reprisals. When the prosecutor's brief mention of Hart is viewed in context, we cannot say that it constituted substantial misconduct and was a material factor in defendant's conviction and warrants reversal and a new trial. *Cf. Wheeler*, 226 Ill. 2d at 123-25.

¶ 65 D. Improper Bolstering of Occurrence Witness

¶ 66 Defendant argues that the trial court abused its discretion when it allowed Quenita to testify repeatedly that she was 100% certain when she identified defendant as the shooter in a photo array, lineup, and in court at the trial. Defendant argues this testimony was irrelevant because it did not make the accuracy of her identification more probable. Also, defendant argues this testimony was prejudicial because it improperly bolstered the reliability of Quenita's identification testimony in the eyes of the jury despite recent scientific research that indicates there is no link between the accuracy of an identification and the witness's level of certainty.

¶ 67 Although defense counsel objected to the admission of this evidence at the trial, counsel clarified on the record that the objection was not based on relevance grounds but, rather, on improper bolstering. The trial court ruled that Quenita's testimony regarding the certainty of her identification of defendant as the shooter was admissible because defendant raised the identification issue during opening statements.

¶ 68 The record establishes that defendant explicitly waived grounds of relevance as the basis for the objection to Quenita's testimony. *People v. Enis*, 139 Ill. 2d 264, 294 (1990) ("an objection based upon a specified ground waives all grounds not specified, and a ground of objection not presented at trial will not be considered on review").

¶ 69 Furthermore, defendant fails on appeal to provide a cohesive discussion or citation to any legal authority to support his assertion that Quenita's testimony constituted improper bolstering. Illinois Supreme Court Rule 341(h)(7) (eff. Jan. 1, 2016) provides that an appellant's brief must contain contentions and the reasons therefore, with citation to the authorities upon which the appellant relies. As a reviewing court, we are entitled to have the issues clearly defined, pertinent authority cited, and a cohesive legal argument presented. *Walters v. Rodriguez*, 2011 IL App (1st) 103488, ¶ 5. "The appellate court is not a depository in which the appellant may dump the burden of argument and research." *Thrall Car Manufacturing Co. v. Lindquist*, 145 Ill. App. 3d 712, 719 (1986). Arguments that are not supported by citations to authority fail to meet the requirements of Rule 341(h)(7) and are procedurally defaulted. *Vilardo v. Barrington Community School District 220*, 406 Ill. App. 3d 713, 720 (2010).

¶ 70 Finally, defendant attempts to advance his argument on appeal by citing recent scientific research about witness certainty that was not presented to the trial court. We cannot consider sources of evidence outside the record. *People v. Woolley*, 178 Ill. 2d 175, 203-04 (1997) (defendant cannot rely on sources of expert testimony that are outside the record to advance his claim on appeal, and the reviewing court cannot consider them).

¶ 71 We conclude that defendant waived his relevance argument and forfeited his improper witness bolstering argument.

¶ 72 III. CONCLUSION

¶ 73 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 74 Affirmed.