2017 IL App (2d) 150461-U
No. 2-15-0461
Order filed March 28, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MATTHEW J. CIONI, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 11-CF-760 Honorable Patrick L. Heaslip, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Schostok and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's conduct during *voir dire* denied defendant his right to a fair and impartial jury and constituted plain error. Additionally, the prosecutors' comments during opening statement and closing arguments constituted plain error. Reversed and remanded.

¶ 2 Following a jury trial, defendant, Matthew J. Cioni, was convicted of aggravated driving under the influence (DUI) (625 ILCS 5/11-501(d)(1)(A), 11-501(d)(1)(2)(E) (West 2014)), six counts of aggravated intimidation (720 ILCS 5/12-6.2(a)(3) (West 2014); 730 ILCS5/3-6-3 (West 2014)), two counts of bribery (720 ILCS 5/33-1(a) (West 2014); 730 ILCS 5/3-6-3 (West 2014)); and one count of improper parking. He was sentenced to concurrent prison terms of 8½

years on the aggravated DUI count, 4 years on each of the aggravated intimidation counts, and 3 years on each of the bribery counts. Defendant appeals, asserting: (1) that the trial court's conduct during *voir dire* constituted plain error, thus, warranting a new trial; (2) alternatively, prosecutorial misconduct warrants a new trial; and (3) alternatively, that three of the aggravated intimidation counts should be vacated based on the one-act, one-crime doctrine. We reverse and remand for a new trial.

¶ 3 I. BACKGROUND

¶ 4 On April 13, 2011, defendant was charged by indictment with aggravated DUI, six counts of aggravated intimidation of a public official, and two counts of bribery. He was also charged with unlawful parking. A jury trial was held on all counts.

¶ 5 A. *Voir Dire*

¶ 6 *Voir dire* commenced on April 16, 2013. Prior to *voir dire*, the trial judge suggested that the charges against defendant be referred to without using the term "aggravated," because it was inflammatory. The parties agreed. Also, prior to having the potential jurors be escorted into the courtroom, the trial judge, after discussion, excused one potential juror who was having anxiety issues.

¶ 7 The bailiff then escorted 34 potential jurors to the courtroom. The trial judge asked the prospective jurors if anyone had any special needs, and he excused one juror who had rheumatoid arthritis. The venire was sworn in, and the judge instructed them that two police officers were expected to testify and that defendant "may or may not testify. That is certainly up to him to decide at sometime if he wishes to do so." The court gave additional instructions, including: "The defendant is not required to prove his or her – prove his innocence, not [*sic*] is he required to present any evidence at all. He may rely on his presumption of innocence. As he

sits here today and throughout these proceedings, he is presumed to be innocent of the charges which he is now facing." The trial judge also listed the charges against defendant.

¶ 8 The court next called 12 prospective jurors to the jury box, and questioned them both as a group and individually. At one point, Judge Heaslip asked each of the potential jurors, individually, the following three questions: (1) "The defendant is presumed to be innocent until the jury determines after deliberations that the defendant is guilty beyond a reasonable doubt. Do you *agree* with that proposition of law?"; (2) The State has the burden of proving the defendant guilty of the charges beyond a reasonable doubt. Do you *agree* with that proposition of law?"; and (3) "The defendant does not have to present any evidence at all and may rely on his presumption of innocence. Do you *agree* with that proposition of law?". (Emphases added.) See *People v. Wilmington*, 2013 IL 112938, ¶ 32 ("it may be arguable that the court's asking for disagreement, and getting none, is equivalent to juror *acceptance* of the principles"). The jurors were not questioned regarding the fourth *Zehr* principle, specifically, that, if the defendant does not testify, it cannot be held against him or her. See Ill. S. Ct. R. 431(b) (eff. May 1, 2007) (codifying *People v. Zehr*, 103 Ill. 2d 472 (1984)). Also, the jurors were not asked if they *understood* the principles. Neither party informed the judge of either omission prior to the conclusion of *voir dire*.

¶ 9 The first 11 potential jurors responded in the affirmative to the three questions. The twelfth potential juror, Michael Craglow, responded in the affirmative to the first question, but the following exchange occurred when Judge Heaslip asked him the second question:

> "THE COURT: The State has the burden of proving the defendant guilty of the charges beyond a reasonable doubt. Do you agree with that proposition of law?
>
> [Craglow]: Kind of, but not really.

THE COURT: Okay. Can you elaborate on that?

[Craglow]: People get away with stuff.

THE COURT: Okay.

[Craglow]: Sometimes it's too hard to prove somebody's guilty, and sometimes you – it's too easy to prove somebody's guilty when they're really not. But I don't -- I don't know.

THE COURT: All right. So you don't agree with that proposition of law? You don't think that's a good proposition of law? You don't think the State should have the burden of proving the defendant guilty of the charges beyond a reasonable doubt?

[Craglow]: I think too many people are guilty and get off.

THE COURT: That's not the question. That's not the question. Listen to the question carefully and answer the questions. The State has the burden of proving the defendant guilty of the charges beyond a reasonable doubt. Do you agree with that proposition of law?

[Craglow]: Not really.

THE COURT: Pardon me?

[Craglow]: Not really.

THE COURT: So you don't -- if you were a defendant, you want the State to have that burden; want them to have to prove you[']r[e] guilty beyond a reasonable doubt? Or should we lower it for you? Maybe it should just be a preponderance of the evidence for you, would that be fair?

[Craglow]: Well, I would attempt to not put myself in that situation.

THE COURT: Well, that's not the question I'm asking you. If you were a defendant,

what burden of proof do you want to have to face; a more difficult burden or should we make it easier?

[Craglow]: If I'm guilty, I'm guilty; but I --

THE COURT: So how do we determine that? How do we determine you're guilty then? Don't we have to have laws to do that?

[Craglow]: Yeah.

THE COURT: So what do you want the law to be?

[Craglow]: Just --

THE COURT: Just a guess? We'll just roll some dice and decide whether you're guilty or not?

[Craglow]: No, I mean, if someone's guilty; they're guilty.

THE COURT: Are you trying to get out of serving on this jury?

[Craglow]: If I have to serve, I'll serve.

THE COURT: No, no, no. Answer my question. See, I want people who are honest and forthright. I don't want people who come in and put on a little show to try and get out of doing things, particularly their civic duty.

So why don't you be honest and forthright with me right now. Are you trying to get out of serving on this jury?

[Craglow]: With this no, I'm not.

THE COURT: Oh.

[Craglow]: Now, this [*sic*] just the fact. I think there's too many --

[DEFENSE COUNSEL]: Judge, at this time I'd just ask that we have a sidebar on this.

THE COURT: That's fine. Please step up. Hold on. Let me do my sidebar button."

¶ 10 At the sidebar, defense counsel requested that Craglow be questioned in chambers because "he's just going to completely contaminate the whole jury." Judge Heaslip responded: "Yeah, but, see, yes, he's trying to contaminate the jury; but I want to nail him and make sure that the rest of them don't follow suit *** to think that they're going to get out of doing this. So I want to stop it right now. I think I'm going to make an example of him, and he'll probably get excused because, frankly, he doesn't want to serve on this jury. That's exactly why he's doing this. Okay. Thank you."

¶ 11 Judge Heaslip resumed questioning Craglow in the presence of other potential jurors:

"THE COURT: Okay. So let's continue with these three questions. You hesitantly answered No. 1 in the affirmative. No. 2, you say you disagree with, correct?

[Craglow]: (No audible response.)

THE COURT: Answer yes or no.

[Craglow]: Yes.

THE COURT: Keep your voice up because you're being recorded.

[Craglow]: Yes.

THE COURT: And remember you're under oath.

[Craglow]: Okay.

THE COURT: You understand that?

[Craglow]: Yeah, I do.

THE COURT: All right. The defendant does not have to present any evidence at all and may rely on his presumption of innocence. Do you agree with that proposition of law?

[Craglow]: Sure.

THE COURT: That's a yes or a no. Sure is not a yes or no.

[Craglow]: Yeah, yeah. Sure.

THE COURT: Yes, you agree with that?

[Craglow]: Sure, yeah.

THE COURT: No. I'm asking -- you and I are going to have a real problem with each other, you know, because let me tell you about the Court and its powers. They're called contempt powers. And when you're in this courtroom, you're in my forum. And when I ask you to answer a question with a yes or no and you answer it sure, that's not how you were asked to answer the question.

You will answer the questions as directed.

I'll ask the question again. You'll answer it with a yes or a no. Do you understand me?

[Craglow]: Yes.

THE COURT: The defendant does not have to present any evidence at all and may rely on his presumption of innocence. Do you agree or disagree with that proposition of law; yes or no?

[Craglow]: Yes.

THE COURT: Thank you. Now, State, I will tender this panel to you for your questioning."

Later, at defense counsel's request, Craglow was excused for cause.

¶ 12 After defense counsel began questioning the potential jurors, he asked: "The Judge told you about the precepts of law. Do you have any problems with any of those precepts?" At one point, a potential juror responded: "No." Defense counsel continued: "Okay. And part of those precepts are is [*sic*] [defendant] doesn't have to present any evidence." The assistant State's Attorney asked to approach the bench. At a sidebar, the prosecutor stated: "Judge, the Court has

already covered these principles of law and the *Zehr* principles. I think that [defense counsel]—" The court stated: "Well, I agree," "They're covered," and "Let's move on."

¶ 13 Six potential jurors from the first panel of 12 were excused (including Craglow, who was excused for cause). The remaining six jurors were selected after the exchange with Craglow. Ultimately, defense counsel used five of seven available peremptory challenges

¶ 14 B. Trial

¶ 15 One of the prosecutors began her opening statement, as follows:

> "—Counsel; ladies and gentlemen of the jury. I will blow up the South Beloit Police Department. I will kill you. I will kill your family members. I'm a member of the Mafia. The Mafia will take care of you if you don't let me go. I will give you $20,000 to let me go. I'm part of the FBI. I will have everyone that you know killed and your family killed as well.
>
> Those are the words of intimidation that this defendant used against South Beloit Police Department Officer Reed on March 23rd of 2011. On that date at around 11:06 p.m., South Beloit Police Department Officer Reed was dispatched to an intersection in the area of Roscoe Avenue and Olive in South Beloit for a call. He was informed that there had been reckless driving complaint."

¶ 16 At this point, defense counsel objected and the court ordered a sidebar. There, defense counsel raised a hearsay objection as to the content of the dispatch. The prosecutor agreed to proceed without it. Defense counsel requested that the jury be instructed to disregard, and the trial court stated: "Thank you. Please continue."

¶ 17 1. Officer Paul Reed

¶ 18 South Beloit officer Paul Reed testified that, on March 23, 2011, at about 11:06 p.m., he responded to a dispatch at the 900 block of Roscoe Avenue in South Beloit. There, he observed a gray Ford pickup truck parked in the intersection of Roscoe Avenue and Olive Street at a diagonal. The intersection is a four-way stop in a residential neighborhood. The area is flat and well lit. The pickup faced northwest in the middle of the intersection. Reed pulled up behind the vehicle and activated his overhead lights. The driver, defendant, turned the truck onto Olive Street and pulled to the side of the road. When defendant drove his vehicle from the middle of the intersection to the side of the road, he drove about 30 feet.

¶ 19 Reed approached the vehicle. Defendant was the only occupant. He told Reed that he lived nearby and that he was looking for his girlfriend. Reed asked for identification, and defendant reached into his left pocket, pulled out several items, and "seemed confused." Reed asked defendant if he had a valid driver's license, and defendant located it on the dashboard, inside his wallet. Reed continued to speak to defendant and noticed a strong odor of alcohol on defendant's breath and that his speech was "extremely slurred." Reed testified that he had difficulty understanding defendant, who seemed to have a difficult time expressing himself. "He was confused." Reed asked defendant if he had consumed any alcoholic beverages, and he replied that he had one beer.

¶ 20 Reed next asked defendant to exit the vehicle, and defendant replied that he would not. Reed then opened the door to the truck and instructed defendant to get out, which he did. Reed first administered the horizontal gaze nystagmus (HGN) test. He explained that he looks for six "indicators of impairment" on this test, or three in each eye. First, Reed assesses smooth pursuit of eyes (the eyes should track smoothly like a ball rolling across an object). Second, he checks for distinct, sustained nystagmus at maximum deviation (*i.e.*, as far out as the eyes can travel),

looking for involuntary jerking of the eyes. Finally, Reed assesses for nystagmus prior to a 45-degree angle from the center. According to Reed, defendant appeared to understand the instructions he gave him. During the test, defendant swayed back and forth "quite a bit" and his eyes lacked smooth pursuit. "A sober person's eyes should, like I said, roll." Defense counsel objected, arguing at a sidebar that the officer could not testify that a person is intoxicated simply because they have nystagmus. The trial court stated: "That's why you get to cross-examine him. Thank you. Please step back." Reed testified that neither of defendant's eyes moved smoothly.

¶ 21 The second and third portions of the tests also showed distinct and sustained nystagmus. The prosecutor asked Reed "how many indicators of impairment" he observed in total. Defense counsel objected, and the trial court overruled the objection. Reed opined that there were six indicators of possible impairment.

¶ 22 Next, Reed administered the one-leg-stand test. While Reed instructed defendant on how to perform the test, defendant yelled that he should not have been stopped. After Reed finished with the instructions, defendant refused to perform the test, stating that it was unfair. Reed placed defendant under arrest for DUI. He handcuffed defendant with his arms behind his back, searched him, and placed him in his squad car. Defendant was "extremely loud." He yelled and screamed and told Reed that he was going to kill him and that Reed "needed to let him go." (There is no audiotape or videotape of the stop or of defendant in the squad car.)

¶ 23 Outside the police station, defendant continued to yell and stated that he was going to kill Reed. He offered Reed $20,000 to let him go. Reed declined and took defendant inside. Inside, in the booking room, Reed was secured to a bench by his handcuffs, along with one leg; his other leg was free. He yelled, screamed, and continued to threaten to kill Reed. "He advised me at one point that he was in the Mafia; [and] that he knew people in the Mafia; that he was going to

have them kill my entire family." Defendant also threatened to blow up the police department, "as well as the city of South Beloit and the entire [S]tate of Illinois." He also told Reed that he was in the FBI and that he was going to have the FBI kill Reed and his family. Also, "at one point he told me that he was going to cut off my head and fuck out my eyeballs."

¶ 24 According to Reed, officer Dan Roggenbuck was present. While Reed completed paperwork, he overheard defendant offer Roggenbuck $20,000 if he would let defendant go. Defendant continued to yell and swear and shook his free leg around, informing Reed that he had not secured his other leg to the bench and that he was going to "kick my teeth out with that free leg."

¶ 25 Defendant did not respond, other than yelling and screaming, when Reed offered him the opportunity to take a certified breath test, which tests the alcohol level in a person's bloodstream. Reed informed defendant that he would note that defendant refused the test.

¶ 26 Reed believed that defendant was intoxicated. He based this opinion on defendant's slurred speech, the strong odor of alcohol he smelled on his breath, his demeanor, and his performance on one field-sobriety test.

¶ 27 On cross-examination, Reed acknowledged that his report of the incident does not state that defendant's car was parked on a diagonal; it states only that it was parked in the middle of the intersection.[1] After Reed activated his lights, defendant turned right onto Olive Street and

[1] The narrative portion of Reed's report, which was *not* admitted into evidence, states, as follows:

> "On Wednesday March 23rd at 2306 hours I Officer Reed was dispatched to the 900 block of Roscoe Ave in reference to a reckless driving complaint involving a blue or grey pickup. Upon arrival I located a grey Ford pickup parked in the middle of the

pulled over to the shoulder. Reed did not notice anything unusual about the manner in which defendant turned or drove his vehicle other than that he was parked in the middle of the intersection.

¶ 28 When Reed first approached defendant's vehicle, he asked defendant for identification. His report does not state that he asked defendant why he was parked in the middle of the intersection. Reed testified that it took several minutes for defendant to find his driver's license, but he did not put that in his report.

¶ 29 According to Reed, defendant had no trouble exiting his vehicle and walking to the back of it. During the tests, defendant faced south and his vehicle and the squad car, whose oscillating lights were on, faced west. Flashing lights can obscure the results of the HGN test, which, Reed explained, indicates that someone has consumed alcohol or other drugs. "Low levels of alcohol would not produce a noticeable amount of nystagmus."

¶ 30 Reed did not ask defendant when defendant had consumed the one beer he stated he had consumed. Reed did not note in his report that he smelled the odor of alcohol after defendant exited his vehicle. The smell of alcohol in a confined area such as a car can be more intense than it is outside such an area.

> intersection of Roscoe Ave and Olive St. Upon contacting the driver, Matthew Cioni, I observed that he had slurred speech and smelled strongly of an alcoholic beverage. He admitted to drinking one beer. The driver failed the [HGN] then became uncooperative and refused to do any further testing. At the Police Department [he] offered to pay me $20,000 to not take him to jail. He then began yelling and threatening to kill me and my family. He told me that when he gets out of prison he is going to kill me and 'fuck me in the head' then blow up the City of South Beloit and the State of Illinois."

¶ 31 After he placed defendant in the back of his squad car, Reed had him wait there for about five minutes. Then, Reed got into the squad car. He did not smell the odor of alcohol in his squad car when he entered it. Reed did not find any alcohol in defendant's vehicle during his search. As Reed walked defendant into the police station, two other officers were present. Reed did not notice that defendant had any trouble walking at that point.

¶ 32 Defendant made the statements to Reed while he was handcuffed to the bench. Reed believed that defendant had the ability to carry out his threats once he was unhandcuffed. The officer sat about eight feet away from defendant. Reed discovered later that there was no video in the booking area where defendant made his threats. He did not file a supplemental report to note that he had checked for a videotape.

¶ 33 Reed further testified on cross-examination that he did not find any bottle caps in defendant's vehicle. He transported defendant to the Winnebago County jail, and defendant had no trouble walking to the squad car.

¶ 34 On re-direct examination, Reed testified that on the day of defendant's arrest, his squad car was not equipped with an operational video camera. Defendant's vehicle was large and defendant is over six feet tall; thus, it would have been easier for him, as compared to a shorter person, to exit his vehicle. Addressing the odor of alcohol, Reed stated that, "[t]he entire time I dealt with [defendant] I could smell an alcoholic beverage coming from his breath." This included while defendant was in his vehicle, in Reed's squad car, and at the police department. Addressing why he administered only one field-sobriety test to defendant, Reed explained that defendant, a large man, was yelling and screaming at him and refusing to take another test and he decided that he would not administer another test.

¶ 35 2. Officer Daniel Roggenbuck

¶ 36 South Beloit police officer Daniel Roggenbuck testified that, on the evening of March 23, 2011, he responded to the dispatch to which Reed had responded. When he arrived at the scene, Roggenbuck pulled up next to Reed's squad car and saw Reed in the driver's seat and defendant in the back seat. Roggenbuck, whose window was open, as was Reed's, heard defendant was screaming and yelling at Reed. Roggenbuck remained in his car and spoke to Reed.

¶ 37 Afterwards, at the police station, Roggenbuck stood by in the hallway outside the booking room, about eight feet away from where defendant was handcuffed to the bench. Nothing was obstructing his view of defendant, and only defendant and Reed were in the booking room. Roggenbuck heard defendant tell Reed that he could still reach Reed with his free leg, which he tapped. Defendant yelled and screamed at Reed and stated that he was going to cut off Reed's head and "fuck out his eyes." Defendant also threatened to kill Reed's family and to blow up the police department, the City of South Beloit, and the State of Illinois.

¶ 38 Roggenbuck further testified that he stood in the doorway because of defendant's aggressive attitude and that he was standing by in case Reed required assistance. Defendant directly addressed Roggenbuck, offering him $20,000 if he would let him go. Defendant never stated that he was kidding or apologized for his remarks. Roggenbuck did not prepare a report of his interaction with defendant.

¶ 39 On cross-examination, Roggenbuck testified that he reviewed Reed's report in preparation for his testimony. He acknowledged that Reed's report does not mention Roggenbuck's presence at the scene.

¶ 40 The State rested. Defense counsel moved for a directed verdict, and the trial court denied the motion. Defendant presented no evidence.

¶ 41 During closing argument, the prosecutor argued several times that "We have had the opportunity over the course of the last two days to have it proven to us that ***," or "It has been proven to us over the last two days beyond a reasonable doubt ***," and "That's been proven to us beyond a reasonable doubt." The State also argued several times that "the People must prove the follow propositions ***," and "The State has the burden of proving each and every element of these offenses." Defense counsel did not object to any of the prosecutor's comments.

¶ 42 However, defense counsel did object when the prosecutor argued that the HGN test "showed the maximum number of impaired – indicators of impairment." The court overruled the objection.

¶ 43 After about two hour of deliberations, the jury asked for a copy of the police report and Roggenbuck's testimony. The court, in consultation with the prosecutors and defense counsel, gave the following answer: "The police report was not admitted into evidence, and you are not entitled to see it. You must rely upon your recollection of the evidence as presented from the witness stand. Your request for a transcript of Officer Roggenbuck's testimony is denied at this time." The court commented to counsel that, if the jury asked the same question about the transcript two hours later, "I'd consider it."

¶ 44 C. Verdict and Subsequent Proceedings

¶ 45 The jury found defendant guilty of all 10 counts. On August 16, 2013, the trial court denied defendant's motion for judgment notwithstanding the verdict or for a new trial.

¶ 46 On February 14, 2014, the trial court sentenced defendant to 10 years' imprisonment on the aggravated DUI conviction, 4 years' imprisonment on each of the aggravated intimidation convictions, and 3 years' imprisonment on each of the bribery convictions. The sentences were to be served concurrently. The court also entered a judgment of conviction on the improper

parking charge. Defendant moved to reconsider sentence, and the trial court, on April 21, 2015, granted the motion and amended the aggravated DUI sentence to 8½ years' imprisonment. Defendant appeals.

¶ 47 II. ANALYSIS

¶ 48 A. *Voir Dire*

¶ 49 Defendant argues first that he was denied his right to a fair and impartial jury by the trial judge's actions during *voir dire* that discouraged prospective jurors from responding candidly and openly when the judge: (1) failed to comply with Rule 431(b); (2) prohibited defense counsel from questioning potential jurors about the Rule 431(b) principles; and (3) chastised and threatened to hold in contempt a juror who stated he disagreed with one of the Rule 431(b) propositions for the explicit purpose of making an example of him so that other jurors would not offer similar answers. For the following reasons, we agree with defendant.

¶ 50 The federal (U.S. Const. amends. VI, XIV) and state constitutions (Ill. Const. 1970, art. I, § 8) guarantee a criminal defendant the right to trial by an impartial jury. *People v. Wilson*, 303 Ill. App. 3d 1035, 1041 (1999); see also *People v. Terrell*, 185 Ill. 2d 467, 484 (1998) ("The purpose of *voir dire* is to assure the selection of an impartial panel of jurors who are free from bias or prejudice.").

¶ 51 Defendant concedes that defense counsel failed to preserve this issue for review by not including it in his posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). He asks that we either: (1) relax the forfeiture rule pursuant to the *Sprinkle* doctrine, which we discuss below; or (2) apply the plain-error exception to forfeiture.

¶ 52 The plain-error doctrine is a limited and narrow exception to the general rule of procedural default (*People v. Naylor*, 229 Ill. 2d 584, 593 (2008)) and allows a reviewing court to consider unpreserved error when one of two conditions is met:

> " '(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. Walker*, 232 Ill. 2d 113, 124 (2009) (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)).

See also *People v. Jones*, 2016 IL 119391, ¶ 10 (there are "two categories of plain error: prejudicial errors, which may have affected the outcome in a closely balanced case, and presumptively prejudicial errors, which must be remedied although they may not have affected the outcome").

¶ 53 "Under both prongs of the plain-error doctrine, the burden of persuasion remains with defendant." *Id.* The initial step in conducting plain-error analysis is to determine whether error occurred at all. *People v. Hudson*, 228 Ill. 2d 181, 191 (2008). This requires us to conduct a substantive review of the issue. *People v. Johnson*, 208 Ill. 2d 53, 64 (2003).

¶ 54 We must also address whether error occurred if we relax forfeiture pursuant to *Sprinkle*. Thus, to reverse and remand for a new trial under either a plain-error analysis or *Sprinkle*, we must find that error occurred. Accordingly, we first address that question.

¶ 55 (1) Whether Error Occurred

¶ 56 The manner in which *voir dire* is conducted, as well as its scope, lie within the trial judge's discretion. *People v. Rinehart*, 2012 IL 111719, ¶ 16. An abuse of that discretion will

only be found where the judge's conduct thwarts "the selection of a jury free from bias or prejudice." *Id.*

¶ 57 Defendant raises two categories of errors: (1) the Rule 431(b) questioning; and (2) the exchange with Craglow. Defendant argues first that Judge Heaslip failed to ask potential jurors whether they both accepted *and understood* the Rule 431(b) principles and failed to question them *at all* as to the fourth principle—that defendant's failure to testify cannot be held against him. He notes that, when defense counsel attempted to question the jurors about the principles, Judge Heaslip sustained the State's objection, instructing defense counsel to "move on." The State concedes that the trial judge failed to conduct *voir dire* in full compliance with Rule 431(b) by failing to ask if each juror *understood* the *Zehr* principles and failing to question them at all on the fourth one. We agree that error occurred with respect to the Rule 431(b) questioning. With respect to defendant's first argument, in *People v. Thompson*, 238 Ill. 2d 598, 607 (2010), the supreme court held that the trial court violated Rule 431(b) by failing to ask jurors if they agreed with the four principles and only asked if they understood them. See also *Wilmington*, 2013 IL 112938, ¶ 32 (where trial court only asked whether potential jurors *disagreed* with the principles, it was arguable that asking for disagreement and getting none was equivalent to juror *acceptance* of the principles, but the court's failure to ask jurors if they *understood* the principles was "error in and of itself"); *cf. People v. Curry*, 2013 IL App (4th) 120724, ¶ 65 (asking only if jurors agreed or disagreed with each principle was erroneous because the court failed to provide each juror with opportunity to respond to whether they understood principles *and* whether they accepted each principle). As to defendant's assertion that the court's failure to question each potential juror on the fourth *Zehr* principle constituted error, we also agree. *Id.* ¶ 32 (failure to inquire at all as to jury's understanding and acceptance of principle that the defendant's failure to

testify cannot be held against him constituted error); see also *Thompson*, 238 Ill. 2d at 607 (failure to inquire at all as to one of the principles constituted error).

¶ 58 Second, as to the questioning of Craglow, defendant asserts that error occurred because the court's aggressive questioning forced the potential juror to defend his position, including asking him if a trier of fact should "just roll some dice and decide whether you're guilty or not." Defendant contends that the trial judge singled out, ridiculed, and chastised Craglow so that no other potential jurors would offer similar answers. Defendant notes that defense counsel objected and asked if Craglow could be questioned in chambers, but Judge Heaslip refused to do so, stating, "I want to nail him and make sure that the rest of them don't follow suit *** to think that they're going to get out of doing this. So I want to stop it right now. I think I'm going to make an example of him[.]" Defendant points out that Craglow was in the first panel of jurors and that, after hearing the exchange, it is only natural that his fellow jurors would not have felt free to reveal any disagreement the with Rule 431(b) principles. Judge Heaslip, according to defendant, mocked Craglow and forced him to defend his position against numerous hypotheticals, and this aggressive diatribe could have only intimidated other potential jurors into concealing any similar prejudices so that they would not be singled out and ridiculed in the same way.

¶ 59 We conclude that error occurred in the questioning of Craglow. Thirty-two other potential jurors were in the courtroom and overheard the exchange between Judge Heaslip and Craglow, and only six jurors had been selected before the judge questioned Craglow. Judge Heaslip's comments and reaction, including the threat of contempt charges, to the potential juror's disagreement with one of the *Zehr* principles and his imprecise answer to another were excessive and acted to discourage other potential jurors from revealing similar prejudices.

Compare *People v. Brown*, 388 Ill. App. 3d 1 (2006) (court's comments were unnecessary, where the first potential juror stated that he could not put aside his bias and the trial judge punished him by ordering him to return to court the following day to observe the trial; continuing thereafter to second-prong plain-error analysis).

¶ 60 Having determined that several errors occurred, we next address whether they warrant reversal and remand for a new trial under: (1) the *Sprinkle* doctrine; and (2) plain error analysis.

¶ 61 (2) Relaxation of Forfeiture – *Sprinkle* Doctrine

¶ 62 Defendant asserts that the forfeiture rule should not be rigidly applied here, where the unpreserved errors concern the conduct of the trial judge. The State does not offer a response to this argument. We agree with defendant.

¶ 63 "[A]pplication of the waiver rule is less rigid where the basis for the objection is the trial judge's conduct." *People v. Kliner*, 185 Ill. 2d 81, 161 (1998). The supreme court first recognized judicial misconduct as a basis for relaxing the forfeiture rule in *People v. Sprinkle*, 27 Ill. 2d 398, 400-03 (1963) (supreme court reviewed the defendant's claims, where trial court had questioned witnesses during a bench trial and used several questions to imply its own opinions on the case and witnesses, but defense counsel did not object). The *Sprinkle* court noted that an attorney's objection to a trial judge's comments could prove embarrassing to the attorney or be viewed with skepticism by juries, which, the court assumed, generally view "most judges with some degree of respect, and accord to them a knowledge of law somewhat superior to that of the attorneys" before them. *Id.* at 400. Thus, an objecting attorney could irreparably damage his or her client's interests. *Id.* But, if the attorney fails to object, the error may be forfeited on appeal. *Id.* The court concluded that a less rigid application of the forfeiture rule "should prevail where the basis for the objection is the conduct of the trial judge than is otherwise required." *Id.* at 401.

¶ 64 More recently, in *People v. McLaurin*, 235 Ill. 2d 478 (2009), the supreme court noted that case law since *Sprinkle* has applied the doctrine in cases involving trial judges': racially derogatory remarks; remarks improperly conveying the impression that the judge expected the defendant would be found guilty and a death penalty hearing would be necessary; remarks evincing a bias against the defendant; expressions of sympathy toward a victim's relative; and comments to a venire at a retrial about imposition of a death sentence at the first trial. *Id.* at 487 (citing cases).

¶ 65 The *Sprinkle* doctrine, like the plain-error doctrine, is primarily concerned with ensuring a fair trial. *Id.* The doctrine has even been applied in bench trials, even though "*Sprinkle* was primarily concerned with the risk of alienating the jury by appearing disrespectful of the court's authority." *Id.* (citing cases). In such cases, the *McLaurin* court noted, "we have implicitly recognized that in some extraordinary circumstances, an objection 'would have fallen on deaf ears.' " *Id.* at 487-88 (quoting *People v. Davis*, 378 Ill. App. 3d 1, 10 (2007)).

¶ 66 The *McLaurin* court emphasized that trial counsel has an obligation to raise contemporaneous objections to properly preserve errors for review. *Id.* at 488.

> "This failure can be excused only under extraordinary circumstances, such as when a trial judge makes inappropriate remarks to a jury [citation] or relies on social commentary, rather than evidence, in sentencing a defendant to death ([citation]). That we have seldom applied *Sprinkle* to noncapital cases further underscores the importance of uniform application of the forfeiture rule except in the most compelling of situations." *Id.*

¶ 67 In the case before it, the *McLaurin* court rejected the defendant's argument that his constitutional rights were violated when the trial court held *in camera* discussions with counsel

without defendant present and where the court instructed the bailiff to speak directly with the jury following their third and fourth notes. *Id.* at 488-89. The supreme court held that the defendant, who had been convicted of unlawful-use-of-a-weapon charges, did not present any extraordinary or compelling reason to relax the forfeiture rule. *Id.* at 489. He did not claim that the trial court had overstepped its authority in the jury's presence or that defense counsel was practically prevented from objecting to the court's handling of the jury notes. *Id.* at 488. Rather, counsel was present during the jury-note conferences and there was no suggestion that counsel's objection would have fallen on deaf ears. *Id.* at 488. See also *People v. Brown*, 388 Ill. App. 3d 1, 9-11 (2009) (rejecting the defendant's argument that the forfeiture rule be relaxed; noting that the trial judge had allowed defense counsel the opportunity to ferret out any juror bias through *voir dire* questioning of the remaining potential jurors; counsel did so only as to some jurors).

¶ 68 We conclude that the forfeiture rule should be relaxed here because the trial judge prevented defense counsel from attempting to ferret out any juror bias. Specifically, after the questioning of Craglow, the court prevented defense counsel from questioning potential jurors about the Rule 431(b) principles, one of which Craglow unwaiveringly disagreed with in their presence and to Judge Heaslip's irritation. *McLaurin* and *Brown* rejected *Sprinkle* arguments on the basis that the trial judges in those cases had not prevented (or had allowed) defense counsel to attempt to discover any juror bias. Here, the venire observed and overheard the following: Judge Heaslip's irritation and argument with Craglow concerning the potential juror's disagreement with the presumption of innocence, a position from which Craglow did not waiver; and, following the sidebar, Craglow's continued disagreement with the principle and then his imprecise affirmative responses concerning the principle that defendant did not have to present any evidence, to which the court threatened to find him in contempt. At the sidebar, Judge

Heaslip had denied defense counsel's request to complete Craglow's questioning in chambers to avoid contaminating the jury, but *agreed* with counsel that "yes, [Craglow]'s trying to contaminate the jury." The judge further stated that he wanted to "nail" the potential juror to ensure that other potential jurors "don't follow suit" to try to "get out" of jury duty. The court stated that it believed that Craglow did not want to serve. Later, during defense counsel's questioning of the venire, the trial judge sustained the State's objection to counsel's questions concerning the *Zehr* principles. Thus, in contrast to *McLaurin* and *Brown*, Judge Heaslip foreclosed counsel's attempt to ferret out any bias in the remaining potential jurors, after the judge *himself* had earlier failed to properly question the venire on all of the Rule 431(b) principles and after he tried to "nail" Craglow on the basis of his belief that Craglow did not want to serve as a juror. In this context, any additional objections would have fallen on deaf ears.

¶ 69 The trial court's threat to find Craglow in contempt for his failure to provide precise affirmative responses to the third principle served to communicate to the other potential jurors a message that the court desired only certain answers to its questions; if an unacceptable answer was given, the result would be ridicule and the threat of a contempt finding. The fact that the questioning had moved on to another principle from the one with which Craglow disagreed would have been, at this point in the proceedings, lost on the remaining potential jurors.

¶ 70 Pursuant to *Sprinkle*, we relax the forfeiture rule here, and, given our conclusion above that there were errors in the *voir dire* questioning, we hold that the purpose of *voir dire*—the selection of a fair and impartial jury—was frustrated. The mechanisms the supreme court has put in place to ensure that a defendant's constitutional right to a fair jury is protected were not fully carried out. Accordingly, we reverse and remand for a new trial.

¶ 71 Although we need not reach defendant's plain-error claims, given the nature of the errors here, we choose to address them and, for the following reasons, we find plain error under prong two of that analysis.

¶ 72 (3) Plain-Error Exception to Forfeiture Rule

¶ 73 *(a) Prong One – Questioning of Craglow and Rule 431(b) Questioning*

¶ 74 Turning to the plain-error exception to the forfeiture rule, defendant argues that Judge Heaslip's errors can be reviewed under the first prong of plain-error analysis—a clear or obvious error 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. He contends that the judge's conduct was so serious that he was denied a fair and impartial jury trial. The State responds that the evidence was not so closely balanced that the trial court's errors warrant reversal under the plain-error doctrine. We agree with the State that the evidence was not closely balanced.

¶ 75 Defendant did not present any evidence, and there was no audio or videotape of the stop. Thus, the case rested on the two officers' credibility. We certainly do not find anything inherently incredible with their testimony, and, as to whether the evidence was closely balanced, we do not find any contradictions that cause us (or would cause a reasonable juror) to question the officers' credibility. Therefore, we cannot conclude that the evidence was closely balanced.

¶ 76 As to the DUI count, officer Reed testified that: he smelled the odor of alcohol on defendant's breath throughout his interaction with him; defendant failed the HGN test; his speech was extremely slurred; and defendant's demeanor reflected that he was intoxicated. As to the intimidation and bribery counts, Reed stated that defendant yelled and screamed at him during the stop and in the booking area at the police station and threatened to kill Reed and his

family or have the Mafia do so. Defendant also offered Reed $20,000 to let him go and threatened to blow up the police station, as well as the city and State. Reed also testified that, while in the booking room, defendant continued to yell and shook his free leg and threatened to kick out Reed's teeth.

¶ 77 Officer Roggenbock corroborated aspects of Reed's testimony, including that defendant yelled and screamed while in the squad car and in the booking room and that he threatened personal injuries to Reed and his family. Roggenbock also testified that defendant offered him $20,000 if he would let him go.

¶ 78 We reject defendant's assertion that Reed's testimony that defendant's speech was extremely slurred belied his other claims that defendant threatened him and tried to bribe him. Reed did not testify that it was impossible to understand defendant. We also find unconvincing defendant's claim that Reed's observations were inconsistent with intoxication, such as the fact that he did not observe any impaired driving and that defendant did not have any difficulty walking. As to his driving, when Reed responded to the dispatch, he found defendant in his car and parked in the middle of an intersection, a clear example of improper driving and a scenario under which a reasonable officer would question the driver's judgment. Although Reed did not observe any impaired driving when he asked defendant to pull over to the side of the road, the distance defendant drove—about 30 feet—was not of a sufficient length that an intoxicated person's impaired driving would necessarily be exhibited. Also, an impaired driver would not necessarily exhibit signs of impairment all of the time. As to the testimony concerning defendant's walking, Reed did testify that defendant swayed back and forth "quite a bit" during the HGN test; thus, the officer's testimony was that defendant was not entirely steady on his feet.

In all, we find no merit to defendant's arguments and we further note that, even if they had some merit, it would not be sufficient to render the evidence closely balanced.

¶ 79 Defendant also maintains that defense counsel's questioning that pointed out alleged inconsistencies between Reed's report and both officers' testimonies apparently influenced the jury because they sent a note to the judge during deliberations, asking for a copy of Reed's report and Roggenbuck's testimony. We reject this inference and assume that the jury more likely was attempting to undertake a thorough consideration of the evidence. See *People v. Wilmington*, 2013 IL 112938, ¶ 35 (jury's notes to judge, without any indication they had reached an impasse, did not reflect "that deliberations here were in any way extraordinary" and "[c]areful consideration of the evidence adduced and exhibits admitted is what we expect of jurors in any trial").

¶ 80 Finally, defendant contends that, even if the jury believed that defendant made the statements, the aggravated-intimidation counts still presented a close question because defendant did not have the ability to carry them out while he was shackled to the bench in the booking room. He also asserts that, although Reed testified that he believed that defendant could carry out the threats as soon as he was released from the bench, his actions thereafter in singlehandedly transporting defendant to the jail, without backup, contradicted this claim. Defendant urges that the evidence was not overwhelming that Reed feared defendant could carry out the threat and, if the jury believed that defendant was intoxicated, his statements would seem less like a credible threat and more like drunken ramblings. See, *e.g.*, *People v. Casciaro*, 2015 IL App (2d) 131291, ¶ 85 (intimidation "requires proof of a threat of physical harm at some time, possibly in the future"; implicit in the term threat "is the requirement that it have a reasonable tendency to create apprehension in the victim"). We find this argument unavailing. Roggenbuck testified

that he remained close to the booking room because he was concerned about defendant's actions, thus, he was close by when Reed unshackled defendant (who would still have been handcuffed and not entirely able to inflict the threatened physical injuries on Reed, *i.e.*, "kick [Reed's] teeth out with that free leg.") to transport him to the jail.

¶ 81 In summary, defendant has not shown that the evidence was closely balanced. Thus, the first prong of plain-error analysis does not apply.

¶ *82* *(b) Prong Two – Questioning of Craglow*

¶ 83 Defendant argues next, in the alternative, that Judge Heaslip's errors can be reviewed under the second prong of plain-error analysis—a clear or obvious error that 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. He contends that the judge's conduct was so serious that he was denied a fair and impartial jury trial. Defendant also contends that the cumulative effect of the *voir dire* errors denied him the opportunity to have an informed and intelligent basis upon which to select potential jurors and thus, constituted plain error. We agree.

¶ 84 In assessing defendant's prong-two arguments, we focus on the judge's questioning of Craglow. In *Thompson*, the supreme court held that a trial court's failure to comply with Rule 431(b) does not *automatically* result in a biased jury because "Rule 431(b) questioning is simply one way of helping to ensure a fair and impartial jury." *Thompson*, 238 Ill. 2d at 610. However, as to defendant's argument concerning the questioning of Craglow, the supreme court has stated that "a trial before a biased jury is structural error subject to automatic reversal."[2] *Id.* at 610-11.

[2] The structural-error category also includes: (1) complete denial of counsel; (2) trial before biased judge; (3) racial discrimination in grand jury selection; (4) denial of self-representation; (5) denial of public trial; and (6) defective reasonable-doubt instruction. *Id.* at

¶ 85 Defendant addresses three First District cases wherein the courts *rejected* plain-error arguments involving a judge's conduct toward a potential juror, arguing that they are distinguishable. Defendant first points to *Brown*, the case upon which he primarily relies. There, the reviewing court rejected a plain-error argument in a case in which the defendant was convicted of cocaine possession, with intent to deliver within 1,000 feet of a school. *Id.* at 10. The defendant had argued that the trial judge interfered with the selection of an unbiased jury by ordering the first potential juror, who admitted that he could not be fair and who the judge excused, to return to the courtroom to observe the trial in order to get an education as to how the system works. After this exchange, the trial judge asked the remaining venire if anyone else had a problem. No juror spoke up. The jury found the defendant guilty.

¶ 86 On appeal, the defendant argued that he was denied the right to a fair and impartial jury when the trial court discouraged prospective jurors from responding candidly when she excused the first potential juror after he stated that he could not put aside his bias and punished him by ordering him to return to court the following day to observe the trial. The *Brown* court determined that, although there was error (specifically, the trial judge's exchange with the prospective juror was "unnecessary"), the defendant did not make a sufficient showing under prong two of plain-error review. *Id.* at 7, 9. It concluded that the defendant's assertion of jury tainting was speculative; that defense counsel *was allowed* to question all the prospective jurors after the initial *voir dire* by the trial judge (although counsel did so only as to some jurors); the

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608-09. These errors are systemic, "erode the integrity of the judicial process," and "undermine the fairness of the defendant's trial." (Internal quotation marks omitted.) *Id.* at 608. An error is designated structural only if it renders the trial fundamentally unfair or an unreliable means of determining guilt or innocence. *Id.* at 609.

requirement that the juror return the following day did not amount to a penalty; and no showing was made that the admonishments intimidated the venire. *Id.* at 9-10.

¶ 87 We note that *Brown*'s lead opinion was written by Justice Garcia. *Id.* at 1. Justice Wolfson concurred in the result. *Id.* at 11 (Wolfson, J., concurring). In his special concurrence, he wrote that he concluded that no error had occurred. *Id.*

¶ 88 Justice Gordon dissented, concluding that the second prong of plain-error analysis applied because the threat of one day's punishment (which amounted to physical intimidation, in his view) tainted the entire venire and the defendant did not receive a fair trial. *Id.* at 13 (Gordon, J., dissenting). Justice Gordon noted that the lead opinion based its decision in part on the fact that defense counsel did not object, but, invoking the *Sprinkle* doctrine, he found this unavailing, noting that, where "errors are directed at the trial court's conduct, the waiver rule is relaxed." *Id.* at 13 (Gordon, J., dissenting) (citing *People v. Young*, 248 Ill. App. 3d 491, 498 (1993)). He would have adopted the approach of federal courts, which "have drawn a line between criticism and threats [of venire members], with criticism falling on the non-reversible side and threats of punishment falling on the reversible side. *Id.* (Gordon, J., dissenting). Compare *United States v. Rowe*, 106 F.3d 1226, 1228 (5th Cir. 1997) (finding error where trial court threatened to punish a potential juror by having her return again and again until she learned to put aside her personal opinions) with *United States v. Vega*, 221 F.3d 789, 803 (5th Cir. 2000) (no error where trial judge merely criticized a potential juror for expressing her bias before a question had been asked). Justice Gordon disagreed with the lead opinion's analysis of the case law, most significantly criticizing its suggestion that defense counsel could have questioned prospective jurors about whether they felt intimidated. *Id.* at 11-14 (Gordon, J., dissenting). He questioned what counsel could have asked the venire and noted that, in one case, the trial court

asked the venire such a question and no juror raised a hand, but, following conviction, a panel member came forward and was prepared to testify that she was intimidated into silence. *Id.* at 12 (Gordon, J., dissenting) (citing *Rowe*, 106 F.3d at 1229). He also cautioned that a requirement of post-verdict interrogation of jurors has been discouraged and is barred if it reveals the effect on the jury's reasoning. *Id.* at 12-13 (Gordon, J., dissenting).

¶ 89 Here, defendant acknowledges *Brown* and two other cases that follow it, arguing that they are distinguishable from this case because the trial judges in those cases did not expressly state their intention to stop potential jurors from answering questions in a certain way. See *People v. Trzeciak*, 2014 IL App (1st) 100259-B, ¶ 84 (appearing to initially review under *Sprinkle* doctrine, but, ultimately, relying on *Brown*'s second-prong plain-error analysis and rejecting the defendant's argument that the trial court's conduct—admonishing, in front of entire venire, a potential juror who claimed bias that he would not be excused and had to return each day to observe the remainder of the trial "to watch how a fair trial operates"—deprived the defendant of a fair jury; holding that the defendant's claim was mere speculation; throughout the entire *voir dire* process, multiple potential jurors stated that they had certain biases, but could still be fair; and "[m]ost telling, *** defense counsel did not object to the swearing of the jury, which indicates *** counsel believed the jury as impaneled could be fair and impartial"); *People v. Morales*, 2012 IL App (1st) 101911, ¶¶ 59-60 (reaffirming *Brown* and determining that it was indistinguishable from facts before it; holding that trial judge's threat of month-long jury service to potential juror with gang bias did not establish second-prong plain error; the defendant did not show that the jury was biased). Defendant asserts that, here, Judge Heaslip's express intent to circumvent *voir dire*'s purpose challenges the integrity of the judicial process in a way that was not present in the First District cases. Also, he notes that the questions in *Brown* related to

general bias on the nature of the offense and the *Brown* majority noted that defense counsel could ask about possible biases. Here, in contrast, the error relates to specific bias against the Rule 431(b) principles on which defense counsel was specifically prohibited from asking further questions.

¶ 90 The State responds that defendant does not assert actual prejudice existed here and does not claim that the selected jury was biased. Rather, he attacks any requirement of affirmative proof of juror bias. Further, the State contends that defendant relies on mere speculation that his right to a fair jury was impacted. Echoing the *Brown* court's admonishment that it is just as likely that no juror expressed a bias subsequent to Craglow's questioning because they did *not* harbor any bias or prejudice, the State argues that it would be difficult to say that the six jurors who were selected from the group questioned after Craglow expressed no bias because the trial judge intimidated them. The State asserts that, here, all of the jurors stated that they could be fair, and it further notes that, unlike *Brown* and *Trzeciak*, Judge Heaslip did not punish Craglow by requiring him to attend the trial. Thus, prospective jurors would not have feared punishment if they expressed a bias that would prevent them from being fair and impartial. The State also points out that Judge Heaslip's intention "to make an example of" Craglow because "he doesn't want to serve on this jury" was made at the sidebar and could not have impacted the venire's openness to *voir dire* questioning.

¶ 91 The State also points to the questioning of the jurors on the *Zehr* principles and other matters, arguing that they constituted sufficient indicators that each seated juror was fair and impartial. Additionally, the State notes that defense counsel questioned each selected juror, ultimately used only five of seven available peremptory challenges, and did not object to the swearing of the jury, all of which reflect, in its view, that counsel believed the jury was fair and

impartial. Finally, the State argues that Judge Heaslip took multiple steps to ensure a fair trial, including barring the use of the term "aggravated" and excusing two jurors for medical reasons. Ultimately, the State urges, while Judge Heaslip's exchange with Craglow may have been unnecessary, the court's comments exhibited Judge Heaslip's frustration with Craglow rather than bias against defendant.

¶ 92 We find *Brown* distinguishable, and we agree with defendant that the nature of the bias here and the fact that defense counsel was prohibited from questioning the venire on the *Zehr* principles, particularly after the trial judge erred in questioning the venire on those principles, compels a different result than that in *Brown*. Craglow professed a bias against the principle that the burden of proof is on the State and not on defendant. After an exchange during which the court presented him with various sarcastic hypotheticals and during which Craglow remained firm in his position, Judge Heaslip refused defense counsel's request that Craglow be questioned in chambers. He stated his intent, albeit at a sidebar, to "make an example" of Craglow, even though he acknowledged that the potential juror would "probably get excused." During the second exchange with Craglow, which was conducted in front of the entire venire, Judge Heaslip became frustrated with Craglow's failure to precisely answer yes or no to another principle and threatened to find him in contempt of court. In our view, the exchange clearly reflected that Judge Heaslip's intent was to have Craglow answer the questions in the manner in which the court, not Craglow, desired and, unmistakably, the entire venire was given this same impression. The threat of punishment via a contempt finding, which was made in the venire's presence, gave the potential jurors the impression that the court desired only certain answers to its questions; that is, they were clearly educated on the harsh consequences of giving the "wrong" answers. This is so even though the threat was made in response to Craglow's imprecise answer

concerning the third *Zehr* principle and not his disagreement with the second principle (with which he firmly disagreed). Any such distinction would have been lost on the venire at this point in the proceedings. In this atmosphere, any potential juror with a bias understood that he or she risked the wrath of the court if they expressed any disagreement. Thus, the purpose of *voir dire*—to ensure a fair and impartial jury that is free from bias or prejudice—was thwarted because inappropriate/incomplete steps were taken toward achieving this goal.

¶ 93 We find disingenuous the State's assertion that defendant was not prejudiced because defense counsel was allowed to question the potential jurors and use preemptory challenges to exclude allegedly biased jurors. The State objected to defense counsel's attempt to question the potential jurors. By sustaining the State's objection, Judge Heaslip prevented defense counsel from questioning potential jurors on the precise concepts at issue here, the Rule 431(b) principles, which are the core mechanisms by which to ensure a fair and impartial jury. And, we note, this came after the judge himself failed to adequately question the jurors on the same principles and after he berated Craglow for disagreeing with one of them. Similarly, the fact that defense counsel did not utilize all available peremptory challenges and did not object to the swearing of the jury cannot be held against defendant because counsel was prevented from ferreting out any bias. See generally *People v. Clark*, 278 Ill. App. 3d 996, 1003 (1996) (*voir dire*'s purpose is to assure the selection of an impartial jury, free from bias and prejudice, and grant counsel an intelligent basis on which to exercise peremptory challenges). We take issue with the State's assertion that the court's comments merely reflected its frustration with Craglow and rather than any bias against defendant. Defendant does not claim that the court was biased against him, but that its treatment of and questioning of Craglow intimidated the entire venire such that he was deprived of his right to a fair and impartial jury.

¶ 94 Finally, we note that defendant points to the *Brown* dissent's rejection of any requirement of affirmative proof of a biased jury. Defendant contends that, if the trial court intimidated potential jurors into concealing their biases, then it would be impossible to make such a showing. *Id.* at 12 (Gordon, J., dissenting). It would also, he suggests, produce absurd results. Defendant presents the following hypothetical: a judge presents the 431(b) principles to the jury and, after asking the venire if they understand and accept them, he tells them that, if they do not answer in the affirmative, he will throw them in jail. Defendant maintains that, under this scenario, if no juror is willing to risk incarceration, there would be no affirmative proof of juror bias on the record, and, under the *Brown* majority's reasoning, such a case would not qualify as an error so serious that it challenges the integrity of the judicial process. Even such extreme cases of judicial intimidation, he argues, would be insulated from appellate review. We agree that there may be challenges in presenting affirmative proof of bias in certain cases, but the facts here do not present such a scenario and thus, we need not decide that question. Defendant does not rely solely on judicial intimidation; rather, he asserts that the combination of both the judge's colloquy and the failure to allow defense counsel the opportunity to question the venire on the *Zehr* principles prejudiced him. Thus, our decision is limited by the context of the question we resolve.

¶ 95 In summary, the quantity and nature of the errors during *voir dire* deprived defendant of a fair and impartial jury, and, therefore, we reverse and remand for a new trial.

¶ 96 B. Prosecutorial Misconduct

¶ 97 Defendant next argues that the prosecutors, during opening statement and closing argument: (1) employed arguments designed solely to inflame the jurors' passions; (2) attempted to improperly align themselves with the jury 26 times; (3) argued that the HGN test indicated

intoxication, where it merely shows consumption of alcohol; and (4) made arguments not based on the evidence, but on the jurors' *voir dire* responses. Defendant contends that the cumulative effect of the prosecutors' misconduct constituted plain error and that he is entitled to a new trial. He also argues in the alternative that he was denied effective assistance of counsel. Although, (given our resolution of the *voir dire* claim) we need not reach this issue, we choose to address it because the error may recur on remand. For the following reasons, we agree with defendant that the prosecutors' misconduct constituted plain error, but we reject his ineffective-assistance claim.

¶ 98 Defendant concedes that some of the allegedly-impermissible arguments were not objected to, while others were objected to and the objections were overruled. Further, defense counsel did not include any of the arguments in defendant's post-trial motion. Thus, the issue has not been preserved for appeal. *Enoch*, 122 Ill. 2d at 186. Defendant argues that we can review the issue under both prongs of plain-error review. We reject any prong-one argument because we determined above that the evidence was not closely balanced. However, we address prong two below. Further, defendant argues that we may review this issue as ineffective assistance of counsel, which we also address below.

¶ 99 (1) Whether Error Occurred

¶ 100 We address first whether error occurred. There appears to be a conflict among supreme court cases regarding the correct standard for reviewing a prosecutor's remarks during argument. *People v. Daniel*, 2014 IL App (1st) 121171, ¶ 32. The decisions in *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007), and *People v. Sims*, 192 Ill. 2d 592, 615 (2000), suggest that we should review this issue *de novo*. In *People v. Hudson*, 157 Ill. 2d 401, 441 (1993), the court suggested that we should review this issue for an abuse of discretion. We need not take a position in this

case because, under either standard, we conclude, as we discuss below, that defendant's claims concerning opening statement and the prosecutors' aligning themselves with the jury do not have merit, but his arguments concerning the HGN test and the *voir dire* responses do have merit.

¶ 101 Defendant notes that, due to the lack of any corroborating physical evidence, the State's case depended entirely on witness credibility. To bolster its case, the State, he argues, employed several improper arguments at the commencement and conclusion of the case. The first words of the State's opening statement attempted to inflame the jurors' passions by painting defendant as a violent and dangerous person:

> "Counsel; ladies and gentlemen of the jury. I will blow up the South Beloit Police Department. I will kill you. I will kill your family members. I'm a member of the Mafia. The Mafia will take care of you if you don't let me go. I will give you $20,000 to let me go. I'm part of the FBI. I will have everyone that you know killed and your family killed as well."

¶ 102 Defendant argues that the prosecutor's opening statement remark was made at a time when the jury knew nothing about the facts of the case. By beginning the statement with the alleged threats and without any context, the prosecutor was not trying to help the jury understand the evidence. Instead, the prosecutor was merely attempting to inflame the jurors' passions against defendant by painting him as a dangerous and violent criminal. Defendant also notes that the prosecutor's comments did not state the threats in the chronological order in which defendant allegedly spoke them.

¶ 103 Every defendant has a constitutional right to a fair trial free from prejudicial comments by the prosecution. *People v. Billups*, 318 Ill. App. 3d 948, 958 (2001); see also U.S. Const., amend. XIV; Ill. Const. 1970, art. I, § 2. The purpose of an opening statement is to apprise the

jury of what each party expects the evidence to prove. *People v. Leger*, 149 Ill. 2d 355, 392 (1992). An opening statement may include a discussion of the evidence and matters that may reasonably be inferred from the evidence. *People v. Smith*, 141 Ill. 2d 40, 63, (1990). Counsel may summarily outline the expected evidence and reasonable inferences from the evidence, but no statement may be made in opening that counsel does not intend to prove or cannot prove. *People v. Kliner*, 185 Ill. 2d 81, 127 (1998). Reversible error occurs only where the remarks, referring to evidence that later proves to be inadmissible, are attributable to the deliberate misconduct of the prosecutor and result in substantial prejudice to the defendant. *Id.* Even where a trial court instructs the jury that opening statements are not evidence and that any statement not based on evidence should be disregarded, the giving of this instruction alone is not always curative; it is a factor to be considered in determining whether the defendant was prejudiced by the improper comments. *People v. Arroyo*, 339 Ill. App. 3d 137, 154 (2003).

¶ 104 We conclude that no error occurred with respect to the opening statement comments. The prosecutor listed the precise threats that the State's witnesses testified to, and, therefore, the comments were based on facts in evidence. Although the threats were couched in the first person, we cannot conclude that this added dramatic effect constituted error. *Cf. People v. Jones*, 2016 IL App (1st) 141008, ¶¶ 24-29 (reviewing *de novo* non-forfeited argument and holding that State's references to the defendant as a "criminal" in its opening statement constituted reversible error, where comment was repeated several times, case was close, and the defendant did not have a prior criminal record).

¶ 105 Next, as to closing argument, defendant argues that the prosecutors used the pronouns "we" and "us" 26 times to collectively refer to the State and jury. The comments included the following: "*We* have had the opportunity over the course of the last two days to have it proven to

us that the defendant committed the offense of intimidation"; "That has been proven to *us* beyond a reasonable doubt"; "It has been proven to *us* over the last two days beyond a reasonable doubt that the offense was committed while Officer Reed was performing his official duties"; "*We* heard about ***"; "That's the reasonable inference, and that's what's been proven to *us* beyond a reasonable doubt over the course of the last two days"; and "Ladies and gentlemen, over the course of the last two days it has been proven to *us* beyond a reasonable doubt that this defendant committed the offense of [DUI], intimidation of a public official, bribery, and improper parking." (Emphases added.) Defendant argues that the prosecutors misstated their role at trial and appeared to act as independent evaluators of the evidence who were performing the same role as the jury, not as advocates. Defendant also argues that, at the end of closing argument, the State asked the jury to find defendant guilty, and, by doing so, after constantly portraying the State as an independent evaluator of the evidence, the prosecutors were effectively saying that they believed defendant was guilty after they had evaluated the evidence. See *People v. Caballero*, 126 Ill. 2d 248, 272 (1989) (although the prosecutor may, if it is based on the evidence, state his or her opinion that the defendant is lying, the prosecutor "may not give his[/her] own opinion as to the guilt or innocence of the accused unless the prosecutor states, or it is apparent, that the opinion is solely based on the evidence").

¶ 106 Defendant relies on *Johnson*. In that case, the reviewing court addressed a forfeited prosecutorial-misconduct issue involving multiple comments by the prosecutor and reversed for a new trial. *Johnson*, 208 Ill. 2d at 469. As to one of the improper comments, the court held that the prosecutor improperly aligned himself with the jury, where he referred to " 'our job' to find the facts." *Id.* at 468. The *Johnson* court ultimately held that, collectively, the multiple comments by the prosecutor "were so numerous that we find no need to assess the prejudicial

effect of each isolated comment" and further concluded that the cumulative effect of the comments prejudiced the jury and were a material factor leading to the defendant's conviction. *Id.*

¶ 107 The State responds that, here, in context, the prosecutors consistently stated to the jurors that it was their duty to find defendant guilty or not guilty. It notes that, by its count, there were at least 50 instances in closing argument where the prosecutors used the terms "The People," "you," and "your," in referencing the different roles the State and jury play in the trial process. The State points to *People v. Rice*, 234 Ill. App. 3d 12 (1992). In *Rice*, the prosecutor stated during opening that " 'We represent the community. The same community that you represent as jurors *** in this case' " and argued during closing argument that " 'We represent the People of the State of Illinois. But you are the People of the State of Illinois.' " *Id.* at 23. The *Rice* court rejected the defendant's argument and concluded that the prosecutor's comments did not substantially prejudice the defendant because they accurately stated that the prosecutor represented the people of the State of Illinois and did not improperly suggest that the prosecutor was a jury member or that the prosecutor's role was similar to the jury's role. *Id.* See also *People v. Edwards*, 218 Ill. App. 3d 184, 195-96 (1991) (reviewing for plain error and rejecting the defendant's argument that the State's remarks substantially prejudiced him; at closing argument, the State had remarked that " 'We, the People of the State of Illinois, me and Mr. Burke, who represent the People, we represent you, represent everyone in the courtroom, even in a manner of speaking the defendant, to present reliable, credible, evidence before the court and you are to determine that in the final analysis' "; court concluded that the State's comments accurately stated that the prosecutor represented the people of the State and, further, that the

State informed the jury that the State had the burden of proving the defendant guilty beyond a reasonable doubt).

¶ 108 The State also argues that the prosecutors' use of the terms "we" and "us," when placed in context, does not constitute reversible error because the prosecutors went through a pattern where they would state the legal requirements, proper burden of proof, and how the evidence fit into the legal requirements. Thus, the State urges, as in *Edwards*, the prosecutors accurately stated the proper burden of proof multiple times: "[i]f you find from your consideration of all the evidence that any one of these propositions has not been proven beyond a reasonable doubt, you should find the defendant not guilty." When the prosecutors stated "we heard" or "we learned" they followed with a general recitation of the testimony: "We learned of the strong odor of alcohol coming from the defendant throughout the officer's interaction with the defendant"; "Speech so slurred that as we learned from Officer Reed that the officer had difficulty understanding what the defendant was saying." These statements, the State argues, show that the prosecutors were offering a general summary of what the entire courtroom heard and presented the facts in a very objective manner. Thus, they did not improperly align themselves with the jury.

¶ 109 The State is afforded a great deal of latitude in presenting closing argument and is entitled to argue all reasonable inferences from the evidence. *People v. Nieves*, 193 Ill. 2d 513, 532-33 (2000). Further, improper comments can constitute reversible error only when they engender substantial prejudice against defendant such that it is impossible to say whether or not a verdict of guilty resulted from those comments. *Id.* at 533. It is generally improper for a prosecutor to express a personal opinion about the case. *People v. Johnson*, 114 Ill. 2d 170, 198 (1986). However, the prosecutor may properly comment on the evidence presented or

reasonable inferences drawn from that evidence. *People v. Moss*, 205 Ill. 2d 139, 184 (2001). In reviewing whether comments made during closing argument are proper, courts must view the closing argument in its entirety and remarks must be viewed in context. *People v. Johnson*, 218 Ill. 2d 125, 141 (2005).

¶ 110 We conclude that the repeated references to "we" and "us" during closing argument were not improper. This case is much more like *People v. Boling*, 2014 IL App (4th) 120634, where the court held that the prosecutor's [repeated] use of the term " 'we' [was] no more expressive of his personal opinion than had he used the term 'you' when speaking to the jury" (*id.* at ¶ 127), than *Johnson*, where the prosecutor stated that it was " 'our job' to find the facts (*Johnson*, 149 Ill. App. 3d 468). The comments here did not misstate the prosecutors' roles at trial or state their personal beliefs or opinions. We agree with the State that the comments were simply a general summary of what the courtroom heard.

¶ 111 Defendant next argues that the prosecutors erred, both in opening statement and closing argument, by arguing, over defense counsel's objection, that the HGN test showed impairment. During closing arguments, the prosecutor told the jury, "The defendant submitted to the [HGN] Standardized Field Sobriety Test. The officer explained to you how that is administered. That the defendant showed the maximum number of impaired – indicators of impairment on that test." Defense counsel objected, "[r]egarding impairment," but the trial court overruled the objection. The prosecutor continued, "That the officer indicated the defendant showed the maximum number of indicators of impairments for that test for each eye for a total of six." Defendant also points to opening statement, during which the prosecutor stated that Reed "noted indicators of impairment." Judge Heaslip also overruled defense counsel's objection at that time. Defendant argues that, because the HGN test does not indicate impairment, but merely alcohol

consumption, the State's argument misstated the evidence and was, thus, improper. This was especially prejudicial here, he urges, because there was no breathalyzer test or any other field-sobriety test. Also, the closing argument comment occurred during rebuttal, when defense counsel had no opportunity to respond. Defense counsel's only opportunity to challenge the improper argument was to object, which he did do, but the court overruled the objection. Thus, the court, "gave credibility to the prosecutor's improper argument." *People v. Lowry*, 354 Ill. App. 3d 760, 774 (2004).

¶ 112 The supreme court has noted that "[a] failed HGN test is relevant to impairment in the same manner as the smell of alcohol on the subject's breath or the presence of empty or partially empty liquor containers in his car. Each of these facts is evidence of alcohol consumption and is properly admitted into evidence on the question of impairment." *People v. McKown*, 236 Ill. 2d 278, 302-03 (2010). Further, the court stated that "evidence of HGN field-sobriety testing, when performed according to the NHTSA protocol by a properly trained officer, is admissible under the *Frye* test for the purpose of showing *whether the subject has likely consumed alcohol and may be impaired*." (Emphasis added.) *Id.* at 306. "The result of the test, therefore, makes it either more or less likely that a defendant was impaired due to alcohol." *Id.* at 304.

¶ 113 We conclude that the prosecutor's comments that the HGN test revealed "indicators of impairment" were improper. Further, the prosecutors' comments bolstered the misstatement by Reed, who testified that the HGN test "provide[s] indicators of impairment to whether or not somebody may or may not be under the influence of alcohol or drugs." The comments are clearly contrary to *McKown*. *Id.* at 314 ("HGN testing is generally accepted in the relevant scientific fields as evidence of alcohol consumption and possible impairment.").

¶ 114 Finally, defendant argues that the prosecutor erred by using the jurors' responses during *voir dire* as evidence. During *voir dire*, the State asked the potential jurors if they had ever observed someone intoxicated by alcohol. After all of the jurors raised their hands, the State asked what were some of the things the jurors noticed that made them realize someone was intoxicated. After several jurors responded, the court sustained defense counsel's objection that the questions were indoctrinating the jury. During rebuttal argument, the State returned to this theme, stating:

> "Additionally, remember back to the jury selection when we were talking about our life experience and common sense when you've seen someone that's under the influence of alcohol. We talked about the different things that we observed. Some people get loud, they get belligerent. One lady indicated that some people—"

At this point, defense counsel objected, and the trial court overruled the objection. The prosecutor continued, "There was an indication by one of the individuals questioned that some people become violent that she's observed when people are under the influence of alcohol." Defendant contends that this argument was improper because the jurors' *voir dire* responses were not evidence. Further, defendant notes that the *voir dire* questions were themselves improper, as evidenced by the court's sustaining defense counsel's objection to them when asked. Defendant maintains that this argument was particularly prejudicial because it was made during rebuttal, and Judge Heaslip implicitly endorsed it by overruling defense counsel's objection to the argument.

¶ 115 The State responds that the prosecutors were merely asking the jurors to use their "common sense and life experience" in assessing the evidence. The prosecutors explained that some intoxicated people "get loud," get "belligerent," and some "become violent." The State

further contends that common sense was a prosecutorial theme throughout the argument, and the reference to *voir dire* was simply an appeal to the common sense and life experience of each juror. Thus, in its view, there was no error.

¶ 116 We conclude that the statements were improper and agree with defendant that the prosecutor went beyond the common-sense theme and asked the jurors to use their *voir dire* responses as evidence. See *People v. Lowry*, 354 Ill. App. 3d 760, 771 (2004) (improper for a prosecutor to argue facts not based upon the evidence). The prosecutors asked the jurors to recall their specific responses to certain questions. They did not merely remind the jurors to use their common sense.

¶ 117 Finally, we note that, even if some of the comments we found erroneous above were not improper, we nevertheless conclude that, cumulatively, they constituted error. " 'Where there are numerous instances of improper prosecutorial remarks, a reviewing court may consider their cumulative impact rather than assessing them in isolation.' " *People v. Abadia*, 328 Ill. App. 3d 669, 684 (2001) (quoting *People v. Brown*, 113 Ill. App. 3d 625, 630 (1983)). See *People v. Ray*, 126 Ill. App. 3d 656, 663 (1984) ("cumulative impact of the numerous improper remarks ineluctably deprived [the] defendant of a fair and impartial trial").

¶ 118 (2) Prong Two

¶ 119 Having found that the prosecutors made improper comments, we next address whether the errors constituted plain error under prong two of that analysis.

¶ 120 The second prong is met where a defendant can show that a prosecutor's improper comments were so serious that they affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Adams*, 2012 IL 111168, ¶ 24; see also *People v. Johnson*, 208 Ill. 2d 53, 64 (2003) ("a pattern of intentional prosecutorial misconduct may so

seriously undermine the integrity of judicial proceedings as to support reversal under the plain-error doctrine").

¶ 121 We conclude that the nature and volume of the prosecutors' comments in this case were such that defendant was deprived of a fair trial and that the comments undermined the integrity of the proceedings. The prosecutors improperly stated the purpose of the HGN test and its results, and they invited the jurors to use their *voir dire* responses as evidence. Although each error, alone, might not have prejudiced defendant, cumulatively, the errors did so and constitute reversible error. The comments were not fleeting, as the State would have us conclude, and the fact that the jury received standard instructions concerning closing argument did not cure the prejudicial effect of the improper comments.

¶ 122 In summary, the cumulative effect of the prosecutors' comments constituted plain error.

¶ 123 (3) Ineffective Assistance of Counsel

¶ 124 Next, defendant argues in the alternative that he is entitled to a new trial because his trial counsel performed deficiently by not objecting to all of the improper arguments and not including any of the improper arguments in his post-trial motion. Defendant contends that he was prejudiced by these errors because the improper arguments threatened to tip the balance against him. The State does not respond to this argument. We reject defendant's claim.

¶ 125 "To show ineffective assistance of counsel, a defendant must demonstrate that 'his [or her] attorney's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.' " *People v. Simpson*, 2015 IL 116512, ¶ 35 (quoting *People v. Patterson*, 192 Ill. 2d 93, 107 (2000)). "Further, in order to establish deficient performance, the defendant must

overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy." *People v. Smith*, 195 Ill. 2d 179, 188 (2000).

¶ 126 We reject defendant's argument that he was denied the effective assistance of counsel based on counsel's failure to object to the remarks challenged by defendant on appeal and the failure to include them in a post-trial motion. Although we have concluded that the remarks deprived defendant of a fair trial, it was not due to counsel's performance. Counsel raised many objections to the improper comments, and nearly all of his objections were overruled. The prejudice to defendant resulted from the prosecutors' actions, not defense counsel's.

¶ 127 III. CONCLUSION

¶ 128 For the reasons stated, the judgment of the circuit court of Winnebago County is reversed and the cause is remanded for a new trial.

¶ 129 Reversed and remanded.