2020 IL App (1st) 171271-U
No. 1-17-1271

SECOND DIVISION
April 28, 2020

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 16CR853101
	)	
GEROY CARMICHAEL,	)	
	)	The Honorable
Defendant-Appellant.	)	Thomas J. Byrne,
	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Lavin and Coghlan concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's armed habitual criminal conviction affirmed where jury received proper instructions delineating the elements of the offense and where the circuit court properly admitted a recorded jailhouse conversation between defendant and his wife.

¶ 2 Following a jury trial, defendant Geroy Carmichael was convicted of the offense of armed habitual criminal and was sentenced to 10 years' imprisonment. Defendant appeals his conviction and the sentence imposed thereon arguing that the circuit court erred in denying his jury instruction request

and in admitting hearsay evidence. For the reasons set forth herein, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 On May 17, 2016, defendant disposed of a loaded semi-automatic firearm out of the rear door of a residence where Chicago police officers were executing a search warrant. The weapon was recovered and defendant, based on his criminal history, was subsequently charged with the offense of armed habitual criminal.

¶ 5 At trial, Chicago Police Officer Robert Gallas, testified that at approximately 3:30 p.m. on May 17, 2016, he and about ten other officers were dispatched to a two-flat residence located at 4847 West Augusta to execute a search warrant. When they arrived at that location, the officers observed that the building was surrounded by a black wrought-iron fence. Because the fence was gated and locked, one of the officers used an L-shaped metal bar to allow them to gain entry to the property. The officers then proceeded to the front exterior door, which was also locked. Officer Gallas heard voices inside the building; however, when the officers announced their office and the reason for the presence, there was no response. As a result, the officers forced entry into the building.

¶ 6 Upon making entry, Officer Gallas observed defendant, who was wearing a tan hoodie, tan pants, and tan gym shoes, running up the stairwell that led to the second-floor residence. Officer Gallas again announced his office and ordered defendant to stop and show his hands. Defendant, however, did not comply, and continued running up the stairs. As he did so, "he was holding his [right] side with an open hand, next to his pants area." Officer Gallas pursued defendant, but defendant was able to lock himself inside of the second-floor residence before he could be detained. When defendant refused to unlock and open the door, the officers used a battering ram

to gain entry to the unit "within a couple of seconds." After gaining entry to the second-floor residence, Officer Gallas proceeded to the rear door of the flat where he encountered defendant and detained him. Three other individuals who were also present in the second-floor residence were also detained. Two of those other individuals were also arrested.[1] Officer Gallas admitted that he did not personally observe defendant throw a gun out of the back door of the second-floor residence prior to arresting him.

¶ 7 Chicago Police Officer Vernon Mitchell was another member of the team that executed the search warrant at issue. He was assigned to "watch the rear and sides of the building, in case anyone ran out the building, or anyone threw anything out of any doors or windows." He was also responsible for inventorying any evidence recovered during the execution of the search warrant. As he was positioned in the rear of the building, Officer Mitchell observed defendant, who was wearing a tan track suit, open the back door of the residence and throw a gun into the backyard. The weapon bounced and landed on the sidewalk. After receiving an "all clear" broadcast, Officer Mitchell informed the rest of the team that a gun had been thrown out of the rear door. He then took photographs of the backyard and the gun before he recovered the weapon, which was a Glock .357 semi-automatic pistol. At the time that he recovered the weapon, it was loaded with 12 rounds in the magazine and one round in the chamber. Officer Mitchell placed the gun into an evidence bag and the gun was later inventoried in accordance with police protocol. After securing the weapon, Officer Mitchell photographed the building. When he made his way to the second-floor residence to take additional photographs, he identified defendant as the man who he had observed discard the weapon. On cross-examination, Officer Mitchell estimated that he was approximately 30 feet away from defendant when he observed defendant discard the handgun.

[1] The record does not contain any information about the identities of the other arrestees or the reasons for their arrests.

¶ 8 Investigator Kimberly Hofsteadter testified that she monitors inmate telephone calls at the Cook County Department of Corrections (the Department). All inmate telephone calls are recorded by the Securus System (Securus). Every time an inmate places a telephone call, he must enter his unique personal identification number (PIN) and identify his name vocally, which is verified by Securus's voice recognition software. Inmates are also informed prior to making a call that the call will be recorded. Securus generates call detail reports at the time the calls are made and those reports are retained in accordance with standard business practices by the Department. Hofsteadter testified that Securus recorded a telephone conversation that defendant placed on May 21, 2016, at approximately 12:33 p.m. to a specific telephone number.[2] A three minute and seven second excerpt from that call was then played for the jury.

¶ 9 In that phone call, defendant and his wife discussed the circumstances of his arrest and defendant remarked, "I woulda been good if I wouldn't a had nothing. All I had to do was just leave it in the drawer." The "it" he is referring to is not specified. In response, defendant's wife recalled asking him the day before why he "ha[d] it in [his] pocket" and asked if he remembered what he told her. According to his wife, defendant replied, "I have to." Defendant, in turn, acknowledged that he "probably did say that" because "[i]t's so dangerous out there on the street" because people will "start blowing." Defendant's wife then voiced her frustration and confusion about his arrest, asking "Did you do what they say you did?" She explained that it did not make sense to her that defendant, knowing police were on the scene, would "toss a gun to them." In response, defendant stated, "yea, that happened, babe. *** I didn't know they was back there." He explained that he was "not thinking" and that he just "needed to get it off of me."

[2] The telephone number is identified in the record. We elect not to include that number in this disposition.

¶ 10 After presenting the aforementioned evidence, the State presented a series of agreed-upon stipulations. The parties first stipulated that defendant had been previously convicted of two qualifying felony offenses that "satisf[ied] the conviction element of the charge of armed habitual criminal." The parties further stipulated that Chicago Police Officer Robert Franks, an expert in the area of detecting, processing, and preserving fingerprint ridge impressions, examined the handgun recovered in the case for the existence of any ridge impressions and that his "examination resulted in a positive finding for the presence of partial ridge impressions on the Glock model 31 .357 caliber semi-automatic handgun." Officer Franks photographed the partial ridge impressions and uploaded the photographs to the Chicago Police Department's Forensic Services Division ADMS computer server. Finally, the parties stipulated that Chicago Police Officer Iwona Dabrowska, an expert in the field of latent print analysis and comparison, was assigned to analyze the latent print evidence recovered from the handgun; however, she found that the evidence was not suitable for identification.

¶ 11 After presenting the aforementioned evidence, the State rested its case-in-chief. Defense counsel moved for a directed finding, arguing that the State failed to satisfy its burden of proving defendant guilty beyond a reasonable doubt. The motion was denied and defendant elected to take the stand and testify.

¶ 12 Defendant testified that in May 2016, he was living in his mother's building located at 4847 West Augusta with his sister, Joy Carrol, and two other individuals, Dennis Carmichael, and Terry McCoy. On May 17, 2016, he was walking down the staircase to the first floor and talking to his wife on his cell phone. He did not have a gun in his pants pocket at that time. As he was on the staircase, defendant "heard a bunch of banging and kicking" coming from the front entrance of the building. The sounds continued for approximately 10 seconds before the door came off the frame.

Defendant, who was approximately 15 feet away from the door at that time, "turned around and started running upstairs." He explained that he did not know who was at the front door and that he was "scared." As a result, he ran into the second-floor unit and locked the door.

¶ 13 After locking the door, defendant heard feet coming up the stairs and banging on the door. He then "heard CPD, open the door. We got a search warrant." Until that point, he had not known it was the police who had broken down the front door and entered the building. Defendant testified that everyone in the house started running and that he "made [his] way towards the back of the house." As he passed the kitchen, he noticed a gun on the kitchen table. Defendant denied that it was his gun and explained that he was not allowed to carry guns. Defendant testified that he did not know who owned the gun or who put the gun on the table. It had not been on the table when he left the unit minutes earlier. Defendant explained that he became "nervous" and "freaked out" when he saw the gun because he knew he was not supposed to be "in the presence" of a firearm and he did not want to be "held responsible" for someone else's gun. As a result, he opened the back door and "tossed" the gun outside to "g[et] rid of it." After defendant tossed the gun out of the back door, police officers kicked open the front door and entered the residence. The officers had their badges displayed and their guns out and ordered him to "freeze." Defendant complied and was then "forced to the ground."

¶ 14 Defendant acknowledged that he placed a phone call to his wife in May 2016 while he was a Cook County Department of Corrections inmate. He denied that he told his wife that he was in possession of a gun on the date that he was arrested. He explained that the portion of the telephone recording published by the State where he and his wife discussed an unspecified item in his pocket was a reference "to some drugs" that he in his pocket on the date he was arrested. Defendant further testified that he only held the gun at issue for "maybe 2, 3 seconds" when he picked it up

and threw it out of the back door. He acknowledged that he had a criminal history that included a 2007 conviction for possession with intent to deliver a controlled substance and a 2008 conviction for possession of a controlled substance.

¶ 15 On cross-examination, defendant admitted that he was living at the 4847 West Augusta residence at the time that Chicago police officers executed the search warrant. Although defendant testified that he was referring to drugs in the May 2016 telephone recording, he admitted that he was not arrested for possessing drugs on May 17, 2016. He claimed he threw five bags of heroin out of the back door at the same time that he disposed of the gun.

¶ 16 Following defendant's testimony, the defense rested. The State called Officer Mitchell to provide additional testimony as a rebuttal witness. He testified that he did not observe defendant throw five bags of heroin out of the back door of the building that was the subject of a search warrant on May 17, 2016. The only item that he observed defendant dispose of was the firearm that he subsequently recovered from the backyard. Officer Mitchell further testified that the backyard and the rear porch were both searched after the scene was secured and that no drugs were discovered. If drugs had been recovered, he would have inventoried the evidence and defendant would have been charged with a drug offense.

¶ 17 Defendant elected not to call a surrebuttal witness and the parties delivered closing arguments. The jury was then provided with a series of instructions to govern its deliberations. Although the defense requested that the jury receive an instruction adding voluntary possession of a firearm as an element of the offense of armed habitual criminal, the court declined to include the instruction. In doing so, the court reasoned: "There's no requirement to give a voluntary instruction in the way the [armed habitual criminal] statute's written; and there's nothing in this case, that would require an additional proposition, defining voluntariness or making voluntariness an additional element of

the offense." Following deliberations, the jury returned with a verdict finding defendant guilty of the offense of armed habitual criminal. The cause proceeded to a sentencing hearing, where the court, after hearing evidence in aggravation and mitigation, sentenced defendant to 10 years' imprisonment. Defendant's posttrial and postsentencing motions were denied. This appeal followed.

¶ 18 ANALYSIS

¶ 19 Jury Instructions

¶ 20 On appeal, defendant first argues that the circuit court deprived him of a fair trial when it refused to provide the jury with a voluntary possession instruction. He contends that the instruction was warranted because his testimony established that he "possessed the gun only to dispose of it" and that his possession of the weapon was thus involuntary.

¶ 21 The State responds that the circuit court properly exercised its discretion when it refused to instruct the jury on voluntary possession because the evidence at trial did not support giving such an instruction.

¶ 22 "The purpose of jury instructions is to provide the jury with the correct legal principles applicable to the evidence so that the jury may reach a correct conclusion according to the law and evidence." *People v. Wales*, 357 Ill. App. 3d 153, 157 (2005). As a general rule, there must be "some evidence" in the record to support giving a specific instruction and it is the province of the circuit court to ascertain whether an instruction should be given based on the issues raised and the evidence presented at trial. *People v. Mohr*, 228 Ill. 2d 53, 65 (2008). A criminal defendant is entitled to an instruction on his theory of the case only if there is some foundation for the instruction in the evidence. *People v. Jones*, 175 Ill. 2d 126, 131-32 (1997); *People v. Bui*, 381 Ill. App. 3d 397, 424-25 (2008). In evaluating the propriety of a set of jury instructions, the

relevant inquiry is "whether the instructions, considered together, fully and fairly announce the law applicable to the theories of the State and the defense." *Mohr*, 228 Ill. at 65. In order to ascertain whether the instructions fully and fairly apprised the jury of the applicable law and the theories of both parties and avoided being confusing or misleading, the instructions should be considered in their entirety and not viewed in isolation. *People v. Parker*, 223 Ill. 2d 494, 501 (2006). The circuit court's determination that a tendered instruction is not supported by the evidence will not be disturbed absent an abuse of discretion. *People v. McDonald*, 2016 IL 118882, ¶ 20; *People v. French*, 2020 IL App (1st) 170220, ¶ 20. An abuse of discretion will only be found " 'if the jury instructions are not clear enough to avoid misleading the jury.' " *Mohr*, 228 Ill. 2d at 66 (quoting *In re Timothy H.*, 301 Ill. App. 3d 1008, 1015 (1998)). However, the issue of whether the instructions tendered to the jury accurately conveyed the applicable law is subject to *de novo* review. *Parker*, 223 Ill. 2d at 501; *People v. Anderson*, 2012 IL App (1st) 103288, ¶ 34. Even where there is an error with respect to a set of jury instructions, reversal is not warranted unless it is evident that the jury was actually misled and that the verdict prejudiced the defendant. *Polk*, 407 Ill. App. 3d at 108.

¶ 23 Section 24-1.7 of the Criminal Code of 2012 sets forth the offense of armed habitual criminal and provides, in pertinent part, as follows: "A person commits the offense of being an armed habitual criminal if he or she receives, sells, *possesses*, or transfers any firearm after having been convicted a total of 2 or more times" of a qualifying predicate offense. (Emphasis added.) 720 ILCS 5/24-1.7(a) (West 2016). Pursuant to the indictment filed in this case, defendant was charged with armed habitual criminal based on the State's assertion that he "*knowingly possessed* a firearm, to wit: a .357 caliber semi-automatic pistol, after having been convicted of the offense of possession of a controlled substance with intent to deliver/delivery of a controlled substance within 1000 feet

of a school/public park/place of worship, under case number 07CR-15526, and the offense of armed robbery, under case number 94CR-24470, in violation of Chapter 720 Act 5 Section 24-1.7(a) of the Illinois Compiled Statutes 1992 as amended ***." (Emphasis added.) At trial, the jury was instructed that in order to convict defendant of the offense of armed habitual criminal, the State had to prove two propositions: (1) "That the defendant knowingly possessed a firearm; and *** (2) That the defendant had previously been convicted of two qualifying felony offenses." Defendant, however, requested the circuit court to add a third proposition to the armed habitual criminal instruction. Specifically, he requested that jury to be instructed in accordance with Illinois Pattern Jury Instruction 4.15, which sets forth the definition of "possession as a voluntary act" and defines the phrase as follows: "Possession is a voluntary act if the person knowingly procured or received the thing possessed, or was aware of his control of the thing for a sufficient time to have been able to terminate his possession." I.P.I. Criminal No. 4.15. The committee note that accompanies the instruction provides that "Th[e] instruction should be given only if voluntariness is an issue." IPI Criminal No. 4.15, Committee Note. The circuit court, however, declined to add a third proposition to the armed habitual criminal instruction. On review, we find no error.

¶ 24 At trial, there was no dispute that defendant had been convicted of two qualifying predicate offenses. There was likewise no dispute that defendant threw a loaded semi-automatic handgun out of the second-floor residence while police were effectuating a search warrant. Instead, the crux of the dispute between the parties were the circumstances that preceded defendant disposing of the weapon. The State argued that defendant had been carrying the gun in his pocket before he threw it out of the back door. In support, the State highlighted Officer Gallas's testimony that defendant fled from the authorities when they breached the front door by running up the stairs

while "holding his side with an open hand, next to his pants area." The State also pointed to the phone call between defendant and his wife wherein he admitted to carrying around an unspecified item in his pocket the day before the search warrant was executed because the streets were "dangerous" and acknowledged he had thrown the gun into the backyard because he "didn't know [the police were] back there" and "needed to get it off of" him. Defendant, in turn, admitted throwing the weapon into the backyard when the police officers entered the second-floor residence, but denied that he had been carrying the weapon on his person prior to doing so. Instead, defendant testified that he had simply observed the weapon resting on the kitchen table, panicked, and briefly picked up the weapon to dispose of it. He further testified that he and his wife had been talking about him carrying drugs in his pocket the day before his arrest, not a handgun, in the telephone recording.

¶ 25 Citing in own testimony, defendant suggests that his possession of the gun was involuntary because he only picked it up to dispose of it. Because his testimony put the voluntariness of his possession of the weapon at issue, he submits that the jury should have been provided with a voluntary possession instruction. We disagree. There was no dispute that defendant was in actual possession of the handgun. Indeed, by defendant's own account, he exercised dominion and control of the weapon when he picked up the gun from the kitchen table, walked over to the back door, and threw the weapon into the backyard. See *People v. Dismuke*, 2017 Il App (2d) 141203, ¶ 44 (recognizing that possession can be actual or constructive and that actual possession is "proved by testimony showing that the defendant exercised dominion over the contraband"). In addition, by defendant's own account, his decision to pick up the gun was voluntary. He specifically testified that the picked up the weapon to dispose of it. We reiterate that IPI Criminal No. 4.15 defines "Possession is a voluntary act if the person knowingly procured or received the thing possessed, or was aware

of his control of the thing *for a sufficient time to have been able to terminate his possession*." (Emphasis added.) I.P.I. Criminal No. 4.15. Here, there is no dispute that defendant was in possession of the weapon for a sufficient time such that he was, in fact, able to terminate his possession by throwing the gun out of the back door. Put simply, defendant's testimony did not, as he suggests, support his contention that his possession of the gun was involuntarily; rather, it showed that his possession was in fact, voluntary. Given the lack of evidence that defendant's possession was involuntary and the fact that the charge against him was based on his knowing possession of the handgun, we find that the circuit court did not err in declining to provide the jury with a voluntary possession instruction. See *People v. Bui*, 381 Ill. App. 3d 397, 425 (2008) (circuit court did not err in declining to provide the jury with a voluntary possession instruction where the "the disputed issue at trial was knowledge, not voluntary possession"); rather, we find that the instructions that the circuit court did provide to the jury, when considered as a whole, fully and accurately stated the relevant law.

¶ 26 In so finding, we are unpersuaded by defendant's reliance on *People v. Larry*, 218 Ill. App. 3d 658 (1991). In that case, police officers effectuated a traffic stop on the vehicle that the defendant was driving. The car belonged to one of defendant's friends, and during the traffic stop, officers observed "the handle of a gun protruding from underneath the right side of the mat on the driver's side of the hump of the car." *Id*. at 660. The gun was recovered, and although the defendant denied any knowledge of the gun, he was charged with unlawful use of a weapon by a felon based on a theory of constructive possession. At trial, the defendant requested the circuit court to provide the jury with IPI 4.15 defining possession as a voluntary act, but court denied the tendered instruction believing that the instruction would be "confusing" to the jury. *Id*. at 665. On review, however, this court found that the circuit court's refusal to provide the instruction constituted

reversible error, reasoning: "Here, particularly given the position of the gun under the car mat, the jury might legitimately have inferred that the defendant had been aware of the gun, but not for a sufficient time to enable him to terminate his possession. Accordingly, it was reversible error for the trial court to refuse to instruct the jury on voluntary possession." *Id*. at 665-66.

¶ 27 Unlike the defendant in *Larry*, the charge against defendant was not premised on his constructive possession of the gun, but on his actual possession of the weapon. Indeed, defendant, unlike the defendant in *Larry*, was observed to be in actual possession of the weapon and defendant, himself, admitted to handling the weapon. Given the lack of evidence that defendant's possession of the gun was involuntary, the record in this case did not provide a basis to instruct the injury on possession as a voluntary act.

¶ 28 Telephone Recording

¶ 29 Defendant next argues that the circuit court erred in admitting into evidence the recorded phone conversation that he had with his wife while incarcerated. He argues that his wife's statements during the phone call constituted inadmissible hearsay, which the State subsequently improperly used as substantive evidence of his guilt.

¶ 30 The State, in turn, responds that the phone call did not contain inadmissible hearsay and was properly admitted at trial.

¶ 31 As a threshold matter, defendant acknowledges that he failed to properly preserve this issue for appellate review as he failed to object to the admission of telephone recording at trial. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (recognizing that to properly preserve an issue for appeal, a defendant must object to the purported error at trial and specify the error in a posttrial motion and that his failure to satisfy both requirements results in forfeiture of appellate review of his claim). In an effort to avoid forfeiture, however, defendant invokes the plain error doctrine, which provides

a limited exception to the forfeiture rule and allows for review of forfeited issues on appeal if the evidence is closely balanced or the error is of such a serious magnitude that it affected the integrity of the judicial process and deprived the defendant of his right to a fair trial. Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967); *People v. Belknap*, 2014 IL 117094, ¶ 48; *People v. Sargent*, 239 Ill. 2d 166, 189 (2010); *People v. Piatkowski*, 225 Ill. 2d 551, 564-65 (2007). The first step in any plain error analysis is to determine whether any error actually occurred. *Piatkowski*, 225 Ill. 2d at 565; *People v. Rinehart*, 2012 IL 111719, ¶ 15. If an error is discovered, defendant then bears the burden of persuasion to show that the error prejudiced him. *Sargent*, 239 Ill. 2d at 189-90. Keeping this standard in mind, we turn now to evaluate the merit of defendant's claim.

¶ 32 Hearsay is an out-of-court statement offered to prove the truth of the matter asserted and is generally inadmissible unless it falls within a specifically recognized exception. Ill. R. Evid. 801(c) (eff. Oct. 15, 2015); *Caffey*, 205 Ill. 2d at 88; *People v. Lawler*, 142 Ill. 2d 548, 557 (1991); *People v. Wright*, 2013 IL App (1st) 103232, ¶ 73. The general prohibition of hearsay evidence exists because there is no opportunity to cross-examine the declarant and therefore the admission of such evidence violates a defendant's constitutionally protected right to confrontation. U. S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8; *People v. Peoples*, 377 Ill. App. 3d 978, 983 (2007); *People v. Jura*, 352 Ill. App. 3d 1090, 1085 (2004). An out-of-court statement by a party-opponent, however, does not constitute hearsay and is admissible irrespective of the purpose for which it is offered. Ill. R. Evid. 801 (d)(2) (eff. Oct. 15, 2015). A statement by a party-opponent includes "the party's own statement" as well as "a statement of which the party has manifested an adoption or belief in its truth." Ill. R. Evid. 801(d)(2)(A), (B) (eff. Oct. 15, 2015). Accordingly, in a criminal case, a statement by party opponent is a statement made by the defendant or one that he has manifested an adoption or belief in its truth that is offered against him, and is admissible as

long as the statement is relevant. *People v. Ramsey*, 205 Ill. 2d 287, 294 (2002); *People v. Kidd*, 175 Ill. 2d 1, 29 (1996).

¶ 33 Defendant does not dispute that his own statements made during the course of the phone call were admissible non-hearsay; rather, he takes issue with the admissibility of his wife's statements, which provided evidence that supported the State's argument that he had been carrying the gun at issue in his pants pocket when police entered the premises and that he had not simply found it on the kitchen table and disposed of it. During the phone call, defendant remarked that he "woulda been good" if he had "le[ft] it in the drawer." In response, his wife reminded him that she had asked him the day before why "he "ha[d] it in [his] pocket" and that he had told her that he "h[ad] to." Defendant, in turn, then acknowledged that he "probably did say that" because it was "so dangerous out there on the street." Although the "it" discussed by the couple is not specified at this point in the conversation, defendant admits shortly thereafter that he had done "what they say [he] did" and had thrown "a gun" into the backyard because he was "not thinking" and did not realize that there were police officers in the backyard at the time that he attempted to dispose of the weapon.

¶ 34 Although defendant is correct that he, himself, never explicitly mentioned having a gun in his pocket the day prior to his arrest, his response to his wife's statement about him having done so "manifested an adoption or belief in its truth." Ill. R. Evid. 801(d)(2)(B) (eff. Oct. 15, 2015). That is, instead of denying that he had been carrying around a gun in his pocket, defendant implicitly acknowledged that he had done so because it was "dangerous out there on the street." Indeed, when his wife asked if him if he recalled telling her that he "ha[d] to" carry a gun on his person, defendant affirmatively responded, "I probably did say that." Therefore, we find that disputed portion of the phone call was not inadmissible hearsay; rather, it was admissible as a statement by

a party-opponent. Accordingly, "[h]aving found no error, there can be no plain error." *Bannister*, 232 Ill. 2d at 79. Moreover, having found no error, defendant's alternative argument that defense counsel was ineffective for failing to properly preserve this issue for review is likewise unavailing. *Id*. (citing *People v. Hall*, 194 Ill. 2d 305, 354 (2000), and *People v. Alvine*, 173 Ill. 2d 273, 297 (1996)). Even if we were to agree that defendant's wife's statements during the phone call were improperly admitted, we emphasize that defendant does not dispute that his own statements were admissible and that in the recording, defendant when talking of disposing of the weapon, specifically said that he "needed to get it *off of* [him.]" If defendant had simply discovered the gun on the kitchen table and picked it up to disposed of it, it would have made more sense for him to have used words to the effect that he needed to get the gun "away from" himself or "out of here," or "away from here" as opposed to "off of" himself. Thus, given that defendant's own words supported the State's theory that he had been carrying the gun at issue on his person prior to disposing of it, any error in admitting his wife's statements would have been harmless. See generally *People v. Yancy*, 368 Ill. App. 3d 381, 385 (2005) (recognizing that the erroneous admission of hearsay evidence is harmless where there is no reasonable probability that the outcome would have been different had the hearsay been excluded).

¶ 35 CONCLUSION

¶ 36 The judgment of the circuit court is affirmed.

¶ 37 Affirmed.