

¶ 3

FACTS

¶ 4 The facts necessary to our disposition of this appeal are derived from the testimony adduced at the defendant's jury trial and from the record on appeal, and are as follows. On March 16, 2010, agents of the Southern Illinois Enforcement Group (SIEG) were involved in an undercover drug investigation using a confidential source. Agents delivered the source to room 305 of the Ramada Limited hotel in Carbondale. They had previously rented room 304, which provided a clear view, through a security peephole, of the door to room 305. The agents watched as the source, who had been searched and given \$100 in "buy money," entered room 305. Approximately two or three minutes later, the source exited the room. He met with an agent and handed the agent three small bags of crack cocaine he had allegedly purchased from the occupants of room 305. Meanwhile, the defendant and another individual later identified as Aaron Blackshire exited room 305 and headed to the hotel parking lot, with the defendant carrying a backpack and Blackshire carrying a duffel bag. Agents from room 304 followed the men, announced they were police officers, and after a brief pursuit, apprehended both men. During the pursuit, the defendant attempted to throw his backpack at the pursuing officers. Four large chunks of crack cocaine, weighing a total of approximately 145 grams and having a street value of approximately \$14,000, were found in the backpack, as was a loaded .38-caliber revolver. Additional weapons were found in the possession or control of Blackshire, as was the \$100 in "buy money" provided to the source.

¶ 5 Blackshire testified, as a witness for the defense, that he had been convicted of an offense and served time for his role in the events described above. He testified that it was

he, not the defendant, who sold drugs on the night in question, and that the defendant had picked up the backpack containing the drugs "on accident." When asked, on cross-examination, if he had sold drugs to the same confidential source the day before, Blackshire denied that he had. After the defense rested, the State called one of the SIEG agents in rebuttal. That agent testified that the day before the events in question, the same confidential source had purchased drugs, specifically from the defendant, who the source identified by the nickname "B.G." The agent further testified that on the night in question, the confidential source had made arrangements to buy crack cocaine from the defendant, not from Blackshire. Following deliberations, the jury convicted the defendant of unlawful possession of a controlled substance with the intent to deliver and aggravated unlawful use of a weapon. He was sentenced to 15 years in the Department of Corrections on the first conviction, and 3 years, to run concurrently, on the second conviction. This timely appeal followed.

¶ 6

ANALYSIS

¶ 7 On appeal, the defendant first takes issue with the rebuttal testimony of the SIEG agent. The defendant contends he received ineffective assistance of counsel because counsel failed to object to the rebuttal testimony, and contends he "was denied his constitutional right of confrontation by the admission of prejudicial hearsay." He also contends it was error for the State to refer to the rebuttal testimony in closing argument. The premise behind the defendant's argument is that the SIEG agent's rebuttal testimony as to when and from whom the confidential source had purchased drugs on the prior day "could only have been obtained from the confidential source who did not testify," and

that accordingly, the rebuttal testimony of the SIEG agent was hearsay and was "in violation of the defendant's Sixth Amendment right of confrontation."

¶ 8 "In order to obtain a reversal on the basis of ineffective assistance of counsel, a convicted defendant must show that counsel's performance fell below an objective standard of reasonableness and that counsel's errors were so serious that they deprived the defendant of a fair trial." *People v. Welch*, 365 Ill. App. 3d 978, 983-84 (2005) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). In the case at bar, the defendant's claim of ineffective assistance of counsel fails on both counts. First, as the State points out, there are no grounds to conclude that counsel's failure to object to the rebuttal testimony fell below an objective standard of reasonableness. To the contrary, given the fact that an objection to the testimony could in turn have led to "the live and potentially more forceful testimony of the [confidential source] from the witness stand" (*United States v. Irby*, 558 F.3d 651, 656 n.4 (7th Cir. 2009)), we have every reason to believe the failure to object was sage trial strategy. As the State points out, in closing argument defense counsel highlighted to the jury the absence of the confidential source, noting that the source's absence made it impossible to tell whether "B.G." was in fact the defendant and whether it was the defendant or Blackshire who was selling drugs on the days in question. Had counsel objected to the rebuttal testimony, and forced the State to call to the witness stand the confidential source, counsel's "identification" argument would have been eviscerated.

¶ 9 Second, even if we were to assume, *arguendo*, that counsel's failure to object was not sound trial strategy, we would nevertheless have to agree with the State that the

evidence against the defendant was overwhelming, and that he suffered no prejudice as a result of any error by counsel, as required by *Strickland* and its progeny. Multiple law enforcement agents testified, without contradiction by anyone, that they saw the defendant carrying the backpack containing the crack cocaine and the .38-caliber revolver, and that the defendant tried to cast away the backpack while he was being pursued. As the State notes, if Blackshire's insinuation that the defendant was an innocent bystander to the drug dealing were true, the defendant's flight and his attempt to get rid of the backpack would make no sense.

¶ 10 With regard to the defendant's second argument, that he "was denied his constitutional right of confrontation by the admission of prejudicial hearsay," we agree with the State that because the defendant did not object in the trial court to the admission of the SIEG agent's rebuttal testimony, this issue has been procedurally defaulted, and may be reviewed, if at all, only under the plain-error doctrine. See, e.g., *People v. Welch*, 365 Ill. App. 3d 978, 987 (2005). As we have long held, in a criminal case such as this one, the plain-error doctrine allows a reviewing court to consider unpreserved error "first, where the evidence in the case is closely balanced and, second, where to leave the error or errors uncorrected raises a substantial risk that an accused was denied a fair trial and remedying the error or errors is necessary to preserve the integrity of the judicial process." *Id.* at 987-88. As explained above, the evidence in this case was not closely balanced: it was overwhelmingly against the defendant. Moreover, "[u]nder both prongs of the plain-error doctrine, the defendant has the burden of persuasion," and if the defendant does not meet that burden, "the procedural default will be honored." *People v.*

Hillier, 237 Ill. 2d 539, 545 (2010). If a defendant fails to argue for plain-error review, that failure is fatal, for such a defendant "cannot meet his burden of persuasion." *Id.* In the case at bar, the defendant has failed to argue for plain-error review of the alleged error, and we shall not consider further the alleged error. See *id.* at 549 (if reviewing court finds procedural default of an error, "then the court must hold the defendant to his burden of demonstrating plain error").

¶ 11 The same is true for the remaining two contentions of error raised by the defendant: that it was error for the State to refer to the rebuttal testimony in closing argument, and that the trial court erred when it did not allow the defendant to represent himself at his sentencing hearing. Neither of these contentions was raised in the trial court. Accordingly, neither has been preserved for review unless as plain error. However, no argument for plain-error review has been put forward, and thus we shall not consider further either claim of error. See *People v. Hillier*, 237 Ill. 2d 539, 545 (2010); *id.* at 549 (if reviewing court finds procedural default of an error, "then the court must hold the defendant to his burden of demonstrating plain error").

¶ 12

CONCLUSION

¶ 13 For the foregoing reasons, we affirm the defendant's convictions and sentences.

¶ 14 Affirmed.