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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Lake County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 12-CF-194
	)	
SAUL LUPIAN,	)	Honorable
	)	Daniel B. Shanes,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE ZENOFF delivered the judgment of the court.  
Justices Jorgensen and Birkett concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant showed no plain error in the State’s closing argument, as the evidence was not close and the alleged error was not structural, and in any event any error was not reversible, as the State’s comments did not contribute to the conviction, were supported by the evidence, or were invited by defendant.

¶ 2 Following a jury trial, defendant, Saul Lupian, was convicted of aggravated driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(d)(1)(H) (West 2012)) and sentenced to two years’ imprisonment. He appeals, contending that he was denied a fair trial when the prosecutor, in closing argument, minimized the State’s burden of proof and exaggerated and misstated the evidence. We affirm.

¶ 3 Lake Zurich police officer William West testified as follows. On October 13, 2011, he responded to a call unrelated to the present case. He was talking to Maria Carmona, who pointed to a man, later identified as defendant, driving a white car. He observed the car as it drove through an intersection and parked.

¶ 4 Defendant got out as West walked over to the car. Defendant was “unable to stand without holding on to the vehicle.” On cross-examination, West clarified that defendant was not actually hanging onto the car, but was merely leaning against it. Defendant had glassy, bloodshot eyes, a strong smell of alcoholic beverage, and his speech, although in Spanish, was slurred. Defendant had “no balance” as he was walking or standing. As they were talking, defendant nearly always had one hand on the car. Defendant’s car was very muddy and had cattails jammed into the grille.

¶ 5 West opined that defendant was under the influence of alcohol. Accordingly, he arrested him for DUI. As West looked into defendant’s vehicle, he saw three bottles of beer, two open and one closed, in the console between the front seats.

¶ 6 Defendant was then taken to the police station, where he was given field sobriety tests. He first took the one-legged-stand test. Defendant spoke almost exclusively in Spanish. West did not speak Spanish but, with the help of Sergeant Tony Grunder, who spoke some Spanish, he explained the test to defendant. West testified that defendant was unable to stand while listening to the instructions. When defendant attempted the test, he was unable to keep his foot up for more than a second or two. He had to keep his arms up to balance himself.

¶ 7 Defendant next attempted the walk-and-turn test. He never touched heel-to-toe on any of the 18 steps. A couple of times, the officers had to walk with him because they felt that he might fall. West concluded that defendant failed both tests.

¶ 8 During the booking process, defendant showed extreme mood swings. He went from crying to angry. He became so belligerent that West felt he could not complete the booking process until defendant had slept.

¶ 9 Grunder largely corroborated West's testimony about the sobriety tests and the booking process. He testified that, from the time defendant entered the booking area, he had great difficulty standing. He "basically appeared as though he was going to lose his balance any time he stood."

¶ 10 In closing argument, the prosecutor told the jury that it would be instructed that the definition of "under the influence of alcohol" means that, "as a result of drinking any amount of alcohol, his mental or physical faculties are so impaired as to reduce his ability to think and act with ordinary care. That's a pretty low bar. That describes a good buz [*sic*]." Later, he told the jury that "[t]he only thing that kept [defendant] from being literally falling down drunk was the presence of something for him to lean against."

¶ 11 During its closing argument, the defense contended that the State did not present sufficient evidence that defendant drove while under the influence of alcohol. Defense counsel noted several items of proof that were allegedly missing from the State's case, including evidence that defendant ever drove erratically. In rebuttal, the prosecutor acknowledged that there was no evidence of bad driving but, recalling the cattails embedded in the grille of defendant's car, said that "maybe that's why we didn't see any bad driving because he wasn't driving on the road" and that perhaps he "was driving through a field somewhere."

¶ 12 During deliberations, the jury asked the trial court for transcripts. The court, with the parties' acquiescence, informed the jury that transcripts were not available and that it should continue to deliberate based on its collective recollection of the evidence. The jury found

defendant guilty. After denying defendant's motion for a new trial, the court sentenced him to two years' imprisonment. Defendant filed a motion to reconsider the sentence, which the trial court denied. Defendant timely appeals.

¶ 13 Defendant contends that the prosecutor's comments quoted above denied him a fair trial. He contends that the comments improperly minimized the State's burden of proof and misrepresented the evidence. Defendant concedes that he did not object to any of these comments, but urges us to consider the issue as plain error because the evidence was closely balanced.

¶ 14 A defendant is not entitled to review of a claimed error unless he has made a timely objection at trial and raised the issue in a posttrial motion. *People v. Wheeler*, 226 Ill. 2d 92, 122 (2007); *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). However, under the plain-error rule, "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Ill. S. Ct. R. 615 (eff. January 1, 1967). A reviewing court will find plain error and grant relief only when "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 15 We disagree with defendant that the evidence here was close. West testified that defendant had glassy, bloodshot eyes, a strong smell of alcoholic beverage, and slurred speech. Defendant had difficulty walking and standing. He could seldom remain upright without holding onto something for balance. West found two empty beer bottles in defendant's vehicle. In the

booking area, defendant was alternately combative and virtually in tears. He completely failed two field sobriety tests. Grunder corroborated West's testimony that defendant failed the field sobriety tests, was combative during the booking process, and had difficulty standing.

¶ 16 Defendant points to no evidence that would provide an alternative explanation for these observations. Instead, defendant's argument that the evidence was closely balanced focuses largely on evidence that the State did *not* present, such as evidence of chemical testing or evidence that defendant had been seen driving erratically. Of course, neither is essential to obtain a DUI conviction, and the remaining evidence was indeed strong.

¶ 17 Defendant contends that the conviction rested on the credibility of West and Grunder. This is certainly true, but in virtually every case a conviction will require the jury to believe the State's witnesses--or at least some of them--and this does not mean that the evidence in every case is closely balanced. Defendant does not suggest any particular reason that the jury should not have believed West and Grunder. He does not demonstrate that they were significantly impeached and, as noted, points to no significant contrary evidence. Finally, the mere fact that the jury requested transcripts at one point during its deliberations does not mean that the evidence was close.

¶ 18 As the evidence was not close, defendant cannot invoke the first prong of plain-error review. Furthermore, defendant does not suggest that the error was structural in order to invoke the second prong. See *People v. Thompson*, 238 Ill. 2d 598, 613-14 (2010) (equating second-prong plain error with structural error).

¶ 19 In any event, even if the prosecutor's comments were improper, they were not so serious that they deprived defendant of a fair trial. In other words, even absent defendant's forfeiture we would not reverse.

¶ 20 Illinois reviewing courts have not applied a consistent standard of review in cases involving a prosecutor's closing remarks. Compare *Wheeler*, 226 Ill. 2d at 121 (applying *de novo* standard), with *People v. Blue*, 189 Ill. 2d 99, 128 (2000) (applying abuse-of-discretion standard). We need not resolve the issue here, as under either standard the prosecutor's remarks were not reversible error.

¶ 21 Prosecutors generally have wide latitude in closing arguments and may comment on the evidence and any reasonable inferences arising from the evidence, even if the inferences reflect negatively on the defendant. *People v. Perry*, 224 Ill. 2d 312, 347 (2007). The first comment to which defendant objects is the statement that the legal definition of "under the influence of alcohol" described a "good buzz." We note that the prosecutor gave the jury, virtually verbatim, the instruction defining "under the influence of alcohol." See Illinois Pattern Jury Instructions, Criminal, No. 23.29 (4th ed. 2000). He then tried to put the formal definition into everyday words to make it more understandable to the jury. We have located no widely accepted definition of "buzz" in this context, so perhaps it is debatable whether the prosecutor's description was accurate. However, only a slight impairment is necessary to support a DUI conviction (*Mills v. Edgar*, 178 Ill. App. 3d 1054, 1057 (1989)), and defendant has cited no case suggesting that a description similar to that used by the prosecutor is inaccurate. In any event, given the overwhelming evidence of defendant's guilt, the prosecutor's isolated comment did not likely contribute to defendant's conviction. See *Wheeler*, 226 Ill. 2d at 123 (reversal not required where prosecutor's remarks did not contribute to defendant's conviction).

¶ 22 The defendant also contends the State improperly minimized its burden of proof when it claimed that a "buzz" was sufficient to establish intoxication and that this was "a pretty low bar." However, the prosecutor clearly was not referring to the reasonable doubt standard, but rather to

the amount of alcohol required for someone to be impaired. Moreover, as the State points out, any misstatement or colloquial phraseology was corrected by the proper jury instructions that were given.

¶ 23 The other comment to which defendant objects is the statement that “the only thing that kept [defendant] from being literally falling down drunk was the presence of something for him to lean against.” We do not understand defendant’s objection to this comment, as it was amply supported by the evidence.

¶ 24 West testified that, when defendant first exited his vehicle, he was unable to stand without leaning on it. As they were talking, defendant nearly always had his hand on his car. As West was explaining the field sobriety tests, defendant leaned against a bench in the booking area or grabbed the wall behind it. When he attempted the one-leg-stand test, he was unable to keep his foot up for more than a second or two. During the walk-and-turn test, the officers walked with him because they were afraid that he would lose his balance. It was thus a reasonable inference from the evidence that defendant would have fallen down had he not had something, such as his car, to support him.

¶ 25 Finally, defendant complains that the prosecutor misstated the evidence when he said that no one saw defendant driving erratically because defendant was “driving through a field somewhere.” This comment, while perhaps needlessly flippant, was invited by defense counsel’s argument that the State did not prove its case because no one saw defendant driving erratically. See *People v. Lyles*, 106 Ill. 2d 373, 390 (1985) (“Where defense counsel provokes a response, defendant cannot complain that the State’s reply denied him a fair trial.”). Moreover, given the testimony that defendant’s car had mud and cattails embedded in the grille, that defendant had driven off the road at some point was a reasonable inference from the evidence.

¶ 26 The judgment of the circuit court of Lake County is affirmed.

¶ 27 Affirmed.