No. 1-09-1732

SIXTH DIVISION
MARCH 4, 2011

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.	)	07 CR 23819
	)	
RAUL LOPEZ,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Garcia and Justice R.E. Gordon concurred in the judgment.

O R D E R

HELD: (1) Defendant was not prejudiced by the prosecutor's assertion in closing arguments that defendant was lying; (2) the trial court did not err in allowing the State to introduce gang-related evidence; (3) defendant forfeited his argument that the trial court failed to comply with Supreme Court Rule 431(b) (Ill. S. Ct. R. 431(b) (eff. May 1, 2007); and (4) defendant is entitled to 610 days of presentence credit, but is not entitled to credit for the day of his sentencing.

Following a jury trial, defendant was convicted of the first degree murder of Alejandro

Rodriguez. The jury also found that defendant discharged a firearm that caused Rodriguez's death. The trial court sentenced defendant to a term of 20 years for first degree murder and a consecutive term of 25 years for discharging a firearm. Luis Ugalde, defendant's codefendant, was tried in a separate, simultaneous jury trial and is not a party to this appeal.

Defendant appeals, arguing that: (1) he was denied a fair trial when the prosecutor improperly told the jury in closing arguments that defendant's testimony was a lie; (2) the trial court improperly allowed the State to present gang-related evidence to support its motive for the murder; (3) the trial court failed to comply with Rule 431(b); and (4) defendant is entitled to 611 days of presentence credit.

The following evidence was admitted at defendant's April 2009 jury trial.

Oscar Morales testified that he had been friends with Alejandro Rodriguez since the third grade. Morales stated that he lived near Spaulding and 26th Street in Chicago. When asked what gangs were prevalent in his neighborhood, he answered the Latin Kings and the Two Six gangs. He testified that neither he nor Rodriguez were members of the Latin Kings.

On the evening of October 20, 2007, Morales went to a "house party" with Rodriguez. Morales stated that he had consumed three beers at the party and Rodriguez had also consumed alcohol, but he was unsure how much. Later, when the party ended, a friend gave Morales and Rodriguez a ride to Spaulding and 27th. They were dropped off near a liquor store. They bought some beer at the liquor store and decided to walk to Morales' house.

As they were walking north on Spaulding, Morales was walking a little in front of Rodriguez. Rodriguez was carrying the beer they had purchased. Then, a black Cadillac pulled

up near them on Spaulding. The car was also headed north with the passenger side closer to them. Morales saw that the front passenger window was down. He testified that the passenger said something to Rodriguez and Rodriguez responded, but Morales was not able to hear what was said. He did not hear any swearing or an argument. After that brief conversation, Morales saw the passenger get out of the car and start shooting in their direction. Morales identified defendant in court as the person who fired the gun.

Morales testified that he was about ten feet away from Rodriguez when defendant began shooting. Morales heard "more than three" gunshots. When he heard the gunshots, Morales stated that he started to run north toward 26th Street. After the gunshots stopped, he saw the Cadillac drive north on Spaulding and turn the corner. Morales turned and went back to Rodriguez. Morales saw Rodriguez laying face down on the ground. He went to a house and started knocking on doors asking for help. He was able to use someone's phone and called 911. When he returned to the street, he saw that police squad cars were already at the scene.

Shortly thereafter, the police transported Morales to Washtenaw Street. Morales saw the same Cadillac there and the police asked if he could identify anyone. Morales identified defendant as the shooter. He also identified the gun at trial that was used in the shooting.

On cross-examination, Morales stated that he did not know the circumstances of Rodriguez's 2003 arrest for reckless conduct in which Rodriguez was arrested for "standing in the middle of the street throwing rocks and yelling King love." He said that Rodriguez told him that he had been arrested "but he never really talked to me like why." [*sic.*]

Wanda Mercado testified that she lives on the 2700 block of South Spaulding. At around

2 a.m. on October 21, 2007, Mercado was awake and watching television in her apartment. She heard five or six gunshots from outside. She went to her living room window and looked out to the street. Mercado stated that there was a streetlight right in front of her living room window so she had a good view to the street. She observed a black Cadillac driving north on Spaulding and then turn east on 27th Street. She saw that the driver had on a short sleeve shirt, but she was unable to see anyone's face or the license plates. She called 911 from her cell phone.

After she called 911, Mercado went outside and saw a man laying on the street. She spoke with the police. The police took her to the area near 38th and Washtenaw where she identified the black Cadillac she had seen drive on Spaulding.

Stephanie Olaguez testified that in October 2007, she was dating defendant. She met defendant through a mutual friend named Lucy Lopez. Lucy and defendant are not related. Olaguez stated that while she was dating defendant, she "assumed he was a Two Sixer." Olaguez identified defendant in court.

On the night of October 20, 2007, Olaguez testified that she attended a family party. Defendant did not attend the party with her. She left the party and drove to Lucy's house. Later, defendant arrived with Luis Ugalde. Ugalde was driving a black Cadillac and defendant was in the passenger seat. Olaguez and Lucy got into the car. Lucy sat in rear driver's side and Olaguez sat in the rear middle seat because a case of beer was in the rear passenger seat. They began to "go driving around." Olaguez stated that music was playing and they were all drinking in the car.

At some point, defendant stopped and talked to some friends. Then, they drove to the

alley behind defendant's house. Defendant got out of the car for about five minutes and then returned to the car. They started driving around and were driving on Kedzie toward 28th. Olaguez asked defendant why they were going that way because she "knew he wasn't supposed to be over there" because she "knew [defendant] was a Two Six and there is not [*sic.*] Two Six on that side." Olaguez stated that the "[Latin] Kings" were in that area. Olaguez was concerned there might be a problem. She asked defendant where they were going and he said something to the effect of "let's see who we see."

The car turned onto Spaulding. When they reached the 2700 block of Spaulding, she saw two men walking on her right, the passenger side of the car. The car stopped and she heard defendant say something, but she could not tell what defendant said over the music. She was not sure if someone responded because she could not hear over the music. Olaguez stated that defendant then opened the door and took a step out of the vehicle and she heard gunshots. She stated that she heard "maybe like three" gunshots. Defendant then got back in the car and they drove back toward Kedzie.

As the car was driving, Olaguez saw an unmarked police car. The car then stopped in the alley behind defendant's house. Defendant again got out of the car for a few minutes. When he returned, he told Lucy to move into the front passenger seat and he got into the rear driver's seat. Olaguez testified that she asked Ugalde to drive her back to her car. On the way to her car, they were pulled over by the police. She was taken to the Area 4 police station and she admitted that she did not immediately tell the police what happened because she was nervous and scared.

On cross-examination, Olaguez admitted that she did not see defendant get into the

vehicle with any type of weapon. She did not hear defendant discuss a plan to shoot someone or use any gang language. When the car approached the two men on Spaulding, she saw that one man was carrying beer in his left hand, but she was unable to see if he had anything in his right hand.

Officer Paul Escamilla testified that he is a police officer with the Chicago police department. In October 2007, he was assigned as a patrolman in the 10th district. In that district, the Latin Kings and the Two Six street gangs had an ongoing conflict. At around 2 a.m. on October 21, 2007, Officer Escamilla was on duty with his partner, Officer Dominguez. They were in civilian dress and in an unmarked car. Officer Escamilla was driving in the area of 26th and Kedzie at approximately 2 a.m. when he heard several gunshots. He testified that the Latin Kings have a presence in that area. Based on information he received from the police radio, Officer Escamilla drove to 38th and Kedzie, which he stated was a Two Six area.

Officer Escamilla toured the area and looked for a specific vehicle. He then pulled over a black Cadillac. He identified Ugalde as the driver of the vehicle and defendant as a passenger in the back seat. He stated that two women were also in the car. He placed defendant and Ugalde under arrest.

Forensic Investigator James Shader testified that he is employed with the forensic services division of the Chicago police department. On October 21, 2007, he received an assignment to process a homicide scene at 2749 South Spaulding. He and his partner went to the scene. They walked through the scene with the detectives, took photographs of evidence, and videotaped the scene. He testified that Rodriguez was laying dead on the street and he observed

an unopened beer can beside him on the ground as well as a cell phone. The cell phone was given to Detective Carlos Cortez.

Shader then proceeded to 3824 South Washtenaw where a black Cadillac had been stopped by police. At that location, he recovered a Mexican identification for Ugalde and administered gunshot residue tests for both defendant and Ugalde.

Detective Carlos Cortez testified that on October 21, 2007, he was assigned to a homicide at 2749 South Spaulding. During his investigation, Detective Cortez inventoried several items, including a wallet and compact disk case that were recovered from Rodriguez's pants pockets. Detective Cortez stated that there were bullet holes through the wallet and the compact disk case. He also recovered a cell phone near Rodriguez's body. Detective Cortez testified that the cell phone was accidentally destroyed by the police department.

Detective Greg Jones testified that he is employed by the Chicago police department and was assigned to Rodriguez's homicide on October 21, 2007. At around 8 a.m., he received some information about Olaguez. He was told that she would take him and his partner to a location where the weapon used in the shooting could be found. Olaguez took them to the alley behind 3326 W. 38th Street. When Detective Jones arrived, he walked behind that location and observed a silver .357 revolver under a garbage can. Detective Jones then called for an evidence technician to come to the location to photograph and recover the weapon. Detective Jones identified the revolver in photographs of the scene.

The parties entered several stipulations into evidence. The first stipulation was that Dr. Mitra Kalelkar would testify that she was employed as a medical examiner and was assigned the

autopsy of Rodriguez. She would testify that Rodriguez sustained five gunshot wounds. Three of the bullets entered from the back and proceeded to the front, the other two entered from the side. Rodriguez's five gunshot wounds were located as follows: two in his thighs, one in the buttocks, one through his back, which lacerated his aorta and carotid arteries, and one through his chest. None of the wounds exhibited close-range firing. She would testify that within a reasonable degree of scientific certainty that the cause of death was the result of multiple gunshot wounds and the manner of death was homicide.

Another stipulation was that Scott Rochowicz would testify that he is employed as a forensic scientist in the Illinois State Police crime lab. He received the sealed gunshot residue kits for Ugalde and defendant. He would testify that after he examined the gunshot residue tests, he concluded that defendant had recently discharged a firearm, contacted a primer gunshot residue related item or had both hands in the environment of a discharged firearm. Ugalde's test results were negative.

The third stipulation as that Mark Pomerance would testify that he is a forensic scientist with Illinois State Police crime lab. He was assigned to Rodriguez's homicide and received a .357 Magnum revolver, one fired bullet, one fired bullet jacket, and five bullet fragments. After his analysis, Pomerance would testify to within a reasonable degree of scientific certainty that the fired bullet and the fired bullet jacket were fired from the .357 Magnum revolver. He would also state that the bullet fragments were unsuitable for comparison.

Following the conclusion of the State's case-in-chief, defendant moved for a directed verdict, which the trial court denied.

Defendant testified in his own defense. In October 2007, he lived with his parents at 3326 W. 38th Street. He stated that he did not know Rodriguez personally, but knew who he was. He said that he had observed conduct by Rodriguez that made defendant believe that Rodriguez associated with the Latin Kings. He said he did not have any problems with Rodriguez, but a friend of Rodriguez would harass people in defendant's neighborhood. Defendant stated he was worried that someone would get hurt if this action continued.

On the night of October 20, 2007, defendant went to the 2700 block of South Spaulding to speak with Rodriguez. He thought Rodriguez was a leader and wanted to talk to him to help put an end to the problems in the neighborhood. He stated that he believed Rodriguez was a dangerous man and that he sometimes carried a gun. Defendant said he brought a gun with him when he went to talk to Rodriguez in case Rodriguez became violent. He testified that he had never fired a gun before that night.

In the early morning of October 21, 2007, defendant was driving around with Ugalde, Olaguez and Lucy Lopez. They located Rodriguez walking on Spaulding. Defendant testified that he was nervous when he saw Rodriguez. He was sitting in the front passenger seat of the vehicle. The car pulled over near Rodriguez, defendant estimated that he was 10 to 15 feet from Rodriguez. He stated that he rolled down the window and called out to Rodriguez, "Hey Alejandro, can I speak to you?" Rodriguez's back was to defendant. Defendant said that Rodriguez responded, "what the 'f' do you want?" Defendant stated that the street was dark and "shadowy." Rodriguez turned a little toward defendant and then defendant saw an object in Rodriguez's right hand. He thought the object was a gun and was afraid. Defendant testified that

Rodriguez's arm had been down by his side and he now began to raise it to his waist.

Defendant admitted that he then pulled out his gun and fired in Rodriguez's direction, but stated that he was not looking at Rodriguez. When he fired, Rodriguez's back was toward defendant. After he finished firing, defendant got back in the vehicle and they drove off. He admitted that he did not see Rodriguez with a gun, but he saw a dark object in his hand. He did not plan to shoot Rodriguez that night, but he thought Rodriguez was going to shoot him.

On cross-examination, defendant testified that he believed the cell phone was a gun. Defendant stated that he used to be a member of the Two Six gang, but was not a member in October 2007. He admitted that he has a bunny rabbit tattoo and a tattoo of three dots, which are Two Six tattoos. He stated that he found the gun a month earlier sitting on a tire of car in his neighborhood. He said he did not know whether the gun was loaded when he went to speak with Rodriguez. Defendant admitted that he fired the gun five times. Defendant maintained that he had never fired a gun before that night and was not aiming it, even though all five of his shots hit Rodriguez.

Defendant testified that after the shooting, he told Ugalde to drive to defendant's house so defendant could put the gun on his property. He denied telling Lucy to switch seats in the car. He said that Olaguez was lying when she testified that defendant told them to change seats. Defendant stated that he did not cock the gun, he "just started shooting." He also said that he removed the shell casing after the shooting and threw them out of the car window.

Defendant admitted that he knew about the murder of another Two Six member, Jesse

Lopez[1] that occurred a day or two before he killed Rodriguez. He denied that Jesse was "one of his guys" because defendant was no longer a Two Six member.

Defendant testified that he spoke with police after the shooting. He admitted that he told the police multiple times that he did not know anything about the Rodriguez's murder. He did not mention that he was scared and believed Rodriguez's cell phone was a gun. Defendant said he was scared while being questioned by the police.

The defense rested after defendant's testimony. In rebuttal, the State presented a video recording of defendant's interrogation at the police station. In the recording, defendant denied having any knowledge of Rodriguez's shooting. He stated that Olaguez and Lucy picked him up from his house around 3 a.m, he later stated it was around 1 or 2 a.m. Defendant also admitted that he was a member of the Two Six gang and had been a member since 2003 or 2004. He said he knew about Jesse Lopez's murder, but he stated that he thought it was the "SD's [Satan Disciples]." He denied any involvement in Rodriguez's shooting and denied being near 26th Street. The State rested in rebuttal after the playing of the recording.

Following closing arguments and instructions, the jury deliberated and found defendant guilty of the first degree murder of Rodriguez. The jury also found the additional fact that defendant personally discharged a firearm. Subsequently, the trial court sentenced defendant to a term of 20 years in prison for first degree murder and a consecutive term of 25 years for discharging a firearm, for an aggregate term of 45 years. The trial court also awarded defendant 537 days of presentence credit.

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[1] Jesse Lopez is not related to defendant.

This appeal allowed.

Defendant first argues that the prosecutor's closing arguments prejudiced defendant by repeatedly calling defendant a liar. The State maintains that the prosecutor's arguments were proper and based on the evidence. Further, the State responds that defendant has forfeited this claim by failing to object at trial and no plain error occurred.

To preserve an issue for review, defendant must both object at trial and in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Failure to do so operates as a forfeiture as to that issue on appeal. *People v. Ward*, 154 Ill. 2d 272, 293 (1992). However, defendant asks this court to review this issue as plain error. Supreme Court Rule 615(a) states that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." 134 Ill. 2d R. 615(a). The plain error rule "allows a reviewing court to consider unpreserved error 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), citing *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005).

Defendant carries the burden of persuasion under both prongs of the plain error rule. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). Defendant asserts that both prongs of the plain error

rule apply in this case because the evidence was closely balanced and he was denied a substantial right as the prosecutor's comments deprived him of a fair trial. However, "[t]he first step of plain-error review is to determine whether any error occurred." *Lewis*, 234 Ill. 2d at 43. We review the issue to determine if there was any error before considering it under plain error and find that no error occurred in the prosecutor's closing arguments to warrant application of the plain error doctrine.

"Defendant faces a substantial burden in attempting to achieve reversal of his conviction based upon improper remarks made during closing argument." *People v. Moore*, 358 Ill. App. 3d 683, 693 (2005). Generally, prosecutors are given wide latitude in closing arguments, although their comments must be based on the facts in evidence or upon reasonable inferences drawn therefrom, even if such inferences reflect negatively on the defendant. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). Further, "A closing argument must be viewed in its entirety, and the challenged remarks must be viewed in their context." *Nicholas*, 218 Ill. 2d at 122. The State may challenge a defendant's credibility and the credibility of his theory of defense in closing argument when there is evidence to support such a challenge. *People v. Kirchner*, 194 Ill. 2d 502, 549 (2000).

While a prosecutor's remarks may sometimes exceed the bounds of proper comment, the verdict must not be disturbed unless it can be said that the remarks resulted in substantial prejudice to the accused, such that absent those remarks the verdict would have been different. *People v. Byron*, 164 Ill. 2d 279, 295 (1995). Thus, "comments constitute reversible error only when they engender substantial prejudice against a defendant such that it is impossible to say

whether or not a verdict of guilt resulted from those comments." *People v. Nieves*, 193 Ill. 2d 513, 533 (2000).

Defendant asserts that the prosecutor in rebuttal closing argument improperly referred to defendant as a liar multiple times. Specifically, defendant complains of the following statements.

> "Like my partner said, there is no evidence other than those lying lips over there that Alejandro had a cell phone in his hand at the time of the shooting.
>
> * * *
>
> Well, his lips were moving. So I'm guessing he was lying.
>
> * * *
>
> He's lying. Everything he said up there was a lie. He never thought that was a gun.
>
> * * *
>
> He made this stuff up. The first time it ever came out of his mouth that he thought this cell pone was a gun was when he put himself up here by choice and lied himself right into a first degree murder conviction."

Defendant contends that these comments unfairly prejudiced defendant as his defense hinged on his credibility. He also argues that the prosecutor failed to show any evidence contradicting defendant's testimony that Rodriguez was holding a cell phone in his right hand.

According to defendant, this constituted plain error.

After viewing the prosecutor's rebuttal argument in its entirety, we find that the prosecutor's arguments were a fair discussion of the evidence and reasonable inferences derived from it. The prosecutor spent a significant portion of the rebuttal argument dissecting the plausibility of defendant's testimony that he went to a rival gang territory at 2a.m. to act as a peacemaker with Rodriguez over neighborhood issues that did not involve defendant. The prosecutor questioned defendant's testimony that he did not check to see if the gun was loaded and he had never fired a gun before that moment. The prosecutor pointed out that defendant hit Rodriguez with five bullets out of five or six shots, at a distance of 10 to 15 feet at night as Rodriguez tried to run away. The prosecutor also highlighted defendant's reaction to the shooting. He did not turn himself into the police rather, he fled the scene, threw shell casings out of the car window and hid the gun under a trash can at his house. Further, when he was arrested, the prosecutor pointed out that defendant did not raise self-defense, but instead claimed to have no knowledge of the shooting. The prosecutor also noted the discrepancy in defendant's statements regarding his membership in the Two Six gang as when he was arrested defendant admitted to being a member for four years, but at trial, defendant testified that he had left the gang by October 2007. Contrary to defendant's argument on appeal, the prosecutor's comments, when considered in context, were not focused on one aspect of the defense's case, *i.e.*, whether Rodriguez had a cell phone in his hand, but instead were a discussion of the entire defense. Accordingly, the prosecutor's comments in rebuttal that defendant was lying was based on the totality of the evidence including defendant's contradictory statement to the police and his

implausible testimony at trial. See *Kirchner*, 194 Ill. 2d at 549; see also *People v. Watkins*, 220 Ill. App. 3d 201, 209 (1991) ("case law supports the proposition that a prosecutor may comment that the defendant or a defense witness is a 'liar' if conflicts in evidence make such an assertion a fair inference). We find that no error occurred in the prosecutor's comment sufficient to avoid defendant's forfeiture of the issue and a finding of plain error.

Next, defendant contends that the trial court improperly allowed the State to present gang-related evidence which deprived him of a fair trial. The State maintains that defendant received a fair trial because the evidence of defendant's gang involvement was relevant to discredit his claim of self-defense and to provide evidence of his motive.

However, defendant did not preserve this issue for review. In the motion for a new trial, defense counsel argued that defendant was denied a fair trial when the State was allowed to enter the videotape of defendant's police interrogation. Defense counsel did not raise any issue as to the admission of gang-related evidence. While his trial counsel did object to the admission of gang-related evidence at trial, his counsel did not specifically raise this issue in defendant's motion for a new trial. In order to preserve an issue for appeal, a defendant must both make an objection at trial and raise the specific issue in a posttrial motion. *People v. Woods*, 214 Ill. 2d 455, 470 (2005) (citing *Enoch*, 122 Ill. 2d at 186). We find that the posttrial motion did not specifically raise this issue, and accordingly, it is forfeited on appeal. However, defendant asks this court to review the issue under both prongs of the plain error doctrine. But first we must determine whether any error occurred. See *Lewis*, 234 Ill. 2d at 43.

Defendant argues that the State was "unrelenting" in its use of gang-related evidence as

motive. According to defendant, the State presented as its theory of the case that defendant was a Two Six member and he killed Rodriguez because he believed Rodriguez was a Latin King and the State also asserted that defendant killed Rodriguez in retaliation for the murder of Jesse Lopez, another Two Six. Defendant points out that the State's theory of a retaliation is counter to the record because defendant initially told the police that he thought the "SDs" killed Jesse Lopez. Defendant argues that this evidence was improper because there was insufficient proof that gang activity or membership was connected to Rodriguez's murder. The State responds that this evidence was relevant to discredit defendant's claim of self-defense and provided evidence of his motive.

Gang-related evidence may be admitted if it is relevant to an issue in dispute and its probative value is not outweighed by its prejudicial effect. *People v. Johnson*, 208 Ill. 2d 53, 102 (2003). "Relevant evidence is defined as evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." *People v. Gonzalez*, 142 Ill. 2d 481, 487-88 (1991). "Although motive is not an essential element of murder, it is generally held that evidence indicating the defendant was a member of a gang or was involved in gang-related activity is admissible to show common purpose or design, or to provide a motive for an otherwise inexplicable act." *People v. Resendez*, 273 Ill. App. 3d 751, 758 (1995).

Here, the gang-related evidence was admitted to establish a motive for Rodriguez's murder. This evidence showed that Rodriguez was shot in an area controlled by the Latin Kings. Olaguez testified that she was concerned when the car crossed into Latin King territory because

she believed defendant was a member of the Two Six gang and was not supposed to be in that area. Officer Escamilla testified about his knowledge of the Latin Kings and Two Six within the 10th District and he stated that the gangs were involved in conflict. He also testified that he heard the gunshots while in Latin King territory, but drove to a Two Six area, where he detained Ugalde's car and arrested defendant.

Defendant gave conflicting testimony about his gang membership. In his interrogation, he admitted to being a member of the Two Six gang since 2003 or 2004. However, at trial, he denied that he was a member at the time of the shooting. He testified that he had left the gang, though he admitted to having two tattoos, a bunny rabbit and three dots, which are affiliated with the Two Six gang. Further, during his police interrogation, defendant stated that he knew another Two Six member, Jesse Lopez, had been killed the night before Rodriguez was shot, though defendant told police he thought the "SDs" killed Jesse.

The State cites the supreme court's decision in *People v. Colon*, 162 Ill. 2d 23 (1994), as support for its argument that the gang evidence was related to the crimes charged because it established motive. In *Colon*, the supreme court held that the gang evidence was properly admitted to establish motive and affirmed the defendant's conviction for murder committed during the course of a drive-by shooting. In that case, witnesses testified that the victim was a Latin King and the area of the shooting was Latin Kings' territory. *Colon*, 162 Ill. 2d at 30. The defendant, like defendant in the instant case, gave conflicting statements as to his membership with the Imperial Gangsters where he told one officer that he was a member and another officer that he was a former member. Evidence was presented that the Imperial Gangsters and the Latin

Kings did not get along. *Colon*, 162 Ill. 2d at 30. The court found the gang evidence was relevant to establish motive. *Colon*, 162 Ill. 2d at 30.

Defendant contends that this evidence was irrelevant to Rodriguez's shooting because defendant was not a gang member and defendant's statement that the "SDs" killed Jesse. However, defendant's statement to the police contains many fabrications, significantly that defendant did not know about Rodriguez's murder and was not involved. Defendant also notes that there was no evidence of gang signals, symbols or color during the shooting.

We conclude that the gang-related evidence was properly admitted to establish a motive for Rodriguez's shooting. While defendant presented a claim of self-defense, his testimony that he knowingly went into rival gang territory at 2 a.m., armed with a gun, to act as a peacemaker to talk to Rodriguez was unconvincing. The State, to counter this testimony, presented a motive based on recent gang activity involving defendant's gang, the Two Six. This evidence was relevant because it had the tendency to make the fact that defendant did not act in self-defense more probable than it would be without the evidence. Accordingly, the trial court did not err in allowing the State to admit gang-related evidence. Since we have found that no error occurred, defendant's claim of plain error fails.

We note that defendant also attempts to raise this issue under a claim of ineffective assistance of counsel. Claims of ineffective assistance of trial counsel are resolved under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court delineated a two-part test to use when evaluating whether a defendant was denied the effective assistance of counsel in violation of the sixth amendment. Under *Strickland*, a

defendant must demonstrate that counsel's performance was deficient and that such deficient performance substantially prejudiced defendant. *Strickland*, 466 U.S. at 687. However, since we have already found that no error occurred, defendant cannot establish the prejudice prong under *Strickland* and his claim of ineffective assistance of counsel fails.

Defendant next asserts that he was denied a fair trial because the trial court failed to comply with Supreme Court Rule 431(b) (Ill. S. Ct. R. 431(b) (eff. May 1, 2007)). The State maintains that defendant has forfeited this issue and defendant has not demonstrated that this was plain error. Further, the State responds that the trial court fully complied with Rule 431(b).

Rule 431(b) provides:

> "(b) The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects.
>
> The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the

principles set out in this section." Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

Prior to selecting the jury, the trial court admonished and questioned the venire as follows:

"And among those principles are, that a criminal trial begins a person accused of a crime presumed to be innocent. That is how a criminal trials start. Whoever comes to court accused of a crime walks into the courtroom presumed to be innocent. *** When a criminal trial begins the accused begins proceedings presumed to be innocent.

Is there anybody here who has a problem with that most fundamental proposition of American justice, that when a criminal trial begins we presume the accused to be innocent.

If you have a problem with that, please raise your hand.

No hands are raised.

***

With that said, is there anyone here who would hold it against an accused simply because someone from the government filed a piece of paper in court indicating what the formal charges are against them? If you have feelings like that, please raise your hand.

No hands are raised.

How is it that someone can go from the status of a citizen accused of a crime to someone who may be guilty of a crime? How can that happen? *** The only way someone can be guilty of a crime is if the government, who brought the charges against the accused, can prove their case beyond a reasonable doubt.

***

Criminal charges must run through the government. The government has the burden of proof, they have to prove their case beyond a reasonable doubt. We don't guess somebody guilty or think they may might be [*sic.*] guilty, or take a hunch they might be guilty. The only way somebody can be guilty is if the government who brought the charge against the accused can prove their case beyond a reasonable doubt.

Is there anyone here who has a problem with that proposition, that the only way that someone may be guilty in a criminal case is if the government who brought the charges can prove that case beyond a reasonable doubt.

If you have a problem with that please raise your hand.

No hands are raised.

The last proposition I'll discuss with you is this. In a

criminal trial, the person accused of a crime does not have to prove their innocence. The accused does not have to testify, they don't have to call witnesses on their own behalf.

In a criminal trial the burden of proof is on the government. They have to prove the case beyond a reasonable doubt, and the accused doesn't have to prove anything.

Hypothetically speaking, there could be a criminal trial. The government may call a hundred witnesses against the accused. The accused, which is their perfect right, chooses not to testify, which is also their right, chooses not to call any witnesses in their own behalf. After hearing from a hundred people on one side and no people on the other, there can be a reasonable doubt in the jury's mind as to whether the government has met their burden of proof.

With that said, is there anybody here who would hold it against an accused, if they did not testify, which is their perfect right, or did not call witnesses? Anybody who thinks an accused has some responsibility to explain the evidence or explain their innocence? Anybody who would hold it against the accused if they did not testify, which is their right?

If you have feelings like that, please raise your hand.

No hands are raised, okay."

Defendant contends that the trial court did not comply with Rule 431(b) because the court (1) did not ask prospective jurors if they understood and accepted the four principles, (2) did not instruct the venire on the third and fourth principles separately, and (3) limited defendant's presumption of innocence to the beginning of the trial. As we previously stated, to preserve an issue for review, defendant must both object at trial and in a written posttrial motion, (*Enoch*, 122 Ill. 2d at 186), and the failure to do so operates as a waiver as to that issue on appeal (*Ward*, 154 Ill. 2d at 293). In his reply brief, defendant acknowledges the supreme court's decision in *People v. Thompson*, 238 Ill. 2d 598 (2010). In *Thompson*, the supreme court stated:

> "Rule 431(b), therefore, mandates a specific question and response process. The trial court must ask each potential juror whether he or she understands and accepts each of the principles in the rule. The questioning may be performed either individually or in a group, but the rule requires an opportunity for a response from each prospective juror on their understanding and acceptance of those principles." *Thompson*, 238 Ill. 2d at 607.

Nevertheless, the *Thompson* court held that a trial court's failure to comply with Rule 431(b) is subject to the rule of forfeiture and must be objected to during jury selection and raised in a posttrial motion and that such an error does not constitute plain error under the second prong, absent a showing that a juror was biased. Here, defendant recognizes that "*Thompson* effectively forecloses the argument that the 431(b) error here may not be considered under the second prong

of plain error." However, defendant maintains that his alleged Rule 431(b) error is reviewable under the first prong of plain error because the evidence was closely balanced. We disagree. Based on our discussion of the facts of this case and the entire record before us, we cannot say that the evidence was closely balanced. Therefore, defendant has forfeited his claim of error under Supreme Court Rule 431(b).

Finally, defendant argues that he is entitled to 611 days of presentence credit, but the trial court only awarded him credit for 537 days. The State concedes that defendant is entitled to 610 days of presentence credit from the date of his arrest, but defendant is not entitled to presentence credit for the date of sentencing. Rather, the State asserts that the Department of Corrections acquires legal custody when the trial court imposes its sentence and issues the mittimus; thus, the day of sentencing is the first day of defendant's prison term.

Section 5-4.5-100 of the Unified Code of Corrections, which governs the calculation of term of imprisonment, provides, in relevant part:

> "(a) COMMENCEMENT. A sentence of imprisonment shall commence on the date on which the offender is received by the Department or the institution at which the sentence is to be served.
>
> (b) CREDIT; TIME IN CUSTODY; SAME CHARGE. Except as set forth in subsection (e), the offender shall be given credit on the determinate sentence or maximum term and the minimum period of imprisonment for time spent in custody as a

> result of the offense for which the sentence was imposed, at the rate specified in Section 3-6-3 (730 ILCS 5/3-6-3). Except when prohibited by subsection (d), the trial court may give credit to the defendant for time spent in home detention, or when the defendant has been confined for psychiatric or substance abuse treatment prior to judgment, if the court finds that the detention or confinement was custodial." 730 ILCS 5/5-4.5-100(a), (b) (West 2008).

Additionally, section 5-8-5 of the Code states, "Upon rendition of judgment after pronouncement of a sentence of periodic imprisonment, imprisonment, or death, the court shall commit the offender to the custody of the sheriff or to the Department of Corrections." 730 ILCS 5/5-8-5 (West 2008).

Recently, the supreme court in *People v. Williams*, No. 109361 (January 21, 2011), considered the question presented here, that is, whether a defendant is entitled to presentence credit for the day of sentencing. The *Williams* court noted that "[b]y directing that the court 'shall commit the offender' to custody '[u]pon rendition of judgment,' creates a requirement on the court that takes effect upon entry of judgment on the defendant's conviction and sentence." (Emphasis omitted.) Williams, slip op. at 5.

> "Because section 5–8–5 requires the court to commit the defendant to the Department at the time of the entry of judgment, section 5–4.5–100 means that the sentence commences upon the issuance of the mittimus.

> Under the plain language of the statute, then, we find that the date of issuance of the mittimus is a day of sentence ***. Because a defendant is entitled to have the day counted once, but only once, we hold that the date of the issuance should therefore not be counted as a day of presentence custody under section 5-4.5-100(b)." Williams, slip op. at 5.

Under *Williams*, defendant is not entitled to credit for presentence custody for his date of sentencing. He was arrested on October 21, 2007 and sentenced on June 22, 2009. The State concedes that defendant is entitled to 610 days of presentence credit. We agree. Under Supreme Court Rule 615(b)(1), this court has the authority to order a correction of the mittimus. 134 Ill. 2d R. 615(b)(1). We order the mittimus to be corrected to reflect 610 days of presentence credit for time spent in custody.

Based on the foregoing reasons, we affirm defendant's conviction and the mittimus is corrected as ordered.

Affirmed; mittimus corrected.