FIFTH DIVISION
May 20, 2011

No. 1-09-1737



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County, Illinois. |
| | ) | |
| v. | ) | No. 06C661197 |
| | ) | |
| RAMONE MILES, | ) | Honorable |
| | ) | Michele M. Simmons, |
| Defendant-Appellant. | ) | Judge Presiding. |

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JUSTICE JOSEPH GORDON delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Epstein concurred in the judgment.

ORDER

*HELD:* Defendant's conviction for aggravated battery with a firearm reversed and remanded for new trial where (1) trial court failed to ask all prospective jurors during *voir dire* if they accepted the third *Zehr* principle, (2) prosecutor made multiple comments during rebuttal closing argument that were not based in evidence and which bore upon the credibility of the prosecution's key witness, and (3) trial court allowed victim's bloody clothing to be examined by jurors during deliberations even though the probative value of such clothing was minimal, insofar as it was not in dispute that the defendant shot the victim, and the central issue was whether such shooting was intentional.

On October 20, 2006, defendant Ramone Miles was arrested for shooting his girlfriend, Tiesha Martin, in the chest. Defendant was charged with attempted first degree murder and aggravated battery with a firearm. Following a jury trial, he was found guilty of aggravated battery with a firearm and sentenced to 13 years' imprisonment. He now appeals, raising three contentions of error: first, that although the trial court asked prospective jurors whether they *understood* that a defendant is not required to offer any evidence on his own behalf, it did not ask them whether they *accepted* such principle, in violation of Supreme Court Rule 431; second, that the prosecutor made improper comments during her closing rebuttal argument; and third, that the trial court abused its discretion by allowing the jurors to take Tiesha's bloody clothing into the jury room during deliberations. For the reasons that follow, we reverse and remand for a new trial.

## I. BACKGROUND

It is undisputed that on the afternoon of October 20, 2006, defendant shot his girlfriend Tiesha in the chest while they were at their residence in Harvey, Illinois. At issue is whether that shooting was intentional. Defendant claims that in a depressed and suicidal moment, he lifted his gun to his own head. Tiesha attempted to snatch the gun away from him, and in the ensuing struggle, he accidentally pulled the trigger. The State's theory of the case, on the other hand, is that defendant deliberately shot Tiesha because he was angry that she did not come home the night before and he suspected her of cheating on him.

The case proceeded to a jury trial. The State called three witnesses: Tiesha herself, Tiesha's friend Lakenya Shambley, who was at Tiesha's residence on the afternoon of the

shooting, and Deputy Chief Tony DuBois, an officer who came to the scene after the shooting occurred.

Lakenya testified that she was fifteen years old when the shooting occurred. On October 19, 2006, the night before the shooting, she spent the night at the home of Tiesha and defendant. When she awoke the following morning, Tiesha was not at home, and defendant was "unhappy."

Lakenya stated that Tiesha did not return to the house until that afternoon. When she returned, Lakenya heard her arguing with defendant " 'cause she stayed out the night before." After the argument, Tiesha and Lakenya sat in the bedroom, smoking a marijuana blunt and talking about the defendant. "[S]he was like, he crazy," Lakenya said. Lakenya stated that smoking the blunt did not affect her memory or cause her to lose consciousness, and she remembered the events that followed clearly.

After she and Tiesha smoked the blunt, defendant called Tiesha out of the room. Lakenya remained in the bedroom, but she could hear them arguing outside. In particular, she heard defendant yelling at Tiesha because she had not returned home the previous night, though she did not hear defendant threatening Tiesha. Lakenya then heard a gunshot. She did not actually see defendant shooting Tiesha.

According to Lakenya, Tiesha ran into the bedroom, telling Lakenya, "He shot me, call the police, the ambulance." Defendant was "right behind her." Tiesha tried to close the bedroom door but couldn't; instead, defendant pushed the door open and entered the room. He was holding a gun in his hand. Both defendant and Tiesha sat on the bed. Lakenya heard defendant saying that Tiesha did not love him. On cross-examination, Lakenya said that she also heard

defendant threatening to kill himself and pointing his gun at himself. However, during redirect examination, she clarified that she did not hear defendant making any reference to killing himself prior to shooting Tiesha, only after.

Tiesha told Lakenya to go get help, so Lakenya ran out of the house and went to a neighbor's house across the street to call the police. She was still at the neighbor's house when the police came. While she was there, she spoke to a detective. She did not return to defendant's house.

Tiesha, the State's next witness, testified that on October 20, 2006, the day of the shooting, she was living with defendant, whom she had been dating for two years. She had three children. One of them, one-year-old Ramone Miles Jr., was defendant's son. Her other children were two and six years old. None of them were at home when the shooting occurred.

The night before the shooting, Tiesha left the house at approximately 10 or 11 p.m. to "go out with" some female friends. She went for a job interview the following morning, then returned to the house in the afternoon. Defendant was angry and upset. They got into an argument. According to Tiesha, he picked up a stepstool and threw it at the wall. He then choked her, both of his hands grabbing her neck. He asked her three times if she was cheating on him, and she denied it.

Eventually, defendant released Tiesha. Tiesha testified that she did not call the police, because defendant had calmed down and she wanted to calm down as well. Instead, she went to the bedroom, where her friend Lakenya was, and they smoked a marijuana blunt together. Tiesha stated that her smoking did not cause her to lose consciousness and did not in any way affect her

ability to recall the events to which she was testifying.

After she finished smoking the blunt, defendant, who was in the kitchen speaking on the phone with his grandmother and mother, called for Tiesha to come. Tiesha went to the kitchen. She overheard defendant telling his grandmother on the phone that he wanted to kill himself, and then defendant directly told her that he wanted to kill himself. Defendant also threatened her. "He was saying that since he taught [*sic*] I was cheating on him, he wanted to do something to me too," Tiesha explained. "He was just basically saying like...like he'll try to hurt me."

When Tiesha was approximately five feet away from him, defendant pulled out a gun from his pocket. Tiesha's testimony was inconsistent as to whether defendant pointed the gun directly at her. During direct examination, she said that defendant pointed the gun "somewhat directly at me"; during cross-examination, she said that he did not point the gun directly at her; however, during redirect examination, she said that he did point the gun directly at her. Tiesha also testified during cross-examination that when defendant pulled out the gun, he was saying that he was going to shoot himself, and she believed him to be "delusional."

Tiesha stated that after defendant drew the gun, she began walking toward him, telling him that although they were "going through a lot of stuff," they would "get over it." She then grabbed the gun, placing her hands over his hands. His hand was still on the trigger when "[t]he gun went off."

Tiesha pointed to the place where she was shot, in the center of her chest. She testified that after she was shot, she ran to the bedroom, saying that she had been shot. Defendant was walking behind her. When Tiesha entered the bedroom, she closed the door. Defendant opened

it and came in, the gun still in his hand. He began to cry and lay down on the bed. "He was saying that he didn't know that he had shot me," Tiesha said, "and it was an accident, and he was finna [*sic*] kill himself." Tiesha opined that the shooting was, in fact, an accident.

Tiesha further testified that she told Lakenya, who was still in the bedroom, and defendant to go get help. Defendant called for an ambulance on his cell phone. He was still holding the gun. Tiesha testified that she was afraid and asked defendant to give her the gun. He was initially reluctant and only gave it to her after she promised that she would not tell anyone that he shot her. Later, but before the ambulance arrived, defendant asked her to give the gun back to him so that he could hide it. Tiesha testified that she did not want to do so, because she feared that he would kill himself or kill her. She made defendant swear on their one-year-old son that "he wouldn't do nothing stupid" before returning the gun to him. Defendant then left to hide the gun.

Tiesha stated that the police eventually arrived, including Deputy Chief DuBois. DuBois spoke with both defendant and Tiesha in the bedroom, and they both told him that Tiesha had been shot in a drive-by shooting. Tiesha explained that she knew that this was a lie, but she said it anyway because she had promised not to get defendant in trouble. However, subsequently, when she was outside and no longer in the presence of the defendant, she told DuBois that defendant had shot her because he was angry that she had stayed out all night. She admitted that she did not tell DuBois that the defendant had threatened to kill himself before shooting her or that the defendant said that the shooting was an accident.

Tiesha said that she was admitted to the hospital that night. On the following day, she

stated, while she was still in the hospital, DuBois came to see her, and she again told him that defendant shot her because she had stayed out all night. She admitted that she told him that there was no struggle over the gun, and she did not tell him that defendant had threatened to kill him at any time before he shot her. During cross-examination, she testified that during this meeting, DuBois threatened her by saying "that my kids was gonna get tooken away."

Later that day, Tiesha said, she spoke with Assistant State's Attorney Lorraine Lynott and signed a handwritten statement detailing the events leading up to the shooting. DuBois and her brother Jari Martin were also present when she signed. The contents of this handwritten statement were elicited through Tiesha's direct testimony, in which she conceded that the account of the shooting that she gave in that statement differed from her court testimony in that, in the handwritten statement, she said:

> "Ray [the defendant] then pulled out a black .38 revolver from either his hoodie or his pants. Ray said, 'I'm finna [*sic*] kill you, b----; you gonna die.' Ray said that as he pulled out the gun and raised it up. Right away Ray pulled the trigger and shot me in my left breast. The bullet went into my chest."

Thus, in her open court testimony, Tiesha in effect recanted the thrust of this handwritten statement by testifying that the gunshot was an accident that occurred while they were struggling over the gun. Tiesha acknowledged, however, that at the time that she signed the handwritten statement, she told ASA Lynott that she was thinking clearly, she was giving the statement voluntarily, she had been treated well by the police and by ASA Lynott, and nobody made threats or promises to induce her to make that statement. On redirect examination, Tiesha further

acknowledged that she never told ASA Lynott that DuBois or anyone from the Harvey Police Department had threatened to take away her children.

Tiesha testified during cross-examination that approximately a month after defendant was arrested, she came to speak with the defense attorney at her office. She told the defense attorney that the shooting had been an accident and the charges against defendant were false.

During redirect examination, Tiesha stated that she still loved the defendant, even after the shooting. She agreed that she had visited him in jail on 15 dates listed by the prosecutor, the most recent of which was May 6, 2008, and that she had also visited him since then. She said that she was not testifying against defendant willingly. Rather, she was subpoenaed and had to be brought to court in handcuffs. She stated that she did not want anything bad to happen to the defendant.

Counsel for the State asked Tiesha to identify the hoodie, t-shirt, and bra that she was wearing when she was shot. All three items of clothing were bloodstained and had a hole in them corresponding to the gunshot. Tiesha testified that they had been cut up by paramedics in the ambulance who were taking the clothes off of her, but other than the fact they were cut up, they were in substantially the same condition as they were when she was wearing them after having been shot.

The State's third and final witness was Deputy Chief DuBois. DuBois testified that on October 20, 2006, at approximately 3:57 p.m., he responded to a call that shots had been fired. Upon arriving at defendant's house, he proceeded to the bedroom, where he saw Tiesha sitting on the bed, bleeding from the chest area, and defendant covering his face with his hands.

Defendant told DuBois that Tiesha had been the victim of a drive-by shooting.

When the ambulance had arrived, DuBois spoke with a juvenile, later identified to him as Lakenya, who was standing outside by the porch and crying. After that conversation, DuBois advised his patrol officers to handcuff and detain the defendant. DuBois then went to speak with Tiesha in the ambulance. He next proceeded to the basement of the house, where he found a .38 revolver under a garbage can. He observed that the revolver contained five live rounds and one spent round. With respect to the firing of the weapon, he stated that it would require a deliberate pulling of the trigger.

DuBois testified that after recovering the weapon, he went to defendant and read him his Miranda warnings. Defendant started kicking the officers and refused to enter the police vehicle. Eventually the police were able to bring him to the police station. DuBois spoke with him in an interview room at the station. Defendant allegedly told DuBois that he was feeling suicidal because he shot his girlfriend, although he refused to reduce that statement to writing.

DuBois finally stated that he did not, at any time, threaten to take away Tiesha's children if she did not make a statement against the defendant. He said that he was not even aware that she had children until she gave her statement to ASA Lynott.

During cross-examination, DuBois stated that the clothing recovered from Tiesha was sent to the Illinois State Police Crime Lab for testing. However, he stated that he did not know what kinds of testing were conducted by the crime lab. Furthermore, he said, although he had authority to do so, he did not request that the crime lab test the clothing to determine the distance between the shot and where Tiesha was standing. (In fact, no expert testimony on this issue was

presented by either side.)

After DuBois' testimony, the State rested. Defendant then took the stand as the sole witness in his own defense. He stated that he met Tiesha around two and a half years before the shooting. They moved in together a few months after they started dating. At the time, he was the only one who was employed. He held his job for almost a year before being laid off. As of the date of the shooting, he was still unemployed.

Defendant testified that, on October 20, 2006, Tiesha returned home in the afternoon. Defendant was the only other person at the house when she arrived. Lakenya came to the house later so that Tiesha could do her hair.

At some point after Lakenya arrived, defendant said, he was alone in the kitchen while Tiesha and Lakenya were in the bedroom. Defendant was speaking on the phone with his grandmother. He stated that he was feeling depressed because he was unemployed, he just lost his car, his mother had cancer, and her condition was becoming worse. "I felt like I didn't want to be on earth any more," defendant said. He stated that he had such feelings "[b]ecause I wasn't doing what I was put here for, to help my family out." After he had finished speaking with his grandmother, he made a phone call to his mother. At the end of that conversation, he said, he felt even worse.

Defendant testified that he then pulled out a gun and pointed it at his head. "I was contemplating taking my life," he said. While he was standing there with the gun pointed at his head, Tiesha entered the kitchen. His back was facing her. She approached him from behind, and, according to defendant, she tried to snatch the gun away from him. The gun went off "when

she snatched it." He admitted that his finger was on the trigger at the time.

Defendant testified that he saw Tiesha's bleeding chest and realized that she had been shot. Tiesha went to the bedroom, and he followed behind her. When Tiesha entered the bedroom, she closed the door. Defendant explained that, because the bedroom is small and the bed takes up a lot of space, "you got to push the door up before you can get in and out." Defendant opened the door – though he did not force it open – and entered. He and Tiesha told Lakenya to call for help, so she left for a neighbor's house. Defendant also called an ambulance on his cell phone.

While he and Tiesha waited for the ambulance to arrive, defendant said, he was crying because Tiesha had been shot. "I just felt as if everything was my fault for even having a gun and everything," he stated. Tiesha told him to "get rid of" the gun, so he placed it in the basement and then came back upstairs to the bedroom. He told her that he was sorry and asked her not to leave him. He stayed by Tiesha's side until the police, including DuBois, arrived.

Defendant stated that he lied to DuBois, telling him that Tiesha had been shot in a drive-by shooting, because he was afraid that, even though the shooting was an accident, the police would not view it as such. Tiesha told DuBois the same story. Then the ambulance arrived. After Tiesha was taken into the ambulance, defendant said, DuBois came back into the house and handcuffed him. Then three or four of the officers punched defendant in the head with their fists, and one of them hit defendant with a gun.

Defendant was brought to the police station, where, he testified, the police told him to sign a statement that he tried to kill Tiesha. He stated that refused to sign it because it was not

true. DuBois and two other police officers were in the room at the time. Defendant told them that he tried to take his life, that Tiesha reached for the gun, and that it went off. The officers stated that he was lying. At no time, according to defendant, did he ever tell the officers that he tried to kill Tiesha or even that he shot Tiesha.

During cross-examination, defendant elaborated further on the events occurring prior to the shooting. He stated that Tiesha left home the night before and did not return until afternoon. Defendant stated that he was "unhappy," though not "mad," when she returned. They got into an argument because, according to defendant, he saw her talking with a lot of men outside, and he did not know what they were talking about. He admitted throwing a stool during the argument, though he said he did not throw it at Tiesha. He also denied choking her. Once the argument ended, Tiesha went to the bedroom with Lakenya. Defendant was still angry. However, he said, at no point did he call Tiesha to come out of the bedroom.

After defendant's testimony, the defense rested, and counsel for both sides presented closing arguments, which shall be discussed below insofar as they are relevant to our resolution of this appeal.

The State requested that Tiesha's bloodstained hoodie, t-shirt, and bra, all of which had been admitted as exhibits, be sent back to the jury room during deliberations. Counsel for the defense expressed concern that the jurors might contaminate the clothing by handling it but did not raise any other objection. Accordingly, the court allowed the clothing to be sent back to the jury room with gloves to be used if the jurors wished to handle it.

The jury found defendant not guilty of attempted first degree murder but guilty of

aggravated battery with a firearm. He was sentenced to 13 years' imprisonment. Defendant now appeals his conviction.

## II. ANALYSIS

Defendant raises three contentions of error on appeal, each of which was broadly described at the outset. We consider these three contentions in turn.

### A. Claimed Lack of Compliance With Rule 431(b)

We begin by considering defendant's contention that the trial court violated Rule 431(b) when it failed to ask prospective jurors whether they *accepted* the principle that a defendant is not required to offer any evidence in his own defense, even though it did ask jurors whether they *understood* such principle.

Defendant acknowledges that his counsel did not properly preserve this issue for review by making a contemporaneous objection or by raising the issue in a posttrial motion. See *People v. Allen*, 222 Ill. 2d 340, 350 (2006) (in order to properly preserve an issue for review, defendant is required to raise an objection at trial and in a written posttrial motion, and failure to do so will result in forfeiture of that issue on appeal), citing *People v. Enoch*, 122 Ill. 2d 176, 186 (1988); *People v. Chapman*, 194 Ill. 2d 186, 225 (2000). However, defendant argues that we should consider his contention of error under the plain error doctrine.

The plain error doctrine "allows a reviewing court to consider unpreserved error when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). In the first instance, the defendant bears the burden of proving that there was plain error

and that such error was prejudicial, in that the evidence was "so closely balanced that the error alone severely threatened to tip the scales of justice against him." *Herron*, 215 Ill. 2d at 187. In the second instance, the defendant bears the burden of proving that the error was so serious that it challenged the integrity of the judicial process, such that prejudice can be presumed regardless of the strength of the evidence against defendant. *Herron*, 215 Ill. 2d at 187; see *People v. Blue*, 189 Ill. 2d 99, 138 (2000) ("when an error arises at trial that is of such gravity that it threatens the very integrity of the judicial process, the court must act to correct the error *** *regardless* of the strength of the evidence of defendant's guilt"). In the case at hand, the defendant argues that both prongs of the plain error doctrine apply, that is, that the evidence was closely balanced and that the error was so serious that it undermined the fundamental fairness of his trial.

Before a reviewing court may invoke the plain error doctrine, it must first determine whether any error occurred. *Chapman*, 194 Ill. 2d at 225-26; see *Herron*, 215 Ill. 2d at 187 ("only if there was error can the defendant plausibly argue that the error prejudiced him in a close case"). Thus, we turn to the merits of defendant's contention of error.

Rule 431(b) provides, in its entirety:

> "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." 177 Ill. 2d R. 431.

These principles of law have become known as the *Zehr* principles, after the leading case of *People v. Zehr*, 103 Ill. 2d 472, 477-78 (1984), in which our supreme court held that refusal to ask *voir dire* questions concerning these principles was reversible error.

Under Rule 431, it is insufficient for a trial court to merely instruct the jurors on these principles and then issue a general admonition for them to "follow the law." *People v. Blair*, 395 Ill. App. 3d 465, 477-78 (2009); see 177 Ill. 2d R. 431, Committee Comments (trial court may not simply give "a broad statement of the applicable law followed by a general question concerning the juror's willingness to follow the law"). Rather, "the rule requires an opportunity for a response from each prospective juror on their understanding and acceptance of those principles." *People v. Thompson*, 238 Ill. 2d 598, 607 (2010)

In this case, defendant claims the trial court did not properly inquire into the prospective jurors' acceptance of the third *Zehr* principle, namely, that the defendant is not required to offer any evidence on his own behalf. We note that the trial court initially instructed all of the prospective jurors as a group that:

"Under our law, a defendant is presumed to be innocent of the charges against him, and this presumption of innocence remains with him throughout every stage of the trial and during your deliberations on a verdict. And the presumption of innocence is not

overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty.

The State has the burden of proving the guilt of the defendant beyond a reasonable doubt. And this burden remains on the State throughout the trial. The defendant is not required to prove his innocence, nor is he required to present any evidence whatsoever on his own behalf."

The trial court then addressed in turn each of three panels of prospective jurors that were seated in the jury box. The trial court addressed the first panel, consisting of 14 prospective jurors, as follows, in relevant part:

"Do all of you understand that the defendant is presumed innocent and that he does not have to offer any evidence in his own behalf but must be proven guilty beyond a reasonable doubt by the State? If all of you understand that, please raise your right hand. (Show of hands.) For the record, everyone has raised their right hand."

Four of the jurors who ultimately deliberated in this case were chosen from this panel.

The trial court then addressed the second panel, consisting of 11 prospective jurors, as follows, in relevant part:

"Do all of you understand that the defendant is presumed innocent and that he does not have to offer any evidence in his own behalf but must be proven guilty beyond a reasonable doubt by the State? If all of you understand that, please raise your right hand. (Show of hands.) For the record, everyone has raised their right hand. Do any of you have any problems with that principle of law? If you do, please raise your right hand.

(No response.) For the record, no one has raised their hand."

Four of the jurors who ultimately deliberated in this case were chosen from this panel.

Finally, the court addressed the third panel, consisting of 13 prospective jurors, as follows, in relevant part:

> "Do all of you understand that the defendant is presumed innocent and that he does not have to offer any evidence in his own behalf but must be proven guilty beyond a reasonable doubt by the State? Do all of you know and understand that? (Show of hands.) For the record, everyone has raised their right hand.
>
> Do any of you have any problems with the principle of law that I just indicated that the defendant is presumed innocent and must be proven guilty beyond a reasonable doubt by the State? If you do have a problem where you're unable to follow that principle of law, please raise your right hand. (No response.) For the record, no one has raised their hand."

Four of the jurors who ultimately deliberated in this case and two alternates were chosen from this panel.

From this record, it is clear that the trial court instructed all of the prospective jurors on the third *Zehr* principle, namely, that the defendant is not required to offer any evidence on his own behalf. It is also clear that the trial court asked all three panels of prospective jurors whether they understood this principle, and it gave each prospective juror an opportunity to respond. Defendant does not dispute either of these two facts. Defendant nevertheless contends that the trial court failed to ask all prospective jurors whether they *accepted* this principle, instead of

merely *understanding* it, and that lack of strict compliance with Rule 431(b) in this regard is grounds for reversal.

It is apparent that the trial court did, in fact, ask the members of the second and third panels whether they accepted the third *Zehr* principle. For the second panel, after asking the venirepersons whether they understood the principle, the trial court went on to ask, "Do any of you have any problems with that principle of law?" and asked for a show of hands. Likewise, for the third panel, the trial court also asked whether any of the venirepersons had "any problems" with the aforementioned principle and asked for a show of hands. We find that such questioning was sufficient to ascertain acceptance of this principle. See *People v. Vargas*, 396 Ill. App. 3d 465, 472 (2009) (Rule 431(b) does not dictate any particular methodology or "magic words" necessary for establishing the venire's understanding and acceptance of the *Zehr* principles).

However, the trial court did not similarly ascertain whether the members of the first panel, from which four jurors were ultimately drawn, accepted the third *Zehr* principle. Although the trial court asked for a show of hands with regard to understanding ("Do all of you understand that the defendant is presumed innocent and that he does not have to offer any evidence in his own behalf *** ?") it did not go on to inquire whether the venirepersons were willing to follow such principle. This, on its face, falls short of the plain language of Rule 431(b), which provides that "The court shall ask each potential juror *** whether that juror understands *and accepts* the following principles." In this regard, we are guided by *Thompson*, 238 Ill. 2d at 607, where our supreme court held that it was error for a trial court not to question potential jurors on their acceptance of the first *Zehr* principle:

> "[W]hile the trial court asked the prospective jurors if they understood the presumption of innocence, the court did not ask whether they accepted that principle. The rule requires questioning on whether the potential jurors both understand and accept each of the enumerated principles. Therefore, we necessarily conclude that the trial court violated Rule 431(b)."

The State argues that, even if the trial court did not fully comply with the strictures of Rule 431(b), its error in this regard would not be so serious that it would rise to the level of plain error. See *Thompson*, 238 Ill. 2d at 611-13 (lack of compliance with Rule 431(b) is not a structural error requiring automatic reversal but, rather, is subject to plain error analysis); *People v. Amerman*, 396 Ill. App. 3d 586, 595 (2009) (although trial court failed to strictly comply with the requirements of Rule 431(b) where it failed to ask all prospective jurors whether they understood and accepted the third *Zehr* principle, such error did not rise to the level of plain error so as to mandate reversal). Nevertheless, we need not decide whether the trial court's lack of compliance with Rule 431(b) in this case would, in and of itself, be sufficient to require reversal, because, for reasons that shall be discussed below, we find that reversal is required on other grounds.

B. Prosecutorial Remarks During Closing Argument

Defendant next contends that he was prejudiced by improper comments that the prosecutor made during her rebuttal closing argument. In particular, he claims that the prosecutor (1) attempted to discredit Tiesha's trial testimony by making statements that had no basis in evidence, and (2) made inflammatory remarks suggesting that an acquittal would signal

that anyone affected by the recession would be justified in committing crimes. (These complained-of statements shall be reproduced in full below.)

As with the previous issue, defendant concedes that his counsel did not properly preserve this issue for review by raising a contemporaneous objection or by raising the issue in a posttrial motion. *Allen*, 222 Ill. 2d at 350 (failure to raise an objection at trial and in a written posttrial motion will result in forfeiture of that issue on appeal); *Enoch*, 122 Ill. 2d at 186. Indeed, counsel for defendant was silent during the entire rebuttal closing argument. However, defendant argues that we should consider his contentions of error under the plain error doctrine. See *Herron*, 215 Ill. 2d at 186-87. In the alternative, he argues that his trial counsel was ineffective for failing to preserve the issue for review.

Prosecutors are required to demonstrate respect and due regard for a defendant's constitutional right to a fair trial. *People v. Starnes*, 374 Ill. App. 3d 132, 135 (2007). However, prosecutors also have wide latitude in closing arguments. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009); *People v. Derr*, 316 Ill. App. 3d 272, 275 (2000). While they may not argue assumptions or facts not contained in the record, they are permitted to comment on the evidence and any fair, reasonable inferences arising therefrom. *Glasper*, 234 Ill. 2d at 204; see *People v. Shum*, 117 Ill. 2d 317, 347 (1987). In determining whether a prosecutorial remark is improper, the reviewing court must consider it in light of the context of the entire closing arguments of both the State and the defendant. *Glasper*, 234 Ill. 2d at 204. Moreover, improper prosecutorial remarks " 'generally do not constitute reversible error unless they result in substantial prejudice to the accused.' " *Shum*, 117 Ill. 2d at 347 (reversal not required where prosecutor in closing argument

made reference to testimony not in evidence, where, in light of all the evidence presented at trial, "we cannot say that the verdict in the action would have been different absent this single isolated remark"), quoting *People v. Baptist*, 76 Ill. 2d 19, 29 (1979).

With these principles in mind, we turn to defendant's contentions of error. Defendant first contends that, in an attempt to discredit Tiesha's trial testimony, the prosecutor made various remarks that were not based upon facts in evidence. One of the key issues at trial was the credibility of the handwritten statement that Tiesha signed the day after the shooting, in which she stated that defendant announced his intent to kill her as he drew the gun and then shot her "[r]ight away," versus the credibility of her trial testimony, in which she stated that defendant accidentally shot her while they were struggling over the gun. In this regard, the prosecutor made the following statement during closing rebuttal argument:

> "She visited [defendant in prison] religiously, 15 times over a year and a half. They talked, they talked, and they talked.
>
> Now she comes here. She hasn't visited him since, what, May of 2008. She is doing what she can just enough, and she's pregnant. She is in the position of feeling horrible, horrible about the defendant, horrible about leaving the defendant, horrible about not being with the defendant any more, so she is doing just enough to try to get him off. But she can't get away from the truth of what she did, and that is exactly what that instruction speaks to, the fact that people do want to come in and change their mind. People do want to come in and give another story to help somebody out.
>
> So that instruction that my partner talked to you about, the instruction that my

> partner directed you to, take a look at it because it acknowledges that exact thing here in court, that it happens all the time. A girlfriend, a wife will tell you exactly what happened when it happened, but when they've got to figure out about real life, who is going to pay the mortgage, who is going to buy the diapers, who is going to support that kid, I have nobody else, I know he beats me but it's not that bad, so now I have to go into court and do what I have to do to get this case taken care of. That's exactly what the law acknowledges.
>
> And so what the law tells you to do is because she acknowledged here in court that she, in fact, made those statements right after the incident, that you can consider those statements from the witness stand as if you heard them here in court."

Defendant contends that this statement constituted plain error because it referenced facts not in evidence and because it interjected the prosecutor's personal opinion that battered women will frequently perjure themselves to help their abusers. We agree on both counts.

First, the prosecutor's statement that "She hasn't visited him since, what, May of 2008" misstates the evidence. In fact, Tiesha testified that she had seen the defendant since May 2008, although she did not give any specific dates.

In addition, the prosecutor's followup statement that Tiesha was pregnant and that she was "not *** with the defendant any more" was not based on any facts introduced into evidence. Defendant correctly points out that, except for the prosecutor's comment, the record is silent as to whether Tiesha was pregnant at the time of trial, and the record likewise does not state that Tiesha was no longer the defendant's girlfriend.

Assumptions and statements of fact that are not based upon the evidence presented in a case may not properly be argued to the jury. *People v. Beier*, 29 Ill. 2d 511, 516-17 (1963); see *People v. Burrett*, 216 Ill. App. 3d 185 (1991). This rule holds true even where the facts concern the physical appearance of someone present at trial and would therefore be visible to the jury. *People v. Escobar*, 77 Ill. App. 3d 169, 177 (1979); *People v. Burke*, 136 Ill. App. 3d 593, 604 (1985). The facts of *Escobar* and *Burke* are instructive. *Escobar* was a murder case in which the court held that it was improper for the prosecutor to reference a tattoo upon defendant's hand for the first time during rebuttal closing argument, where such tattoo was highly probative of defendant's identity as the perpetrator. The State's theory in that case was that defendant drove a car which carried a gunman who shot and killed the victim. *Escobar*, 77 Ill. App. 3d at 170. The State's single occurrence witness identified the driver as a high school acquaintance whom he only knew as "New York." *Escobar*, 77 Ill. App. 3d at 170. Defendant denied being that acquaintance and also denied being the driver of the car. *Escobar*, 77 Ill. App. 3d at 170-71. During rebuttal closing argument, the prosecutor stated for the first time that defendant had a tattoo on his hand reading "N.Y., New York." *Escobar*, 77 Ill. App. 3d at 175. The *Escobar* court found that this constituted reversible error, explaining:

> "Comments on matters not in evidence are improper, especially so during final arguments when it is too late for the other side to present evidence to counter or explain them. Moreover, by saving this matter for his rebuttal argument, the prosecutor even precluded defense counsel from arguing in response without prolonging the arguments by first obtaining leave of court to make an additional argument." *Escobar*, 77 Ill. App. 3d at

177.

Likewise, the court in *Burke* also found it error to comment upon a defendant's physical appearance, even when such appearance would have been plainly visible to the jury. The *Burke* defendant was charged with various drug-related offenses. *Burke*, 136 Ill. App. 3d at 595. During closing argument, counsel for the defense pointed out that the State had not tested the remains of marijuana cigarettes recovered in defendant's residence for the presence of lipstick. *Burke*, 136 Ill. App. 3d at 604. In response, the prosecutor responded during rebuttal that the defendant had not worn any lipstick during the previous day of trial. *Burke*, 136 Ill. App. 3d at 604. The *Burke* court found that this statement was improper, insofar as it was not based upon the evidence. *Burke*, 136 Ill. App. 3d at 605.

We find the instant case to be analogous to *Escobar* and *Burke*. Since Tiesha's pregnancy, and the concomitant implication that she had been seeing someone other than the defendant, was not a matter in evidence, it was error for the prosecutor to reference it during her closing argument. The State argues in its brief that, since the defense made no objection to this statement, "the only fair inference to be drawn here is that Tiesha was visibly pregnant." Even if we were to accept this proposition for the sake of argument, it would not cure the error of referencing such fact for the first time during closing argument, just as the visibility of the defendant's tattoo in *Escobar* and the visibility of the defendant's makeup in *Burke* were insufficient to cure error in those cases.

Defendant next argues that it was improper for the prosecutor to state that "A girlfriend, a wife will tell you exactly what happened when it happened, but when they've got to figure out

about real life, *** I have nobody else, I know he beats me but it's not that bad, so now I have to go into court and do what I have to do to get this case taken care of." According to defendant, this statement constitutes a personal opinion by the prosecutor that battered women will frequently perjure themselves to help their abusers, a generalization which has no basis in the evidence. The State, on the other hand, argues that this statement was grounded in evidence insofar as it matched the evidence presented about Tiesha, who testified that she still loved defendant despite the injury that he had inflicted upon her.

We agree with defendant. It is plain from the face of this statement that the prosecutor was not merely speaking about Tiesha but was drawing broader conclusions about the actions of abused women in general. The reference to "A girlfriend, a wife" cannot merely be a reference to Tiesha, since the testimony at trial was that Tiesha was defendant's girlfriend, not his wife. This is reinforced by the use of the plural – "when *they've* got to figure out about real life" (emphasis added) – indicating that the focus is no longer on Tiesha as an individual, but on girlfriends and wives generally. Such generalization is improper, because it has no basis in the evidence.

In this regard, the case is analogous to *People v. Bell*, 152 Ill. App. 3d 1007, 1018 (1987), where the prosecutor attempted to bolster the credibility of a confession that defendant later recanted by telling the jury, "What we know is people have a human, natural, impulsive desire to tell the truth, to confess when they've done something bad; to tell the honest, true version of what has happened * * *." The *Bell* court held that this generalization about human nature was improper because it was not based upon any relevant evidence in the record or from legitimate

inferences therefrom. *Bell*, 152 Ill. App. 3d at 1018. The same is true about the prosecutor's generalization about the nature of battered girlfriends and wives in the instant case. The State asserts in its brief that "even a cursory glance" at this case will show that it is distinguishable, but makes no attempt to elaborate on how it is distinguishable.

Moreover, we find the cumulative weight of these errors to rise to the status of plain error, since the evidence in this case was closely balanced on the critical question of defendant's state of mind when the gun was fired. See *Herron*, 215 Ill. 2d at 187 (plain error exists where evidence is "so closely balanced that the error alone severely threatened to tip the scales of justice" against the defendant). Tiesha told DuBois and ASA Lynott that defendant announced an intention to kill her right before firing. However, Tiesha and the defendant both testified at trial that the shooting was an accident that occurred while they were struggling over the gun. The jury was therefore called to make a determination as to which of these conflicting accounts was most credible. This credibility determination was crucial due to the weakness of the State's corroborating evidence. Lakenya, the only other occurrence witness, did not see the shot, since she was in the bedroom rather than in the kitchen where the altercation was taking place. Although she did not hear defendant threatening to kill himself before the shot was fired, she also did not hear defendant threatening Tiesha (as in the State's preferred version of events). Furthermore, no expert testimony was offered as to whether the shot was fired at close range or from a distance, or as to whether the angle of the shot would support one version of events over another. The State argues that the fact that defendant hid the gun is corroborating evidence of his guilt. However, hiding the gun is entirely consistent with the version of events given by

defendant, who testified that even though the shooting was an accident, he was afraid that the police might not believe it as such.

Therefore, this entire case rises and falls upon the credibility of Tiesha and the defendant's trial testimony as compared to the credibility of Tiesha's prior statements. In this context, casting aspersions upon the credibility of Tiesha's trial testimony using facts not in evidence may well have swayed the jury's verdict and therefore compromised the fairness of defendant's trial.

Due to our resolution of this issue, we need not consider defendant's claims regarding supposed inflammatory remarks made by the prosecutor during her closing rebuttal argument. In any event, we find no error in the complained-of statement, which read as follows:

> "Explain to me at which point it's okay to fight with your girlfriend because your mom has cancer, that it's okay to shoot your girlfriend in the chest because you lost your job or you lost your car? We're in a recession, ladies and gentlemen. The moment that becomes okay, where are we today? People are losing their jobs right and left in this economy. Do you think that gives them the right to do whatever they want when they get home? Please. What we're talking about right now is what he chose to do. We're talking right now about what he decided to do. We're not talking about a troubled young man. We're talking about a pissed off boyfriend."

Defendant argues that this amounts to an argument that, if defendant were acquitted, it would signal that anyone affected by the recession would be justified in committing crimes. We disagree. When viewed as a whole, the prosecutor's argument remained focused on defendant

and on his individual accountability for his actions. Defendant testified that at the time of the shooting, he was feeling depressed because his mother had cancer, that he had lost his job, and that he had lost his car. In that context, the prosecutor's statement here is that such circumstances did not justify his later decision to shoot his girlfriend.

*People v. Moore*, 356 Ill. App. 3d 117, 120 (2005), cited by defendant on this matter, is distinguishable. In that case, the court found it improper for the prosecutor to urge the jury to convict defendant of burglary in order to bring down their own insurance premiums, an argument which had no bearing on defendant's guilt or innocence under the evidence. *Moore*, 356 Ill. App. 3d at 120. By contrast, the complained-of statement in the instant case was a direct response to the testimony that defendant offered in his own defense.

C. Tiesha's Clothes Being Taken Into the Jury Room During Deliberations

Defendant finally contends that the prejudice caused by the prosecutor's improper remarks during rebuttal closing argument was compounded by the trial court's error in allowing the jury to take Tiesha's bloody clothing into the jury room during deliberations, since her clothing had minimal relevance to any material issue in the case and therefore primarily served to prejudice and inflame the jury against defendant. As with the previous issue, defendant acknowledges that he has forfeited this issue by failing to raise an objection at trial and in a written posttrial motion. See *Allen*, 222 Ill. 2d at 350, citing *Enoch*, 122 Ill. 2d at 186. However, defendant argues that we should consider it under the plain error doctrine, since the evidence was closely balanced. *Herron*, 215 Ill. 2d at 186-87.

The decision to send exhibits back with the jury is within the sound discretion of the trial

court, and we shall not reverse that decision absent an abuse of discretion. *People v. Williams*, 228 Ill. App. 3d 981, 993 (1992). The trial court must compare the probative value of the exhibits against the possible prejudicial value they might have on the jury. *Shum*, 117 Ill. 2d at 353.

In this case, defendant contends that the probative value of Tiesha's bloody clothing was highly limited, since it was undisputed that defendant shot Tiesha in the chest, and the location of the shot was likewise undisputed. Therefore, defendant urges, examination of the clothes during deliberations would not serve to aid the jury in their analysis of the critical issue in this case, namely, defendant's state of mind when the shot was fired. In this regard, defendant argues that this case is analogous to *People v. Davis*, 97 Ill. 2d 1, 28 (1983), where our supreme court held that the trial court erred by permitting the prosecutor at the sentencing hearing to introduce into evidence a blood-stained shirt belonging to one murder victim and photographs of another murder victim following his death, since such exhibits had minimal probative value. The *Davis* court explained that the fact that defendant had participated in the commission of two or more murders "was more than adequately established without introduction of the evidence in question." *Davis*, 97 Ill. 2d at 28-29. The *Davis* court rejected the State's argument that the photographs were necessary to show that the deaths resulted from intentional acts, stating,

> "Further, we do not consider the evidence probative of defendant's mental state at the time of the offenses. The fact that Cash's shirt was blood-stained does not prove whether or not he was shot intentionally. Nor does the photograph depicting Biebel in his wheel chair with a blood stain on his overalls necessarily establish defendant's state of mind at

the time of the offense." *Davis*, 97 Ill. 2d at 29.

Likewise, in the instant case, the location of the bullet wound was more than adequately established through trial testimony. During her testimony, Tiesha pointed to the place where the bullet entered, in the center of her chest. This was reinforced by the testimony of defendant, who agreed with the prosecutor's statement that Tiesha was shot in the "[d]ead center of her chest." Therefore, examination of Tiesha's clothes would not impart any new insight to the jurors as to the location of the shot.

The State argues that the clothing "was certainly probative of the angle of the bullet," which the jury could then weigh against the various accounts of the shooting given at trial, including defendant's story that Tiesha approached him from behind and then attempted to snatch the gun from him. However, the State did not raise this argument before the jury, nor was there any expert testimony about the bullet's trajectory or the range from which the bullet was fired and what impact that might have upon Tiesha's clothing.

Thus, we find that the trial court erred in allowing Tiesha's bloody clothing to be sent back to the jury room during deliberations, insofar as the probative value of such clothing was negligible in light of the testimony presented at trial and therefore could only have served to inflame the jury's passions against the defendant. However, it is not necessary for us to determine whether this error, in and of itself, would rise to the level of plain error so as to mandate reversal, because, for the reasons stated above, reversal is already required due to the prosecutor's improper arguments during rebuttal closing argument.

For the foregoing reasons, we reverse and remand for proceedings not inconsistent with

this opinion.

Reversed and remanded.