2013 IL App (1st) 110028-U

No. 1-11-0028

FIFTH DIVISION
June 14, 2013

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 2831 (01)
	)	
MIGUEL ADORNO,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice McBride and Justice Palmer concurred in the judgment.

ORDER

¶ 1 *HELD:* Defendant was not entitled to a jury instruction for the lesser offense of reckless conduct when he knowingly fired a weapon in the direction of his victim; defendant's due process right to a fair trial was not violated by the trial court's comments to the jury during *voir dire*; the trial court properly denied defendant's motion *in limine* after applying the factors established in *People v. Montgomery*, 47 Ill. 2d 510 (1971).

¶ 2 This appeal arises from defendant Miguel Adorno's convictions for attempted first degree

murder and aggravated battery with a firearm following a jury trial. He was sentenced to a 15-year prison term for attempted murder and a mandatory consecutive 15-year prison term for personally discharging a firearm. On appeal, defendant contends that: 1) the trial court should have instructed the jury on the offense of reckless conduct as a lesser included offense of attempted first degree murder and aggravated battery with a firearm based on his conduct in relation to the offense; 2) that the trial court violated his due process right to a fair trial when it attempted to define reasonable doubt during *voir dire*, thus inviting the jury to convict him using a constitutionally deficient standard; and 3) the trial court erred by denying his motion *in limine* to exclude his prior conviction for conspiracy to commit murder without proper consideration of the factors required by *People v. Montgomery*, 47 Ill. 2d 510 (1971). For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 The evidence presented at trial established that defendant fired a weapon during a disturbance at a party which occurred in the early morning hours of January 23, 2010. As a result of the shooting, Shannon Fanning was shot in the arm.

¶ 5 Prior to trial, defense counsel filed a motion *in limine* to bar evidence of defendant's prior conviction for conspiracy to commit murder on the basis that it would be more prejudicial than probative. The trial court denied the motion, stating:

> "Relying on the standard in People vs. Montgomery, certainly it's within that purview. The next step is to find out if it's material and relevant. I do find that out. The next step is the

balancing step to see if it's more probative than prejudicial. I determined that it would be more probative than prejudicial, so your motion *in limine* is denied."

¶ 6 During *voir dire*, while questioning the prospective jurors on the *Zehr* principles, the trial court stated the following:

"Then the other thing is, the State has the burden of proof, and that burden of proof is proof beyond a reasonable doubt, and that lasts throughout each and every stage of the trial.

Does anybody have any qualms about the State has the burden of proof or the proof being proof beyond a reasonable doubt? Raise your hand either in the inner or outer part of the courtroom.

Nobody has raised their hand.

Illinois does not define reasonable doubt, but any of you who may have sat on a civil jury there's a preponderance of the evidence, reasonable doubt is the highest burden of proof in our country and in our State. Those of you who may have sat on civil cases, preponderance of the evidence, if you look at this like a scale, all you have to do is tilt it. So the definition of preponderance of the evidence is, it's more likely than not that the event occurred.

> Again, Illinois doesn't define reasonable doubt. That's up for you to decide in words, but in analogy to the scale thing, you would have to tip it like this, so that would be some insight into what proof beyond a reasonable doubt would be."

¶ 7 There was no objection made by defense counsel to the trial court's comments regarding reasonable doubt during *voir dire*.

¶ 8 At trial, Jasmine Nagamine testified that she was a 24-year old nurse who lived in the basement apartment at 2026 North Karlov in Chicago on January 22, 2010, with her then roommate, Melissa West (Missy). Missy has since joined the Army. Jasmine hosted a small party at her apartment with her brother, Jeffrey, and his friends: Shannon Fanning, the victim, Sharall, John, Billy, Ashlee and Alex. Defendant, whom she knew through a friend, arrived with two males and three females that she did not know. She knew defendant both as Miguel and as K-Oz. Everyone in the apartment was drinking except Jasmine and one of the girls who had come with defendant because she was "passed out."

¶ 9 Jasmine saw her roommate Missy engage in an argument with defendant, and Missy told her to get defendant and his group to leave. Jasmine told them to leave and looked for Missy's laptop computer in the living room, but could not find it there. Jasmine heard a horn beeping outside. She subsequently went outside and retrieved Missy's laptop from the backseat of a car parked outside and went back into the apartment.

¶ 10 Jasmine further testified that her brother stood in the doorway telling defendant and his group that they had to leave. Everyone inside exited the apartment and arguments ensued

between defendant's friends and her brother's friends. Defendant then pushed Jasmine, but her brother grabbed her before she could push him back. Defendant then hit her brother, and they began to fight. The fight eventually ended up on the ground before it broke up. After the fight, defendant went to the trunk of the car from which the laptop was retrieved and started pounding on it, saying "open the trunk." Jasmine's brother then told everyone to get back inside and everyone began rushing towards the door. Jasmine heard three to five gunshots and Shannon entered the apartment, bleeding. The police were called and Jasmine told them what happened. She subsequently identified defendant in a lineup.

¶ 11 Jeffrey Nagamine testified that on the night of the shooting, he and some of his friends went to his sister Jasmine's apartment at approximately 10:15 p.m. for a small gathering. When they arrived, only Jasmine and her roommate Missy were present. Sometime later, defendant, whom Jeffery knew by his nickname K-Oz, arrived with two other men and three women. They appeared to have been drinking and one of the women was throwing up. Everyone at the party was drinking.

¶ 12 According to Jeffrey, approximately an hour and a half after defendant's arrival, he saw defendant walk into the bathroom, which was connected to Missy's bedroom, and stay there for an extended period of time. Jeffrey saw Missy knock on the bathroom door, but defendant did not answer. Missy then went into her bedroom and Jeffrey heard her yelling. Missy and defendant came out of her bedroom arguing and went out of the front door. They then argued in front of the apartment. Subsequently, Jeffrey saw Jasmine and Missy walk over to a silver Chevrolet Impala which was double parked near the apartment with its engine running and

remove Missy's computer from the back seat. Missy walked back into the apartment and defendant followed her. Jeffrey stood by the door and when defendant asked to be let inside to speak to Jasmine, Jeffrey told him that he and his friends had to leave. Everyone inside then exited the apartment. Once Jasmine and Missy were back outside, they argued with defendant over an Ipod. Defendant pushed Jasmine, Jeffrey pulled her behind him and as he turned back around, defendant hit him in his left jaw. A fight between defendant and Jeffrey ensued, with Jeffrey punching defendant three to four times. Defendant ended up on the ground before Jeffrey retreated. However, defendant got up and yelled to Jasmine, "Your brother doesn't know me. Your brother's going to die tonight."

¶ 13 As all of the people from the party began walking back to the apartment, defendant ran over to the Chevrolet Impala and started banging on the trunk saying, "Open the trunk, I have to get my banger." Jeffrey testified that he took that to mean that defendant had a gun, and he began pushing people back into the apartment. He heard defendant demand that his friend who was standing next to the car "pop the trunk." The friend reached into the car and did so; defendant then reached into the trunk. Jeffrey then heard six to eight gunshots. Once back inside the apartment, Jeffrey saw that Shannon was bleeding from his inside right forearm. The paramedics were called, and Jeffrey later identified defendant from a lineup.

¶ 14 Shannon Fanning testified that he was friends with Jeffrey and Jasmine and also knew Missy. On January 22, 2010, he went to Jasmine and Missy's apartment with some other friends for a gathering and defendant, whom he did not know, arrived approximately 40 minutes later with a group of people. Shannon noticed people "pacing" - going in and out of rooms, "looking

suspicious." Shannon saw defendant enter the bathroom and later saw Missy and defendant having a conversation with raised voices. Missy and Jasmine then left the apartment and asked defendant to leave once they were just outside the apartment.

¶ 15 Shannon was standing behind Jeffrey and defendant during their fight, and saw one of the men who had come with defendant approach the fight. Shannon grabbed the person by the jacket and pulled him back. Shannon did not punch, kick or injure the person. The fight between defendant and Jeffrey ended with defendant on the ground; Jeffrey did not hit defendant once he was on the ground. People from the party were standing around, separating the two, until defendant said he was going to get a gun. At that point, everyone started walking back to the apartment. Meanwhile, defendant walked to the rear of a Chevrolet Impala that was parked in the middle of the street with its engine running. Defendant was banging on the trunk, asking for someone to open the trunk. Shannon and the others were going back inside the apartment when he heard gunshots. He was the last one in, and turned around to see defendant moving forward as he fired the last few shots. Shannon felt a hit in his arm before getting the license plate to the car and going inside. Paramedics were called and he was subsequently taken to the hospital where he was treated for a broken arm. Shannon identified defendant from a photo array while he was being treated in the hospital.

¶ 16 Ernest Alexander, who testified pursuant to subpoena, stated that he had known defendant for a few months prior to the shooting. Earlier that evening, Ernest was at Serbio Urbino's house drinking with defendant and three girls he just met that evening: Ashley, Monika and one whose name he did not know. Defendant showed him a gun and said something like "I don't go out

without the banger." Ernest identified the gun at trial as the one defendant showed him that night. The group left Serbio's and went to the store for more liquor in someone's car. Defendant got separated from the group before they left because he was stopped by the police. Ernest put defendant's gun in the trunk after defendant left. Defendant rejoined the group after calling for someone to come pick him up. The group then went to the basement apartment on Karlov where there was a party in progress. Ernest knew one of the girls there from high school. Ernest testified that everyone was drinking and talking; however at some point, the girl who lived there made a commotion over someone stealing something. She went to the car that Ernest and the group had come in and grabbed a laptop computer and an Ipod. When she got back to the apartment, everyone was yelling for Ernest and his group to leave. Ernest testified that he turned around to say that he was sorry for what happened and then leave, but he saw that a fight had started behind him. He did not see who started the fight, and saw someone beating defendant up. Ernest ran towards the fight to try and break it up, but someone grabbed him and pulled off his vest. When Ernest got to the fight, it was over. He pushed Jeffrey off of defendant and told Jeffrey and Shannon to just go inside because they were going to leave.

¶ 17 Ernest testified that he saw defendant go to the trunk of the car they arrived in and heard defendant say, "Give me my banger, give me my banger," meaning "give me my gun." Ernest did not remember if the trunk was open and was walking to retrieve his vest when he heard gunshots. Ernest saw defendant shooting the gun towards the group of people and heard five to six shots. Ernest eventually got back in the car, followed by defendant, and the group went to defendant's house. Ernest then called a friend to pick him up and later voluntarily turned himself in to police.

¶ 18 Chicago police officer Vincent Stinar testified that he and other police officers went to an apartment at 5626 West Grand, where they were allowed entry after knocking. They were directed to a rear bedroom and knocked for access. Defendant came out and was taken into custody. A gun was in plain view under a radiator in the room, and there was a magazine in the handle.

¶ 19 Chicago police department evidence technician Sheila Caldwell testified that she took photos of the scene on Karlov, defendant's bedroom, and the Chevrolet Impala. She recovered four shell casings from the ground in front of 2026 North Karlov and recovered a gun from defendant's bedroom.

¶ 20 The parties stipulated that the gun recovered from defendant's bedroom, People's Exhibit No. 6, was a FIE-Titen Model .25 caliber semi-automatic pistol and that the four fired cartridges recovered at the scene were fired from that gun.

¶ 21 Defendant testified in his own defense, admitting that he was a convicted felon, having pled guilty to conspiracy to commit murder in 2008. In January 2010, he lived at 5626 West Grand with his family, and on the night of the shooting, he went to Serbio's house with Ernest, Ashley, Monika and Marlene. Everyone there was drinking. Defendant stated that they all left together to attend a party on Cicero and Addison. Because that was a known "bad area," defendant took his gun for protection, which Ernest put in the trunk. According to defendant, Jasmine texted him while they were out, so they went to her house instead.

¶ 22 After being at Jasmine's house for an hour and a half, defendant went to the bathroom. He heard Jasmine and Missy running through the room connected to the bathroom laughing, and

he decided to "scare them to the back door." Instead, they opened the door and asked defendant what was going on. Missy said to him, "could you please get the f*ck out of my room." Defendant denied stealing anything from that room. A verbal confrontation took place before Jasmine and Missy went outside and retrieved a laptop computer from the back seat of the car defendant and his friends had arrived in. The car was not where they left it; instead it was running in the middle of the street with Serbio inside.

¶ 23 Jasmine then said that everyone had to leave. Defendant tried to apologize to Jasmine, but her brother Jeffrey started saying, "b**** a** n****** stealing." Defendant stated that this is when the fight began and Jeffrey hit him first. Defendant acknowledged that Jeffrey had the upper hand during the fight, so he ran away. However, Jeffrey caught up to him and hit him again. The crowd started running towards them, which scared defendant so he kneeled down and put his hands over his head. While he was on the ground, defendant could see a lot of feet around him and testified that "people" continued to hit him while he was on the ground. He managed to push someone out of his way and run to the car. Defendant's initial plan was to get inside, but he was being chased by people who were saying, "grab him, we're going to kill him." Defendant, fearing for his life, started yelling, "pop the trunk, I got a gun in the trunk," thinking that the people chasing him would be scared and stop. When he reached the trunk however, people who were chasing him were right on his heels. Defendant testified he reached into the trunk, grabbed the gun and fired it from under his arm without turning around first. He fired the weapon several more times into the air. After that he went home, put the gun in his bedroom and went to sleep. Shortly thereafter, he was arrested.

¶ 24 On cross-examination, defendant admitted that the gun recovered by police belonged to him and that he called it a "banger." He further stated that he fired the first shot without turning around first, from under his arm. After that, he turned around and shot, although the people were now running back towards the apartment. Defendant stated that he fired into the air from behind the trunk on the sidewalk, but did not remember how many shots he fired. He denied chasing the group back towards the house, denied that based on where the shell casings were recovered from, that he would have had to walk towards the house from the trunk of the car. Defendant did admit that once he fired the gun at the group, no one came near him and that everyone was inside the gate at that point.

¶ 25 Defendant also entered the stipulated testimony of Melissa West into evidence, which was as follows: Melissa was at her apartment with her roommate Jasmine on January 22, 2010, and some other friends. During the gathering, three males and three females whom she did not know came into her apartment. Defendant was one of those males. After a period of time, defendant went into the bathroom and remained a long time; when Melissa went to check on him, she found him in her bedroom going through her things. Melissa told Jasmine to have defendant leave. Melissa then noticed that her Ipod was missing from her bedroom and her laptop computer was missing from the living room. Melissa went outside and recovered her laptop computer from the car that defendant arrived in. She demanded that her Ipod be returned. Defendant then punched Jeffrey and a fight ensued. Jeffrey was getting the best of defendant and she stepped in and protected defendant. Defendant said, "I'll kill you, Jeff." Defendant then banged on the trunk of the car he came in and said, "I got a banger," the trunk opened and

Melissa heard numerous shots.

¶ 26 The State entered evidence in rebuttal: a certified copy of defendant's May 20, 2008, conviction for conspiracy to commit murder; the testimony of Chicago police detective Brian Tedeschi who interviewed defendant on January 23, 2010, at 2:20 a.m., during which defendant stated that he knew nothing about what happened at 2026 North Karlov because he was home with his mother all day; and the testimony of Monika Herrera, one of the women who went with defendant to the party at Jasmine's apartment. Monika's testimony was substantially similar to that of the other State's witnesses, except she stated that when defendant came to the car to get his gun from the trunk, Marlene, the driver, would not open the trunk. Defendant then pounded on the window, went in through the back, fought his way to the front, and opened the trunk. Defendant then got out of the car, walked around to the back of it, while the other group was walking back to the apartment. Monika then heard five to six gunshots.

¶ 27 The jury found defendant guilty of attempted first degree murder and that he was armed with a firearm. The trial court then sentenced him to 15 years for attempted first degree murder while armed with a firearm and a consecutive 15-year sentence. This timely appeal followed.

¶ 28 ANALYSIS

¶ 29 On appeal, defendant contends that: 1) the trial court should have instructed the jury on the offense of reckless conduct as a lesser included offense of attempted first degree murder and aggravated battery with a firearm; 2) that the trial court violated his due process right to a fair trial when it attempted to define reasonable doubt during *voir dire*, thus inviting the jury to convict him using a constitutionally deficient standard; and 3) the trial court erred by denying his

motion *in limine* to exclude his prior conviction for conspiracy to commit murder without proper consideration of the factors required by *People v. Montgomery*, 47 Ill. 2d 510 (1971).

¶ 30 Reckless Conduct Instruction

¶ 31 Defendant contends that the trial court should have instructed the jury on the offense of reckless conduct as a lesser included offense of attempted first degree murder. Defendant alleges that his testimony supports the giving of the reckless conduct instruction because his testimony is evidence that defendant acted recklessly in firing his gun and injuring Shannon. Therefore, defendant argues that the trial court erred in refusing defense counsel's request for a reckless conduct instruction. Defendant requests that his convictions be reversed and a new trial granted with proper jury instructions.

¶ 32 A trial court's refusal to issue a specific jury instruction is reviewed under an abuse of discretion standard. *People v. Douglas*, 362 Ill. App. 3d 65, 76 (2005). Where some credible evidence exists to support an instruction for a lesser offense, it is an abuse of discretion to fail to give that instruction. *People v. DiVencenzo*, 183 Ill. 2d 239, 249 (1998). Whether a defendant has met the evidentiary minimum for a certain jury instruction is a matter of law, and thus, our review is *de novo*. *People v. Tijerina*, 381 Ill. App. 3d 1024, 1030 (2008).

¶ 33 An instruction on a lesser included offense will be given upon a defendant's request if there is slight evidence in support of the offense. *People v. Scott*, 256 Ill. App. 3d 844, 850 (1993). A trial court's " 'refusal to give an instruction is harmless error and does not warrant reversal where the evidence is so clear and convincing that the jury could not have reasonably found that the defendant was not guilty.' " *People v. Blan*, 392 Ill. App. 3d 453, 459 (2009)

(quoting *People v. Taylor*, 233 Ill. App. 3d 461, 465 (1992)).

¶ 34 A person commits reckless conduct when he or she, by any means lawful or unlawful, recklessly performs an act or acts that: 1) cause bodily harm to or endanger the safety of another person; or 2) cause great bodily harm or permanent disability or disfigurement to another person. 720 ILCS 5/12-5 (West 2010). On the other hand, a person commits aggravated battery with a firearm by knowingly or intentionally by means of discharging a firearm causing injury to another person while committing a battery. 720 ILCS 5/12-4.2(a) (West 2010). To sustain a conviction for attempted murder, it must be shown that the accused acted with specific intent to kill, but intent is a state of mind which, if not admitted, can be shown by surrounding circumstances, and the intent to take a life may be inferred from the character of the assault, the use of a deadly weapon, and other circumstances. *People v. Anderson*, 108 Ill. App. 3d 563, 566 (1982). Furthermore, specific intent to take a human life is a material element of the offense of attempted murder, but the very fact of firing a gun at a person supports the conclusion that the person doing so acted with the intent to kill. *People v. Seats*, 68 Ill. App. 3d 889, 895 (1979).

¶ 35 Defendant cites to *People v. Williams*, 293 Ill. App. 3d 276 (1997) in support of his contention. In that case, the defendant was convicted of unlawful use of a weapon by a felon, four counts of aggravated discharge of a firearm and involuntary manslaughter. *Williams*, 293 Ill. App. 3d at 278. On appeal, defendant contended that the trial court erred in refusing to instruct the jury on the offense of reckless conduct. *Williams*, 293 Ill. App. 3d at 278. In that case, defendant and the victim were involved in a confrontation, after which the victim fired a shot at him. *Williams*, 293 Ill. App. 3d at 278. According to the defendant, he then turned

around and fired his gun six times into the air above their heads with his eyes closed; one of the bullets struck and killed the victim. *Williams*, 293 Ill. App. 3d at 278. Each of the remaining witnesses had a different version of events. *Williams*, 293 Ill. App. 3d at 278. In finding that the defendant was entitled to an instruction on reckless conduct, the court noted that defendant never stated that he knowingly fired his gun directly at the other men. The court held that whether his firing of the gun in the air, over the heads of the men with his eyes closed constituted firing the gun in the direction of another person was a factual question to be resolved by the finder of fact. *Williams* 293 Ill. App. 3d at 282.

¶ 36 The evidence presented here is distinguishable from that presented in the *Williams* case. Defendant testified at trial that he was beaten up by Jeffrey following a misunderstanding at the party; as the crowd of people approached him, he knelt to the ground and was hit by "people" as he was on the ground; he pushed his way through the crowd and ran towards the car; the group chased him to the car hot on his heels. When he got to the car, defendant reached into the trunk, got his gun and fired the first shot from under his arm without looking. He then fired the remaining shots into the air. In *Williams,* the defendant testified he fired all of the shots in the air with his eyes closed.

¶ 37 According to defendant's testimony, the people chasing him were right on his heels, therefore defendant knew he was firing the weapon in their direction when he reached into the trunk and fired the gun under his arm without looking.

¶ 38 Illinois courts have clearly and consistently held that when a defendant points a firearm in the direction of an intended victim and fires the weapon, he has not acted recklessly. *People v.*

Sipp, 378 Ill. App. 3d 157, 166 (2007). Because defendant knowingly fired his gun in the direction of the crowd, a reckless conduct instruction was not appropriate. We do not find the court abused its discretion in refusing to instruct the jury on reckless conduct.

¶ 39 Defendant argues the trial court refused to so instruct the jury because it mistakenly believed that an argument of self-defense was inconsistent with and negated a reckless conduct instruction. However if a decision of the trial court is correct, we may affirm the decision on any basis in the record, regardless of the rationale. *People v Dinelli*, 217 Ill. 2d 387, 403 (2005).

¶ 40 Arguendo, if the court did commit error when it refused to give the reckless conduct instruction, the error was harmless because the evidence in this case is overwhelming. Five eyewitnesses, two of whom were defendant's friends who came to the party with him, contradicted his version of events. They testified defendant fired his weapon in the direction of the partygoers, not straight up in the air as defendant testified. After yelling words to the effect of "open the trunk, I'm going to get my banger," and "your brother is going to die tonight," all the witnesses testified that defendant went to the car after the fight was over, retrieved the gun, and repeatedly fired at the group that was retreating to the apartment. The evidence elicited in this case shows that defendant knew the victim and others were present in the general vicinity of the apartment building, and defendant fired his weapon multiple times in their direction. Because the evidence is overwhelming, any error in failing to give the instruction was harmless. *People v. Stewart*, 406 Ill. App. 3d 518, 539 (2010). Accordingly, the trial court did not err in refusing to instruct the jury as to reckless conduct**.**

¶ 41 Judicial Comments during *Voir Dire*

¶ 42 Next, defendant contends that the trial court violated his due process right to a fair trial when it attempted to define reasonable doubt during *voir dire*, thus inviting the jury to convict him using a constitutionally deficient standard. In his argument, defendant equates the trial court's comments during *voir dire* with jury instructions, and requests a new trial.

¶ 43 We first note that the record contains no contemporaneous objection to the court's comments nor did defendant include this issue in his motion for new trial. The waiver rule governs alleged errors made during *voir dire*. *People v. Campbell*, 264 Ill. App. 3d 712, 728 (1992). The record shows that defendant neither objected to the trial court's comments when made during *voir dire* nor mentioned any objection in his post-trial motion. Both a contemporaneous objection and a written post-trial motion are required to preserve an issue for appellate review, otherwise the issue is waived. *People v. Enoch*, 122 Ill. 2d 176, 186-88 (1988). Because defendant did not preserve the issue for review, we cannot review the merits of the trial court's error unless the alleged error constitutes plain error. *Campbell*, 264 Ill. App. 3d at 729.

¶ 44 Defendant, while apparently conceding that the issue is procedurally waived, nonetheless argues that we should review the merits of the issue under the plain error doctrine. He contends that both prongs of the plain error analysis are met because the evidence was closely balanced and the integrity of the trial was challenged because the error gave the jury permission to convict based on a lesser standard.

¶ 45 Fairness is the foundation of our plain error jurisprudence. *People v. Herron*, 215 Ill. 2d 167, 177 (2005). A fair trial, however, is different from a perfect trial. *Herron*, 215 Ill. App. 3d at 177. The plain error doctrine is a not a general savings clause preserving for review all errors

affecting substantial rights whether or not they have been brought to the attention of the trial court; rather, it is a narrow and limited exception to the general waiver rule whose purpose is to protect the rights of the defendant and the integrity and reputation of the judicial process. *Herron*, 215 Ill. 2d at 177.

¶ 46 Under the plain error doctrine, a reviewing court may consider a forfeited error if 1) the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence and 2) where the error is so serious that the defendant was denied a substantial right and thus a fair trial. *Herron*, 215 Ill. 2d at 178-79. Under a plain error analysis, the defendant bears the burden of persuasion with respect to prejudice. *United States v. Olano*, 507 US 725, 734, 113 S. Ct. 1770, 1778 (1993).

¶ 47 We must first determine whether error occurred at all before proceeding to consider whether either prong of the doctrine has been satisfied. *People v. Brewer*, 2013 IL App (1st) 07281, ¶ 21. The ultimate question of whether a forfeited claim is reviewable as plain error is a question of law that is reviewed *de novo*. *Brewer*, 2013 IL App (1st) 07281, ¶ 21.

¶ 48 Here, we do not believe that the evidence is so closely balanced to permit us to reach the merits of the claimed error under the first prong of plain error. Five witnesses for the State testified to substantially the same sequence of events: defendant and his friends went to a party at Jasmine's house; a laptop and Ipod came up missing after defendant was discovered in Missy's room; both items were retrieved from the car that defendant and his friends arrived in; there were multiple arguments between those present and then a physical fight ensued between defendant and Jeffrey, during which Jeffrey bested defendant; defendant then went to the car that they

arrived in to retrieve a gun to shoot Jeffrey; when his friends would not aid him in retrieving the gun, he went inside the trunk himself, retrieved the gun and began shooting at the people who were attempting to go back into the apartment. He was also identified in a lineup by several witnesses. In contrast, defendant's evidence suggested that the argument between he and Missy was merely a misunderstanding; that he was not upset when Jeffrey called him a b*tch nor was he upset that he had gotten beaten up; he retrieved the gun in fear of his life and he fired his gun once without looking then several times in the air. In summary, our review of the evidence leads us to conclude that it is not closely balanced.

¶ 49 Turning to the second part of the plain error analysis, we note that a less rigid application of the waiver rule prevails when misconduct of the trial judge is involved. *People v. Barrow*, 133 Ill. 2d 226, 260 (1989). Because of this relaxed standard, and because the judge's comments deal with a most serious subject matter - the State's burden of proof - we elect to resolve the plain error issue in defendant's favor and address the merits of the issue. *People v. Berry*, 244 Ill. App. 3d 14, 25 (1991).

¶ 50 It is well established that the concept of reasonable doubt needs no definition and that it is improper for the court or counsel to attempt to define reasonable doubt to the jury. *People v. Thomas*, 191 Ill. App. 3d 187, 196-97 (1989). We must therefore consider whether these comments require reversal of defendant's conviction. For comments by a trial judge to constitute reversible error, the defendant must show that the remarks were prejudicial and that he was harmed by the comments. *People v. Heidorn*, 114 Ill. App. 3d 933, 937 (1983).

¶ 51 In this case, we conclude that reversal is not required. Not all improper comments

constitute reversible error. *Heidorn*, 114 Ill. App. 3d at 937. The verdict will not be disturbed unless the judge's remarks constituted a material factor in the conviction or unless prejudice to the defendant appears to be their probable result. *Heidorn*, 114 Ill. App. 3d at 937.

¶ 52 As previously stated, the trial judge made the following statements during *voir dire*:

> "Then the other thing is, the State has the burden of proof, and that burden of proof is proof beyond a reasonable doubt, and that lasts throughout each and every stage of the trial.
>
> Does anybody have any qualms about the State has the burden of proof or the proof being proof beyond a reasonable doubt? Raise your hand either in the inner or outer part of the courtroom.
>
> Nobody has raised their hand.
>
> Illinois does not define reasonable doubt, but any of you who may have sat on a civil jury there's a preponderance of the evidence, reasonable doubt is the highest burden of proof in our country and in our State. Those of you who may have sat on civil cases, preponderance of the evidence, if you look at this like a scale, all you have to do is tilt it. So the definition of preponderance of the evidence is, it's more likely than not that the event occurred.
>
> Again, Illinois doesn't define reasonable doubt. That's up

> for you to decide in words, but in analogy to the scale thing, you would have to tip it like this, so that would be some insight into what proof beyond a reasonable doubt would be."

¶ 53 We note that the trial court made subsequent pre- and post-trial admonishments to the jury that its comments were to be disregarded as well as anything except the evidence received in the case. Specifically regarding the burden of proof, during the jury instructions phase of the trial, the trial court admonished the jury as follows:

> "The defendant is presumed to be innocent of the charges against him. This presumption remains with him throughout every stage of the trial and during your deliberations on the verdict and is not overcome unless from all the evidence you are convinced beyond a reasonable doubt that he 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 case. The defendant is not required to prove his innocence."

¶ 54 We do not believe that the court's comments during *voir dire* could reasonably be construed as inviting the jury to convict defendant based on less than the reasonable doubt standard. Moreover, the subsequent remarks cured any possible error. Defendant has not shown that he was prejudiced by the comments, thus reversal is not required. See *Berry*, 244 Ill. App. 3d at 26; *Heidorn*, 114 Ill. App. 3d at 937. We conclude, in view of the overwhelming evidence

of defendant's guilt, that the trial court's comments, while improper and should not have been made, had no effect on the verdict of the jury and constituted harmless error.

¶ 55 Alternatively, defendant raised trial counsel's ineffectiveness for the failure to preserve this issue. However, we have considered the merits of this issue and have determined that any error in the comments made during *voir dire* were cured by subsequent instructions to the actual jury and the evidence against the defendant was overwhelming. To get a new trial on the basis of ineffective assistance of counsel, a defendant alleging ineffective assistance must not only show an error but he must show that but for the alleged error there is reasonable probabilty the outcome of the trial would have been different but for the error. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). Here the evidence against the defendant is overwhelming and there is no reasonable probability the outcome of the trial would have been different absent the alleged error. Therefore, defendant cannot satisfy the prejudice prong of *Strickland*. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064.

¶ 56 Admission of Defendant's Prior Conviction

¶ 57 Finally, defendant contends that the trial court erred by denying his motion *in limine* to exclude his prior conviction for conspiracy to commit murder without proper consideration of the factors required by *People v. Montgomery*, 47 Ill. 2d 510 (1971).

¶ 58 Evidence of past crimes which do not relate to testimonial credibility may be admitted if they are relevant for some proper purpose other than impeachment. *People v. Williams*, 161 Ill. 2d 1, 39 (1994). It is a fundamental tenet of our criminal justice system, however, that the introduction of evidence of other crimes to show or suggest a propensity to commit crime is an

improper purpose and is prohibited. *Williams*, 161 Ill. 2d at 39-40.

¶ 59 In *Montgomery*, our supreme court held that evidence of a witness' prior conviction is admissible to attack the witness' credibility where: 1) the prior crime was punishable by death or imprisonment in excess of one year, or involved dishonesty or false statement regardless of the punishment; 2) less than 10 years has elapsed since the date of conviction of the prior crime or release of the witness from confinement, whichever is later; and 3) the probative value of admitting the prior conviction outweighs the danger of unfair prejudice. *Montgomery*, 47 Ill. 2d at 516. The last factor requires a judge to conduct a balancing test, weighing the prior conviction's probative value against its potential prejudice. *People v. Mullins*, 242 Ill. 2d 1, 14 (2011).

¶ *60* *Montgomery* further explained that in performing this balancing test, the trial court should consider the nature of the prior conviction, the nearness or remoteness of that crime to the present charge, the subsequent career of the person, the length of the witness' criminal record, and whether the crime was similar to the one charged. *Montgomery*, 47 Ill. 2d at 518; *Mullins*, 242 Ill. 2d at 14-15. If the trial court determines that the prejudice substantially outweighs the probative value of admitting the evidence, then the evidence of the prior crime must be excluded. *Montgomery*, 47 Ill. 2d at 518; *Mullins*, 242 Ill. 2d at 15. The determination of whether a witness' prior conviction is admissible for purposes of impeachment is within the sound discretion of the court. *Montgomery*, 47 Ill. 2d at 517-18; *Mullins*, 242 Ill. App. 2d at 15.

¶ 61 In this case, we note that defendant's testimony was essentially his entire defense, thus his credibility was a central issue before the jury. Accordingly, his prior convictions were crucial in

measuring his credibility. " 'Similarity alone does not mandate exclusion of a prior conviction.' " *Mullins*, 242 Ill. 2d at 16 (quoting *People v. Atkinson*, 186 Ill. 2d 450, 463 (1999)). This is especially so when the jury is instructed to consider the evidence of the defendant's prior convictions for the limited purpose of impeachment, which ensures that the jurors understood the narrow reason for which the prior convictions were admitted. See *Atkinson*, 186 Ill. 2d at 463.

¶ 62 Additionally, in *Atkinson*, our supreme court specifically rejected the notion that the *Montgomery* balancing test is not properly performed unless the trial court explicitly states that it is doing so on the record. *Atkinson*, 186 Ill. 2d at 462-63; see also *People v. Williams*, 173 Ill. 2d 48, 83 (1996) (trial court did not disregard *Montgomery* rule simply because it did not explicitly state for the record that it was balancing the opposing interests).

¶ 63 Here, defense counsel sought to exclude evidence of defendant's prior conviction for conspiracy to commit murder. In denying defendant's motion *in limine*, the trial court specifically stated that it was applying the *Montgomery* rule and further that in conducting the balancing step, it concluded that the prior conviction was more probative than prejudicial. Contrary to defendant's argument, the record does not demonstrate that the trial court failed to weigh the probative value of the impeachment against its possible prejudicial effect. Rather, the record reflects that the trial court was very much aware of the *Montgomery* standard and gave proper consideration to the relevant factors as part of its balancing process. Thus the trial court's decision to admit defendant's prior conviction was not error.

¶ 64 CONCLUSION

¶ 65 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 66 Affirmed.