2011 IL App (2d) 080223-U
No. 2—08—0233
Order filed July 19, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Stephenson County.
Plaintiff-Appellee,	)	
v.	)	No. 07—CF—238
WILLIAM J. JILES,	)	Honorable David L. Jeffrey,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Presiding Justice Jorgensen concurred in the judgment.
Justice Schostok specially concurred.

ORDER

Held: In prosecution for residential burglary, the trial court's failure to comply with Supreme Court Rule 431(b) was plain error because the evidence was closely balanced.

There was also plain error in the State's assertion in closing argument that defendant showed consciousness of guilt in that, though the police officer had not told him what crime they were investigating, he asked the officer if they were "investigating something that had been taken." The State should have known that, in a videotape of defendant's encounter with the officer, which was introduced at the suppression hearing but not at trial, the officer told defendant at the outset of their encounter that defendant was being detained because "[s]omething might have gotten taken." The

State falsely portrayed defendant's statements to the officer and denied him a fair trial.

¶ 1 INTRODUCTION

¶ 2 In 2008, defendant, William Jiles, was convicted of residential burglary (see 720 ILCS 5/19–3 (West 2006)). He appealed, arguing (1) the trial court erred in denying his motion to quash arrest and suppress evidence; (2) he was denied a fair trial because the trial court failed to comply with Supreme Court Rule 431(b) (eff. May 7, 2007); (3) he was denied a fair trial because of material misrepresentations made by the State during closing argument; and (4) the evidence was insufficient to support his conviction. We held that the Rule 431(b) violation was plain error and by itself required reversal. See *People v. Jiles*, No. 2—08—0233 (2010) (unpublished order under Supreme Court Rule 23). Though the Rule 431(b) issue was dispositive, in the interest of judicial economy we addressed the suppression issue and concluded that the trial court did not err in denying the motion to quash and suppress. We declined to address the prosecutorial misconduct argument because it was unlikely to recur upon remand. Finally, we found no double jeopardy bar to retrial.

¶ 3 Subsequent to our decision, the supreme court issued *People v. Thompson*, 238 Ill. 2d 598 (2010), which clarified the grounds for a plain-error reversal for a Rule 431(b) violation. On March 4, 2011, the court vacated our judgment and remanded this case for us to consider whether *Thompson* dictated a different result on the Rule 431(b) issue. See *People v. Jiles*, 239 Ill. 2d 569 (2011). We have reviewed *Thompson* as well the remaining issue involving alleged prosecutorial misconduct. We again conclude that the trial court's failure to comply with Rule 431(b) was plain error. We also agree with defendant that the State made material misrepresentations during closing argument and that the error rose to the level of plain error. Though either error is by itself a sufficient ground for reversal, we address both.

¶ 4 ANALYSIS

¶ 5 I. Rule 431(b)

¶ 6 We review the Rule 431(b) issue for plain error since defendant did not raise the issue below. See *People v. Woods*, 214 Ill. 2d 455, 470 (2005) (to preserve an issue for review, the defendant must specifically object at trial and raise the specific issue again in a posttrial motion). The plain error rule is an exception to general forfeiture principles and allows a reviewing court to consider unpreserved claims of error in specific circumstances. *Thompson*, 238 Ill. 2d at 613. An error constitutes plain error when:

> " '(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.' " *Id.* at 613 (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)).

See also *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005) (the plain error doctrine applies 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").

¶ 7 Supreme Court Rule 431(b) states:

> "The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is

> not required to offer any evidence on his or her own behalf; and (4) that the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects.
>
> The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

The four principles enumerated in the rule are often referred to as the *Zehr* principles as they originated with the supreme court's decision in *People v. Zehr*, 103 Ill. 2d 472 (1984). In what follows, we refer to the principles according to their enumeration in the rule.

¶ 8 There was clear and obvious error here because (as we pointed out in our prior disposition), though the trial court recited all four Rule 431(b) principles in its preliminary instructions to the venire members, the court actually queried the members only with respect to principles (1) and (4), omitting principles (2) and (3). This clearly fell short of Rule 431(b)'s requirements. As *Thompson* confirmed, Rule 431(b) "mandates a specific question and response process," and the trial court "must ask each potential juror whether he or she understands and accepts *each* of the principles in the rule." (Emphasis added.) *Thompson*, 238 Ill. 2d at 607.

¶ 9 As to whether the error was also plain error, our original order in this case followed decisions of this district holding that reversal under the second, or "substantial rights," prong of the plain error rule does not require the defendant to establish that the Rule 431(b) violation actually impacted the jury. See, *e.g.*, *People v. Blair*, 395 Ill. App. 3d 465, 477-78 (2009), *vacated*, 239 Ill. 2d 558 (2011). In *Thompson*, however, the supreme court held that a second-prong reversal for a Rule 431(b)

violation is not required unless the defendant shows that the violation resulted in a biased jury. *Thompson*, 238 Ill. 2d at 614.

¶ 10 We need not decide whether the jury was biased, because there was plain error in that the evidence was not closely balanced. Our prior disposition found no double-jeopardy bar to retrying defendant, but the sufficiency of the evidence is a separate question from whether the evidence was closely balanced. *Piatkowski*, 225 Ill. 2d at 566. To facilitate our analysis, we group the State's evidence according to the three subjects into which it fell: (1) defendant's proximity to the scene of the crime; (2) his explanation to the police for being in such proximity; and (3) the independent evidence linking him to the scene.

¶ 11 A. Defendant's Proximity to the Crime Scene

¶ 12 The relevant events in this case occurred on or around a city block in Freeport. The State introduced into evidence an aerial map of the area. The map, on which various streets are labeled, depicts a rectangular block bounded by Sullivan Drive on the west, South Park Boulevard on the east, West Church Street on the north and West Pearl City Road on the south. The map shows that West Pearl City Road becomes West Empire Street east of South Park Boulevard. Parkview Nursing Home (Parkview) is at the northeast corner of West Pearl City Road and South Park Boulevard. The block is partially bisected by South Parkview Drive, which starts at West Church Street and winds south to the parking lot of Parkview. Parkview can also be approached by a drive that opens on West Pearl City Road west of South Park Boulevard. The map shows the home of the victim, Lois Harlan, on the south side of West Church Street just east of South Parkview Drive but west of Parkview.

¶ 13 Harlan testified that, on the night of August 15, 2007, she was in her bedroom when her dog barked and ran toward the kitchen. Harlan followed the dog into the kitchen, where her observations

led her to believe that an intruder had entered through the patio doors that were near the kitchen table. First, Harlan noticed that a tote bag that he she had left on one of the chairs to the kitchen table was now on the table itself. No items were missing from the bag. Second, Harlan testified that, while she always keeps both the glass patio door and the outer screen door shut, the screen door was open while the glass door was closed. Harlan called her neighbor at about 9:30 p.m. and called the police shortly afterward.

¶ 14 Officer Adam Wichman testified that, around 9:30 p.m. on August 15, 2007, he received a dispatch of a reported residential burglary at Harlan's house. As he was driving west on West Pearl City Road, Wichman saw defendant, whom Wichman knew from a prior encounter, walking east on the north side of West Pearl City Road. Defendant was southeast of Harlan's home in the same block, and was west of the driveway entrance to Parkview. Defendant was the only person on the street when Wichman stopped him.

¶ 15 Sara Holweg, a Parkview employee, testified that, when she arrived for her 10 p.m. shift around 9:40 or 9:45 p.m. on August 15, 2007, she saw defendant walking east on West Pearl City Road approaching the entrance to Parkview. Holweg waited as defendant crossed the driveway entrance.

¶ 16 B. Defendant's Explanation

¶ 17 Defendant gave a series of statements to the police. The first was given to Wichman, who had stopped defendant for questioning immediately upon seeing him on West Pearl City Road. Defendant did not appear out of breath but seemed "nervous" as he spoke. Though defendant was cooperative, he was not as "forthcoming" as when Wichman had spoken to him on a previous occasion involving a domestic disturbance. Wichman told defendant that he stopped him because

of "an event that happened on Church Street." Defendant then volunteered that he had been dropped off on West Pearl City Road by Doris Buttner[1] and that he was waiting to meet Paula Alafandi when she picked up her daughter, Amanda, who worked at Parkview. Defendant said that Doris had dropped him off at about 9 p.m. near the bicycle sign on West Pearl City Road. According to defendant, Doris was driving a red sedan similar to a Toyota Camry or Corolla and drove east after dropping him off. Wichman had not noticed any red cars as he was driving west on West Pearl City Road before seeing defendant. After the questioning on West Pearl City Road, Wichman transported defendant to the police station. On the way, defendant "asked if [the police] were investigating something that had been taken." Wichman responded that he was "not completely sure what was being investigated."

¶ 18 Defendant's other statements were given to Office Shenberger at the police station. Defendant gave two statements to Shenberger. In the first statement, which was given on August 15, 2007, the night of defendant's arrest, defendant stated that Doris had come to his house at 6 p.m. that evening. At 8:45 p.m., Doris gave defendant a ride to Parkview. Defendant told Shenberger that he (defendant) wanted to wait for Alafandi to pick up her daughter Amanda at Parkview. Defendant believed that Amanda finished her shift at 9:15 p.m. Defendant had Doris drive past Alafandi's house on the way to Parkview. When defendant saw that Alafandi's car was not at her house, he surmised that she was at Parkview picking up Amanda. Defendant did not drive himself to Parkview because he believed his license was invalid due to parking tickets. He did not phone Alafandi ahead of time because his phone was out of power.

[1] At trial, Doris identified herself as Doris Gerloff. We refer to her simply as "Doris."

¶ 19 Shenberger testified that he then confronted defendant with his prior statement to another officer, Sergeant Dyra. According to Shenberger, defendant told Dyra that he had planned to go to a party that night at the house of his coworker, "Jon." When Shenberger asked defendant why he had not mentioned the party in his prior statement to Shenberger, defendant stated that he had originally planned to go to the party but changed his mind because Jon has "wild parties."

¶ 20 After taking this initial statement from defendant, Shenberger left and spoke with Doris and Alafandi's (other) daughter, Ashlee Seyster. After speaking with them, Shenberger returned to the station and told defendant that Doris' statement was "different" than his. Shenberger also told defendant that the police could verify whether Doris and defendant drove past Alafandi's house earlier that night because Alafandi's house was near the police station and Doris' car would have been filmed on the station's exterior camera. Defendant maintained that he was telling the truth.

¶ 21 Shenberger interviewed defendant again on August 16, 2007. At this point, defendant admitted that "he wasn't truthful on the statement the previous night because he didn't want his wife to know he was having relations with both [Alafandi] and [Doris]." Defendant admitted that he did not have Doris drive past Alafandi's home the night before. Shenberger asked defendant if he had been on West Church Street the night before, and defendant said no. Defendant stated that Doris had dropped him off in the "area of Empire Street and Park Boulevard." Shenberger asked defendant why he did not go inside Parkview while he was waiting for Alafandi to arrive. Defendant replied that he didn't know that he could go inside, and that he had intended to wait for Alafandi until 10 p.m. before walking back home.

¶ 22 Doris testified that, July 8, 2011about 6 p.m. on August 15, 2007, she drove to defendant's home at 19 ½ South Adams Street between Main and Stephenson. Doris' car was a red Dodge

Stratus. Defendant and Doris watched a movie and talked. They had dated in the past but at the time were "just friends." Later in the evening, defendant said he wanted to go a party given by "Jon," his coworker at the El Patio Restaurant. As defendant had been drinking, Doris offered defendant a ride, and he accepted. Defendant did not provide Doris an address but said that Jon "could be in a bush looking out" for defendant. Doris testified that they left defendant's house around 8:45 p.m. but that it was "possible" they left as late as 9 or 9:15 p.m. From defendant's home, Doris took Adams to Carroll to West Empire Street to West Pearl City Road to Sullivan Drive to West Church Street. She let defendant off on West Church Street at a "corner where there was a streetlight." Doris marked on the aerial map a range between two points on West Church Street where she believed she dropped off defendant. According to the map's scale, Doris let defendant off between 225 and 400 feet east of Harlan's driveway on West Church Street. Doris did not see anyone else at the place where she let defendant off.

¶ 23 Shenberger testified that he drove the route Doris said she had taken from defendant's house to West Church Street. The drive took eight and a half minutes. It took seven and a half minutes to drive from defendant's home to Parkview's entrance on West Pearl City Road.

¶ 24 Amanda Seyster, Alafandi's daughter, testified that she was not employed at Parkview on August 15, 2007, and that she had not worked there since August 6, 2007. Her shift had been from 4 to 7 p.m. and she never stayed late. On one occasion, defendant gave her a ride to Parkview before her shift. Alafandi was not with them. Defendant never met Alafandi at Parkview or accompanied Alafandi when she drove Amanda to or from work.

¶ 25 Alafandi testified that she had known defendant for 10 to 12 years. They had been in a "serious relationship" and discussed the possibility of defendant leaving his wife. Alafandi and

defendant broke up on July 10, 2007, however. Alafandi was upset when she learned that defendant had sexual relations with Doris.

¶ 26 Alafandi further testified that, when she picked up Amanda at Parkview, it was always at 7 p.m., or 7:10 p.m. at the latest. Defendant never came with Alafandi to pick up Amanda or met Alafandi at Parkview. Defendant knew that Alafandi picked up Amanda at 7 p.m. Since their breakup in July 2007, Alafandi saw defendant "[o]nce or twice" but had not seen him at all since Amanda quit her job at Parkview. Alafandi did not inform defendant that Amanda quit her job at Parkview.

¶ 27 Jon Richardson and Jon Madison both testified that they worked with defendant at El Patio Restaurant in August 2007. Neither of them had a party on August 15, 2007. Madison testified that he, Richardson, and "John Domini" were the only individuals named "Jon" or "John" who worked at El Patio in August 2007.

¶ 28 C. Other Evidence

¶ 29 While Wichman was speaking with defendant on West Pearl City Road, Officer David McKee arrived at Harlan's house and searched the rear for possible tracks left by the perpetrator. The grass was "very wet," and McKee observed a track in the grass beginning near Harlan's patio. The track appeared to have been made by a person walking away from Harlan's patio. There were no footprints in the track. Using a flashlight, McKee followed the track through residential yards, across driveways, across South Parkview Drive, and eventually to West Pearl City Road, where the track ended. McKee was unable to detect footprints on the driveways or on South Parkview Drive, but was able to relocate the dew track on the other side of the pavement. Once he arrived on West Pearl City Road, McKee saw defendant speaking with Wichman near the entrance to Parkview.

Based on the scale for the aerial map, the dew track ended on West Pearl City Road approximately 400 feet west of where Wichman first saw defendant.

¶ 30 While speaking with defendant, Wichman observed that the right knee of defendant's sweat pants was wet and muddy and had grass clipping stuck to it. (About an hour later, Wichman took photos of defendant's sweat pants. The photos were admitted at trial. As Wichman acknowledged, and as our own inspection of the photos confirms, the pants appear dry in the photos and have no grass clippings on them.)

¶ 31 Shenberger testified that, on the night of August 15, 2007, he walked the dew path that McKee had discovered. It took Shenberger 2 minutes and 20 seconds to walk the dew path from Harlan's home to where it ended at West Pearl City Road.

¶ 32 State Trooper Anthony Heidel, a crime scene investigator for the State of Illinois, testified that he went to Harlan's home around 11 p.m. on August 15, 2007. He processed the scene for fingerprints, footprints, and other "trace evidence" such as DNA. Heidel tested the patio doors, lifting four fingerprints from the handle of the glass patio door. Heidel searched the third of the kitchen space nearest the patio door and found no wet footprints, which surprised Heidel because there was substantial dew outside. The only dry footprints Heidel found were linked to Harlan. Heidel testified that the tote bag would have been close enough to the patio door that someone could have reached an arm inside and moved the bag without stepping into the house. It would have been "awkward" to do so, however. Heidel testified that he also took swabs of the patio doors for potential DNA. Additionally, Heidel searched the grounds of Harlan's house but found no footprints.

¶ 33 Leann Gray, a forensic scientist with the crime lab of the Illinois State Police, testified that none of the latent fingerprints taken from Harlan's home and submitted to the crime lab for analysis were suitable for comparison.

¶ 34 The parties stipulated that hair and other debris found on the shoes and clothing that defendant wore on August 15, 2007, were unsuitable for comparison. The parties further stipulated that there was no apparent transfer of hairs from Harlan's dog to defendant's clothing or shoes. Also, the parties stipulated that none of the swabs taken by Heidel contained sufficient human DNA for analysis.

¶ 35 Defendant presented no evidence of his own.

¶ 36 Defendant does not dispute that a burglary occurred, but only that he committed it. For plain-error purposes, we need only conclude that the evidence would have supported either a conviction or an acquittal. Here we note that, though there was evidence at the suppression hearing that defendant is a known burglar and that the crime under investigation on August 15, 2007, fit his *modus operandi* (Wichman testified at the suppression hearing that he and his fellow officers had been briefed about defendant and his choice of crime), there was no such evidence at trial. Certainly, the timing of events was such that defendant could have committed the crime and traversed his way to West Pearl City Road before he was spotted by Wichman at approximately 9:30 p.m. But that in itself does not point to defendant to the exclusion of the presumably multiple individuals who were a similar distance from Harlan's house at the time. There was, additionally, a dew track leading from Harlan's house to a point on West Pearl City Road about 400 feet behind where defendant was spotted on the street. As for the strength of that track as evidence of guilt, *People v. Toolate*, 45 Ill. App. 3d 567 (1976), is instructive.

¶ 37 In *Toolate*, a police officer was on patrol at 2:20 a.m. when he saw a man he later identified as the defendant. *Toolate*, 45 Ill. App. 3d at 567. The defendant was about 20 feet from a restaurant walking away from the building. The officer drove back toward the building but could no longer see the defendant. As the officer drove into the parking lot of the restaurant, he noticed "fresh" pry marks on the lock of the front door and "fresh" wood fibers on the ground. *Id.* at 568. The officer then drove back to where he last saw the defendant and noticed a trail of "fresh" footprints in the snow. The officer followed the footprints approximately 100 feet to a car, in which he found the defendant sprawled across the front seat, with "fresh" snow on the car's floor. *Id.* There was a pair of gloves on the back seat as well. After detaining the defendant, the officer followed the footprints back from the car and observed a screwdriver near the path. The officer continued following the footprints and saw that they encircled the restaurant before ending at the front door. The officer also found a crowbar nearby. *Id.* The owner of the restaurant testified that he not had observed any marks on the front door the day before the officer saw them. *Id.* The defendant testified that he had driven to the area after visiting a relative and, wanting to be alone, stopped the car and listened to his stereo for about two hours. *Id.* at 568-69. When his car would not start, he walked to a nearby public telephone. When he returned to the car, he leaned over to place a tape in the tape player, and was in this position when the officer saw him. *Id.* at 569.

¶ 38 The appellate court found insufficient evidence that the defendant performed a substantial step toward the commission of the offense of burglary. First, the court held that the State failed to prove a connection, first, between the pry marks and the instruments, and, second, between the defendant and the instruments:

> "There is no proof *** that either the crowbar or screwdriver belonged to the defendant or were ever in his possession. There was no evidence that these were the instruments used to pry at the door. There was no evidence of whether the crowbar and screwdriver were somewhat covered by snow, or appeared to have been dropped after the snowfall. There was no evidence that the gloves found in the defendant's car were used to handle those instruments. Nor is there clear evidence that the pry marks on the east door were not there on the day before. Although these circumstances arouse a suspicion concerning the defendant's purpose and conduct around the Maid Rite Sandwich Shop, it does not establish the defendant's guilt of attempted burglary beyond a reasonable doubt." *Id.* at 569.

As for the footprints leading from the defendant's car to the restaurant, the court said:

> "Even placing the defendant at or near the building, that, in itself, is insufficient to prove that the defendant specifically intended to commit a burglary. Furthermore, the intent to commit a felony or theft in the restaurant can not be attributed to the defendant as part of his mental state merely by proving his presence near the building." *Id.* at 570.

¶ 39 All that was said of the footprints in *Toolate* can be said of the dew path here, and indeed the dew path is even less probative because it led not to defendant himself but to a point several hundred feet behind him. Defendant did have grass, mud, and wetness on one pants knee when Wichman first saw him, but there was no evidence narrowing down the myriad possibilities by which defendant's pants could have become wet and dirty that night when it was undisputed that there was heavy dew in the area.

¶ 40 The State argues that defendant's explanation for why he was present on West Pearl City Road shortly after the burglary at Harlan's house "was internally inconsistent and was severely

undermined by [Doris], Alafandi, and Amanda." Certainly, "[f]alse exculpatory statements have independent, probative value as evidence of consciousness of guilt" (*People v. Muhammad*, 257 Ill. App. 3d 359, 368 (1993)) and are admissible as part of the State's case-in-chief (*People v. Seawright*, 228 Ill. App.3d 939, 969 (1992)). A false exculpatory statement is not, however, conclusive evidence of guilt. *People v. Puente*, 98 Ill. App. 3d 936, 942 (1981). See also *United States v. Di Stefano*, 555 F.2d 1094, 1104 (2d Cir.1977) (*"*falsehoods told by a defendant in the hope of extricating himself from suspicious circumstances are insufficient proof on which to convict where other evidence of guilt is weak and the evidence before the court is as hospitable to an interpretation consistent with the defendant's innocence as it is to the Government's theory of guilt"); *People v. Wackerle*, 156 Mich. App. 717, 721, 402 N.W.2d 81, 83 (1986) ("an innocent person may have [a] motive to make false exculpatory statements"). In any criminal trial, the evidentiary value of a false exculpatory statement will depend on the nature of the statement, the strength of the evidence offered to establish the falsity of the statement, and the remaining evidence (if any) of the accused's guilt.

¶ 41 With these principles in mind, we examine the strength of defendant's statements as evidence of guilt. As for the conflicting accounts given by defendant and Doris, it is plausible, given the apparent romantic triangle between Doris, Alafandi, and defendant (and defendant's wife, for that matter), that, if defendant did want to see Alafandi at Parkview that night, he would not have shared that purpose with Doris. As for defendant's recantation to Shenberger on August 16, 2007, it seems all defendant recanted was that he drove past Alafandi's house with Doris. This recantation actually cohered with (1) defendant's prior statements, which, except for his claim that he had Doris drive past Alafandi's house, gave no suggestion that he shared with Doris his intent to meet Alafandi; and

(2) Doris' testimony, according to which defendant did not mention a desire to meet Alfandi. If, as seems plausible, defendant did not want Doris to know he was attempting to meet Alafandi, it would have been fitting for him not to have Doris drive past Alafandi's house.

¶ 42 It is also plausible, we think, that defendant did not know that Amanda had quit her job at Parkview and that he had forgotten that Amanda's shift ended at 7 p.m. As for the internal inconsistencies in defendant's statements, the State presumably means Shenberger's testimony that defendant told Dyra that he had Doris drop him off so that he could attend a party at "Jon's" house, while defendant told Wichman and Shenberger that Doris dropped him off so that he could meet Alafandi. When Shenberger confronted defendant with what he had said to Dyra, defendant claimed he originally intended to attend "Jon's" party but changed his mind. Notably, Dyra never testified, so we do not know the entirety of what defendant told him. It is significant, however, that defendant's mention to Dyra of Jon's party was not unprecedented but indeed matched what Doris claimed defendant told her as being his reason for wanting to be dropped off on West Church Street, in an area that happened to be near both Harlan's house and Parkview. Reviewing the evidence in its entirety, there is substantial coherence in the notion that defendant, using the pretense of a party at "Jon's," had Doris drop him off so that he could meet Alafandi.

¶ 43 We do not agree that defendant's account for his presence on West Pearl City Road was as weak as the State claims. At least, what weaknesses there were in that account did not so remedy the weaknesses in the State's remaining evidence (defendant's proximity, the wet and soiled pants knee, and the dew track) that we can say that the State's case was overwhelming.[2]

[2] The trial court twice commented on the strength of the State's evidence. In its order denying defendant's motion to quash and suppress, the court remarked that the State "barely"

¶ 44 Since the evidence was closely balanced, we reverse "regardless of the seriousness of the error." *Herron*, 215 Ill. 2d at 187. We note, nonetheless, that the error here, considered in context, had particular potential for harm. The State presented inconclusive evidence, relying in large part on what it considered defendant's failure to give a plausible explanation for being in temporal and spatial proximity to the crime. The defense presented no evidence. In a case where it was particularly necessary for the jury to understand the degree of the State's burden and that it remained on the State from first to last, it was an unfortunate coincidence that the very Rule 431(b) principles on which the court failed to query the jury concerned the State's burden to prove guilt beyond a reasonable doubt and the defendant's right not to present evidence on his own behalf. Though we need not find the jury biased to reverse based on the "closely balanced" prong of the plain error rule, we certainly see how the particular error here could have impacted the jury.

¶ 45 Though we find that the Rule 431(b) violation is in itself a sufficient basis for reversal, we also address defendant's allegation of prosecutorial misconduct.

¶ 46 II. Prosecutorial Misconduct

¶ 47 Defendant argues that the State made remarks in closing argument that portrayed defendant's statements to the police in a false light. Since defense counsel did not make a contemporaneous objection and thus the issue was not preserved for appeal, defendant asks us to review the issue for plain error. He alternatively argues that counsel was ineffective for failing to object to the remarks.

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established probable cause for defendant's arrest. The court then wrote, "Quite frankly, how that is going to develop into proof beyond a reasonable doubt, I don't know but that is the State's burden to establish at trial." Later, in denying defendant's motion for a directed verdict at the close of the State's case, the court commented that it was "admittedly a close case."

Because we find that the remarks were plain error and mandate reversal, we need not address the ineffectiveness claim.

¶ 48 "For a prosecutor's closing remarks to constitute error, they must fall outside the 'wide latitude' accorded a prosecutor in making a closing." *People v. Spicer*, 379 Ill. App. 3d 441, 463 (2007) (quoting *People v. Hart*, 214 Ill. 2d 490, 513 (2005)). "In closing, the prosecutor may comment on the evidence and any fair, reasonable inferences it yields." *People v. Nicholas*, 218 Ill. 2d 104, 121 (2006).

¶ 49 There was error in this case, but not because the State misstated the evidence introduced at trial. Rather, this case presents a more unusual occurrence: the State made an argument that was undercut by videotape evidence that the State introduced at the suppression hearing but, apparently, did not attempt to introduce at trial. The video was of defendant's encounter with Officer Wichman on West Pearl City Road, as recorded by Wichman's dashboard video camera. The video depicts Wichman saying to defendant, at the beginning of their encounter, "The problem right now is that we're pretty positive you're a suspect in something. Some stuff might have gotten taken. So you can't go anywhere right now, okay?" (The entire video is described in our prior disposition.) At trial, where the videotape was not introduced, the State argued that defendant showed consciousness of guilt when, while en route to the police station in Wichman's squad car, he asked Wichman "if [the police] were investigating something that had been taken." First, the State said:

> "Wichman tells the Defendant, 'I'm investigating something that happened on Church Street. You know anything about it?' Something of that nature. 'Why are you here? Why are you walking here?' Because he's—he's asking these questions because he knows

> [defendant] lives downtown, he knows his car. It's in the dark, it's in the street, and a long way from where [defendant] lives. What's going on?
>
> That's what he says. He's investigating something that happens on Church Street.
>
> Eventually[,] Wichman transports [defendant] to the police department, *and without more, he makes a statement. Are you supposed to be investigating something that was stolen?* And I argue this, ladies and gentlemen, is a showing that he had knowledge, knowledge that the police are investigating a burglary, something where possibility [*sic*] it was stolen because, as I recall, the [*sic*] Wichman's statement was that, well, we're just investigating something that happened on Church Street. Have you been there?" (Emphasis added.)

Later, the State said:

> "Would argue that another piece of circumstantial evidence that is a false explanation of [defendant's] behavior shows the why—false explanation of why he acted or shows a consciousness of guilt, especially when he's confronted with a—a crime, a residential burglary that just occurred. *Not told specifically what they're investigating, but he asks the question, 'You investigating something that was stolen, something that was taken?*" (Emphasis added.)

¶ 50 The suggestion in the State's argument is that defendant could not have known what kind of crime the police were investigating unless he committed the crime. The videotape, however, showed an alternative source for the knowledge: Wichman's prior statement to defendant that "[s]ome stuff might have gotten taken." The State's argument was true to the evidence at trial, where the videotape was not admitted, but it was not true to what the State knew or should have known about

the case. We assume, because we have no evidence to the contrary, that the prosecutor did not intentionally cast defendant's question to Wichman in a false light; the prosecutor may well have forgotten what Wichman told defendant on the videotape. Whatever the prosecutor's mind set, however, the effect of the argument was the same. That impact cannot be overstated, as defendant's question to Wichman, in the manner in which the State portrayed it, constituted the only direct evidence of defendant's guilt.

¶ 51 We recognize that the videotape was known to the defense, having been disclosed in discovery and introduced at the suppression hearing. The defense, presumably, had its reasons for not moving to introduce the videotape at trial.[3] It certainly was *not* reasonable to expect the defense to introduce the videotape prophylactically, as if anticipating misleading argument from the State that only the videotape could counteract. Ultimately, the defense was left with the sole recourse of an objection to the State's argument. The defense's failure to make that objection does not affect our plain error analysis but simply precipitates it.

¶ 52 It was not the defendant's duty to anticipate or correct the State's misrepresentation, but rather the State's duty not to make such argument in the first instance. The State was obligated to

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[3] We imagine the defense at least would have wanted the videotape substantially redacted. On the tape, Wichman informs defendant that a police dog is tracking a scent from Harlan's house. Later, defendant reacts as the dog approaches him, and then Wichman comments that the dog's conduct indicates that the dog tracked defendant's scent from Harlan's house. "[B]loodhound evidence is inadmissible to establish any factual proposition in a criminal proceeding in Illinois." *People v. Cruz*, 162 Ill.2d 314, 369-70 (1994).

insure that its presentation of evidence, and its argument, were fair. As was said in *People v. Tribbett*, 90 Ill. App. 2d 296, 301-02 (1967):

> "We all know what a trial is, but we sometimes forget certain basic pre-conditions, if it is to serve its function and serve it well. For a working definition, let us say that a trial is a contest held just once between well prepared adversaries of roughly equal strength. This necessarily implies that neither side has an unjust advantage over the other. ***
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> ***
>
> Since a trial contemplates a lone occasion, preparation for that occasion is of the utmost importance."

The need to maintain approximate parity between adversaries at trial mandates that the State exercise particular care in presenting evidence of the accused's statements, which are among the most damning indicia of guilt in the eyes of a fact finder. Compliance with the rules of discovery (see *e.g.*, Ill. S. Ct. R. 412(a)(ii) (eff. March 1, 2001) and 725 ILCS 5/114—10 (West 2006)) regarding disclosure to the defense of any statements or confessions of the defendant does not relieve the State of its obligation to present an accurate account of the defendant's statements. The State's presentation of evidence and argument in this case were inconsistent with its "duty *** to seek justice, not merely to convict" (Ill. S. Ct. Code of Prof. Res., canon 3.8 (eff. March 1, 2001)). See also *People v. Valdery*, 65 Ill. App. 3d 375, 378 (1978) ("While the State's Attorney must diligently prosecute each case before him, he may never disregard the constitutional right of a fair and impartial trial or the search for truth which is an inherent part of justice").

¶ 53 As the State's argument was clearly beyond even the wide latitude the State enjoys in closing argument, it was error. It was also plain error under either prong of the rule. First, as we noted in

Part I of this analysis, the evidence was closely balanced. Second, the error implicated substantial rights because it "ha[d] the effect of undermining the entire trial" (*People v. Keene*, 169 Ill. 2d 1, 23 (1995)). Apart from defendant's question to Wichman, which, as portrayed by the State, evidenced consciousness of guilt, the State's case was based on purely circumstantial evidence.

¶ 54 Consequently, we reverse defendant's conviction. Because our reversal is based on trial errors, defendant may be retried if the evidence was sufficient for a conviction. *People v. Lopez*, 229 Ill. 2d 322, 367 (2008). As we explained at length in our prior disposition, the evidence was sufficient to convict defendant.

¶ 55 For the foregoing reasons, we reverse the judgment of the circuit court of Stephenson County and remand this cause for a new trial.

¶ 56 Reversed and remanded.

¶ 57 JUSTICE SCHOSTOK, specially concurring:

¶ 58 Contrary to the majority's determination, the evidence in this case was not closely balanced. The defendant was found a short distance from the victim's home shortly after it had been burglarized. A dew track went from the victim's home to a point near where the defendant was standing when an officer stopped him. The defendant appeared nervous and provided inconsistent explanations to the police of why he was in the area. Although none of these components may have been sufficient standing alone, in combination they surpassed the threshold of closely balanced evidence. As such, the defendant is not entitled to any relief based on the first-prong of the plain error doctrine. However, I agree with the majority that the prosecutor's closing argument amounted to error and that the error affected the fairness of the defendant's trial. On that basis alone, this court must reverse and remand for a new trial.