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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Du Page County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 07—CF—2729
)	
IGNACIO C. ROSARIO,)	Honorable
)	Blanche Hill Fawell,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Hutchinson and Schostok concurred in the judgment.

ORDER

Held: Defendant has not established that the trial court's violation of Rule 431(b) resulted in a biased jury; therefore, he has failed to meet his burden of showing the error affected the fairness of his trial and challenged the integrity of the judicial process. Accordingly, defendant's procedural default is not excused based on either prong of plain-error review.

Where the jury acquitted defendant of seven of the thirteen charges, the failure to give a limiting instruction relative to gang membership, an element of the charge of Aggravated Unlawful Use of a Weapon (720 ILCS 5/24—1.6(a)(1)(3)(F) (West 2006)), did not prejudice defendant in the eyes of the jury insofar as all other charges.

Pursuant to the statute (55 ILCS 5/4—2002(a) (West 2008)) and *People v. Kitch*, 239 Ill. 2d 452, 470 (2011), the State is awarded the statutory assessment of \$50 against defendant as costs of this appeal.

Defendant, Ignacio C. Rosario, was convicted by a jury of Aggravated Discharge of a Firearm (“towards an occupied building”) (720 ILCS 5/24.1.2(a)(1) (West 2006)), Aggravated Discharge of a Firearm (“in the direction of another person”) (720 ILCS 5/24.1.2(a)(2) (West 2006)), three counts of aggravated Unlawful Use of a Weapon (720 ILCS 5/24—1.6(a)(1)(3)(A), (C), (F) (West 2006)); and one count of Unlawful Use of a Weapon (720 ILCS 5/24—1.1(a) (West 2006)). The trial court sentenced him to two concurrent terms of 18 years’ imprisonment for each count of aggravated discharge of a firearm, with the remaining four counts merged. On appeal, defendant argues that he was denied a fair and impartial jury trial because the trial court failed to comply with Illinois Supreme Court Rule 431(b) (eff. May 1, 2007), which requires the trial court to inquire of each potential juror, individually or in a group, whether that juror understands and accepts the principles of presumption of innocence and proof of guilt beyond a reasonable doubt; that defendant is not required to offer any evidence; and, if there is no objection from defendant, that defendant’s failure to testify may not be held against him. Defendant also argues that the trial court erred in failing to limit the use of gang and other crimes evidence; or, in the alternative, counsel was ineffective for failing to request a limiting instruction on this evidence.

I. BACKGROUND

Defendant was charged by indictment with thirteen felonies. Count 1 charged defendant with “Aggravated Discharge of a Firearm in that [he] knowingly discharged a firearm in the direction of Derrick E. Barber, in violation of 720 ILCS 5/24—1.2(a)(2)”; count 2 charged defendant with “Aggravated Discharge of a Firearm in that [he], while outside the building located at ***, and with knowledge that the building was occupied, knowingly discharged a firearm in the direction of that building, in violation of 720 ILCS 5/24—1.2(a)(1)”; count 3 charged defendant with attempt murder

in that he, with intent, performed a substantial step toward the commission of murder by personally discharging a firearm, striking Derrick E. Barber and causing great bodily harm in violation of 720 ILCS 5/8—4(a), (c)(1)(D); count 4 charged that defendant committed attempt murder in that he, with intent, performed a substantial step toward the commission of murder by personally discharging a firearm that struck Tommie Ward in violation of 720 ILCS 5/8—4(a), (c)(1)(C); count 5 charged defendant with “Aggravated Discharge of a Firearm in that [he] knowingly discharged a firearm in the direction of Richandra J. Manning, in violation of 720 ILCS 5/24—1.2(a)(2)”; count 6 charged defendant with “Aggravated Discharge of a Firearm in that [he] knowingly discharged a firearm in the direction of Tommie Ward, in violation of 720 ILCS 5/24—1.2(a)(2)”; count 7 charged defendant with “Aggravated Discharge of a Firearm in that [he] knowingly discharged a firearm in the direction of another person, in violation of 720 ILCS 5/24—1.2(a)(2)”; count 8 charged defendant with “Aggravated Battery with a Firearm in that [he], in committing a battery, knowingly caused an injury to Derrick E. Barber, in that [he] personally discharged a firearm that struck *** Derrick E. Barber, in violation of 720 ILCS 5/12—4.2(a)(1)”; count 9 charged defendant with “Aggravated Battery with a Firearm in that [he], in committing a battery, knowingly caused an injury to Tommie Ward, in that [he] personally discharged a firearm that struck *** Tommie Ward, in violation of 720 ILCS 5/12—4.2(a)(1)”; count 10 charged defendant with “Aggravated Unlawful Use of a Weapon in that [he, having been]convicted of a felony ***, knowingly carried on or about his person an uncased and loaded pistol at a time when he was not on his own land, or in his own abode, or fixed place of business, and that pistol was immediately accessible at the time he carried it, in violation of 720 ILCS 5/24—1.6(a)(1)(3)(A); count 11 charged defendant with “Aggravated Unlawful Use of a Weapon in that [he, having been]convicted of a felony ***, knowingly carried

on or about his person an uncased and loaded pistol at a time when he was not on his own land, or in his own abode, or fixed place of business, at a time when [he] had not been issued a currently valid Firearm Owner's Identification Card, in violation of 720 ILCS 5/24—1.6(a)(1)(3)(C)"; count 12 charged defendant with "Aggravated Unlawful Use of a Weapon in that [he, having been]convicted of a felony ***, knowingly carried on or about his person an uncased and loaded pistol at a time when he was not on his own land, or in his own abode, or fixed place of business, at a time when [he] was a member of a street gang, in violation of 720 ILCS 5/24—1.6(a)(1)(3)(F)"; count 13 charged defendant with "Aggravated Unlawful Use of Weapons by Felons in that [he, having been]convicted of a felony ***, knowingly possessed a pistol, in violation of 720 ILCS 5/24—1(a)".

During *voir dire*, the trial court read the 13-count indictment to the jury and cautioned that "the charges *** are not to be considered as evidence against the defendant just because he has been charged." The trial court told the jury that "the presumption is just the opposite," that every defendant is presumed to be innocent, that such presumption remains with the defendant throughout every stage of the trial through jury deliberations, and that this presumption is not overcome unless the jury is convinced beyond a reasonable doubt that defendant is guilty. After reading the list of witnesses, the trial court then addressed the jury as follows:

"Is there anyone who does not accept the principle that the State has the burden of proof of guilt beyond a reasonable doubt?

Is there anyone who does not accept the principle that no inference of guilt arises should the defendant not testify or offer any evidence?

Is there anyone who does not accept the principle that no conclusions or decisions

should be drawn [*sic*] until jury deliberations begin?

* * *

Is there anyone who does not accept the principle that should the State not prove the defendant guilty beyond a reasonable doubt, it is your duty to sign a not guilty verdict?”

Later, while questioning the first 13 jurors, 6 of whom were ultimately accepted as the first panel, the trial court, the State, and the defense attorneys asked twenty times whether a particular juror *understood* a particular proposition; for example, the proposition that the State must prove the defendant guilty beyond a reasonable doubt. These questions were posed before the entire venire to different jurors at different times. After the first panel was accepted and dismissed for the day, the *voir dire* continued. In the course of questioning the second panel, individual jurors were asked four times about whether they understood a particular proposition; the alternate jurors were asked a total of 23 times whether they understood.

At trial, Kwayla Dudley testified that she hosted a party at her home on October 6, 2007, that was attended by several guests including defendant, whom she knew as “Casper.” She testified that after one of the guests, Derrick Barber, spilled a drink on defendant, Dudley asked everyone to leave. She then went upstairs to check on her children. She testified that she then heard shots fired. At first she ducked down, but then she ran downstairs and out the front door with her children. Don Scott, who had been staying at her house, drove her and her children in his car to her mother’s house.

Defendant’s sister, Richandra Manning, testified that she invited defendant to join her at Dudley’s party. Manning was sitting on the deck playing cards when defendant arrived. He was accompanied by their niece, Rosalinda. After defendant went inside, Manning heard yelling coming from the kitchen. Defendant ran out and Manning stood up to see what was going on. At that point,

she fell, but she did not recall anything else until she was in the hospital and learned that she had been shot in the abdomen.

Don Scott testified that on the night of the party he was lying on a couch in the living room when he heard a “commotion” in the kitchen and heard Dudley telling people that they had to leave. He saw defendant and a black male, Derrick Barber, in the kitchen. He also saw defendant lift his shirt and display a gun in his waistband. At that point, Barber started to run out of the kitchen. Scott then heard a couple of shots, and he ran out the front door.

Derrick Barber testified that he and two brothers, Tommie and Leroy Ward, were present at the party. Barber testified that he was drinking and was “somewhat intoxicated.” He was playing cards in the kitchen when he saw a “Hispanic dude.” According to Barber, he and defendant had a “friendly” conversation about their tattoos, but a little later Barber accidentally spilled his drink on defendant, who then “got an attitude.” Barber stated that Dudley asked him to leave so he went out the front door to his truck which was parked on the driveway. Barber heard a few sounds like “pop.” Then Leroy and Tommie Ward came outside and all three ran after defendant and the girl who was with him. Barber felt a pinch and saw sparks and realized he had been shot in the stomach. Shortly after, an ambulance arrived and took him to the hospital.

On cross-examination, Barber admitted that he had been drinking at the party and was intoxicated by the time these events occurred.

Tommie Ward testified that he attended the party at Dudley’s and that he knew almost everyone there. He stated that Leroy Ward is his brother. He stated that he saw Derrick Barber have a brief verbal argument with defendant in the kitchen that lasted “a minute or two.” Dudley asked Barber to leave, and Tommie left shortly after. They stayed in the front of the house on the

driveway. They heard some sounds like gunshots and Leroy ran around to the front of the house and said that defendant was shooting. Tommie stated that he, Barber, and Leroy ran to the back of the house and saw defendant near a white car. At that point defendant turned around and pointed a gun at them, and Derrick was shot. Tommie tried to chase defendant but couldn't catch him, so he went back and picked up Derrick, who eventually went to the hospital. Tommie went to the police station in the squad car and gave a statement to the police. After he was brought back to the house later that morning, he noticed that he had been shot in the foot.

On cross-examination, Tommie stated that he drank "a fair amount" of alcohol the night of the party.

Aaron Sturdevant, a neighbor, testified that on October 6, around 2 a.m., he was at home in bed but was awake because of noise coming from a party in the neighborhood. As he was thinking about calling the police regarding the noise, he heard gunshots and jumped out of bed to look out his window. He saw a male and a female run out of his neighbor's back yard. He saw the man point a gun back toward the house and saw "muzzle flashes"; then he heard three more shots. The two people then tried to get into a white car parked on the street. Sturdevant saw the man "holding off some African Americans that were coming after him" by pointing the gun at them. When the female could not get the car unlocked, they ran down the street. On cross-examination, Sturdevant admitted that he gave a written statement to police officers on the night of the shooting and that he did not include anything in his statement about seeing the male holding off a group of blacks or that he heard two separate rounds of gunshots being fired.

Sturdevant also stated that he was testifying pursuant to a plea agreement he had made with the State regarding pending charges against him. He agreed to testify truthfully in this case and to

plead guilty to one count of violating an order of protection; in exchange, the State would drop another charge against him.

Officer Jason Russell, Aurora Police Department, testified as an expert in the area of gangs and gang identification. He testified that in January 2003 he was assigned to the Special Operations Group that consisted of gangs, narcotics and vice. As a gang officer, he had extensive ongoing training in identification of street gangs, tactics and gang enforcement.

Officer Russell described the representations of different gangs in the Chicagoland area, particularly the Latin Kings. Certain hand signs signify different gangs. On July 8, 2007, Russell was assigned to the Puerto Rican Festival in Aurora. While at the festival, he observed defendant “throw up” the Latin King sign. He approached defendant and asked his name. Defendant replied “I’m King Casper.” Defendant told Russell that he had been involved with the Latin Kings for “quite some time.” Russell observed a tattoo on defendant’s bicep that depicted “Casper the Friendly Ghost” with a five-pointed crown on his head. Russell opined that the five-point crown signified a Latin King affiliation.

Russell identified two photographs of defendant with his brother, Christopher Rosario. The photographs showed them shaking hands and using gang signs. Defendant was wearing a gold necklace with a five-pointed crown and a black and gold shirt with several crowns all over it. Another photograph showed defendant’s tattoo of “Casper” with the crown and another tattoo on his forearm of the king from a deck of cards with a five-pointed crown. In the same photograph, defendant is wearing a gold hat, which is one of the Latin King’s primary colors.

Based on all these observations, Russell opined that defendant was a member of the Latin Kings.

The parties stipulated that defendant had a 2004 felony conviction for cocaine possession, that he did not have a Firearms Owner's Identification card, and that he was the driver of the white Cadillac.

Defendant's motion for a directed finding was denied. Defendant did not testify.

The jury instructions, given both verbally and in writing, informed the jury that a defendant is presumed to be innocent; that this presumption remained with defendant throughout every stage of the trial; that this presumption is not overcome unless from all the evidence the jury is convinced beyond a reasonable doubt that the allegations are proven; that the State had the burden of proving the allegations beyond a reasonable doubt; and that this burden remains on the State throughout the case. Further, the trial court instructed the jury that defendant was not required to disprove the allegations and the fact that defendant did not testify must not be considered in any way in arriving at the verdict.

The jury found defendant not guilty of two counts of attempted murder of Derrick Barber and Tommie Ward; not guilty of two counts of aggravated battery with a firearm of Derrick Barber and Tommie Ward; not guilty of three counts of aggravated discharge of a firearm toward Derrick Barber, Tommie Ward and Richandra Manning. The jury then found defendant guilty of aggravated discharge of a firearm at an occupied building; aggravated discharge of a firearm at another person; aggravated unlawful use of a weapon based on the weapon being immediately accessible; aggravated unlawful use of a weapon based on no FOID card; aggravated unlawful use of a weapon by a gang member; and unlawful use of a weapon by a felon.

The trial court sentenced defendant to two concurrent terms of 18 years' imprisonment for each count of aggravated discharge of a firearm, and the remaining four counts merged into these convictions.

Defendant timely appealed

II. ANALYSIS

A. *Voir Dire*

When we construe a supreme court rule, our standard of review is *de novo*. *People v. Willhite*, 399 Ill. App. 3d 1191, 1194 (2010). Illinois Supreme Court Rule 431(b) (eff. May 1, 2007), as amended, provides:

“(b)The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant's failure to testify cannot be held against him or her ***.”

Additionally, Rule 431 provides “[t]he court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section.”

At the beginning of *voir dire*, the trial court introduced defendant, the attorneys, and the court personnel to the potential jurors and read the list of witnesses. After reading the charges, the trial court informed the prospective jurors in the *voir dire* that defendant was presumed innocent, that the presumption was not overcome until the State proved him guilty beyond a reasonable doubt, that it was the State's responsibility to prove defendant guilty, that defendant did not have to prove his

innocence, that he did not have to testify and no inference could be drawn from that, and the burden of proof never shifts from the State. Defendant contends that although the jury was informed of these propositions, the trial court failed to comply with the mandate of Rule 431(b) because each of the selected jurors was not asked whether he or she understood and accepted them.

Acknowledging that he failed to preserve this issue for review by either objecting during *voir dire* or including it in the motion for a new trial, defendant urges us to review this issue under the plain-error doctrine. Under the plain-error doctrine, we may review a forfeited error when either (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” or (2) “the error is so serious that the defendant was denied a substantial right, and thus a fair trial.” *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). Defendant bears the burden of persuasion under both prongs. *Herron*, 215 Ill. 2d at 187. The first step in the plain-error analysis is to determine whether any error occurred. *People v. Cosby*, 231 Ill. 2d 262, 273 (2008).

Our supreme court has stated “essential to the qualification of jurors in a criminal case is that they know that a defendant is presumed innocent, that he is not required to offer any evidence in his own behalf, that he must be proved guilty beyond a reasonable doubt, and that his failure to testify in his own behalf cannot be held against him.” *People v. Zehr*, 103 Ill.2d 472, 477 (1984). The record shows that prospective jurors were informed of all four *Zehr* principles before individual questioning commenced. When individually questioning each juror, the trial court either reminded the juror of the principles of law it spoke of earlier or admonished the juror that defendant did not have to testify. At different times, the trial court did both. The record indicates that the entire venire was given ample opportunity to indicate they either did or did not accept a particular proposition.

Further, the jury was instructed verbally and given IPI Criminal 4th No. 2.04, which provided that “in arriving at the verdict it must not consider in any way the fact that defendant did not testify; that each and every proposition had to be proved beyond a reasonable doubt for each charge,

This issue is controlled by our supreme court's decision in *People v. Thompson*, 238 Ill.2d 598 (2010), where the defendant failed to present any evidence of a biased jury. The court held that he failed to meet his burden under the second prong of the plain-error doctrine, and would not review the error. As suggested in *Thompson*, “[a] simple objection would have allowed the trial court to correct the error during *voir dire*.” *Thompson*, 238 Ill.2d at 612. Although under the plain-error rule defendant may bypass normal forfeiture principles, he has failed to show that the evidence is so closely balanced that the error threatens to tip the scales of justice against him or that the error has affected the fairness of his trial and challenged the integrity of the judicial process. See *Thompson*, 238 Ill.2d at 612-14. Thus, the plain-error doctrine does not provide a basis for relaxing defendant's forfeiture of this issue. “We cannot presume the jury was biased simply because the trial court erred in conducting the Rule 431(b) questioning.” *Thompson*, 238 Ill.2d at 614.

Rule 431(b), mandates a specific question and response process. The trial court must ask each potential juror whether he or she understands and accepts each of the principles. The questioning may be performed either individually or in a group, but the rule requires an opportunity for a response from each prospective juror on their understanding and acceptance of those principles. *People v. Thompson*, 238 Ill. 2d 598, 607 (2010). A violation of Rule 431(b) does not implicate a fundamental right or constitutional protection, but only involves a violation of the supreme court's rules. *Glasper*, 234 Ill.2d at 193.

The issue presented here is identical to that presented in *Thompson*, where the prospective jurors received some, but not all, of the required Rule 431(b) questioning and the venire was admonished and instructed on Rule 431(b) principles. Therefore, *Thompson* controls, and we do not find that the jury was necessarily biased. Defendant claims that the evidence was closely balanced and, further, that the error was so serious that it denied him of his substantial right to a fair and impartial jury. Defendant has not, however, presented any evidence that the jury was biased or that he was actually prejudiced by this error. The jury's verdict of not guilty of some of the charges cannot be considered to be an indicator of the closeness of the evidence of the charges of which he was convicted. Several witnesses testified that defendant was the shooter and that he shot in the direction of Dudley's house and in the direction of another person. In this case, as in *Thompson*, defendant has not established that the trial court's violation of Rule 431(b) resulted in a biased jury. Therefore, defendant has failed to meet his burden of showing the error affected the fairness of his trial and challenged the integrity of the judicial process. Accordingly, we will not excuse defendant's procedural default based on either prong of plain-error review. See *Thompson*, 238 Ill. 2d at 614-15.

B. Gang Evidence

Defendant was charged with and convicted of Aggravated Unlawful Use of a Weapon in violation of section 5/24—1.6(a)(1)(3)(F) of the Criminal Code of 1961, in that he, “a person who has been convicted of a felony under the law of Illinois, knowingly carried on or about his person an uncased and loaded pistol at a time when he was not on his own land, or in his own abode, or fixed place of business, at a time when [he] was a member of a street gang.” (720 ILCS 5/24—1.6(a)(1)(3)(F) (2006)). The aggravating factor provided in the statute is if “the person possessing the weapon is a member of street gang or is engaged in street gang related activity.”

Section (F) read “the person possessing the weapon is a member of a street gang or is engaged in street gang related activity, as defined in Section 10 of the Illinois Streetgang Terrorism Omnibus Prevention Act.”

Defendant argues that, because the jury heard evidence of defendant’s gang membership, the trial court should have instructed the jury, either verbally or in writing, in accordance with *People v. Smith*, 141 Ill.2d 40 (1990). He further argues that failure to give a limiting instruction on defendant’s prior conviction was error. Defense counsel failed to request either limiting instruction, and defendant contends that, therefore, his counsel was ineffective.

Evidence of gang membership is admissible only when there is sufficient proof that membership is related to the crime charged. *Smith*, 141 Ill.2d at 58. Defendant’s reliance on *Smith* is misplaced. Our supreme court held in *Smith* that the trial court erroneously allowed evidence of alleged gang membership to show motive, and this error was exacerbated by errors committed during the prosecution’s opening statement and closing argument. After concluding that the individual errors, standing alone, would not compel reversal, the *Smith* court stated: “[b]ut taken together with the incompetent evidence of the alleged gang-related motive and the similar remarks in closing argument, we consider additional factors weighing to the prejudice of defendant and further supporting our decision to reverse defendant’s conviction.” *Smith*, 141 Ill.2d at 64. We find the facts in *Smith* are distinguishable in that the admission of evidence of other crimes was in error with no limiting instruction given.

Defendant also relies on *People v. Denny*, 241 Ill. App. 3d 345, 360 (1993), where the appellate court reversed, remarking “[a]s part of our conclusion that reversal is required because of the prejudicial effect to defendant of the erroneously admitted evidence of the [previous] incident,

we note that the jury never received any instruction limiting its consideration of that evidence.” *Denny*, 241 Ill. App. 3d at 360. Again, in this case, there was no erroneous admission of the evidence.

To the contrary, in this case, the State was *required* to prove beyond a reasonable doubt the elements set forth in subsection (a)(1) or (a)(2), in addition to one of the nine factors in subsection (a)(3). 720 ILCS 5/24—1.6(a)(1) through (a)(3) (West 2006). Subsection (a)(3)(F) is listed as one of these nine factors. The factors in subsection (a)(3) transform the crime from “simple” unlawful use of a weapon to aggravated unlawful use of a weapon. See 720 ILCS 5/24—1 (West 2006) (defining the offense of unlawful use of weapons). Absent proof of one of the nine factors, the defendant has not been proven guilty of the crime as charged. *People v. Zimmerman*, 239 Ill.2d 491 (2010). In this case, the evidence of gang membership was one of three elements of the crime charged which the State had the burden of proving beyond a reasonable doubt. See *People v. Vasquez*, 368 Ill. App. 3d 241, 249 (2006) (“The elements that the State must establish for unlawful use of a weapon by a felon are: (1) the defendant knowingly possessed a firearm, and (2) the defendant had previously been convicted of a felony. 720 ILCS 5/24—1.1(a) (West 2000)).”).

Defendant argues in the alternative that defense counsel was ineffective for failing to request a limiting instruction on this evidence that would have informed that jury that the evidence of gang membership pertained to only count 12 of the indictment that charged defendant with “Aggravated Unlawful Use of a Weapon.” Defendant asserts that the jury should have been instructed that this evidence was to be used for deliberating on this count only. Additionally, defendant asserts that the jury should have been similarly instructed that the evidence of a prior conviction was to be used only for the purposes of counts 10 through 13 of the indictment, where one of the elements of each

charge that the State was required to prove was that defendant had previously been convicted of a felony. However, the record shows that no limiting instruction was requested by defense counsel and this issue was not raised in any post-conviction motion, and, therefore, this argument is forfeited. See *People v. Enoch*, 122 Ill. 2d 176 (1988).

Notwithstanding forfeiture, in this case the failure to request such instructions does not demonstrate ineffective assistance of counsel. Ineffective-assistance-of-counsel claims are reviewed under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a defendant must prove (1) his counsel's performance failed to meet an objective standard of competence and (2) counsel's deficient performance resulted in prejudice to the defendant in order to obtain reversal. *Thompson*, 359 Ill.App.3d at 952. To satisfy the deficient-performance prong, the defendant must show that counsel made errors so serious that he was not functioning as the “counsel” guaranteed by the sixth amendment (U.S. Const., amend.VI). To satisfy the prejudice prong, the defendant must show that but for counsel's errors, a reasonable probability exists that the outcome of the proceedings would have been different. *Thompson*, 359 Ill.App.3d at 952. The failure to satisfy either *Strickland* prong will preclude a finding of ineffective assistance of counsel. *People v. Young*, 347 Ill.App.3d 909, 927 (2004).

We are not convinced that error occurred, but assuming *arguendo* there was error, defendant has shown no prejudice as the evidence was overwhelming and the outcome would have been the same. In this case, we find that this evidence regarding gangs and defendant's prior conviction was properly admitted and the failure to provide a limiting instruction would not have resulted in a different verdict on the sundry counts. The evidence that defendant intended to shoot at someone in particular may be considered closely balanced; however, the evidence that defendant was a

convicted felon and gang member who shot a gun in the direction of an occupied house was overwhelming.

C. Statutory Assessment

Finally, the State has requested attorney fees pursuant to statute. See 55 ILCS 5/4—2002(a) (West 2008). Under *People v. Kitch*, 239 Ill. 2d 452, 470 (2011), we grant to the State the statutory assessment of \$50 against defendant as costs of this appeal. The *Kitch* court explained that “Section 4—2002 of the Counties Code provides that a State's Attorney in a county such as Schuyler is entitled to a fee of \$50 for each case of appeal taken from his county to the Supreme or Appellate Court when prosecuted by him.” See *Kitch*, 239 Ill. 2d at 470-71. Here, the State's Attorney's Appellate Prosecutor (SAAP) defended the appeal. Under the applicable statutory scheme, any case in which SAAP appears is, by necessity, prosecuted or defended by a State's Attorney. See 55 ILCS 5/3-9005 (West 2008) (it is State's Attorney's duty to commence and prosecute all criminal actions arising out of his or her county). Moreover, under section 4.01 of the State's Attorneys Appellate Prosecutor's Act, SAAP attorneys are authorized to “represent the People of the State of Illinois” in the appellate court “when requested to do so and at the direction of” a State's Attorney. 725 ILCS 210/4.01 (West 2008). Under this statute, State's Attorneys retain a central role in an appeal even where they utilize SAAP's services, and SAAP attorneys may prepare, file and argue briefs in the appellate court with the advice and consent of the State's Attorney. Therefore, we grant the SAAP's request for attorney fees.

III. CONCLUSION

For the reasons stated, the judgment of the circuit court of Du Page County is affirmed; SAAP is awarded a \$50 attorney fee under section 4—2002(a) of the Counties Code.

Affirmed.