2014 IL App (2d) 121373-U
No. 2-12-1373
Order filed September 18, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 11-CF-1739
ALFREDO GARCIA,	)	Honorable Blanche Hill Fawell,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Zenoff and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not deny defendant his right to a fair trial when the court, during jury selection, asked prospective jurors, "Is there anyone who does not accept the principle that a police officer's testimony must be given the same weight as any other testimony, no more, nor no less simply because he or she is a police officer?" Although trial court's inquiry was not a proper statement of the law and therefore constituted error, defendant did not object to the trial court's inquiry or raise the error in a post-trial motion. Furthermore, error did not rise to the level of plain error as the evidence in the case was not closely balanced and it was not so serious as to affect the fairness of defendant's trial.

¶ 2 Following a jury trial in the circuit court of Du Page County, defendant, Alfredo Garcia, was found guilty of unlawful delivery of a controlled substance (720 ILCS 570/401(a)(2)(D)

(West 2010)) and unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(a)(2)(D) (West 2010)). The trial court sentenced defendant to two concurrent terms of 16 years' imprisonment. On appeal, defendant argues that he was denied a fair trial because the trial court misstated the law by telling prospective jurors during *voir dire* that they must give a police officer's testimony "the same weight as any other testimony, no more, nor no less." We affirm.

¶ 3 I. BACKGROUND

¶ 4 On August 16, 2011, defendant was charged by indictment with one count of unlawful delivery of 900 grams or more of a substance containing cocaine in violation of section 401(a)(2)(D) of the Illinois Controlled Substances Act (Act) (720 ILCS 570/401(a)(2)(D) (West 2010)) and one count of unlawful possession with intent to deliver 900 grams or more of a substance containing cocaine also in violation of section 401(a)(2)(D) of the Act (720 ILCS 570/401(a)(2)(D) (West 2010)). The charges stemmed from an undercover narcotics operation conducted by the Du Page Metropolitan Enforcement Group (DuMEG). Defendant pleaded not guilty, and a jury trial commenced on August 15, 2012.

¶ 5 During jury selection, the trial court told the prospective jurors that they "will take an oath that [they] will decide this case solely on the law as [the court] instruct[s them], and on the evidence which is admitted during the trial." The court further told the prospective jurors that they "are the sole judges of the credibility or believability of the witnesses" and that they "will have to decide which witnesses to believe and how much weight or importance to give their testimony." Immediately after questioning the prospective jurors on the *Zehr* principles (see *People v. Zehr*, 103 Ill. 2d 472 (1984); Illinois Supreme Court Rule 431(b) (eff. July 1, 2012)), the court informed them that they will hear the testimony of a police officer. The court then

asked, "Is there anyone who does not accept the principle that a police officer's testimony must be given the same weight as any other testimony, no more, nor no less simply because he or she is a police officer?" Defense counsel did not object to this inquiry, and none of the prospective jurors responded affirmatively. After the jury was impaneled, the trial court told the jurors that, following closing arguments, it would instruct them on the law. The court also reiterated that the jurors "will be the judges of the credibility or believability of the witnesses, and [they] will determine the weight and importance to be given to the testimony of each [witness]."

¶ 6 At trial, Manny Perez testified that in July 2011, he was an officer with the Bartlett police department assigned to DuMEG. Perez testified that prior to July 28, 2011, he had spoken to Venustiano Calderon, also known as "Binny," about purchasing numerous kilograms of cocaine. At 7:28 a.m. on July 28, 2011, Calderon called Perez to inform him that the transaction would take place at Calderon's restaurant, La Playa Cantina in Glen Ellyn. Perez arrived at the restaurant at 8:44 a.m. and parked in the restaurant's parking lot. One minute later, Calderon exited the restaurant and entered Perez's vehicle. Calderon did not have any cocaine with him. Perez was upset because he had told Calderon to bring a kilogram of cocaine so that he could see the product. Perez noted that he had shown Calderon that he had the money to purchase 15 "bricks" of cocaine the previous night. Calderon responded that the operation was being run by a woman in the organization and she wanted to see the money first. Perez told Calderon that he had already shown him the money, that he was not willing to deal with anyone new, and that he wanted to see one kilogram of cocaine before he brought Calderon any money. Perez then left the parking lot.

¶ 7 Perez testified that Calderon immediately called him and apologized. Calderon told Perez that he would vouch for Perez and would show him a kilogram of cocaine. Perez returned

to the restaurant parking lot at 9:28 a.m., and one minute later, Calderon walked to the vehicle with a plastic bag. After Calderon entered Perez's vehicle, he showed Perez a kilogram of cocaine, and Perez "gave the bust signal." Both Calderon and Perez were arrested. Inside the restaurant, officers found a red purse with a zebra print on it that contained three additional kilograms of a substance the police suspected to be cocaine.

¶ 8 John Fremgen testified that he is a supervisory special agent with the Drug Enforcement Administration. Fremgen conducted surveillance at La Playa Cantina on July 28, 2011, by watching activity in the restaurant's parking lot before the undercover officer had arrived there. At 7:30 a.m. on July 28, Fremgen observed Calderon enter the restaurant. At 7:48 a.m., a blue Monte Carlo pulled up to the restaurant. The two men in the car, who were later identified as defendant and Luis Sanchez, then exited the vehicle and entered the restaurant.

¶ 9 Officer Don Cummings of the Carol Stream police department testified that from January 2008 through January 2012, he was assigned to DuMEG. Cummings was the main surveillance officer for the operation at La Playa Cantina on July 28, 2011. Cummings testified that he observed Perez park his undercover vehicle in the restaurant's parking lot between 8:44 a.m. and 9:08 a.m. On three separate occasions, Calderon entered the undercover vehicle, exited the vehicle, and re-entered the restaurant. At 9:14 a.m., Perez left the parking lot. Perez returned to the parking lot at 9:28 a.m. Shortly later, Calderon exited the restaurant with a plastic bag and entered Perez's vehicle. At 9:30 a.m., Perez activated the custody sign, and officers arrested Perez and Calderon.

¶ 10 Daniel Alaimo testified he is employed by the Addison police department but assigned to DuMEG. Alaimo testified that on July 28, 2011, he was parked behind La Playa Cantina. At about 9:19 a.m., Alaimo observed a gold Chevy Trailblazer park in the rear of the building.

Alaimo testified that two men and two women exited the vehicle and entered the restaurant. One of the women was carrying a white and red purse.

¶ 11 Kevin Kelliher of the Illinois State Police testified that he assisted in executing a search warrant on La Playa Cantina shortly after 9:30 a.m. on July 28, 2011. Kelliher entered the restaurant and observed two individuals running towards the back door. Kelliher testified that one of his fellow officers noted some individuals were barricaded in a storage room. After opening the storage room, three individuals, including defendant, were found inside.

¶ 12 Officer Jeffrey Lizik testified that he is employed by the Naperville police department and was assigned to DuMEG between December 2008 and December 2011. Lizik assisted in executing a search warrant on La Playa Cantina shortly after 9:30 a.m. on July 28, 2011. Lizik found a purse in the restaurant's kitchen. The purse contained three packages, each of which, Lizik suspected, contained a kilogram of cocaine. Lizik observed defendant, along with other suspects, inside the restaurant. Lizik conducted a search of defendant at the time and recovered $352 in United States currency and a cell phone.

¶ 13 Sara Norris testified that she works as a forensic scientist for Du Page County. Norris weighed and tested two of the packages that the police recovered from La Playa Cantina. People's Exhibit 3, which was the package shown to Perez, weighed 1,000 grams and contained cocaine. People's Exhibit 5A, which was one of the packages recovered from the purse, weighed 999 grams and contained cocaine.

¶ 14 Venustiano Calderon testified that he is incarcerated on charges of unlawful delivery of a controlled substance and unlawful possession of a controlled substance with intent to deliver. Calderon stated that he was given immunity for his testimony, but that there was no agreement as to his sentence. According to Calderon, he met with defendant on July 27, 2011, to arrange a

transaction in which defendant would obtain drugs for Calderon to sell to Perez. Calderon wanted to sell 15 kilograms of cocaine to Perez for $33,000 per kilogram. Defendant spoke to numerous people whom Calderon did not know and informed Calderon that those individuals would sell Calderon the drugs to resell to Perez. However, defendant informed Calderon that his contact would only be able to provide him with two or three kilograms. Calderon and defendant also discussed the details of the delivery, including what time it would occur.

¶ 15 On the morning of July 28, 2011, Calderon was the first to arrive at La Playa Cantina. Twenty minutes later, defendant arrived with a friend. Calderon asked defendant if he had the cocaine. Defendant responded that he did not, but that it would be arriving soon. Calderon then approached Perez, who was outside, and informed him that he did not have the cocaine, but that it was on its way. Perez left, but later returned. After the drugs arrived, Calderon brought a kilogram of cocaine to Perez. Calderon was then arrested.

¶ 16 Luis Sanchez testified that he that he is incarcerated on charges of unlawful delivery of a controlled substance and unlawful possession of a controlled substance with intent to deliver. Sanchez stated that he was given immunity if he testified, but that there was no agreement as to his sentence. Sanchez also acknowledged that he had been previously convicted of felony possession of cannabis for which he received probation. Sanchez testified that on July 27, 2011, defendant asked him for help in obtaining cocaine. Defendant and Sanchez went to a restaurant, the owner of which had cocaine. Sanchez and defendant, accompanied by a woman named Lucy and her husband, then met Calderon at La Playa Cantina to arrange a deal to sell the cocaine. Calderon discussed the deal with Lucy and her husband. After Sanchez left La Playa Cantina, defendant called him regarding the details of the transaction.

¶ 17 On July 28, 2011, defendant met Sanchez in Bolingbrook and drove him to La Playa

Cantina. While defendant was driving, Sanchez called Lucy's boyfriend to discuss the amount of cocaine that he and Lucy needed to bring to the restaurant. Lucy's boyfriend then spoke with defendant. When Sanchez and defendant arrived at La Playa Cantina, they went inside to discuss the drug transaction with Calderon. Subsequently, other people arrived with the drugs.

¶ 18 Officer Manuel Camuy of the Lombard police department testified that he and a colleague interviewed defendant at 12:13 p.m. on July 28, 2011. Camuy testified that after defendant was advised of his rights, he agreed to speak to the officers. Camuy testified that defendant explained that he was introduced to Calderon by a friend. Calderon wanted to purchase four kilograms of cocaine. Defendant informed Calderon that he would call his contact, Sanchez, who would be able to supply the cocaine. Defendant described himself as "the middleman" between Calderon and Sanchez. Calderon was to pay $29,000 per kilogram.

¶ 19 Camuy further testified that defendant told him that on July 27, 2011, at 8 p.m., he, Calderon, Sanchez, and four other individuals met at La Playa Cantina to discuss the drug transaction. Sanchez was to arrange for the four individuals to bring the cocaine so that Calderon could sell it to Perez. Defendant said that he would make $250 per kilogram as his payment for introducing Sanchez to Calderon. The plan was for the individuals to initially sell Perez two kilograms of cocaine. If all went well, they would bring Perez another two kilograms of cocaine. On July 28, 2011, at 7:30 a.m., defendant met with Sanchez, and defendant drove Sanchez to La Playa Cantina. Defendant was driving his blue Monte Carlo. When they arrived at La Playa Cantina, defendant and Sanchez went inside. Two men and two women, who were part of the drug transaction, arrived and entered the restaurant through the back door. One of the females was carrying a red bag. Although defendant did not see the cocaine, he was aware that those people had the cocaine with them.

¶ 20 Camuy testified that defendant also agreed to write out a statement to the police, which defendant wrote in Spanish and signed. Camuy translated the statement as follows: "I met Benny [*sic*] from the—from meeting Eduardo. Eduardo asked me if I knew anyone who sold cocaine. I told him that I would ask my friend, Junior. Junior gave me the number of El Guero. El Guero and I went to speak to the other people. The other people and I and El Greco went to see Benny [*sic*], and there they began to discuss and arrange to make—to do what they were going to do, and they were going to give me $250 for each one." Camuy agreed that the word "kilo" does not appear in the written statement.

¶ 21 Following Camuy's testimony, the state rested. The defense did not call any witnesses. Following closing arguments, the trial court read the instructions to the jury. The court told the jury that "[t]he law that applies to this case is stated in these instructions, and it is your duty to follow all of them." The instructions further provided, "[o]nly you are the judges of the believability of the witnesses and of the weight to be given to the testimony of each of them. In considering the testimony of any witness, you may take into account his ability and opportunity to observe, his memory, his manner while testifying, any interest, bias, or prejudice he may have, and the reasonableness of his testimony considered in the light of all the evidence in the case."

¶ 22 During deliberations, the jury sent the judge two notes. The first note asked the judge for defendant's written statement to be translated to English and to "confirm the signature [was] valid as [defendant's]" The judge responded to the note by telling the jury that it had received all the evidence that had been admitted, and instructed the jury to continue deliberating. The jury's second note asked for a transcript of Camuy's testimony. The judge informed the jury that the transcript would take 45 minutes to be prepared, and asked them to continue deliberating. After about four hours of deliberations, the jury found defendant guilty on both charges.

¶ 23 On October 30, 2012, defendant filed a motion for a new trial. The trial court denied defendant's motion. On December 10, 2012, the court sentenced defendant to two concurrent 16-year terms of imprisonment. This appeal followed.

¶ 24 II. ANALYSIS

¶ 25 On appeal, defendant raises a single contention. He asserts that the trial court erred when, during *voir dire*, it asked the prospective jurors, "Is there anyone who does not accept the principle that a police officer's testimony must be given the same weight as any other testimony, no more, nor no less simply because he or she is a police officer?" Defendant equates the trial court's inquiry with a jury instruction and argues that it was a misstatement of the law which deprived him of a fair trial.

¶ 26 Initially, we note that to preserve an issue for appeal, both a contemporaneous objection and a written posttrial motion are required. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). In this case, defendant did not object to the trial court's inquiry at the time it was made and he did not include this issue in his motion for a new trial. As such, we find that this issue has been forfeited. See *People v. Jones*, 235 Ill. App. 3d 342, 350 (1992). Defendant acknowledges his failure to raise this issue in the trial court, but argues that the trial court's action amounted to plain error. See Illinois Supreme Court Rule 615(a) (eff. Jan. 1, 1967). The plain-error doctrine allows a reviewing court to consider an unpreserved error in two instances: (1) where 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) where a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007); see also *People v.*

Herron, 215 Ill. 2d 167, 178-79 (2005). Under either prong of the plain-error doctrine, the burden of persuasion is on the defendant. *People v. Walker*, 232 Ill. 2d 113, 124 (2009). The first step in determining whether plain error exists is determining whether an error actually occurred. *People v. Thomas*, 2014 IL App (2d) 121203, ¶17; *People v. Downs*, 2014 IL App (2d) 121156, ¶ 21. Accordingly, we turn to whether defendant's claim constitutes error.

¶ 27 According to defendant the trial court's inquiry constituted a misstatement of the law because it "improperly instructed the jurors as to precisely how much weight it [*sic*] should give a police officer's testimony." The State responds that the question posed by the trial court in this case is similar to a trial court inquiring whether a prospective juror would be more likely to believe the testimony of a witness simply because the witness is a police officer. See *People v. Taylor*, 235 Ill. App. 3d 763, 764 (1992). As such, the State argues that the trial court's inquiry was not improper.

¶ 28 Under Illinois law, there is no presumption that a police officer's testimony is more credible than that of any other witness. *People v. Williams*, 228 Ill. App. 3d 981, 1005 (1992); *People v. Ford*, 113 Ill. App. 3d 659, 662 (1983). Rather, a police officer's testimony is to be evaluated in the same manner as that of any other witness. *Williams*, 228 Ill. App. 3d at 1005; *Ford*, 113 Ill. App. 3d at 662. While these principles may have been what the trial court intended to communicate to the prospective jurors, the words used by the trial court could be reasonably interpreted as conveying something different. Significantly, the trial court told the prospective jurors that a police officer's testimony shall be given "the same weight as any other testimony, no more, nor no less." In other words, the trial court's comments could be viewed as telling the prospective jurors precisely how much weight it should give a police officer's testimony. However, at a jury trial, it is uniquely the province of the jury to weigh the credibility

of each witness. *People v. Mejia*, 247 Ill. App. 3d 55, 62 (1993). Although the trial court conveyed this exact principle to the jurors via other comments and the instructions themselves, it seemingly contradicted the court's inquiry regarding the testimony of a police officer. Thus, we find that the trial court's inquiry was not only improper (see *Williams*, 228 Ill. App. 3d at 1005; *Ford*, 113 Ill. App. 3d at 662), it created confusion. Accordingly, we agree with defendant that the trial court's inquiry constituted error.

¶ 29 Defendant further insists that the trial court's inquiry amounted to plain error under both prongs of the plain-error doctrine. As noted above, under the first prong of the plain-error analysis, we examine the closeness of the evidence. *Piatkowski*, 225 Ill. 2d at 565; *Herron*, 215 Ill. 2d at 178-79. The defendant must establish that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him. *Piatkowski*, 225 Ill. 2d at 565; *Herron*, 215 Ill. 2d at 187. In determining whether the first prong of the plain-error doctrine has been satisfied, a court makes a " 'commonsense assessment' of the evidence within the context of the circumstances of the individual case." *People v. Adams*, 2012 IL 111168, ¶ 22 (quoting *People v. White*, 2011 IL 109689, ¶ 139).

¶ 30 Defendant insists that the evidence at trial was so closely balanced that the court's instruction "threatened to determine the outcome of the trial against defendant." Defendant notes that he was charged under an accountability theory and maintains that the only evidence that inculpated him was the testimony of his codefendants and Officer Camuy. Citing *People v. Steidl*, 177 Ill. 2d 239, 256 (1997), defendant asserts that where a verdict rests solely upon the credibility of witnesses at trial, the evidence is closely balanced.

¶ 31 Initially, we point out that defendant's reliance on *Steidl* is misplaced. *Steidl* concerned whether an attorney's failure to investigate amounted to incompetency of trial counsel. *Steidl*,

177 Ill. 2d at 256. The supreme court stated that whether a failure to investigate amounts to incompetency depends on the value of the evidence in the case. *Steidl*, 177 Ill. 2d at 256. The court then explained that the evidence in that case was closely balanced because no physical evidence linked the defendant to the crime scene and the defendant presented an alibi. *Steidl*, 177 Ill. 2d at 256. Here, in contrast, defendant did not present an alibi. In fact, defendant was apprehended at the crime scene, and he confessed to Camuy both orally and in writing.

¶ 32 Defendant claims that it appears that the jury had questions about the veracity of the alleged statements he made to Camuy as evidenced by the notes that the jurors sent to the judge as well as the fact that they took four hours to reach a verdict. However, the nature of the jury's deliberations is not itself indicative of closely balanced evidence. See *People v. Cotton*, 393 Ill. App. 3d 237, 260 (2009) (noting that the mere fact that the jury initially indicated that it could not reach a decision does not render the evidence closely balanced). Moreover, we find that it is just as likely that the jurors' notes merely support the notion that they wanted to review the contents of defendant's written statement and ensure that it was signed by defendant. In this regard, we note that the first note asked the judge for defendant's written statement to be translated to English and to "confirm the signature [was] valid as [defendant's]." The judge responded to the note by telling the jury that it had received all the evidence that had been admitted, and instructed the jury to continue deliberating. The jury's second note asked for a transcript of Camuy's testimony, which, we note, contained a translation of defendant's written statement. Camuy further testified that defendant signed the written statement.

¶ 33 Moreover, the testimony of the State's other witnesses was consistent with the oral and written statements defendant provided to Camuy. Fremgen testified that at about 7:48 a.m. on July 28, 2011, he was conducting surveillance of La Playa Cantina's parking lot when he

observed a blue Monte Carlo pull up to the restaurant. Two men, later identified as defendant and Sanchez, exited the car and entered the restaurant. At about 9:19 a.m., Alaimo observed two men and two women exit a vehicle and enter the restaurant. Alaimo noted that one of the women was carrying a white and red purse. Perez testified that at 9:29 a.m. on July 28, 2011, Calderon entered his car with a plastic bag and showed him what was represented to be cocaine. Perez then gave the "bust signal." Kelliher and Lizik helped execute a search warrant on La Playa Cantina shortly after 9:30 a.m. on July 28, 2014. Kelliher noted that defendant was found hiding inside a storage room at the restaurant. Lizik found a red purse containing three packages. Norris, a forensic scientist with Du Page County, testified that the package shown to Perez weighed 1,000 grams and contained cocaine. Norris also testified that one of the packages that was recovered from the purse weighed 999 grams and contained cocaine.

¶ 34 Sanchez testified that on July 27, 2011, defendant asked him for help in acquiring some cocaine. After finding a source, Sanchez, defendant, and two others met Calderon at La Playa Cantina to arrange the deal. The following day, defendant picked up Sanchez and the two men drove to La Playa Cantina. Once inside the restaurant, Calderon, defendant, and Sanchez discussed the transaction before other individuals arrived to deliver the drugs. Similarly, Calderon testified that he met with defendant on July 27, 2011, to arrange a transaction in which he would bring Calderon drugs to sell to Perez. Defendant spoke to numerous people whom Calderon did not know and informed him that those individuals would provide Calderon with the drugs to sell to Perez. The following morning, Calderon met defendant and a friend of defendant at La Playa Cantina. Calderon asked whether defendant had brought the cocaine, and defendant told Calderon that he had not, but that it would be arriving soon.

¶ 35 In short, given the testimony presented by the State at trial, which was consistent with claimant's oral and written statements acknowledging his role in the drug transaction, coupled with the fact that defendant was apprehended at the crime scene, we find that the evidence was not so closely balanced that the error alone severely threatened to tip the scales of justice against him.

¶ 36 We also reject defendant's claim that the trial court's inquiry arose to the level of plain error under the second-prong analysis. Our supreme court has equated the second prong of the plain-error analysis with structural error. *People v. Thompson*, 238 Ill. 2d 598, 613-14 (2010). "Structural error is a systemic error that erodes the integrity of the judicial process and undermines the fairness of the defendant's trial." *Downs*, 2014 IL App (2d) 121156, ¶ 31. As this court recently noted, the concept of structural error is "tightly circumscribed," having been recognized only where there is: (1) a complete denial of counsel; (2) a trial before a biased judge; (3) racial discrimination in the selection of a grand jury; (4) a denial of self-representation at trial; (5) a denial of a public trial; and (6) a defective reasonable-doubt instruction. *Downs*, 2014 IL App (2d) 121156, ¶ 31. In this case, the trial court's inquiry did not fall within any of these categories. Accordingly, we reject defendant's claim that the trial court's inquiry constituted plain error under second-prong analysis.

¶ 37 III. CONCLUSION

¶ 38 For the reasons set forth above, we affirm the judgment of the circuit court of Du Page County.

¶ 39 Affirmed.