2017 IL App (3d) 140661-U

Order filed August 2, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
	)	Peoria County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-14-0661
v.	)	Circuit No. 12-CF-910
	)	
TONY HARRIS,	)	Honorable
	)	Stephen Kouri,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Lytton and McDade concurred in the judgment.

ORDER

¶ 1 Held: During jury selection, the trial court erroneously failed to comply with Illinois Supreme Court Rule 431(b) (eff. Jul. 1, 2012). Based on the application of plain error, defendant is entitled to a new trial because the evidence was closely balanced.

¶ 2 Defendant was convicted of the offense of attempt first degree murder of a peace officer and aggravated discharge of a firearm stemming from a shooting which occurred on August 17, 2012. The trial judge sentenced defendant to an enhanced term of 55-years' imprisonment for attempt first degree murder of a peace officer to be served concurrently with a 30-year

imprisonment for aggravated discharge of a firearm. Defendant appeals both convictions by citing judicial errors in the jury selection process, ineffective assistance of counsel, and the unconstitutional nature of his sentence.

¶ 3 FACTS

¶ 4 On August 21, 2012, the State charged Tony Harris (defendant) by indictment with attempt first degree murder pursuant to section 9-1 of the Criminal Code of 1961 (720 ILCS 5/9-1(a)(1)), aggravated discharge of a firearm pursuant to section 24-1.2 of the Criminal Code of 1961 (720 ILCS 5/24-1.2(a)(3)), a class X felony, and aggravated unlawful use of a weapon pursuant to section 24-1.6 of the Criminal Code of 1961 (720 ILCS 5/24-1.6(a)(1)). At the time of occurrence, defendant was 17 years of age. Before trial, the State dismissed the aggravated unlawful use of a weapon charge.

¶ 5 A jury trial began on November 18, 2013. During *voir dire,* the court provided the following group admonishment to all potential jurors present in court:

> "In order to help you follow the law and evidence in the case as we proceed forward, I would like to go over with you a few basic principles that apply in each and every criminal case. First, under the law, the defendant is presumed innocent of the charges against him. This presumption remains with him throughout every stage of the trial and during your deliberations on a verdict. It is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty.
>
> Second, the State has the burden of proving the guilt of the defendant beyond a reasonable doubt. That burden remains with the State throughout the entire case.

Third, the defendant is not required to present evidence in his defense. He is not required to prove his innocence. He is entitled to rely on the presumption of innocence. This also means that he is not required to testify, and if he chooses not to do so, it cannot be used against him in any way."

¶ 6 Following the group admonition, Jean Lang, Judith Tomlinson, David Montgomery, and Becky Buchen were called to the jury box. The court provided further admonishments to this panel as follows:

"THE COURT: Do you accept and understand the principle that the defendant as he sits here today is presumed innocent of the charges against him? Do you all accept that?

MS. LANG: Yes.

MS. TOMLINSON: Yes.

MR. MONTGOMERY: Yes.

MS. BUCHEN: Yes.

THE COURT: Do you accept and understand the principle that before the defendant can be found guilty of any one of the charges, the State must prove the charge beyond a reasonable doubt? Do you all accept that?

MS. LANG: Yes.

MS. TOMLINSON: Yes.

MR. MONTGOMERY: Yes.

MS. BUCHEN: Yes.

THE COURT: Do you accept and understand the principle that the defendant is not required to offer any evidence in his defense? He can simply stand on the presumption of innocence?

MS. LANG: Yes.

MS. TOMLINSON: Yes.

MR. MONTGOMERY: Yes.

MS. BUCHEN: Yes.

THE COURT: And, lastly, do you accept and understand the principle that the defendant is not required to testify, and if he chooses not to do so, it cannot be used against him in any way? Do you all accept that?

MS. LANG: Yes.

MS. TOMLINSON: Yes.

MR. MONTGOMERY: Yes.

MS. BUCHEN: Yes."

Following additional questions, Ms. Buchen and Ms. Tomlinson were excused by defense counsel.

¶ 7 Next, Margaret Goulden and Ruth Kampa were called to the jury box and the court asked the following questions:

"THE COURT: Do you accept and understand the principle that the defendant as he sits here today is presumed innocent? Do you both accept that?

MS. GOULDEN: Yes.

MS. KAMPA: Yes.

THE COURT: Do you accept and understand the principle that before the defendant can be found guilty of any one of the charges, the State must prove the charge beyond a reasonable doubt?

MS. GOULDEN: Yes.

MS. KAMPA: Yes.

THE COURT: Do you accept and understand the principle that the defendant is not required to offer any evidence in his defense? He can simply stand on the presumption of innocence?

MS. GOULDEN: Yes.

MS. KAMPA: Yes.

THE COURT: And, lastly, do you accept and understand the principle that the defendant is not required to testify, and if he chooses not to do so, it cannot be used against him in any way?

MS. GOULDEN: Yes.

MS. KAMPA: Yes."

Following additional questions, Ms. Goulden was excused by defense counsel, and juror Jose Sanchez was accepted by both sides.

¶ 8 Next, Willita Jackson, Annette Ford, Erin Noon, and William Hurst were called forward. The court asked this panel the following questions:

"THE COURT: Do you accept and understand the principle that the defendant as he sits here today is presumed innocent of the charges against him?

MS. JACKSON: Yes.

MS. FORD: Yes.

MS. NOON: Yes.

MR. HURST: Yes.

THE COURT: Do you accept and understand the principle that before the defendant can be found guilty of any one of the charges, the State must prove the charge beyond a reasonable doubt?

MS. JACKSON: Yes.

MS. FORD: Yes.

MS. NOON: Yes.

MR. HURST: Yes.

THE COURT: Do you accept and understand the principle that the defendant is not required to offer any evidence in his defense? He can simply stand on the presumption of innocence?

MS. JACKSON: Yes.

MS. FORD: Yes.

MS. NOON: Yes.

MR. HURST: Yes.

THE COURT: And, lastly, do you accept and understand the principle that the defendant is not required to testify, and if he chooses not to do so, it cannot be used against him [sic] any way? Do you all accept that?

MS. JACKSON: Yes.

MS. FORD: Yes.

MS. NOON: Yes.

MR. HURST: Yes."

Following additional questions, Mr. Hurst was excused by defense counsel and juror Sharon McGinty was accepted by both sides.

¶ 9 Next, Joshua Neal, George Richardson, Leon Gatlin, and Tommy Briggs were called forward. The court asked this panel the following questions:

"THE COURT: Do you accept and understand the principle that the defendant as he sits here today is presumed innocent of the charges against him? Do you both -- do you all accept that?

MR. NEAL: Yes.

MR. RICHARDSON: Yes.

MR. GATLIN: Yes.

MR. BRIGGS: Yes.

THE COURT: Do you accept and understand the principle that before the defendant can be found guilty, the State must prove the charge beyond a reasonable doubt?

MR. NEAL: Yes.

MR. RICHARDSON: Yes.

MR. GATLIN: Yes.

MR. BRIGGS: Yes.

THE COURT: Do you accept and understand the principle that the defendant is not required to offer any evidence in his defense? He can simply stand on the presumption of innocence?

MR. NEAL: Yes.

MR. RICHARDSON: Yes.

MR. GATLIN: Yes.

MR. BRIGGS: Yes.

THE COURT: And, lastly, do you accept and understand the principle that the defendant is not required to testify, and if he chooses not to do so, it cannot be used against him in any way?

MR. NEAL: Yes.

MR. RICHARDSON: Yes.

MR. GATLIN: Yes.

MR. BRIGGS: Yes."

Following further questioning, Mr. Gatlin was excused by the State and juror Robert Williamson was accepted by both sides.

¶ 10 Following opening arguments, the State called Whitney Parrott as a witness. During her testimony, Parrott explained that she was with defendant, Auston Wood, and Alexis Reeser at Logan Park in Peoria, Illinois on the evening of August 17, 2012. According to Parrott, Wood placed Wood's handgun in Parrott's purse and all three friends left the park and traveled to the Food Market (the store) located on the corner of Starr and Arago Streets in Peoria.

¶ 11 Once the group reached the side of the store, a police officer pulled up in a squad car and attempted to speak with Wood. Wood responded by running away from the officer's stationary squad car. The officer left the squad car and pursued Wood on foot. At this time, defendant removed the handgun from Parrott's purse and also took off running in the same direction. Shortly after defendant left with the handgun, Parrott heard three gunshots before Parrott entered the store.

¶ 12 Parrott identified herself in a photograph standing inside the store with defendant. The photograph was taken from the store's security camera of the store's interior. Parrott advised the jury that she was the person by the cash register and identified defendant as the individual wearing the white hat. Parrott testified that she left the store with defendant and asked defendant if he heard the gunshots because Parrott believed the police were shooting at Wood. In response to her question about the gunfire, defendant purportedly replied: "That was me."

¶ 13 During cross-examination, Parrott denied being Wood's girlfriend at the time or having a sexual relationship with Wood. Parrott also admitted that she initially lied during her interview with police and told them she did not know how the gun got in her purse.

¶ 14 Officer Logan, a police officer for the city of Peoria, testified that at 9:41 p.m. on August 17, 2012, he drove past the store on the corner of Starr and Arago Streets. At that location, Logan recognized Wood, walking in front of the store. Logan knew Wood was wanted in connection with an unrelated incident. Consequently, Logan pulled his squad car up near the store in order to speak to Wood.

¶ 15 As Logan approached the store, he also noticed defendant walking at the front of the store. Defendant was wearing a black T-shirt and a white cap. Logan said he was familiar with defendant before the incident.

¶ 16 Logan testified that he called out to Wood. Wood looked at the officer and raised his shirt to signify Wood did not have any weapons in his waistband. Logan exited the car to talk to Wood and Wood immediately took off running. Logan gave chase south down Arago Street but lost sight of Wood.

¶ 17 After giving up the chase, Logan began walking back to the store. While returning to the store, Logan heard three gunshots and saw three muzzle flashes.[1] Consequently, Logan dove to the ground and made his way behind a tree because he believed the gunshots were being fired at him. Logan testified the shots came from the rear yard of 1304 South Arago Street. According to Logan, the shots were fired from the northeast corner of the home. Due to darkness, Logan could not see who fired the shots.

¶ 18 Next, Logan walked the jury through the contents of the store's surveillance video. Logan identified Parrott inside the store near the cash register. The video showed Logan's squad car pulling into the parking lot next to the store and Logan exiting the vehicle to talk to Wood.

¶ 19 When asked about the muzzle flashes, Logan responded that he saw three shots and believed the shots were fired in his direction because he could see the muzzle flashes, indicating to Logan that the shooter stood on the opposite side of the gun. Logan said the muzzle flashes went off at about chest level. Logan admitted to merely believing the shots were fired in his direction. Logan did not hear the sound of any bullets striking the garage or trees around him and did not hear any whizzing of a bullet going past.

¶ 20 Logan later assisted other officers in searching the area for bullet strikes, but found no damage to any structures. However, the other officers did locate two shell casings on the grass and one shell casing on the steps of a side porch at the home on 1304 Arago Street.

¶ 21 Officer Ellis, a police officer for the city of Peoria, testified he photographed and collected the physical evidence from the crime scene following the shooting. Ellis photographed a .380 Hi-Point firearm lying on the ground next to a dumpster in the west side parking lot of the

[1]While giving his testimony, Logan appears to have been standing before the jury and using a geographical exhibit of Starr and Arago Streets to explain to the jury how the chase progressed. While pointing at the exhibit, Logan stated: "As I was walking and to about right here where the end of the tree covering, there were three gunshots fired from this corner behind this first house in my direction. I saw three muzzle flashes as I was right about here (Indicating)."

store. According to Ellis, this firearm was not rusted, tarnished, and did not have the appearance that the firearm had been in the parking lot for a lengthy period of time. Ellis described gouge marks in the surface of the firearm that appeared to be recent.

¶ 22 Ellis testified that he collected the firearm, one fired shell casing discovered on the top landing to the stairs at 1304 Arago Street, and two fired casings that Ellis discovered on the concrete at the base of the same stairs. Ellis, along with other officers, also searched area buildings for projectile strikes but found nothing.

¶ 23 Dustin Johnson, a forensic scientist for the Illinois State Police, specialized in firearms identification. With laboratory testing, Johnson confirmed the three fired .380 auto caliber shell casings were fired from the firearm recovered by law enforcement on the night of the shooting.

¶ 24 Keith McDaniel, a Peoria police detective, testified that on August 19, 2012, defendant was present at the Peoria police station, but refused McDaniel's request for an interview. McDaniel testified that he was the lead detective assigned to this case.

¶ 25 After defendant refused to speak to McDaniel, McDaniel handcuffed defendant and began escorting defendant down the hallway. According to McDaniel, defendant then smirked at McDaniel and spontaneously stated "It was a easy shot. If I wanted to kill him, I could have killed him." McDaniel admitted he was the only person present when defendant volunteered this incriminating statement. Consequently, McDaniel immediately wrote down defendant's exact words in a police report.

¶ 26 Reginald Anderson, who was in custody at the Peoria County Jail, testified for the prosecution in exchange for a promise to be allowed to enter an open guilty plea to a felony retail theft offense. During his testimony, Anderson acknowledged his prior convictions for aggravated battery, burglary, residential burglary, and obstructing justice.

¶ 27 During his testimony before the jury, Anderson stated that on September 16, 2013, he overheard a conversation between defendant and defendant's friend. This conversation took place while Anderson, defendant, and defendant's friend were seated on a cement bench in the "holding area" at the courthouse. Anderson said that defendant's friend asked defendant what he was in for and defendant said "Man, busting at the police." According to Anderson, defendant told his friend that defendant was by "old girl crib" where the "old girl" and her mother resided. After defendant fired shots at the police, defendant told the friend he tossed the gun and ran into the store to grab a soda and came back out to play it off. Defendant also stated he was going to "F them, F them good Semarios up***When I see Auston, I'm going to pop his a**."

¶ 28 Eugene Haywood testified for the defense. At the time of his testimony, Haywood was incarcerated for aggravated possession of a firearm. Haywood also informed the jury that he had a murder conviction in June of 2013.[2]

¶ 29 During his testimony, Haywood described defendant as a lifelong friend. Haywood also stated that defendant and Wood were friends and hung out on a daily basis. According to Haywood, in September of 2013, he and defendant occupied the same cell. Haywood testified that defendant told Haywood "Auston bogus for putting me in this situation and going downtown telling people that I tried to kill the police."

¶ 30 Lakeisha Davis testified that she and her daughter, Deshaya Diggins, lived at 1304 South Arago Street in Peoria at the time of the shooting. According to Davis, Diggins has a child with Wood. Davis stated that her house is located approximately five footsteps from the store. When the shooting occurred, Davis was inside the residence and could not tell what direction the gunshots were coming from.

[2]Haywood did not have a murder conviction.

¶ 31 Deshaya Diggins testified that she lived at 1304 South Arago Street on the date of the shooting. Diggins invited Wood to the house for dinner by a text message and Wood responded that he would come over that night. Within seconds of receiving Wood's message Diggins heard gunshots. Diggins indicated that she did not see Wood that night and had no communications with him after she heard the gunshots.

¶ 32 Defendant testified that on August 17, 2012, defendant and Wood had a telephone conversation that resulted in a dispute over $2500 defendant gave Wood to purchase drugs. Following the call, defendant stated that he and Wood "had problems with each other" and that defendant wanted to fight Wood.

¶ 33 Later that night, defendant, Wood, Parrott, and Reeser were playing basketball at Logan Park. Defendant and Wood had another disagreement with each other. During this confrontation, Wood showed defendant a .380 caliber handgun Wood had tucked into Wood's waistband. After the verbal dispute with defendant, Wood placed the gun in Parrott's purse. Soon, a large group of individuals began to assemble and move toward Starr Street.

¶ 34 According to defendant, when defendant was close to the store, defendant observed Officer Logan pull into the store parking lot in a squad car. Moments later, he saw Logan leave the squad car and take off running after someone. Defendant did not see who Logan was chasing, but when Parrott told defendant that Logan was chasing Wood, defendant removed the handgun from Parrott's purse. According to defendant's testimony, defendant intended to hide the gun under a porch at 1304 South Arago Street just in case the police searched people in the area. However, before defendant could hide the handgun, Wood came running around the house. When the men met, defendant passed the handgun to Wood. Wood handed defendant the $2500 he owed defendant.

¶ 35 According to defendant's version of the events, after this exchange, defendant began to walk away. While stuffing the money into his pockets, defendant heard three gunshots behind him. After the shots were fired, defendant ran into the store. Defendant removed his white hat because he was hot. After a few minutes, defendant left the store. Regarding who fired the gun, the following exchange between the prosecutor and defendant took place:

Q "And, yet, you knew that it was Auston [Wood] who had shot the officer, right?

A Man. See, if you look at the evidence, the officer was never shot at. He [Wood] shot in the air.

Q That's not my question. My question is you knew that officer, that Auston [Wood] was the one that did this, right?

A Yes, Ma'am."

¶ 36 On redirect, the following exchange between defendant and his attorney:

Q Do you know – do you have any personal knowledge of how Auston Wood shot the gun by observation?

A No sir. Later down the line when me and him was on the phone arguing --

Q Well everything you know is just from what people told you, is that correct?

A Yes, sir.

Q But nothing else by observation as you know how the three shots were shot --

A No, sir."

¶ 37 In addition, defendant addressed the testimony of the State's witnesses during direct examination. Defendant denied making any statement to McDaniel as they walked down the hallway at the police station. Defendant addressed Haywood's testimony by stating that defendant spoke to Haywood about how defendant felt he was set up in this case. Contrary to

Anderson's testimony, defendant asserted Haywood would not have a reason to ask defendant why defendant was in jail during this conversation, since defendant and Haywood spent time together as cell mates before the alleged conversation.

¶ 38 Ivan Ellis was the last witness to testify for the defense. At the time of his testimony, Ellis was in federal custody and had recently plead guilty to conspiracy to commit drug trafficking. Ellis testified that he, defendant, Wood, Diggins, and Parrott were friends back on August 17, 2012. At approximately three or four o'clock in the afternoon on August 17, 2012, Ellis saw Wood hanging out with his "girlfriend," Diggins, on Starr Street. Ellis testified Wood also had an intimate relationship with Parrott at that time.

¶ 39 According to Ellis, he was walking to the store around nine o'clock when he heard three gunshots. Later, at approximately one or two o'clock in the morning, Ellis met defendant at "Tony Mack's" house to collect $100 defendant owed him. While at the Mack's home, Ellis overheard defendant place a phone call to Wood. According to Ellis, Wood was at 1304 South Arago Street at the time of this call. Ellis testified he had visited the home at 1304 South Arago Street many times before because Diggins styled Ellis's hair. The defense rested at the conclusion of Ellis's testimony.

¶ 40 Following closing arguments, instructions from the court, and deliberations, the jury found defendant guilty of attempt first degree murder and aggravated discharge of a firearm. The jury also found defendant personally discharged a firearm at the time of the commission of the offense. On December 20, 2013, defendant filed a motion for judgment N.O.V. or, in the alternative, a motion for a new trial. The trial court denied defendant's motion.

¶ 41 At the sentencing hearing, the State referenced defendant's 2011 criminal damage and criminal trespass charge, which resulted in a term of felony probation for defendant. Defendant

violated his probation for possessing a semi-automatic rifle and was re-sentenced to serve time in the Department of Corrections. According to the State, defendant committed the instant offenses just 33 days after his release from the Department of Corrections. The State further referenced the teenaged defendant's violent tendencies at school, resulting in multiple out-of-school suspensions. Based on defendant's character, criminal history, and the facts of this case, the State believed defendant deserved "something much greater" than the minimum sentence.

¶ 42 Defense counsel argued the evidence presented by the State failed to prove the officer was in any danger because there is no evidence that any shots were fired in his direction. Further, defense counsel pleaded with the court to consider defendant's youth when viewing his criminal history. Therefore, defense counsel asked the court to sentence defendant to the statutory minimum.

¶ 43 Before the trial court announced the sentence, the trial judge stated:

> "There is a temptation on my part to just max you out, to just max you out, because there's a strong argument for that. There just is a strong argument for that; but I factored in the matters in mitigation, including your age. The penalty has to be severe."
>
> "Mr. Harris has -- if I'm doing my math right -- approximately 55 years left in his life expectancy. I'm going to sentence the defendant, including the add-on, to 55 years, Illinois Department of Corrections."

¶ 44 In addition to the 55-year sentence for the attempt murder charge, the court also imposed a concurrent 30-year sentence for the offense of aggravated discharge of a firearm, as alleged in count II. Defendant filed a motion to reconsider the sentence on January 9, 2014. The record indicates that the trial court did not deny defendant's motion until August 25, 2014. Defendant filed a notice of appeal.

¶ 45 ANALYSIS

¶ 46 Defendant requests a new trial on two grounds. Defendant argues the trial court violated Illinois Supreme Court Rule 431(b) during the jury selection process warranting a new trial. In addition, defendant claims he received ineffective assistance of counsel mandating another trial on this basis as well. Alternatively, if this court denies defendant's request for a new trial, defendant requests this court to reduce his punishment because the mandatory 20-year firearm enhancement imposed by the trial court violates the eighth amendment and the proportionate penalties clause of the Illinois Constitution.

¶ 47 The State submits defendant has forfeited argument of any judicial errors that may have occurred during jury selection and has failed to show plain error excuses forfeiture in this case. Additionally, the State argues defendant received effective assistance of counsel, and submits the 20-year firearm enhancement does not violate the eighth amendment or the proportionate penalties clause.

¶ 48 I. Violation of Supreme Court Rule 431(b)

¶ 49 Defendant contends the trial court committed error by failing to strictly comply with the requirements of *People v. Zehr*, 103 Ill. 2d 472 (2011), as codified in Illinois Supreme Court Rule 431(b). Ill. S. Ct. R. 431(b) (eff. Jul. 1, 2012). Recognizing forfeiture may apply, defendant argues plain error is present in this record.

¶ 50 Rule 431(b) requires the trial court to ask each potential juror whether they accept and understand "(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 if a defendant does not testify it cannot be held against him or her; however,

no inquiry of a prospective juror shall be made into the defendant's decision not to testify when the defendant objects." Ill. S. Ct. R. 431(b) (eff. Jul. 1, 2012). Rule 431(b) mandates "a specific question and response process." *People v. Thomas*, 2015 IL App (3d) 130078-U, ¶ 25; *People v. Wilmington*, 2013 IL 112938, ¶ 32 (quoting *People v. Thompson*, 238 Ill. 2d 598, 607 (2010)).

¶ 51 In this case, defendant submits the first prong of plain error is present. Defendant argues evidence presented by both sides in this case was closely balanced.[3] Plain error occurs when "(1) a clear or obvious error occured 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." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007); Ill. S. Ct. R. 615(a) (eff. 1963). A trial court's compliance with Illinois Supreme Court Rule 431(b) is reviewed *de novo*. *Thompson*, 238 Ill. 2d at 606.

¶ 52 The record reveals that the trial court did not follow the mandated question and answer process in that the trial judge, on several occasions, asked whether the jurors accepted certain *Zehr* principles without ascertaining whether each juror understood the principles. Therefore, a clear and obvious error occurred in this case. The next question before this court is whether the evidence presented by the parties was closely balanced. The State contends the evidence was not closely balanced and concludes plain error does not apply.

¶ 53 Recently, our supreme court in *People v. Sebby*, 2017 IL 119445, held that Rule 431(b) violations are cognizable under the first prong of plain error doctrine following precedent set forth by *Wilmington* and *Belknap*. *Wilmington*, 2013 IL 112938; *People v. Belknap*, 2014 IL

[3]We note that defendant was also convicted of aggravated discharge of a firearm, but defendant's brief fails to challenge the closeness of evidence as to this charge. Therefore, we decline to review this issue.

117094. Further, the *Sebby* court held that under *Herron* and *Piatowski*, defendants are entitled to relief from clear Rule 431(b) violations if they demonstrate that the evidence was closely balanced. *Id*., *Sebby*, 2017 IL 119445, ¶ 64; *People v. Herron*, 215 Ill. 2d 167 (2005); *Piatowski*, 225 Ill. 2d 551.

¶ 54 As the court observed in *Sebby*, the issue before this court similarly "does not involve the sufficiency of close evidence but rather the closeness of sufficient evidence." *Sebby*, 2017 IL 119445, ¶ 60; See *Piatowski*, 225 Ill. 2d at 566. When determining whether the evidence presented at trial was closely balanced, reviewing courts must "evaluate the totality of the evidence and conduct a qualitative, commonsense assessment of it within the context of the case." *Sebby*, 2017 IL 119445, ¶53; *Belknap*, 2014 IL 117094, ¶¶ 52-53. Thus, our inquiry necessarily involves "an assessment of the evidence on the elements of the charged offense or offenses, along with any evidence regarding the witnesses' credibility." *Id*. In this case, defendant was charged with attempt first degree murder under sections 9-1(a)(1) and 8-4(a) of the Criminal Code of 1961. 720 ILCS 5/9-1(a)(1) (West 2012);720 ILCS 5/8-4(a) (West 2012). Accordingly, the State had to prove that defendant took a substantial step towards the commission of first degree murder. The State's theory was based on evidence indicating defendant personally discharged the three gunshots while aiming the weapon toward Officer Logan. Hence, the State had the burden to first establish defendant was, in fact, the actual gunman that discharged the weapon. Next, the State had the burden of proof to establish defendant acted with the intent to kill or do great bodily harm to a police officer. Both issues of identity and intent were subject to conflicting evidence at trial.

¶ 55 Based on the testimony of multiple witnesses for both the State and defense, it was undisputed that three gunshots were fired in close proximity to Officer Logan, and that three

shell casings and a firearm were recovered near 1304 South Arago Street. In addition, it is undisputed that the shell casings were consistent with the type of weapon discovered. Further, it is undisputed that Wood placed the handgun in Parrott's purse, and that defendant removed the handgun after Wood ran away from Logan.

¶ 56 However, two issues were highly disputed in this case. First, the identity of the gunman was subject to dispute. Second, whether the gunman intended to cause serious harm to Officer Logan or merely fired the weapon into the air without taking aim at the officer was also at issue.

¶ 57 Before determining whether the evidence on either issue was closely balanced, a broad overview of the testimony is appropriate at this point in the analysis. It is undisputed Officer Logan did not see the shooter and there was no eyewitness that could place the gun in defendant's hand. Consequently, the State's evidence that defendant was the gunman was based solely on the incriminating statements defendant allegedly made to three State witnesses. First, Parrott told the jury that defendant told her that he fired the shots. Second, McDaniel told the jury that defendant told him: "It was a easy shot. If I wanted to kill him, I could have killed him." Third, Anderson testified about a third incriminating statement by defendant while in custody for this offense. However, each one of the three witnesses that told the jury about defendant's incriminating statements had credibility issues.

¶ 58 All three of the State's witnesses that advised the jury defendant admitted he was involved in the shooting had credibility issues. For example, Parrott admitted, during her testimony, that she provided an initial false statement to the police when she told the officer she did not know how the gun defendant removed from her purse had originally been placed in her purse. Next, McDaniel had a direct interest in the outcome of the trial since he was the lead detective assigned to solve a serious crime against a fellow officer. Finally, Anderson was a

jailhouse informant with an extensive criminal history, including aggravated battery, burglary, residential burglary, and obstructing justice.

¶ 59 The defense put on evidence that was in direct conflict with the testimony of the State's witnesses concerning defendant's incriminating admissions. During his testimony, defendant denied he discharged the gun after removing it from Wood's purse. Although defendant did not see who the shooter was, defendant explained during cross-examination that the evidence supported the view that Wood discharged his own gun into the air. Defendant also denied making any statement to McDaniel or making any statement in Anderson's presence admitting defendant was shooting at the police.

¶ 60 The defense also presented the testimony of Eugene Haywood, which contradicted Anderson's account of the conversation between defendant and Haywood. Haywood testified that during a conversation with defendant, defendant told Haywood that "Auston [was] bogus for putting me in this situation and going downtown telling people that I tried to kill the police."

¶ 61 Wood did not testify in this case to contradict defendant's testimony about passing the gun to Wood before the three shots were fired by someone other than defendant. Hence, the evidence was closely balanced due to a credibility contest similar to that involved in *Sebby*. If the jury believed the State's witnesses about defendant's incriminating statements, the evidence would be sufficient to support defendant's conviction. On the other hand, if the jury found defendant to be a credible witness, his testimony negated the State's evidence and would render the evidence insufficient to support defendant's conviction on the issue of identity. Consequently, we conclude the evidence concerning the identity of the gunman involves a pure contest of credibility and is closely balanced.

¶ 62 Next, we consider whether the issue of intent was also closely balanced. Viewing the evidence in the light most favorable to the State, Logan had a rational basis to conclude the projectiles were aimed in his direction based on the muzzle flash. However, the physical evidence does not corroborate Logan's perception and weakens his conclusion because no bullet strikes were located in the area where Logan took cover. Further, without objection, defendant testified that the shooter fired the shots into the air, not at Logan. The evidence of intent to harm can also be described as very skeletal.

¶ 63 Based on the recent decision issued by our supreme court in *Sebby*, we are compelled to conclude, due to the closely balanced evidence of identity and intent, that this defendant is entitled to a new trial based on plain error resulting from the trial court's lack of compliance with Rule 431(b). Further, as a precursor to remand, we find when viewing the evidence presented in the light most favorable to the State, that the State presented sufficient evidence to obtain convictions on the charges levied.

¶ 64 II. Ineffective Assistance of Counsel

¶ 65 In the interest of providing a thorough analysis to address all errors arising during the guilt and innocence phase of this proceeding, we will next address defendant's contention that he is entitled to a new trial due to the ineffective assistance of trial counsel.

¶ 66 It is well established that accused persons are guaranteed the assistance of competent counsel for their defense. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8; *Strickland v. Washington*, 466 U.S. 668, 685-686 (1984). In order to establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 669. The facts surrounding

defendant's claim are undisputed, thus our standard of review concerning the ultimate legal issue of whether counsel's actions support an ineffective assistance claim is *de novo*. *People v. Nowicki*, 385 Ill. App. 3d 53, 81 (2008).

¶ 67 Defendant first alleges trial counsel's ineffectiveness by claiming defense counsel should have corrected Haywood's false statement that he had been convicted of murder. Defendant claims Haywood's statement damaged Haywood's credibility to the jury and prejudiced defendant.

¶ 68 We note that defendant must show a reasonable probability that but for counsel's error, the result of the proceeding would have been different. *People v. Albanese*, 104 Ill. 2d 504, 525 (1984). A reasonable probability denotes facts sufficient to undermine confidence in the outcome of the case. *Strickland* at 694. In this case, defendant's prejudice argument fails to demonstrate such reasonable probability. First, Haywood is a jailhouse informant and his testimony is already subject to great scrutiny. Further, Haywood's statements that he and defendant were "lifelong friends" and that he was currently incarcerated for aggravated possession of a firearm certainly did as much to undermine Haywood's credibility as his statement regarding the murder conviction. These statements, coupled with the other evidence presented, render any potential error in failing to correct Haywood's assertion harmless.

¶ 69 Moreover, defendant's contention that counsel's failure to object to the State's improper argument constituted ineffective assistance of counsel is misplaced. Defendant takes issue with trial counsel's failure to object to the State's statement: "He said he saw the muzzle flashes. Ladies and gentlemen, I don't know if any of you are familiar with firearms, but use your common sense. The muzzle flash is what comes out of the end of the barrel. You don't see that unless the barrel is pointing at you," during closing argument. We believe the State based this

statement on Logan's testimony that he believed the shots were fired in his direction because he could see the muzzle flashes, which could indicate that the shooter stood on the opposite side of the gun. Prosecutors are permitted to comment on the evidence and on any fair, reasonable inferences it yields. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). Therefore, counsel was not ineffective for failing to object to the State's statement that merely summarized Officer Logan's perception of the events on the night of the shooting.

¶ 70 III. Firearm Enhancement

¶ 71 Lastly, defendant argues the mandatory 20-year firearm enhancement added to his sentence was unconstitutional because the statute required the trial judge sentence defendant to a *de facto* life sentence. Further, defendant argues the trial judge abused his discretion because he failed to consider mitigating factors at sentencing, and that upon remand, the case should be heard before a different judge.

¶ 72 Having determined defendant is entitled to a new trial, we will not address the sentencing issue raised on appeal.

¶ 73 CONCLUSION

¶ 74 The judgment of the circuit court of Peoria County is reversed.

¶ 75 Reversed.