2013 IL App (5th) 110188-U

NO. 5-11-0188

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 09-CF-1163
	)	
ELIJAH BRANCH,	)	Honorable
	)	John Baricevic,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WEXSTTEN delivered the judgment of the court.
Justices Welch and Goldenhersh concurred in the judgment.

ORDER

¶ 1 *Held*: None of the defendant's forfeited claims of error warranted review under the plain-error doctrine, and although the trial court should not have provided the jury with exhibits that were not admitted into evidence, doing so did not require reversal of the defendant's conviction.

¶ 2 A St. Clair County jury found the defendant, Elijah Branch, guilty of first-degree murder (720 ILCS 5/9-1(a)(1) (West 2008)). On appeal, the defendant raises several issues in support of his argument that we should reverse his conviction and remand for a new trial. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 In October 2009, the defendant was charged with first-degree murder for the shooting death of Michael Williams of East St. Louis. In February 2011, the cause proceeded to a jury trial where the State's evidence established the following.

¶ 5 On Monday, September 21, 2009, Williams, his girlfriend, Latoya Stewart, and her

pregnant sister, Kenisha Walton, were sitting in a black Kia Optima in the parking lot of the Alpha Plaza apartment complex on Wimmer Place in East St. Louis. Williams was in the driver's seat, Stewart was in the front-passenger's seat, and Walton was in the backseat. There were 10 to 20 people socializing outside the apartment complex at the time.

¶ 6 At approximately 1:30 a.m., a silver Mazda pulled into the parking lot and parked directly alongside the Kia. The Mazda was occupied by the defendant, the defendant's cousin, Royneiss Dugan, the defendant's girlfriend, Christine Weaver, and Weaver's friend, Latesha Jamison. The defendant was driving with Weaver beside him, and Dugan was in the backseat with Jamison.

¶ 7 Moments later, the defendant and Dugan got out of the Mazda, and Walton and Stewart saw that the defendant had a .38-caliber revolver in the front of his pants. When Walton told Williams that the defendant was armed, Williams stated that he wanted to leave and put the Kia in reverse. As the Kia was backing out, the defendant called over indicating that he wanted to talk to Williams. In response, Williams stated that he was going to the store and would be right back. At that point, the defendant approached the Kia and shot Williams two times through the driver's-side window. One of the bullets struck Williams in the chest and the other went through his left arm. He was nevertheless able to drive out of the parking lot and proceed up an adjacent street for several blocks before crashing into a chainlink fence. After reentering the Mazda and lighting a cigarette, the defendant also drove away. Williams died at the scene of the crash from internal bleeding resulting from the gunshot wound to his chest; a homicide investigation ensued, and the defendant soon became the primary suspect.

¶ 8 When the police later interviewed the defendant about Williams's death, the defendant acknowledged that he had been the driver of the silver Mazda on the morning in question and that Dugan, Weaver, and Jamison had been with him. He indicated, however, that they had

only gone to the apartment complex to "drop [Dugan] off."

¶ 9 At trial, the defendant did not testify on his own behalf, and Weaver was the sole witness for the defense. Weaver testified that she, Jamison, Dugan, and the defendant had been at the apartment complex on the morning in question, because Dugan's girlfriend lived there, and they were dropping him off at her place. Weaver and Jamison were both "quite drunk" at the time. Weaver testified that soon after getting out of the Mazda, Dugan had returned and tapped on the driver's-side window to get the defendant's attention. In response, the defendant exited the car, and Weaver subsequently heard a gunshot. Weaver stated that after hearing the shot, she had looked out and seen "about four or five other people" standing by Dugan and the defendant. She also noticed that a car had pulled up and stopped behind the Mazda. "[M]aybe another minute or two later," Weaver saw that the car that had pulled up was "driving off." She then heard a second gunshot. Thereafter, the defendant and Dugan got back into the Mazda, and they left. Weaver testified that she did not know who had fired the shots she heard, but she indicated that the defendant did not have a gun in his possession on the morning in question.

¶ 10 In closing arguments, the State emphasized that four of its witnesses–Stewart, Walton, Cynthia Wilson, and her daughter, Elizabeth Wilson–had identified the defendant as the driver of the Mazda who had shot and killed Williams. Stating that "it was the driver who was the shooter," the State further emphasized that Weaver, Jamison, and the defendant had confirmed that they had been at the apartment complex with Dugan on the morning in question and that the defendant had been driving the Mazda. The State also reminded the jury that the defendant had been described as being a "larger man" with "a low haircut," while Dugan had been described as being smaller with dreadlocks.

¶ 11 Arguing that the police had failed to adequately investigate the events that led to Williams's murder and were "trying to pin [it] on [the defendant]," defense counsel suggested

that Dugan might have been the one who had actually fired the shots into the Kia. Emphasizing that Stewart and the Wilsons had been unable to identify the defendant from a photographic line-up they had been shown after the shooting, defense counsel further suggested that the State's eyewitnesses had conspired to wrongly convict the defendant.

¶ 12 On February 17, 2011, after deliberating for approximately 10 hours, the jury returned its verdict finding the defendant guilty of first-degree murder. At one point, after sending the trial court a note indicating that it was deadlocked, the jury was instructed to continue to deliberate. See *People v. Prim*, 53 Ill. 2d 62 (1972). Notably, defense counsel filed a posttrial motion alleging that the defendant was entitled to a new trial because the defense was improperly prohibited from "mentioning or questioning witnesses about a .45[-]caliber handgun that was uncovered during the course of the investigation," the trial court erroneously provided the deliberating jury with a transcript of Walton's testimony, the trial court erroneously provided the deliberating jury with demonstrative exhibits that had not been admitted into evidence, and "multiple witnesses for the prosecution gathered and corroborated testimony with other witnesses."

¶ 13 On March 31, 2011, the trial court denied the defendant's motion for a new trial and sentenced him to serve a 33-year term of imprisonment. On April 28, 2011, the defendant filed a timely notice of appeal.

¶ 14 DISCUSSION

¶ 15 On appeal, the defendant argues: (1) the State improperly introduced evidence that his photograph was already in a police database when the investigation into Williams's death commenced; (2) the State improperly introduced evidence suggesting that he possessed a gun 3½ weeks before Williams was shot and killed; (3) the State engaged in prosecutorial misconduct during its rebuttal closing argument; and (4) the trial court erroneously provided the deliberating jury with demonstrative exhibits, *i.e.*, People's Exhibits 25 and 26, that had

not been admitted into evidence. As the State asserts, however, only the defendant's fourth claim of error has been properly preserved for our review, and the plain-error doctrine, which the defendant asks that we employ, is inapplicable with respect to the others.

¶ 16 Plain Error

¶ 17 "It is well settled that both an objection at trial and a written post-trial motion raising the issue are necessary to preserve an alleged error for review." *People v. Kliner*, 185 Ill. 2d 81, 161 (1998). However, the plain-error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider an unpreserved error when

> "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) a clear or obvious error occurred, and the error is so serious that it affected the fairness of the defendant's trial and the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Taylor*, 2011 IL 110067, ¶ 30 (citing *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005)).

"In both instances, the burden of persuasion remains with the defendant." *Herron*, 215 Ill. 2d at 187.

¶ 18 Here, noting that the jury deliberated for 10 hours and asked the trial court for guidance numerous times before finding him guilty, the defendant argues that the evidence of his guilt was closely balanced, and we should therefore review his forfeited claims of error under the plain-error doctrine. See *People v. Aguirre*, 291 Ill. App. 3d 1028, 1035 (1997) ("Contrary to the State's assertion, we find this to be a close case, as evidenced by the jury's note requesting the police reports and the witnesses' statements and by the note stating that the jury was split 10 to 2."); *People v. Preatty*, 256 Ill. App. 3d 579, 590 (1994) (suggesting that the evidence was closely balanced where "the jury deliberated 6½ hours on what was a relatively simple fact situation"). We disagree.

¶ 19 At the outset, "[w]e reject the general premise [that] a lengthy deliberation necessarily means the evidence is closely balanced." *People v. Nugen*, 399 Ill. App. 3d 575, 584 (2010). We similarly reject the notion that a jury's questions and requests to review evidence are proof that the jury entertained a reasonable doubt as to the accused's guilt. See *People v. Minniweather*, 301 Ill. App. 3d 574, 580 (1998). "That the jury asked for guidance during deliberations merely indicates that the jury took its job seriously and conscientiously worked to come to a just decision." *Id.* Moreover, attempts to evaluate the strength of the evidence in a particular case by assessing a jury's conduct during deliberations ignore contingencies such as the "holdout juror" (*People v. McCoy*, 405 Ill. App. 3d 269, 278 (2010)) and further ignore that it is impermissible to impeach a verdict with evidence of "the jury's motive, method, or process of deliberations" (*People v. Sullivan*, 2011 IL App (4th) 100005, ¶¶ 24-26).

¶ 20 In any event, "[t]he testimony of a single witness, if it is positive and the witness credible, is sufficient to convict" (*People v. Smith*, 185 Ill. 2d 532, 541 (1999)), and here, four witnesses unequivocally identified the defendant as the driver of the Mazda who shot and killed Williams as he sat behind the wheel of the Kia. Additional witnesses, including Weaver and Jamison, corroborated details of those witnesses' accounts, and there was no evidence before the jury that anyone other than the defendant committed the act. We note that the investigator who prepared the photographic line-up used during the homicide investigation, Detective Marion Riddle of the East St. Louis police department, testified that it was a "very tough" array, and Cynthia Wilson testified that the men in the line-up all "looked like they could be quadruplets, twins, and related." The record also indicates that the Wilsons were disinterested witnesses who resided at the apartment complex and happened to be outside at the time of the shooting. We lastly note that when imposing sentence, the trial court candidly stated that it was "absolutely clear from the evidence that

[the defendant had] committed the offense."

¶ 21 Construing the evidence adduced at trial in the light most favorable to the prosecution (*People v. Chandler*, 238 Ill. App. 3d 161, 166 (1992)), the evidence of the defendant's guilt was not closely balanced. Accordingly, with respect to each of the unpreserved issues that the defendant raises on appeal, he must demonstrate that "a clear or obvious error occurred" and that the error was "so serious that it affected the fairness of [his] trial and the integrity of the judicial process." *Taylor*, 2011 IL 110067, ¶ 30. Of course, "it is appropriate to first determine whether error occurred at all." *Id.*

¶ 22 Line-Up Photo

¶ 23 In *People v. Arman*, 131 Ill. 2d 115 (1989), our supreme court held:

> "There is no dispute that when identification is a material issue at trial, testimony relating the use of mug shots in an investigation may be introduced to show how a defendant was initially linked to the commission of an offense. [Citation.] The admissibility of such evidence is not without limits, however. Mug shot evidence tending to inform the jury of a defendant's commission of other, unrelated criminal acts should not be admitted. [Citations.] In this case, [the investigator's] reference to the photograph's having come from the Chicago police department's identification files informed the jury that the person depicted had been previously arrested, and the testimony was, therefore, evidence of other crimes that should not have been admitted.
>
> The erroneous admission at trial of mug shot evidence suggesting the defendant's involvement in unrelated offenses does not automatically warrant reversal. [Citations.] When the competent evidence in the record establishes the defendant's guilt beyond a reasonable doubt and it can be concluded that retrial without the erroneous admission of the challenged evidence would produce no different result,

the conviction may be affirmed." *Arman*, 131 Ill. 2d at 123.

¶ 24 Here, Riddle testified that when he questioned witnesses at the apartment complex, it seemed that many people knew Dugan, but no one knew the "the shooter" who had been with him on the morning in question. Riddle subsequently ran Dugan's information through the East St. Louis police department's "in-house system," and when looking at "previous incidents" involving Dugan, the defendant's name came up as one of Dugan's known associates. Riddle explained that the defendant's description generally matched the witnesses' descriptions of the shooter, that the defendant "also had a picture in the system," and that the defendant's photo had thereby been obtained for the array that was used as a line-up during the homicide investigation.

¶ 25 On appeal, citing *Arman*, the defendant asserts that Riddle's testimony improperly suggested that at the very least, the defendant had previously been arrested. We readily conclude, however, that a retrial without the challenged testimony would not produce a different result and that the issue is thus not a matter of plain error. See *People v. Benson*, 266 Ill. App. 3d 994, 1006 (1994); *People v. Dunigan*, 263 Ill. App. 3d 83, 88 (1994), *aff'd*, 165 Ill. 2d 235 (1995).

¶ 26 Prior Gun Possession

¶ 27 Although Jamison testified as a witness for the State, her testimony was similar to Weaver's, and she, too, stated that she had not seen the defendant with a gun on the morning in question. Specifically, Jamison testified that she had heard gunshots after the defendant and Dugan had exited the Mazda, but she did not see who had fired the shots, because she was drunk and "throwing up" in the backseat at the time. When cross-examined by the defense, Jamison testified that not only had she not seen the defendant with a gun on the morning in question, she had "been around" the defendant and Weaver for "about couple of weeks" before the shooting, and she had not seen the defendant with a gun during that time,

either.

¶ 28 Weaver testified that she had not seen the defendant with a gun prior to the shooting and that she and the defendant had been living together at the time. Indicating that on September 23, 2009, she had been interviewed by Riddle and Illinois State Police Special Agent Todd Schultze, Weaver acknowledged that she had given the police a statement about the incident. When cross-examined, the State asked Weaver about her statement, and she maintained that she recalled giving it but could not recall what she had said. She also indicated that although viewing a copy of the statement might refresh her recollection about it, while she was interviewed, Riddle had made her "say things that [she] didn't want to say." Weaver specifically denied stating that she had seen the defendant with a gun 3½ weeks before the shooting.

¶ 29 As rebuttal witnesses, Riddle testified that he had not forced Weaver to say anything, and Schultze testified that Weaver had stated that she had seen the defendant with a gun approximately 3½ weeks before the shooting. When defense counsel objected to Schultze's testimony on hearsay grounds, the trial court indicated that it was admitting the testimony for impeachment purposes.

¶ 30 On appeal, the defendant argues that the State improperly introduced the testimony suggesting that he might have possessed a gun 3½ weeks prior to the morning that Williams was shot and killed. The State responds that the defendant opened the door to the evidence and that it was otherwise properly admitted to impeach Weaver's credibility.

¶ 31 As a general rule, it is permissible to attack the credibility of a witness by impeaching the witness with evidence of a prior inconsistent statement. *People v. Grano*, 286 Ill. App. 3d 278, 294 (1996). The admission of a witness's prior inconsistent statement for impeachment purposes is left to the sound discretion of the trial court. *Kotvan v. Kirk*, 321 Ill. App. 3d 733, 748 (2001).

¶ 32 Here, the record indicates that over defense counsel's objection, the trial court allowed the State to use the evidence in question for impeachment purposes, and on the record before us, we cannot conclude that the trial court abused its discretion. Moreover, even assuming, *arguendo*, that the jury considered Weaver's prior inconsistent statement as substantive evidence, whether the defendant might have possessed a gun nearly a month before Williams was shot and killed was not remotely central to the State's case. The resulting prejudice, if any, was therefore minimal, and the defendant is thus unable to establish that the alleged error was "so serious that it affected the fairness of [his] trial and the integrity of the judicial process." *Taylor*, 2011 IL 110067, ¶ 30.

¶ 33 State's Rebuttal Closing Argument

¶ 34 "It is well settled that prosecutors are afforded wide latitude in closing argument, and even improper remarks do not merit reversal unless they result in substantial prejudice to the defendant." *People v. Rosenthal*, 394 Ill. App. 3d 499, 515 (2009). It is equally settled that "the prosecutor may properly comment on the evidence presented or reasonable inferences drawn from that evidence, respond to comments made by defense counsel which clearly invite response, and comment on the credibility of witnesses." *People v. Sims*, 403 Ill. App. 3d 9, 20 (2010). "A prosecutor's comments must be considered in the context of the parties' arguments as a whole and their relationship to the evidence." *People v. Hall*, 194 Ill. 2d 305, 350 (2000).

¶ 35 Alleging prosecutorial misconduct, the defendant contends that the State's rebuttal closing argument included egregiously improper comments that denied him a fair trial. We agree with the State, however, that when viewed in their proper context, the complained-of remarks were either invited, harmless, or within the bounds of acceptable argument. "Moreover, the trial court properly instructed the jury that the comments made by the attorneys during closing arguments should not be considered as evidence, thereby addressing

any potential prejudice." *People v. Groel*, 2012 IL App (3d) 090595, ¶ 63. Again, the defendant is unable to establish that error occurred, let alone that "a clear or obvious error occurred." *Taylor*, 2011 IL 110067 at ¶ 30.

¶ 36 We reject the defendant's contention that the plain-error doctrine is applicable to the forfeited issues that he raises on appeal. The evidence of his guilt was not closely balanced, and with respect to each of the unpreserved claims, he is unable to demonstrate that "a clear or obvious error occurred" and that the error was "so serious that it affected the fairness of [his] trial and the integrity of the judicial process." *Id*. The defendant is likewise unable to establish the cumulative error that he argues on appeal. *People v. Desantiago*, 365 Ill. App. 3d 855, 871 (2006); *People v. Babiarz*, 271 Ill. App. 3d 153, 162 (1995).

¶ 37 Demonstrative Exhibits

¶ 38 We lastly turn to the defendant's claim that the trial court erred in providing the jury with exhibits that were not admitted into evidence. As previously noted, this is the only argument presented on appeal that was properly preserved for appellate review. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988).

¶ 39 The record indicates that approximately three hours into its deliberations, the jury asked the trial court for two exhibits that had been used for demonstrative purposes at trial. One of the exhibits, People's Exhibit 25, which the jury's note referred to as "the big board w/ the streets," is a large aerial photograph of the area of East St. Louis where the apartment complex is located. The photograph depicts several city blocks of East St. Louis, and the streets depicted in the photo are clearly labeled. The other exhibit, People's Exhibit 26, which the jury's note referred to as "the other [big board] w/ the apt. buildings," is a large aerial photo of the apartment complex, and the only street depicted is Wimmer Place, which is not labeled. Several witnesses marked on People's Exhibit 26 while testifying.

¶ 40 When the jury requested People's Exhibits 25 and 26 during its deliberations, defense

counsel objected, stating that because the exhibits had never been admitted into evidence, they should not go back to the jury. Acknowledging that the exhibits had not been admitted into evidence, the State nevertheless indicated that it did not "see a problem" with allowing the jury to view them. Noting that during trial, they had both been used by both parties without objection, the trial court agreed with the State and sent the exhibits back.

¶ 41 When the issue was later revisited at the hearing on the defendant's motion for a new trial, defense counsel again argued that the exhibits should not have gone back to the jury because they were never properly admitted into evidence. Opining that the trial court was correct in allowing the exhibits to go back, the State reiterated that both parties had extensively used them without objection. Observing that "there was a sufficient foundation for each exhibit to be admitted," the trial court stated that it would have admitted the exhibits into evidence had it been asked to do so. Further stating that giving the jury the exhibits could not have possibly affected its verdict, the trial court concluded that if it was error to send the exhibits back, the error was harmless.

¶ 42 As the defendant observes on appeal, "[w]here documents have not been admitted into evidence, the trial judge is without discretion to provide them to the jury during deliberations." *People v. Williams*, 173 Ill. 2d 48, 87 (1996). The State concedes this point, and we accept the State's concession. See *People v. Calvert*, 326 Ill. App. 3d 414, 426 (2001). We reject the defendant's claim of prejudice, however. As the trial court noted below, matters such as "the angle of the shot, or where could a person have shot because of where they were," were not issues at the defendant's trial, and as previously stated, the evidence of the defendant's guilt was not closely balanced. Under the circumstances, we find that although the trial court erred in providing the deliberating jury with People's Exhibits 25 and 26, the error was harmless.

¶ 43 CONCLUSION

¶ 44 For the foregoing reasons, none of the defendant's forfeited issues warrant review under the plain-error doctrine, and although the trial court should not have provided the jury with exhibits that were not admitted into evidence, doing so did not require reversal of the defendant's conviction. Accordingly, we hereby affirm the defendant's conviction and sentence.

¶ 45 Affirmed.