

substantive evidence; (3) the trial court abused its discretion by denying defense counsel's motion to exclude a juror; (4) he was denied a fair trial by comments made by the prosecutor during closing argument; (5) his conviction for armed habitual criminal violate *ex post facto* principles; (6) the trial judge erred in relying on his prior convictions, factors inherent in the offense of armed habitual criminal, in sentencing him; and (8) the court should reduce the fines and fees assessed. For the following reasons, we reverse and remand for a new trial.

¶ 3 BACKGROUND

¶ 4 Defendant was charged by way of information with one count of armed habitual criminal, two counts of unlawful use of a weapon by a felon, and four counts of aggravated unlawful use of a weapon. The State proceeded to trial on one count of armed habitual criminal.

¶ 5 On the day trial was to commence, the State informed the court that it was unable to proceed. The prosecutor explained that there was a neon green sticker affixed to the evidence envelope containing the gun that indicated a request for a fingerprint analysis of the gun had been made. The prosecutor informed the court that despite the sticker, no analysis had been done and that the request was an error. The prosecutor explained that the State would have to call an additional witness from the Forensic Services division of the Chicago police department to testify as to the fact that the indication that the gun was to be tested for fingerprints was a "mistake."

¶ 6 The trial began on August 9, 2011. Chicago Police Officer Jason Perez testified that he was on duty on August 2, 2010, and was patrolling an area on the south side of Chicago with his partner Officer Antonio DiCarlo in a marked squad car. They received a call to report to 73rd and Racine. As they turned down 73rd Street, he saw a group of five people standing in the street.

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Officer Perez shined the spotlight onto the crowd. Officer Perez noticed that defendant, who he identified in court, moved away from the group toward the north side of the street. The officers exited their vehicle and began to approach defendant. Defendant continued to walk away, but turned partially toward the officers, allowing them to see his right side, chest and shoulders.

Officer Perez drew his gun, pointed it at defendant and ordered him to stop. Officer Perez testified that defendant continued to walk away and reached into his waistband and pulled out a gun, which he threw to the ground. Although Officer Perez did not see where the gun landed, he heard the sound of metal scraping against the concrete. Defendant then turned and put his hands up, took a few more steps and laid stomach down on the ground. Officer Perez handcuffed defendant while Officer DiCarlo recovered the gun.

¶ 7 On cross-examination, Officer Perez testified that the lights on the squad car had been activated but the siren was not. Officer Perez testified that he authored the police report and that he might have indicated that he drew his weapon after defendant pulled the gun out of his waistband.

¶ 8 Officer Antonio DiCarlo testified that after he exited the squad car, he saw defendant walk northbound away from the group of men. Officer DiCarlo had a full frontal view of defendant. Defendant walked toward the curb, despite the officers' orders to stop, and reached into his waistband. Officer DiCarlo pulled out his gun and pointed it at defendant. Defendant then removed the gun from his waistband and threw it on the ground. Officer Perez handcuffed defendant and Officer DiCarlo recovered the gun, which was a .45 caliber semi-automatic handgun containing a magazine with eight live rounds and one live round in the chamber.

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Officer DiCarlo inventoried the gun and it was in his continuous care, custody and control from the time he recovered it until he sealed the envelope and placed it in the evidence vault.

¶ 9 On cross-examination, Officer DiCarlo acknowledged that he mistakenly checked the box on the evidence envelope indicating that the weapon "had not been handled by recovering personnel, except by those wearing gloves," and that the Forensic Services department should "preserve [the evidence] for fingerprints." Officer DiCarlo did not put a sticker on the envelope indicating that the gun should be processed for fingerprints because he saw defendant in possession of the gun. He attempted to fix his mistake by underlining the box on the envelope that indicated that the evidence had already been handled by recovering personnel. Officer DiCarlo did not intend to have the gun tested for fingerprints.

¶ 10 Chicago police officer Matthew Savage testified that he was assigned to the laser section of Forensic Services and his job duties include examining physical evidence for the presence of latent fingerprints. All inventoried weapons are sent for ballistics testing, but not all weapons are sent to his department for latent fingerprint testing. A request from a patrolman for fingerprint analysis on a weapon would not be honored; the order would have to come from a detective or the court. The presence of a "preserve for prints" notification on an evidence envelope does not constitute a formal request for an item to be sent to his department for fingerprint analysis. It only serves as notice to those in the Forensic Services unit to use gloves when handling the weapon.

¶ 11 In August 2010, Officer Savage was the only officer assigned to analyze evidence for fingerprints. He did not receive an assignment to conduct any fingerprint analysis on the gun

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discarded by defendant. Officer Savage testified that it was obvious after looking at the gun that no fingerprint testings had been completed because there was no powder residue on the gun.

Officer Savage testified that it was regular practice to keep a record of receipt of any piece of evidence received by the laser unit, which were kept in the Chicago police department's I-CLEAR system. Defendant objected on hearsay grounds when the prosecutor asked if there had been a report generated with respect to the gun. The prosecutor tendered a document to defense counsel from the I-CLEAR system indicating no record of receipt of the gun in the Forensic Services section.

¶ 12 After reviewing the document, defendant requested to *voir dire* Officer Savage regarding the process of accepting evidence into the Forensic Services unit. During *voir dire*, Officer Savage again stated that in August 2010, he was the only officer who received evidence to be analyzed by his unit. Prior to trial, he had reviewed the I-CLEAR system for the gun recovered in this case and he was sure he did not receive the item because his name did not appear on the chain of custody. Defense counsel renewed his objection to Officer Savage's testimony, which was overruled by the trial court. The court found that the proper foundation for Officer Savage's testimony had been laid.

¶ 13 On cross-examination, Officer Savage testified that he did not know who placed the neon green sticker on the evidence envelope. He did not review the ballistics results regarding the weapon, but did acknowledge that the personnel handling the gun wore gloves during the testing.

¶ 14 Prior to resting, the prosecutor read into evidence a stipulation indicating that defendant had been previously convicted of two felonies. Both felonies qualified under the armed habitual

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criminal statute.

¶ 15 Santino Boyd testified for the defense. Boyd testified that on the night in question, he and defendant attended a party at a nightclub on 72nd and Racine, about a block away from where defendant was arrested. There was an altercation outside of the club so people scattered. Boyd and defendant were in a group of about 10 to 12 people who went to the intersection of 73rd and Racine after the altercation. Defendant was standing about four to seven feet in front of Boyd when a police car pulled around the corner and two officers jumped out of the car with their guns drawn. The officers told them not to move and pointed their guns at the crowd. Boyd stated that defendant didn't move after the police arrived but that defendant did shout profanity at the officers. Boyd testified that one of the officers began looking around the grassy area between the sidewalk and the curb and then saw the officer enter a nearby alley. When the officer returned from the alley, he spoke with his partner who then went over and handcuffed defendant. Boyd testified that defendant did not enter the alley prior to the officers' arrival and that defendant did not move from his position once he was told by the officers not to move.

¶ 16 Boyd acknowledged that he had two alcoholic beverages at the club, in a two-and-a-half hour period. He also said that when the officer exited the alley, he was holding a black object that looked like a gun.

¶ 17 Tyisha Jones was also present on the night of defendant's arrest. She and her friend left the club and walked to the corner of 73rd and Ada, one block beyond Racine. She and her friend were standing on the corner and she saw a group of about ten people standing in the street. A police vehicle stopped in front of the group of ten. Right as the squad arrived, Jones saw a man

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run into the alley behind her. Two officers exited the squad and ordered everyone to get down. Defendant questioned the officers' intent by using profanity and the officers immediately handcuffed defendant. Jones stated that she thought defendant was arrested for "talking shit" to the police. After defendant was handcuffed, Jones saw one of the officers walk into the alley and pick up a gun from the ground. The officer instructed Jones and her friend to leave, which they did.

¶ 18 The State called Officer DiCarlo as a rebuttal witness. Officer DiCarlo testified that defendant did not use profanity in addressing the officers. He did not see anyone go into or come out of the alley and stated that he did not go into the alley. He also testified that he did not see any women near the entrance to the alley or instruct anyone to leave the scene. Officer DiCarlo did not draw his weapon until defendant refused to show his hands and reached into his waistband while walking toward the curb.

¶ 19 After hearing all of the evidence, the jury convicted defendant of being an armed habitual criminal. The court sentenced defendant to nine-and-a-half years' imprisonment and ordered to him pay numerous fines and fees. It is from this judgment that defendant now appeals.

¶ 20 ANALYSIS

¶ 21 Defendant first argues that the State failed to prove him guilty of armed habitual criminal beyond a reasonable doubt. Specifically, defendant claims that the testimony of the police officers was incredible, contrary to human nature and contradicted by the defense witnesses.

¶ 22 The standard of review on a challenge to the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could

have found the essential elements of the crime beyond a reasonable doubt. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). It is not the function of the reviewing court to retry the defendant or substitute its judgment for that of the trier of fact. *People v. Collins*, 214 Ill. 2d 206, 217 (2005). The trier of fact assesses the credibility of the witnesses, determines the appropriate weight of the testimony and resolves conflicts or inconsistencies in the evidence. *People v. Naylor*, 229 Ill. 2d 584, 614 (2008). The trier of fact is not required to disregard inferences that flow from the evidence or search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt. *People v. Hall*, 194 Ill. 2d 305, 332 (2000). A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 225 (2009). Defendant's conviction will not be reversed on review simply because he claims a witness was not credible or the evidence was contradictory. *Id.* at 228.

¶ 23 A person commits the offense of being an armed habitual criminal if he “receives, sells, possesses, or transfers any firearm” after having been convicted of at least two triggering offenses. 720 ILCS 5/24–1.7 (West 2008).

¶ 24 Here, the evidence was sufficient to support a conviction for armed habitual criminal. Officers Perez and DiCarlo both testified credibly that they saw defendant reach to his waistband, pull out a gun and drop it on the ground. Officer Perez did not see where the gun landed but heard the sound of metal scraping against the concrete. Officer DiCarlo recovered the gun. We recognize that the defense witness testified contrary to the officers. However, the credibility of a witness is a matter within the province of the jury and the jury's finding on such matters is

entitled to great weight. *Smith*, 185 Ill. 2d at 542. We will not substitute our judgment for that of the trier of fact. *People v. Jennings*, 364 Ill. App. 3d 473, 478 (2005).

¶ 25 Next, defendant argues that the trial court erred when it instructed the jury it could consider defendant's prior conviction for armed habitual criminal as substantive evidence where the court had previously ruled that the jury would not be informed of the nature of defendant's prior convictions and where the instruction indicted that defendant had been previously convicted of armed habitual criminal, and defendant had not been previously convicted of armed habitual criminal. Prior to trial, the prosecutor informed the court that the parties would be stipulating to the fact that defendant had two prior felony conviction that qualified under the armed habitual criminal statute. The State indicated that it would not disclose to the jury that those convictions were for attempt murder and aggravated unlawful use of a weapon. The trial court ordered the State not to disclose the nature of defendant's prior convictions to the jury.

¶ 26 Following closing argument, the prosecutor tendered a version of Illinois Pattern Jury Instruction 3.13X relating to the admissibility of a defendant's prior conviction. The jury instruction stated:

"Ordinarily, evidence of a defendant's prior conviction of an offense may not be considered by you as evidence of the guilt of the offense with which he is charged. However, in this case, because the State must prove beyond a reasonable doubt the proposition that the defendant has previously been convicted of two qualifying felony offenses, you may also consider evidence of defendant's prior conviction of the offense of armed habitual criminal for the purpose of determining whether the State has proven

that proposition."

This instruction was given to the jury.

¶ 27 Before we proceed to the merits of defendant's claim however, we must agree with the State that defendant has forfeited review of this issue. A defendant forfeits review of any supposed jury instruction error if he does not object to the instruction or offer an alternative at trial and does not raise the issue in a posttrial motion. *People v Herron*, 215 Ill. 2d 167, 175 (2005). A defendant is thereby encouraged to raise issues before the trial court, allowing the court to correct its errors before the instructions are given, and consequently precluding a defendant from obtaining a reversal through inaction. *Herron*, 215 Ill. 2d at 175. Nevertheless, defendant urges this court to consider this error under the first prong of the plain error analysis.

¶ 28 The plain-error doctrine allows a reviewing court to consider unpreserved error when: (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence. *Id.* at 186-87; Ill. S. Ct. R. 615(a) (eff. Dec. 6, 2006).

"In the first instance, the defendant must prove 'prejudicial error.' That is, the defendant must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him. The State, of course, can respond by arguing that the evidence was not closely balanced, but rather strongly weighted against the defendant. In the second instance, the defendant must prove there was plain error and that the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Id.* at 178-79.

The burden of persuasion remains with the defendant in both instances. *People v. McLaurin*, 235 Ill. 2d 478, 495 (2009). Before invoking plain error, courts must determine whether error occurred. *People v. Walker*, 232 Ill. 2d 113, 124-25 (2009).

¶ 29 The State does not contest that the giving of this jury instruction constituted error, given the trial court's prior ruling on the issue and the fact that defendant did not have a prior conviction for armed habitual criminal. However, the State argues this error does not rise to the level of plain error where the evidence in this case was not closely balanced.

¶ 30 Whether the evidence is closely balanced is a separate question from whether the evidence is sufficient to sustain a conviction beyond a reasonable doubt. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The closely balanced standard errs on the side of fairness and grants a new trial even if the evidence was otherwise sufficient to sustain a conviction. *In re M.W.*, 232 Ill. 2d 408 (2009). We must make a qualitative, rather than strictly quantitative "commonsense assessment" of the evidence in determining whether the evidence is closely balanced. *People v. White*, 2011 IL 109689, ¶ 139.

¶ 31 Defendant argues that the evidence was closely balanced because the determination of defendant's guilt came down to a credibility contest between the officers and the defense witnesses. Officers Perez and DiCarlo testified that they saw defendant in possession of the gun and saw him throw it to the ground. Officer DiCarlo recovered the gun. In contrast, Jones testified that as the squad car approached, she saw a man enter the alley. Boyd saw one of the officers enter the alley and look around. Jones saw the officer pick up a gun from the ground. Boyd testified that when the officer exited the alley he was holding a gun.

¶ 32 In *People v. Ware*, 407 Ill. App. 3d 315, 337 (2011), defendant was charged with stabbing a victim who came to his apartment door. Two witnesses testified that the defendant was the aggressor, while a third witness and the defendant testified that the defendant acted in self-defense with defendant contending that he was not aware that a stabbing had occurred. However, the police took photographs that showed blood outside defendant's apartment and down the hallway leading to the victim's apartment and a bloody butcher knife recovered from defendant's apartment that supported the State's theory of the case and contradicted defendant's testimony. *Id.* This court held that evidence is not closely balanced simply because event witnesses present conflicting testimony because the court was able to look to extrinsic “evidence to corroborate or contradict the different versions of what occurred.” *Id.* at 357.

¶ 33 Conversely, in *People v. Naylor*, 229 Ill. 2d 584, 608 (2008), two police officers testified that the defendant sold the officers heroin in exchange for marked money. The defendant took the stand and denied selling heroin to the officers. No extrinsic evidence was introduced into evidence. *Id.* In conducting a plain-error analysis, our supreme court found that “credibility was the only basis upon which defendant’s innocence or guilt could be decided,” and thus, the evidence was closely balanced. *Id.* The court only found the evidence closely balanced given the conflicting testimony and “the fact that no extrinsic evidence was presented to corroborate or contradict either version ***.” *Id.* at 607. The *Naylor* court held,

"[t]he State's emphasis that two police officers testified against defendant does not make the State's case overwhelming. The State presented only the testimony of the two officers regarding the sale of the heroin. Each officer admitted that he never saw

Officer McKenna recover the prerecorded currency from defendant. For whatever reason, the State did not call Officer McKenna to testify. Arguably, defendant's erroneously admitted incompetent prior conviction was the State's only successful attack on defendant's testimony." *Id.* at 607.

¶ 34 *Ware* and *Naylor* stand for the proposition that evidence is not closely balanced just because there is conflicting testimony. Where extrinsic evidence corroborates or contradicts the version of the events, conflicting testimony does not establish closely balanced evidence.

¶ 35 Similar to *Naylor*, there was no extrinsic evidence produced in this case to corroborate either the State's or defendant's version of the events. Officers Perez and DiCarlo testified that they saw defendant in possession of a gun before he threw it down on the ground. Both Boyd and Jones testified that they saw the officers retrieve the gun from the alley. Absent any extrinsic evidence, *i.e.*, fingerprints, DNA, etc., which would tend to corroborate defendant's possession of the gun, we find the evidence in this case to be closely balanced. "When error occurs in a close case, we will opt to 'err on the side of fairness, so as not to convict an innocent person.'"

Piatkowski, 225 Ill. 2d at 566, quoting *Herron*, 215 Ill. 2d at 193.

¶ 36 Because the jury instruction in this case erroneously instructed the jury to consider defendant's prior conviction for armed habitual criminal as substantive evidence, in violation of the court's order and where defendant had not been previously convicted of armed habitual criminal, and the evidence in this case was closely balanced, we find that defendant has met his burden and established plain error. Our supreme court's observation in *Naylor* is appropriate here:

"This court explained long ago:

'A defendant charged with crime has a right to a fair and impartial trial according to the rules of law requiring the exclusion of incompetent and prejudicial evidence. Regardless of his depravity of character or how full of crime his past life may have been, he is entitled to be tried only upon competent evidence and to stand before the jury unprejudiced by improper reference to his former crimes. The law does not provide one method for trying innocent persons and another for trying guilty persons. All persons are presumed to be innocent of the crime with which they are charged until they have been proven guilty beyond a reasonable doubt according to the established methods of procedure.' *People v. Lund*, 382 Ill. 213, 217, 46 N.E.2d 929 (1943). Defendant deserved no less at his trial." *Naylor*, 229 Ill. 2d at 610.

Accordingly, we remand this matter for a new trial.

¶ 37 Although we conclude that the evidence is closely balanced, we have also found that the evidence was sufficient to prove defendant guilty beyond a reasonable doubt. Accordingly, we find that there is no double jeopardy impediment to a new trial. In doing so, we reach no conclusion as to defendant's guilt that would be binding on retrial. *Piatkowski*, 225 Ill. 2d at 566-67 (2000). Given our disposition in this case, we need not consider defendant's remaining claims.

¶ 38 CONCLUSION

¶ 39 For the foregoing reasons, we reverse and remand this matter for a new trial.

¶ 40 Reversed and remanded.

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