NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2017 IL App (3d) 150140-U

Order filed November 3, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 9th Judicial Circuit, Warren County, Illinois.
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-15-0140 Circuit No. 14-CF-2
JASON A. DEBUSSCHERE,	)	Honorable Rodney G. Clark,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice Holdridge and Justice Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's conviction of unlawful possession of cannabis with intent to deliver was reversed as plain error where the only evidence of the defendant's access to the safe where the cannabis was located was based on the incomplete impeachment of the defendant's girlfriend, impeachment that resulted in an unfounded insinuation that was substantial, repeated, and prejudicial.

¶ 2 The defendant appealed his conviction of unlawful possession of cannabis with intent to deliver and 8-year sentence.

¶ 3 FACTS

¶ 4 The defendant, Jason Debusschere, was charged with unlawful possession of methamphetamine (720 ILCS 646/60(a), (b)(1) (West 2012)), unlawful possession with intent to distribute more than 30 grams of cannabis (720 ILCS 550/5(d) (West 2012)), and unlawful possession of more than 30 grams of cannabis (720 ILCS 550/4(d) (West 2012)).

¶ 5 At trial, Inspector Jimmy McVey, an investigator for the City of Monmouth, testified that he received information from a confidential source that led him to surveil a home at 926 South A Street in Monmouth, Illinois, on December 19, 2013. Based on information received during the day, McVey was able to get a search warrant for 926 South A Street, which was executed later that night. When he entered the house, Elizabeth Boaz was the only person in the house. When the police searched the home, they found suspected cannabis in the kitchen cabinet. They also found sandwich baggies with the corners cut off, two digital scales, a pair of men's pants with methamphetamine in the pocket, and a police scanner. The officers found a telephone bill addressed to the defendant at that address. McVey testified that the police found a locked safe in the bedroom, but Boaz did not know the combination. When the police eventually opened the safe, they found, among other items, 73.4 grams of cannabis, and $805 in cash.

¶ 6 The defendant was arrested in March 2014 with 1.2 grams of cannabis on his person. Prior to trial, the trial court denied the defendant's motion *in limine*, which sought to bar the admission of evidence of the cannabis found on the defendant's person and the statements made by the defendant to McVey at the time of his arrest. At trial, McVey testified that he told the defendant that there would be the possibility of a sentence reduction if the defendant helped make a case against his cannabis supplier. McVey testified that the defendant told him that he purchased about a half pound of cannabis a day to distribute from a man in Galesburg named “T-

Screw." During this same conversation, the defendant told McVey that the cannabis found at 926 South A Street was his.

¶ 7 Boaz testified that she was renting the home at 926 South A Street at the time of the search. The defendant was her boyfriend, and he would stay over a few nights a week. Boaz testified that she had acquired the safe in her bedroom from her friend's nephew, and she was thinking of purchasing it, but she did not know how to open it. Boaz testified that she did not have the key or know the combination. The defendant also had no way of opening the safe. The prosecutor asked Boaz:

"Q. What if I told you that in that safe there was a picture of you in that safe? Would that surprise you?

A. Yeah.

Q. Okay. Do you have any knowledge of a picture being in that safe?

A. (Shaking head.)

Q. Is there any reason that the [friend's nephew] would have a picture of you and put it in the safe?

A. No.

Q. We'll get back to that later then. ---"

¶ 8 The prosecutor never did get back to the issue of the photograph. The prosecutor did not ask Boaz any further questions regarding the photograph, nor did he ask any of the other witnesses if such a photograph was in the safe. McVey identified the contents of the safe, but did not mention any photographs. During closing, the prosecutor acknowledged that Boaz denied any knowledge of what was in the safe. The prosecutor went on to state:

> "Miss Boaz got on the stand but she never testified as to any knowledge of what was in the safe or that she had possession of it, that it was her safe, that it was anybody else's safe except of somebody named 'Jay' who that was the only time, the first time we've heard about this person."

¶ 9 Two of the three bags found in the safe were tested and confirmed to be cannabis. Those two bags weighed 43.1 grams. The suspected cannabis found in the kitchen weighed 26 grams; it was never tested to confirm it was cannabis.

¶ 10 The jury convicted the defendant of the two cannabis charges. After trial, the defendant filed a *pro se* motion alleging ineffective assistance of counsel, but the trial court denied the defendant's motion, finding that a motion to suppress would have been futile and the other allegations were matters of trial strategy. At sentencing, the trial court ordered the county to pay the defendant's appointed trial counsel $2998.80 and charged the defendant a public defender fee in that amount. The trial court merged the two cannabis counts and sentenced the defendant to 8 years in prison. The defendant's motion to reduce his sentence was denied, and he appealed.

¶ 11 ANALYSIS

¶ 12 The defendant argues that the State needed to prove that he possessed the cannabis found in the locked safe and that the insinuation that a photograph proved that Boaz was lying about the safe, without substantiating the insinuation, was reversible error. The defendant acknowledges that his counsel failed to object at trial, so he asks for plain error review under the first prong of the plain error analysis. The defendant raises other issues on appeal, but we find it necessary to address only the one issue, and we reverse on that issue alone.

¶ 13 "Generally, the State may not impeach a defense witness on cross-examination with a prior inconsistent statement unless the State can prove that statement with extrinsic evidence if

the witness denies making it." *People v. Williams*, 204 Ill. 2d 191, 211 (2003). The State must have a good-faith basis to ask cross-examination questions, and the intent and ability to complete its impeachment. *Id.* at 212. Incomplete impeachment, though, is not reversible when it can be considered harmless error. *People v. McCoy*, 2016 IL App (1st) 130988, ¶ 59. The incomplete impeachment of a witness is reversible error when the resulting unfounded insinuation is substantial, repeated, and definitely prejudicial. *Id.*

¶ 14 The defendant argues that the State made no effort to support its insinuation that there was a photograph of Boaz in the safe, so Boaz was lying, and she and the defendant had the ability to open the safe. The State contends that any error was harmless because the prosecutor did not repeat the argument regarding the photograph, and three prosecution witnesses testified regarding the contents of the safe and did not mention the photograph as being found in the contents of the safe. Also, the State argues that Boaz impeached her own credibility.

¶ 15 Clearly, the questioning about the photograph amounted to an incomplete impeachment of Boaz. The State contends, however, that the error was not repeated, substantial, or prejudicial. See *McCoy*, 2016 IL App (1st) 130988, ¶ 61. Due to the quantity of cannabis in the safe, it was a critical issue that the defendant had access to the safe, and the question implied that Boaz was lying about the safe, making it prejudicial and substantial. In addition, the unfounded insinuation was repeated in that the prosecutor asked three questions regarding the photograph and implied that he would return to the issue of the photograph. See *McCoy*, 2016 IL App (1st) 130988, ¶ 61 (State's sequence of three questions that led to the unfounded insinuation that the defendant had threatened the victim was substantial, repeated, and prejudicial).

¶ 16 Having found that a more than harmless error occurred, since the defendant did not preserve the error for review, we turn to the plain error analysis. A reviewing court may consider

a forfeited error when the evidence is close, regardless of the seriousness of the error, or if the error is serious, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 187 (2005). The defendant argues for plain error review under the first prong, *i.e.*, that the evidence was closely balanced. The defendant contends that the case was closely balanced because Boaz's credibility regarding the defendant's access to the safe was critical to the case. As the State points out, there was a significant amount of evidence that the defendant lived at the residence where the cannabis was found, but the only evidence regarding the safe was that it was found inside the residence and Boaz's testimony that the safe belonged to someone else. Thus, we conclude that the evidence was closely balanced, and the defendant was denied a fair trial by the incomplete impeachment. We reverse the defendant's conviction and remand for a new trial. In view of our determination on this issue, we do not consider it necessary to address the other issues raised on appeal.

¶ 17 CONCLUSION

¶ 18 The judgment of the circuit court of Warren County is reversed and remanded.

¶ 19 Reversed and remanded.