2018 IL App (1st) 161554-U
No. 1-16-1554
Order filed September 27, 2018

FOURTH DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MARCO RAMIREZ, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County. No. 12 CR 18726 The Honorable Matthew E. Coghlan, Judge, presiding.

JUSTICE GORDON delivered the judgment of the court.
Justices Reyes and Burke concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant claims that the trial court committed second-prong plain error by not *sua sponte* barring (1) testimony by the murder victim's mother that she kissed her son goodbye as he left for the party from which he did not return; and (2) testimony by a State witness about his unrelated cooperation with the police and payments from the police. There is not clear or obvious error and, thus, we affirm.

¶ 2 Defendant Marco Ramirez was convicted after a jury trial of first-degree murder and sentenced to 35 years with the Illinois Department of Corrections (IDOC). On this appeal, defendant claims that the trial court committed second-prong plain error by not *sua sponte* barring (1) testimony by the murder victim's mother that she kissed her son goodbye as he left for the party from which he did not return; and (2) testimony by a State witness about his unrelated cooperation with, and payments from, the police. Defendant also claims that second-prong plain error occurred when the State discussed the mother's testimony during the State's opening and closing. For the following reasons, we do not find these claims persuasive and affirm.

¶ 3 BACKGROUND

¶ 4 In the case at bar, a jury found that defendant was a member of a gang that beat the victim to death because the victim happened to be wearing a shirt with the color of a rival gang. In this appeal, defendant does not claim either that the evidence against him was insufficient or that it was closely balanced. Defendant claims only that the State's alleged misconduct, by introducing

allegedly prejudicial testimony and making allegedly prejudicial comments during opening and closing, rendered his trial fundamentally unfair.

¶ 5 On May 29, 2010, the 19-year-old victim, Alan Oliva, and his girlfriend, Pauline Ponce, went to a party at 11 p.m. Before Oliva left his home, his mother testified, without objection, as to how she said goodbye to him that night. Rhonda Oliva testified that her husband, her sons and her mother were all at home and the following occurred:

> "My husband and sons were in the basement watching TV together. [The victim] said good-bye to his father. Then he came upstairs. I was in the kitchen making salads. He came in and he had told me that he was leaving. My mother was there also ***. He said good-bye, told me he was going out. I asked him just to stay home, we had to get up early [for a Memorial Day barbecue]. He said he was just gonna go for a little while. I just told him to be careful and then gave him a kiss good-bye, and actually then he kissed my mother good-bye and she told him the same thing, just be careful and see you tomorrow."

¶ 6 After midnight, Oliva and Ponce left the party with four others and walked to a nearby liquor store to buy cigarettes. The store was closed, so Oliva and another man, Mario Gallegos, walked to a nearby gas station, while the others returned to the party. After Oliva and Gallegos left the gas station,

they were attacked by a gang of four to five men, one of whom was wielding a baseball bat. Gallegos escaped, but Oliva was beaten with a baseball bat and stabbed in the back. He died of his wounds.

¶ 7 The State's evidence at trial showed that the attackers were members of the Satan Disciples. The State's evidence included a statement by defendant in which he admitted: that he was a member of the Satan Disciples; and that he was with other gang members at a barbecue on May 30, 2010, just prior to the attack. Defendant stated that, just before the attack, another gang member reported that a couple of "flakes" were outside, and a group then left the barbecue in order to beat up the "flakes." Defendant admitted that he punched Oliva who later died. Defendant's girlfriend, Nancy Flores, testified at trial that the word "flake" means a member of an opposing gang. A police officer, who testified as a gang expert, explained that red, which was the color of Oliva's shirt, was one of the colors of the Latin Counts, who were rivals of the Satan Disciples. As noted above, defendant does not challenge the sufficiency of the State's evidence or claim that the evidence was close.

¶ 8 On this appeal, defendant challenges a portion of the testimony of Wayne Kates, a former member of the Satan Disciples and a government informant. Kates testified that he attended a gang meeting on August 21, 2010, after the

attack, at which defendant described stabbing the victim in the back with an ice pick.

¶ 9 In this appeal, defendant challenges the portion of Kates' testimony where Kates testified to working with the police to purchase guns. Kates testified that, after being arrested in connection with an unrelated shooting, he began working with the police and the FBI. He agreed to wear a wire and the FBI gave him cash to purchase guns from other Satan Disciples members. After guns were recovered and two arrests resulted, Kates received $7700 in exchange for his assistance. Defendant's trial counsel did not object to any portion of Kates' direct testimony.

¶ 10 After the State rested, defendant moved for a directed verdict, which was denied, and the parties proceeded to closing arguments. Defendant claims on appeal that the following portions of the State's closing remarks were prejudicial:

> "Alan Oliva was a good kid. He was 19 years old. He just graduated high school, and he was taking some college courses. Like any good 19-year old kid, faced with a long weekend, Memorial Day weekend, he wanted to go out with his girlfriend and with his friends.

That day, he was at home. He had dinner with his family, kissed his Mom good-bye; and he went out with his friends. He was 19 years old. He wanted to have fun.

He didn't deserve to die. Everyone in this room—everyone in this room would agree—everyone in this room, with the exception of one, would agree that Alan Oliva didn't deserve to die for wearing a red shirt, walking down Ashland Avenue, in an area that somebody thought that it was theirs."

¶ 11 The State also argued:

"The evidence is Alan's Mom, when she came into the courtroom; and she told you, Alan's a good kid. He was not in a gang. He was living in the suburbs and came to the City to go to a party. *** Alan Oliva was a good kid. He was 19 years old. He didn't deserve to die, but he does deserve justice, and there's only one just verdict."

Defendant's trial counsel did not object to these comments.

¶ 12 The jury found defendant guilty of first-degree murder. The trial court denied defendant's posttrial motion for a new trial and, after considering factors in aggravation and mitigation, sentenced defendant to 35 years with IDOC. This appeal followed.

¶ 13 ANALYSIS

¶ 14 On appeal, defendant claims that the trial court erred by not *sua sponte* barring (1) testimony by the victim's mother that she kissed her son goodbye; and (2) testimony by a State witness about his unrelated purchases of guns for the police. Defendant also claims that error occurred when the State discussed the mother's testimony during the State's opening and closing. Defendant concedes that he did not object at trial either to the testimony or to the State's remarks but he argues that these errors rise to the level of second-prong plain error, because they threatened the integrity of the judicial system. *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007). For the following reasons, we do not find these arguments persuasive and affirm defendant's conviction and sentence.

¶ 15 I. Plain Error

¶ 16 Although defendant concedes on appeal that he failed to raise this issue in the court below and thus forfeited this issue for our review, he asks us to review the issue under the plain error doctrine, which permits a reviewing court to review unpreserved errors under certain circumstances. *People v. Piatkowski*, 225 Ill. 2d 551, 564-65 (2007).

¶ 17 Failure to either object to an error at trial or raise the error in a posttrial motion results in forfeiture. *People v. Sebby*, 2017 IL 119445, ¶ 48; *People v. Belknap*, 2014 IL 117094, ¶ 66 (in order to preserve a purported error for

consideration by a reviewing court, a defendant must object to the error at trial and raise the error in a posttrial motion).

¶ 18 However, even when a defendant has failed to preserve an alleged error for our review, we may still review the issue for plain error. *Sebby*, 2017 IL 119445, ¶ 48; *Piatkowski*, 225 Ill. 2d at 564-65; Ill. S. Ct. R. 615(a) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court."). The plain error doctrine allows a reviewing court to consider 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, 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. *Piatkowski*, 225 Ill. 2d at 564-65.

¶ 19 In a plain error analysis, it is the defendant who bears the burden of persuasion. *Sebby*, 2017 IL 119445, ¶¶ 51-52; see also *People v. Woods*, 214 Ill. 2d 455, 471 (2005).

¶ 20 In the case at bar, defendant argues only second-prong error—that the errors were so serious that they challenge the integrity of the judicial process, regardless of the closeness of the evidence. *Piatkowski*, 225 Ill. 2d at 564.

Whether the defendant argues first- or second-prong error, "[t]he initial analytical step under either prong of the plain error doctrine is [to] determin[e] whether there was a clear or obvious error at trial." *Sebby*, 2017 IL 119445, ¶ 49; *Piatkowski*, 225 Ill. 2d at 565 ("the first step is to determine whether error occurred").

¶ 21 In addition, a reviewing court may affirm on any basis found in the record. *People v. Begay*, 2018 IL App (1st) 150446, ¶ 35; *In re Gabriel W.*, 2017 IL App (1st) 172120, ¶ 31; *People v. Miles*, 2017 IL App (1st) 132719, ¶ 22. For the reasons discussed below, we affirm the trial court.

¶ 22 II. Standard of Review

¶ 23 Defendant argues, first, that the trial court erred by not *sua sponte* barring the admission of certain testimony by the victim's mother and by an informant. While *de novo* review applies to an evidentiary question if that question concerns how to correctly interpret a rule of law (*e.g.*, *People v. Caffey*, 205 Ill. 2d 52, 89 (2001)), the admission of evidence is generally within the sound discretion of the trial court, and a reviewing court will generally not disturb a trial court's evidentiary ruling absent an abuse of that discretion. *E.g.*, *People v. Romanowski*, 2016 IL App (1st) 142360, ¶ 21. In the case at bar, there is no

dispute about a rule of law,[1] so we apply an abuse-of-discretion standard of review to the admission of evidence. See generally *People v. Drake*, 2017 IL App (1st) 142882, ¶¶ 52-53 (Gordon, J., concurring in part and dissenting in part). An abuse of discretion occurs only when the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court. *In re Marriage of Heroy*, 2017 IL 120205, ¶ 24; *People v. Patrick*, 233 Ill. 2d 62, 68 (2009).

¶ 24 Defendant also argues that the State acted improperly by its discussion of the admitted evidence during its closing. "A review of the case law reveals a conflict among Illinois Supreme Court cases" about whether to apply a *de novo* or abuse of discretion standard of review to allegations of improper remarks made during closing argument. *People v. Moody*, 2016 IL App (1st) 130071, ¶ 59; *People v. Branch*, 2018 IL App (1st) 150026, ¶ 31 ("there exists some confusion among Illinois courts regarding whether to apply a *de novo* or abuse of discretion standard"). However, we need not resolve this issue, as our finding in this case would be the same under either standard. We stated the abuse of discretion standard in the above paragraph. *De novo* consideration means that the reviewing court performs the same analysis that a trial judge would perform. *Begay*, 2018 IL App (1st) 150446, ¶ 35.

[1] In his reply brief to this court, defendant observes: "The parties largely agree on the principles of law."

¶ 25 Defendant also argues that the State acted improperly by its discussion of the evidence during its opening. As this court observed just last year, "[r]ecent decisions from this court have used both standards"—both abuse of discretion and *de novo*. *People v. Smith*, 2017 IL App (1st) 143728, ¶ 49. Compare *Jones*, 2016 IL App (1st) 141008, ¶ 23 (reviewing *de novo*), with *People v. Trotter*, 2015 IL App (1st) 131096, ¶ 43 (reviewing for an abuse of discretion). However, we need not resolve this issue, as our finding in this case would be the same under either standard.

¶ 26 III. Mother's Testimony

¶ 27 Defendant argues, first, that the State's introduction of and comments on the victim's mother's testimony rise to the level of second-prong plain error.

¶ 28 As defendant readily concedes, not every mention of a defendant's family or background requires reversal. *People v. Harris*, 225 Ill. 2d 1, 31 (2007). Victims do not live in a vacuum, and neither do jurors. *Harris*, 225 Ill. 2d at 31. In addition, background facts may be necessary to fully present the State's case. *Harris*, 225 Ill. 2d at 31 ("her testimony that she had children was necessary to explain why she left the liquor store in the afternoon").

¶ 29 On appeal, the State argues that it needed to establish that the victim was not a gang member but an innocent man caught up in a gang dispute. This way, the jury would not think that this was a matter of two gangs battling it out in

turf warfare and believe, rightly or wrongly, that the victim was a participant in his own death. As a result, a theme of the State's case was to establish the victim's lack of gang membership and his overall innocence. In its opening, for example, the State observed that the victim was a high school graduate, enrolled in college, gainfully employed and "not a gang member." The point was to counteract other evidence that suggested the victim was a "flake" or rival gang member. Although the victim was not on trial, the State had a legitimate concern that questions about the victim's own background might adversely affect the jurors' judgment.

¶ 30 In this court's opinion concerning defendant's codefendant Pablo Colon, we observed that "there is 'widespread disapproval that exists toward street gangs.' " *People v. Colon*, 2018 IL App (1st) 160120, ¶ 34 (quoting *People v. Gonzalez*, 142 Ill. 2d 481, 489-90 (1991)). In addition, we observed that " 'in metropolitan areas, there may be strong prejudice against street gangs.' " *Colon*, 2018 IL App (1st) 160120, ¶ 34 (quoting in a parenthetical *People v. Smith*, 141 Ill. 2d 40, 58 (1990)). For the same reasons that gang membership may be necessary to understand an otherwise inexplicable act (*Colon*, 2018 IL App (1st) 160120, ¶ 35), the complete lack of gang membership may be necessary for a jury to fully grasp the events that led to a victim's murder.

¶ 31 Defendant argues that the State's introduction of and comments on the victim's mother's testimony are similar to the testimony and remarks that led the Illinois Supreme Court to reverse in *People v. Bernette*, 30 Ill. 2d 359 (1964), and *People v. Hope*, 116 Ill. 2d 265 (1986).

¶ 32 In *Bernette*, the supreme court reviewed the sufficiency of the evidence and found: "We do not see how the jury here could have reached any other conclusion." *Bernette*, 30 Ill. 2d at 367. However, the court found that its analysis could not end there because "the jury did select the death penalty." *Bernette*, 30 Ill. 2d at 368. "[T]he fixing of the death penalty is discretionary with the jury." *Bernette*, 30 Ill. 2d at 368. As a result, the court observed that it could not affirm a judgment of death, even though proof of guilt was clear, if any prejudicial error bore "a direct relationship to the jury's selection of the death penalty." *Bernette*, 30 Ill. 2d at 368.

¶ 33 The *Bernette* defendant argued, and the supreme court agreed, that the prosecutor had dwelt on testimony from the victim's widow, even going "to the extreme of eliciting the ages of the children." *Bernette*, 30 Ill. 2d at 372. The court condemned "this inflammatory appeal" to the jury and found that its effect on the jury's "selection of the death penalty cannot be known." *Bernette*, 30 Ill. 2d at 372. Since "the issue of guilt and the matter of punishment" were decided

and delivered by the jury in a single verdict, the court reversed and remanded for a new trial. *Bernette*, 30 Ill. 2d at 374.

¶ 34 The *Bernette* case is distinguishable on many levels. First, it was a death penalty case, which the instant case is not. The *Bernette* court stressed that its analysis could not end in affirmance because of the unique characteristics of a death penalty case. *Bernette*, 30 Ill. 2d at 367-68. Second, there was no testimony in the case at bar concerning helpless dependents who were left without support, as there was in *Bernette*. Third, in *Bernette*, the testimony had already established that the victim's wife was one of the people who discovered her husband mortally wounded, lying on the floor in front of the safe, during an armed robbery of their restaurant. *Bernette*, 30 Ill. 2d at 363. As a result, the court found that the additional evidence about their children and their ages could serve no other purpose than to inflame the jurors and possibly propel them to select the death penalty. *Bernette*, 30 Ill. 2d at 372. By contrast, as we discussed above, the evidence of the victim's non-gang background in the case at bar helped the jury to complete the narrative of events that night. Thus, we do not find *Bernette* persuasive.

¶ 35 Like *Bernette*, *Hope* was another death penalty case, and the same jury both found defendant guilty and sentenced him to death. *Hope*, 116 Ill. 2d at 270. The supreme court observed that "a high standard of procedural accuracy

is required in determining whether or not the death penalty will be imposed. *** The possibility that the jury, even one member, may have sentenced the defendant to death on the basis of an irrelevant, highly prejudicial and nonstatutory aggravating factor constitutes reversible error." *Hope*, 116 Ill. 2d at 274. As in *Bernette*, the prosecutor in *Hope* elicited from the victim's widow the number of their children and their ages. *Hope*, 116 Ill. 2d at 277. In addition, the *Hope* prosecutor introduced a photo of the victim and the widow with their children. *Hope*, 116 Ill. 2d at 277. The *Hope* court observed that the jurors' common sense tells them that murder victims do not live in a vacuum and, thus, not every mention of their families requires reversal. *Hope*, 116 Ill. 2d at 276-77. The *Hope* court further observed that the State may comment on the devastating effects of crime and may urge a proper and fearless administration of justice. *Hope*, 116 Ill. 2d at 277-78. However, the court found that "any doubt" about the importance and materiality of the State's questions "was removed when defense counsel's objections were overruled." *Hope*, 116 Ill. 2d at 278. "In overruling the [defense's] objections, the prejudicial effect was amplified." *Hope*, 116 Ill. 2d at 278. As a result, the *Hope* court had no choice but to reverse and remand. *Hope*, 116 Ill. 2d at 279.

¶ 36 We find the *Hope* case distinguishable for many of the same reasons as we did with the *Bernette* case. In addition, we observe that the *Hope* case is

further distinguishable because, in the *Hope* case, the error was preserved, and it was the trial court's denial of the defense's objections that the *Hope* court found called attention to the importance of the evidence. As we already observed, the error in the case at bar was not preserved and, thus, denials by the trial court did not flag the evidence for the jury as they did in *Hope*.

¶ 37 For all these reasons, we cannot find a clear and obvious error in the introduction of, and comments on, the mother's testimony. Without clear and obvious error, there can be no plain error. *Piatkowski*, 225 Ill. 2d at 565.

¶ 38 IV. Informant's Testimony

¶ 39 Second, defendant claims that the testimony by government informant, Wayne Kates, about his cooperation with the police and his efforts to purchase guns from Satan Disciple members, was prejudicial and irrelevant to the question of who killed Oliva. Defendant argues that this evidence was prejudicial because it showed that defendant's gang, the Satan Disciples, was a dangerous gang.

¶ 40 Defendant correctly observes that evidence is relevant, and presumptively admissible, if it tends to make the existence of any consequential fact "more probable or less probable than it would be without the evidence." Ill. R. Evid. 401 (eff. Jan. 1, 2011). "All relevant evidence is admissible, except as otherwise provided by law." Ill. R. Evid. 402 (eff. Jan. 1, 2011). However,

evidence, although relevant, "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Ill. R. Evid. 403 (eff. Jan. 1, 2011). Defendant does not cite any cases where a police informant's cooperation with, and payments from, the police were *sua sponte* barred by the trial court, nor can we find one.

¶ 41 If the State had failed to ask on direct examination about Kates' cooperation with the government and his receipt of money from the police, the defense would likely have brought it out on cross-examination, where it would have surprised the jury and dropped like a bomb. As the appellate court has previously observed, "[w]e seriously doubt that any sensible jury, using common sense, needs to be instructed to view paid informants with caution." *People v. Trice*, 2017 IL App (4th) 150429, ¶ 46. If the State had tried to hide this information by not bringing it out on direct, the attempt would have boomeranged on the State's case, undermining it. As a case in point, defense counsel in the case at bar cross-examined Kates extensively about his agreements with the government.

¶ 42 To the extent that defendant is concerned with prejudice from Kates' testimony about guns, there was no evidence at trial that a gun was used in this murder, and Kates' testimony did not associate defendant with the guns that the police recovered through Kates' efforts. In addition, to the extent that defendant

is concerned that the jury would conclude that the Satan Disciples was a dangerous gang, that message was already conveyed from the fact that the gang beat and stabbed to death the victim in the case at bar.

¶ 43 Thus, we can find no error in the State's attempt to front this issue on direct examination. As we noted above, where there is no clear and obvious error, there can be no plain error. *Piatkowski*, 225 Ill. 2d at 565.

¶ 44 Lastly, defendant argues cumulative error, citing *People v. Blue*, 189 Ill. 2d 99, 104 (2000) ("This court holds that cumulative errors occurring at trial deprived defendant of his due process right to a fair trial."). However, since we find no errors, there can be no cumulative error.

¶ 45 CONCLUSION

¶ 46 For the foregoing reasons, we do not find defendant's claims persuasive and, thus, affirm his conviction and sentence.

¶ 47 Affirmed.