2019 IL App (2d) 170017-U
No. 2-17-0017
Order filed September 10, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 15-CF-2053
DARIUS HARRIS,	)	Honorable James C. Hallock,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justice Hutchinson concurred in the judgment.
Justice Hudson specially concurred.

ORDER

¶ 1 *Held*: (1) Trial court substantially complied with Supreme Court Rule 431(b) in questioning the prospective jurors during *voir dire;* (2) trial court's permitting a police officer to narrate the contents of video evidence was harmless error; and (3) the State's allegedly improper comments during closing argument did not constitute plain error.

¶ 2 Following a jury trial, the defendant, Darius Harris, was convicted of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1), (a)(3)(A-5), (a)(3)(c) (West Supp. 2015)) and was sentenced to three years' imprisonment. On appeal, the defendant argues that (1) the trial court failed to comply with Supreme Court Rule 431(b) (Ill. S. Ct. R. 431(b) (eff. July 1,

2012)) in questioning the prospective jurors during *voir dire*; (2) the trial court erred in permitting a police officer to narrate the contents of video evidence; and (3) the State's improper comments during closing argument deprived him of a fair trial. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On January 27, 2016, the defendant was charged by indictment with aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1), (a)(3)(A-5), (a)(3)(c) (West Supp. 2015)) following a November 26, 2015, shooting at a convenience store in Aurora. On October 17, 2016, the trial court conducted a jury trial on that charge.

¶ 5 The defendant testified that on November 26, 2015, he and some friends drove to the Primo's Food Mart parking lot in Aurora to buy $50 of marijuana from Gheronica Suggs. Upon arriving, he and his friend Davon got into the back seat of Suggs' Jeep. The defendant sat behind Suggs on the driver's side. Davon sat behind the front-seat passenger, a man whom the defendant did not know.

¶ 6 The defendant gave the front seat passenger money to purchase the marijuana. The passenger took it, then appeared to reach into his pocket as if he were pulling out the marijuana. Instead, the passenger pulled out a gun from his waistband and pointed it at the defendant and Davon. Davon slapped the gun out of the passenger's hand. The passenger got out of the Jeep and ran away. Davon also got out of the Jeep and ran back to the car in which he and the defendant had arrived.

¶ 7 Inside the Jeep, the defendant grabbed Suggs from behind and a struggle ensued. They exited the car and exchanged words. The defendant sat down on the driver's seat and leaned over to search for the marijuana or something else that would compensate him for the $50 taken

by the passenger. Suggs waved him off nonchalantly, put his hands up, and then turned and walked away.

¶ 8 Moments later, Suggs turned around, pulled a gun from his waistband and fired it at the defendant. The defendant got out of the car and ran. Primos' surveillance cameras recorded the incident.

¶ 9 Aurora police officer Douglas Rashkow arrived at Primo's in response to a dispatch of shots fired. He watched the surveillance footage of the incident. He searched the parking lot and found six .45 caliber bullet casings and one 9 mm shell casing.

¶ 10 While watching the video, Officer Rashkow noted the direction the defendant ran after being shot. Officer Rashkow went to the nearby residence of Oscar Santillanes, which was just west of the store. Santillanes' residence had surveillance cameras on it. Santillanes indicated that he had heard between five and seven gunshots. His surveillance video showed a man jumping fences, carrying a black, gun-shaped object.

¶ 11 The police subsequently received a dispatch that a gunshot wound victim (the defendant) had arrived at Rush Copley Hospital. The police went to speak with him.

¶ 12 The defendant initially told police that he had been shot at a gas station while purchasing gas and cigarettes. After the police informed him that they had just seen him on surveillance video, the defendant admitted that he was shot at Primo's while purchasing marijuana.

¶ 13 Officer Rashkow told the defendant that one of the videos appeared to show the defendant holding something. The defendant acknowledged that he had something in his hand but could not remember what it was. Officer Rashkow asked the defendant whether he accidently fired a gun. The defendant "just smiled and said he never pointed a gun at anybody."

¶ 14 The defendant consented to a gunshot residue (GSR) test. Scott Rochowiz, a forensic scientist, examined the GSR test results and concluded that the defendant's right hand showed gunshot residue indicating that he "either discharged a firearm, was in close proximity to a firearm when it was discharged, or handled" an item with gunshot residue on it. Rochowicz explained that a bullet would leave a "bullet wipe" at the entrance of a gunshot wound, but it would not leave GSR. He indicated that GSR did not travel through objects. He estimated that a .45-caliber or 9mm would spread GSR four to six feet. However, Rochowicz further indicated GSR could travel 10 to 12 feet or more in the direction the firearm was fired, depending on the weather conditions.

¶ 15 Detective Jason Cudebec examined still pictures that were taken from the surveillance videos of where Suggs' Jeep was parked and where Suggs stood when he first fired his firearm. After taking measurements in the Primo's parking lot, Detective Cudebec estimated that Suggs was 22 feet and 4 inches away from the defendant when he first shot at him. Detective Cudebec acknowledged that he had testified before the grand jury that Suggs was 10 to 15 feet away from the defendant when he began firing. Detective Cudebec explained, however, that he had not taken measurements or viewed the slowed and zoomed video of the surveillance footage before his grand jury testimony. Detective Cudebec further testified that he had learned that there were no other shootings in the area of Primo's between October 1, 2015, and the day of the instant shooting.

¶ 16 The defendant testified that at the time of the shooting he had a BB gun in his waistband. He did not have it in his hand while sitting in Suggs' Jeep or when getting out of the vehicle and running away. He did not tell police about it on the day of the incident. During a traffic stop on

December 31, 2015, Illinois State police officers found a black BB gun in the defendant's vehicle. Officers transported the gun to the Aurora police department.

¶ 17 At trial, the defendant identified himself in the surveillance video from the neighboring house and said that he was carrying a BB gun in his right hand.

¶ 18 Forensic scientist Thomas Holloran examined the shell casings and determined the .45 caliber cartridges were fired from the same firearm. He also examined the 9mm shell casing. He explained that a 9mm cartridge could not be fired from a .45 caliber firearm due to the different sizes of the cartridges and firearm chambers. He also explained that a 9 mm bullet could not be fired from a BB gun because there is no place to chamber a 9mm bullet in a BB gun. Holloran also testified that a BB gun operates using pressurized gas and does not use gunpowder.

¶ 19 The day after the shooting, Officer Kevin Jenkins obtained a copy of the surveillance video from Primos, plus video from Oscar Santillanes and Pedro Junaz, who live in the same house as Santillanes and had also installed outdoor video cameras. Officer Jenkins had adjusted some portions of the videos to go in slow motion or to zoom in. Officer Jenkins testified that the adjustments made to the Primo's video allowed the viewer to see a "muzzle flash" from "inside the vehicle."

¶ 20 Defense counsel objected to the admission of all the videos as well as to Officer Jenkins' narration of them. Defense counsel argued that the videos lacked the proper foundation and Officer Jenkins had no personal knowledge of any of the events depicted. The trial court overruled the objection and admitted the videos.

¶ 21 At the close of the trial, the jury found the defendant guilty of aggravated unlawful use of a weapon. Following the denial of his posttrial motion, the trial court sentenced the defendant to three years' imprisonment. The defendant thereafter filed a timely notice of appeal.

¶ 22 II. ANALYSIS

¶ 23 A. Trial court's compliance with Rule 431(b)

¶ 24 The defendant first argues that the trial court failed to strictly comply with Rule 431(b) because it did not question the prospective jurors whether they understood and accepted each of the fundamental principles outlined in *People v. Zehr*, 103 Ill. 2d 472, 477 (1984). Further, the defendant contends that the trial court failed to ask any questions at all about one of the principles—that he had no obligation to present any evidence on his behalf.

¶ 25 Rule 431(b) provides:

> "The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (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 the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects.
>
> The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." Ill. S. Ct. R. 431(b) (eff. July 1, 2012).

¶ 26 At the outset, we note that the defendant forfeited this issue because he neither objected at the time of *voir dire* nor raised this issue in his posttrial motion. Nonetheless, we may review a forfeited error under the plain-error rule if either the evidence is so closely balanced that the jury's verdict may have resulted from the error and not the evidence, or the error was so serious

that the defendant was denied a substantial right and thus a fair trial. See *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). However, we must first determine whether an error occurred. *People v. Blair*, 395 Ill. App. 3d 465, 469 (2009).

¶ 27 As to the first, second, and fourth *Zehr* principles, the defendant contends that the trial court failed to adequately question the jurors to determine whether they accepted those concepts. Rather, the trial court asked only whether the jurors would "take issue" with some of the propositions. The defendant insists that asking the jurors if they "take issue" with the propositions did not comply with Rule 431(b). We disagree.

¶ 28 Rule 431(b) does not require the trial court to recite the principles therein verbatim. *People v. Atherton*, 406 Ill. App. 3d 598, 611 (2010). We believe asking the potential jurors whether they took issue with the propositions was just another way of asking if they accepted those propositions. Thus, the trial court's questions of the jurors as to those principles complied with Rule 431(b). *Id*.

¶ 29 In so ruling, we note that the Illinois Appellate Court, Fourth District, has determined that Rule 431(b) requires strict compliance. See *People v. McGuire*, 2017 IL App (4th) 150695, ¶ 35 ("Trial courts must exercise diligence when instructing the jury of the *Zehr* principles as codified in Rule 431(b) and must not deviate in any way from the precise language chosen by the Illinois Supreme Court to be in that rule."). However, as our supreme court has not determined that such strict compliance with Rule 431(b) is required, we decline to depart from our decision in *Atherton* and continue to hold that substantial compliance is sufficient. See *People v. Sebby*, 2017 IL 119445, ¶ 77 (a violation of the amended version of Rule 431(b) is not *per se* reversible error).

¶ 30 Alternatively, even if we were to find that the trial court did not substantially comply with Rule 431(b), the defendant would not be entitled to any relief because the trial court's purported error did not rise to the level of plain error because the evidence in this case was not closely balanced. In determining whether the evidence adduced at trial was close, a reviewing court must evaluate the totality of the evidence and conduct a qualitative, commonsense assessment of it within the context of the case. *Id.* ¶ 53. Thus, this court will assess the evidence on the elements of the charged offense with any evidence regarding the witnesses' credibility. *People v. Olla*, 2018 IL App (2d) 160118, ¶ 32. Evidence is closely balanced when the witnesses for the State and witnesses for the defense give plausible opposing versions of the events, neither of which is corroborated by extrinsic evidence. *Id.* ¶ 34. However, there is no contest of credibility when one version of events is implausible or is corroborated by other evidence.

¶ 31 Here, the State asserted that the defendant had a 9 mm gun on the day in question while the defendant claimed that he only had a BB gun. The defendant's version of events is implausible in light of the evidence presented at trial. First, gun powder residue was found on the defendant's right hand. BB guns do not use gun powder and thus do not leave gun powder residue. Forensic scientist Rochowiz testified that it is possible for a person to get gun powder residue on himself if he is in the presence of a discharged firearm. However, that person has to be within four to six feet of that firearm for that to occur. As the evidence showed that Suggs was over 22 feet away from the defendant when he fired his gun at the defendant, it is not plausible that the defendant got gun residue on him from Suggs' discharged firearm. Rather, the most reasonable inference is that the defendant got gun powder residue on himself because he discharged a 9 mm gun.

¶ 32 Second, seven shell casing were recovered from the scene. This is consistent with Santillanes' testimony that he heard up to seven shots.

¶ 33 Third, one of those shell casing recovered was a 9 mm shell casing that was found on the ground near the vehicle in which the defendant was located at the time of the shooting. The evidence established that the 9 mm bullet could not have been fired from a BB gun. It could not have been shot by a .45 gun, which the evidence suggests Suggs was using because of the six .45 shell casings found near where Suggs was standing during the shooting. Further, the evidence indicates that the 9 mm shell casing was not left by anyone other than the defendant because there had been no reported shootings near Primo's for six weeks prior to the shooting involving the defendant. Accordingly, as the evidence was not closely balanced, the trial court's purported error did not deprive the defendant of a fair trial.

¶ 34 The defendant further argues that the trial court failed to question the jury at all about the third principle—that he need not present evidence on his own behalf. However, the trial court did question the jury whether they "understand that the presumption of innocence stays with the defendant throughout the entire course of the trial and is not overcome unless, from the evidence, you, as the jury, believe the State has proven the guilt of the defendant beyond a reasonable doubt?" This satisfies the third principle. See *Atherton*, 406 Ill. App. 3d at 611 (trial court's question to potential jurors of whether they would be willing to follow the instruction that "defendant does not have the burden of proving himself innocent" sufficiently conveyed to the jury that the defendant was not obligated to present any evidence on his behalf); *People v. Chester*, 409 Ill. App. 3d 442, 447 (2011) ("The court's statement that 'defendant is not required to prove his innocence' would be interpreted by a reasonable jury to satisfy the third Rule 431(b) principle because if defendant is not required to prove his innocence, he has no reason to present

evidence"). Consequently, no error occurred. Even if we were to find error, the defendant's right to a fair trial was not compromised because the defendant did present evidence on his own behalf. *People v. Albarran*, 2018 IL App (1st) 151508, ¶ 58.

¶ 35 B. Lay Witness Testimony As To What Surveillance Video Showed

¶ 36 The defendant's second contention on appeal is that the trial court committed reversible error by allowing a police officer to narrate surveillance videos. The defendant argues that the officer was not qualified or disclosed as an expert and his lay opinion invaded the province of the jury because he provided his own inferences and conclusions about what they were seeing.

¶ 37 During Officer Jenkins' testimony, the State played the surveillance video from Primo's in its entirety and then played just the shooting portion of the video in slow motion. In describing the video, Officer Jenkins told the jury that "if you look inside of the vehicle after that, you can actually see what we call a "muzzle flash." Defense counsel objected, stating that Jenkins was not an expert and that he was only speculating as to what he believed was in the vehicle. The trial court overruled the objection. Officer Jenkins then further testified that "[i]t appears to me and it is pretty obviously [*sic*] that a shot is fired from the inside of the vehicle and you can actually see the muzzle flash going out of the vehicle."

¶ 38 The admission of evidence is ordinarily within the sound discretion of the trial court. However, whether it was proper for a prosecution witness to draw conclusions, including an identification of someone depicted in a video, when the witness had no personal knowledge of the events portrayed, is a legal question which does not require an exercise of discretion, fact finding, or evaluation of credibility. Thus, the standard of review is *de novo*. *People v. Sykes*, 2012 IL App (4th) 111110,¶ 30.

¶ 39 In the instant case, the record reflects that Officer Jenkins was not qualified by the prosecution as an expert witness. Therefore, he was a lay witness.

¶ 40 A lay witness may not express an opinion or draw inferences from the facts. Ill. R. Evid. 602 (eff. Jan. 1, 2011); *People v. Crump*, 319 Ill. App. 3d 538, 542 (2001). As a general rule, a witness' opinion is not admissible in evidence because testimony must be confined to statements of fact of which the witness has personal knowledge. Ill. R. Evid. 701 (eff. Jan. 1, 2011); *People v. Sprinkle*, 74 Ill. App. 3d 456, 464 (1979). There are exceptions, however, to this general rule. *Sprinkle*, 74 Ill. App. 3d at 464. Improper opinion testimony is not necessarily prejudicial where the conclusion or testimony adduced is an obvious one. *People v. Sepka*, 51 Ill. App. 3d 244, 259 (1977). A lay witness may express an opinion based upon his or her observations where it is difficult to reproduce for the jury the totality of the conditions perceived and where the opinion given is one that persons in general are capable of making and understanding. *People v. Stokes*, 95 Ill. App. 3d 62, 66 (1981).

¶ 41 Lay witness testimony is especially improper and prejudicial when it goes to the ultimate question of fact that is to be decided by the jury. *People v. McClellan*, 216 Ill. App. 3d 1007, 1013 (1991). A police officer is a figure of authority whose testimony may be prejudicial if the officer informs the jurors that they should believe a portion of the prosecution's case. *Sepka*, 51 Ill. App. 3d at 259.

¶ 42 We believe that Officer Jenkins' narration of the video as a lay witness was improper because it went beyond what could be obviously seen in the video. This court's viewing of the surveillance video does not indicate that any "muzzle flash" coming from inside the vehicle while the defendant was in the front seat was readily apparent. The trial court therefore erred in overruling defense counsel's objection to Officer Jenkins' testimony on this point. See *People v.*

Holveck, 141 Ill. 2d 84, 106 (1990) (if a witness statement leaves no room for the jurors to make their own interpretation of facts, then it "invade[s] the province of the jury").

¶ 43 Nonetheless, we believe that the trial court's ruling on this point was harmless error. In light of the evidence that the defendant had gun powder residue on his right hand and because a 9 mm shell casing was found close to where the defendant had been during the incident, Officer Jenkins' testimony did not prejudice the defendant. See *People v. Brouder*, 168 Ill. App. 3d 938, 945 (1988) (police officer's testimony that defendant charged with resisting arrest "resisted" was not reversible error where other testimony was sufficient to establish resistance); *Sprinkle*, 74 Ill. App. 3d at 465 (improper opinion testimony not necessarily prejudicial when the conclusion reached is obvious; victim's testimony that defendant charged with attempted murder "attempted to slit my throat" appeared obvious).

¶ 44 B. Improper Prosecutorial Comments in Closing Argument

¶ 45 The defendant's third contention on appeal is that the State committed reversible error by improperly vouching for the State's witnesses during closing arguments and arguing about facts not in evidence. The defendant acknowledges that he did not object to the State's comments of which he now complains nor did he include the issue of the alleged improper comments in his posttrial motion. To preserve an alleged error for review, a defendant must both make an objection at trial and include the issue in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Therefore, the defendant has forfeited this issue for review. The defendant asks this court to review his argument under the first prong of the plain error doctrine, asserting that the evidence at his trial was closely balanced. We have previously concluded that the evidence in this case was not in fact closely balanced. Accordingly, there is no need for us to determine

whether the prosecutor's comments constituted error. See *People v. Belknap*, 2014 IL 117094, ¶ 66.

¶ 46 III. CONCLUSION

¶ 47 For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed. As part of our judgment, we grant the State's request that the defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2018); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 48 Affirmed.

¶ 49 JUSTICE HUDSON, specially concurring:

¶ 50 Though I agree with the result at which the majority arrives, I write separately as I disagree with its reasoning concerning the trial court's application of Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). Defendant contends that the trial court did not address the third principle set forth in that rule: "that the defendant is not required to offer any evidence on his or her own behalf." *Id.* The majority holds that the trial court sufficiently complied with this rule by inquiring of the jurors whether they understood "that the presumption of innocence stays with the defendant throughout the entire course of the trial and is not overcome unless, from the evidence, you, as the jury, believe the State has proven the guilt of the defendant beyond a reasonable doubt?" This seems to me more of a paraphrase of the second principle set forth in Rule 431(b)—"that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt"—than it does of the third principle. Thus, I cannot agree that the trial court's inquiry constituted substantial compliance with the rule insofar as the third principle is concerned.

¶ 51 The majority cites *People v. Atherton*, 406 Ill. App. 3d 598 (2010), in support of its holding. In that case, this court found adequate the trial court's inquiry of the jury as to "whether they would be willing to follow the instruction that 'defendant does not have the burden of proving himself innocent.' " *Id.* at 611. In *Atherton*, then, the trial court's inquiry actually addressed the defendant's burden of proof, specifically, that he did not have one. Unlike *Atherton*, the question here relied on by the majority to find substantial compliance concerns the State's burden. *People v. Chester*, 409 Ill. App. 3d 442, 447 (2011), also relied on by the majority, is similarly distinguishable. Hence, I simply cannot conclude that such questioning adequately covers the issue encompassed by the third principle set forth in Rule 431(b), particularly since the supreme court saw it fit to address both burdens in separate portions of the rule.

¶ 52 I recognize that strict compliance with Rule 431(b) is not required in our district (see *Atherton*, 406 Ill. App. 3d at 610-611); however, I question whether inquiring if a juror "takes issue" with one of the principles set forth in the rule is a fair paraphrase of whether the juror "understands and accepts" the principle, as required by Rule 431(b). *Atherton* sanctioned an inquiry into whether the jurors "ha[d] any difficulty" and would be "willing to follow" the principles. *Id.* at 611. The former arguably encompasses understanding of the principles, and the latter arguably encompasses acceptance of them. *Id.* Conversely, while not "taking issue" with a principle certainly suggests acceptance of it, it does not suggest that the juror has an adequate understanding of the principle—both of which are required by Rule 431(b). *People v. Perry*, 2011 IL App (1st) 081228, ¶ 74. Of course, all of this could be easily avoided.

¶ 53 It is simply not that difficult for a trial court to inquire of jurors in language that specifically tracks Rule 431(b). Substituting language such as "have any difficulty with" or

"takes issue with" for "understands and accepts" does not shorten the inquiry or make it any easier. Indeed, pursuant to Rule 431(b) (eff. July 1, 2012), potential jurors may be addressed as a group, greatly alleviating any burden. See also *People v. Wallace*, 402 Ill. App. 3d 774, 777 (2010). What such improvisation does, however, is to inject potential error into the record and may lead to an otherwise unnecessary reversal, remand, and new trial. The better practice, clearly, is to use the specific language set forth in Rule 431(b), regardless of whether substantial compliance is sufficient to avoid a reversal.

¶ 54 I nevertheless am compelled to agree with the majority's conclusion that defendant has not established that plain error occurred. Accordingly, I specially concur in the majority's disposition.