2019 IL App (4th) 160647-U

NO. 4-16-0647

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
March 22, 2019
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
JOSEPH S. COURTNEY,	)	No. 15CF1004
Defendant-Appellant.	)	
	)	The Honorable
	)	Leslie J. Graves,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Knecht and DeArmond concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed defendant's conviction because (1) he knowingly and voluntarily waived his right to counsel and (2) his other arguments fail to satisfy the plain error doctrine.

¶ 2 In September 2015, the State charged defendant, Joseph S. Courtney, with unlawful violation of an order of protection. 720 ILCS 5/12-3.4(a)(1) (West 2014). In December 2015, defendant dismissed his attorney and proceeded *pro se* to a jury trial. Prior to the trial, the trial court granted the State's motion to admit propensity evidence. Later that month, the jury convicted defendant of this offense, and the court sentenced him to six years in prison.

¶ 3 Defendant appeals, arguing (1) he did not knowingly and voluntarily waive his right to counsel, (2) the trial court erred by granting the State's motion to introduce propensity evidence, and (3) the trial court failed to properly question the jurors on the relevant *Zehr* principles (see *People v. Zehr*, 103 Ill. 2d 472, 469 N.E.2d 1062 (1984)). We affirm.

¶ 4 I. BACKGROUND

¶ 5 A. The Charges

¶ 6 In September 2015, the State charged defendant with unlawful violation of an order of protection. 720 ILCS 5/12-3.4(a)(1) (West 2014). The State alleged that defendant "knowingly commit[ed] an act which was prohibited by the order of protection, in that said defendant contact[ed] [M.J.], a protected party, by phone." The State charged this offense as a Class 4 felony for which defendant was eligible for an extended-term sentence because of his prior domestic battery conviction.

¶ 7 B. The Dismissal of Defendant's Attorney

¶ 8 In October 2015, the trial court conducted a status hearing. Defendant noted that he had a private attorney working for him on another criminal case, but he did not know if this private attorney would be representing him for his alleged violation of the order of protection in this case. In response, the court appointed the public defender's office to represent defendant in this case.

¶ 9 On December 14, 2015, the trial court conducted a hearing. Craig Reiser, defendant's public defender, requested a trial date of January 11, 2016. Defendant addressed the court, stating that "I want my 120 day trial. I don't want no more continuances. I am ready for trial." The following exchange took place:

> "THE COURT: Mr. Courtney [defendant], you have indicated that your—you don't want a continuance?
>
> DEFENDANT: Correct, Your Honor.
>
> THE COURT: And you are saying that you want to go to trial today?
>
> DEFENDANT: I am ready for trial, yes, Your Honor.

THE COURT: Okay, you are ready to represent yourself in this trial?

DEFENDANT: Sure, Your Honor.

THE COURT: Do you understand that Mr.—your—Mr. Reiser is your attorney. He is an excellent attorney, I have tried cases with him for the last fifteen years. *** Do you understand that?

DEFENDANT: Yes, Your Honor.

THE COURT: Okay. You also understand—he's in custody on another matter as well, correct?

MR. REISER: Yes.

THE COURT: You are in custody on two matters, so even if you went to trial today and were acquitted, that you'd still be in custody? You understand that?

DEFENDANT: Yes, Your Honor.

THE COURT: Mr. Reiser has indicated he needs a continuance because he has got a lot of cases and this is a new case and he would rather be prepared for trial than just wing it. Do you understand that?

DEFENDANT: Yes, Your Honor.

THE COURT: And you're telling me that even though you'd still be in custody, you want a trial today without a lawyer?

DEFENDANT: Yes, Your Honor.

MR. SHAW [(ASSISTANT STATE'S ATTORNEY)]: If we can start tomorrow, I can see if the victim's available. It's a two witness case. We have got a recording of the defendant's voice. Certainly I will take care of this. *** So he

is correctly admonished, he is looking at one to six [(years in prison)], four years MSR [(mandatory supervised release)].

THE COURT: Can you do it tomorrow afternoon?

MR. MORSE [(ASSISTANT STATE'S ATTORNEY)]: Yeah, we can definitely pick up tomorrow afternoon.

THE COURT: Okay. Before we do this, understand this, Mr. Courtney [(defendant)]. If you are found guilty of this, you're eligible for up to six years in the Department of Corrections. *** You could receive probation, however you could receive up to six years in the Department of Corrections. MSR on this?

MR. MORSE: Four years.

THE COURT: Four years of mandatory supervised release, and you are telling me—have you ever tried a case?

DEFENDANT: No, Your Honor.

THE COURT: Did you go to law school?

DEFENDANT: No, Your Honor.

THE COURT: Okay, so you are telling me you would rather do this on your own, knowing that that's the possible penalty?

DEFENDANT: Yes, Your Honor.

THE COURT: Than wait for Mr. Reiser?

DEFENDANT: Yes, Your Honor.

MR. MORSE: Your Honor, any penalty on 15-CF-1004 would be consecutive to 2015-CF-663.

THE COURT: Do you understand that? Let's say, and I don't know

what's going to happen because I don't know, you could very well be acquitted tomorrow, but if you are found guilty, *** and if you are convicted of the next one, whatever sentence for that one that is imposed is consecutive, which means it will run after that, and you are willing to take that chance?

DEFENDANT: Yes, Your Honor.

THE COURT: All right, we'll pick a jury tomorrow."

¶ 10 The trial court's December 14, 2015, docket entry noted that the public defender's office was released pursuant to defendant's request. On December 15, 2015, prior to jury selection, the following exchange took place:

"THE COURT: Okay. The State is ready to proceed to trial. Mr. Courtney [(defendant)], you indicated yesterday, as of 9:00 yesterday, [that] Mr. Reiser was your attorney. Yesterday you chose to terminate his—your relationship with him on this matter, and you elected to have the trial today *pro se*, which means you intend to represent yourself; is that true?

DEFENDANT: Yes, Your Honor.

THE COURT: Okay. And I talked to you yesterday ***, and I'm going to go through this again because *** it's important that I do. *** First of all, you know that you have the right to be represented by an attorney, correct?

DEFENDANT: Correct.

THE COURT: Okay. And that you were, and you still have that right. That the attorney has knowledge that only an attorney can have *** [such as how] to pick a jury, how to do opening statements, how to cross-examine witnesses, how to put evidence into the case. All of those things are things that a seasoned

trial attorney knows how to do. *** And you're putting yourself at a disadvantage; you understand that?

DEFENDANT: Yes. I guess the thing is a cut-and-dried [*sic*] situation. Either I made the phone call or I didn't.

THE COURT: We don't want to talk about that now, okay? *** But you understand that, let's say that the State has a witness on the stand and they're saying something and you object. If you don't give me the right objection, I may not sustain that [objection], which means that evidence may come in that shouldn't because you don't know what you're doing; you understand that?

DEFENDANT: Correct.

THE COURT: I'm not saying it's going to happen. I want to throw out all these potential pitfalls that you might have, okay? A seasoned trial attorney, especially Mr. Reiser, would know what to do. *** And that's why I tried to talk you out of this yesterday. And you understand that I'm going to treat you the same as I would an attorney? *** [Y]ou understand that?

DEFENDANT: Right.

THE COURT: Okay. Do you also understand that—and correct me if I'm wrong; I don't—that this is a Class 4 felony. The possible penalties if, in fact, you are convicted are, you are eligible for probation, but because of some criminal history that you have *** you're eligible for one to six years in the Department of Corrections; you understand that? And if you are convicted, it's a four-year period of mandatory supervised release, and you understand that mandatory supervised release is what we now call parole; you understand that?

DEFENDANT: Uh-huh.

THE COURT: You need to speak.

DEFENDANT: Yes, Your Honor.

THE COURT: Okay. You also understand a possible fine of up to $25,000 can be levied against you?

DEFENDANT: Yes, Your Honor.

THE COURT: Okay. Am I missing anything pursuant to the—

MR. MORSE [(ASSISTANT STATE'S ATTORNEY)]: Your Honor, as to penalties, I believe that any penalty in this case would be consecutive to a sentence in 15-CF-663.

THE COURT: Yes. And I mentioned that yesterday. So if you're convicted of this and you're convicted of that, it will run consecutive, and you understand what that means; one will follow the other, correct?

DEFENDANT: Yes, Your Honor.

THE COURT: Okay. As it relates to the admonishments, did I miss anything else?

MR. SHAW [(ASSISTANT STATE'S ATTORNEY)]: (Counsel shakes head.)"

C. The State's Propensity Evidence

¶ 11 Following defendant's request to proceed *pro se,* the State filed a motion to introduce propensity evidence. 725 ILCS 5/115-7.4 (West 2014). The State argued that "when a defendant is accused of an act of domestic violence, evidence of additional acts of domestic violence are appropriately admissible for consideration on any relevant issue, including Defendant's

propensity to commit acts of domestic violence." The State intended to introduce evidence regarding defendant's pending charges for aggravated domestic battery and domestic battery. M.J. was the alleged victim in these pending charges. The trial court granted the State's motion over defendant's *pro se* objection.

¶ 12 D. The *Zehr* Principles

¶ 13 Also on December 15, 2015, the trial court conducted jury selection for defendant's trial. Illinois Supreme Court Rule 431(b) (eff. July 1, 2012), which codified the principles established in *Zehr*, 103 Ill. 2d at 477, requires a trial court to ask all potential jurors whether they *understand* and *accept* that (1) the defendant is presumed innocent, (2) the State bears the burden of proving the defendant guilty beyond a reasonable doubt, (3) the defendant has no obligation to present evidence, and (4) the defendant's choice to not testify cannot be held against him. During jury selection, the court failed to comply with Rule 431(b). Regarding the first three principles, the court asked if the jurors *understood* those principles but neglected to ask whether certain jurors *accepted* those principles. The court neglected to question the jurors on the fourth principle.

¶ 14 E. The Trial

¶ 15 M.J. testified that she previously dated defendant. M.J. stated that on the night of July 4, 2015, defendant, who appeared to be intoxicated, arrived at her residence. M.J. testified that defendant became belligerent, grabbed her by the throat, punched her, and threw her across the room. M.J. called the police, and the State subsequently charged defendant with aggravated domestic battery and domestic battery.

¶ 16 M.J. testified that after the assault, she petitioned the trial court for an order of protection against defendant. On July 23, 2015, the court granted M.J.'s request for an order of

protection. M.J. noted that she petitioned for this order because she was "scared" of defendant and did not want contact with him.

¶ 17 M.J. further testified that on September 11, 2015, she received a phone call. Her phone displayed the incoming call as "Mike." M.J. testified that when she answered the phone, she recognized defendant's voice "as soon as I heard it." She stated that hearing defendant's voice made her feel anxious because "it brought back every memory I had from July 4." She testified that she did not want defendant to contact her and that "as soon as I heard his voice, I was trying to hang up immediately." Lynn Evans testified that she works at the jail administration office. Evans noted that her responsibilities include processing requests for phone calls and maintaining the jail's phone records. She stated that one of defendant's cellmates, Mike Turner, called M.J. on September 11, 2015. The Department of Corrections had recorded this phone call, and the State played the recording to the jury.

¶ 18 Following this, the State rested. The trial court then asked if defendant had any evidence to present. Defendant stated that he did. However, defendant rested once the court told him that he had to take the witness stand to present evidence.

¶ 19 In closing argument, the State argued that defendant violated the order of protection when he called M.J. from prison. The State argued that "we know that [defendant] made that phone call because the one witness that you heard from today who knows the defendant, has heard his voice before today, told us exactly that; that she had no question in her mind who made that phone call. And you heard his voice yourselves. You heard his voice say her name." Defendant argued that the State failed to prove him guilty beyond a reasonable doubt because the State "never brought Mike Taylor to this trial today. He could have easily established that it was him that actually called [M.J.] on that day in question. The State also has

not brought forth an expert [witness] to establish whom the voice that actually was on that audio recording."

¶ 20 The jury found defendant guilty of violating the order of protection. 720 ILCS 5/12-3.4(a)(1) (West 2014). In February 2016, the trial court sentenced defendant to six years in prison.

¶ 21 F. Defendant's Posttrial Motions

¶ 22 In March 2016, defendant filed a "motion for reduction of sentence." Defendant argued only that (1) "he never wanted to go *pro se*" and (2) his "misdemeanor conviction in case no. 2000 cm-000484 was without counsel at his plea of guilty and based on a silent record." Also in March 2016, defendant filed a "motion in arrest of judgment[,]" which stated that he "wishes to appeal all appealable issues in this matter." The trial court denied defendant's motions.

¶ 23 This appeal followed.

¶ 24 II. ANALYSIS

¶ 25 Defendant appeals, arguing (1) he did not knowingly and voluntarily waive his right to counsel, (2) the trial court erred by granting the State's motion to introduce propensity evidence, and (3) the trial court failed to properly question the jurors on the relevant *Zehr* principles. We address these issues in turn.

¶ 26 A. Defendant's Waiver of Counsel

¶ 27 Defendant argues he did not knowingly, voluntarily, or effectively waive his right to counsel. We disagree.

¶ 28 1. *The Applicable Law*

¶ 29 "A defendant has a constitutional right to represent himself." *People v. Baez*, 241

Ill. 2d 44, 115, 946 N.E.2d 359, 401 (2011); U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. "In order to represent himself, a defendant must knowingly and intelligently relinquish his right to counsel." *Baez*, 241 Ill. 2d at 115-16. A defendant's waiver of counsel must be "clear and unequivocal, not ambiguous." *Id.* at 116. "In determining whether a defendant's statement is clear and unequivocal, a court must determine whether the defendant truly desires to represent himself and has definitively invoked his right of self-representation." *Id.* "Courts must 'indulge in every reasonable presumption against waiver' of the right to counsel." *Id.* (quoting *Brewer v. Williams*, 430 U.S. 387, 404 (1977)). "The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances of that case, including the background, experience, and conduct of the accused." *Baez*, 241 Ill. 2d at 116.

¶ 30 "Illinois Supreme Court Rule 401(a) governs the trial court's acceptance of a defendant's waiver of counsel." *People v. Reese*, 2017 IL 120011, ¶ 61, 102 N.E.3d 126. This rule provides as follows:

> "(a) Waiver of Counsel. Any waiver of counsel shall be in open court. The court shall not permit a waiver of counsel by a person accused of an offense punishable by imprisonment without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:
>
> (1) the nature of the charge;
>
> (2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences; and

(3) that he has a right to counsel and, if he is indigent, to have counsel appointed for him by the court." Ill. S. Ct. R. 401(a) (eff. July 1, 1984).

¶ 31 The purpose of Rule 401(a) is to ensure that a waiver of counsel is knowingly and intelligently made. *Reese*, 2017 IL 120011, ¶ 62. However, strict technical compliance with Rule 401(a) is not always required. *Id.* "Substantial compliance is sufficient for a valid waiver of counsel if the record indicates the waiver was made knowingly and intelligently and the trial court's admonishment did not prejudice the defendant's rights." *Id.*

¶ 32 "Substantial compliance occurs when any failure to fully provide admonishments does not prejudice defendant because either: (1) the absence of a detail from the admonishments did not impede defendant from giving a knowing and intelligent waiver or (2) defendant possessed a degree of knowledge or sophistication that excused the lack of admonition." *People v. Pike*, 2016 IL App (1st) 122626, ¶ 112, 53 N.E.3d 147. "When a defendant is admonished in substantial compliance with Rule 401(a), there is a valid waiver of counsel." *Id.* "While a finding whether a defendant's waiver of counsel was knowing and voluntary is reviewed for an abuse of discretion [citation], the legal issue of whether the court failed to substantially comply with Supreme Court Rule 401(a) admonishments is a question of law that we review *de novo*." *Id.* ¶ 114.

¶ 33 2. *This Case*

¶ 34 a. Clear and Unequivocal Waiver

¶ 35 We conclude that defendant clearly and unequivocally waived his right to counsel. We so conclude because of defendant's exchange with the trial court:

"THE COURT: Okay. The State is ready to proceed to trial. Mr. Courtney [(defendant)], you indicated yesterday, as of 9:00 yesterday, [that] Mr. Reiser

was your attorney. Yesterday you chose to terminate his—your relationship with him on this matter, and you elected to have the trial today *pro se*, which means you intend to represent yourself; is that true?

DEFENDANT: Yes, Your Honor."

¶ 36 b. The Trial Court Substantially Complied with Rule 401

¶ 37 We likewise conclude that the trial court substantially complied with Illinois Supreme Court Rule 401(a) (eff. July 1, 1984). The first requirement of Rule 401(a) is for the court to explain the nature of the charge levied against a defendant. Ill. S. Ct. R. 401(a)(1) (eff. July 1, 1984). "One commits the offense of violating an order of protection when he (1) commits an act that was prohibited by a court in a valid order of protection *** and (2) has been served notice of or otherwise acquired actual knowledge of the contents of the order of protection." *People v. Brzowski*, 2015 IL App (3d) 120376, ¶ 25, 32 N.E.3d 1152; 720 ILCS 5/12-3.4(a)(1) (West 2014). Although the court did not explain the nature of this charge, defendant expressed an understanding of it:

"THE COURT: *** [An] attorney has knowledge that only an attorney can have *** [such as how] to pick a jury, how to do opening statements, how to cross-examine witnesses, how to put evidence into the case. All of those things are things that a seasoned trial attorney knows how to do. *** And you're putting yourself at a disadvantage [by going *pro se*]; you understand that?

DEFENDANT: Yes. I guess the thing is a cut-and-dried [*sic*] situation. Either I made the phone call or I didn't."

¶ 38 In this case, it is undisputable that M.J. had a valid order of protection that proscribed defendant from contacting her. Defendant correctly noted that his case was "a cut-and-

dried [*sic*] situation. Either [he] made the phone call or [he] didn't." Accordingly, despite the trial court's failure to discuss the nature of the charge, the court substantially complied with Rule 401(a)(1) because "defendant possessed a degree of knowledge that excused the lack of admonition." *Pike*, 2016 IL App (1st) 122626, ¶ 112.

¶ 39 The second requirement of Rule 401(a) is to explain the minimum and maximum sentence prescribed by law, including the possibility of consecutive sentences. Ill. S. Ct. R. 401(a)(2) (eff. July 1, 1984). We conclude that the trial court met this requirement:

> "THE COURT: Okay. Before we do this, understand this, Mr. Courtney [(defendant)]. If you are found guilty of this, you're eligible for up to six years in the Department of Corrections. *** You could receive probation, however you could receive up to six years in the Department of Corrections. MSR on this?
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> MR. MORSE: Four years.
>
> THE COURT: Four years of mandatory supervised release, and you are telling me—have you ever tried a case?
>
> DEFENDANT: No, Your Honor.
>
> * * *
>
> THE COURT: Okay, so you are telling me you would rather do this on your own, knowing that that's the possible penalty?
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> DEFENDANT: Yes, Your Honor.
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> * * *
>
> MR. MORSE [(ASSISTANT STATE'S ATTORNEY)]: Your Honor, any penalty on 15-CF-1004 would be consecutive to 2015-CF-663.
>
> THE COURT: Do you understand that? Let's say, and I don't know

what's going to happen because I don't know, you could very well be acquitted tomorrow, but if you are found guilty, *** and if you are convicted of the next one, whatever sentence for that one that is imposed is consecutive, which means it will run after that, and you are willing to take that chance?

DEFENDANT: Yes, Your Honor."

¶ 40 The third requirement of Rule 401(a) is to explain that a defendant "has a right to counsel and, if he is indigent, to have counsel appointed for him by the court." Ill. S. Ct. R. 401(a)(3) (eff. July 1, 1984). We conclude that the trial court substantially complied with this requirement:

"THE COURT: Okay. And I talked to you yesterday ***, and I'm going to go through this again because *** it's important that I do. *** First of all, you know that you have the right to be represented by an attorney, correct?

DEFENDANT: Correct."

¶ 41 Certainly, the trial court *should have* told defendant that he had the right to counsel and, if indigent, the right to have counsel appointed to him by the court. See *id.* However, prior to his request to proceed *pro se*, defendant was represented by the public defender's office. See 725 ILCS 5/113-3(b) (West 2014) ("In all cases, except where the penalty is a fine only, if the court determines that the defendant is indigent and desires counsel, the Public Defender shall be appointed as counsel."). Simply put, because defendant already had been appointed a public defender, he had knowledge, constructive or actual, that he had the right to an attorney and that one would be provided for him if he could not afford one. Accordingly, we conclude that the court substantially complied with Rule 401(a)(3) because "defendant possessed a degree of knowledge that excused the lack of admonition." *Pike*, 2016 IL App (1st) 122626, ¶ 112.

¶ 42 In summation, the public defender's office previously represented defendant and defendant expressed an understanding of the charges filed against him. Moreover, the trial court repeatedly warned defendant about the dangers of firing his attorney, discouraged defendant from firing his attorney, told defendant that he had the right to an attorney, and explained the possible punishment that defendant would face if convicted. Notwithstanding this, defendant fired his public defender and proceeded *pro se* to trial. Accordingly, we conclude that (1) the trial court substantially complied with Rule 401 and (2) defendant knowingly, voluntarily, and effectively waived his right to counsel. *Reese*, 2017 IL 120011, ¶ 62; *Pike*, 2016 IL App (1st) 122626, ¶ 112.

¶ 43 c. Suggested Procedure

¶ 44 Although we have affirmed defendant's waiver of counsel, we encourage trial courts to *strictly comply* with the exact wording of Rule 401(a) to avoid this issue on appeal. Courts should create a "checklist" pursuant to Rule 401(a) that could be used whenever a defendant wishes to proceed *pro se*. Such a list would ensure that a defendant is properly admonished prior to proceeding *pro se*. Furthermore, as this court has previously mentioned, the State shares in the responsibility to ensure that courts comply with Rule 401:

> "[T]he trial court's obvious error of not complying with Rule 401(a) should have been equally obvious to the prosecutors handling this first degree murder case. Particularly when dealing with obstreperous defendants, trial courts might become distracted and inadvertently omit taking actions—like Rule 401(a) admonishments—that the law requires. When this happens, prosecutors should step forward and respectfully remind the court about any necessary steps that had been overlooked." *People v. Seal*, 2015 IL App (4th) 130775, ¶ 48, 38 N.E.3d 642

(Steigmann, J., concurring).

¶ 45 B. Defendant's Other Claims of Error

¶ 46 Defendant further argues that the trial court erred by (1) granting the State's motion to introduce propensity evidence and (2) failing to properly question the jurors on the relevant *Zehr* principles. However, defendant failed to preserve these issues and fails to satisfy the plain error doctrine.

¶ 47 1. *The Applicable Law*

¶ 48 To preserve an alleged error for appeal, a defendant must object at trial and file a written posttrial motion. *People v. Colyar*, 2013 IL 111835, ¶ 27, 996 N.E.2d 575. Further, the "posttrial motion must alert the trial court to the alleged error with enough specificity to give the court a reasonable opportunity to correct it." *People v. Coleman*, 391 Ill. App. 3d 963, 971, 909 N.E.2d 952, 960 (2009). Failure to do either results in forfeiture. *People v. Sebby*, 2017 IL 119445, ¶ 48, 89 N.E.3d 675.

¶ 49 The plain-error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider an 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. *People v. Ely*, 2018 IL App (4th) 150906, ¶ 15, 99 N.E.3d 566.

¶ 50 When a defendant claims first-prong error, he must prove that an error occurred and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him. *Id.* ¶ 18. In determining if the evidence was close, a reviewing court evaluates the totality of the evidence and conducts a qualitative, commonsense assessment of the evidence within the context of the case. *Sebby*, 2017 IL 119445, ¶ 53. The evidence is closely balanced if the outcome of a case turned on how the fact finder resolved a contest of credibility.

People v. Westfall, 2018 IL App (4th) 150997, ¶ 74, 115 N.E.3d 1148. A "contest of credibility" exists if (1) both sides present a plausible version of events and (2) no extrinsic evidence corroborates or contradicts either version of events. *Id.* If the defendant meets his burden, he has demonstrated actual prejudice, and his conviction should be reversed. *Id.* ¶ 74.

¶ 51 When a defendant claims second-prong error, he must prove that a structural error occurred. *People v. Thompson*, 238 Ill. 2d 598, 613-14, 939 N.E.2d 403, 413 (2010). A structural error is an error which renders a criminal trial fundamentally unfair or unreliable in determining a defendant's guilt or innocence. *People v. Marzonie*, 2018 IL App (4th) 160107, ¶ 54, 115 N.E.3d 270. Structural errors occur in very limited circumstances such as a complete denial of counsel, denial of self-representation at trial, trial before a biased judge, denial of a public trial, racial discrimination in the selection of the grand jury, or a defective reasonable doubt instruction. *People v. Averett*, 237 Ill. 2d 1, 13, 927 N.E.2d 1191, 1198 (2010). Further, a "Rule 431(b) violation is not cognizable under the second prong of the plain error doctrine, absent evidence that the violation produced a biased jury." *Sebby*, 2017 IL 119445, ¶ 52.

¶ 52 The defendant bears the burden of persuasion at all times under the plain error doctrine. *People v. Bates*, 2018 IL App (4th) 160255, ¶ 73, 112 N.E.3d 657. If the defendant fails to meet his burden, the issue is forfeited, and the reviewing court will honor the procedural default. *People v. Ahlers*, 402 Ill. App. 3d 726, 734, 931 N.E.2d 1249, 1255 (2010).

¶ 53 2. *This Case*

¶ 54 We first conclude that defendant forfeited review of these issues. Defendant did not object to the trial court's failure to comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) and failed to include this argument in his posttrial motions. Likewise, although defendant objected to the State's introduction of propensity evidence, he failed to include this

argument in his posttrial motions. Defendant's motion attempting to "appeal all appealable issues" is not sufficient to preserve these alleged errors. *Coleman*, 391 Ill. App. 3d at 971. Accordingly, these issues are forfeited and will be reviewed under the plain error doctrine.

¶ 55 We next conclude that defendant fails to satisfy the plain error doctrine. In this case, the State charged defendant with unlawful violation of an order of protection. 720 ILCS 5/12-3.4(a)(1) (West 2014). Evans, who was responsible for processing requests for phone calls and maintaining the jail's phone records, testified that one of defendant's cellmates, Mike Turner, called M.J. on September 11, 2015. M.J. testified that after defendant assaulted her, the trial court granted her request for an order of protection against defendant. She further testified that on September 11, 2015, she received a phone call from "Mike." She stated that when she answered the phone, she recognized defendant's voice. The Department of Corrections had recorded this phone call, and the State played this recording to the jury.

¶ 56 Defendant fails to satisfy the first prong of the plain error doctrine because the evidence was not closely balanced. Indeed, because Evans' testimony and the audio recording of the phone call support M.J.'s version of events, we view the evidence of defendant's guilt as overwhelming. See *Westfall*, 2018 IL App (4th) 150997, ¶ 74.

¶ 57 Defendant's argument also fails to satisfy the second prong of the plain error doctrine. Even assuming defendant's claims of error are true, they do not arise to a structural error. *Averett*, 237 Ill. 2d at 13. Moreover, defendant's argument that the trial court failed to properly admonish the jurors pursuant to Rule 431(b) is not cognizable under the second prong of the plain error doctrine because defendant fails to demonstrate that the trial court's error produced a biased jury. *Sebby*, 2017 IL 119445, ¶ 52. Thus, defendant's remaining arguments are forfeited and fail to satisfy the plain error doctrine. *Westfall*, 2018 IL App (4th) 150997, ¶ 81.

¶ 58 III. CONCLUSION

¶ 59 For the reasons stated, we affirm defendant's conviction. We also grant the State its $50 statutory assessment against defendant as the costs of this appeal. 55 ILCS 5/4-2002 (West 2016).

¶ 60 Affirmed.