2024 IL App (4th) 230144-U

NO. 4-23-0144

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
March 22, 2024
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Winnebago County
DAVID STEPHENS,	)	No. 18CF1885
Defendant-Appellant.	)	
	)	Honorable
	)	Robert Randall Wilt,
	)	Judge Presiding.

PRESIDING JUSTICE CAVANAGH delivered the judgment of the court.
Justices Zenoff and Vancil concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, finding (1) the evidence was sufficient for a jury to reasonably conclude defendant was guilty beyond a reasonable doubt and (2) defendant affirmatively acquiesced to the trial court's procedure for designating alternate jurors.

¶ 2 Defendant, David Stephens, was convicted by a jury of first degree murder (720 ILCS 5/9-1(a)(1) (West 2016)) for shooting and killing Billy Manning and unlawful use of a weapon by a felon (*id.* § 24-1.1(a)). On appeal, defendant argues (1) the State failed to prove he was guilty beyond a reasonable doubt of both first degree murder and unlawful use of a weapon by a felon because his convictions resulted from the uncorroborated, inconsistent, and impeached testimony of two witnesses and (2) the trial court's procedure for selecting alternate jurors amounted to plain error, warranting a new trial. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On July 25, 2018, defendant was charged by indictment with 12 counts of first degree murder for shooting and killing Manning and one count of unlawful use of a weapon by a felon. Defendant was initially tried on the matter in September 2020, wherein the trial court declared a mistrial due to a hung jury. Defendant was subsequently retried for the same offenses in October 2020.

¶ 5 A. Jury Selection

¶ 6 The trial court began jury selection by stating, "As you all know, I do it differently than a lot of the other judges. The alternate peremptories are not limited to the alternate positions. So you have nine going in. You do not refer to any juror as an alternate though." Twenty potential jurors were brought into the courtroom for *voir dire*. During the questioning of one potential juror, L.R., the court said, "Here's what we're doing: We're selecting 14 jurors, not 12. So we pick two extras. Normally what I do is at the end of the trial I identify the two extras as alternate jurors." L.R. was not impaneled on the jury. Of the 20 potential jurors, 9 were impaneled. Following *voir dire* of the second set of potential jurors, four more jurors were impaneled, which included juror No. 13, D.S. When discussing another potential juror to impanel, the State asked, "This would be for the second alternate[?]" The court replied, "Yes. We don't refer to them at this point in time. Never in front of me." Thereafter, T.T. was impaneled as juror No. 14.

¶ 7 After all the jurors were impaneled, the trial court explained:

> "Now, we are picking 14 jurors, not 12. We pick extras in case somebody has a conflict or problem that arises, then maybe we can release them and have coverage, if you will. That's why we pick a couple extra. I don't know if you will be the alternate or not. I designate the alternate at the end of the trial."

¶ 8 Defendant did not object to the trial court's procedure for the designation of alternate jurors.

¶ 9 B. Jury Trial

¶ 10 The events in question occurred on September 23, 2017, outside a home in Rockford, Illinois, referred to by witnesses as the "swag house," during which a party had been taking place. The trial occurred over a four-day period, with 14 witnesses testifying. However, defendant's contentions on appeal largely center around the testimony of two witnesses. Therefore, we limit our factual recitation to relevant testimony related to defendant's contentions on appeal.

¶ 11 1. *Testimony of Dravonna Tolon*

¶ 12 Dravonna Tolon arrived at the party at the swag house in her own vehicle but never went inside. At the time of the events, she was in the passenger seat of "Clayvon's" vehicle. Tolon was not aware Clayvon's real name was Randell Gary (We will use his first name and the first name of others throughout this decision who share the last name of Gary). Randell was seated in the driver's seat. Tolon said Randell's vehicle was parked in the front of the house. Tolon observed the victim, Manning, exit the swag house from the side and walk toward the street. Tolon said an individual named "Jamaica" was standing toward the front of Randell's vehicle. Tolon identified defendant in court as Jamaica. As Manning was walking near the sidewalk at the front of the house, Tolon witnessed defendant fire three shots from a black handgun at Manning. Manning stumbled but did not fall to the ground. Defendant then approached Manning and shot him three more times at close range. Tolon then left Randell's vehicle and got into her own vehicle to leave.

¶ 13 Tolon recalled being interviewed by detectives on March 6, 2018, at which time she was given a photographic lineup. She circled the person she identified as defendant. On cross-examination, Tolon did not recall telling police officers defendant was standing "right next to" her. She did not recall being unable to describe the gun used by defendant. She did not recall telling officers that Randell and defendant had a conversation or that she was standing outside Randell's vehicle rather than sitting inside of it. Tolon denied testifying at a prior hearing that defendant was hunched over, as opposed to standing directly over Manning, when he shot him. She also denied telling officers or testifying earlier that she was friends with Manning.

¶ 14 2. *Testimony of Antrone Cook*

¶ 15 Cook testified he was at the swag house on September 23, 2017, but he did not see defendant there. Cook stated he was next to Manning when he was shot but he did not see who shot him. He believed Manning was shot four times.

¶ 16 Cook admitted he had testified a few weeks prior that defendant was at the party, but he reaffirmed he did not see defendant shoot anyone. Cook was interviewed by detectives on August 16, 2018. The interview was video and audio recorded. Cook did not recall telling detectives that Manning and defendant had been arguing. He did not recall telling detectives defendant shot Manning in the back four times before Cook ran from the area and that there were five shots fired in total. Cook did not recall (1) telling detectives he believed Manning was talking to defendant's girlfriend, (2) describing defendant's girlfriend to detectives, (3) telling detectives Manning did not have a gun, or (4) telling detectives the gun used was black. He testified that, during the police interview, he had circled defendant's picture in a photographic lineup.

¶ 17 On cross-examination, Cook stated he was coerced by officers into saying defendant had shot Manning. He reiterated he had not seen defendant with a gun nor did he see defendant shoot Manning.

¶ 18 3. *Other Relevant Testimony*

¶ 19 Detective William Donato of the Rockford Police Department testified he searched a white Lexus that had been photographed in the driveway of the swag house from the evening Manning was shot. Inside the vehicle, Donato discovered mail addressed to defendant. Donato denied coercing Cook in any way. The video recording of Cook's interview was played for the jury after the trial court gave a limiting instruction. During the interview, Cook stated defendant had a gun, which he had used to shoot Manning.

¶ 20 On cross-examination, Donato agreed the Lexus he had searched did not belong to defendant, but to Charles Gary, defendant's brother. Additionally, Donato testified the woman at the party Cook had said Manning was talking to was Markayla Herbert, Charles's girlfriend, not defendant's. When Donato was asked about his interview with Tolon, he said Tolon had told him she had been standing outside Randell's car next to defendant when the shooting began. Tolon had told Donato that Randell's vehicle was parked in the driveway, not the street.

¶ 21 Detective Nathan Kohanyi of the Rockford Police Department testified as a qualified expert on firearms. He identified seven spent 9-millimeter cartridge cases, one spent .380-caliber cartridge case, and two live rounds of .380-caliber ammunition from the scene. Kohanyi explained the difference in ammunition meant there were likely two guns fired at the scene. Kohanyi stated it was possible, but unlikely, only one gun had been fired. Rockford police officer Ryan Lane testified he had observed a red Buick on the southwest corner of the house that had been struck by a bullet.

¶ 22 Dr. Mark Peters performed the autopsy of Manning's body. He described four gunshot wounds on Manning's back. He concluded Manning had died from the gunshot wounds. Peters did not find evidence of close-range firing of a gun on Manning's skin. However, he stated Manning's clothing could have filtered evidence of any close-range fire.

¶ 23 The trial court admitted a certified copy of defendant's prior conviction of felony aggravated battery. The State rested.

¶ 24 Defendant called his brother, Devonte Gary, to testify. Devonte stated he was in the basement of the swag house with defendant when he heard gunshots. Randell, also defendant's brother, testified he drove to the swag house that evening but denied he had parked in front of the house or that Tolon was ever inside his vehicle. Randell stated he knew Tolon but denied speaking to her. He did not recall seeing her at the house. Randell was inside the house when he saw defendant. Randell said he left the house, while defendant stayed inside. Outside, Randell saw his brother Charles in an argument with someone. He stated he never saw defendant outside. When Randell was leaving in his vehicle, he heard gunshots. He continued to drive home. He later learned Charles had been arguing with Manning and that Manning had been shot.

¶ 25 Defendant rested, and the trial court denied defendant's motion for a directed verdict.

¶ 26 Prior to closing arguments, the following exchange occurred outside the presence of the jury:

> "THE COURT: Right now we have jurors 13 and 14 are the alternates. I don't know of any reason why one of the other individuals could not serve. We haven't had a situation this time as we did the last time where we had a juror was potentially sleeping or anything like that. So I guess we will keep them as

alternates unless the parties reach an agreement to name somebody else as an alternate.

[THE STATE]: Yes, Judge. I'm fine with that.

[DEFENDANT'S COUNSEL]: Not a problem, Judge.

THE COURT: If for some reason you think there is somebody else that needs to be one of the alternates and the parties agree, fine, I'll agree to do that; otherwise, 13 and 14 will be alternates which are [D.S.] and [T.T.].

[DEFENSE COUNSEL]: Yes, Judge."

¶ 27 Following closing arguments by the parties, the trial court read the jury instructions. After the jury instructions were read, the court designated D.S. and T.T. as the alternate jurors.

¶ 28 The jury found defendant guilty of all charges.

¶ 29 Following his conviction, defendant retained new counsel and filed a motion for a judgment of acquittal or a new trial. Relevant to defendant's present appeal, defendant argued in his motion the evidence was insufficient to support the jury's verdict. The trial court denied defendant's motion.

¶ 30 At the sentencing hearing, the trial court merged defendant's 12 guilty verdicts for first degree murder into the singular count IV conviction for first degree murder. The court sentenced defendant to 85 years' imprisonment on count IV, first degree murder, and 10 years on count XIII, unlawful use of a weapon by a felon, to run consecutively. Defendant filed a motion to reconsider the sentence, which the court denied.

¶ 31 This appeal followed.

¶ 32 II. ANALYSIS

¶ 33 On appeal, defendant argues (1) the State failed to prove he was guilty beyond a reasonable doubt of both first degree murder and unlawful use of a weapon by a felon because both Tolon's and Cook's testimonies were uncorroborated, inconsistent, and impeached and (2) the trial court's procedure for selecting alternate jurors constituted plain error, warranting a new trial. We address each claim in turn.

¶ 34 A. Insufficient Evidence Claims

¶ 35 When examining the sufficiency of the evidence, we must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Internal quotation marks omitted and emphasis in original.) *People v. Collins*, 106 Ill. 2d 237, 261 (1985). The trier of fact has the responsibility to assess the witnesses' credibility, weigh their testimony, resolve inconsistencies and conflicts in the evidence, and draw reasonable inferences from the evidence. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). We will not reverse a criminal conviction based on insufficient evidence unless the evidence is so unreasonable, improbable, or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Murray*, 2019 IL 123289, ¶ 19.

¶ 36 1. *First Degree Murder*

¶ 37 For first degree murder, the State had to prove (1) defendant performed the acts which caused the death of Manning and (2) when he did so, he knew that his acts would cause Manning's death. 720 ILCS 5/9-1(a)(1) (West 2016). "An individual acts with knowledge when he is consciously aware that his conduct is practically certain to cause a particular result." *People v. Castillo*, 2018 IL App (1st) 153147, ¶ 26; 720 ILCS 5/4-5(b) (West 2016). A defendant's mental state is rarely proven by direct evidence and as such is generally inferred from the

character of the defendant's acts and from the circumstances surrounding the commission of the offense. *People v. Eubanks*, 2019 IL 123525, ¶ 74. "[T]he trier of fact is in the best position to determine whether a particular mental state is present." *People v. Pollard*, 2015 IL App (3d) 130467, ¶ 27.

¶ 38 Defendant contends the testimonies of Tolon and Cook were so inconsistent and incredible the jury could not reasonably accept their testimonies. Defendant cites *People v. Smith*, 185 Ill. 2d 532 (1999), and *People v. Washington*, 375 Ill. App. 3d 1012 (2007), in support.

¶ 39 In *Smith*, the State's case against the defendant hinged on the testimony of a single witness to directly link the defendant to the murder charge. *Smith*, 185 Ill. 2d at 542. While two other witnesses had placed the defendant at a bar near where the murder had occurred, neither of these witnesses who observed the shooting identified the defendant as the shooter. *Id.* The *Smith* court identified several inconsistencies in the main witness's testimony, along with several other reasons to question her credibility. First, the witness testified the victim left the bar alone and was alone when he was shot. *Id.* However, two other witnesses both stated they had left the bar with the victim. *Id.* Second, the main witness testified the defendant followed the victim out of the bar using the same door a few seconds after the victim had left the bar right before the victim was shot. *Id.* at 543. However, the bartender stated the defendant had left the bar with other individuals four or five minutes before the victim left the bar, adding the victim left the bar with two other people. *Id.*

¶ 40 Additionally, the *Smith* court noted the witness's credibility had been repeatedly impeached. *Id.* at 544. The witness testified she did not use drugs daily at the time of the shooting; however, she had signed a statement to a defense investigator stating she had been

using drugs daily. *Id.* The witness also made inconsistent statements about seeing an individual at the police station. *Id.* The *Smith* court also noted the witness's behavior after the shooting undermined her credibility, when she went back into the bar after the shooting to find her sister and they both proceeded to go to another bar for drinks. *Id.* The witness did not tell police she had seen the shooting until two days later, when her sister was at the police station under suspicion of her involvement in the murder. *Id.* Lastly, the court noted the witness had a motive to falsely implicate the defendant because her sister had been implicated in providing the gun to an alternative suspect, her sister's boyfriend. *Id.* The court noted the witness's testimony "exonerated her sister's boyfriend, and at the same time may have deflected suspicion away from her sister." *Id.* The *Smith* court found no reasonable trier of fact could have found the witness's testimony credible. *Id.* at 545.

¶ 41 In *Washington*, the appellate court reversed the defendant's conviction for attempted first degree murder. The court noted the State's case rested on eyewitness testimony. *Washington*, 375 Ill. App. 3d at 1025. None of the three objective eyewitnesses, including the victim, identified who had fired the gun. *Id.* The defendant's three accomplices gave inconsistent testimony regarding who had shot the gun. *Id.* The first accomplice originally stated he did not know who shot the gun and only identified the defendant as the shooter at trial after receiving immunity for his own involvement in the shooting. *Id.* at 1025-26. The second accomplice originally stated no one fired a gun, but he later testified the defendant shot the gun after he received a deal from the State in exchange for his testimony. *Id.* at 1026. The third accomplice originally stated the second accomplice fired the gun but later testified differently after receiving immunity from the State. *Id.* The *Washington* court found "[t]here was no objective

corroboration, no credible testimonial corroboration, and no absolute conviction of truth in the testimony so as to support [the] defendant's guilt." *Id.* at 1028-29.

¶ 42 We find neither *Smith* nor *Washington* applicable to defendant's case *sub judice*. While both *Smith* and *Washington* contained inconsistencies in the statements of eyewitnesses, both cases involved witnesses with obvious reasons established from the record to undermine their credibility and a motive to testify falsely.

¶ 43 Here, no such evidence or inferences from any evidence adduced at trial provides reasons to believe Tolon or Cook manufactured their testimonies at the expense of defendant. Tolon's testimony was inconsistent with Cook's testimony, and Cook's testimony was inconsistent with his prior statements, but inconsistencies alone are not on par with the degree of incredibility observed in *Smith* and do not supply inferential reasons for either of the witnesses to falsely implicate defendant, as observed in *Smith* and *Washington*.

¶ 44 Defendant argues Tolon's and Cook's testimonies were at odds with each other, leaving it impossible for the jury to reasonably accept either of their testimonies. Tolon testified she did not see defendant and Manning arguing prior to the shooting, whereas Cook stated they were pushing each other over a girl. Tolon testified the shooting started when Manning was near a vehicle parked next to the house, while Cook said the shooting occurred when Manning was already in the street. Tolon stated Manning did not fall after the first three gunshots, while Cook said Manning fell to the ground after being shot. Tolon said defendant fired three shots, then moved closer to Manning before firing three more shots, whereas Cook said defendant fired four shots in total. Tolon stated defendant was not close to Manning when firing the final three shots, but Cook stated the shots were fired at point-blank range.

¶ 45 Defendant contends the objective evidence from his trial does not corroborate either Tolon's or Cook's version of events. Tolon stated the shooting started when Manning was in the driveway, walking toward the street or defendant. Defendant argues this would mean Manning would have had a bullet wound toward the front of his body, but Dr. Peters's autopsy noted all of the bullet entry wounds were in Manning's back. Regarding Cook's testimony, Cook stated defendant fired four shots at Manning in his back, but Lane testified he had observed a bullet in a vehicle near the corner of the house. Cook also stated the shooting occurred with the gun nearly touching Manning's back, but Peters was unable to identify any evidence of such close-range firing on Manning's skin. Tolon recalled six shots were fired and Cook recalled four shots were fired, but Kohanyi recovered eight spent cartridge cases from various locations. Defendant notes one of the cartridge cases was recovered in front of the stairs leading to the front of the house, where neither Tolon nor Cook stated defendant had fired the gun. Additionally, Kohanyi testified that two different guns were likely fired.

¶ 46 Defendant also contends both Tolon's and Cook's testimonies were impeached with prior inconsistent statements. Additionally, defendant argues the credibility of both Tolon and Cook was undermined by their actions following the shooting. Tolon, for example, arrived in her own vehicle with a friend but left without her friend, despite her friend being outside when the events occurred. Tolon also did not speak to police about the shooting until March 2018, and Cook did not speak to police about the shooting until August 2018, despite claiming Manning was like a cousin to him.

¶ 47 The evidence from the trial showed Manning was shot and killed by four gunshot wounds to his back. The autopsy revealing Manning's four gunshot wounds lined up nearly perfectly with Cook's testimony. However, the evidence also showed at least eight spent

cartridge cases, which were recovered from the scene, including seven from one gun and another likely from a different gun. Tolon testified she heard six gunshots—a number closer to the number of cartridge cases recovered from the scene. We agree with defendant that both Tolon's and Cook's accounts contained myriad inconsistencies both between each other's accounts and what each had stated in prior statements to police or at the first trial. However, "even contradictory testimony does not necessarily destroy the credibility of a witness, and it is the task of the trier of fact to determine when, if at all," a witness testified truthfully. *People v. Gray*, 2017 IL 120958, ¶ 47. Furthermore, inconsistent testimony regarding collateral matters does not "render the testimony of the witness as to the material questions incredible or improbable." *Id.* Many of the discrepancies between Tolon's and Cook's testimonies involved collateral matters, such as precisely where Manning was prior to being shot, how many shots they had each heard being fired in total, and what defendant had been doing prior to the shooting.

¶ 48 Defendant's witnesses, Devonte and Randell, both placed defendant in the house. Devonte stated he was in the basement of the house when he heard the gunshots, whereas Randell stated he had left the house just before the shooting had occurred. There is no dispute defendant was at least at the house where the shooting occurred. The jury was also given versions from Devonte and Randell that defendant was not involved in the shooting and from Cook explicitly testifying defendant was not the shooter. However, only two people were identified or came forward as witnessing the shooting itself: Tolon and Cook. Neither Tolon's nor Cook's testimonies lined up perfectly on the details of what had occurred.

¶ 49 Cook, as we just noted, testified defendant did not shoot Manning. However, Cook's prior statements identified defendant as the shooter. Tolon was first interviewed by police approximately six months after the shooting occurred, and Cook was first interviewed by

police nearly a year after the shooting. Both Tolon and Cook did not testify about the events that evening until nearly three years later. While Tolon and Cook both denied some statements from prior police interviews or testimony, Tolon and Cook stated for the most part they did not recall prior statements. There was a gap in time before the police were able to interview both Tolon and Cook after the shooting occurred and an even larger gap in time between the police interviews and their testimonies at trial. With the passage of time, memories fade. But one thing remained consistent: both Tolon and Cook had stated they saw defendant shoot a gun at Manning. The corroborating evidence at trial confirmed Manning was shot and killed by a gun. "In the criminal context, there is no requirement that corroborating evidence prove commission of an offense beyond a reasonable doubt." *In re Z.C.*, 2022 IL App (1st) 211399, ¶ 51 (citing *People v. Sargent*, 239 Ill. 2d 166, 183 (2010)).

¶ 50 Ultimately, the jury was tasked with weighing all the evidence, including all of the inconsistent evidence, and determining who, if anyone, to find credible from the testimonies provided. This case is clearly one that would challenge any rational trier of fact given defendant's first trial ended with a hung jury. However, as we noted above, we are not retrying defendant but reviewing the evidence in a light most favorable to the prosecution to determine if *any* rational trier of fact could have found defendant guilty beyond a reasonable doubt. This standard makes it the jury's responsibility to "resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "[A] reviewing court will not substitute its judgment for that of the trier of fact on issues involving the weight of the evidence or the credibility of the witnesses." *Murray*, 2019 IL 123289, ¶ 19.

¶ 51 The jury was in the best position to work through the inconsistencies and conflicting testimony. We recognize that Tolon and Cook gave varying accounts and, at times, gave inconsistent and even contradictory statements to their own testimony, but it is precisely the function of the jury to deliberate and decide when determining the facts of this case. "[T]he appellate court should not usurp the function of the jury and substitute its judgment on questions of fact fairly submitted, tried, and determined from the evidence which did not greatly preponderate either way." *Maple v. Gustafson*, 151 Ill. 2d 445, 452-53 (1992). We simply do not find Tolon's and Cook's testimonies were so unreasonable, improbable, or unsatisfactory that it created a reasonable doubt of defendant's guilt. Therefore, we find a jury could reasonably and rationally conclude beyond a reasonable doubt that defendant shot Manning, and when he did so, he knew shooting Manning would cause his death.

¶ 52 Defendant also contends no motive was established at trial for him to shoot and kill Manning. We also will not entertain this argument because "motive is not an essential element of the crime of murder, and the State has no obligation to prove motive in order to sustain a conviction of murder." *People v. Smith*, 141 Ill. 2d 40, 56 (1990).

¶ 53 2. *Unlawful Use of a Weapon by a Felon*

¶ 54 For unlawful use of a weapon by a felon, the State had to prove (1) defendant knowingly possessed a firearm and (2) defendant had previously been convicted of the offense of aggravated battery. 720 ILCS 5/24-1.1(a) (West 2016). Defendant does not specifically argue how Tolon's and Cook's testimony affected the State's evidence on this offense. As a reviewing court, it is not our duty to "search out all possible explanations consistent with innocence and raise them to the level of reasonable doubt." (Internal quotation marks omitted.) *People v. Newton*, 2018 IL 122958, ¶ 24. We assume, then, defendant's arguments about the incredibility

of Tolon and Cook apply equally to defendant's second conviction. We have already found that Tolon's and Cook's testimonies were within the province of the jury to review for conflict and credibility determination.

¶ 55 The evidence showed two witnesses identified defendant as possessing a gun that he used to shoot Manning. Defendant's prior felony conviction for aggravated battery was admitted into evidence. Therefore, we find a jury could reasonably conclude beyond a reasonable doubt defendant knowingly possessed a gun after previously being convicted of aggravated battery.

¶ 56 B. Alternate Juror Selection Procedure Claim

¶ 57 Defendant contends the trial court's procedure for selecting alternate jurors violated the law and Illinois Supreme Court rules governing the same.

¶ 58 The relevant statutory section from the Code of Criminal Procedure of 1963 (Code) and the Illinois Supreme Court rules at issue state:

> "After the jury is impaneled and sworn the court may direct the selection of 2 alternate jurors who shall take the same oath as the regular jurors. Each party shall have one additional peremptory challenge for each alternate juror. If before the final submission of a cause a member of the jury dies or is discharged he shall be replaced by an alternate juror in the order of selection." 725 ILCS 5/115-4(g) (2020).
>
> "Impaneling Juries. In criminal cases the parties shall pass upon and accept the jury in panels of four, commencing with the State, unless the court, in its discretion, directs otherwise, and alternate jurors shall be passed upon separately." Ill. S. Ct. R. 434(a) (eff. Feb. 6, 2013).

> "After the jury is impaneled and sworn the court may direct the selection of alternate jurors, who shall take the same oath as the regular jurors. Each party shall have one additional peremptory challenge for each alternate juror. If before the final submission of a cause a member of the jury dies or is discharged he shall be replaced by an alternate juror in the order of election." Ill. S. Ct. R. 434(e) (eff. Feb. 6, 2013).

¶ 59 Defendant argues the Code and Rule 434 permit the trial court to direct the selection of alternate jurors, but neither authorized the court to designate alternate jurors at the close of trial or at the court's whim. Defendant notes he could not find Illinois case law specifically on point, but he cites *State v. Houston*, 534 A. 2d 1293 (Me. 1987), in support of his contention.

¶ 60 In *Houston*, the Supreme Judicial Court of Maine found the trial court's procedure for selecting an alternate juror at the end of the case violated the rules governing jury selection. *Id.* at 1295. The *Houston* court noted that Maine's rules governing criminal procedure did not "grant a judge discretion to designate who will sit as the alternate juror. Instead, the rule contemplates the alternate juror must be selected by a random process that cannot be skewed by the exercise of discretion by the presiding justice." *Id.* Additionally, the alternate juror was required to be identified prior to the trial commencing, not at its conclusion. *Id.* The defendant did not object to the trial court's procedure, so the *Houston* court reviewed the matter for "obvious error." (Internal quotation marks omitted.) *Id.* at 1296. The court concluded error had occurred but found it did not warrant reversal of the defendant's conviction. *Id.*

¶ 61 We find *Houston* inapplicable to the case at bar. First, the *Houston* case, applying Maine law, requires the trial court to select alternate jurors at random and designate the alternate

jurors prior to the trial commencing. No plain reading of the Code or Rule 434 places such a requirement on Illinois trial courts. Second, "Rule 434(a) expressly grants a trial court the discretion to alter the traditional procedure for empaneling juries so long as the parties have adequate notice of the system to be used and the method does not unduly restrict the use of peremptory challenges." *People v. Walls*, 2022 IL App (1st) 200167, ¶ 38. The record is clear the trial court apprised defendant of its unique method for selecting alternate jurors on multiple occasions. This gave defendant adequate notice of the court's method, and at no time did defendant object when the court explained its procedure.

¶ 62 While defendant concedes he forfeited this issue by not objecting contemporaneously or raising the issue in his posttrial motion, he asks us to review it under the plain-error doctrine. The State argues defendant cannot avail himself of the plain-error doctrine because he affirmatively acquiesced to the trial court's procedure for the selection of the alternate jurors. We agree with the State.

¶ 63 This court has previously stated "[p]lain-error analysis applies to cases involving procedural default [citation], not affirmative acquiescence [citation]." *People v. Bowens*, 407 Ill. App. 3d 1094, 1101 (2011); see *People v. Page*, 2022 IL App (4th) 210374, ¶ 27 ("Where a party acquiesces to a ruling, the party waives the right to challenge the ruling and may not invoke the plain-error doctrine."). The reason affirmative acquiescence negates a defendant's ability to pursue the plain-error doctrine on appeal is because it deprives the trial court of an opportunity to cure the alleged defect had the defendant simply objected. See *People v. Bush*, 214 Ill. 2d 318, 332-33 (2005). That is, a defendant cannot idly sit by and agree to a possible error—such as an openly expressed variation of a trial procedure—and then, on appeal, point to such error that might have been averted had the defendant simply objected at the time.

¶ 64 In the case *sub judice*, the trial court explained its procedure for selecting alternate jurors during the jury selection process and defendant did not object. At the close of evidence, the court again explained its intention to designate the last two impaneled jurors as the alternate jurors, to which defendant's counsel affirmatively acquiesced. "[W]here defense counsel affirmatively acquiesces to actions taken by the trial court, a defendant's only challenge may be presented as a claim for ineffective assistance of counsel on collateral attack." *Bowens*, 407 Ill. App. 3d at 1101. Defendant has not argued in this appeal for ineffective assistance of counsel. Furthermore, any alleged defect in this situation, where defendant's counsel affirmatively acquiesced to the trial court's procedure, would require defendant to seek a remedy pursuant to the Post-Conviction Hearing Act. 725 ILCS 5/122-1 *et seq*. (West 2022).

¶ 65 Even assuming, *arguendo*, this court had reviewed defendant's claim under the plain-error doctrine, we would not have found defendant had established any clear or obvious error.

> "Under the plain-error doctrine, this court will review forfeited challenges 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; or (2) a clear or obvious error occurred, and the error is so serious that it affected the fairness of the defendant's trial and the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Taylor*, 2011 IL 110067, ¶ 30.

A reviewing court begins a plain-error analysis by determining whether error occurred at all. *Sargent*, 239 Ill. 2d at 189.

¶ 66 As we noted earlier, the trial court had the discretion to alter the traditional procedure for impaneling juries where the parties are provided adequate notice of the method the court intends to use. *Walls*, 2022 IL App (1st) 200167, ¶ 38. Defendant was given more than adequate notice the court intended to select two additional jurors and designate them as alternate jurors at the end of the trial. Indeed, the record suggests the last two impaneled jurors were always going to be the alternate jurors, even though the court declined to designate them as such at the beginning of the trial. Defendant has failed to demonstrate any error, let alone a clear or obvious one. Therefore, we need not continue our plain-error analysis under either prong of the doctrine. "The plain error exception will be invoked only where the record *clearly* shows that an alleged error affecting substantial rights was committed." (Emphasis in original.) *People v. Hampton*, 149 Ill. 2d 71, 102 (1992).

¶ 67 III. CONCLUSION

¶ 68 For the reasons stated, we affirm the trial court's judgment.

¶ 69 Affirmed.