No. 1-09-2256

FIFTH DIVISION
June 10, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 06 CR 21554
	)	
GREGORY SMITH,	)	
	)	Honorable
Defendant-Appellant.	)	Clayton J. Crane,
	)	Judge Presiding.
	)	

JUSTICE HOWSE delivered the judgment of the court.

Presiding Justice Fitzgerald Smith and Justice Epstein concurred in the judgment.

ORDER

HELD: Errant jury verdict form did not effect the outcome of trial because the record shows the jury was properly instructed on the crimes charged to the defendant in the indictments and the defendant was not convicted or sentenced under the errant jury verdict form.

Following a jury trial in the circuit court of Cook County,

defendant Gregory Smith was convicted of two counts of attempt first degree murder (720 ILCS 5/8-4(a), 720 ILCS 5/9-1(a)(1) (West 2008)) and two counts of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2008)) and sentenced to 21 years in the Illinois Department of Corrections. On appeal, Smith claims: (1) the State failed to prove him guilty beyond a reasonable doubt; (2) he was denied a fair trial when the State made improper remarks during closing arguments; (3) he was denied a fair trial because of an error on a jury form; (4) the trial court abused its discretion by failing to respond to a jury question; (5) the trial court abused its discretion when it allowed a police officer to testify as an expert witness on firearms; and (6) the trial court failed to properly admonish the venire under Supreme Court Rule 431(b). For the reasons set forth below, we affirm defendant's conviction

BACKGROUND

Defendant Gregory Smith, age 15 at the time of the offense, was charged with eight counts of attempt first degree murder, two counts of aggravated battery with a firearm (720 ILCS 5/8-4(a), 720 ILCS 5/9-1(a)(1) (West 2008)), and two counts of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1)/(3)(a) (West 2008)).

Smith was tried as an adult.

At trial, the State called Eddie Mastin, a retired Cook County Sheriff as a witness. Mastin testified that on June 30, 2006, he was sitting on a bench in front of 5131 South Ingleside, in Chicago, waiting for a friend when he observed one of the two victims, Maurice McDonald, walk past him alone. McDonald later returned, walking past Mastin again, then crossed the street. Mastin testified he heard four or five gunshots and observed a man on a bicycle a short distance down the street. He observed a young man approach the man on the bike, place something in his pocket, mount the bike, and the two rode away. Mastin identified the second man as the defendant Smith. Mastin testified that he could not identify the object in Smith's hand but observed that it was larger than his hand.

Mastin walked down the block and found McDonald and the second victim Cruse Caldwell on the ground, both suffering from gunshot wounds.

Mastin spoke with the police after the shooting and relayed his observations to them. Mastin testified that the police showed him a series of photographs and he identified the young man and the other man riding the bicycle.

Mastin testified that in August 2006, he viewed a lineup at a police station, and again identified the young man and the other man riding the bicycle.

On cross examination, Mastin was unable to identify the color of Smith's tie while he sat in court. He testified that he currently has problems with his right eye but on June 30, 2006, he did not have any trouble with his right eye.

The State also called Cruse Caldwell, who testified that on June 30, 2006, he was walking with Maurice McDonald on South Ingleside Avenue toward 53rd Street in Chicago. McDonald stopped to talk to another person and Caldwell continued to walk. Caldwell testified that he observed a boy walking alongside a young male riding a bicycle on the other side of the street. Caldwell testified that as he passed the pair, he turned around and observed the boy cross the street, point a handgun at McDonald and shoot. Caldwell ran, and the boy shot at him, and back at McDonald. Caldwell testified that he was hit from the gunfire and a bullet pierced his lung.

After the shooting, police and paramedics arrived at the scene. Caldwell lost consciousness while being treated in an ambulance and did not regain consciousness for more than two months. Caldwell underwent multiple surgeries and remained at Northwestern Hospital for more than three months.

Prior to trial, Caldwell did not view a lineup or photographs and did not give a statement to authorities. At trial, Caldwell identified Smith as the shooter.

Chicago police forensic investigator Marvin Otten testified for the State that he recovered numerous .9 millimeter cartridge cases and fired bullets from the scene.

Police officer James DeLisle testified for the State that on July 8, 2006, he recovered a handgun, near 4959 S. Drexel Ave., in Chicago, containing a magazine with both live and spent rounds. The handgun was not checked for fingerprints.

Forensic scientist and firearms expert Leah Kane testified for the State that the bullets and shell casings recovered at the scene of the shooting were fired by the .9 millimeter handgun recovered by Officer DeLisle. Kane testified that .22 caliber is not part of the .9 millimeter family.

Police officer John Foster testified for the State that after the shooting, officers chased suspects Jonathan and Joshua McClellan into their residence. Jonathan jumped out of a window and escaped while Joshua was taken into custody. Officer Foster testified that he interviewed Joshua and instructed Officer Otten to perform a gunshot residue test which resulted in a negative finding. Joshua was released from custody when police determined he was no longer a suspect in the shooting.

Officer Foster testified that he interviewed one victim, McDonald, on July 2, 2006, and then witness Mastin on July 10, 2006. He showed Mastin a photo array and Mastin identified Smith

as the boy he observed at the scene, and Jonathan McClellan as the man on the bicycle. Officer Foster testified that during his interview of Mastin, he showed him a book of photographs. The names of the pictured individuals appear on the photographs but he folded the page to hide the names when he showed the photographs to Mastin. Officer Foster arrested Smith on August 21, 2006, and placed him in a lineup viewed by both McDonald and Mastin separately. Mastin identified Smith in the lineup as the boy he observed at the scene of the shooting.

Police officer John Thornton testified for the defense that he had learned the names of Jonathan and Joshua McClellan while at the scene of the shooting and went to their home where he observed them outside and chased them into their home. Officer Thornton found Joshua hiding in a bedroom and in possession of spent .22 caliber shell casings and arrested him.

On cross-examination, over defense objection to his qualifications as an expert, Officer Thornton testified that .22 caliber casings cannot be fired by a .9 millimeter handgun. In ruling on the defense objection, the trial court stated, "Chicago police officer. Overruled."

After closing arguments, the jury was instructed on all charges. Shortly after the jury entered into deliberations, the trial court received a note from the jury asking: "Does it mean

if we find the defendant is found not guilty of attempt first degree murder of victim one, then he is not guilty of attempt first degree murder of the second victim?"

The trial court informed defense counsel and the State as to the contents of the note and stated to the attorneys:

> "The answer is no. But it is clear from the instructions as to how they are to proceed. And it [the note from the jury] says, 'or does paragraph two mean that if we find the defendant not guilty of attempt first degree murder we are not to consider aggravated battery charges?'
>
> The difficulty I have at this point is that they are reading the allegation which they are to consider if they find the defendant guilty of first degree murder. That has no application whatsoever to the aggravated battery charge. I'd love to tell them that, but I don't think that's appropriate at this point.
>
> And I'm going to ask them to please carefully read the jury instructions and continue to deliberate."

Defense counsel responded, "That's fine."

The jury found Smith guilty of two counts of attempt first degree murder and two counts of aggravated battery with a

firearm. The jury further found Smith personally discharged a firearm that proximately caused death to another person.

Defense counsel, the State and the trial court agreed that there was a typographical error on the jury verdict form for the final charge which should have listed "great bodily harm" instead of "death."

Smith filed motion for new trial based on the errant jury form. The motion was denied but the trial court vacated the defendant's conviction and sentence for personally discharging a firearm. The conviction for aggravated battery with a firearm merged into the greater offense. The sentence of 21 years in prison is based solely on the conviction for attempt first degree murder. This appeal followed.

ANALYSIS

In this appeal, Smith argues: (1) the State failed to prove his guilt beyond a reasonable doubt; (2) the State violated his right to a fair trial by making inappropriate comments in closing argument; (3) he was denied a fair trial because the jury erroneously found he killed someone during the commission of the offense; (4) the trial court abused its discretion when it did not respond to the jury question; (5) the trial court abused its discretion when it allowed a police officer to testify as an expert witness on firearms; and (6) the trial court failed to ask

each potential juror the four principles under Supreme Court Rule 431(b).

Sufficiency of the Evidence

Smith claims the State failed to prove his guilt beyond a reasonable doubt of attempt first degree murder because the identification testimony was unreliable.

Due process requires that a person may not be convicted in a criminal proceeding "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004). When this court considers a challenge to a criminal conviction based upon the sufficiency of the evidence, it is not our function to retry the defendant. *People v. Hall*, 194 Ill. 2d 305, 329-30 (2000). Rather, the relevant inquiry is 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. *People v. Woods*, 214 Ill. 2d 455, 470 (2005). A court of review will not overturn the fact finder's verdict unless "the proof is so improbable or unsatisfactory that there exists a reasonable doubt of the defendant's guilt." *People v. Sherrod*, 394 Ill. App. 3d 863, 865 (2009) (citing *People v. Maggette*, 195 Ill. 2d 336, 353 (2001)).

Identification testimony must be excluded if there is a very substantial likelihood of misidentification. *People v. Stokes*, 71 Ill. App. 3d 773, 777 (1979). A single witness's identification of the accused is sufficient to sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification. *People v. Cox*, 377 Ill. App. 3d 690, 697 (2007). An identification will be insufficient to support a conviction if it is vague and doubtful. *In re Keith C.*, 378 Ill. App. 3d 252, 258 (2007).

The reliability of a witness's identification of a defendant is a question to be determined by the jury. *Cox*, 377 Ill. App. 3d at 697. It is the function of the jury to assess the credibility of witnesses, the weight to be given their testimony and the inferences to be drawn from the evidence. *People v. Romero*, 384 Ill. App. 3d 125, 132 (2008). The jury is in the position to view the demeanor of a witness while he or she is being questioned and may believe as much, or as little, of any witness testimony as it sees fit. *Id.* Whether eyewitness testimony is trustworthy is typically within the common knowledge and experience of the average juror. *Id.* We will not substitute our judgment for that of the fact finder on what weight is given to the evidence presented or the credibility of the witnesses. *Id.*

Circumstances to be considered in evaluating an identification include the following: (1) the opportunity the witness had to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the identification confrontation; and (5) the length of time between the crime and the identification confrontation. *Cox*, 377 Ill. App. 3d at 697.

In respect to the first identification factor, Smith claims Caldwell's identification testimony is insufficient because he did not have an adequate opportunity to view the offender. We disagree because the record shows Caldwell had several opportunities, during a reasonable period of time and under afternoon daylight conditions, for a clear and unobstructed view of the offender's face at the time of the shooting.

Caldwell testified he observed the offender prior to the shooting and again during the shooting. Caldwell observed the offender walk with the man riding the bicycle, when the offender crossed the street, when the offender shot McDonald and then pointed the handgun at him and shot him before firing again at McDonald.

As for the second identification factor, Smith claims Caldwell had little reason to pay attention to the offender's

appearance while he walked in the opposite direction. However, there is nothing in the record to suggest that Caldwell's degree of attention was inadequate during his opportunities to view the offender. The record shows that Caldwell was paying attention to his surroundings as he walked up the street because he observed the offender and the man on the bicycle as they moved in the opposite direction across the street. Caldwell testified that something about the pair caused him to turn around when he passed them, and then he observed the offender cross the street and start shooting. Caldwell was paying attention when he saw McDonald being shot.

In respect to the third factor, the accuracy of the witness's prior description of the criminal, we cannot say it is applicable here because Caldwell did not give a prior description.

For the fourth factor, the level of certainty demonstrated by the witness at the identification confrontation, Smith claims Caldwell would not have identified him as the shooter had the State not brought charges against him. Smith claims Caldwell identified him as the shooter because Caldwell observed his name on the indictment prior to testifying at trial. Smith's claim here is unpersuasive because it is not supported by any legal authority. This line of reasoning would lead to an absurd result

where every witness identification, in every criminal case, would then be insufficient because witnesses generally observe the name of the defendant on either an indictment, a subpoena or some case-related document prior to trial. Therefore, we cannot say Caldwell's in-court identification of Smith as the shooter is unreliable simply because Caldwell may have viewed Smith's name on the indictment prior to trial.

In respect to the length of time between the offense and the confrontation, Smith claims that the 26-month interval, between the shooting and Caldwell's in-court identification, is too long to allow for a reliable identification. Here, while this large time lapse could be significant, it only goes to the weight of the testimony, making it a credibility determination for the jury. *People v. Holmes*, 141 Ill. 2d 204, 242 (1990). We note Caldwell's testimony was corroborated by Mastin, who identified Smith as the boy accompanying the young man on the bicycle. Furthermore, Illinois courts have regularly upheld criminal convictions when there were similar periods, as here, between the crime and the identification of the defendant. See *Holmes*, 141 Ill. 2d at 242 (eighteen-month time lapse as insignificant); *People v. Rodgers*, 53 Ill. 2d 207, 214 (1972)(conviction upheld where there was a two-year time lapse between the crime and identification); *People v. Dean*, 156 Ill. App. 3d 344

(1987)(identification made two-and-a-half years later).

Thus, after viewing the evidence in a light most favorable to the prosecution, we find that a rational trier of fact could find Caldwell's in-court identification of Smith as the shooter reliable to establish Smith's guilt beyond a reasonable doubt of attempt first degree murder.

Smith next claims Mastin's testimony is unreliable because he did not observe the shooting and now has poor vision.

Again, Smith is asking us to make a credibility assessment, which were are unable to do. *Romero*, 384 Ill. App. 3d at 132. Moreover, we cannot say that Mastin's testimony is unreliable because he observed the suspects from just a half block away after the shooting. The record shows that Mastin was able to pick Smith from police photos and in a police lineup as the boy he observed after the shooting, holding a large object in his hand, and who mounted a bicycle being driven by a second young man. Mastin identified Smith in court as the boy he observed after the shooting. Mastin's testimony is corroborated by Caldwell, who testified that prior to the shooting, he observed a boy walking along side of a young man riding a bicycle and that the boy was the shooter.

Although Mastin testified he was unable to identify the color of Smith's tie in court and testified that his right eye

was bad at trial, Mastin testified that his right eye was fine on the day of the shooting. The jury found Mastin's testimony credible and we cannot second guess the jury, which had an opportunity to view Mastin's demeanor while he testified. *Romero*, 384 Ill. App. 3d at 132.

Thus, after viewing the evidence in a light most favorable to the prosecution, we find that a rational trier of fact could find Caldwell's in-court identification of Smith as the shooter reliable to establish Smith's guilt beyond a reasonable doubt of attempt first degree murder.

Closing Arguments

Smith claims he was denied a fair trial when counsel for the State engaged in improper closing argument by telling the jury that he, his partner, the police, and forensic and lay witnesses were committed to justice and asked the jury to make the same commitment.

The State remarked in rebuttal argument:

> "My partner and I, and everyone else that we called as a witness, we are committed to justice, not to winning. To justice. And all we're asking you to do is to decide this case with that same commitment."

The State, on the other hand, claims its remarks were

invited by defense counsel's comments in closing when counsel stated:

> "I've done a good job if I get a not guilty. They want to do a good job, the prosecutors. They do a good job if they get a conviction.
>
> ***
>
> They don't want to make any mistakes in this case. They want to win. They want a conviction. If they don't get a conviction, they didn't win."

However, Smith forfeited this claim when he failed to object at trial and failed to include the claim in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). The Illinois Supreme Court has held that a "defendant must both specifically object at trial and raise the specific issue again in a posttrial motion to preserve any alleged error for review." *People v. Woods*, 214 Ill. 2d 455, 470 (2005).

However, under the plain error doctrine, a reviewing court may consider unpreserved error when: (1) a clear or obvious error occurs, and the evidence is so closely balanced that the error alone threatens to tip the scales of justice against the defendant; or (2) a clear or obvious error occurs and that error

is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 187-88 (2005); *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). In order to find plain error, this court must first find that the trial court committed error. *People v. Rodriguez*, 387 Ill. App. 3d 812, 821 (2008).

A prosecutor is given wide latitude in making a closing argument. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). A closing argument must serve a purpose beyond inflaming the emotions of the jury. *Id.*

In reviewing the issue of improper closing arguments, the Illinois Supreme Court instructs that comments in closing argument must be considered in context of the entire closing arguments of both the State and the defense. *People v. Cloutier*, 156 Ill. 2d 483, 507 (1993). The State is allowed to comment on the evidence and any reasonable inference from the evidence. The State may comment on the strength of its case and to urge the fearless administration of justice and the detrimental effect of crime. *Id.* In addition, the State may respond to comments made by defense counsel in closing argument that clearly invite a response. *People v. Munson*, 206 Ill. 2d 104, 145 (2002).

A prosecutor's remarks will not warrant a new trial unless

they are so prejudicial to the defendant that, absent those remarks, there is doubt as to whether the jury would have rendered a guilty verdict. *People v. Allen*, 401 Ill. App. 3d 840, 855 (2010). When our consideration implicates the legal question of whether a prosecutor's comments warrant a new trial, our review is *de novo*. *Id.*

We cannot say defense counsel did not invite the State's remarks after alluding that the State was only interested in getting a conviction and "winning." The State proffered a reasonable response to defense counsel's comments, clarifying that its concern was not solely to winning but for justice. *Munson*, 206 Ill. 2d at 145. Furthermore, we cannot say Smith was prejudiced by the State's remarks or absent those remarks, there is doubt as to whether the jury would have rendered a guilty verdict because the evidence showed Smith was identified as the shooter by one of the victims and another witness placed him at the scene. We cannot find that error occurred here. If there was error, it did not rise to the level of plain error. As a result, Smith has forfeited the claim.

Erroneous Verdict Form

Smith argues that he was a denied a fair trial when the jury was provided with an erroneous verdict form to find him guilty of killing someone during the commission of the crime. Smith argues

that this demonstrates the jury was biased against him because they found him guilty of killing someone.

Count 8 of the State's indictment alleges:

> "Gregory Smith committed the offense of attempt first degree murder in that he, without lawful justification, with intent to kill, did an act, to wit: shot [Cruse] Caldwell while armed with a firearm which constituted a substantial step toward the commission of first degree murder, and during the commission of the offense he personally discharged a firearm that proximately caused great bodily harm to [Cruse] Caldwell, in violation of Chapter 720, Act 5, Section 8-4(a)(720-5/9-1(a)(1)), of the Illinois Compiled Statutes 1992, as amended, and contrary to the Statute, and against the peace and dignity of the same People of the State of Illinois."

The jury was given a series of jury instructions including Illinois Pattern Jury Instructions, Criminal, No. 6.05X which reads:

> "A person commits the offense of attempt

> first degree murder when he, with the intent to kill an individual, does any act which constitutes a substantial step toward the killing of an individual.
>
> The killing attempted need not have been accomplished." Illinois Pattern Jury Instructions, Criminal, No. 6.05X (4th ed. 2000).

Illinois Pattern Jury Instructions, Criminal, No. 28.01, also given to the jury, reads:

> "The state has also alleged, during the commission of the offense of attempt first degree murder, the defendant personally discharged a firearm that proximately caused great bodily harm to another person. The defendant has denied that allegation." Illinois Pattern Jury Instructions, Criminal, No. 28.01 (4th ed. 2000).

The jury was presented with the following verdict form:

> "We, the jury, find the allegation against Gregory Smith was proven that during the commission of the offense of attempt first degree murder (Cruse Caldwell) the

> defendant personally discharged a firearm that proximately caused death to another person." Illinois Pattern Jury Instructions, Criminal, No. 28.06 (4th ed. 2000).

The verdict form should have had the words "great bodily harm" in place of the word "death." Each juror signed this form.

Defense counsel had an opportunity to view the verdict form prior to its distribution to the jury and failed to object, resulting in a forfeiture of the claim. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). As previously stated, the Illinois Supreme Court has held that a "defendant must both specifically object at trial and raise the specific issue again in a posttrial motion to preserve any alleged error for review." *People v. Woods*, 214 Ill. 2d 455, 470 (2005).

We will review the claimed error using a "plain error analysis," where we may consider unpreserved error when: (1) a clear or obvious error occurs, and the evidence is so closely balanced that the error alone threatens to tip the scales of justice against the defendant; or (2) a clear or obvious error occurs and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 188-87 (2005); *People v.*

Piatkowski, 225 Ill. 2d 551, 565 (2007). In order to find plain error, this court must first find that the trial court committed error. *People v. Rodriguez*, 387 Ill. App. 3d 812, 821 (2008).

Here, the jury was instructed on the allegation that during the commission of the offense, Smith personally discharged a firearm that proximately caused great bodily harm to Caldwell. The trial court mistakenly submitted to the jury a verdict form that stated that "the jury finds proven beyond a reasonable doubt that during the offense of attempt murder of Caldwell, Smith discharged a firearm that proximately caused death to another person."

We find that an error occurred when this form was submitted to the jury. We must now determine whether the error constituted plain error.

We cannot say the error tipped the scales of justice against Smith under the first prong because the evidence was not close. Further, we cannot say the error is so serious that it affected the fairness of Smith's trial and challenged the integrity of the judicial process under the second prong because no judgment of conviction was entered against Smith for personally discharging a firearm. The jury was properly instructed on attempt first degree murder and received the proper verdict form for this offense. The State presented evidence that established Smith's

guilt of attempt first degree murder. Caldwell identified Smith as the person who shot him and Mastin corroborated Caldwell's testimony when he testified that he observed Smith mount a bicycle driven by a young man after the shooting.

Smith benefitted from the error because it prevented his conviction under the charge of personally discharging a firearm that caused great bodily harm, when the jury, although instructed on the charge, did not receive a verdict form for this charge. Moreover, the trial court did not sentence Smith under the improper verdict. In fact, the trial court reduced Smith's sentence when it discovered the error.

The evidence is to show that Smith personally discharged a firearm, the jury was convinced that Smith discharged a firearm and they signed the available verdict form that stated defendant was guilty of discharging a firearm. We cannot say the jury was biased because they signed the only available verdict finding defendant guilty of discharging a firearm during the offense.

As a result, we find that the error did not rise to the level of plain error, and Smith has forfeited the issue.

Jury Question

Smith claims the trial court erred during deliberations when it did not answer a question posed by the jury. Smith did not preserve this issue with an objection at trial and in a posttrial

motion, thus, we will undertake a plain error analysis. It is axiomatic that in a plain error analysis that we determine that an error occurred. *People v. Rodriguez*, 387 Ill. App. 3d 812, 821 (2008).

A trial court's decision whether to answer questions asked by jurors during deliberations is ordinarily left to the sound discretion of the trial court and the court's decision will be disturbed on appeal only if it constitutes an abuse of discretion. *People v. Falls*, 387 Ill. App. 3d 533, 537 (2008). A trial court may exercise its discretion and properly decline to answer a jury's inquiries where the instructions are readily understandable and sufficiently explain the relevant law, where further instruction would serve no useful purpose or would potentially mislead the jury, when the jury's inquiry involves a question of fact, or if the giving of an answer would cause the court to express an opinion which would likely direct a verdict one way or another. *People v. Lee*, 342 Ill. App. 3d 37, 55 (2003).

The trial court informed both parties that it received a note from the jury stating: "Does it mean if we find the defendant is found not guilty of attempt first degree murder of victim one, then he is not guilty of attempt first degree murder of the second victim?"

The trial court stated to the attorneys for the State and the defense:

> "The answer is no. But it is clear from the instructions as to how they are to proceed. And it [the note from the jury] says, 'or does paragraph two mean that if we find the defendant not guilty of attempt first degree murder we are not to consider aggravated battery charges?'
>
> The difficulty I have at this point is that they are reading the allegation which they are to consider if they find the defendant guilty of [attempt] first degree murder. That has no application whatsoever to the aggravated battery charge. I'd love to tell them that, but I don't think that's appropriate at this point.
>
> And I'm going to ask them to please carefully read the jury instructions and continue to deliberate."

Defense counsel responded, "That's fine."

Smith claims the jury was confused and believed that if they found him not guilty of attempt first degree murder of one victim

then either (1) there was an automatic determination that he was not guilty of attempt first degree murder of the second victim or (2) they could not consider the aggravated battery charge.

Upon review of the record, we cannot say that the trial court's response to the jury's question was an abuse of discretion.

A review of the jury instructions shows the jury was instructed on the elements of attempt first degree murder and instructed that if they found that the State proved each element beyond a reasonable doubt they should find the defendant guilty, or if they found that the State failed to prove each element beyond a reasonable doubt, they should find the defendant not guilty.

The instructions do not inform the jury that if they found Smith not guilty for attempt first degree murder of one victim then there is an automatic finding of not guilty concerning the second victim or that they could not consider the aggravated battery charge. In addition to the instructions, the jury was provided with two verdict forms regarding attempt first degree murder of Maurice McDonald, one for a guilty verdict and the second for a not guilty verdict. The jury was also provided with the two verdict forms regarding attempt first degree murder of Cruse Caldwell. We cannot say the instructions and verdict forms

did not sufficiently explain the relevant law or were confusing.

Furthermore, the trial court considered the implications of its answer to the jury and admitted it was hesitant to provide additional information. Smith's claim that the jury was confused when it made its verdict is speculation and speculation does not sufficiently prove the trial court's action prejudiced the defendant. *People v. Reid*, 136 Ill. 2d 27, 41 (1990).

Nevertheless, Smith cites *People v. Childs*, 159 Ill. 2d 217 (1994), in support of his claim that the trial court abused its discretion by not responding to the jury's question. In *Childs*, the jury sent out a note during deliberations and the bailiff called the trial judge when the judge was having lunch with the assistant state's attorneys. The judge told the bailiff what response to give and then told the prosecutors what the jury had asked and the response. No attempt was made to contact the defense attorney. *Id.* at 225. Upon returning to court, the defendant's attorney was informed of the note and the response, and objected. Subsequently, the defendant was found guilty of murder and armed robbery. *Id.* at 225-26. The appellate court reversed the defendant's conviction, finding that defendant was prejudiced by the trial court's *ex parte* response to the jury's question. *Id.* at 226. The appellate ruling was upheld when the supreme court found that the State failed to sustain its burden

of proving that the trial court's improper *ex parte* communication to the jury was harmless beyond a reasonable doubt. *Id.* at 233.

Childs is distinguishable because the question here does not concern an *ex parte* communication between the trial court and the prosecution. There was no *ex parte* communication here. Unlike *Childs*, counsel for both parties were read the content of the jury's note. The trial court informed the attorneys that he was going to inform the jury to review the instructions because it felt the instructions were clear and would solve the issue for the jury. Defense counsel agreed.

Next, Smith argues his claim is supported by *People v. Flynn*, 172 Ill. App. 3d 318 (1988). In *Flynn*, the State dropped one of five charges against the defendant during trial. During its deliberations, the jury inquired of the court as to why there were now only four counts pending. The trial court responded that this was a legal matter and the jurors should deliberate on the four counts before them. *Id.* at 323. On appeal, we found plain error because the defendant may have been prejudiced had the jury inferred the defendant pleaded guilty to the missing charge or the trial court displayed leniency. *Id.* at 324.

Here, unlike *Flynn*, the jury did not question a missing charge, rather it questioned the jury instructions. The instructions did not contain an automatic finding of not guilty.

The instructions, coupled with the separate verdict forms, that there was no automatic finding of not guilty of attempt first degree murder of the second victim if the jury found Smith not guilty of attempt first degree murder of the first victim. The instructions itself contained the answer to the jury's question. See *Lee*, 342 Ill. App. 3d at 55 (trial court may decline to answer jury's inquiries where the instructions are readily understandable and sufficiently explain the relevant law).

In sum, while the trial court, within its discretion, could have directly answered the jury's question, the trial court had no duty to do so under the circumstances of this case. Thus, we cannot say an error occurred here and therefore, there is no plain error and defendant's claim is forfeited.

Officer Thornton's Expert Opinion Testimony

Smith claims the trial court abused its discretion when it allowed Officer Thornton to testify that spent .22 caliber shell casings could not have been fired from a .9 millimeter handgun.

Smith failed to preserve this issue for review by failing to include the issue in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). However, under the plain error doctrine, a reviewing court may consider unpreserved error when: (1) a clear or obvious error occurs, and the evidence is so closely balanced that the error alone threatens to tip the scales

of justice against the defendant; or (2) a clear or obvious error occurs and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 188-87 (2005); *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). In order to find plain error, this court must first find that the trial court committed error. *People v. Rodriguez*, 387 Ill. App. 3d 812, 821 (2008).

The trial court has discretion in allowing a witness to testify as an expert and its decision will not be reversed absent an abuse of discretion. *People v. Hunley*, 313 Ill. App. 3d 16, 28 (2000). In Illinois, an individual will be permitted to testify as an expert if the witness' experience and qualification afford the witness knowledge that is not common to lay persons and where such testimony will aid the trier of fact in reaching its conclusion. *People v. Barajas*, 322 Ill. App. 3d 541, 553 (2001).

In the instant case, Officer Thornton opined that .22 caliber bullets may not be fired from a .9 millimeter handgun. Prior to eliciting this testimony, the State did not lay a foundation as to Officer Thornton's qualifications to offer an expert opinion on firearms and firearm ammunition. *People v. Park*, 72 Ill. 2d 203, 209 (1978). Smith claims that Officer

Thornton's status as a police officer alone does not render him an expert able to testify that certain shell casings are incompatible with a specific weapon. In support of his claim, Smith cites *People v. Tayborn*, 254 Ill. App. 3d 381 (1993).

In *Tayborn*, the defendant was convicted of attempt first degree murder. On appeal, the defendant claimed the trial court improperly precluded an evidence technician from testifying that .38 caliber cartridges could not be fired from .9 millimeter pistols. The defendant attempted to lay a foundation for the evidence technician's qualification to testify but was unable to do so. We found that the evidence technician had not been properly qualified as an expert. *Id.* at 390. Like *Tayborn*, there was no foundation for officer Thornton's opinion testimony and the admission of his opinion without a foundation was error. *People v. Tayborn*, 254 Ill. App. 3d at 390.

While we find error here, we find it does not rise to the level of plain error. The evidence is not closely balanced and the error does not affect the fairness of Smith's trial or challenge the integrity of the judicial process because Officer Thornton's testimony does not affect the outcome of the case. The evidence shows that .9 millimeter bullets were used to shoot the victims in this case and they were fired from a .9 millimeter handgun. Prior to Officer Thornton's testimony, the State's

expert witness Kane testified that .22 caliber bullets are not a part of the .9 millimeter family. Therefore, the issue of whether a .22 caliber bullet can be fired from a .9 millimeter handgun is irrelevant and will not affect the outcome of the case. We cannot find that there was plain error as the testimony could not have prejudiced Smith and as a result, Smith has forfeited the claim.

Zehr Principles

Smith argues the trial court failed to comply with Supreme Court Rule 431(b) by failing to ask the venire if they understood and accepted three of the four "Zehr" principles.

Smith failed to preserve this issue for review by failing to both object at trial and include the alleged error in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). When a defendant has forfeited appellate review of an issue, the reviewing court will consider only plain error. *People v. McLaurin*, 235 Ill. 2d 478, 495 (2009). Under the plain error, we may consider unpreserved error when: (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scale of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affects the fairness of the defendant's trial and challenge

the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

The first step of plain error review is determining whether any error occurred. *People v. Walker*, 232 Ill. 2d 113, 124-25 (2009).

In plain-error review, the burden of persuasion rests with the defendant. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

Under Supreme Court Rule 431(b), the trial court must ask potential jurors whether they understand and accept four fundamental principles of a fair trial which are: (1) the presumption of innocence, (2) the State's burden of proof, (3) the defendant's right not to testify, and (4) the defendant's right not to present evidence. 177 Ill. 2d R. 431(b); *People v. Zehr*, 103 Ill. 2d 472, 477 (1984).

Smith claims the trial court failed to ask the second panel whether they understood and accepted the principle that the defendant is presumed innocent.

The trial court stated:

> "Earlier I touched upon some principles of law that apply in all criminal cases. One of those is that the defendant need not prove his innocence. Does anybody have any

difficulty with this?"

Smith claims the trial court's question here more closely aligns with the principle that the defendant need not offer any evidence on his or her own behalf, not the presumption of innocence.

Smith's claim here is not persuasive because there is no evidence the potential jurors were confused and the trial court offered an in-depth explanation of the presumption of innocence earlier when it addressed the whole group of 28 prospective jurors explaining:

> "Mr. Smith, as with all other persons charged with crimes, is presumed to be innocent of the charges that bring him before you. That presumption cloaks him now at the onset of the trial and will continue to cloak him throughout the course of these proceedings.
>
> ***
>
> It is absolutely essential as we select this jury that each of you understand and embrace these fundamental principles. That is, that all persons charged with a crime are presumed to be innocent and that it is the

> burden [of] the State who has brought the charges to prove the defendant guilty beyond a reasonable doubt.
>
> What this means is the defendant has no obligation to testify in his own behalf or to call any witnesses in his defense. He may simply sit here and rely upon what he and his attorneys perceive to be the inability of the State to present sufficient evidence to meet their burden.
>
> Should that happen, you will have to decide the case on the basis of the evidence presented by the prosecution. The fact the defendant does not testify must not be considered by you in any way in arriving at your verdict.
>
> However, should the defendant elect to testify or should his attorneys present witnesses on his behalf, you are to consider that evidence in the same manner and by the same standards as evidence presented by the state's attorneys."

While potential jurors were not provided an opportunity to

respond during the trial court's presentation before the group of 28, individuals were afforded an opportunity to respond to the *Zehr* principles when the groups split into two.

However, Smith claims the trial courts verbiage after reciting each *Zehr* principle was improper because it failed to expressly ask whether the jury "understood and accepted" three of the four *Zehr* principles, instead asking, "Does anybody have any difficulty with this?"

Yet, there is nothing in the rule that requires the trial court to use the exact words "understood and accepted." *People v. Strickland*, 399 Ill. App. 3d 590, 604 (2010). Rather the court is required to use a method of inquiry to provide each juror with an opportunity to respond. Official Reports Advance Sheet No. 8 (April 11, 2007), R. 431(b), eff. May 1, 2007. Here, the trial court's question – "Does anybody have any difficulty with this?" – provides prospective jurors an opportunity to respond to the *Zehr* principles and express a potential bias.

Furthermore, our Supreme Court in *Thompson*, recently held that compliance with Rule 431(b) is not indispensable to a fair trial. *Thompson*, 238 Ill. 2d at 614. The court stated in *Thompson*:

> "[T]he rule serves to promote the selection

> of an impartial jury by making questioning mandatory, [but] Rule 431(b) questioning is only one method of helping to ensure the selection of an impartial jury." *Id.*

The supreme court held in *Thompson* that a failure to provide potential jurors with each of the *Zehr* principles is not plain error. *Id.* at 615. Thus, in the instant case, where the trial court provided potential jurors with each of the *Zehr* principles and an opportunity to reject them, there cannot be any error, let alone plain error, and Smith has forfeited the issue.

CONCLUSION

Based on the foregoing, the judgment of the trial court is affirmed.

Affirmed.