2020 IL App (4th) 190007-U

NO. 4-19-0007

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November 24, 2020
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DEONTAE WARD-HODGES, Defendant-Appellant.	) Appeal from the) Circuit Court of) Macon County) No. 16CF1502)) Honorable) Erick F. Hubbard,) Judge Presiding.

JUSTICE CAVANAGH delivered the judgment of the court.
Justices Harris and Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: (1) An issue is preserved for appellate review only if the issue was raised in some reasonably discernable form in both a contemporaneous objection and a written posttrial motion.

(2) Opinion testimony expresses what the witness thinks, believes, or infers about the facts, whereas non-opinion testimony expresses the witness's personal knowledge of the facts themselves.

(3) Generally, testimony that the defendant admitted a fact is non-opinion testimony.

(4) Even if lay opinion testimony violates Illinois Rule of Evidence 701 (eff. Jan. 1, 2011) by drawing an inference that the jury is just as capable of drawing for itself, the error is harmless if there is no reasonable probability that the testimony affected the outcome of the trial.

(5) Only jury instructions that, by their terms, require the jury to find an ultimate fact from a predicate fact impose a mandatory presumption, not jury instructions that merely inform the jury of the law.

(6) For the prosecution as for the defense, only very slight evidence supporting a theory justifies the giving of a jury instruction on that theory.

(7) Asking potential jurors to raise their hands if they do not understand or accept a principle in Illinois Supreme Court Rule 431(b) (July 1, 2012) is not clearly an insufficient method of inquiry under that rule and, hence, is not a plain error.

(8) For a sentence to be doubly enhanced, the circuit court must consider, as a factor in aggravation, an element of the offense, or the court must consider an aggravating factor twice.

(9) It is not a double enhancement to treat, as aggravating, a factor that typically accompanies the commission of an offense but that is not an element of the offense, *i.e.*, something that must be proved to establish guilt.

¶ 2 In the Macon County circuit court, a jury found defendant, Deontae Ward-Hodges, guilty of aggravated fleeing (625 ILCS 5/11-204.1(a)(1) (West 2016)) and driving while his driver's license was revoked (*id.* § 6-303(d)). The court denied defendant's motion for a new trial. For aggravated fleeing, the court sentenced him to five years' imprisonment, and for driving while his driver's license was revoked, the court sentenced him to a concurrent term of two years' imprisonment (finding that he had a previous conviction of that offense).

¶ 3 Defendant appeals on four grounds.

¶ 4 First, defendant contends that the circuit court erred by admitting lay opinion testimony that was inadmissible under Illinois Rule of Evidence 701 (eff. Jan. 1, 2011). This issue is forfeited by its omission from the posttrial motion. Forfeiture aside, we are unconvinced that the testimony in question was opinion testimony. In any event, we find no reasonable probability that the testimony influenced the outcome of the trial.

¶ 5 Second, defendant contends that a jury instruction imposed an unconstitutional mandatory presumption. We find no mandatory presumption in the jury instruction, which merely instructed the jury on the potentially applicable law, as jury instructions are supposed to do.

¶ 6 Third, defendant contends that the circuit court violated Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) by asking potential jurors to raise their hands if they did not understand or accept a constitutional principle in that rule. This objection, which defendant never raised below, is forfeited. Because the procedure of which defendant now complains did not clearly violate Rule 431(b), the doctrine of plain error does not avert the forfeiture.

¶ 7 Fourth, defendant contends that the circuit court doubly enhanced his sentence for aggravated fleeing by considering, as an aggravating factor, the risk of harm posed by the aggravated fleeing. To preserve a claim of sentencing error, both a contemporaneous objection and the reiteration of that objection in a written postsentencing motion are required. Defendant took neither of those steps with respect to the issue of a double enhancement. Because the risk of harm is not an element of aggravated fleeing, it is unclear that the court doubly enhanced the sentence. Absent a clear or obvious error, the doctrine of plain error does not avert the forfeiture of this sentencing issue.

¶ 8 Therefore, we affirm the judgment.

¶ 9 I. BACKGROUND

¶ 10 A. Jury Selection

¶ 11 After requesting the potential jurors to listen closely, the circuit court stated to them the four principles in Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). The court then told the potential jurors:

> "I am now going to ask you questions based on these principles. *** [I]f any one of you would answer no to any of the following questions[,] please raise your hand.

Do you understand and accept that the defendant is presumed innocent of the charges against him? Let the record reflect no hands were raised.

Do you understand and accept that[,] before a defendant can be convicted[,] the State must prove the defendant guilty beyond a reasonable doubt? Let the record reflect no hands were raised.

Do you understand and accept that the defendant is not required to offer any evidence on his own behalf? Let the record reflect no hands were raised.

Do you understand and accept that the defendant has the right to testify or not testify[?] And that a defendant's choice not to testify cannot be held against him? Let the record reflect no hands were raised."

¶ 12 B. Evidence in the Jury Trial

¶ 13 On October 12, 2016, three Decatur police officers were riding together in a marked squad car: Detectives Jonathan Roseman, Scott Rosenbery, and James Callaway. Roseman was driving. As they were patrolling Decatur, Rosenbery saw someone get out of a white Pontiac Grand Am, enter a house, and get back into the rear passenger compartment of the Pontiac. Then Roseman saw the Pontiac commit a traffic violation: failing to use a turn signal more than 100 feet away from Marietta Street before turning onto that street (see 625 ILCS 5/11-804(b) (West 2016)).

¶ 14 Roseman attempted to make a traffic stop. His squad car was equipped with a dashcam, which was automatically activated whenever Roseman turned on the overhead emergency lights. About two minutes of the dashcam video were played for the jury.

¶ 15 Instead of pulling over and stopping, the Pontiac accelerated. Roseman tried to keep up, but because it had rained the night before, he dared not go faster than 60 miles per hour. Even as he drove at that speed, the Pontiac was pulling away.

¶ 16 In the jury trial, there was some question as to what the speed limit was on Marietta Street. Roseman and Rosenbery testified that the speed limit there was 30 miles per hour but they did not know if the speed limit was posted. Callaway, who had worked for years in traffic enforcement before being assigned to the street crimes unit, testified that Marietta Street was "an urban residential area" where the speed limit was not posted and that, consequently, under "state law"—which Callaway had reviewed before coming to testify—the speed limit was 30 miles per hour.

¶ 17 The Pontiac, which, according to Roseman's testimony, was traveling at more than twice that speed, came to a halt against a fence. The driver of the Pontiac fled on foot, and none of the police officers got a good look at him. Two men, Kenneth White and Terrence Rush, remained in the backseat of the Pontiac. Less than five minutes after the car chase ended, a man was seen running between some nearby houses. He slipped and fell, enabling the police to catch up with him and apprehend him. It was defendant.

¶ 18 Deputy Sheriff Brian Hickey interviewed defendant, who sometimes answered Hickey's questions, sometimes did not answer, and sometimes responded nonverbally. (It was stipulated in the jury trial that defendant's driver's license had been revoked. Also, a certified abstract of his driving record was admitted in evidence. Because the abstract, however, revealed other offenses, it was not shown to the jury.) The interview included the following:

> "Q. The reason you didn't stop for the police was because you know you were revoked?
>
> A. Had a warrant.
>
> * * *
>
> Q. Who was in the car with you?

A. Kenny and T.

* * *

Q. So you're driving[,] and where was Kenny and T?

A. In the backseat.

* * *

Q. Whose car is that, that white Pontiac?

A. I don't know, I was just riding with them.

Q. You were riding with them, but you were driving, they just flip you the keys and said[,] ['Y]ou go drive[']?

[No verbal response.]

* * *

Q. So then they just flip you the keys cause you're out riding around?

[No verbal response.]

* * *

Q. They picked you up, and then you just got tired of driving?

[No verbal response.]"

As we said, defendant sometimes responded to Hickey with gestures. For example, when asked, "You were riding with them, but you were driving ***?" defendant nodded his head.

¶ 19 After the video of the interview was played for the jury, the prosecutor asked Hickey if defendant had made statements that he was the driver. Defense counsel objected, arguing that the jury, having just watched the video, was capable of answering that question for itself. Defense counsel argued: "Detective Hickey is in no better position to assess what was said on that video than the jury who just watched the video. They're the triers of fact. He doesn't get to testify

to the ultimate question. This isn't in the of expert testimony [*sic*]." The prosecutor explained, however, that because the video was difficult to hear, he just wanted to make sure the jury knew that defendant had admitted being the driver. "This is the arena of personal observation," the prosecutor argued, "which every witness can testify to." The circuit court overruled defense counsel's objection, whereupon the prosecutor asked Hickey: "Detective, did the defendant ever make admissions that he was driving the vehicle at the time Detective Roseman was pursuing it?" Hickey answered: "That is correct."

¶ 20 C. The Jury Instruction Conference

¶ 21 In the jury instruction conference, the State tendered a non-pattern instruction based on section 11-601(c) of the Illinois Vehicle Code (*id.* § 11-601(c)). (By "non-pattern instruction," we mean a jury instruction that was not in the Illinois Pattern Jury Instructions, Criminal (2006).) The proposed jury instruction, State's instruction No. 19, read as follows: "The maximum speed limit in an urban district for all vehicles where a speed limit sign is not posted is 30 miles per hour." Defense counsel objected to State's instruction No. 19 on the grounds that (1) the speed limit on Marietta Street was unproven and (2) the statute was never presented to the jury as evidence. The circuit court overruled defense counsel's objection and accepted State's instruction No. 19.

¶ 22 Given the circuit court's acceptance of State's instruction No. 19, defense counsel acceded to an additional non-pattern instruction by the State that defined an "urban district." State's instruction No. 20 read as follows: "An urban district is defined as the territory contiguous to and including any street which is built up with structures devoted to business, industry[,] or dwelling houses situated at intervals of less than 100 feet for a distance of a quarter of a mile or more."

¶ 23 D. The Jury's Request to Review the Video of the Interrogation

¶ 24 About four hours into the jury's deliberations, the circuit court informed the parties that the jury had requested to review the video of the interrogation. Neither party objected to the request. In the presence of defense counsel, the prosecutor prepared the video equipment and showed a court officer how to replay the video for the jury.

¶ 25 E. The Posttrial Motion

¶ 26 Defendant's motion for a new trial "incorporate[d] by reference all errors appearing on the face of the record and renew[ed] all objections as though fully recited therein." Defense counsel made no argument in the hearing on the motion, choosing instead to "stand on the pleadings and the arguments laid out within."

¶ 27 F. Sentencing Hearing

¶ 28 In imposing the sentence of five years' imprisonment for aggravated fleeing, the circuit court remarked that it was considering, as an aggravating factor, the physical risk to which defendant had subjected himself and others by driving at such a high rate of speed through a residential neighborhood when the roads were wet.

¶ 29 II. ANALYSIS

¶ 30 A. Lay Opinion Testimony

¶ 31 The prosecutor asked Hickey: "Detective, did the defendant ever make admissions that he was driving the vehicle at the time Detective Roseman was pursuing it?" Hickey answered: "That is correct." According to defendant, Hickey thereby gave lay opinion testimony that was inadmissible because the testimony drew an inference the jury was just as capable of drawing on its own, without Hickey's help. See *People v. Sykes*, 2012 IL App (4th) 111110, ¶ 36; *United States v. Skeet*, 665 F.2d 983, 985 (9th Cir. 1982). One of the conditions for admitting lay opinion

testimony is that the testimony would be "helpful to *** the determination of a fact in issue." See Ill. R. Evid. 701 (eff. Jan. 1, 2011). The jury did not need help with simple logic. If the car had only three occupants—defendant and two others—and the two others were in the backseat, then, necessarily, defendant was the driver.

¶ 32 The State responds that, for two reasons, defendant has forfeited his objection that the reputed lay opinion violated Illinois Rule of Evidence 701 (eff. Jan. 1, 2011). First, the contemporaneous objection was not on that specific ground. "A specific objection forfeits all other, unspecified objections." *People v. Kelley*, 2019 IL App (4th) 160598, ¶ 86. Defense counsel's objection was that because the jury had watched the video, Hickey was "in no better position to assess what was said on the video." This was not an objection that Hickey would offer a lay opinion. This was merely an objection that Hickey, unnecessarily, would recount what defendant said in the video, which the jurors had just watched for themselves. This objection by defense counsel would apply just as readily to a *verbatim* repetition of what defendant had said on the video. Second, instead of specifically raising Rule 701, the posttrial motion "renew[ed] all objections as though fully recited herein." The appellate court has held that such catchall language is too general to preserve an issue for appellate review. See *People v. Walensky*, 286 Ill. App. 3d 82, 96 (1996).

¶ 33 In response to the State's claim of forfeiture, defendant maintains that defense counsel did make a sufficient contemporaneous objection. Defendant grants, however, "that counsel did not reiterate the grounds for his objection when he renewed his objections in the [posttrial] motion." Even so, on the authority of *People v. Heider*, 231 Ill. 2d 1, 18 (2008), defendant argues that because the circuit court "had an opportunity to review the same essential claim that was later raised on appeal" (to quote from *Heider*) and because the record that defense

counsel made below is specific enough to prevent defendant from "asserting on appeal an objection different from the one he advanced below," "the purpose of preserving a claim of error was met."

¶ 34 *Heider* is distinguishable because defense counsel in that case argued the sentencing issue in the hearing on the postsentencing motion, even if the motion itself failed to raise the issue. See *id.* at 18. By contrast, in the hearing on the posttrial motion in the present case, defense counsel made no argument. Instead, he told the circuit court: "Your Honor, as the Court is aware of the issues that I have raised are issue that already discussed at trial [*sic*]. So, I would stand on the pleadings and the arguments laid out within." Thus, no argument was made to supply the omission in the posttrial motion. "Both a contemporaneous objection and a written posttrial motion are required to preserve an issue for review." *People v. Lewis*, 234 Ill. 2d 32, 40 (2009). Thus, we need not resolve the dispute as to whether defendant made a pertinent contemporaneous objection. By his own admission, he did not take the second procedural step with respect to the issue of lay opinion testimony: that issue was not raised in the motion for a new trial.

¶ 35 In an effort to avert a resulting forfeiture, defendant invokes the doctrine of plain error, arguing the closeness of the evidence. See *People v. Sebby*, 2017 IL 119445, ¶ 51. The first step in plain error analysis is to determine whether a clear or obvious error occurred. *Id.* ¶ 49. It is unclear that the prosecutor asked for Hickey's opinion. Rather, the prosecutor asked Hickey if a factual proposition were true, namely, that defendant had admitted driving the car. Case law defines "opinion testimony" as "what a witness thinks, believes, or infers in regard to facts in dispute, as distinguished from his personal knowledge of the facts themselves." (Internal quotation marks omitted.) *Prairie v. Snow Valley Health Resources, Inc.*, 324 Ill. App. 3d 568, 577 (2001). The prosecutor did not ask Hickey what he thought, believed, or inferred. This case is not like *People v. McCarter*, 385 Ill. App. 3d 919, 933-34 (2008), for example, in which witnesses were

asked to interpret what they had heard others say. The prosecutor did not ask Hickey to interpret any of defendant's statements. Nor did he ask Hickey if defendant "effectively" or "tacitly" had admitted being the driver. He just asked Hickey if defendant had admitted being the driver. This question did not call for an opinion, and Hickey's simple affirmative answer did not present itself as an opinion. Therefore, we conclude, *de novo*, that Rule 701 is inapplicable. See *People v. Burdine*, 362 Ill. App. 3d 19, 29 (2005) (holding that the appellate court "review[s] questions concerning the applicability of supreme court rules *de novo*"). There was no clear or obvious violation of that rule.

¶ 36 Assuming, for the sake of argument, that Hickey gave lay opinion testimony that, because of its unhelpfulness, was inadmissible (see Ill. R. Evid. 701 (eff. Jan. 1, 2011))—and, again, assuming there is no forfeiture of this issue—the only apparent harm was a waste of time. We find no reasonable probability that the testimony affected the outcome of the trial. See *People v. Gibson*, 2018 IL App (1st) 162177, ¶ 110 (holding that "[a] nonconstitutional error is harmless only if there is no reasonable probability that it affected the outcome of the hearing"). Defendant asserts that Hickey's testimony "prevent[ed] the jurors from making their own interpretation of that fact." It is unclear how Hickey's testimony could have *prevented* the jury from independently determining the facts. The jury remained free to accept or reject his testimony—and it appears that the jury exercised that freedom. During its deliberations, the jury requested to see the video of the interrogation again, and the video equipment was taken to the deliberation room. Evidently, the jury was unwilling to take Hickey's word for it that defendant had admitted being the driver.

¶ 37 B. Mandatory Presumption

¶ 38 Defendant contends that State's instruction No. 19 imposed an unconstitutional mandatory presumption that the Pontiac was traveling at least 21 miles per hour over the speed limit—an element of aggravated fleeing (see 625 ILCS 5/11-204.1(a)(1) (West 2016)).

¶ 39 The State claims that, by omitting to make a contemporaneous objection to State's instruction No. 19 on that ground, defendant forfeited that ground. See *People v. Cuadrado*, 214 Ill. 2d 79, 89 (2005). In other words, defense counsel objected to State's instruction No. 19 but not on the ground of an unconstitutional mandatory presumption. Hence, in the State's view, that unspecified ground is forfeited.

¶ 40 In opposition to the State's claim of forfeiture, defendant cites *People v. Mohr*, 228 Ill. 2d 53, 65 (2008), for the proposition that "[a]n issue raised on appeal does not need to be identical to the objection raised at trial." It is true that, under *Mohr*, the phrasing of the issue in the contemporaneous objection and the phrasing of the issue in the posttrial motion and on appeal do not have to be identical. See *id.* But the phrasing has to be "close enough" to preserve the issue on appeal. *Id.* Substantially, the objection below and the objection on appeal must be the same. See *People v. O'Neal*, 104 Ill. 2d 399, 408 (1984). The issue must at least be recognizable or reasonably discernable in the way it was presented below. *Mohr* does not allow such a wide divergence as to abandon the well-established rule that "a specific objection" to a jury instruction forfeits "all other unspecified grounds." *Cuadrado*, 214 Ill. 2d at 89.

¶ 41 In the jury instruction conference, defense counsel never objected to State's instruction No. 19 on the ground that it imposed a mandatory presumption. A mandatory presumption in a jury instruction requires the jury, on proof of a predicate fact, to find an ultimate fact. *People v. Hester*, 131 Ill. 2d 91, 99 (1989). Defense counsel never claimed that State's instruction No. 19 did that. Defense counsel never even mentioned any "presumption." Instead,

defense counsel claimed that State's instruction No. 19 supplied evidence, *i.e.*, section 11-601(c) of the Illinois Vehicle Code (625 ILCS 5/11-601(c) (West 2016)), that the State should have presented in the trial. An argument that the State should have proven the existence of section 11-601(c) is not "close enough" to an argument that State's instruction No. 19 imposed an unconstitutional mandatory presumption. This issue is forfeited. See *Cuadrado*, 214 Ill. 2d at 89; *O'Neal*, 104 Ill. 2d at 408.

¶ 42 Assuming we are mistaken about the forfeiture, State's instruction No. 19 did not require the jury to find an ultimate fact from proof of a predicate fact. See *Hester*, 131 Ill. 2d at 99. Rather, all State's instruction No. 19 did was inform the jury of the law—as jury instructions are supposed to do. "The function of jury instructions is to convey to the jurors the law that applies to the facts so they can reach a correct conclusion." *People v. Hopp*, 209 Ill. 2d 1, 8 (2004).

¶ 43 One of the conclusions the jury had to reach in this case was whether "defendant traveled at a rate of speed at least 21 miles per hour over the legal speed limit." (We quote from an issues instruction the circuit court gave the jury on the offense of aggravated fleeing or attempting to elude a police officer.) Because "the legal speed limit" depended partly on the law, the jury had to be informed of the potentially applicable law: that "[t]he maximum speed limit in an urban district for all vehicles where a speed limit [was] not posted [was] 30 miles per hour," to quote State's instruction No. 19. Defendant admits that "[t]he State's instruction [No.] 19 appears to reflect [section 11-601(c) of the Illinois Vehicle Code (625 ILCS 5/11-601(c) (West 2016))]."

¶ 44 By merely telling the jury the law, State's instruction No. 19 did not require the jury to find any ultimate facts that would trigger the law. *Cf. People v. Woodrum*, 223 Ill. 2d 286, 310-11 (2006) (holding that section 10-5(b)(10) of the child abduction statute (720 ILCS 5/10-5(b)(10) (West 1998)) imposed a facially unconstitutional mandatory presumption by

providing that " 'the luring or attempted luring of a child under the age of 16 into a motor vehicle, building, housetrailer, or dwelling place without the consent of the parent or lawful custodian of the child shall be prima facie evidence of other than a lawful purpose' "); *People v. Pomykala*, 203 Ill. 2d 198, 201-02 (2003) (in which the unconstitutional jury instruction stated that if the jury found the defendant to be under the influence of alcohol at the time of the vehicular collision, " 'such evidence shall be presumed to be evidence of a reckless act unless disproved by evidence to the contrary' "). The jury still had to decide whether the propositions in the issues instruction had been proven beyond a reasonable doubt, including whether "defendant traveled at a rate of speed at least 21 miles per hour over the legal speed limit." The issues instruction read: "If you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty." To find that "defendant traveled at a rate of speed at least 21 miles per hour over the legal speed limit," the jury would have had to find, beyond a reasonable doubt, that defendant sped at least 51 miles per hour through an urban district in which the speed limit was not posted. The jury instructions, which lacked any coercive fact-finding language similar to that in *Woodrum* or *Pomykala*, left the jury free to decide whether the underlying facts had been proven or unproven. If the question of an unconstitutional mandatory presumption was preserved for review, we find, *de novo*, that the jury instructions imposed no unconstitutional mandatory presumption. See *People v. Dorn*, 378 Ill. App. 3d 693, 698 (2008) (holding that the appellate court "reviews *de novo* whether the jury instructions, as a whole, accurately conveyed the law").

¶ 45 C. Evidence to Support the Giving of State's Instruction No. 20

¶ 46 According to defendant, "there was no evidence to support" the giving of State's Instruction No. 20, which defined an "urban district" as "the territory contiguous to and including

any street which is built up with structures devoted to business, industry[,] or dwelling houses situated at intervals of less than 100 feet for a distance of a quarter of a mile or more." See 625 ILCS 5/1-214 (West 2016). Defendant cites *People v. Shackles*, 44 Ill. App. 3d 1024, 1026 (1977), which warned: "It is error to submit an instruction to the jury where there is no evidence to support the giving of the instruction." In defendant's view, there was no evidence that Marietta Street was in an "urban district" as described in State's instruction No. 20, and defense counsel rendered ineffective assistance by failing to object to the instruction on that basis.

¶ 47 The State disagrees about the lack of supporting evidence. Callaway testified that Marietta Street was "an urban residential area." Also, the State points out, "the dash cam video of the police chase, which was played for the jury [citation], clearly shows a quintessential city block of residential dwellings."

¶ 48 Defendant responds that Callaway's testimony on this issue was too "brief" and "conclusory" to justify State's instruction No. 20. Also, defendant argues, "[i]t strains credulity to suggest that [the] distances [between buildings] could easily be gleaned with any kind of certainty from the less than two minute video of the car chase that was shown to the jury."

¶ 49 But "[v]ery slight evidence on a given theory in a case will justify the giving of an instruction on that theory in a criminal prosecution." *People v. Cookson*, 108 Ill. App. 3d 861, 865 (1982); see also *People v. Williams*, 244 Ill. App. 3d 5, 12 (1991) (holding that, "[a]s a general proposition of law, both the State and the defendant are entitled to instructions which present their respective theories, even though they are supported by slight evidence"). Callaway was a Decatur police officer who had been assigned to the street crimes unit for nine years. Before being assigned to the street crimes unit, he "worked in traffic *** for about [10] years." The day of the trial, before testifying, he "looked up" the "state law" and "review[ed] it." It would be reasonable to suppose

that Callaway, by virtue of his experience as a Decatur police officer, was familiar with the streets of Decatur and whether they conformed to the definition of an "urban district" in section 1-214 (625 ILCS 5/1-214 (West 2016)). He testified that Marietta Street "[i]n that area between the 500 and around a thousand blocks" was "an urban residential area" where the speed limit was unposted. Arguably, Callaway's testimony satisfies the "very slight evidence" standard in *Cookson*. It would be "within the wide range of reasonable professional assistance" to assume that *Cookson* was satisfied. *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

¶ 50 D. The Inquiries Under Illinois Supreme Court Rule 431(b)

¶ 51 Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) requires the circuit court to ask each potential juror whether he or she understands and accepts the four *Zehr* principles (named after *People v. Zehr*, 103 Ill. 2d 472 (1984)) and to give each juror an opportunity to respond when so questioned. The rule provides as follows:

> "(b) The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that[,] before a defendant can be convicted[,] the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that if a defendant does not testify[,] it cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's decision not to testify when the defendant objects.
>
> The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." *Id.*

¶ 52 The circuit court recited each of the four *Zehr* principles to the potential jurors, and each time the court recited a *Zehr* principle, the court asked the potential jurors to raise their hands if they did not understand or accept the principle. None of the potential jurors raised their hands (as the court noted for the record).

¶ 53 Although defendant made no objection at the time, he now objects, on appeal, that this method of inquiry violated Rule 431(b). Acknowledging that the failure to make a contemporaneous objection and to reiterate the objection in a written posttrial motion generally results in a forfeiture of the issue (see *People v. Enoch*, 122 Ill. 2d 176, 186 (1988)), defendant seeks to avert the forfeiture by again invoking the doctrine of plain error. He argues that that the evidence in the trial was closely balanced and that the reputed violation of Rule 431(b) could have swayed the verdict. See *People v. Sebby*, 2017 IL 119445, ¶ 48.

¶ 54 The first question in plain error analysis is whether a clear or obvious error occurred. See *People v. Lilly*, 2018 IL App (3d) 150855, ¶ 8. The circuit court's method of inquiry in this case did not clearly violate Rule 431(b). The court gave each potential juror an opportunity to respond: if a potential juror did not understand or accept the *Zehr* principle in question, the potential juror was to raise his or her hand.

¶ 55 The case from the Second District that defendant cites, *People v. Dismuke*, 2017 IL App (2d) 141203, did not disapprove of this procedure. Instead, in *Dismuke*, the appellate court found fault with the circuit court's "unclear and inadequate *** instructions":

> "First, the court instructed the potential jurors *not* to raise their hands if they understood, agreed with, and accepted the *Zehr* principles. Second, the court instructed the potential jurors to *raise* their hands in response to its question if they did *not* understand or accept the principles. Third, after reciting each principle, the

> court changed the question from 'understand and accept' to 'difficulty or disagreement.' Thus, the potential jurors received three different instructions about what they were supposed to do with their hands. More problematic was the court's substitution of 'difficulty or disagreement' for 'understand and accept.' " (Emphases in original.) *Id.* ¶ 54.

By contrast, in the present case, there was no "confusing multi-task exercise." *Id.* ¶ 55. There were no shifting directions. There was no deviation from the terms "understand" and "accept." Consistently, the circuit court asked the potential jurors if they understood and accepted each *Zehr* principle and requested them to raise their hand if the answer was no.

¶ 56 Defendant admits that in *Lilly*, 2018 IL App (3d) 150855, ¶ 15, the appellate court rejected the contention that "the response to a Rule 431(b) *voir dire* must be in the affirmative." The appellate court explained in *Lilly*: "For example, a court that asked the question, 'does any member of the venire not understand and accept those principles?' would be seeking responses in the negative, but would still be in compliance with the rule." *Id.* How the negative responses are to be signified—whether verbally or by raising one's hand—makes no meaningful difference, provided that a record is made. We cannot reasonably find a clear or obvious error in a procedure approved by the appellate court in *Lilly*. See *id.* ¶ 12. Therefore, the procedural forfeiture of the Rule 431(b) issue will be honored. See *People v. Eppinger*, 2013 IL 114121, ¶ 19.

¶ 57 E. Double Enhancement

¶ 58 Defendant argues that the circuit court doubly enhanced his sentence by considering, as a factor in aggravation, "the threat of harm posed by the fleeing to the passengers, the pursuing police officers, the public, and [defendant] himself." Defendant acknowledges that a sentencing error must be raised in both a contemporaneous objection and a written postsentencing

motion and that in the proceedings below he never challenged the court's consideration of the threat of harm as an aggravating factor. See *People v. Hillier*, 237 Ill. 2d 539, 544-45 (2010). Nevertheless, he maintains that the doctrine of plain error should avert the forfeiture because the evidence in the sentencing hearing was closely balanced and the purported sentencing error made the sentencing hearing unfair. See *Sebby*, 2017 IL 119445, ¶ 48.

¶ 59 We begin by asking whether there was a clear or obvious error. See *Eppinger*, 2013 IL 114121, ¶ 19. Quoting from *People v. Gonzalez*, 151 Ill. 2d 79, 83-84 (1992), defendant argues that "[t]here is a general prohibition against the use of a single factor both as *an element of a defendant's crime* and as an aggravating factor justifying the imposition of a harsher sentence than might be otherwise imposed." (Emphasis added.) The threat of harm is not an element of aggravated fleeing. See 625 ILCS 5/11-204.1(a)(1) (West 2016). An "element" is "[a] constituent part of a claim that must be proved for the claim to succeed." Black's Law Dictionary (11th ed. 2019). In the guilt phase, the State need not prove the threat of harm. See 625 ILCS 5/11-204.1(a)(1) (West 2016). Nowhere does the statute mention the threat of harm. See *id.* If, hypothetically, the fleeing occurred at noon on a dry, straight, well-paved, otherwise abandoned country road that was intersected by no side roads or driveways and if the vehicles were traveling at 51 miles per hour through a 30-mile-per hour speed zone, the offense of aggravated fleeing could still be committed. Endangerment is not an element.

¶ 60 In sum, "[a] double enhancement occurs when either (1) a single factor is used both as an element of an offense and a basis for imposing a harsher sentence than might otherwise have been imposed[ ] or (2) the same factor is used twice to elevate the severity of the offense itself." *People v. Guevara*, 216 Ill. 2d 533, 545 (2005). In our *de novo* consideration of this issue (see *People v. Phelps*, 211 Ill. 2d 1, 12 (2004)), we find no clear showing that the circuit court did either

(1) or (2). Thus, there was no clear or obvious error of double enhancement in considering the threat of harm as an aggravating factor (see *Guevara*, 216 Ill. 2d at 545; *Gonzalez*, 151 Ill. 2d at 83-84), and the forfeiture of this sentencing issue will be honored (see *Eppinger*, 2013 IL 114121, ¶ 19).

¶ 61 III. CONCLUSION

¶ 62 For the foregoing reasons, we affirm the circuit court's judgment.

¶ 63 Affirmed.