FOURTH DIVISION
September 27, 2012

No. 1-10-0856

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. 08 CR 3767
	)	
DAREL LUCAS,	)	Honorable
	)	Lawrence P. Fox,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

O R D E R

¶ 1 *HELD*: Defendant's failure to object to the trial court's noncompliance with Supreme Court Rule 431(b) resulted in the forfeiture of this claim on appeal.

¶ 2 After a jury trial, defendant Darel Lucas was convicted of second degree murder and sentenced to 16 years in prison. On appeal, defendant contends the trial court did not comply with Supreme Court Rule 431(b) (eff. May 1, 2007), when it failed to ask jurors whether they "understood and accepted" the principles enumerated in *People v. Zehr*, 103 Ill. 2d 472 (1984),

and failed to inquire at all regarding the principle that a defendant is not required to offer evidence on his own behalf. We affirm.

¶ 3 Defendant was arrested and charged with first degree murder after the victim JuJuan Robertson was shot and killed in January 2008.

¶ 4 During *voir dire*, the court explained the principles enumerated in *People v. Zehr*, 103 Ill. 2d 472 (1984), *i.e.*, a defendant (1) is presumed innocent, (2) must be proven guilty beyond a reasonable doubt, (3) is not required to offer any evidence on his own behalf, and (4) cannot be penalized by the failure to testify upon his own behalf. The court then questioned individual panels of potential jurors regarding three of the four *Zehr* principles asking after each principle if anyone had a "problem" with it or would hold the decision not to testify against defendant. The court did not ask whether the panels understood and accepted that a defendant is not required to present evidence on his own behalf. Defendant did not object and a jury was then selected.

¶ 5 At trial, the State presented the testimony of, *inter alia*, eyewitnesses Pierre Burton, Mason Johnson, Terrell Houston, and Miles Cross, each of whom identified defendant as the person who shot the victim. The defense presented the testimony of defendant who testified that he was afraid for his life at the time of the shooting and Arron McIntyre who testified that the victim was known as a bully in the neighborhood.

¶ 6 Pierre Burton testified that he was talking to defendant, who was sitting in a car, when the victim drove up. The victim and defendant then exited their vehicles and began arguing. Johnson heard defendant tell the victim to talk to him like a man and saw Houston and Johnson try to "break it up." At one point, defendant shot the victim. After the first shot, the victim jumped back and turned around. Defendant then shot again.

¶ 7 Mason Johnson testified that he had previously been convicted of several felonies, and, at the time of trial, was in prison because of a narcotics conviction.[1] After exiting the victim's car, Johnson watched as defendant drove into the area, slowed down, and asked the victim what he had said he was going to do to defendant's "baby mama." When the victim got out of his car, defendant drove away. The victim said defendant was a bitch, advised him to run, and then drove away. A few minutes later, defendant drove by. Then the victim drove by again. When Houston drove by, Johnson flagged the car down, got in, and told him to drive up the block. When Johnson saw the victim's car, he got out and began running to the victim. Defendant was standing facing away from the victim and the victim was touching the back of defendant's head. Defendant, who was walking away, turned and fired a gun. Johnson did not hear a second shot.

¶ 8 Johnson did not recall testifying before the grand jury that defendant shot the victim a second time but admitted that he had testified that the victim was shot a second time in the back of the leg. He also did not recall testifying that he saw defendant pull a gun out of a pocket.

¶ 9 During cross-examination, Johnson admitted that he used marijuana and heroin on a regular basis. On the evening of the shooting, he had used marijuana. He denied telling the police that he saw someone in defendant's car. Johnson further testified that as he approached the victim and defendant, he heard the victim say that the victim did not care if defendant had a gun, the victim would beat defendant's ass. He characterized the victim as physically bigger than defendant.

¶ 10 Assistant State's Attorney Jose Villarreal testified that he met with Johnson prior to Johnson's testimony before the grand jury. During that testimony, he asked Johnson where defendant got the gun, and Johnson answered that defendant removed it from a right front pocket.

[1] Johnson is also known as "Little Mason."

When he asked Johnson whether defendant shot the victim a second time, Johnson answered in the affirmative.

¶ 11 The parties stipulated that if called to testify Detective Noradin would testify that during a conversation with Johnson, Johnson indicated that he saw another person in the car with defendant that night.

¶ 12 Terrell Houston testified that although he saw the victim grab defendant, he did not see a weapon in the victim's hand. However, defendant pulled out a gun and shot the victim. As the victim began to turn away, defendant shot him again. Although Houston initially denied seeing the shooting, he later admitted that he was present and identified defendant as the shooter.

¶ 13 Miles Cross also testified that he saw defendant shoot the victim in the chest. When the victim turned away, defendant shot him again. Cross denied telling the police that earlier on the day of the shooting he heard the victim say the victim was going to kick defendant's ass.

¶ 14 The parties then stipulated that Detective Landando would testify, if called to testify, that during a conversation with Cross, Cross said that the victim rode around the neighborhood the day of the shooting telling people that the victim was going to kick defendant's ass.

¶ 15 Defendant testified that after he stopped the victim and another man from beating Darrell Meeks in September 2005, he kept his distance from the victim because he knew what "type of guy" the victim was, *i.e.*, a bully. After defendant was stabbed in 2006, he purchased a gun which he carried when he went out at night.

¶ 16 In late 2007, defendant became embroiled in a dispute with the victim over a debt. The week before Christmas, the victim asked whether defendant had the money and stated that he was going to f*** defendant up if defendant did not have it. After this conversation, defendant feared the victim. When he did not have the money in early January, the victim told defendant that if he kept "playing," the victim would f*** him up.

¶ 17 A few days later while out with Arron McIntyre, defendant saw the victim. When he stopped and rolled down the window, the victim asked whether he had the money. After he said no, the victim told him that the victim was going to beat his ass, and f*** him up. Defendant told the victim that he would have the money the following Monday. Defendant drove away when the victim got out of the car and began moving toward him. He parked less than a block away in order to speak to a friend. The victim then pulled up and jumped out of his car. The victim told defendant to come closer and defendant complied. However, when the victim threatened to f*** him up because he did not have the money, he began to back away. Although defendant offered to give the victim the money on Monday, the victim wanted it then. As defendant backed up, the victim continued to move toward him. When the victim rushed to try and grab him defendant turned to walk away. He then felt something tap the back of his head. The tap felt like a gun and defendant was scared that the victim was going to shoot him because he had previously seen the victim with a gun. Afraid for his life, defendant pulled a gun from his right pocket and shot the victim. After a few seconds, he fired again. Defendant did not see the victim with a gun that night.

¶ 18 Arron McIntyre testified that the victim had a reputation in the neighborhood as a bully. He testified consistently with defendant regarding the 2005 beating and the debt. As defendant and the victim argued in the street, defendant tried to walk away saying that he was not trying to fight the victim. McIntyre then saw the victim hit defendant on the back of the head and try to get closer to defendant. At the time of the first gunshot, the victim was still walking toward defendant, as if trying to grab him. Defendant's right arm was behind him pointing toward the victim. After the first shot, the victim asked whether that " 'little ass' " gun was all defendant had. A few seconds later, there was a second shot.

¶ 19 Ultimately, defendant was convicted of second degree murder and sentenced to 17 years in prison. The trial court subsequently granted defendant's motion to reconsider sentence and reduced defendant's sentence to 16 years in prison.

¶ 20 On appeal, defendant contends that the court violated Supreme Court Rule 431(b) (eff. May 1, 2007), when it inquired whether any jurors had a "problem" with three of *Zehr* principles and did not ask potential jurors whether they understood and accepted that a defendant is not required to present evidence. Defendant admits that he has forfeited these contentions for purposes of this appeal by failing to object and to raise them in his posttrial motion (see *People v. Enoch*, 122 Ill. 2d 176, 186 (1988)), but asks this court to review them for plain error (*People v. Herron*, 215 Ill. 2d 167, 186-87 (2005)). He contends that trial court's failure to ask the venire whether it understood and accepted all four of the *Zehr* principles constituted plain error under the first prong of the plain error doctrine because the evidence at trial was close. See *Herron*, 215 Ill. 2d at 186-87 (a reviewing court may address forfeited errors "when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence"). The first step in plain error review is to determine whether any error occurred (*People v. Thompson*, 238 Ill. 2d 598, 613 (2010)), as absent error, there can be no plain error (*People v. Bannister*, 232 Ill. 2d 52, 79 (2008)).

¶ 21 Here, defendant raises two alleged errors. He first contends that the trial court erred when it did not explicitly ask jurors if they "understood and accepted" the *Zehr* principles. He next contends that the court erred when it failed to inquire whether the *venire* understood and accepted that a defendant is not required to present any evidence. We find it necessary to examine both considerations of error because defendant argues that the evidence was closely balanced and we cannot determine whether the evidence was so closely balanced as to tip the scales of justice against defendant without first determining the full extent of the error. For the following reasons,

this court determines that although the trial court did not err when it asked potential jurors whether they had a "problem" with three of the *Zehr* principles, the court erred when it failed to inquire as to all four principles.

¶ 22 *People v. Digby*, 405 Ill. App. 3d 544 (2010), is instructive. There, this court determined that the trial court's questions to potential jurors whether they " ' had a problem' " with the presumption of a defendant's innocence, whether they " 'disagreed' " with the State's burden of proof, and whether they would hold the defendant's failure to testify " 'against' " him did not constitute error when the court's phrasing "clearly indicated to the prospective jurors that the court was asking them whether they understood and accepted the principles enumerated in the rule." *Digby*, 405 Ill. App. 3d at 546, 548. In other words, there are no magic words which ensure compliance with the Rule 431(b). *Digby*, 405 Ill. App. 3d at 548. See also *People v. Quinonez*, 2011 IL App (1st) 092333, ¶¶ 5, 50 (finding no error when the trial court asked prospective jurors, *inter alia*, if they had " 'a problem' " or " 'disagreed' " with the *Zehr* principles when, although the court did not use the precise language of the rule, the court's words indicated to the potential jurors that the court was asking them, not only whether they accepted the principles enumerated in Rule 431(b), but also whether they understood them); *People v. Salcedo*, 2011 IL App (1st) 083148, ¶ 33 (finding no error when the court asked potential jurors whether they had " 'any difficulty or quarrel' " with the *Zehr* principles because difficulty could include a lack of understanding). Therefore, the trial court's language in the instant case, asking the potential jurors if they had a "problem" with three of the *Zehr* principles indicated to those individuals that the court was not only asking whether they accepted the principles, but also whether they understood them. *Digby*, 405 Ill. App. 3d at 548. Accordingly, we reject defendant's contention.

¶ 23 Defendant next contends that the trial court erred when, although the court explained the four principles enumerated in Rule 431(b) to the *venire*, it failed to question the individual panels of potential jurors regarding whether they understood and accepted, or, in this case, "had a problem with," the proposition that a defendant is not required to present any evidence. The State, on the other hand, contends that because defendant testified and presented evidence at trial, no prejudice "can possibly" result from the trial court's allegedly improper questioning of the *venire*, and, consequently, defendant cannot establish that this "purported" error alone could had led to his conviction. However, our supreme court has determined that Rule 431(b) requires an opportunity for a response from each prospective juror on his or her understanding and acceptance of the four principles enumerated in *Zehr* (*Thompson*, 238 Ill. 2d at 607), although, as discussed above, the precise language of the rule need not be utilized (*Digby*, 405 Ill. App. 3d at 548). Therefore, we reject the State's contention.

¶ 24 Defendant would have this court reach his constitutional contentions through the closely balanced evidence prong of plain error review. In considering whether the first prong of the plain error doctrine has been satisfied, this court must consider whether the outcome of defendant's trial may have been affected by the trial court's failure to ask potential jurors whether they understood and accepted that a defendant does not have to present evidence. In order to prevail on this claim, defendant must establish that this error alone could have led to his conviction, that is, the verdict "may have resulted from the error and not the evidence" properly adduced at trial. *Herron*, 215 Ill. 2d at 178; see also *People v. Naylor*, 229 Ill. 2d 584, 593 (2008) (defendant bears the burden of persuasion under both prongs of the plain error doctrine).

¶ 25 Defendant has not met this burden, as it is clear in this case that the trial court's failure to ask potential jurors whether they understood and accepted that a defendant is not required to present evidence, in and of itself, did not tip the scales of justice against defendant when the

evidence at trial was not closely balanced and defendant did, in fact, present evidence and testify. See *People v White*, 407 Ill. App. 3d 224, 232 (2011) (even if the evidence was closely balanced, the trial court's failure to inquire whether the potential jurors understood a defendant's right not to testify was of "no consequence" because the defendant testified and the court instructed the potential jurors of defendant's right not to testify). In the instant case, it was undisputed that defendant shot the victim twice. Burton and Houston further testified that the second shot occurred as the victim was turning away from defendant. Although the defense supported its self-defense theory with testimony that the victim was known as a bully in the neighborhood and defendant's testimony that he was afraid of the victim and thought that the victim tapped him on the head with a gun, defendant admitted that he did not see the victim with a gun that night. Accordingly, because defendant has failed to persuade this court that it was the trial court's noncompliance with Rule 431(b), in and of itself, that resulted in his conviction, the trial court's error does not rise to the level of a first prong plain error exception. See *Naylor*, 229 Ill. 2d at 593. As the evidence against defendant was not closely balanced, this court must honor his procedural default. See *Herron*, 215 Ill. 2d at 186-87.

¶ 26 For the foregoing reasons, the judgment of the trial court is affirmed.

¶ 27 Affirmed.