

No. 1-11-0392

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	Nos. 08 CR 3745
	)	08 CR 5489
	)	
MARIUSZ WDZIEKONSKI,	)	Honorable
	)	Larry G. Axelrod,
Defendant-Appellant.	)	Judge Presiding.

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

**ORDER**

- ¶ 1 *Held:* The court did not err in questioning potential jurors as required by Supreme Court Rule 431(b); the court described, and questioned the venire members, separately for each of the four principles described in the Rule, and those questions substantially complied with the Rule.
- ¶ 2 Following a jury trial, defendant Mariusz Wdziekonski was convicted of institutional vandalism and unlawful acts upon cemetery grounds and was sentenced to seven years' imprisonment. On appeal, defendant contends that the court failed to comply with Supreme Court Rule 431(b) (eff. July 1, 2012), requiring that the court ascertain whether each potential

juror understands and accepts certain principles regarding the presumption of innocence and the burden of proof. For the following reasons, we affirm the judgment of the circuit court.

¶ 3 Defendant was charged with institutional vandalism and unlawful acts upon cemetery grounds for, on or about January 4, 2008, allegedly spray-painting "swastikas and other anti-Semitic graffiti" on more than 10 headstones, monuments, or grave markers in Westlawn Jewish cemetery (the Cemetery) "by reason of the actual or perceived religion of a group of individuals," thereby causing more than \$10,000 in damage to Cemetery property.

¶ 4 The case proceeded to a jury trial. During *voir dire*, the court asked the venire members to raise a hand if "anyone here \*\*\* disagrees with" each of the concepts of presumption of innocence, the State's burden of proof beyond a reasonable doubt, and that a defendant is not required to present evidence. The court asked the question three times, after describing each of the three concepts or principles. No member raised a hand. The court also told the venire that the defendant does not have to testify and asked the members to raise a hand if any of them would "hold the fact that the defendant did not testify at trial against the defendant." Nobody did. The case proceeded through *voir dire* to the empaneling of a jury.

¶ 5 The evidence at trial was that, some time between the afternoon of January 4<sup>th</sup> and the morning of January 6<sup>th</sup>, 67 monuments or grave markers in the Cemetery were defaced with blue and silvery-white spray paint. The graffiti included swastikas, the number 88, and the words or phrases "Skinhead," "White Power," and "Juden Raus." The graffiti also included a Star of David at the end of a hangman's noose, and the twin-lightning-bolt logo of the SS, the Nazi military force. A witness explained that "88" signifies "Heil Hitler," while "Juden Raus" means "Jews, get out" in German. The Cemetery spent over \$10,000 to clean the defaced markers.

¶ 6 When a detective went to defendant's home at about 11 a.m. on January 31<sup>st</sup>, defendant denied that he vandalized the Cemetery, though he admitted his membership in a white

supremacist or neo-Nazi organization and showed the detective his membership uniform. He agreed to go to the police station for an interview, where he was informed of his *Miranda* rights upon arrival, at about noon. Defendant initially admitted that he stood lookout while three other persons entered and vandalized the Cemetery with brown spray paint. When left alone in the interview room, defendant tried to choke himself with his belt, so that officers handcuffed him. However, he declined medical treatment and questioning continued. Defendant then identified a particular person as one of the vandals, but after detectives interviewed that person and confronted defendant with the results, defendant admitted that the man was not involved but he had named him "as a diversion." At about mid-day on February 1<sup>st</sup>, defendant requested an attorney and refused to answer further questions, and he was placed in the station lockup. However, after about 15 minutes, he requested to speak with the detectives again, and was again informed of his *Miranda* rights. Defendant admitted to vandalizing the Cemetery and gave a written statement after 3 p.m. on February 1<sup>st</sup> to the effect that he alone vandalized the Cemetery.

¶ 7 Defendant's tattoos include a German soldier and a "falanga," the symbol of a World War II-era Polish fascist group. Defendant's webpage included the "totenkopf" logo used by Nazi concentration camp guards, defendant dressed in a Nazi uniform, and defendant wearing a shirt with "88" on it.

¶ 8 Defendant testified that he did not vandalize the Cemetery. He corroborated much of the police testimony regarding the questioning process. However, the detective who came to his home told, rather than asked, him to go to the police station. There, he was threatened with deportation if he did not cooperate. (Detectives denied this allegation in direct and rebuttal testimony.) Though he asked to make a telephone call, he was not allowed to do so. When he was informed of his *Miranda* rights, he asked for an attorney. However, when detectives returned to the interview room, he resolved to give the false confession to avoid deportation, in

which he implicated three men who entered the Cemetery with black and brown spray paint. However, the detectives were displeased that he could not name the men. Defendant then injured himself so that he would "gain some attention" or be taken for medical treatment. He denied that the police asked him if he wanted medical treatment. After he was handcuffed, he gave another false statement implicating a named individual; however, detectives later told him that said person had an alibi. Defendant was placed in the lockup overnight, then was questioned again the next morning. Defendant admitted that, after he requested counsel and refused to answer more questions, so that he was returned to the lockup, he requested to speak with detectives. He then gave the false account and written statement implicating himself alone.

¶ 9 Following closing arguments, instructions, and deliberations, the jury found defendant guilty of institutional vandalism and unlawful acts upon cemetery grounds. In his unsuccessful post-trial motion, defendant raised no issue or claim regarding jury selection in general nor specifically involving the questions to the venire mentioned above. Following arguments in aggravation and mitigation, the court sentenced defendant to seven years' imprisonment. This appeal followed.

¶ 10 On appeal, defendant contends that the court failed to comply with Supreme Court Rule 431(b), requiring that it ascertain whether each potential juror understands and accepts certain principles regarding the presumption of innocence and the burden of proof.

¶ 11 Supreme Court Rule 431(b) requires in jury trials in criminal cases that:

"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."

Ill. S. Ct. R. 431(b) (eff. July 1, 2012).

Under the Rule, "trial courts may not simply give 'a broad statement of the applicable law followed by a general question concerning the juror's willingness to follow the law.'" *People v. Thompson*, 238 Ill. 2d 598, 606 (2010), quoting Ill. S. Ct. R. 431, Committee Comments.

Instead, the Rule requires a court to:

"ask each potential juror whether he or she understands and accepts each of the principles in the rule. The questioning may be performed either individually or in a group, but the rule requires an opportunity for a response from each prospective juror on their understanding and acceptance of those principles." *Id.* at 607.

¶ 12 In *Thompson*, the supreme court found that the trial court failed to comply with Rule 431(b) when it "did not question any of the prospective jurors on the third principle, whether they understood and accepted that defendant was not required to produce any evidence on his own behalf." *Id.* "Additionally, while the trial court asked the prospective jurors if they understood the presumption of innocence, the court did not ask whether they accepted that principle. The rule requires questioning on whether the potential jurors both understand and accept each of the enumerated principles." *Id.*

¶ 13 Since *Thompson*, this court has held that the trial court complies with Rule 431(b) by asking the venire after each of the principles in the Rule if the members "have any difficulty with the principle" (*People v. Ware*, 407 Ill. App. 3d 315, 355-56 (2011)), "have any difficulty or quarrel with the principle" (*People v. Ingram*, 409 Ill. App. 3d 1, 10-13 (2011)), "have a problem with this rule of law" or "disagree with this rule of law" (*People v. Quinonez*, 2011 IL App (1st) 092333, ¶¶ 5, 44-50), or "have any quarrel with this proposition of law" (*People v. Martin*, 2012 IL App (1st) 093506, ¶¶ 29, 71-78). This court has similarly held that asking the venire members if they would hold it against the defendant if he chose not to testify complied with the Rule regarding the fourth right-to-not-testify principle. *Quinonez*, at ¶¶ 5, 48-50; *People v. Digby*, 405 Ill. App. 3d 544, 548 (2010).

¶ 14 Failure to comply with Rule 431(b) "does not necessarily render a trial fundamentally unfair or unreliable in determining guilt or innocence." *Thompson*, 238 Ill. 2d at 611. Thus, non-compliance with Rule 431(b) is not a structural error necessarily requiring reversal. *Id.* at 611. The usual rule that a defendant forfeits a claim or objection not raised in the trial court applies to a court's failure to comply with Rule 431(b). *Id.* at 611-12. Moreover, when this court is applying plain-error analysis to determine whether to set aside forfeiture, we will not presume that violation of Rule 431(b) resulted in a biased jury and thus an unfair trial, but instead a defendant must show either that he actually had a biased jury or that the trial evidence was so closely balanced that the guilty verdict may have resulted from the Rule violation. *Id.* at 613-15. The first step of plain-error review is determining whether any error occurred. *Id.* at 613.

¶ 15 Here, defendant failed to preserve his challenge to the error now contended. However, we conclude that there was no error and thus no plain error. The trial court asked – separately for each of the Rule 431(b) principles – if any of the venire members disagree with the presumption of innocence, the State's burden of proof beyond a reasonable doubt, or that a defendant is not

required to present evidence. The court also told the venire that a defendant does not have to testify and asked the members if any of them would hold it against defendant if he decided not to testify. Defendant contends that the court erred by not ascertaining from the potential jurors whether they both understood and accepted the principles, while the State responds that the court's questions did precisely that. Following our earlier decisions as set forth above, we find that asking the venire members if they disagree with the principles, or would hold defendant's decision not to testify against him, adequately ascertained whether they understood and accepted the principles. The court properly gave any venire member who had an issue with any one or more of the principles an opportunity to tell the court so that they could be further questioned.

¶ 16 Accordingly, the judgment of the circuit court is affirmed.

¶ 17 Affirmed.