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SIXTH DIVISION
December 12, 2014

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. 11 CR 8041 |
| |) | |
| MELVIN STRICKLAND, |) | The Honorable |
| |) | Thomas V. Gainer, Jr., |
| Defendant-Appellant. |) | Judge Presiding. |

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶1 *HELD:* Following *Aguilar*, defendant's conviction for aggravated unlawful use of a weapon pursuant to section 24-1.6(a)(1), (1)(3)(A) of the Criminal Code is void and must be vacated. However, defendant's conviction for aggravated unlawful use of a weapon pursuant to section 24-1.6(a)(1), (1)(3)(C) of the Criminal Code for possession a handgun without a proper firearm owner's identification card remains constitutional. Despite the trial court's failure to comply with Illinois Supreme Court Rule 431(b), defendant did not sustain his burden of demonstrating plain error. This cause is remanded for resentencing.

¶2 Following a jury trial, defendant, Melvin Strickland, was convicted of two counts of aggravated unlawful use of a weapon (AUUW) pursuant to sections 24-1.6(a)(1), (a)(3)(A) and 24-1.6(a)(1), (a)(3)(C) of the Criminal Code (720 ILCS 5/24-1.6(a)(1), (a)(3)(A), 24-1.6(a)(1), (a)(3)(C) (West 2012)).¹ On appeal, defendant contends that his convictions should be vacated as unconstitutional in light of *People v. Aguilar*, 2013 IL 112116. In the alternative, defendant contends he is entitled to a new trial where the trial court failed to comply with the dictates of Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). Based on the following, we vacate defendant's conviction pursuant to section 24-1.6(a)(1), (a)(3)(A) and affirm defendant's remaining conviction. We remand for sentencing on defendant's remaining conviction.

¶3 **FACTS**

¶4 At trial, Officer Kuber² testified that, on May 9, 2011, she³ and her partner, Officer Mueller responded to a call regarding a domestic dispute at 8020 South Princeton Avenue in Chicago, Illinois. Upon the officers' arrival, defendant and a woman were standing in front of the address and stated that neither had called the police. However, as the officers reentered their police car, the female informed Officer Mueller that defendant was armed with a handgun. Officer Mueller shared the information with Officer Kuber, and then approached defendant while Officer Kuber remained in the driver's seat of the police car. Defendant took flight, running northbound on Princeton Avenue. Officer Mueller gave chase on foot, while Officer Kuber followed in the police car. Officer Kuber heard Officer Mueller radio in a flash message with directions. Officer Mueller also announced on the radio that defendant was "holding his side."

¹On defendant's motion, the trial court simultaneously conducted a severed bench trial for defendant's charge of unlawful possession of a firearm by a street gang member. He was acquitted of that charge.

² None of the officers' first names appear in the record.

³ It is unclear from the record whether Officer Kuber is a male or female, but both parties refer to her as a female.

¶5 Officer Kuber testified that she found defendant in a garage located at 7940 South Wentworth Avenue. Other officers had already arrived at the location and defendant was in custody. Officer Kuber was shown a fully loaded Taurus black handgun that was recovered from defendant. Officer Kuber later returned to 8020 South Princeton Avenue to locate the female, but she was no longer at the location.

¶6 Latasha Hall testified that she lived in a single-family home at 7940 South Wentworth Avenue. On the date in question, she was looking out her back kitchen window when she observed defendant jump over her neighbor's fence and kick the service door of her detached garage. Hall then observed a police officer run into her backyard. Hall informed the police officer that a man wearing a black t-shirt and jeans with long dreadlock braids was in her garage. According to Hall, the officer yelled "whoever's in the garage get down, drop it, put your hands up." Hall testified that the officer showed her a handgun recovered in the garage. Hall denied that any handguns had been in her garage. Hall said that the lock on her garage service door was broken.

¶7 Officer Landrum testified that, at approximately 7 p.m. on the date in question, he received a flash message radio call to proceed to 79th Street and Wentworth Avenue. Upon his arrival at the location, Officer Landrum observed defendant from approximately 100 feet away, running in an alley between Yale Avenue and Wentworth Avenue and then hopping a fence. Officer Landrum was accompanied by Officers Rumbaugh and Kennedy. Officer Landrum described defendant as wearing a black long-sleeved t-shirt and jeans with braids in his hair. Officer Landrum proceeded on foot and was directed to 7940 Wentworth Avenue. Officer Landrum testified that he ran down the gangway of the single-family house at that address and was met by the resident of the home, Hall. Hall directed him to her garage. Officer Landrum

opened the closed garage service door and observed defendant standing in the north corner of the garage holding a handgun. Defendant dropped the handgun and Officer Landrum instructed defendant to get down. Officer Landrum placed defendant in custody and transported him to the police station. Meanwhile, other officers arrived to the garage and recovered the handgun.

¶8 Officer Rumbaugh testified that, after responding to the flash message with Officers Landrum and Kennedy, he observed defendant running in an alley between Yale Avenue and Wentworth Avenue. Defendant had braids in his hair. According to Officer Rumbaugh, defendant hopped a fence at 7940 South Wentworth. Officer Landrum followed defendant ahead of Officer Rumbaugh. When Officer Rumbaugh entered the garage at 7940 South Wentworth, defendant was on the ground and Officer Landrum was placing defendant in custody. Officer Rumbaugh observed a handgun on the garage floor. Officer Rumbaugh recovered the .45 caliber semi-automatic handgun with nine live rounds in the magazine and one round in the chamber, which he unloaded.

¶9 The parties stipulated that, if called, Cynthia Kruss, a forensic scientist specializing in the analysis and comparison of latent fingerprints, would testify that no latent fingerprints suitable for comparison were found on the .45 caliber handgun or the 10 rounds of ammunition recovered from the scene. Kruss would testify that one latent fingerprint suitable for comparison was found on the magazine, but the print did not match defendant.

¶10 The parties further stipulated that, on May 9, 2011, defendant did not have a valid Firearm Owner's Identification Card (FOID card).

¶11 Defendant made a motion for a directed finding. The motion was denied.

¶12 Defendant testified that, at approximately 7 p.m. on the date in question, he was at his girlfriend's residence located at 8020 South Princeton Avenue. Defendant was engaged in a

conversation with his girlfriend when the police arrived. The police inquired whether anyone had called the authorities and, after first denying that she placed the call, defendant's girlfriend replied in the positive. According to defendant, his girlfriend said something to the police and the officer attempted to approach defendant. In response, defendant pulled up his pants, which were too large, and ran. Defendant testified that he ran northbound through the alley at 80th Street and Princeton Avenue and hopped a fence. Defendant said that the officers yelled at him to stop. Defendant testified that he was scared because he did not want to go to jail. Upon entering the backyard after hopping the fence, defendant observed officers in front of the house and an officer in the backyard, so he kicked in the garage door and lay down in the garage. Defendant did not provide the house address.

¶13 Defendant testified that he overheard a woman tell an officer that a man had kicked in the garage service door and must be hiding inside. Defendant also overheard one officer ask another for a taser gun. Defendant testified that he has a heart murmur and did not want to get "tasered," so he "got up from behind the car, unlocked the [garage] door, and told the officer to come, just arrest him, don't hit him with a taser. [The officer] leaned on the car, and he arrested [defendant]." Defendant testified that he did not have a handgun while he was in the garage.

¶14 On cross-examination, defendant testified that he had been wearing a black t-shirt and "dreads" on the date in question. Defendant denied that he ever saw the handgun that was recovered from the garage.

¶15 The jury found defendant guilty of both counts of AUUW. The counts were merged for purposes of sentencing. Defendant was sentenced to two years' imprisonment with credit for time served on the AUUW count pursuant to section 24-1.6(a)(1), (a)(3)(A). Defendant did not file any posttrial motions. This appeal followed.

¶16

ANALYSIS

¶17

I. Constitutionality of Section 24-1.6(a)(1), (a)(3)(C)

¶18 Defendant first contends that the statutes under which he was convicted are unconstitutional. Relying on the supreme court's decision in *Aguilar*, defendant contends his conviction pursuant to section 24-1.6(a)(1), (a)(3)(A) of the Criminal Code is expressly unconstitutional and his conviction pursuant to section 24-1.6(a)(1), (a)(3)(C) is unconstitutional because it cannot be severed from section 24-1.6(a)(1), (a)(3)(A). The State agrees that defendant's conviction pursuant to section 24-1.6(a)(1), (a)(3)(A) was rendered unconstitutional by *Aguilar*. The State, however, argues that section 24-1.6(a)(1), (a)(3)(C) of the Criminal Code remains valid and defendant's conviction thereunder should be affirmed.

¶19 We agree that our supreme court struck section 24-1.6(a)(1), (a)(3)(A) of the Criminal Code as an unconstitutional categorical prohibition on the carrying of operable firearms outside of the home. *Aguilar*, 2013 IL 112116, ¶ 21-22. We, therefore, vacate defendant's conviction pursuant to section 24-1.6(a)(1), (a)(3)(A).

¶20 Next, we turn to defendant's contention related to section 24-1.6(a)(1), (a)(3)(C) of the Criminal Code wherein he was convicted of possessing a firearm without a valid FOID card. Defendant argues that the provision cannot be severed from the subsection of the statute found unconstitutional by *Aguilar* and is facially unconstitutional for impermissibly restricting his second amendment rights . We review this legal question *de novo*. *People v. Henderson*, 2013 IL App (1st) 113294, ¶ 16.

¶21 This court has repeatedly found that section 24-1.6(a)(1), (a)(3)(C) is unaffected by *Aguilar* and remains constitutional. *Henderson*, 2013 IL App (1st) 113294, ¶ 22; see also *People v. Taylor*, 2013 IL App (1st) 110166, ¶ 32, *People v. Akins*, 2014 IL App (1) 093418-B, ¶ 15.

We find no reason to depart from our colleagues' reasoned conclusions. In *Henderson*, this court held the subsection (a)(3)(C) was severable from the subsection struck in *Aguilar*, reasoning that section 24-1.6(a)(1), (a)(3)(C) Criminal Code can stand independently because removing the subsection struck by *Aguilar* "undermines neither the completeness nor the executability of the remaining subsections." *Henderson*, 2013 IL App (1st) 113294, ¶ 22; see also *Akins*, 2014 IL App (1st) 093418-B, ¶ 13. In terms of the facial validity of the statute, this court in both *Henderson* and *Taylor* concluded that section 24-1.6(a)(1), (a)(3)(C) of the Criminal Code was limited to those lacking a valid FOID card and was not a flat ban. *Id.*; *Taylor*, 2013 IL App (1st) 110166, ¶ 32; see also *Akins*, 2014 IL App (1st) 093418-B, ¶ 14. We similarly conclude that defendant's conviction pursuant to section 24-1.6(a)(1), (a)(3)(C) of the Criminal Code remains constitutional post-*Aguilar*.

¶22 Because we have concluded that section 24-1.6(a)(1), (a)(3)(C) of the Criminal Code is unaffected by *Aguilar* and the trial court did not impose a sentence on defendant's conviction thereon, we have the authority to remand the cause for sentencing on that conviction pursuant to Illinois Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999). Rule 615(b)(2) provides that a reviewing court may "set aside, affirm, or modify any or all of the proceedings subsequent to or dependent upon the judgment or order from which the appeal is taken." We remand the cause for sentencing on defendant's conviction pursuant to section 24-1.6(a)(1),(3)(C) of the Criminal Code.

¶23 II. Rule 431(b) Violation

¶24 Defendant next contends the trial court failed to comply with the admonishments required by Rule 431(b) when questioning potential jurors during *voir dire*. Specifically, defendant contends the trial court failed to ask all of the prospective jurors whether they understood and

accepted the principles enumerated in Rule 431(b). Defendant maintains he is entitled to a new trial as a result.

¶25 Defendant acknowledges that he failed to object to the alleged error and failed to include it in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124 (1988) (a defendant forfeits appellate review where he fails to object to the alleged error at trial and fails to include it in a posttrial motion). Defendant, therefore, requests that this court review his contention under the plain error doctrine.

¶26 We first must determine whether any error occurred. *People v. Hudson*, 228 Ill. 2d 181, 191, 886 N.E.2d 964 (2008). Construction of a supreme court rule is reviewed *de novo*. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 332, 775 N.E.2d 987 (2002).

¶27 Supreme Court Rule 431(b) codified our supreme court's holding in *People v. Zehr*, 103 Ill. 2d 472, 477, 469 N.E.2d 1062 (1984). The rule was amended effective May 1, 2007, placing a *sua sponte* duty on trial courts to ensure compliance with the mandates of Rule 431(b). *People v. Thompson*, 238 Ill. 2d 598, 607, 939 N.E.2d 403(2010). The amended rule provides:

"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 the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure 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."

(Emphasis added.) Ill. S. Ct. R. 431(b).

¶28 Here, prior to conducting *voir dire* of the individual panel members, the trial judge admonished the entire group of potential jurors as follows:

"Mr. Strickland, as with all persons charged with crimes, is presumed to be innocent of the charges that bring him here before you. That presumption cloaks him now at the onset of the trial and will continue to cloak him throughout the course of the proceedings, that is during jury selection, during opening statements that the lawyers will be given an opportunity to make, during the presentation of the evidence, during the closing arguments the attorneys will make in support of the verdicts they're seeking, during the instructions on the law that I'll read and provide to you and on into your deliberations unless and until you individually and collectively are convinced beyond a reasonable doubt that the defendant is guilty.

It is absolutely essential as we select this jury that each of you understand and embrace certain fundamental principles of law. All persons charged with a crime are presumed to be innocent, and 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 on his own behalf or to call any witnesses in his defense. He may simply sit here and rely upon what he and his attorneys perceived to be the inability of the State to present

sufficient evidence to meet their burden. Should that happen, you'll have to decide the case on the basis of the evidence presented by the prosecution.

The fact that the defendant chooses not to 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 attorney. The bottom line, however, is that there's no burden upon the defendant to prove his innocence, it is the State's burden to prove him guilty beyond a reasonable doubt."

¶29 Later, after 14 potential jurors were seated in the jury box and the remaining potential jurors were seated in the gallery, the trial court continued:

"Now, I'm going to start with the individual voir dire. I want to address myself to the 14 of you in the jury box concerning those fundamental principles of law I discussed earlier. I spoke about the fact that the defendant is presumed to be innocent of the charges against him and that this presumption stays with the defendant throughout the trial and is not overcome unless and until the jury determines the defendant is guilty beyond a reasonable doubt.

Is there anyone in the jury box who doesn't understand that fundamental principle of law? If so, raise your hand.

No hands raised.

Is there anyone in the jury box who cannot accept or abide by that fundamental principle of law? If so, raise your hand.

Once again, no hands are raised.

I also spoke about the fact that the State bears the burden of proving the defendant guilty beyond a reasonable doubt. Is there anyone in the jury box that does not understand that fundamental principle of law? If so, raise your hand.

Once, again, no hands are raised.

Is there anyone in the jury box who cannot accept or abide by that fundamental principle of law? If so, raise your hand.

Once, again, no hands are raised.

Because the defendant is presumed to be innocent, he does not have to present any evidence at all in this case, he may simply rely on the presumption of innocence.

Is there anyone in the jury box who does not understand that fundamental principle of law? If so, raise your hand.

No hands are raised.

Is there anyone in the jury box that cannot accept or cannot abide by that fundamental principle of law? If so, raise your hand.

No hands are raised.

Finally, the defendant has a constitutional right to remain silent. Should the defendant exercise that right and decide not to testify in this case, the decision not to testify must not be considered by you in any way in arriving at your verdict.

Is there anyone in the jury box who does not understand that fundamental principle of law? If so, raise your hand.

No hands are raised.

Is there anyone in the jury box who cannot accept or abide by that fundamental principle of law? If so, raise your hand.

Again, no hands are raised."

Seven jurors were selected from the original panel of jurors seated in the jury box. Five jurors and one alternate were selected from a second panel of jurors and one alternate was selected from a third panel of jurors. All of the jurors were in the courtroom for *voir dire*; however, the trial court did not provide the Rule 431(b) admonishments to the second or third panels of prospective jurors.

¶30 Our review of the record demonstrates that the trial court did not comply with Rule 431(b). In *People v. Thompson*, 238 Ill. 2d 598, 607 (2010), the supreme court advised:

"Rule 431(b), therefore, mandates a specific question and response process. The trial court must 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.*" (Emphasis added.)

It is clear from the record that the trial court failed to ascertain whether all of the potential jurors understood the *Zehr* principles provided. Even though all of the jurors were in the courtroom when the original panel was asked whether they understood and accepted the *Zehr* principles, the trial court failed to inquire individually or as a group whether the remaining five jurors and two alternates also understood and accepted the *Zehr* principles. The trial court, therefore, violated Rule 431(b). The trial court's lack of compliance with Rule 431(b) constitutes error.

¶31 This court may review forfeited errors under the doctrine of plain error in two narrow instances:

"First, where the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence, a reviewing court may consider a forfeited error in order to preclude an argument that an innocent person was wrongly convicted. [Citation.] Second, where the error is so serious that defendant was denied a substantial right, and thus a fair trial, a reviewing court may consider a forfeited error in order to preserve the integrity of the judicial process." *People v. Herron*, 215 Ill. 2d 167, 178-79, 830 N.E.2d 467 (2005).

The burden is on the defendant to establish plain error. *Thompson*, 238 Ill. 2d at 613.

¶32 In this case, defendant challenges the Rule 431(b) error under the first prong of the plain error analysis. To establish first-prong plain error, a defendant must demonstrate " 'prejudicial error.' That is, the defendant must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him." *Herron*, 215 Ill. 2d at 187.

¶33 Defendant contends that the evidence was closely-balanced because each side had "a competing, and rational, theory of the case, with evidentiary support," especially where only one of the State's witnesses actually saw defendant in possession of the handgun and defendant's baggy pants made it improbable for him to run and jump a fence while simultaneously holding the handgun. In addition, defendant argues that his version of the events was corroborated because his fingerprints were not found on the recovered handgun. We disagree with defendant and find he did not satisfy his burden of demonstrating the evidence was closely-balanced.

¶34 The trial evidence demonstrated that Officers Kuber and Mueller, who was unavailable to testify due to medical leave, responded to a call regarding a domestic dispute. When Officer Mueller approached defendant to investigate into his companion's claim that he had handgun, defendant fled. Officer Mueller gave chase on foot and Officer Kuber followed in the police vehicle. Officer Kuber testified that Officer Mueller was heard over her radio instructing defendant to stop and saying that defendant was holding his side. When Officer Kuber finally caught up with defendant, he was in custody in Hall's detached garage. Officer Landrum testified that, while defendant was under pursuit, he and his partners received a flash message to proceed to 7940 South Wentworth Avenue. Officer Landrum arrived at the address and Hall notified him that a man hopped her backyard fence and kicked in the service door of her garage. Officer Landrum testified that, upon entering the garage, defendant was found standing in the corner of the garage while holding a handgun. According to Officer Landrum, defendant dropped the handgun and complied with his instruction to lie on the ground. Officer Landrum placed defendant in custody, while his partner, Officer Rumbaugh, recovered the handgun containing ten live rounds. Hall confirmed that defendant hopped the fence in her backyard and broke the service door of her garage to gain entry. Hall further testified that there were no handguns kept in her garage. The parties stipulated that defendant's fingerprints did not appear on the handgun, magazine, or ammunition and that defendant did not have a valid FOID card. Simply put, the evidence was not closely-balanced in demonstrating that defendant carried "on or about his person" a handgun without a valid FOID card.

¶35 While the supreme court in *People v. Naylor*, 229 Ill. 2d 584, 606-07 (2008), recognized that plain error can be established by demonstrating the evidence was closely-balanced where the case involved a credibility contest, the supreme court came to its conclusion because the

opposing versions of events presented by the police and defendant were both credible and there was no extrinsic evidence to corroborate or contradict either version. Here, in contrast, defendant's version of the events was not credible.

¶36 Ultimately, we conclude that defendant failed to show "the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him." *Herron*, 215 Ill. 2d at 187. Defendant, therefore, has failed to establish plain error.

¶37 CONCLUSION

¶38 We vacate defendant's conviction for AUUW pursuant to section 24-1.6(a)(1), (1)(3)(A) of the Criminal Code, but affirm defendant's conviction for AUUW pursuant to section 24-1.6(a)(1), (1)(3)(C) of the Criminal Code and remand this cause for sentencing on the remaining count.

¶39 Vacated in part; affirmed in part; remanded for sentencing.