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2014 IL App (3d) 120801-U

Order filed June 17, 2014

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 14th Judicial Circuit, Rock Island County, Illinois
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-12-0801 Circuit No. 11-CF-612
HALTER L. GLASS III,	)	Honorable F. Michael Meersman, Judge Presiding.
Defendant-Appellant.	)	

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JUSTICE WRIGHT delivered the judgment of the court.  
Justices Carter and McDade concurred in the judgment.

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**ORDER**

¶ 1 *Held:* The trial court erred by failing to strictly comply with Illinois Supreme Court Rule 431(b); however, the error did not constitute plain error because the evidence at trial was not closely balanced. Defendant is entitled to one additional day of sentencing credit.

¶ 2 A jury found defendant Halter L. Glass III guilty of attempted first degree murder (720 ILCS 5/8-4(a), 9-1 (West 2010)), aggravated domestic battery (720 ILCS 5/12-3.3(a-5) (West 2010)), and aggravated unlawful restraint (720 ILCS 5/10-3.1(a) (West 2010)). On appeal, defendant challenges his attempted murder conviction, arguing the trial court failed to strictly

comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) during *voir dire*. Defendant concedes he forfeited his Rule 431(b) claim, but urges us to consider the claim under the first prong of plain error because the evidence was closely balanced. Defendant also claims he is entitled to one additional day of credit for time spent in presentence custody. We modify defendant's sentence and otherwise affirm his convictions.

¶ 3

### FACTS

¶ 4

Defendant was charged with attempted first degree murder (720 ILCS 5/8-4(a), 9-1 (West 2010)), aggravated unlawful restraint (720 ILCS 5/10-3.1(a) (West 2010)), aggravated domestic battery (720 ILCS 5/12-3.3(a-5) (West 2010)), criminal sexual assault (720 ILCS 5/11-1.20(a)(1) (West 2010)), and two counts of aggravated criminal sexual assault (720 ILCS 5/11-1.30(a)(2), (3) (West 2010)). The cause proceeded to a jury trial.

¶ 5

The jury was selected from two panels of prospective jurors. In response to questioning by the court, the members of the first panel stated they understood and were willing to abide by the four principles outlined in Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). Members of the second panel stated they understood the Rule 431(b) principles; however, they were not asked whether they accepted and were willing to abide by those principles.

¶ 6

The State presented the following evidence at trial. Defendant and his wife, K.G., had two young daughters together. K.G. also had two sons from a previous relationship, named D.S. and M.G. On June 27, 2011, the couple and the four children resided together in Moline, when defendant purportedly battered K.G. Defendant was arrested for domestic battery against K.G. and released from jail on July 5, 2011.

¶ 7

On July 8, 2011, at approximately 1:30 a.m., K.G. contacted the Moline police to report her young son, D.S., and D.S.'s friend, J.E., were driving K.G.'s vehicle without permission.

Responding to this report, Officer Derek Cullison found the boys, who directed Officer Cullison to the vehicle, located near the local movie theater. The officer spoke to the boys, and D.S. told Officer Cullison they took the car because defendant was assaulting K.G. at their home. Three other officers went to the home to investigate D.S.'s version of the events.

¶ 8           Officer Brett Kopf arrived at K.G.'s home at approximately 1:30 a.m. and knocked on the door. K.G. answered the door and appeared to the officer to be in shock. She said, "[H]e's going to kill me." Kopf entered the home and saw defendant standing in the living room. Defendant was sweating and appeared to be under the influence of a substance unknown to the officer.

¶ 9           While Officer Kopf stayed inside the home with defendant, Officer Brian Johnson spoke with K.G. outside the residence. She told Johnson, "[H]e's going to kill me, he's going to kill me." K.G. told Johnson she had fallen asleep on the couch earlier that night; defendant woke her up by punching her in the face and choking her. Defendant took K.G. to the back bedroom and continued to beat her. He choked her with a brassiere. She believed defendant was going to kill her, and the assault stopped only because D.S. came home and interrupted it. D.S. ran from the house on foot, and shortly thereafter, defendant forced K.G. into her vehicle to search for D.S. The vehicle broke down a short distance from the home. K.G. told Johnson she believed that if the vehicle had not broken down, defendant would have taken her somewhere and killed her. After the vehicle had broken down, K.G. and defendant returned home on foot. Defendant ingested a full bottle of prescription medicine because he thought the police were coming. K.G. did not tell Johnson anything about a sexual assault or a knife.

¶ 10           Johnson observed K.G. had several scratches, a large amount of redness on her upper chest area, and a large contusion on the side of her head. Johnson went inside the home and told Kopf to arrest defendant. During a sweep of the home, Johnson saw signs of an altercation in the

back bedroom. He saw a broken table and lamp, and a white brassiere was lying on the floor. After defendant's arrest, the officers arranged for K.G.'s transportation to the hospital.

¶ 11 D.S. testified that K.G. was his mother and defendant was his stepfather. He was 14 years old at the time of trial. On the evening of July 7, 2011, he was at home playing Xbox with his little brother and a friend, J.E. D.S. received a telephone call from defendant informing him not to be scared if defendant came by the home that evening. The call frightened D.S. because he knew if defendant returned home, defendant would hurt someone. However, D.S. did not tell his mother about the call because she was asleep. Fearing for his safety, D.S. and J.E. took K.G.'s vehicle, so if defendant showed up at the home, he would see the vehicle was gone and think nobody was home. When D.S. and J.E. returned with his mother's vehicle later that night, D.S. heard banging sounds coming from his mother's bedroom. J.E. testified the noises sounded like hitting and sobbing. When defendant and K.G. came out of the bedroom, defendant took D.S.'s cellular telephone. D.S. and J.E. played video games for a short time and then ran, on foot, from the home and hid in the movie theater parking lot. Defendant found D.S. and J.E. and asked them to come home, but they ran away again before encountering the police and reporting the ongoing assault.

¶ 12 Kim Sieverding testified she was a registered nurse who examined K.G. at the hospital the morning of July 8. K.G. told Sieverding defendant beat her, hit her about 40 times, tried to kill her, choked her, and put a knife to her neck. K.G. said defendant tried to drive her to the river, intending to kill her. She said defendant took her back home and inserted a foreign object into her vagina. When collecting samples for a sexual assault kit, Sieverding saw that K.G. had bruising to her neck, chest, head, inner thighs, and lower legs. Photographs were taken of K.G.'s injuries and introduced into evidence. Sieverding testified that K.G. initially did not mention

anything about defendant inserting something inside her vagina. K.G. reported the insertion of the object following the administration of morphine after her initial examination. K.G. told Sieverding she was not lying, although Sieverding testified nobody had accused her of lying.

¶ 13 Alexander Pince testified he was the physician who treated K.G. on July 8. He observed abrasions, contusions, muscle tenderness, and emotional distress. Most of K.G.'s physical injuries were on and around her neck. She had contusions and abrasions on her face, forehead, hairline, and scalp. A computerized tomography scan showed no internal trauma to her head. K.G. had a hard time controlling her emotions; she could not express herself clearly and often could not talk through her sobbing. She had difficulty relaying events in chronological order, and her story fluctuated. Pince found her behavior and emotional state typical of a patient in shock. K.G. told Pince defendant woke her up by punching her and then taking her into another room where he ripped off her shirt. Defendant choked her by using his hands, a belt, and her brassiere, causing her to lose consciousness. When she regained consciousness, she felt like she had been vaginally penetrated by some object. She told Pince several times that her attacker told her he was going "to treat her like the whore that she was." During the examination, Pince did not observe injuries to K.G.'s vaginal area. However, Pince testified an object could have been inserted into her vagina without causing injury.

¶ 14 K.G. testified defendant called her on July 5, 2011, and asked her to pick him up from jail. Surprised by the news that he was being released, K.G. hung up on defendant. She took the four children to her mother's house for two or three days. During that time, defendant contacted K.G. several times by calling and texting her. K.G. texted back to defendant telling him she wanted a divorce.

¶ 15 K.G. and the kids moved back to their own home on the evening of July 7, believing it to be safe because defendant had removed his belongings. D.S. was in his room playing Xbox with a friend, while K.G. and her daughters watched television and fell asleep on the couch. K.G. woke up to defendant strangling her. She reached for her phone, but defendant had taken it. According to K.G., defendant dragged her into the bedroom by her shirt and hair. Defendant sat on K.G.'s chest, straddling her, and punched her all over her body. Defendant said, "Bitch, you're going to be dead by the end of the night. You won't survive this. Bitch, I'm going to kill you. This is what you get for fucking my friend." He said, "If you admit to fucking my friend, I'll stop." K.G. told him that she would not admit to something she had not done.

¶ 16 Defendant choked her with a belt. He wrapped it around her neck and used one hand to tighten it. He also choked her with a brassiere and his bare hands. As defendant choked her he said, "Bitch, you're dying." K.G. lost consciousness multiple times and she thought she was dying. Defendant held a knife to her throat and said, "Bitch, I'm going to kill you." He did not cut her with the knife, but cut off her clothes and underwear. He said he was going to treat her "like the whore [she] was." While he had the belt around her neck, Defendant inserted objects into her vagina. K.G. did not know what defendant had put inside her, but knew it was smooth and that it was not his penis. Defendant stomped on her legs and chest and kicked her in the head. He also hit her over the head and in the chest with a lamp. The beating stopped when D.S. arrived home and yelled, "Mom, are you okay?" Defendant stopped assaulting her and replied to D.S. by saying, "[Y]es, we're just having rough sex."

¶ 17 Defendant took K.G. to the living room, causing D.S. and J.E. to move to D.S.'s bedroom. Defendant ingested D.S.'s Adderall medication, and told K.G. the two of them were going to die together. D.S. and J.E. ran out the front door. Defendant took K.G. to her vehicle,

telling her he was going to drive them into the river, which K.G. believed. Defendant drove two blocks before the car broke down in front of the movie theater. When defendant and K.G. left the vehicle, they saw D.S. and J.E. in the same parking lot, but the boys ran away. At that time, defendant gave K.G. her cellular telephone and told her to call the police and claim that D.S. took her vehicle without permission. He told her if she told the police what had actually happened, he would steal a police officer's gun and shoot her. After K.G. and defendant returned home, the police arrived, and K.G. told them what had happened. After defendant's arrest, K.G. found a knife in her home and reported it to the police. She was unsure whether it was the knife defendant used during the assault.

¶ 18 Defendant's father, Halter Glass, Jr., testified for the defense. After defendant was released from jail on July 5, he was staying with Glass, Jr. When Glass, Jr. arrived home on July 7, 2011, K.G. was in his backyard speaking with defendant for 15 to 30 minutes. Glass could not hear the conversation but saw K.G., who appeared to be angry, speed off in her vehicle.

¶ 19 Defendant testified he was staying with his father after his release from jail. He talked to K.G. on the telephone after he was released. They agreed to get a divorce in the interest of the children, and they made plans to meet at Glass, Jr.'s house on July 7. Early on July 7, defendant went to the marital home and retrieved some of his clothes. Later that day, K.G. and the kids visited him at Glass, Jr.'s house, where they stayed no more than 45 minutes. During the visit, K.G. received two telephone calls on her cellular telephone, which she "frantically cleared" before explaining to defendant the calls were from her mother. This action made defendant suspicious. Defendant testified he found out later that the calls came from his best friend, who "slept" with K.G. while defendant was in jail. K.G. left Glass, Jr.'s house to have dinner at her

mother's house. She and defendant made plans for K.G. to provide a ride for defendant to visit the marital home later that evening after leaving her mother's house. However, K.G. later called defendant and told him he needed to find his own ride.

¶ 20 Defendant's uncle gave him a ride to the home around 12 a.m. on July 8. Defendant went in the front door and saw K.G. and their daughters asleep on the couch. Defendant shook K.G. to wake her up. He asked her about her relationship with his best friend. K.G. denied having a romantic relationship with him. Defendant thought she was lying and became angry. He asked her again, and she asked him to leave. She told him they could discuss the relationship between K.G. and defendant's friend some other time.

¶ 21 Defendant grabbed K.G. by her arm and shirt, and may have grabbed some of her hair. He took her into the bedroom and struck her two or three times in the head with a closed fist. K.G. fell down on a mattress. Defendant choked her with his hands for two or three seconds. She reached up to remove his hands and slid off the mattress onto the floor. Defendant struck her an unknown number of times. K.G. did not lose consciousness, and defendant stopped choking her because he knew choking could kill her. Defendant did not want K.G. to die; he just wanted to scare her so she could feel what he was feeling. Defendant stated he did not place any objects in her vagina, use a knife, hit her with a lamp, or use a belt to choke her.

¶ 22 According to defendant, D.S. returned home and called out for his mother. In response, defendant told D.S. that he and K.G. were having sex. After D.S. went to D.S.'s room, defendant and K.G. left the bedroom and entered the living room, just before defendant became "overwhelmed with emotion." He took some pills he saw on the table and told K.G., "Bitch, you are going to watch me die." Shortly thereafter, D.S. and J.E. came through the living room and ran out the front door. Defendant drove K.G.'s vehicle in pursuit of the boys. Defendant told

K.G. he should drive her vehicle into the river, but did not say he *would* drive it into the river. Instead, the vehicle broke down near the movie theater. Defendant and K.G. decided to call the police to help locate the boys. Defendant told K.G. he would take an officer's gun and shoot K.G. if the police tried to talk to him. Defendant admitted he told K.G. he was going to kill her; however, he did not actually intend to kill her. He did not attempt to kill her, nor did he sexually assault her, but he did intend to kill himself.

¶ 23 The jury received a pattern jury instruction admonishing them of the four principles listed in Rule 431(b). See Illinois Pattern Jury Instructions, Criminal, No. 2.03 (4th ed. Supp. 2009). The jury returned guilty verdicts on aggravated domestic battery, aggravated unlawful restraint, and attempted first degree murder. The jury returned not guilty verdicts on criminal sexual assault and the two counts of aggravated criminal sexual assault.

¶ 24 Defendant filed a posttrial motion, arguing the evidence was insufficient to establish his intent to commit attempted murder. The court denied the motion.

¶ 25 The court sentenced defendant to concurrent sentences of 12 years' imprisonment for attempted first degree murder, 7 years for aggravated domestic battery, and 5 years for aggravated unlawful restraint.

¶ 26 Defendant appeals.

¶ 27 ANALYSIS

¶ 28 Defendant raises two contentions of error on appeal. First, he argues the court's failure to strictly comply with Rule 431(b) constituted plain error requiring reversal of his attempted murder conviction and a remand for a new trial. Second, he claims he is entitled to one additional day of credit against his sentence for time spent in presentence custody.

¶ 29

A. Supreme Court Rule 431(b)

¶ 30

Rule 431(b) "mandates a specific question and response process." *People v. Thompson*, 238 Ill. 2d 598, 607 (2010). The trial court must ask each potential juror whether he or she understands and accepts each of the four principles listed in the rule. *People v. Wilmington*, 2013 IL 112938. Each prospective juror must then be given an opportunity to respond concerning their understanding and acceptance of those principles. *Thompson*, 238 Ill. 2d 598. In the present case, the trial court failed to comply with Rule 431(b) because the court did not ask the second panel members whether they accepted and would abide by the four principles. However, defendant forfeited that error by failing to both object and raise the error in a posttrial motion. See *Thompson*, 238 Ill. 2d 598. Defendant argues that we may excuse his procedural default and reach the Rule 431(b) error under the plain error rule.

¶ 31

The plain error rule allows us to consider forfeited errors when one of two conditions applies: (1) the evidence in the case was *so* closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) the error was so fundamental that it affected the fairness of the trial and challenged the integrity of the judicial process. *Wilmington*, 2013 IL 112938. Defendant argues the evidence of his intent to commit attempted first degree murder was so closely balanced that the Rule 431(b) error alone tipped the scales of justice against him. A conviction for attempted first degree murder requires proof that defendant had the specific intent to kill the victim. *People v. Jones*, 81 Ill. 2d 1 (1979).

¶ 32

When determining whether the evidence meets the closely-balanced prong of plain error, we must make a "commonsense assessment" of the evidence presented in the case. *People v. White*, 2011 IL 109689, ¶ 139. The mere fact that the defendant's testimony contradicts the testimony of a State's witness does not necessarily mean that the evidence in the case is closely

balanced. *People v. Naylor*, 229 Ill. 2d 584 (2008). Rather, the court must take a qualitative approach to the evidence and consider it "within the context of the circumstances of the individual case." *People v. Adams*, 2012 IL 111168, ¶ 22.

¶ 33 In the present case, a conflict in the testimony of K.G. and defendant existed on three matters. K.G. recalls defendant put a knife to her throat, struck her with a lamp, and choked her with a belt and brassiere until she lost consciousness. In contrast, defendant denies threatening her with a knife, striking her with a lamp, or choking her with anything but his hands.

¶ 34 However, on many other matters defendant's versions of the events was the same as K.G.'s testimony. Defendant testified he struck K.G. an unknown number of times and admitted choking her with his hands until K.G. began making choking noises. He admitted telling K.G. he was going to kill her, drive her into the river, and shoot her with an officer's weapon if the police approached him. In short, they agreed defendant choked K.G., although K.G. recalls he used a belt and brassiere when doing so, and both agree defendant declared his intent to kill K.G. more than once.

¶ 35 In the present case, the jury did not need to decide which version of events it found more credible since defendant admitted he struck, choked, and told K.G. she was going to die. The only determination for the jury to make was whether the circumstantial evidence supported defendant's defense: in essence, that he did not mean what he said to her during this vicious, prolonged assault, admittedly triggered by K.G.'s relationship with his best friend. We conclude the present case does not involve the kind of credibility contest at issue in *Naylor*, 229 Ill. 2d 584. In *Naylor*, the factfinder was presented with two mutually exclusive versions of the facts. Only by finding the State's witnesses credible and the defendant's testimony incredible could the factfinder reach a guilty verdict.

¶ 36 Here, in addition to the uncontroverted words declaring his intent to kill K.G., the undisputed evidence established the assault began around 12:00 a.m. and ended when the police arrived at 1:30 a.m. The medical examination documented a serious head injury and wounds consistent with choking. Perhaps, if defendant had stopped the assault before police intervention, or K.G's injuries were superficial rather than substantial, the evidence of intent could be characterized as closely-balanced. However, in this case, no evidence supported defendant's defense that he did not intend to kill K.G. other than the fact that she was removed from his company by the police investigating her well being. As a result, the plain error rule does not apply, and the Rule 431(b) error is not reversible.

¶ 37 B. Sentencing Credit

¶ 38 Defendant claims he is entitled to one additional day of credit toward his sentence for time he spent in presentence custody under section 5-4.5-100(b) of the Unified Code of Corrections (730 ILCS 5/5-4.5-100(b) (West 2010)). The State concedes defendant is entitled to the credit. We agree defendant is entitled to one additional day's worth of credit for the partial day he spent in custody on the day of his arrest. See *People v. Johnson*, 396 Ill. App. 3d 1028 (2009). We remand the matter to the trial court to correct its own error and amend the mittimus to provide defendant with one additional day of sentencing credit.

¶ 39 CONCLUSION

¶ 40 The judgment of the circuit court of Rock Island County is affirmed as modified.

¶ 41 Affirmed as modified.