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2014 IL App (5th) 120413-U

NOTICE  
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NO. 5-12-0413

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 06-CF-1235
	)	
KARESON G. CHAPMAN,	)	Honorable
	)	Michael N. Cook,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE SCHWARM delivered the judgment of the court.  
Presiding Justice Welch and Justice Cates concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court erred in summarily dismissing the defendant's petition for postconviction relief where the petition set forth the gist of a constitutional claim.

¶ 2 **BACKGROUND**

¶ 3 In March 2009, a St. Clair County jury found the defendant, Kareson G. Chapman, guilty of second-degree murder (720 ILCS 5/9-2(a) (West 2006)), armed violence (720 ILCS 5/33A-2(b) (West 2006)), and aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2006)). The convictions stemmed from a July 2006 incident in which the defendant shot and killed Kovoshi Darden and shot and injured Kovoshi's brother,

Tanario Darden, following an argument outside a liquor store in East St. Louis. In May 2011, the defendant's convictions were affirmed on direct appeal. *People v. Chapman*, No. 5-09-0325 (2011) (unpublished order under Supreme Court Rule 23).

¶ 4 At trial, the evidence established that on the night of July 23, 2006, the defendant got into an argument with Kovoshi and Tanario in a parking lot of the Norman Owens housing project in East St. Louis. The defendant and his friend, Carlos Hopson, both testified that Kovoshi had been the aggressor during the argument and that Kovoshi had been known to carry a gun and had a reputation for violence. The defendant further testified that he had seen Kovoshi shoot at people on previous occasions and that Kovoshi had claimed to have murdered in the past. The defendant claimed that Kovoshi and Tanario each had a handgun and that Kovoshi had pointed a gun at him and had threatened to kill him. The defendant and Hopson both testified that the defendant was crying and upset after the incident. Tanario testified that the defendant had instigated the argument at the housing project and had "talked in a very violent way." Tanario suspected that the defendant had a gun and, for whatever reason, had wanted to harm Kovoshi. Tanario claimed that neither he nor Kovoshi were armed and that Kovoshi did not normally carry a gun.

¶ 5 Later that night, the defendant and Hopson drove to a liquor store across the street from the housing project, where they encountered Kovoshi and Tanario again. The defendant acknowledged that he had a pistol that he owned for "protectational purposes" in his vehicle and that he had put the pistol in his pocket before exiting the vehicle. The defendant and Hopson indicated that the defendant had tried to make peace with Kovoshi

outside the liquor store, but Kovoshi was belligerent. The defendant and Hopson both indicated that Kovoshi had lifted up his shirt to show that he had a gun, and the defendant claimed that Kovoshi had again threatened to kill him. The defendant testified that when it appeared to him that Kovoshi and Tanario were about to pull their guns, he fired two shots at Kovoshi and one shot at Tanario as he was running away. The defendant indicated that he then shot Kovoshi twice more in the arm when Kovoshi tried to raise his gun in the defendant's direction. Hopson indicated that he had fled the scene in the defendant's vehicle shortly after the shooting started, and the defendant testified that he had fled the scene on foot. The defendant testified that he had not wanted to harm Kovoshi or Tanario, but he believed that the shooting was justified because if he had failed to react as he had, "it would have been [him] lying there on the pavement." Tanario testified that he had been talking to a friend who was amongst a crowd that had gathered outside the liquor store when he heard a gunshot and saw Kovoshi "holding his chest." Tanario testified that the defendant then pointed a gun at him and shot him as he was running away. Tanario stated that he subsequently ran to a local hospital where he received treatment for his gunshot wound. Tanario indicated that the defendant was drunk on the night of the shooting, but the defendant denied that he was. An autopsy revealed that Kovoshi had a blood-alcohol concentration of .111 at the time of his death.

¶ 6 On the afternoon following the shooting, the defendant turned himself in to the police after hearing that Kovoshi had died. The defendant testified that he had given the police a "brief overview" of what had happened but had stayed up all night and was "maybe off on a couple of events." The defendant acknowledged that he had told the

police that he might have overreacted. The defendant's statement to the police was generally consistent with his trial testimony, and he maintained that when he shot Kovoshi and Tanario, they had guns that they were about to pull or he thought that they had guns that they were about to pull.

¶ 7 A security camera captured much of what happened in the parking lot at the liquor store, but the images on the video, which the jury saw several times, are less than clear. As one of the case investigators acknowledged at trial, the video is "not that clear," "[t]here's a lot of things it doesn't show," and one "can't really tell shots were fired" by watching it. The video nevertheless shows Kovoshi once lifting up his shirt while arguing with the defendant. The video also shows someone walk over to where Kovoshi was lying shot on the ground and then hand something to someone in a car that flees the scene. An occurrence witness testified that after the shooting, she had seen a man walk across the street with a gun in each of his hands. The witness could not describe the man, however, and she acknowledged that she had impaired vision due to glaucoma. The defendant indicated that he was not the man whom she had seen.

¶ 8 We note that during *voir dire*, the trial court failed to comply with Supreme Court Rule 431(b) (eff. May 1, 2007), but the issue was not preserved for appellate review (see *People v. Bush*, 214 Ill. 2d 318, 332 (2005) ("To preserve an issue for review, a defendant must raise an objection both at trial and in a written posttrial motion.")). We further note that during its deliberations, the jury sent the trial court several notes seeking guidance with respect to the murder instructions it received.

¶ 9 In May 2012, the defendant filed a *pro se* petition for relief pursuant to the Post-

Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2012)) and a request for appointment of counsel. The defendant's petition set forth numerous allegations of error, including a claim that the trial court's failure to comply with Supreme Court Rule 431(b) was "plain error" that denied him a fair trial. Incorporating by reference a letter that the defendant wrote to his attorney on direct appeal, the petition further alleged that appellate counsel was ineffective for failing to argue the defendant's "legitimate claims." In the referenced letter, marked received September 10, 2010, the defendant asked his appellate attorney to add to his brief several issues that he believed were "important and significant." As stated in the letter, one of the additional issues that the defendant specifically asked appellate counsel to raise was "[t]hat the trial court erred in not instructing the jury per Supreme Court Rule 431(b) [a]s amended."

¶ 10 In July 2012, the trial court entered an order summarily dismissing the defendant's *pro se* postconviction petition for failing to assert the gist of a constitutional claim. In August 2012, the defendant filed a timely notice of appeal.

¶ 11 DISCUSSION

¶ 12 The defendant argues that the trial court erred in summarily dismissing his *pro se* petition for postconviction relief because it set forth the gist of a constitutional claim that his counsel on direct appeal was ineffective for failing to raise the issue that the trial court's failure to comply with Illinois Supreme Court Rule 431(b) constituted plain error. We agree.

¶ 13 The Post-Conviction Hearing Act

¶ 14 The Act sets forth a procedural mechanism through which a defendant can claim

that "in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2012). The Act provides a three-stage process for the adjudication of postconviction petitions in noncapital cases. *People v. Boclair*, 202 Ill. 2d 89, 99 (2002).

¶ 15 At the first stage, the trial court independently assesses the defendant's petition, and if the court determines that the petition is "frivolous" or "patently without merit," the court can summarily dismiss it. 725 ILCS 5/122-2.1(a)(2) (West 2012); *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). To survive the first stage, "a petition need only present the gist of a constitutional claim." *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). "This is a purposely low threshold for survival because most petitions are drafted at this stage by defendants with little legal knowledge or training." *People v. Ligon*, 239 Ill. 2d 94, 104 (2010). A *pro se* petition for postconviction relief is considered frivolous or patently without merit "only if the petition has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). "A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation." *Id.* "A claim completely contradicted by the record is an example of an indisputably meritless legal theory." *People v. Brown*, 236 Ill. 2d 175, 185 (2010).

¶ 16 If a petition is not dismissed at the first stage, it advances to the second stage, where an indigent petitioner can obtain appointed counsel and the State can move to dismiss the petition. 725 ILCS 5/122-2.1(b), 122-4, 122-5 (West 2012). At the second



¶ 19

## The Plain-Error Doctrine

¶ 20 If a defendant fails to properly preserve an issue for review on direct appeal, appellate counsel may raise the issue under the doctrine of plain error. See, e.g., *People v. McKinney*, 2011 IL App (1st) 100317, ¶ 27.

"The plain-error doctrine is a familiar one. It permits a reviewing court to consider unpreserved error when (1) a clear or obvious error occurs and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurs and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. [Citation.]

As a matter of convention, [a reviewing] court typically undertakes plain-error analysis by first determining whether error occurred at all. If error is found, the court then proceeds to consider whether either of the two prongs of the plain-error doctrine have been satisfied. Under both prongs, the burden of persuasion rests with the defendant." *People v. Sargent*, 239 Ill. 2d 166, 189-90 (2010).

¶ 21

## Supreme Court Rule 431(b)

¶ 22 Rule 431(b) was adopted to memorialize our supreme court's holding in *People v. Zehr*, 103 Ill. 2d 472 (1984). *People v. Glasper*, 234 Ill. 2d 173, 187 (2009). As amended, the version of Rule 431(b) in effect at the time of the defendant's trial provided:

"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." Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

The four principles set forth in Rule 431(b) are often referred to as the "*Zehr* principles." See, e.g., *People v. McNeal*, 405 Ill. App. 3d 647, 661 (2010).

¶ 23 Merits of the Defendant's Claim

¶ 24 As previously indicated, the defendant argues that counsel on direct appeal was ineffective for failing to raise the issue that the trial court's failure to comply with Illinois Supreme Court Rule 431(b) constituted plain error. At the outset, we reject the State's assertion that we are precluded from considering this argument because it was not included in the defendant's petition. See 725 ILCS 5/122-3 (West 2012) ("Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived."); *People v. Pendleton*, 223 Ill. 2d 458, 475 (2006) (reiterating that a claim not raised in a postconviction petition cannot be raised for the first time on appeal). The defendant's petition alleged that the trial court's purported Rule 431(b) violation constituted "plain error," and when asserting that appellate counsel was ineffective for

failing to argue what he referred to as his "legitimate claims," the defendant specifically incorporated by reference his letter to appellate counsel requesting that the trial court's failure to comply with Rule 431(b) be raised as an issue on appeal. The defendant thus made the letter part of his claim that appellate counsel was ineffective for failing to argue his "legitimate claims." See *Bajwa v. Metropolitan Life Insurance Co.*, 208 Ill. 2d 414, 432 (2004); *People v. Miller*, 203 Ill. 2d 433, 436 (2002). Moreover, "[a] *pro se* postconviction petition must be liberally construed in a defendant's favor." *People v. Clark*, 386 Ill. App. 3d 673, 675 (2008).

¶ 25 We also reject the State's suggestion that the record does not support the defendant's assertion that the trial court failed to comply with Rule 431(b). Although during jury selection, the trial court admonished the pool of prospective jurors as to each of the four *Zehr* principles, the trial court did not ask the jurors whether they understood and accepted the principles. As the defendant notes on appeal, "[o]nly later did the court single out and ask four potential jurors out of the entire venire whether they would presume [the defendant] was innocent until proven guilty," but even then, "the court still did not ask those four whether they understood and accepted the principle." Our supreme court has held that Rule 431(b) requires "a specific question and response process" and that "[t]he trial court must ask each potential juror whether he or she understands and accepts each of the principles in the rule." *People v. Thompson*, 238 Ill. 2d 598, 607 (2010). Moreover, the process applies to all four *Zehr* principles and to "each potential juror" (Ill. S. Ct. R. 431(b) (eff. May 1, 2007); see also *People v. Perry*, 2011 IL App (1st) 081228, ¶ 74). A general statement of the applicable law followed by a general

question concerning a juror's willingness to follow the law is insufficient (*Thompson*, 238 Ill. 2d at 607), and "the trial court's failure to ask jurors if they *understood* the four Rule 431(b) principles is error in and of itself" (*People v. Wilmington*, 2013 IL 112938, ¶ 32 (emphasis in original)). Under the circumstances, the defendant's contention that the trial court failed to comply with Rule 431(b) is supported by the record. See *Wilmington*, 2013 IL 112938, ¶ 32; *Thompson*, 238 Ill. 2d at 607; *Perry*, 2011 IL App (1st) 081228, ¶ 74. We must therefore determine whether appellate counsel was ineffective for failing to raise the issue on direct appeal.

¶ 26 "[T]his court may take judicial notice of its own records in the same case before it" (*In re Kane County Collector*, 135 Ill. App. 3d 796, 801 (1985)), and we note that appellate counsel on direct appeal filed the defendant's brief on September 28, 2010. At that time, there were numerous appellate court decisions holding that a trial court's failure to comply with Rule 431(b) constituted plain error under the second prong of the plain-error doctrine and that the proper remedy was a new trial. See *People v. Blanton*, 396 Ill. App. 3d 230, 235-40 (2009); *People v. Madrid*, 395 Ill. App. 3d 38, 44-48 (2009); *People v. Blair*, 395 Ill. App. 3d 465, 467-82 (2009); *People v. Owens*, 394 Ill. App. 3d 147, 151-55 (2009); *People v. Wilmington*, 394 Ill. App. 3d 567, 571-75 (2009); *People v. Arredondo*, 394 Ill. App. 3d 944, 949-56 (2009); *People v. Graham*, 393 Ill. App. 3d 268, 275-77 (2009); *People v. Anderson*, 389 Ill. App. 3d 1, 5-10 (2009). Although there were also cases holding that a Rule 431(b) violation was amenable to harmless-error analysis (see *People v. Stump*, 385 Ill. App. 3d 515, 519-22 (2008)) and did not automatically require reversal under the second prong of the plain-error doctrine (*People v. Alexander*,

391 Ill. App. 3d 419, 429-33 (2009)), those cases arguably contravened "the trend of authority regarding the failure to comply with *Zehr* and the 2007 version of Rule 431(b)" (*Blair*, 395 Ill. App. 3d at 481). Ultimately, the split in authority was resolved in October 2010, when in *People v. Thompson*, 238 Ill. 2d 598, 608-11, 613-15 (2010), our supreme court held that noncompliance with Rule 431(b) is neither a "structural error" requiring the automatic reversal of a conviction nor an error implicating the second prong of the plain-error doctrine. As the defendant notes on appeal, however, *Thompson* "did not foreclose reviewing courts from reversing a conviction if a Rule 431(b) error occurred in a closely balanced case," *i.e.*, under the first prong of plain-error review. See *Wilmington*, 2013 IL 112938, ¶¶ 31-34; *People v. Belknap*, 2013 IL App (3d) 110833, *leave to appeal allowed*, No. 117094 (2014). The defendant thus argues that appellate counsel should have raised the trial court's Rule 431(b) violation under the first prong of the plain-error doctrine. In response, the State suggests that raising the issue under the first prong of plain error review would have been futile because the evidence of the defendant's guilt was not closely balanced. We agree with the defendant, however, that the evidence of his guilt was closely balanced, at least with respect to the jury's verdict finding him guilty of second-degree murder.

¶ 27 As we noted on direct appeal, the "accounts of what occurred on the night in question varied by witness," and the defendant claimed that he shot in self-defense, which necessarily implicated credibility determinations that the jury had to resolve. *Chapman*, No. 5-09-0325, order at 3, 16-17. With respect to the altercation at the housing project, for instance, the defendant and Hopson both indicated that Kovoshi had been the

aggressor, and the defendant testified that Kovoshi had pointed a gun at him and told him that he was going to kill him. Tanario, on the other hand, suggested that the defendant had exhibited an aggressive attitude and had wanted to harm Kovoshi, who did not have a gun. Only the defendant, Tanario, and Hopson, testified as to the actual shooting, and Tanario indicated that he was unarmed and had not seen all that had occurred prior to hearing a gunshot and seeing Kovoshi holding his chest. The defendant indicated that Tanario and Kovoshi were both armed and were about to pull their guns when he opened fire. Hopson indicated that Kovoshi had acted as if he were reaching for a gun when the defendant started shooting. The defendant and Hopson both stated that the defendant had attempted to peacefully resolve the situation. Tanario claimed that Kovoshi did not have a gun at the liquor store, but images captured by the security camera arguably indicated otherwise. Before finding the defendant guilty of second-degree murder, the jury deliberated at length and twice indicated that it could not unanimously agree on a verdict. *Chapman*, No. 5-09-0325, order at 12-13. The jury also sent out several notes seeking clarification on the tendered murder instructions, and the notes suggested that there was a "holdout juror" on the issue of whether the defendant's use of force against Kovoshi was justified. *Id.* at 11-13, 16-17. Notably, however, in one of its notes indicating that it could not agree on whether the defendant's use of force against Kovoshi was justified, the jury indicated that it had reached an agreement on the charges of armed violence and aggravated battery with a firearm, both of which were based on the defendant's act of shooting Tanario "in the back" as he was running away. We further note that the jury could have rationally viewed the defendant's use of force against Tanario differently than

his use of force against Kovoshi. We lastly note that where an error has been found to have possibly influenced a verdict as to one charged offense but not another, a reversal and remand for a new trial is only required on the charge that was possibly influenced by the error. See *People v. Lee*, 164 Ill. App. 3d 155, 160-61 (1987).

¶ 28 In any event, we agree with the defendant's assessment of the record and conclude that the evidence of his guilt was closely balanced, at least with respect to the jury's verdict finding him guilty of second-degree murder. See *People v. Naylor*, 229 Ill. 2d 584, 608 (2008) (holding that the evidence of the defendant's guilt was closely balanced where "credibility was the only basis upon which [his] innocence or guilt could be decided"); *People v. Gonzalez*, 2011 IL App (2d) 100380, ¶ 26 (finding that the evidence of the defendant's guilt was closely balanced where "the credibility of the witnesses was critical" and "the notes from the jury indicated that it had difficulty deciding the case"); *People v. Morey*, 308 Ill. App. 3d 722, 726 (1999) ("The jury reported that it was deadlocked during deliberation, suggesting that the jury viewed the evidence to be closely balanced."); *People v. Lee*, 303 Ill. App. 3d 356, 362 (1999) ("Here, we must view the evidence as being closely balanced based upon the fact that the jury was deadlocked for several hours and had on three occasions indicated that it could not reach a unanimous verdict."). Moreover, given the instructions that the jury received, had the jury concluded that the defendant's use of force against Kovoshi was justified, the trial would have resulted in a finding that the defendant was not guilty of murder.

¶ 29 "Appellate counsel's assessment of the merits of an issue \*\*\* depends on the state of the law at the time of the direct appeal." *People v. English*, 2013 IL 112890, ¶ 34.

Here, when appellate counsel filed the defendant's brief on direct appeal, there was ample authority holding that a trial court's failure to comply with Rule 431(b) constituted plain error under the second prong of the plain-error doctrine and that the proper remedy was a new trial. Moreover, even if appellate counsel anticipated that the supreme court's holding in *Thompson* would foreclose second-prong plain-error analysis of a Rule 431(b) violation, counsel could have raised the defendant's claim under the first prong of the plain-error doctrine by arguing that the evidence of the defendant's guilt was closely balanced, at least with respect to the jury's verdict finding him guilty of second-degree murder. See *People v. Johnson*, 2012 IL App (1st) 091730, ¶¶ 38-51 (reversing and remanding for a new trial where the defendant argued on direct appeal that the trial court's failure to comply with Rule 431(b) constituted plain error under the first prong of plain-error review and the evidence of the defendant's guilt was closely balanced).

¶ 30 As previously noted, "a petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *Hodges*, 234 Ill. 2d at 17. Here, we conclude that the defendant's *pro se* petition satisfied the low threshold of presenting the gist of a constitutional claim and that the trial court erred in summarily dismissing the petition. It is arguable that appellate counsel's failure to raise the defendant's Rule 431(b) claim under the first-prong of plain-error analysis fell below an objective standard of reasonableness, and it is arguable that had the issue been so raised, the defendant would have been granted a new trial, at least on the State's murder charge. We accordingly reverse the trial court's judgment and

remand for further proceedings.

¶ 31

#### CONCLUSION

¶ 32 For the foregoing reasons, we reverse the trial court's summary dismissal of the defendant's *pro se* petition for postconviction relief and remand the cause for further proceedings pursuant to sections 122-4 through 122-6 of the Act (725 ILCS 5/122-4 to 122-6 (West 2012)).

¶ 33 Reversed and remanded.