2016 IL App (2d) 150213-U
No. 2-15-0213
Order filed December 12, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 14-CF-1519
LAMARCUS BASSETT,	)	Honorable John R. Truitt
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Birkett and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: Even if the trial court committed a technical violation of Illinois Supreme Court Rule 431(b), any error is not reversible under the plain-error doctrine.

¶ 2 Defendant, Lamarcus Bassett, was convicted of armed robbery (see 720 ILCS 5/18-2(a)(2) (West 2014)), and on direct appeal, he raises one issue concerning jury selection. Defendant argues that he is entitled to a new trial because the trial court violated Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) by failing to obtain an adequate response from one of the jurors. We conclude that, even if a technical violation of Rule 431(b) occurred, the

conviction should be affirmed because the plain-error doctrine does not excuse defendant's procedural default in failing to object at trial or raise the issue in his posttrial motion.

¶ 3 I. BACKGROUND

¶ 4 A jury found defendant guilty of one count each of armed robbery and aggravated robbery. The trial court merged the aggravated robbery conviction into the armed robbery and sentenced defendant to 32 years' imprisonment.

¶ 5 At trial, the victim, Deonterryo Thompson, testified that about 6:30 p.m. on June 17, 2014, in front of the apartment building where he resided, he was barbequing with his friends Tuvy, Nuky, Scottie, Moon, and Nadine Bassenett. Thompson was approached by three people: defendant, who he referred to as Koolaid, someone he referred to as Deangelo, and an unknown person. Defendant and Deangelo asked of Tuvy's whereabouts. Thompson replied that Tuvy had left, and defendant and at least one other person entered the apartment building. Thompson entered the building, intending to seek safety in his apartment because he "didn't feel comfortable outside anymore."

¶ 6 Once inside the building, which Thompson described as well-lit, defendant held a gun in Thompson's face and said, "we kill niggers out here." Thompson testified that the unknown individual had drawn a gun too. Defendant told Thompson to empty his pockets, and Thompson eventually gave defendant "about" $150, which was divided into bundles. Thompson testified that he told the investigating police officers that, at the time of the robbery, he had two bundles in the same pocket: one consisting of two $20 bills and ten $1 bills and the other consisting of $100. On cross-examination, Thompson admitted that he had given defendant only about $50, which is what he previously had reported to the police. To explain the discrepancy, Thompson testified, "I just gave them a bundle. It happened a while ago. I can't really remember."

Defendant ran out the back door and entered a black Nissan. The encounter lasted about seven minutes.

¶ 7 Thompson testified that he had been familiar with Koolaid before the robbery. Thompson acknowledged that Deangelo's name is actually Delano and attributed the confusion to his relative unfamiliarity with him. Thompson testified that he had seen defendant "a lot" before the robbery but had seen Delano only "a couple times."

¶ 8 The day after the incident, Thompson met with Detective Dwayne Beets and gave a physical description of the unknown individual, but he did not give a physical description of defendant. At the police station, Thompson identified defendant in a photographic lineup. He testified that the person he picked out was the man he knew as Koolaid and the person who held a gun in his face and took his money.

¶ 9 On cross-examination, Thompson acknowledged that his description of the firearm differed at trial from the one he gave to the police. Thompson testified that "[t]hey all look alike to me." He also claimed to have had a better recollection of the incident when it occurred in June 2014, which was six months before the trial.

¶ 10 Detective Beets corroborated Thompson's testimony about their meetings. Detective Beets testified that, although Thompson did not provide a physical description of defendant, Thompson gave him a name for defendant. Thompson did not give a physical description because he was familiar with defendant.

¶ 11 Defendant unsuccessfully moved for a directed verdict, and elected to forgo presenting a case-in-chief. Before deliberations, the trial court instructed the jury, in part, as follows:

> "The defendant is presumed to be innocent of the charges against him. The presumption remains with him throughout every stage of the trial and during your

deliberations on the verdict and is not overcome unless from all the evidence in this case you are convinced beyond a reasonable doubt that he is guilty.

The State has the burden of proving the guilt of the defendant beyond a reasonable doubt and this burden remains on the State throughout the case.

The defendant is not required to prove his innocence.

The fact that the defendant did not testify must not be considered by you in any way in arriving at your verdict."

¶ 12 After three hours of deliberation, the jurors sent a note stating that they were a "hung jury," and the court directed them to continue deliberating. The jury sent another note asking whether they needed to decide all the charges, and the court instructed them to fill out the verdict form that reflected their verdict as to each charge. The jury eventually returned a guilty verdict on the charges of armed robbery and aggravated robbery, and the jury was polled. The court merged the lesser-included offense into the armed robbery and imposed a 32-year prison sentence. This timely appeal followed.

¶ 13 II. ANALYSIS

¶ 14 Defendant's sole contention on appeal focuses on the trial court's alleged noncompliance with Rule 431(b) during jury selection. Defendant challenges the *voir dire* of Michael Messink, who was selected as a juror and participated in the deliberations that resulted in the guilty verdict. To preserve an issue for appeal, a defendant must raise an objection in the trial court and raise the issue in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defense counsel did not object to the trial court's purported noncompliance with Rule 431(b) or raise the issue in a posttrial motion. Conceding that he forfeited the issue, defendant argues that the plain-

error doctrine compels reversal because the error was serious and the evidence was closely balanced.

¶ 15 We may review an unpreserved error under the plain-error doctrine found in Illinois Supreme Court Rule 615(a) (eff. Jan. 1, 1967), which provides a limited and narrow exception to the general rule of procedural default. *People v. Lewis*, 234 Ill. 2d 32, 42 (2009). There are two avenues for arguing plain error, and defendant relies on both. The plain-error doctrine allows a reviewing court to consider unpreserved error where either: (1) a clear or obvious error occurs and the evidence is so closely balanced that such error threatens 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 is so serious that it affects the fairness of the defendant's trial and challenges the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Walker*, 232 Ill. 2d 113, 124 (2009); *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). In both instances, the burden of persuasion remains on the defendant. *People v. Herron*, 215 Ill. 2d 167, 187 (2005) (citing *People v. Hopp*, 209 Ill. 2d 1, 12 (2004)).

¶ 16 The first step in conducting plain-error review, however, is to determine whether error occurred at all. *Walker*, 232 Ill. 2d 113, 124 (2009). Rule 431(b) contains the four commonly-known *Zehr* (*People v. Zehr*, 103 Ill. 2d 472, 477 (1984)) principles and states as follows:

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

¶ 17 "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). In short, the Rule 431(b) admonitions require each juror's understanding and acceptance of (1) the presumption of innocence; (2) the State's burden of proof beyond a reasonable doubt; (3) the defendant's right to remain silent and fail to present evidence; and (4) the fact that the defendant's refusal to testify may not be held against him. Our supreme court has emphasized that the trial court must ensure that each juror *both understands and accepts* each of these four principles. *People v. Belknap*, 2014 IL 117094, ¶¶ 44-46, *People v. Wilmington*, 2013 IL 112938, ¶ 32; *People v. Thompson*, 238 Ill. 2d 598, 607 (2010). The questions may be asked of each individual juror or by group, but in either event, Rule 431(b) contemplates " 'a specific question and response process.' " *Wilmington*, 2013 IL 112938, ¶ 32 (quoting *Thompson*, 238 Ill. 2d at 607).

¶ 18 Defendant argues that the trial court violated Rule 431(b) by failing to ascertain whether Messink understood and accepted the second principle. For each panel of potential jurors, the trial court explained the jury selection process and engaged in a question and response process:

> "Good afternoon to the seven of you. I don't deviate on my procedure. I'll be following the same procedure I used with the first panel of seven. I'll be asking you all a series of questions that you ought to be able to answer with a yes, no, maybe, or I don't understand what you just asked. Make sure the answer is out loud. If you're answering in such a way that I'll need to follow up with additional questions, I'll come back to you for additional questions. So the first time through the most brief but accurate response

you could give would be appreciated, and if you would answer in the order you were just called and seated."

¶ 19 Referring to the principles of law set forth in Rule 431(b), the court told the potential jurors, "I'll be asking if you understand the principle and whether you accept or agree with the principle."

¶ 20 First the court asked, "Do you all understand and agree or accept the principle that the defendant is presumed to be innocent of these charges against him?" To this question, all seven potential jurors, including Messink, individually responded "yes."

¶ 21 Second, the court asked, "Do you all understand and/or accept the principle that before the defendant can be convicted the State must prove him guilty beyond a reasonable doubt?" The transcript shows that the first four of the seven potential jurors individually responded "yes," but there is no recordation of the other three, including Messink, responding.[1]

¶ 22 Third, the court asked, "Do you all understand and agree or accept the principle that the defendant is not required to offer any evidence on his own behalf?" To this question, all seven potential jurors, including Messink, individually responded "yes."

¶ 23 Fourth, the court asked, "Finally, do you all understand and agree or accept the principle that if the defendant does not testify, you cannot hold that against him?" To this question, all seven potential jurors, including Messink, individually responded "yes."

¶ 24 Once defense counsel tendered the acceptable jurors, including Messink, the prosecutor followed up on the trial court's questioning. The prosecutor asked whether there was "anything about the charges that would make it difficult for you to hear the case" and "if *** we have

[1] The two jurors other than Messink who did not answer ultimately were not impaneled to hear defendant's trial.

proven each element of the offenses the defendant is charged with beyond a reasonable doubt, would you hesitate in finding this Defendant guilty?" Messink responded "no" to both questions.

¶ 25 The report of proceedings shows that Messink indicated to the State in open court that he would not hesitate to find defendant guilty if the State proved the elements of the offense beyond a reasonable doubt. However, the report of proceedings shows that there is no recordation of Messink responding to *the trial court* that he understood and accepted the State's burden of proof. Our supreme court observed, "it may be arguable that the court's asking for disagreement, and getting none, is equivalent to juror acceptance of the principles" (*Wilmington*, 2013 IL 112938, ¶ 32), but in this case the court asked for acceptance of the principles, not disagreement with them. Regardless, even if the trial court technically violated Rule 431(b)(2) by not obtaining an affirmative response from Messink, we conclude that such a violation does not amount to plain error.

¶ 26 Addressing the second prong of the plain-error doctrine first, we hold that the error was not so serious that it affected the fairness of the trial or challenged the integrity of the judicial process. See *Walker*, 232 Ill. 2d at 124. This case is similar to *Wilmington* and *Thompson*, where in each case the jurors received some, but not all, of the required Rule 431(b) questioning and the venire was admonished and instructed on Rule 431(b) principles. *Wilmington*, 2013 IL 112938, ¶ 33; *Thompson*, 238 Ill. 2d at 615. In both cases, the supreme court held that, without more, such violations of Rule 431(b) do not automatically result in a biased jury that would warrant relief under the second prong of the plain-error doctrine. *Wilmington*, 2013 IL 112938, ¶ 33; *Thompson*, 238 Ill. 2d at 615. Here, before trial, the State ascertained that the jurors accepted the law and understood the principles set forth in Rule 431(b). The jurors also

responded that they would follow the instructions and law as tendered by the trial court and would speak up on matters with which they disagreed. Before deliberations, the trial court properly instructed the jury regarding the Rule 431(b) principles. The record belies defendant's claim of a biased jury, where only one juror did not respond to one of the four Rule 431(b) principles.

¶ 27 Second, no plain error occurred because the evidence is not so closely balanced that the error, by itself, threatened to tip the scales of justice against the defendant. Defendant argues that "the alleged victim was caught in numerous substantial contradictions and his story of how it happened did not make sense." Specifically, defendant emphasizes Thompson's inability to recall the exact date of the robbery, his vague descriptions of the firearms, and his inconsistent statements about whether defendant took $50 or $150. Such deficiencies in Thompson's testimony are reasonable considering the traumatic nature of the incident and the six months that passed before he testified at trial. Most importantly, Thompson was familiar with defendant before the robbery, knew him by name, and picked him out of a photographic lineup. Thompson's identification of defendant as the offender was unequivocal at all times. Thompson's testimony was positive and credible regarding the elements of the offense. See *People v. Mister*, 2016 IL App (4th) 130180-B, ¶ 104 ("[t]he testimony of a single witness, if it is positive and credible, is sufficient to convict").

¶ 28 Defendant argues that the closeness of the evidence is established by the relative duration of the trial evidence and the jury's deliberations. Defendant claims that, in this trial where the presentation of evidence lasted only 1½ hours, the evidence must have been closely balanced because the jury called itself "hung" after 3 hours of deliberations. We agree with the State that it is speculative to conclude that the relatively long deliberations cast doubt on the strength of the

State's case. In fact, defendant concedes in his reply brief that "[c]ounsel has not been able to find a case that holds that the fact that a jury says it is 'hung' means it is by definition a close case." The jury's delay in reaching the guilty verdicts on both counts potentially could be attributed to a number of factors other than the closeness of the evidence. Under these circumstances, we conclude that the evidence was not so closely balanced that the minor and technical nature of the alleged Rule 431(b) violation, by itself, warrants relief under the first prong of the plain-error doctrine. See *Walker*, 232 Ill. 2d at 124 (a clear or obvious error warrants relief only if "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").

¶ 29 III. CONCLUSION

¶ 30 For the reasons stated, we affirm the judgment of the circuit court of Winnebago County. As part of our judgment, we grant the State's request that defendant be assessed the State's attorney fee of $50 under section 4-2002(a) of the Counties Code (55 ILCS 5/4-2002(a) (West 2014)) for the cost of this appeal. See *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 31 Affirmed.