

NOTICE
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2016 IL App (5th) 140155-U

NO. 5-14-0155

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Jackson County.
)	
v.)	No. 11-CF-596
)	
DAVID N. MARSH,)	Honorable
)	William G. Schwartz,
Defendant-Appellant.)	Judge, presiding.

PRESIDING JUSTICE SCHWARM delivered the judgment of the court.
Justices Goldenhersh and Cates concurred in the judgment.

ORDER

¶ 1 *Held:* The defendant's conviction is affirmed where the evidence is not closely balanced, and the amount of presentencing credit is modified upon joint motion of both parties.

¶ 2 **BACKGROUND**

¶ 3 Sometime on or about November 4, 2011, the defendant, David N. Marsh, was arrested for burglary. On November 4, 2011, a felony information was filed charging the defendant with burglary. On November 15, 2011, a first amended information was filed charging the defendant with two counts of burglary. Count I alleged that, on October 31, 2011, the defendant and Terrell W. White entered Robertson Vending, located at 1764

North Illinois Avenue in Carbondale, knowingly and without authority with the intent to commit a theft therein. Count II alleged that, on November 2, 2011, the defendant and Terrell W. White entered Arnold's Market, located at 2141 South Illinois Avenue in Carbondale, knowingly and without authority with the intent to commit a theft therein.

¶ 4 On December 2 and 3, 2013, the defendant was tried before a jury on both counts. During *voir dire*, the court questioned each potential juror individually. The court asked questions regarding the four principles of criminal law referenced in Supreme Court Rule 431(b): the defendant's presumption of innocence, the State's burden to prove the defendant guilty beyond a reasonable doubt, the fact that a defendant need not testify or produce any evidence at all, and that the defendant's refusal to testify could not be held against him. Both the defendant and the State agree that the court failed to ask whether the potential jurors understood and accepted each principle.

¶ 5 Officer Brody Jeters of the Carbondale Police Department testified that, in the early morning of October 31, 2011, he was dispatched to Robertson Vending regarding an alarm. Officer Jeters testified that he saw that the front door had been busted open, and he found no one but other officers at the scene. Officer Jeters helped to secure the building, and he found large garden shears and a screwdriver that appeared to have been used in the burglary as well as a partial footprint. Officer Jeters testified that a crime scene investigator collected the tools and analyzed the footprint.

¶ 6 Support Services Sergeant Corey Kemp of the Carbondale Police Department testified that, on October 31, 2011, he was a detective who also was dispatched to the Robertson Vending alarm call. Sergeant Kemp testified that he assisted the owner in

obtaining the video surveillance of the burglary. He testified that the store had a DVR system, which recorded all video to a hard drive, and that he was able to pick the date and time of the video to be copied. He testified that he chose the events that were to be copied and that the video captured the actual burglary in progress. Sergeant Kemp then copied the relevant videos to a USB drive that did not alter the video. Sergeant Kemp testified that he then converted that copy to a DVD, which he identified in court.

¶ 7 Rickey Robertson, the owner of Robertson Vending, testified that Robertson Vending stocks and services coin-operated vending machines. He testified that the business stored its money in a "safe room," which was reinforced, had a security system and cameras, and had a large safe as well as some filing cabinets where bags of quarters were stored. He stated that, on October 31, 2011, he received a call that the business's alarm system had been triggered. He went to the business, where he found that the front door had been busted open. Robertson testified that the door had not been damaged when he closed the business the previous day, and he had not given anyone permission to enter after hours. He testified that he walked through the business and found that someone had also broken into the safe room by busting the deadbolts out of its door. He testified that some of the change bags were missing from the filing cabinet. He testified that the change bags were off-white cotton bags similar to money bags at the bank, and that "Robertson Vending" had been printed on the bags. However, Robertson testified that the bags were turned inside out, and therefore the printing was on the inside of the bags. He testified that the stolen bags contained approximately \$350 in quarters.

¶ 8 Robertson testified that the surveillance system had cameras in several areas, including the safe room and front entrance, and was continuously recording and working properly on October 31, 2011. At that time, Robertson viewed the DVD recording of the burglaries identified by Kemp. Robertson stated the footage was dated October 31, 2011, and began at "1 minute, 19 seconds after midnight." The footage was admitted and published to the jury. The footage showed two individuals, who Robertson could not identify, in the front entrance. One of the individuals wore a hoodie with the hood up, while the other had a large afro. The two individuals were then seen attempting to break into the safe room. The individuals left the building at "2 minutes and 29 seconds after midnight." The individuals returned at "15 minutes and 41 seconds after midnight." The individuals were seen breaking into the safe room, taking change bags from the filing cabinets, and leaving at "16 minutes and 40 seconds after midnight."

¶ 9 Jeff Buritsch, a crime scene investigator for the Carbondale Police Department, testified that he was dispatched to Robertson Vending on October 31, 2011, to process a crime scene. Buritsch conducted a cursory review of the business and examined the video surveillance. Buritsch determined that two individuals had entered the business by forcing open the doors. Supporting his theory, he identified four photographs showing the damage to the doors. One photograph was then published to the jury, and Buritsch used it to show that the damage to the door proved that it was forced open by an outside blow, rendering the door inoperable. Buritsch stated that he found the striker plate and bolts of the door inside the business, and he identified photographs showing where these parts had landed. Buritsch testified that he examined the door to the safe room. Buritsch

identified photographs showing the location of a pair of hedge clippers and a claw hammer. He testified that he collected these items, and he also identified these items in court. He testified that damage on these items was consistent with having been used as a pry tool. He testified that he also found a screwdriver, and he identified it in court as well. Buritsch testified that the damage to the door to the safe room led him to believe the door had been forced open by being pried at the striker plate. He testified that he went into the safe room, where he noticed that some filing cabinets were open.

¶ 10 Officer William Bethel of the Carbondale Police Department testified that, on November 2, 2011, at about 6 a.m., he was dispatched to Arnold's Market in Carbondale on a burglary call. Upon arrival, he noticed that the front window of the store was broken, and an ATM inside the store had been knocked over. He testified that he worked with other officers to search the building to see if anyone remained, but he found no one still inside. He testified that he saw a cellphone located outside the front of the store on the pavement. Officer Bethel testified that he did not collect the cellphone, nor did he conduct a crime scene investigation.

¶ 11 Rodney Kroenlein, the owner of Arnold's Market, testified that he was called early in the morning of November 2, 2011, regarding a break-in at the store. He arrived at the store to find the front window broken and an ATM leaning over. He walked through the store to determine if anything had been stolen, but it appeared that only the ATM had been moved. Kroenlein testified that the store had a 16-camera video surveillance system, which turned on when it detected motion and recorded to a DVR located in the store. He testified that, on November 2, 2011, he reviewed the footage, found that the

surveillance system had been functioning normally, and saw that it had captured what broke the window and moved the ATM. He then copied the relevant footage to a DVD, which he identified in court. The footage from this DVD was admitted into evidence and published to the jury. Kroenlein testified that the relevant footage was dated November 2, 2011, at 3:10 a.m. The video showed two individuals pull up to the store in a white van, break into the front window with a tool, enter the store, and attempt to put the ATM through the window. The individuals then abandoned the ATM, returned to the van, and left at 3:12 a.m. Kroenlein testified that he did not know these individuals, nor could he see an identifiable face in the footage.

¶ 12 Officer Jesse Ital of the Carbondale Police Department testified that, on November 2, 2011, he was dispatched to Arnold's Market to investigate the broken window and collect evidence as a crime scene tech. Officer Ital testified that he noticed a cellphone lying on the ground underneath the window and an ATM leaning against the window. He identified a photograph showing that the cellphone was in front of the doors to the store. Officer Ital collected the cellphone as evidence, and he identified the phone at trial. Based on his review of the crime scene, Officer Ital believed that the individuals had entered the foyer by the broken window but had gone nowhere else in the store. Officer Ital testified that he found a rubber mallet, which appeared to be the tool used to break the window, lying on the floor behind the ATM. He identified a photograph showing where the mallet was located. Officer Ital testified that he collected the mallet, and he then identified the mallet in court.

¶ 13 Lieutenant Matthew Dunning of the Carbondale Police Department testified that he became involved in the Arnold's Market investigation at around 8 a.m. on November 2, 2011. Lieutenant Dunning identified the cellphone previously identified by Ital as having been at the scene. He testified that he looked through the contact list and found a contact under "Mom." He testified that he determined that "Mom" was Phyllis Marsh and that she had a relationship with the defendant.

¶ 14 Detective Aaron Baril of the Carbondale Police Department testified that he became involved in the Arnold's Market investigation on November 2, 2011. He testified that he reviewed the video surveillance and determined that the individuals responsible had arrived in a white Dodge Caravan. He testified that he was able to locate the vehicle on November 2, 2011, and he determined that it belonged to Sylvia Steinmetz. He identified photographs of the vehicle from that day showing that all of its back seats had been removed and there were shards of glass throughout the van.

¶ 15 Detective Baril testified that he spoke with the defendant on November 3, 2011. He testified that the defendant said he had come to Carbondale on November 2, 2011, to smoke crack cocaine. The defendant told Detective Baril that he had borrowed his girlfriend Sylvia's van, and he had gone to see his friends, Tommy and Kim. Detective Baril testified that he identified these people as Sylvia Steinmetz, Thomas O'Grady, and Kim Smith. The defendant told Detective Baril that, at around 11 p.m. on November 1, 2011, he fell asleep at Kim's, and two white males he did not know took the van to get cigarettes before returning it. The defendant told Detective Baril that his cellphone had been in the van, and he believed the two white males had taken it because he had since

lost it. The defendant claimed that the van had been returned around midnight of November 2, 2011, and he had then returned it to Sylvia Steinmetz in Vienna. Detective Baril testified that he located the van at Sylvia Steinmetz's residence. He also testified that, at the time he questioned the defendant, the defendant had a bandaged cut on his left ring finger. Detective Baril testified that, on November 14, 2011, he arrested Terrell White for both the November 2, 2011, Arnold's Market burglary and the October 31, 2011, Robertson Vending burglary.

¶ 16 Sylvia Steinmetz testified that she owned a 2000 Dodge Caravan. She testified that she allowed the defendant to borrow the vehicle around the time of November 2, 2011. She testified that the defendant brought the vehicle back before 6 a.m. on November 2, 2011.

¶ 17 Kim Smith testified that, around October 31, 2011, she was working at Sidetracks in Carbondale when the police picked her up from her job and took her to the Carbondale police station regarding a warrant for failure to pay fines on a forgery charge. Smith testified that, on October 31, 2011, her employer had held a Halloween party, and she had taken costume supplies home, including a black afro wig. She testified that, around that same time, she had been visited by the defendant and Terrell White. She stated that she had known the defendant and White for over 15 years. She testified that the defendant and White stayed at her residence off and on for three or four days. She testified that they arrived at her residence in a white van, which she identified via photograph as Steinmetz's van. Smith testified that, during that time, the three of them smoked crack cocaine. She testified that the defendant and White left and returned several times during

this period. On one occasion, she testified that the defendant asked her for the black afro wig, and she gave it to him. On that occasion or another occasion, the defendant asked if she had any tools, and she gave him a rubber mallet. She later identified the rubber mallet recovered from Arnold's Market as the rubber mallet she gave to the defendant. She testified that, on one occasion, the defendant called her about 30 minutes after leaving and asked if her drug dealer "would take a hundred dollars in quarters." She testified that the defendant arrived shortly thereafter with an off-white canvas bag containing about \$94 in quarters. She did not remember the bag having any writing on it.

¶ 18 Smith was shown portions of the Robertson Vending surveillance tape. She identified the afro on one of the individuals on the tape as being the same afro wig she had given to the defendant. She identified the defendant as the other individual who reached into the filing cabinet and removed bags of quarters. She claimed that she had "known [the defendant] 20 years" and could identify his face "from the nose down." She noted that "the little goatee, the little mustache that he has been wearing for years [could be seen] from the middle of his nose down."

¶ 19 On cross-examination, Smith testified she began crying when picked up by the police because "[she] was scared because [she] knew they were taking [her] freedom." She admitted she wanted to cooperate so that the police wouldn't arrest her. However, she stated that she would have cooperated anyways and that her reason for cooperating was not to avoid arrest. She admitted she is an addict, though she was not using drugs at the time of the trial. On redirect, Smith testified that there had been no men, other than the defendant and White, at her residence during this time. She further stated that she

never told the defendant that two men had taken the van, nor did she see anyone other than the defendant or White take the van. She testified that Detective Baril, who questioned her, never threatened her, and she cooperated with him because "[t]here was no reason for [her] not to cooperate."

¶ 20 Terrell White testified that, while he was originally a defendant in this case, he made an open plea. He testified that he did not take a deal, and the prosecutor recommended that the court sentence him for four years. However, the court sentenced him to probation instead. White testified that, around October 31, 2011, he met with the defendant and ended up at Smith's residence "[d]rinking [and] smoking [crack cocaine]." He testified that only the defendant, Smith, and himself were present. He testified that he was at Smith's residence "[o]ff and on" for three or four days. He testified that, during this time, he and the defendant went to Robertson Vending in a "White Chrysler" van. He then identified via photograph Steinmetz's van as the van they drove to the business. He testified that they went to the business to break in with a pry bar. He stated that both of them participated in the break-in. White testified that they looked around the office for money so that they could buy "[g]as, cigarettes, beer." White testified that he was wearing the afro wig acquired from Smith. He testified that he and the defendant left Robertson Vending, then returned 10 or 15 minutes later "because [they] didn't get nothing the first time." He testified they kicked in the door to the room "where they kept all the *** coins and stuff." He noted the room had filing cabinets and a safe. He testified that he kicked in the door, and the defendant took canvas bags of coins from the filing cabinets. He testified that the money was used to buy gas, cigarettes, and drinks, at

which point they took what was left to Smith's residence and later used the remainder to buy crack cocaine. White watched the surveillance tape from Robertson Vending and identified himself and the defendant. He noted that the tape revealed the defendant also attempted to kick in the door to the safe room.

¶ 21 White testified that he and the defendant also went to Arnold's Market during this timeframe. He testified that both of them intended to try to take the ATM from Arnold's Market "[t]o get the money." He testified that they went to the store, broke a window, tried to take the ATM, discovered it was too heavy, and left. He testified that they arrived in Steinmetz's van and used the rubber mallet from Smith's residence to break the window. White watched the surveillance tape from Arnold's Market and identified both himself and the defendant. He noted that the tape showed the defendant breaking the window with the rubber mallet. White testified that, after they left Arnold's Market, the defendant could not find his cellphone, but the defendant had his cellphone prior to them breaking in to Arnold's Market. He testified that he slept at Smith's residence that night.

¶ 22 On cross-examination, White testified that he had made statements to Detective Baril that may contradict his testimony. He testified that he told Detective Baril that the defendant had pried the door open to Robertson Vending and that he got the bag of quarters from a vending machine. However, White clarified that they broke into "[o]ne vending machine. We broke into Robertson." He testified that he didn't remember telling Detective Baril that it was the defendant who wore the afro wig at Robertson Vending.

¶ 23 The defendant called Detective Baril back to the stand. Detective Baril testified regarding White's statements when questioned on November 14, 2011. He testified that, at that time, White stated that the defendant, and not both of them, pried open the door at Robertson Vending. Detective Baril testified that White claimed that they obtained the money from Robertson Vending from a "[v]ending machine" and that they broke into only one machine. Detective Baril testified that he did not believe White said the money came from a filing cabinet at that time. Detective Baril testified that White did not remember at that time where he had slept after leaving Arnold's Market. Detective Baril testified that White said the defendant was wearing "[a] wig or something" during the Robertson Vending break-in. Detective Baril testified that White did not know at that time if the defendant had a cellphone. Detective Baril testified that, at the time of the interview, White did not remember the defendant leaving anything behind at Arnold's Market. Detective Baril testified that the defendant's DNA had been found on the cellphone. On cross-examination, Detective Baril testified that he asked White "What about a cellphone?" White responded, "I don't have a cellphone." Detective Baril testified that White did not elaborate further on that.

¶ 24 At the end of trial, the jury found the defendant guilty on both counts. On March 14, 2014, the circuit court sentenced the defendant to 20 years' imprisonment on each count, to be served concurrently, and three years of mandatory supervised release. The circuit court also awarded the defendant 94 days in presentence custody credit. On April 5, 2014, the defendant timely filed his notice of appeal.

¶ 26 On appeal, the defendant argues that the circuit court violated Supreme Court Rule 431(b) in questioning the venire. Supreme Court Rule 431(b) requires that the court "ask each potential juror *** whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that if a defendant does not testify it cannot be held against him or her." Ill. S. Ct. R. 431(b) (eff. July 1, 2012). The State concedes that the circuit court violated Supreme Court Rule 431(b) because it did not specifically question all potential jurors as to whether they understood and accepted these four principles as required by the rule and by *People v. Zehr*, 103 Ill. 2d 472, 477-78 (1984). The defendant argues that this admitted error is reversible under the plain-error doctrine because the evidence is closely balanced.

¶ 27 "The plain-error doctrine allows errors not previously challenged to be considered on appeal if either: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) the error was so fundamental and of such magnitude that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Wilmington*, 2013 IL 112938, ¶ 31. "In plain-error review, the burden of persuasion rests with the defendant." *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). In this case, the defendant argues that the evidence was closely balanced because the two individuals in the

surveillance videos were unidentifiable, because the drug use and potential criminal prosecution of both Smith and White make their testimony less credible, and the differences between White's pretrial statements to Detective Baril and his testimony make his testimony less credible.

¶ 28 In making this argument, the defendant cites *People v. Mueller*, 2015 IL App (5th) 130013, in which a conviction for retail theft was reversed under plain-error review when the circuit court violated Supreme Court Rule 431(b) and the evidence, consisting of one witness to the theft, an officer whose identification of the defendant did not make it into evidence, and a surveillance tape, was closely balanced. However, the evidence in *Mueller* was much more closely balanced than the evidence at trial in this case. The court in *Mueller* noted that the surveillance tape was not clear enough to allow for identification. *Id.* ¶¶ 28-29. The jury asked to see the tape again because it was " 'too far away,' " and the court granted this request. *Id.* ¶ 38. However, the court also refused to show the jury the tape a second time despite asking the jury if they wished for it to be played again. *Id.* Further, the court in *Mueller* noted numerous discrepancies between the surveillance tape and the witness's description of events, finding the witness's testimony to be "weak." *Id.* ¶¶ 30-33. Given the issues with both the tape and the witness testimony, the court found the evidence to be closely balanced. *Id.* ¶ 41.

¶ 29 By contrast, in our case, the defendant does not contest any testimony by the police officers and other Carbondale Police Department employees, nor does he contest the testimony by the two business owners. He does not contest Steinmetz's identification of the van used in both burglaries. He does not contest the rubber mallet or various tools

found by the police. Perhaps most importantly, he does not contest the police department's finding, corroborated by both the "Mom" contact and his DNA, that his cellphone was recovered just outside the front of Arnold's Market. He only contests whether the tapes were sufficient for identification and whether Smith and White were credible enough witnesses for the evidence to be considered closely balanced.

¶ 30 With regards to the surveillance tapes, we note that the tapes were played before the jury. Moreover, both Smith and White pointed to the specific features that allowed them to identify the defendant in the tape. Smith described how she had "known [the defendant] for 20 years" and could identify his face "from the nose down," including "the little goatee, the little mustache that he has been wearing for years [could be seen] from the middle of his nose down." White identified both himself and the defendant in both surveillance tapes. When these tapes were played to the jury, they could see for themselves whether the tape corroborated Smith and White's identifications. "[A]s a court of review, we do not reweigh the evidence or substitute our judgment for that of the trier of fact." *People v. Torres*, 327 Ill. App. 3d 1106, 1110 (2002).

¶ 31 The defendant argues further that neither Smith nor White should be found credible because they are or have been drug users and both faced the possibility of prosecution when arrested. "It is the function of the trier of fact to assess the credibility of the witnesses, to determine the appropriate weight of the testimony, and to resolve conflicts or inconsistencies in the evidence." *People v. Evans*, 209 Ill. 2d 194, 211 (2004). The jury was aware of both Smith and White's issues as witnesses and could judge for themselves whether these issues made them less credible. Smith, for instance,

admitted she is a drug addict, but she also stated that she had stopped using drugs prior to the trial. She also admitted that she was scared of being arrested on her outstanding warrant, but she insisted she would have cooperated with the investigation even if she did not have an outstanding warrant. Moreover, Smith's testimony appears to have been clear and cogent, with no major discrepancies. We cannot say that her struggles with drug addiction or her outstanding warrant are sufficient to consider the evidence closely balanced. White, likewise, admitted that he uses drugs, and he admitted that he was originally a defendant in this case. However, White did not take a deal and instead entered an open plea. The prosecutor recommended a four-year sentence, but the court sentenced him to probation instead. White, therefore, did not need to testify in order to secure a better deal for himself, and we find neither his drug use nor his open plea sufficient to consider the evidence closely balanced.

¶ 32 There were discrepancies between White's trial testimony and his statements to Detective Baril. Detective Baril noted that White had previously told him that the money from Robertson Vending came from a "[v]ending machine." However, it appears that White referred to Robertson Vending itself as a "vending machine," as he clarified on cross-examination that they broke into "[o]ne vending machine. We just broke into Robertson." White originally told Detective Baril that the defendant wore the afro wig at Robertson Vending, but he testified in court that he wore the afro wig. White testified at trial that he slept at Smith's residence after the Arnold's Market break-in, but he had personally told Detective Baril that he did not remember where he slept after the Arnold's Market break-in. We do not find these discrepancies to be serious, given that they either

cover irrelevant information, involve a misunderstanding of terms, or can be clarified from the surveillance tapes. White also stated at trial that the defendant lost his cellphone during the Arnold's Market break-in. However, when asked "What about a cellphone?" by Detective Baril on November 14, 2011, White responded "I don't have a cellphone." While White's responses are not necessarily in conflict, we agree that the differences could be troubling if they were the basis for identifying the cellphone. However, the cellphone was identified by the defendant's DNA and the "Mom" contact. We therefore do not find any of these alleged discrepancies to be sufficient to find the evidence closely balanced.

¶ 33 Neither the surveillance tapes nor the testimonies of Smith and White are problematic enough to consider the evidence closely balanced. Thus, we cannot say that the court's violation of Supreme Court Rule 431(b) threatened to tip the scales of justice against the defendant. We therefore affirm in part the judgment of the circuit court.

¶ 34 The defendant also argued in his brief and at oral argument that he was entitled to additional presentence credit because he had not been credited for all the time he served in custody. The parties have filed a joint motion in which they agree that the defendant is entitled to an additional 127 days of presentencing credit, complete with a Jackson County Sheriff's Office report corroborating this determination. We accept the parties' determination and grant the motion, modifying the mittimus and granting the defendant an additional 127 days of presentencing credit.

¶ 35

CONCLUSION

¶ 36 For the reasons stated, we affirm in part and modify in part the decision of the circuit court of Jackson County.

¶ 37 Affirmed in part; modified in part.