

NOTICE
Decision filed 07/13/16. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2016 IL App (5th) 140361-U

NO. 5-14-0361

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,)	St. Clair County.
)	
v.)	No. 13-CF-89
)	
ANDRE JACKSON,)	Honorable
)	John Baricevic,
Defendant-Appellant.)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justices Chapman and Moore concurred in the judgment.

ORDER

¶ 1 *Held:* During *voir dire*, the circuit court committed reversible error when it failed to properly question the venire pursuant to Supreme Court Rule 431(b).

¶ 2 The defendant, Andre Jackson, was charged by information with two counts of aggravated domestic battery for strangling his then fiancé, Sheena Berry. The defendant was also charged with three counts of domestic battery for grabbing Sheena's face, pushing her, and striking her about the body with his hands. Following a jury trial, the defendant was convicted of one count of aggravated domestic battery for strangling Sheena on the first floor of their residence, and was found not guilty on all of the remaining charges. The circuit court sentenced the defendant to a term of 60 days

imprisonment, followed by 18 months of probation for the offense of aggravated domestic battery under section 12-3.3(a-5) of the Criminal Code of 2012 (720 ILCS 5/12-3.3(a-5) (West 2012)).

¶ 3 On appeal, the defendant contends that: (1) the trial court committed reversible error by failing to properly question potential jurors as to whether they understood, and accepted, the four principles outlined in *People v. Zehr*, 103 Ill. 2d 472, 469 N.E.2d 1062 (1984), which were codified by Supreme Court Rule 431(b) (Ill. S. Ct. R. 431(b) (eff. May 1, 2007)); (2) the trial court erred in granting the State's motion *in limine* to limit inquiry during *voir dire* into a potential juror's presumption of guilt or innocence of the defendant; and, (3) the evidence presented by the prosecution was insufficient to sustain the defendant's conviction. For the following reasons, we reverse and remand for a new trial.

¶ 4 BACKGROUND

¶ 5 On March 11, 2014, the circuit court of St. Clair County commenced trial on the information wherein the defendant was charged with two counts of aggravated domestic battery, and three counts of domestic battery to Sheena Berry. During the *voir dire* of the entire panel, the trial court questioned the potential jurors regarding the four principles set forth in Supreme Court Rule 431(b) (Ill. S. Ct. R. 431(b) (eff. May 1, 2007)). In doing so, the court asked the prospective jurors about the first two principles, as follows:

"Do you understand and accept that [Defendant], who sits here accused of a crime, is presumed innocent of the charge against him? That presumption of innocence stays with [Defendant] throughout the trial and is not overcome unless

from all the evidence you believe that the State has proved [Defendant] guilty beyond a reasonable doubt?

Anybody disagree with that?

(no response)

Seeing no hands,—"

After covering these first two principles, the court went on to address the prospective jurors in the following manner:

"Do you understand this means further that the State of Illinois, represented by Mr. Fuld, has the burden of proving [Defendant's] guilt beyond a reasonable doubt. [Defendant] does not have to prove his innocence. [Defendant] does not have to present any evidence or testify unless he chooses to do so. And if he does not, you are not to hold that against him.

Anybody disagree with that?

(no response)

Seeing no hands,—

Thank you."

The defendant did not object to the court's manner of questioning the potential jurors regarding the four principles of law, as set forth in Rule 431(b). The prospective jurors were asked additional questions by the court. The prosecutor and defense counsel were then allowed to ask questions. Thereafter, challenges for cause, and peremptory challenges were made, and a panel of jurors was chosen. Once the jury was selected, but before the jury was sworn, defense counsel informally questioned whether the court had

adequately complied with the requirements of Rule 431(b), which are commonly referred to as the *Zehr* principles. Specifically, the following colloquy ensued, outside the presence of the jury:

"Defense Counsel: Judge, so that the record is clear, did you review the four *Zehr* principles? That has to be done. I guess it's late for—

The Court: That's those questions that I—Yeah, I think I did.

Defense Counsel: Okay.

The Court: I mean you can see what the Appellate Court says. I think I complied.

Defense Counsel: Okay."

That ended the discussion regarding Rule 431(b).

¶ 6 Following opening statements, Sheena Berry was called to testify for the State. Sheena testified that prior to January 5, 2013, she had been living with her then fiancé, Andre Jackson, the defendant. By the time of trial, she had become the defendant's wife. Sheena recounted that on January 5, 2013, at approximately 2 a.m. she saw a photo of another woman on the defendant's phone. The photo depicted a woman who was wearing lingerie. Sheena confronted the defendant about the photo she had observed. Later that same day, around 6 p.m., as Sheena was preparing for work, she again asked the defendant about the woman in the photo. An argument ensued. Sheena testified that while the two were arguing, she pushed the defendant in the head. The defendant then pushed her on the couch, as he tried to walk away. Sheena got up off of the couch, and continued to ask the defendant about the woman in the photo. According to Sheena, the

defendant explained that he did not want to talk about the photo, proceeded to walk away from her, and headed into the kitchen. Sheena followed the defendant into the kitchen, and when he refused to answer her questions, she grabbed a glass of water and poured it on him. Sheena testified that the defendant then grabbed her with both hands around her neck, but that she was able to breathe while the defendant choked her. Once the choking ceased, Sheena testified that she did not have to gasp for air.

¶ 7 Following the choking incident, Sheena ran upstairs to a landing between the first and second floor, picked up a framed picture, and began swinging it from side to side, hitting the wall. Sheena testified that the defendant came up the stairs, took the photograph away from her, pushed her up against the wall, and choked her once more. Sheena affirmatively stated that she was able to breathe while being choked. While not entirely certain, Sheena believed that a scratch on her arm may have resulted from her being pushed against the wall by the defendant. Once the altercation subsided, Sheena finished getting ready, and headed into work. On her way into work, Sheena called her supervisor, Dawn Peach, at St. Elizabeth's Hospital, and informed her of what had happened. Peach advised Sheena to head to the emergency room of the hospital to be evaluated. During her emergency room visit, the police arrived, and Sheena provided a videotaped interview. Sheena's videotaped interview contradicted some of her testimony at trial. Specifically, during the police interview, Sheena stated that the defendant had been the aggressor, and that she was unable to breathe when the defendant had choked her on the first floor of the residence.

¶ 8 Two days after the incident, on January 7, 2013, Sheena filed a petition for an order of protection. Sheena recalled writing in the petition that the defendant grabbed her by the head, threw her into the couch, and choked her to the point where she could not breathe. Sheena also acknowledged writing in the petition that when she ran up the steps, the defendant followed her, choked her again, and threw her against the wall. When asked by the prosecution if that was the truth, Sheena responded, "That's what I thought to be the truth, yes." At trial, Sheena could not remember that all of those things happened. One week after Sheena filed for an order of protection, she returned to the court to have it dismissed.

¶ 9 On cross-examination, Sheena admitted that after she calmed down, she realized that she had been able to breathe while being choked. Specifically, she stated that "when you start to pass out, you see black and you see little dots and stuff. None of that happened to me." When asked whether finding a photo of another woman on the defendant's phone influenced what she told police, Sheena responded by saying, "I was upset about the woman for sure." Sheena further testified that after thinking about the night in question, she dropped the order of protection, and also wanted the charges dropped. She wanted the charges dropped based on the events that occurred, as opposed to the consequences that arose as a result of the incident.

¶ 10 Angela Capps, a registered nurse who treated Sheena on January 5, 2013, was the State's next witness. Capps testified that Sheena reported being assaulted by a male, and came in to be evaluated for the injuries she had sustained. While at the hospital, Sheena complained of right forearm pain, right hand pain, and bruising on her chest and neck

area. Capps testified that she personally observed the bruising on Sheena's chest and neck. Capps also observed that Sheena was visibly upset, shaking, and tearful. On cross-examination, Capps admitted that she had no firsthand knowledge of how the alleged injuries occurred. Capps also admitted that she had no way of knowing if Sheena had exaggerated what had actually occurred between she and the defendant.

¶ 11 The State then called Officer Nathan Weinel to testify. Weinel interviewed Sheena in the hospital approximately four hours after the alleged battery occurred. During the interview, Sheena told Weinel that the defendant threw her on the couch, that he placed both hands around her neck, and choked her so that she could not breathe. Sheena further stated that the argument continued up the steps where the defendant choked her again. Weinel observed a small red scratch between Sheena's eyebrows, a red scratch and bruising on her right forearm, but he did not observe any redness around her neck. The interview, which was videotaped, was entered into evidence as People's Exhibit 3. On cross-examination, Weinel testified, again, that he did not observe any injury to Sheena's neck. He also stated that he had no firsthand knowledge of what happened between the defendant and Sheena.

¶ 12 The State's last witness was Dawn Peach, a registered nurse and administrative staff supervisor at the hospital where Sheena worked, and was treated. Peach observed some redness on Sheena's neck, and another injury on her arm, while she was being treated at the hospital. During cross-examination, Peach testified that she was not present when the alleged injuries occurred. Peach also stated that the redness on Sheena's neck

had faded by the time the police officer arrived at the hospital. After Peach testified, the State rested.

¶ 13 The defendant was the first and only witness in his defense. Before addressing the night in question, the defendant testified that Sheena had previously been violent towards him. The defendant then explained that on January 5, 2013, as he was preparing to leave for work, Sheena confronted him about the woman in the photograph. When the defendant refused to talk about the photo, Sheena came up from behind him, and hit him with her hands. The defendant did not want to quarrel, and attempted to walk away, but Sheena blocked his path. With his left hand, the defendant pushed against Sheena in order to walk past her into the kitchen. The defendant testified that Sheena followed him into the kitchen, and poured a glass of water on him. Instead of retaliating in kind, the defendant attempted to step around Sheena, but when he did, she punched him. The defendant believed that Sheena was getting ready to follow up her initial punch with another wild swing. To prevent her from doing so, the defendant stuck out his left arm, and made contact near Sheena's neck. The defendant testified that he stuck out his left arm to defend himself in an attempt to stop Sheena from charging while she was swinging her fist. Sheena stopped, and then stormed up the steps onto the landing. Once on the landing, Sheena picked up a framed photograph, and started slamming it against the wall. The defendant went up the steps, and grabbed the photo away from Sheena because she was putting holes in the wall. Sheena then began to swing her fists at the defendant once more. Similar to what had occurred on the first floor, the defendant again stuck out his left arm near Sheena's neck, and pushed her back to stop her from attacking

him. When the incident subsided, Sheena continued up the steps to get ready for work, and the defendant left. The defendant testified that he never choked Sheena, and never heard her gasp for air. He also stated that he did not grab Sheena with both hands to stop her because he was suffering from a pinched nerve in his right shoulder.

¶ 14 On cross-examination, the defendant again explained that he did not try to grab Sheena's arms to prevent her from swinging at him because of his pinched nerve. When asked why he never called the police to report what had happened, the defendant stated that he did not want to jeopardize his fiancé's career, as she was in the process of applying to become a nurse in the Air Force. The defendant did not have any bruises from the incident. He claimed, however, that had he gone to the police station, the police would have seen that his eye was red and swollen, and that there were other scratch marks on his body. According to the defendant, Sheena hit him about his body, including his face, shoulder area, and arms.

¶ 15 Following the jury's deliberations, the defendant was found guilty of one count of aggravated domestic battery for strangling Sheena on the first floor of their residence. He was found not guilty on all four of the remaining charges. The defendant was sentenced to a term of 60 days' imprisonment, followed by 18 months of probation. This appeal followed.

¶ 16

ANALYSIS

¶ 17 The defendant argues that during *voir dire*, the trial court failed to comply with the requirements of Supreme Court Rule 431(b), also commonly referred to as the *Zehr* principles, when questioning the potential jurors. While the defendant concedes that the

circuit court mentioned the four principles set forth in Rule 431(b), he claims that the court did not sufficiently inquire into whether the potential jurors understood and accepted each principle. In particular, the defendant takes exception to the fact that the court combined principles (1) and (2) of Rule 431(b) when addressing potential jurors, and then, in summary fashion, combined principles (2) through (4) without properly asking each juror whether he or she understood and accepted each of the individual principles. Contrary to the defendant's position, the State argues that the circuit court complied with the requirements of Rule 431(b), despite the fact that it combined several of the principles when addressing the prospective jurors.

¶ 18 Before addressing the merits of the litigants' arguments, we note that the defendant admits that he did not formally object during the *voir dire*, when the *Zehr* issue presented itself. "To preserve a claim for review, a defendant must both object at trial and include the alleged error in a written posttrial motion." *People v. Thompson*, 238 Ill. 2d 598, 611, 939 N.E.2d 403, 412 (2010). Here, while the defendant included the issue in his posttrial motion, he failed to make an objection at trial. Therefore, we must conclude that this issue has been forfeited on appeal. *Thompson*, 238 Ill. 2d at 612, 939 N.E.2d at 412; see also *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988) (stating that the law in Illinois requires both a trial objection and a written posttrial motion raising the issue that could have been raised during trial).

¶ 19 The defendant requests, however, that this court relax the forfeiture rule, and review the alleged error under the *Sprinkle* doctrine. "[U]nder the *Sprinkle* doctrine, the forfeiture rule may be relaxed when a trial judge oversteps his or her authority in the

presence of the jury or when counsel has been effectively prevented from objecting because it would have fallen on deaf ears." (Internal quotation marks omitted.) *Thompson*, 238 Ill. 2d at 612, 939 N.E.2d at 412. The *Sprinkle* doctrine has been applied only in extraordinary circumstances, such as when a judge makes inappropriate remarks to a jury, or when the judge relies on social commentary as opposed to evidence in imposing a death sentence. *Thompson*, 238 Ill. 2d at 612, 939 N.E.2d at 412.

¶ 20 In this case, while defense counsel did not make an objection, he provided the court with an opportunity to consider whether its admonishments to the potential jurors complied with the requirements of Rule 431(b). The court believed that it had complied with the requirements, and invited defense counsel to take the issue up with the appellate court. As evidenced by the court's comment, while an objection by defense counsel may have fallen on deaf ears, we decline to apply the *Sprinkle* doctrine, as this is not the sort of extraordinary circumstance to which the doctrine has been applied, and there is no compelling reason to relax the forfeiture rule in this case.

¶ 21 Inasmuch as we have determined that the defendant forfeited the issue raised during *voir dire* regarding Rule 431(b), we are left with a limited review. "Forfeited errors are reviewable in two instances: (1) where a clear and obvious error occurred 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 and (2) where a clear or obvious error occurred 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." *People v. Belknap*, 2014 IL 117094 ¶ 48, 23 N.E.3d 325.

This standard of review is known as the plain-error doctrine, which bypasses normal forfeiture principles, and allows a reviewing court to consider unpreserved error. *Thompson*, 238 Ill. 2d at 613, 939 N.E.2d at 413. Under the plain-error analysis, the burden of persuasion remains with the defendant, and our first consideration is to determine whether the trial court committed error in its admonitions to the venire under Rule 431(b). *Thompson*, 238 Ill. 2d at 613, 939 N.E.2d at 413. This is a question we review *de novo*. *Belknap*, 2014 IL 117094, ¶ 41, 23 N.E.3d 325.

¶ 22 We begin our analysis by reviewing the rule. Under Rule 431(b), the trial court may question potential jurors individually, or as a group, but it must allow each prospective juror the opportunity to respond when asked whether he or she understands and accepts the principles stated in the rule. Ill. S. Ct. R. 431(b); *People v. Thompson*, 238 Ill. 2d 598, 607, 939 N.E.2d 403, 410 (2010). "Rule 431(b), therefore, mandates a specific question and response process." *Thompson*, 238 Ill. 2d at 607, 939 N.E.2d at 409. Moreover, the committee comments explain that this rule is intended to "end the practice where the judge makes a broad statement of the applicable law followed by a general question concerning the juror's willingness to follow the law." Ill. S. Ct. R. 431(b), Committee Comments (eff. May 1, 2007).

¶ 23 The parties herein disagree about whether combining several of the principles of Rule 431(b) constitutes error. The most recent pronouncements, however, by our supreme court, as well as this court, indicate that "it may be arguable that asking jurors whether they disagreed with the Rule 431(b) principles is tantamount to asking them whether they accepted those principles" but "the trial court's failure to ask whether the

jurors understood the principles constitutes error alone." *Belknap*, 2014 IL 117094, ¶ 46, 23 N.E.3d 325; see also *Thompson*, 238 Ill. 2d at 607, 939 N.E.2d at 410 (the trial court commits error if it fails to ask whether potential jurors both understand and accept each of the enumerated principles in Rule 431(b)); *People v. Mueller*, 2015 IL App (5th) 130013, ¶ 23, 37 N.E.3d 347 (stating that the language of Rule 431(b) is clear and unambiguous; and that the trial court shall ask whether potential jurors understand and accept the four principles set forth in the rule).

¶ 24 In this case, when addressing the prospective jurors, the trial court combined principles (2) through (4) into one principle. In our view, this is not the specific question and answer process that is required by Rule 431(b). Rather, this method of questioning is more akin to making a broad statement of applicable law, followed by a general question concerning the potential jurors' willingness to follow the law, a practice which is clearly contrary to the committee comments. We also note that when addressing Rule 431(b), the circuit court collapsed principle (2) into principle (1), and also collapsed principles (3) and (4) into principle (2). Based upon a review of the record, we are concerned that the manner in which the circuit court addressed all four principles of Rule 431(b) did not provide the prospective jurors with a clear understanding of the rule. Therefore, in light of the recent pronouncements by this court and our supreme court, we conclude that the trial court erred in its attempt to comply with the requirements of Rule 431(b) during *voir dire*.

¶ 25 Having concluded that the trial court failed to comply with Rule 431(b), we must next determine whether this error requires reversal under either prong of the plain-error

doctrine. We begin that analysis by considering the first prong of the doctrine, which requires reversal only if the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant. "When reviewing a claim of error under the first prong of the plain-error doctrine, 'a reviewing court must undertake a commonsense analysis of all the evidence in context' to determine if the evidence is closely balanced." *People v. Mueller*, 2015 IL App (5th) 130013, ¶ 25, 37 N.E.3d 347 (quoting *Belknap*, 2014 IL 117094, ¶ 50, 23 N.E.3d 325). That analysis must be conducted in a qualitative manner, as opposed to being performed quantitatively, and must take into account "the totality of the circumstances." *Belknap*, 2014 IL 117094, ¶¶ 53, 62, 23 N.E.3d 325.

¶ 26 The evidence in this case has already been described at length. The State contends that this evidence was not closely balanced. In particular, the State argues that Sheena's testimony was corroborated by the medical personnel who examined her, the police officer who interviewed her, and by her videotaped interview, wherein she said that the defendant choked her to the point she could not breathe, and that she was gasping for air once the defendant released her. We disagree, and are far from convinced that the evidence against this defendant was overwhelming. To the contrary, our commonsense, qualitative analysis of the State's evidence, when viewed within the totality of the circumstances, leads us to conclude that the defendant has met his burden of persuasion that the evidence in this case was so closely balanced that the failure to follow the requirements of Rule 431(b) threatened to tip the scales of justice against the defendant.

¶ 27 In considering the totality of the circumstances in this case, we cannot disregard the many inconsistencies in the State's evidence. Specifically, Capps treated Sheena in the emergency room shortly after the alleged battery, and observed bruising on her chest and neck area. The videotaped interview of the victim, however, did not show any bruising. Officer Weinel, who conducted the interview, testified he did not see any bruising on the victim's chest and neck area. Furthermore, Peach testified she had observed some redness on Sheena's neck, which was different from the description given by Capps. Similarly, Peach's observation was also different from what Weinel observed a few hours later at the hospital. Moreover, Capps, Weinel, and Peach did not have any firsthand knowledge of what occurred between Sheena and the defendant. The quality of their testimony is weak, and is inconsistent.

¶ 28 More importantly, Sheena, herself, gave conflicting testimony about the circumstances of the violent quarrel that took place between she and the defendant. Immediately following the incident, she told the police that the defendant was the aggressor, who choked her until she could no longer breathe. At trial, she denied these facts, and recanted some of the testimony she had provided in her videotaped interview. Specifically, Sheena testified that she had been able to breathe while being choked, and that she did not gasp for air once the choking ceased. Sheena also explained that she knew she could breathe while being choked by the defendant. She testified that when being choked "you see black and you see little dots and stuff" which did not happen to her. Moreover, Sheena stated that she may have embellished what had happened because she was upset about the photograph she found on the defendant's phone. In order to

convict the defendant of the charge of aggravated domestic battery by strangulation, the prosecution needed to produce evidence, beyond a reasonable doubt, that the defendant intentionally impeded the normal breathing or circulation of Sheena's blood by applying pressure on her throat or neck. See 720 ILCS 5/12-3.3(a-5) (West 2012). Sheena's own testimony, however, created two significantly different versions of events. Therefore, her testimony offered little clarity as to what actually happened the night of January 5, 2013, and made the evidence closely balanced.

¶ 29 Additionally, while there were some visible injuries to Sheena's body, those injuries were also consistent with the defendant's version of what occurred. According to the defendant, any contact he had with Sheena's neck area was due to him extending his left arm to prevent his fiancé from attacking him. Applying a commonsense analysis to the defendant's version of events, we cannot say that his description of what happened is so far-fetched that we can conclude that it was highly improbable. To the contrary, the defendant's explanation of the violence that occurred that evening, and the resulting injuries, were not illogical, or out of the realm of reality.

¶ 30 After deliberating, the jury convicted the defendant of choking Sheena on the first floor of the residence (count I), but not the second floor (count II), although there was testimony from Sheena that the choking occurred twice. The jury also acquitted the defendant of the remaining counts of the information which alleged injuries to Sheena's face and body. Clearly, the record shows that the evidence in this case was closely balanced. In light of the closely balanced evidence, and the erroneous manner in which

the circuit court addressed the Rule 431(b) requirements during *voir dire*, it would be difficult to conclude that these errors did not impact the verdict of the jury.

¶ 31 In summation, our commonsense, qualitative analysis of the evidence, viewed in the totality of the circumstances, leads us to conclude that the evidence in this case was so closely balanced that the circuit court's Rule 431(b) errors threatened to tip the scales of justice against the defendant, thereby causing prejudicial error. Accordingly, we must reverse and remand this cause for a new trial.

¶ 32 Although we conclude that the evidence was closely balanced, and reversal of the defendant's conviction and sentence is required, we also conclude, after carefully reviewing the record, that the evidence was sufficient to prove the defendant guilty beyond a reasonable doubt. Therefore, "prosecution of the defendant on remand will not violate principles prohibiting double jeopardy." *Mueller*, 2015 IL App (5th) 130013, ¶ 42, 37 N.E.3d 347. In making this determination, we reach no conclusion as to the defendant's guilt that would be binding on retrial. *Mueller*, 2015 IL App (5th) 130013, ¶ 42, 37 N.E.3d 347. Based upon the disposition of this cause, we need not address the defendant's remaining contentions on appeal.

¶ 33 CONCLUSION

¶ 34 For the foregoing reasons, we reverse the defendant's conviction and sentence, and remand for a new trial.

¶ 35 Reversed; cause remanded.