

No. 1-14-2609

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 13 CR 10527
)	
RICHARD HIGHTOWER,)	Honorable
)	Stanley Sacks,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

- ¶ 1 *Held:* Judgment affirmed where the trial court's methodology in informing and questioning the prospective jurors satisfied the requirements of Illinois Supreme Court Rule 431(b).
- ¶ 2 Following a jury trial, defendant Richard Hightower was found guilty of the Class 3 felony of attempted robbery and sentenced to 4 years' imprisonment with 1 year of mandatory supervised release and 445 days of presentence custody credit. On appeal, defendant maintains that the trial court denied him his right to a fair trial because it empanelled a jury that did not understand or accept the four principles enumerated in Illinois Supreme Court Rule 431(b) (eff.

July 1, 2012), which are essential to the qualification of a juror in a criminal case. Defendant concedes that he failed to preserve this issue for review because his trial counsel did not object during jury selection or in his motion for a new trial. However, defendant argues that we may review his forfeited claim under the second prong of the plain-error doctrine. In the alternative, defendant argues that his trial counsel was ineffective for failing to preserve the issue for review. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3 Defendant was charged with attempted robbery, aggravated battery on a public way, and unlawful restraint for events that occurred on May 17, 2013. Prior to trial, the court granted the State's motion to *nolle prosequi*, the unlawful restraint charge.

¶ 4 During jury selection, the trial court addressed the venire stating:

"In a moment, I'm going to read to you certain legal principles that you are to follow and apply in the case of [defendant]. After I've read them to you — one at a time, obviously — I'm going to then ask you, anybody out there as a possible juror not understand and accept that instruction. Don't understand it, don't accept it, raising your hand."

¶ 5 After the potential jurors were sworn, the trial court acknowledged the poor acoustics in the courtroom and asked the prospective jurors to let him know and move closer if they could not hear him. The court then explained:

"Because in a minute I'm going to read you certain legal principles that apply in the case of [defendant] as well as the other criminal case also. Once I'm done reading it to you, I'm going to then ask you what I told you a moment ago. And if there's a

possible juror not understand and accept that instruction. Don't understand or don't accept it, let us know by raising your hand. If you both understand and accept it, you don't have to do anything at that point.

First of all, under the law, the defendant is presumed innocent of the charge against him. That (unintelligible) every stage of the case. And not unless convinced beyond a reasonable doubt defendant is guilty.

Presumption of innocence, proof beyond a reasonable doubt. Anybody that's a possible juror understand and accept that instruction? If so, raise your hand now.

(No response.)

No hands, no response.

And these all pretty much go hand in hand together — these four principles. Secondly, the State — in this case, Melissa Samp and Grace Logan — the State has the burden of proving guilt beyond a reasonable doubt. That burden is on the State throughout the entire case.

Anybody that's a possible juror understand and accept that instruction? And, again, if so, raise your hand now.

(No response.)

And, again, no hands, no response.

Thirdly, [defendant] is not required to prove his innocence, call witnesses in his own behalf.

Anybody that's a possible juror understand and accept that instruction? And, again, if so, raise your hand now.

(No response.)

And, again, no hands, no response.

And the fourth principle, defendant has the absolute right to remain silent and not testify, choose not to testify. You as jurors cannot hold the fact against him in any way in reaching a verdict in this case.

Anybody that's a possible juror understand and accept that instruction? And again, it's as with the others. If so, raise your hand now.

(No response.)

And, again, no hands; no response."

¶ 6 The court continued with preliminary remarks and then proceeded to interview the potential jurors individually regarding their backgrounds and potential biases. During each interview with the prospective jurors, the trial court inquired whether anything caused them to believe that they could not be fair and impartial.

¶ 7 At trial, the victim, Salone Hanks, testified that at about 10 a.m. on May 17, 2013, she dropped her mother off in front of her building at 655 West 65th Street. After parking approximately 50 feet away, the victim removed groceries, including a white colored milkshake, from her car and began walking back toward her mother's building. As she walked, an

individual, whom the victim identified in court as defendant, approached her from behind and said "bitch give me your car keys." When she turned around, defendant struck her in the face and reached for her pockets. The victim tried to back up and push defendant away while he kept reaching for her pockets. During the struggle, the victim was screaming and hollering and when she dropped the milkshake, it "splattered everywhere." The struggle continued until several people emerged from a school building across the street and defendant ran away.

¶ 8 Shortly thereafter, police officers came to the scene. The victim told the police that someone tried to rob her and described her assailant as a heavysset black male, wearing a black shirt and jeans. The police took the victim into their vehicle and began searching the neighborhood for the defendant. He was spotted standing behind the gate of a school.

¶ 9 Joseph Foster testified that he was working as a security guard at Kershaw Elementary School on the day in question. At about 11 a.m. he saw an individual, whom he did not recognize, on the security camera go across the pre-kindergarten lot. Foster went outside and saw a "chubby" black male lying on the ground with his face covered. Defendant left when Foster told him to get out of "CPS property." Foster saw the same person with the police after they arrived about four to five minutes later.

¶ 10 Chicago Police Officer E. J. Heidewald testified that a nearby individual had directed him and his partner to the victim on the day in question. As they drove the victim around the area in the police vehicle, the victim said "that's him" and Officer Heidewald saw defendant behind a gate at the elementary school. When Officer Heidewald placed defendant in custody, he had a black jacket stained with a sticky and wet white substance. The jacket was entered into evidence as People's Exhibit No. 7.

¶ 11 After the State rested, defendant moved for a directed finding, which the court denied.

Defendant did not testify or present any evidence.

¶ 12 Following closing arguments, the trial court reminded the jurors that:

"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 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."

¶ 13 The jury found defendant guilty of attempted robbery but acquitted him of the aggravated battery charge.

¶ 14 Defendant filed a motion for a new trial, which the court denied.

¶ 15 The trial court sentenced defendant to four years' imprisonment with one year of mandatory supervised release for the Class 3 felony of attempted robbery.

¶ 16 Defendant filed a motion to reconsider sentence, which the court denied.

¶ 17 On appeal, defendant maintains that the trial court denied him his right to a fair trial because it empanelled a jury that did not understand or accept the four principles enumerated in Illinois Supreme Court Rule 431(b) (eff. July 1, 2012), which are essential to the qualification of a juror in a criminal case.

¶ 18 As an initial matter, defendant concedes that he did not preserve his claim of error because he did not object during jury selection and did not include the issue in his motion for a new trial. However, defendant argues that we may consider his forfeited claim of error under the second prong of the plain-error doctrine. Absent error, there can be no plain error. *People v. Bannister*, 232 Ill. 2d 52, 79 (2008). Thus, the first step in the plain-error analysis is to determine whether there was an error. *Id.* at 77. Here, we find that there was no error and therefore, no plain error. See *People v. Vargas*, 409 Ill. App. 3d 790, 796 (2011).

¶ 19 When an issue is raised concerning Illinois Supreme Court Rule 431(b) (eff. July 1, 2012), we must first determine whether the trial court violated the rule, and then, if it did, what consequences should flow from noncompliance. *People v. Wilmington*, 2013 IL 112938, ¶ 26. Our review of these questions is *de novo*. *Id.* (citing *People v. Thompson*, 238 Ill. 2d 598, 606-07 (2010)).

¶ 20 In *People v. Zehr*, 103 Ill.2d 472, 477 (1984), our supreme court articulated four principles that are essential to a juror's qualification in a criminal case. Illinois Supreme Court Rule 341(b) codifies these principles and requires a trial court to "ask each potential juror, individually or in a group, whether that juror understands and accepts" each enumerated principle:

"(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).

In addition, Rule 431(b) mandates a specific question and answer process (*Thompson*, 238 Ill. 2d at 607) wherein the "court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles." Ill. S. Ct. R. 431(b) (eff. July 1, 2012). A trial court's method of inquiry complies with Rule 431(b) when it is sufficient to ascertain the acceptance and understanding of the potential jurors. *Vargas*, 409 Ill. App. 3d at 796.

¶ 21 Here, both parties agree that the court addressed each principle, asked whether the potential jurors understood and accepted each principle, and provided them with an opportunity to respond as required by Rule 431(b). We agree that the trial court properly addressed each principle and asked whether the potential jurors understood and accepted them. However, because the court's explanation of how to communicate acceptance and understanding was somewhat ambiguous, we must determine whether that ambiguity interfered with the potential jurors' opportunity to respond in violation of Rule 431(b).

¶ 22 Here, prior to instructing the potential jurors regarding the *Zehr* principles, the trial court repeatedly explained that not raising one's hand would signal understanding and acceptance. Further, immediately before articulating the principles, the court stated, "And if there's a possible juror not understand and accept that instruction. Don't understand or don't accept it, let us know by raising your hand." The court elaborated, "If you both understand and accept it, you don't have to do anything at that point."

¶ 23 As such, the trial court emphasized that not raising one's hand signaled understanding and acceptance. Further, the court paused after each subsequent question allowing potential jurors time to respond and ask for clarification if needed. Despite the somewhat unclear explanation

that followed each principle, not one potential juror raised his or her hand or expressed any confusion regarding the principle or the method to communicate acceptance and understanding. See *People v. Ware*, 407 Ill. App. 3d 315, 356 (2011) (finding no error because there is no "special magic language" that needs to be used to show whether a potential juror understands and accepts the enumerated principles). Further, the trial court repeated, and thereby reinforced, the four *Zehr* principles before the jury began deliberation. See *id.* at 356-57 (trial court's repetition of *Zehr* principles prior to deliberation reinforced the earlier Rule 431(b) questioning and further showed there was no error). Based on the record as a whole, we do not find that the trial court's phrasing was fatal to the jurors' understanding acceptance or opportunity to respond.

Accordingly, the trial court's method of inquiry while less than perfect, was sufficient to ascertain acceptance and understanding in compliance with Rule 431(b). Thus, because we find no error, there can be no plain error. See *Vargas*, 409 Ill. App. 3d at 796.

¶ 24 Even if the trial court's instructions fell short of compliance with Rule 431(b), we would find that the defendant is not entitled to relief from forfeiture under the plain-error doctrine. Notably, the defendant does not contend that the first prong of the plain-error doctrine applies. Rather, the defendant argues that under the second prong of the doctrine, the trial court committed a Rule 431(b) violation, which impacted his right to an impartial jury and therefore affected the fairness of his trial. In making his argument, defendant disregards the instructions that immediately preceded the Rule 431(b) questioning and maintains that because no one in the venire raised their hands, all 49 of the prospective jurors were biased. Therefore, defendant concludes that he necessarily received an unfair trial by a biased jury. We disagree.

¶ 25 Our supreme court has held that Rule 431(b) questioning is simply one way of helping to ensure a fair and impartial jury and it is not the only means by which to achieve that objective.

Thompson, 238 Ill. 2d at 614-15 (citing *People v. Glasper*, 234 Ill. 2d 173, 195-96 (2009)). Thus, the questioning is not indispensable to the selection of an impartial jury and a Rule 431(b) violation does not require automatic reversal. *Thompson*, 238 Ill. 2d at 614-15. Accordingly, to obtain relief from forfeiture under the second prong of the plain-error doctrine, a defendant must show that the Rule 431(b) violation actually resulted in a biased jury. *Id.* at 615. Defendant has the burden of persuasion regarding jury bias under the plain-error analysis. *Id.* at 614.

¶ 26 The record does not support defendant's assertion that the entire panel of potential jurors did not accept nor understand the four principles enunciated by the court. Here, it is undisputed that the trial court articulated the *Zehr* principles and questioned the prospective jurors regarding their acceptance and understanding of those principles. The trial court inquired extensively and repeatedly into any potential bias of the venire. The court also individually requested confirmation of each juror's their ability to be impartial. Before the jury began deliberation, the trial court again repeated the four *Zehr* principles. Our precedent instructs us to presume that citizens sworn as jurors follow the law and the jury instructions given to them. See *Glasper*, 234 Ill. 2d at 201. Further, the fact that the jury acquitted defendant of the aggravated battery charge cuts against a finding of bias. Therefore, even if the trial court failed to comply with Rule 431(b), defendant is not entitled to relief from his forfeiture of that claim of error.

¶ 27 In sum, we find no error, and even if the court erred, defendant has not shown that the alleged Rule 431(b) violation resulted in a biased jury. Therefore, defendant's trial counsel was not ineffective for failing to object during *voir dire* nor for failure to include the issue in a posttrial motion. See *People v. Peoples*, 205 Ill. 2d 480, 532 (2002) (where the underlying issue has no merit, a defendant suffers no prejudice due to trial counsel's failure to preserve it for appeal).

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¶ 28 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 29 Affirmed.