2018 IL App (1st) 160150-U

No. 1-16-0150

Order filed September 19, 2018

Third Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 15 CR 14997
	)	
DANIEL VAZZANA,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE COBBS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Howse concurred in the judgment.

ORDER

¶ 1 *Held*: We reverse defendant's conviction for violating a protective order and remand for a new trial because the court's failure to ensure that jurors understood the principles stated in Illinois Supreme Court Rule 431(b) amounted to plain error where the evidence was closely balanced.

¶ 2 Following a jury trial, defendant Daniel Vazzana was convicted of a felony violation of an order of protection (720 ILCS 5/12-3.4(a) (West 2014)), and sentenced to two years' imprisonment. Defendant appeals, arguing that the trial court committed plain error by failing to

comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) during jury selection. He also argues that his conviction should be reversed because the State engaged in prosecutorial misconduct during closing argument. We reverse defendant's conviction and remand for a new trial.

¶ 3 Defendant was charged by information with aggravated domestic battery (720 ILCS 5/12-3.3(a) (West 2014)) and a felony violation of a protective order (720 ILCS 5/12-3.4(a) (West 2014)), stemming from an August 13, 2015, incident with his live-in girlfriend, Valeria Rickard. The case proceeded to a jury trial.

¶ 4 During jury selection, the court admonished the venire *en masse*. The court first informed prospective jurors about the presumption of innocence:

> "THE COURT: [A] criminal trial begins with a person accused of a crime walking into court presumed to be innocent. This is how a trial starts. The accused is presumed to be innocent. We don't take the position of, well, the accused must have done something wrong or else it wouldn't have gotten this far. Somebody must have done something or else there wouldn't be a trial. We do the opposite. The accused comes to court presumed to be innocent.
>
> Is there anybody here who has a disagreement or a problem with that proposition that when a criminal trial starts, the accused is presumed to be innocent? If you have a disagreement or problem with that please raise your hand."

None of the prospective jurors raised their hand.

¶ 5 The court next informed the potential jurors of the State's burden at trial:

"THE COURT: Criminal cases happen to run through the government. The government, it's their burden of proof. They have to prove guilt beyond a reasonable doubt. You don't guess somebody guilty or make a hunch about it or think about it. The only way they can be guilty is if the government who brought the charge can prove guilt beyond a reasonable doubt.

Is there anybody here who has a disagreement or problem with that? That's the only way you can prove guilty beyond a reasonable doubt.

If you have a disagreement or problem with that, please raise your hand."

Again, no potential juror raised their hand.

¶ 6 The court continued admonishing the venire as follows:

"THE COURT: In a criminal trial, the accused does not have to prove their innocence. An accused does not have to testify. They don't have to call any witnesses on their own behalf. In a criminal trial, the burden of proof is on the government. The government has to prove the guilt beyond a reasonable doubt. An accused does not have to prove anything at all.

Hypothetically speaking, there may be a criminal trial. The government may call 100 witnesses against the accused. The accused, which is their perfect right, chooses not to testify, and which is also their perfect right, chooses not to call witnesses on their own behalf.

After hearing from 100 people on one side and no people on the other, there can be a reasonable doubt in the jury's mind as to whether or not the government has met their burden of proof.

> With that said, is there anybody who has a disagreement or a problem with that proposition? Anybody hold it against the accused that they did not testify, which is their perfect constitutional right, or did not call any witnesses in their own behalf, which is als their right? Anybody who thinks that there is some expectation that defendant needs to testify and explain the evidence or somehow defend themselves by testifying? If you have a disagreement or problem with that, the defendant does not have to testify or call any witnesses or prove anything in a criminal case, please raise your hand."

No prospective juror raised their hand. After jury selection, the trial commenced.

¶ 7 Rickard testified that, on August 13, 2015, she and her children shared an apartment with defendant, her boyfriend. Rickard had a protective order that was in effect at the time that prevented defendant from being on Rickard's property under the influence of alcohol. Rickard identified the protective order as People's Exhibit No. 1.

¶ 8 That night, Rickard was in the apartment with her youngest child while defendant was outside playing with Rickard's eight-year-old daughter and other neighborhood children, including Alexis Vargas. Rickard's daughter came inside and complained that defendant had not allowed her to take her turn in a game. When Rickard went outside to talk to defendant, she saw a beer can and he appeared to be intoxicated. She told defendant to stop treating her children "like crap" if he wanted to remain in a relationship with her. He "got in" her face and whispered derogatory remarks. Rickard attempted to back up, but defendant continued to position himself within inches of her face. Rickard then pushed defendant backward. He complained that she had poked him in the eye and then kicked her left thigh multiple times. Rickard reached out with her left arm to block defendant's kicks. He kicked again and struck Rickard's outstretched arm. She

heard a snap and felt an instant burning through her arm. Rickard told defendant that he had broken her arm, which he denied. Rickard's eight-year-old daughter then walked outside, told defendant that he had hurt her mother, and slapped him. Rickard told defendant that she was going to call the police and he ran inside, grabbed some items, and left. Rickard spoke to the police when they arrived. She did not go to the hospital at that point because two of her children needed to be picked up and she needed to make childcare arrangements. Her brother eventually picked up her children and she went to the hospital. There, she was diagnosed with a fractured left wrist. She estimated that she wore a cast for six to seven weeks.

¶ 9 On cross-examination, Rickard testified that defendant had been drinking beer for three hours prior to the incident. She acknowledged that she did not call the police to report defendant's drinking in violation of the protective order. She stated that defendant kicked her "three to five times." She denied that she followed defendant as he left the apartment. She also denied falling down. Rickard admitted that she declined the offer to have emergency medical services come to her apartment and treat her injuries. The responding officers did not photograph her injuries. Rickard admitted that she left for the hospital before her brother arrived to care for her children.

¶ 10 Vargas, who was 12 years old at the time of trial, testified that she lived in the same apartment building as Rickard. That evening, Vargas was outside with defendant, Rickard's daughter, and other neighborhood children. Defendant had been playing a game where he lifted the children and spun them around. Rickard's daughter believed that defendant had skipped her turn and went inside to complain to her mother. Rickard came outside and told defendant to come inside. Vargas stated that defendant "started to get in [Rickard's] face" and mumble things

to her. Vargas could not hear what defendant said. Rickard backed away and defendant again moved close to her. Rickard pushed defendant. He grabbed his face and told her that she had poked him in the eye. Rickard moved toward the curb and defendant kicked her left leg. Vargas stated that defendant kicked Rickard "three to five times." Rickard used her left arm to shield her leg from defendant's kicks. Vargas heard Rickard tell defendant that he had broken her arm. Vargas estimated that she was standing 10 to 12 feet away when defendant kicked Rickard. Vargas did not see Rickard fall down.

¶ 11 On cross-examination, Vargas testified that she did not speak with the responding officers. Vargas acknowledged that she plays with Rickard's children and that Rickard had babysat for her in the past. She admitted that, prior to her testimony, she had discussed the events of that night with Rickard. She also admitted that she was present when Rickard was questioned by the assistant State's Attorney and that Rickard was present when she was questioned.

¶ 12 On redirect-examination, Vargas testified that she was telling the truth. She stated that she never saw Rickard fall down or trip.

¶ 13 The parties stipulated that defendant had a prior qualifying offense for purposes of the offense of violation of an order of protection.

¶ 14 During closing argument, the State argued that it had met its burden to prove defendant guilty beyond a reasonable doubt through the testimony of Rickard and the corroborating testimony of Vargas. After highlighting this testimony, the prosecutor remarked: "There's, in fact, no other evidence to the contrary."

¶ 15 Defense counsel argued that Rickard's testimony defied common sense and raised doubt about what transpired. Counsel further argued that Vargas's testimony should be viewed in light

of her relationship with Rickard and the fact that she admitted to discussing the events with Rickard in advance of her testimony. Counsel highlighted that both Rickard and Vargas testified that defendant kicked Rickard "three to five times," and argued that this language was "unusual" for someone Vargas's age. Counsel then discussed the witnesses that the jury did not hear from and rhetorically asked why not "one impartial witness" was called to corroborate Rickard's story.

¶ 16 In rebuttal, the State maintained that the testimony from Rickard and Vargas "was consistent, it was credible, and it was unimpeached." The prosecutor called allegations that Vargas was biased "a bit of a stretch," and then remarked:

> [STATE'S ATTORNEY]: "Vargas was outside that day and saw what happened. Now, sure, I suppose we could have paraded the other children that were out that day in court and had them testify in front of you, but we didn't. We had [Vargas] testify for you. [Vargas] told you what happened. She was not lying."

¶ 17 During deliberations, the jury sent several notes to the court. First, the jury asked the court for police reports, medical records, or photographs. The jury also asked how long after the incident the charges were filed. The court informed the jury that police reports were not evidence, that they had heard all of the evidence received, and to continue deliberations. The jury then asked the court for the transcripts of Vargas's testimony and defense counsel's opening and closing remarks. In addition, the jury asked if being under the influence of alcohol on the property constituted a violation of the order of protection and, also, if "intimidation" would violate the order of protection. The court responded that the transcripts were not available. The court further responded that the answer to the jury's remaining questions should be found in the jury instructions that they received. Next, the jury asked for the definition of "great bodily

harm," which the court answered by telling the jury that the words "mean what they say." Another jury note asked if there was any evidence that substantiated Rickard's injuries. The court informed the jury that this was a question of fact that the jury had to resolve. The jury then asked if they could contact their family and informed the court that they were split on the aggravated domestic battery count. The court brought the jury into the courtroom and told them that the jury could inform their families where they were and when they could be expected home. The court also told the jurors to continue deliberating. Finally, the jury sent a note indicating that, after six hours of deliberation, they could not come to a decision on the aggravated domestic battery charge. The court brought the jury out and the forewoman confirmed that they jury was deadlocked as to that issue, but had reached a verdict on the violation of the protective order charge.

¶ 18 After deliberation, the jury found defendant guilty of violating a protective order. The court declared a mistrial on the aggravated domestic battery charge. Prior to sentencing, the State moved to *nolle prosequi* the aggravated domestic battery charge. Defendant moved for a new trial, which the court denied. The court then sentenced defendant to two years' imprisonment.

¶ 19 On appeal, defendant argues that he was denied his right to a fair trial by an impartial jury because the trial court failed to strictly comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012), and, therefore, his case should be remanded for a new trial before an impartial jury. He also argues that his conviction should be reversed because the State engaged in prosecutorial misconduct during closing argument. We first address defendant's contention that the court failed to comply with Rule 431(b).

¶ 20 In setting forth this argument, defendant acknowledges that he has forfeited this issue on appeal by failing to raise the issue in the trial court and in a posttrial motion. *People v. Thompson*, 238 Ill. 2d 598, 611 (2010) ("To preserve a claim for review, a defendant must both object at trial and include the alleged error in a written posttrial motion."). However, he asks us to review this issue under the plain-error doctrine, arguing that the evidence that he physically abused Rickard in violation of the protective order was so closely balanced that the trial court's error threatened to tip the scales of justice against him.

¶ 21 Under the plain-error doctrine, a reviewing court may consider unpreserved error when "(1) a clear or 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, or (2) a clear or obvious error occurred and the 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." See Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967); *People v. Sargent*, 239 Ill. 2d 166, 189 (2010). Under either prong of the plain-error doctrine, the burden of persuasion remains on the defendant. *People v. Nowells*, 2103 IL App (1st) 113209, ¶ 19. However, before considering whether the plain-error exception to the rule of forfeiture applies, a reviewing court conducting plain-error analysis must first determine whether an error occurred, as "without reversible error, there can be no plain error." *People v. McGee*, 398 Ill. App. 3d 789, 794 (2010).

¶ 22 Here, the parties agree, as do we, that the trial court erred by failing to properly ask the venire members if they understood and accepted the four principles outlined in Rule 431(b). Rule 431(b) requires that a trial court ask potential jurors whether they understand 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).

¶ 23 Our supreme court has held that Rule 431(b) requires that the trial court ask potential jurors whether they understand and accept the enumerated principles in a " 'specific question and response process,' " and that simply asking whether the jurors agree or disagree with the principles is insufficient. *People v. Wilmington*, 2013 IL 112938, ¶ 32 (quoting *People v. Thompson*, 238 Ill. 2d 598, 607 (2010)).

¶ 24 In this case, the court asked whether the prospective jurors had "a disagreement or a problem with" each principle. "[I]t 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. However, the trial court's failure to ask whether the jurors understood the principles constitutes error alone." *People v. Belknap*, 2014 IL 117094, ¶ 46; see also *People v. Sebby*, 2017 IL 119445, ¶ 49 (finding "clear error" where the trial court asked the jurors whether they "had any problems with" or "believed in" the 431(b) principles). Accordingly, the court erred in failing to comply with the requirements of Rule 431(b).

¶ 25 Despite this error, defendant is not entitled to relief unless he can establish that it constituted plain error. Defendant argues that the improper admonishments amount to plain error because the evidence at trial was closely balanced and came down to a "pure case of credibility."

¶ 26 "[A] reviewing court must undertake a commonsense analysis of all the evidence in context when reviewing a claim under the first prong of the plain-error doctrine." *People v. Belknap*, 2014 IL 117094, ¶ 50. Such an inquiry involves an assessment of the evidence on the elements of the charged offense or offenses, along with any evidence regarding the witnesses' credibility. *People v. Sebby*, 2017 IL 119445, ¶ 53.

¶ 27 Here, defendant was charged with a felony violation of a protective order. To prevail, the State was required to prove the following elements: (1) defendant physically abused Rickard; (2) in violation of a protective order; (3) that was in effect at the time of the abuse; (4) after defendant had been served notice of the contents of the order or otherwise had actual knowledge of the contents of the order; and (5) defendant had previously been convicted of a qualifying offense. See 720 ILCS 5/12-3.4(a) (West 2014).

¶ 28 Defendant's argument is essentially limited to the first element. He contends that the evidence that he physically abused Rickard was so closely balanced that the court's error threatened to tip the scales of justice against him. Specifically, defendant points to the fact that there was no corroborating evidence presented, such as medical reports or photographs of Rickard's injuries, and, therefore, the case hinged exclusively on the jury's determination regarding the credibility of the State's witnesses. We agree.

¶ 29 The evidence that defendant physically abused Rickard comes exclusively from the testimony of both Rickard and Vargas. Rickard testified that defendant kicked her several times, breaking her wrist, after she confronted him about his mistreatment of her children. Rickard admitted that she refused medical assistance at the scene and went to the hospital later in the evening where she was diagnosed with a fractured wrist. The State did not introduce any

physical evidence, such as photographs or a medical report, to corroborate that Rickard had been injured. Rather, the State relied on the testimony of Vargas, a 12-year-old child, who was present at the time, to corroborate Rickard's testimony. Vargas, however, was a friend to Rickard's children and Rickard had babysat Vargas in the past. In addition, Vargas did not speak with police after the incident and, prior to testifying, discussed the case with Rickard. Vargas was also present when the assistant State's Attorney questioned Rickard about the case and Rickard was present when Vargas was being questioned. Therefore, defendant's conviction rested entirely on how the jury viewed the credibility of these two witnesses.

¶ 30 Our supreme court has found that, when the outcome of case rests solely on a "contest of credibility," the evidence may be considered closely balanced. See *People v. Sebby*, 2017 IL 119445, ¶ 63 (finding that the evidence was closely balanced where the outcome of the case turned on how the trier of fact resolved a "contest of credibility" in which the defense witnesses' account of events was "no less plausible" than the State's witnesses' version, and neither version was supported by corroborating evidence); *People v. Naylor*, 229 Ill. 2d 584, 606-07 (2008) (finding that the evidence was closely balanced where the case was a "contest of credibility" between two officers and the defendant, who testified to two credible versions of events without any corroborating extrinsic evidence). Here, as mentioned, defendant's conviction rested solely upon the credibility of two State's witnesses. In the context of this case, given the totality of the circumstances, we conclude that the evidence is closely balanced.

¶ 31 In reaching this conclusion, we are not persuaded by the State's reliance on *People v. Adams*, 2012 IL 111168 and *People v. Brookins*, 333 Ill. App. 3d 1076 (2002). In *Adams*, the court concluded that the evidence was not closely balanced because defendant's version of

events, which included him unwittingly parking next to cocaine that was lying unsecured on the ground right before being approached by police officers, was "highly improbable" even if it was not "logically impossible." *Adams*, 2102 IL 111168, ¶ 22. In *Brookins*, the court concluded that the evidence was not closely balanced where the defendant (1) was seen entering a residence that was not his; (2) arrested as he exited a nearby alley, (3) possessed a bag with $140 in coin currency, (4) and the arresting officer testified that the defendant admitted that he "only took the change." *Brookins*, 333 Ill. App. 3d at 1084. Here, unlike *Adams* or *Bookins*, there was no corroborating physical evidence, such as a bag of cocaine or coin currency, and defendant did not provide a "highly improbable" version of events.

¶ 32 Defendant's final requirement for relief under first-prong plain error is to show prejudice. *Sebby*, 2017 IL 119445, ¶ 68. As our supreme court has recently clarified, "[w]hat makes an error prejudicial is the fact that it occurred in a close case where its impact on the result was potentially dispositive." *Id.* Thus, "[t]he only question in a first-prong case, once clear error has been established, is whether the evidence is closely balanced." *Id.* at ¶ 69. Because defendant has shown clear error in a case where the evidence was closely balanced, he has shown that he was prejudiced. As such, we reverse defendant's conviction and remand the case for a new trial.

¶ 33 Given that the trial court's error in adhering to Rule 431(b) amounted to plain error, we need not address defendant's claim that he was prejudiced by the prosecutor's alleged improper remarks during closing argument. Further, although we conclude that the evidence is closely balanced, we nevertheless find, after carefully reviewing the record, that the evidence was sufficient to prove defendant guilty beyond a reasonable doubt. Therefore, there is no double jeopardy impediment to a new trial. See *People v. Piatkowski*, 225 Ill. 2d 551, 567 (2007) ("[W]e

find that the evidence was sufficient to convict for reasonable doubt purposes, thereby precluding any double jeopardy claim on remand should we determine that a new trial is warranted.").

¶ 34 For these reasons, we reverse the judgment of the circuit court of Cook County and remand for further proceedings.

¶ 35 Reversed; cause remanded.