

¶ 3

BACKGROUND

¶ 4 The State charged defendant with 18 counts of predatory sexual assault of a child, and 60 counts of aggravated criminal sexual abuse. 720 ILCS 5/11-1.40(a)(1) (West 2012); 720 ILCS 5/11-1.60 (West 2012). The State proceeded to trial on 3 counts of predatory criminal sexual assault of a child and 6 counts of aggravated criminal sexual abuse.

¶ 5 During *voir dire*, the circuit court addressed the prospective jurors:

“Now, I’m going to read for you some very important constitutional principles that American law is based upon. And in each case, I want to ask you if anyone has a problem with this proposition to please raise your hand.

Does everyone understand that a person accused of a crime is presumed to be innocent of the charge, him or her? Does anyone not understand and accept that proposition, the presumption of innocence? If so, please raise your hand. No one has raised their hand. Let the record reflect that.

Next proposition, that the presumption of innocence stays with the defendant throughout the trial and is not overcome unless from all the evidence you believe the State has proved his or her guilt beyond a reasonable doubt.

Does anybody not understand and accept that proposition? If so, please raise your hand. Let the record reflect there was [*sic*] no hands.

This means the State has the burden of proving a defendant's guilt beyond a reasonable doubt. Does anyone not understand that or have a problem with that? If so, please raise your hand. Let the record reflect no hands were raised.

This means that the defendant does not have to prove his innocence or need to present any evidence on his own behalf. That's the law.

Does anyone have any problems with that law? Nobody has raised their hand.

Do you also understand this means the defendant does not have to testify if he chooses not to do so? Does anyone have a problem with that proposition, which is the law? Nobody has raised their hand.

Do you understand that if the defendant does not testify then this must not be considered by you in any way in reaching your verdict? Anybody fail to understand that or have an argument with that? No one has raised their hand.

Do you understand that if the defendant does testify, then you should judge his credibility, his testimony, in the same manner as you would judge the testimony of any other witness? Does anyone disagree with that or have a problem with that? If so, please raise your hand. Let the record reflect no one has done so.

Does anybody – now, formally, do you have any disagreements, questions, or problems with any of these constitutional principles of law that I just read to you? If so, please raise your hand. Nobody has raised their hand.”

Defendant did not object to the court’s questioning of prospective jurors in this manner, and the jury was eventually seated.

¶ 6 The alleged victim of defendant’s abuse was his daughter, M.S. The State’s first witness was M.S.’s pediatrician, Dr. Helen Arkema. Dr. Arkema testified that she performed a general physical examination on M.S., who was then 11 years old. During the examination, M.S. started sobbing. When Dr. Arkema asked her why she was crying, M.S. told her that her father “used her” and sucked on her breasts and genitals. M.S. also told her that her father had put his penis between her legs. Dr. Arkema testified that after she called the police and a colleague who specialized in treating victims of child abuse, she finished the exam and found no physical signs of abuse.

¶ 7 M.S., then 14 years old, testified next. She testified that although she did not remember each and every instance of abuse, she did remember what defendant had done to her. She was four or five years old the first time that he abused her. From that time, she testified that the abuse continued at least once per month until the day that she told Dr. Arkema about it. She testified that defendant touched her breasts with his hands and licked and sucked them. She also testified that he touched her vagina and her buttocks with his hand, mouth, and penis. When other people were present, defendant would let her know that he wanted to abuse her by whispering in her ear.

He would whisper in English, as M.S. did not speak any other language. She testified that English was the language spoken in her home.

¶ 8 Police social worker Natalia Mercado testified next. The day after Dr. Arkema learned of the abuse, Ms. Mercado conducted a video-taped forensic interview with M.S. The video was published to the jury and M.S.'s statements in the interview were consistent her live testimony.

¶ 9 Dr. Suzanne Dakil, a qualified expert in child-abuse pediatrics, testified next. She testified that she examined M.S. within a week of her examination by Dr. Arkema. Based on the examination, she could not state within a degree of medical certainty that M.S. was abused. But she also testified that only three to five percent of child victims of sexual abuse have indicative findings.

¶ 10 Detective Jeff Jacoby testified that he responded to a call from Dr. Arkema on the day of M.S.'s physical examination. When he interviewed M.S., she told him that her father had been kissing her and touching her "in places." When asked to be more specific, she indicated to her breasts and vaginal area. She told him that it began when she was around five years old, had happened many times since, and was still happening.

¶ 11 The next day, Detective Jacoby interviewed defendant. Using a pre-printed form, he informed defendant of his *Miranda* rights. Detective Jacoby read each line and asked each question in English, and defendant replied appropriately to each question in English and initialed each line on the form. After going through the form, Detective Jacoby asked defendant if he understood what had just been read to him, and if he did not have any questions, to sign the form, which defendant did. During the next 20 minutes, defendant confessed to having sexual contact with his daughter and penetrating her, digitally, orally, and with his penis.

¶ 12 Assistant State's Attorney Melissa Samp testified that Detective Jacoby requested that she join the interview to help prepare a written statement for defendant. When she arrived, she again informed defendant of his *Miranda* rights. She testified that he agreed to have his statement memorialized in writing, and that she typed his statements into a computer. She then printed the statement and had defendant read the first paragraph aloud to ensure that he understood English. He never indicated that he did not understand English, and Ms. Samp had no problem understanding him. Various changes were made and initialed by defendant, and he signed the bottom of each page. Ms. Samp and Detective Jacoby also signed each page.

¶ 13 The statement was published to the jury. In it, defendant detailed a number of occasions in which he had inappropriately touched his daughter, beginning when she was six years old. He admitted to touching, kissing and licking M.S.'s chest and vagina, as well as rubbing his penis on her vagina and buttocks. He also stated that he "showed [M.S.] how to rub his penis", and would occasionally give her money to get her to cooperate. The State rested at the end of Ms. Samp's testimony. Defendant moved for a directed verdict, which the court denied.

¶ 14 Defendant then testified on his own behalf through an interpreter. He testified that he was from India and that his primary language was Malayalam. He denied being read his *Miranda* rights before he was asked to sign a paper. He also testified that he asked for a lawyer, but that Detective Jacoby ignored him. He testified that he never admitted to any wrongdoing, and that he only signed the document prepared by Ms. Samp because he thought it was a bond slip, and because Ms. Samp and Detective Jacoby told him to sign it. On cross-examination, defendant admitted that he had taken and passed the driver's license test and citizenship exam, both in

English. He also admitted that M.S. did not speak Malayalam and that his sons only knew a little. He also worked at a printing company, where was required to speak English with a coworker.

¶ 15 The jury found defendant guilty of 3 counts of predatory criminal sexual assault of a child and 6 counts of aggravated criminal sexual abuse. The circuit court denied defendant's motion for a new trial and sentenced him to 68 years' imprisonment. This appeal followed.

¶ 16 ANALYSIS

¶ 17 Defendant argues that he is entitled to a new trial because the circuit court failed to comply with Rule 431(b). This case provides an example of how even very experienced and able trial judges can run afoul of Rule 431(b) when they try to simplify its principles for jurors. When delivering admonishments to prospective jurors, criminal defendants, or others, trial court judges need only "read the words from the rule directly into the record," which serves to "preserve judicial resources, expedite resolution of any challenges, and result in predictable and consistent results." *People v. Dominguez*, 2012 IL 111336, ¶¶ 66-67.

¶ 18 Defendant argues that the circuit court failed to ask the prospective jurors whether they both understood and accepted Rule 431(b)'s third and fourth principles – that the defendant is not required to offer any evidence on his behalf and that the defendant's decision not to testify should not be held against him. Defendant acknowledges that this issue was neither raised at trial nor in a posttrial motion. Thus, he requests plain error review and argues the evidence is closely balanced, warranting a new trial.

¶ 19 Rule 431(b) states that the circuit court shall ask each prospective juror whether he or she "understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must

prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant's failure to testify cannot be held against him or her ***." Ill. S. Ct. R. 431(b) (eff. July 1, 2012). "The language of Rule 431(b) is clear and unambiguous." *People v. Thompson*, 238 Ill. 2d 598, 607 (2010). While questioning may be performed either individually or in a group, the rule requires an opportunity for a response from each prospective juror on their understanding and acceptance of the rule's four principles. *Id.* We review compliance with supreme court rules *de novo*. *Id.* at 606-07.

¶ 20 The plain error doctrine allows a reviewing court to bypass normal forfeiture principles and consider an otherwise unpreserved error affecting substantial rights when either: "(1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." *People v. Herron*, 215 Ill. 2d 167, 187 (2005); *see also* Ill. S. Ct. R. 615(a) (eff. Jan 1, 1967). Defendant seeks application of only the first prong of the plain error rule, *i.e.*, "where the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence." *Herron*, 215 Ill. 2d at 178.

¶ 21 Here, the circuit court correctly recited the rule's first and second principles. The court also correctly recited the third principle – the defendant is not required to offer any evidence on his own behalf – although the court included language not required by the rule ("the defendant does not have to prove his innocence"). *Id.* The court, however, did not ask the prospective jurors whether they understood the third principle, instead stating to them, "[t]hat's the law."

¶ 22 Trial courts are required to ask prospective jurors whether they both understand and accept Rule 431(b)'s principles. *See People v. Belknap*, 2014 IL 117094 ¶ 46 (failure to ask whether the prospective jurors understood the rule's principles constituted error alone); *People v.*

Wilmington, 2013 IL 112938, ¶ 32 (failure to ask prospective jurors if they understood the rule’s principles was “error in and of itself”). Here, the court failed to comply with Rule 431(b) when it failed to ask the prospective jurors whether they understood the third principle.

¶ 23 The circuit court also failed to ask the prospective jurors whether they *accepted* Rule 431(b)’s third principle. Instead, the court asked “Does anyone have any problems with that law?” Courts fail to comply with Rule 431(b) when asking prospective jurors whether they “have any problems” with the rule’s principles or use similar language in lieu of “acceptance.” *See People v. Sebby*, 2017 IL 119445, ¶ 49 (finding failure to comply with Rule 431(b) when the court asked prospective jurors whether they “had any problems” or “believed in” the rule’s four enumerated principles); *see also Wilmington*, 2013 IL 112938, ¶ 28 (failure to comply with Rule 431(b) when the court asked prospective jurors whether they disagreed with three of the rule’s principles). In this case, the court failed to inquire whether the prospective jurors accepted Rule 431(b)’s third principle. Although the court did not use the same language for its questions on all four principles, the rule requires the court to specifically ask whether the prospective jurors both understand and accept each of the rule’s principles. *See People v. Morris*, 2013 IL App (1st) 110413, ¶ 83.

¶ 24 Further, the circuit court failed to correctly recite the fourth principle – that the defendant’s failure to testify cannot be held against him. Instead, the court stated, “Do you understand that if the defendant does not testify then this must not be considered by you in any way in reaching your verdict?” Despite this incorrect recitation, the court properly asked the prospective jurors whether they understood the principle, but did not inquire whether they accepted the principle. Instead, the court asked “Anybody *** have an argument with [the fourth

principle]?” Rule 431(b) requires courts to ask jurors whether they accept the fourth principle, not whether they have arguments against the rule’s principles. *See* Ill. S. Ct. R 431(b) (eff. July 1, 2012). Overall, we must conclude the court failed to comply with the rule. *Sebby*, 2017 IL 119445, ¶ 49.

¶ 25 The circuit court’s failure to comply with Rule 431(b) requires a determination of whether the first prong of the plain error rule applies. Under that prong, we may disregard forfeiture principles and consider an unpreserved error if the evidence is close, regardless of the seriousness of the error, or, where the evidence is so close that the jury’s guilty verdict may have resulted from the error and not the evidence. *Herron*, 215 Ill. 2d at 178, 187. When determining whether the evidence presented at trial was close, “a reviewing court must evaluate the totality of the evidence and conduct a qualitative, common-sense assessment of it within the context of the case.” *Sebby*, 2017 IL 119445, ¶ 53. We conclude the evidence here was not closely balanced and that the jury properly found defendant guilty of predatory sexual assault of a child and aggravated criminal sexual abuse. 720 ILCS 5/11-1.40(a)(1) (West 2012); 720 ILCS 5/11-1.60 (West 2012).

¶ 26 Defendant argues that the evidence presented at trial is closely balanced because it amounted to a credibility contest between M.S. and defendant. In particular, defendant points to the disavowal of his written confession and his failure to fully understand his *Miranda* rights due to his limited English. Also, defendant testified that he only signed a *Miranda* waiver form and the written statement because he was told it was routine to do so and that he could go home and return to court later. Further, defendant points to the testimony of the State’s child-sexual abuse

expert, who could not say within a reasonable degree of medical certainty that M.S. was sexually abused. Defendant's argument is unavailing.

¶ 27 Defendant made separate oral inculpatory admissions to Ms. Samp and Detective Jacoby regarding his physical contact with M.S. Both Ms. Samp and Detective Jacoby notified defendant of his *Miranda* rights, and defendant stated that he understood the warnings. He then provided a narrative to the assistant state's attorney, which was summarized into a written statement describing the physical contact he had with M.S. Ms. Samp read each line of the statement aloud with defendant and he then signed each page indicating its accuracy.

¶ 28 Defendant's written statement is consistent with: (1) the oral admissions he made to Ms. Samp and Detective Jacoby; (2) the descriptions of abuse which M.S. related to Dr. Arkema; (3) M.S.'s statements to Detective Jacoby; (4) M.S.'s statements during her forensic interview; and (5) M.S.'s testimony at trial. *See People v. Jackson*, 2012 IL App (1st) 092833, ¶ 35 (finding evidence of predatory criminal sexual assault was not closely balanced because the defendant's oral admission to an assistant state's attorney, which the defendant later disavowed, was consistent with the testimony of several witnesses, including the victim and individuals to whom the victim described the sexual contacts).

¶ 29 Defendant's reliance upon *Sebby* is unpersuasive because the defendant in *Sebby*, unlike defendant here, made no oral or written admissions of guilt. Instead, the court in *Sebby* found the evidence was closely balanced because both parties presented plausible versions of what occurred and neither version was supported by corroborating evidence. *Sebby*, 2017 IL 119445, ¶ 62. Here, M.S.'s version of what occurred is supported by the testimony of numerous witnesses and defendant's admissions.

¶ 30 Defendant also argues that he did not fully understand his *Miranda* rights and disavowed his written statement because of his limited English. Although defendant is not a native English speaker, his English skills were evident. Multiple witnesses testified to defendant's ability to speak, understand, and read English. M.S. testified that English was spoken at home and that defendant whispered to her in English when he sought physical contact. Defendant admitted that M.S. does not speak his native language, Malayalam. Both Ms. Samp and Detective Jacoby testified that defendant spoke to them in English and that they had no problem understanding him. Ms. Samp spoke to defendant in English and he never indicated that he did not understand her at any point while she prepared the written statement. She testified that she even had defendant read aloud a portion of the statement in order to clarify that he understood English.

¶ 31 Additional evidence bolsters the conclusion that defendant's English was sufficient. For example, defendant never requested an interpreter while was being interviewed by Ms. Samp or Detective Jacoby. Although he used a Malayalam interpreter during the trial, defendant directly responded to questions asked in English and spoke English several times while testifying. Defendant initially testified that he "never learned English," but later admitted that he understood "a little bit of English." Further, defendant testified that he passed driver's license and citizenship exams, both given in English. Defendant has lived in the United States since 1993 and his job required him to speak with a co-worker in English. None of these facts standing alone establishes defendant's English skills. However, a common-sense evaluation of the totality of the evidence establishes that defendant's English was sufficient for him to understand his *Miranda* rights and the written statement he provided.

¶ 32 In support of his closely balanced evidence argument, defendant contends that he signed the *Miranda* waiver form because the detective and another officer informed him that signing the waiver form is routine. This claim, if true, casts further doubt on defendant's assertion that his English skills are limited. Defendant also testified that he signed the written statement because he was told that it was a bond slip. Yet, defendant read aloud at trial, in English and without the assistance of his interpreter, the first four words of the statement entitled, "Statement of Kuruvila Kandathil." Ms. Samp testified at trial that she read aloud all nine pages of the statement with defendant, and defendant subsequently signed each page, indicating that he understood what he was signing.

¶ 33 Finally, defendant points to the testimony of Dr. Dakil, who could not state within a reasonable degree of medical certainty that M.S. was sexually abused. Nevertheless, we must conduct a common-sense assessment of all the evidence presented at trial within the context of the case. *Sebby*, 2017 IL 119445, ¶ 53. Here, Dr. Dakil's inability to state within a reasonable degree of medical certainty that M.S. was sexually abused does not sufficiently counterbalance defendant's oral confession, written statement, and the testimony of several witnesses supporting the statement, especially in light of Dr. Dakil's testimony that only three to five percent of children who have been the victims of sexual abuse have indicative findings on an examination.

¶ 34 Furthermore, the first prong of the plain error test requires more than closely-balanced evidence; it requires proof of prejudice from a clear and obvious error, in that there is a resulting possibility that the jury's verdict may have resulted from the error rather than the evidence. *People v. Ely*, 2018 IL App (4th) 150906, ¶ 18. That is, the claimed error "has to be of *such a nature* that it might have tipped the scales against the defendant." (Emphasis in original.) *Id.* In

this case, defendant has failed to demonstrate how plain error resulting from the circuit court's failure to comply with Rule 431(b) affected the outcome of the trial. In sum, we find that the evidence was not closely balanced and that the circuit court's error under Rule 431(b) does not rise to the level requiring a plain error analysis.

¶ 35

CONCLUSION

¶ 36 We affirm the judgment of the circuit court of Cook County.

¶ 37 Affirmed.