

**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).

**FILED**

March 28, 2018  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

2018 IL App (4th) 151005-U  
NO. 4-15-1005

IN THE APPELLATE COURT  
OF ILLINOIS  
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macoupin County
RODNEY J. CUNNINGHAM,	)	No. 15CF81
Defendant-Appellant.	)	
	)	Honorable
	)	Joshua Aaron Meyer
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.  
Presiding Justice Harris and Justice Steigmann concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant affirmatively waived his claim the trial court failed to properly question the prospective jurors on the principles stated in *People v. Zehr*, 103 Ill. 2d 472, 469 N.E.2d 1062 (1984).

¶ 2 In July 2015, defendant, Rodney J. Cunningham, was convicted of four counts of aggravated assault of a peace officer (720 ILCS 5/12-2(b)(4) (West 2014)) and found not guilty of one count of aggravated battery (720 ILCS 5/12-3.05(d)(4)(i) (West 2014)). In September 2015, the trial court sentenced defendant to 3 years and 6 months in prison on each of the aggravated assault convictions to be served concurrently. Defendant appeals, arguing the court failed to properly question the jurors pursuant to *People v. Zehr*, 103 Ill. 2d 472, 469 N.E.2d 1062 (1984). We affirm.

¶ 3 I. BACKGROUND

¶ 4 In May 2015, the State charged defendant by information with one count of

aggravated battery (720 ILCS 5/12-3.05(d)(4)(i) (West 2014)) and one count of aggravated assault of a peace officer (720 ILCS 5/12-2(b)(4) (West 2014)). In July 2015, the State charged defendant with an additional three counts of aggravated assault of a peace officer.

¶ 5 Defendant's trial was held in July 2015. In questioning the first panel of prospective jurors, the trial court stated in relevant part:

“The last thing I have to do is read you four things that are called *Zehr* principles. These are important principles in criminal cases, and every judge must read these to the jury.

The first one is the Defendant is presumed innocent until the jury determines, after deliberation, that the Defendant is guilty beyond a reasonable doubt.

Does anyone disagree with this rule of law? If you disagree, raise your hand.

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The State has the burden of proving the Defendant guilty beyond a reasonable doubt.

Does anyone disagree with that rule of law?

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The Defendant does not have to present any evidence at all and may rely on the presumption of innocence.

Does anyone disagree with this rule of law?

\*\*\*

The Defendant does not have to testify.

Would any of you hold the fact that the Defendant did not testify at trial against the Defendant \*\*\*[?]"

No prospective juror expressed any disagreement with these principles. The court then asked, "All right, do the parties believe that the venire has been properly admonished as [to the] *Zehr* principles?" Both defense counsel and the State responded, "Yes, Your Honor."

¶ 6 The trial court asked the same questions of the other panels of prospective jurors until a jury was selected. No prospective juror expressed any disagreement with these principles. Defense counsel stated he believed the prospective jurors had been properly admonished as to the *Zehr* principles.

¶ 7 After hearing the evidence in this case, the jury found defendant not guilty of aggravated battery and guilty of four counts of aggravated assault of a peace officer.

¶ 8 This appeal followed.

¶ 9 II. ANALYSIS

¶ 10 Defendant argues the trial court failed to properly question the prospective jurors regarding the *Zehr* principles because it failed to determine whether the jurors both understood and accepted the *Zehr* principles. The court only asked if prospective jurors disagreed with these principles.

¶ 11 Defendant concedes he did not preserve this issue for appeal because he neither objected to the trial court's questions to the prospective jurors regarding the *Zehr* principles nor included this issue in a posttrial motion. However, defendant argues the court's failure to comply with Illinois Supreme Court Rule 431(b) is reviewable under the plain error doctrine because the evidence was closely balanced. *People v. Sebby*, 2017 IL 119445, ¶ 69, 89 N.E.3d 675, 692.

¶ 12 Rule 431(b) requires trial judges to ask all potential jurors whether they both “understand” and “accept” the following four fundamental principles of criminal law: (1) the defendant is presumed innocent; (2) the State bears the burden of proving defendant’s guilt beyond a reasonable doubt; (3) the defendant has no obligation to present any evidence; and (4) the defendant’s decision to not testify cannot be held against him. Ill. S. Ct. R. 431(b). These are commonly referred to as the *Zehr* principles. *People v. Johnson*, 2012 IL App (1st) 091730, ¶ 40, 993 N.E.2d 1, 11.

¶ 13 Our supreme court has held a trial court violates Rule 431(b) by failing to ask the prospective jurors whether they both understand and accept the four *Zehr* principles. *People v. Belknap*, 2014 IL 117094, ¶ 46, 23 N.E.3d 325, 336. In this case, the trial court asked the prospective jurors whether they disagreed with the *Zehr* principles. It did not ask whether the prospective jurors understood and accepted these principles. Pursuant to the supreme court’s decision in *Belknap*, the court erred in the way it questioned the prospective jurors.

¶ 14 The State argues defendant acquiesced in the trial court’s error by telling the court, when asked, the prospective jurors had been properly admonished as to the *Zehr* principles. As a result, plain error review is not available. We agree with the State and conclude defendant affirmatively waived this argument. Plain error review is only available in cases of procedural default, not affirmative acquiescence. *People v. McGuire*, 2017 IL App (4th) 150695, ¶¶ 25-32; *People v. Bowens*, 407 Ill. App. 3d 1094, 1101, 943 N.E.2d 1249, 1258 (2011); *People v. Townsell*, 209 Ill. 2d 543, 547-48, 809 N.E.2d 103, 105 (2004).

¶ 15 If a defendant’s attorney affirmatively acquiesces to an action taken by the trial court, any potential claim of error on appeal is waived, and defendant can only argue his counsel was ineffective for acquiescing. *People v. Young*, 2013 IL App (4th) 120228, ¶¶ 25-26, 996

N.E.2d 671, 676-77. As a result, even though the trial court erred in the way it questioned the prospective jurors regarding the *Zehr* principles, the error is not reviewable pursuant to the plain error doctrine.

¶ 16

### III. CONCLUSION

¶ 17 For the reasons stated, we affirm defendant's conviction and sentence in this case.

As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 18 Affirmed.