2019 IL App (1st) 160713-U

No. 1-16-0713

Order filed May 10, 2019

Fifth 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. 14 CR 19862
	)	
ROBERT KAZLUSKI,	)	Honorable
	)	Mary Margaret Brosnahan,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HALL delivered the judgment of the court.
Justices Hoffman and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm defendant's conviction for aggravated domestic battery over his contention that the trial court failed to properly question the venire pursuant to Illinois Supreme Court Rule 431(b) (eff. July 1, 2012).

¶ 2 Following a jury trial, defendant Robert Kazluski was found guilty of aggravated domestic battery (720 ILCS 5/12-3.3(a) (West 2014)) and sentenced to eight years' imprisonment as a Class X offender. On appeal, he argues the trial court violated Illinois

Supreme Court Rule 431(b) (eff. July 1, 2012) when questioning the venire, thereby necessitating a new trial. We affirm.

¶ 3 Defendant was charged by indictment with aggravated domestic battery and domestic battery for striking Terri Zisman, whom he was dating, on September 27, 2014, in Chicago. The case proceeded to a jury trial.

¶ 4 During *voir dire*, the trial court stated to the entire pool of jurors the following:

> "I'm going to go through four separate principles of law. One of the bedrocks of our criminal justice system. I will say what the principle is, I will ask you all understand it. If not, raise your hand. If somebody – next question is going to be assuming nobody raised their hands, now that I know you all understand it, can you all and will you all follow the law in this regard. First one is this. Talked about all of them in my opening remarks. First principle of our criminal justice system is this: Defendant, by that we mean the person charged, the defendant is presumed to be innocent of the charges placed against him. Does everybody understand that? Everyone is telling me yes. Any of you that could not or would not follow that principle of law. If so, raise your hand. No hands are up.
>
> Second principle is this: Before a defendant, meaning the person charged, can be convicted, the State has the burden of proving that person guilty. The standard is beyond a reasonable doubt. Does everybody understand that? Everyone is telling me yes. Any of you that could not or would not follow that principle of law. If so, raise your hand. No hands are up.

Third principle is that the defendant, meaning the person charged, that person is not required to offer any evidence on their own behalf. These principles all dovetail back to each other. We just got through saying the State always keeps the burden of proof. They bring the charges at trial. It's not as if they can put on a few witnesses and volleyball the proof over to the other side. They keep it the whole time. Meaning the person charged, they are never required to offer any evidence on their own behalf.

Do you all understand that? Everybody is telling me yes. Anyone here who could not or would not follow that principle of law. If so, raise your hand. No hands are up.

Fourth and final principle is this: Goes back into what I said. The person charged at trial, they never have to offer any evidence or call witnesses. So if the person charged, the defendant fails to testify, you can't hold that against him because that's the right the defense has. They don't have to call any witnesses, meaning they don't have to testify and if they don't, you can't hold it against them. Everybody understand? Everybody is saying yes.

Anybody here who could not or would not follow that principle of law. If so, raise your hand. No hands are up."

A jury was subsequently impaneled.

¶ 5 At trial, Zisman, defendant's ex-girlfriend, testified that on the morning of September 27, 2014, she and defendant ate breakfast at a restaurant at Lincoln Avenue and Wellington Avenue in Chicago. Zisman testified she was 60 years old at the time of trial and had been in a dating relationship with defendant for six years. While eating at the restaurant, defendant became angry and left before finishing his meal or paying the bill. Zisman paid the bill and discovered

defendant outside in an alley near the restaurant. Defendant reimbursed Zisman for the breakfast and the two decided to go to the nearby Oktoberfest street festival. Prior to entering the festival, Zisman and defendant went to a liquor store where defendant bought Zisman a pint of vodka and himself a six pack of beer.

¶ 6 At the festival, Zisman and defendant drank the alcohol purchased from the liquor store as well as alcohol purchased from the festival. At some point, defendant returned to the liquor store and bought more beer and vodka. Defendant was drinking "primarily beer and pineapple drinks" and Zisman was drinking "vodka and pineapple drinks" until the festival shut down around 10 p.m. After the festival ended, defendant wanted to go to a motel but Zisman did not. At this point, Zisman noticed that defendant was getting angry and "[h]is tone had changed. He was getting more upset." Zisman wanted to go home, charge her phone, and "just get away." She had seen signs of defendant's anger throughout the history of their relationship.

¶ 7 Zisman testified that defendant was to her left, and she was attempting to light a cigarette. The next thing she remembered was sitting on the ground, slumped over, with defendant lying next to her and police and festival attendees surrounding them. Zisman described the moment as being hit by "a big Mack truck" while in traffic. Zisman was later treated at a nearby hospital, where she stayed for five days.

¶ 8 Zisman testified that on one previous occasion, defendant had hit her and police were called. She further described a previous incident where defendant showed up to her home and broke a window, resulting in police being called. Zisman explained that, at the time of the incident, she was 4 feet 10 inches tall and weighed 124 pounds, and defendant was 5 feet 10 inches and weighed 205 pounds.

¶ 9 Karina Quintana testified that, on September 27, 2014, she was working at the Oktoberfest street festival in a tent. Around 10:30 p.m., she heard a man screaming "what are you doing" and "where are you going" repeatedly. Quintana exited the tent and observed a man, identified in court as defendant, and a woman facing each other. Defendant, who was much taller than the woman, was "hovering" over the woman and screaming, "I'm going to ask you one more time." At this point, defendant was pulling his fist back. Defendant then punched the woman with a closed fist directly in the face. The woman fell backwards and appeared to lose consciousness.

¶ 10 Quintana ran to the woman and sat her up. She observed swelling on the left side of the woman's face as well as bruising and "a little bit of internal bleeding around the nose." Quintana testified that there was nothing obstructing her view of the punch, and defendant and the woman were one foot away from each other before the punch. She also observed cigarettes on the ground near the woman. Quintana did not observe the woman strike, push, punch, or yell at defendant. She later identified defendant in a photo array at the police station.

¶ 11 Anthony Toman, a paramedic for the Chicago Fire Department, responded to the scene and assisted Zisman. Zisman told him "my boyfriend punched me in the face and I fell backwards." Toman observed swelling to her face as well as a possible laceration. He transported her to a nearby hospital.

¶ 12 Dr. Juan Santiago testified that he treated Zisman for her injuries as a code yellow patient, which comprises the highest level of severity a patient can have for her injuries. Zisman had a blood alcohol serum level of .154 but "was able to specify exactly what happened to her." Santiago examined Zisman and treated her for injuries on the left side of her face as well as

fractures around her eyes, cheek, and mandible. He also found evidence of a contusion to the back of her head. Zisman had to undergo surgery to her nose and remained at the hospital for four days. It was Santiago's expert opinion that Zisman suffered her head injuries from severe blunt trauma caused by extreme force. Photographs of Zisman's injuries were admitted into evidence.

¶ 13 Chicago police detective Mike Roth testified that he interviewed defendant two days after the incident at the police station. Roth provided defendant his *Miranda* warnings, and defendant agreed to speak with Roth and his partner. Defendant explained that he was trying to reconcile his relationship with Zisman, so they went out to breakfast then to the Oktoberfest afterwards. He told Roth that he and Zisman were drinking at the festival and, when it closed, Zisman did not want to leave. Defendant grabbed her arm to make her leave, but Zisman punched him once and struck him in the upper body. Defendant then punched Zisman once, "not very hard." Roth testified that after he confronted defendant about Zisman's injuries, defendant responded, "oh, I didn't know I hit her that hard."

¶ 14 Defendant told Roth that after he hit Zisman, an unknown individual from the festival punched him in the face, causing him to fall back and hit his head on a brick wall. He then lost consciousness and ended up at the hospital. Defendant never told Roth that Zisman hit him in the face, only the "upper body." Roth further testified that he spoke with Quintana, who identified defendant in a photo array at the police station.

¶ 15 Kate Blazek testified she was working as an emergency room nurse and treated defendant at the hospital. Defendant was placed in restraints and had security at his bedside because he was

"being violent" and was a threat to himself or others. Defendant's blood was drawn, and he had a blood alcohol serum level of .281.

¶ 16 Defendant testified that prior to September 27, 2014, he had been dating Zisman for five and a half years. On that date, defendant met Zisman for breakfast in order to reunite and reconcile their relationship. While at the restaurant, they got into an argument and defendant left instead of arguing further. Defendant later reconnected with Zisman outside the restaurant and reimbursed her for the bill. Defendant and Zisman decided to go to the Oktoberfest but first went to a nearby liquor store to buy a pint of vodka for Zisman and a six pack of beer for defendant to drink inside the festival. At the festival, defendant and Zisman drank the alcohol and had a "great old time."

¶ 17 Around 1 p.m., defendant and Zisman had finished the alcohol defendant purchased from the liquor store. At the festival, defendant purchased food and more drinks, including German beers for himself and a vodka drink served in an emptied-out pineapple for Zisman. Defendant then returned to the liquor store to buy another six pack of beer for himself and a pint of vodka for Zisman, which the couple consumed at the festival before it ended.

¶ 18 When the festival ended, Zisman did not want to leave, but defendant suggested that they get a motel room together. As defendant was guiding Zisman out of the festival, Zisman became "aggravated" and started to yell at defendant. Defendant testified that Zisman "got mad and *** struck [him] in the face" because she was aggravated with defendant asking her questions. Defendant told Zisman to stop, but she hit defendant a second time with the pineapple drink defendant had bought her.

¶ 19 Defendant testified that the second hit caused a bruise on his face and he was in fear of Zisman because she was attempting to hit him again. Defendant pushed his hand out to block the strike and "guess[ed] [his] hand *** touched her and she went to the ground." He made contact with Zisman with an open hand, and she fell back and hit her face directly on the ground. Defendant was taken to the hospital, but did not recall being violent to the hospital staff.

¶ 20 Defendant denied telling Detective Roth that he had punched Zisman in the face or that an unknown individual punched him in the face. Defendant further denied ever punching Zisman in the face at the festival as she was lighting a cigarette.

¶ 21 Defense witness James Kazluski, defendant's younger brother, testified to two separate incidents where he observed Zisman become physically violent.[1] On New Year's Eve 2014, Zisman was drinking "a lot" and "snapped." Zisman began "swinging on" and "slapping on" defendant. Defendant had to cover his face with one arm and "try to keep pushing her back." On Easter Sunday, James was drinking with defendant, Zisman, and another individual. While walking to Easter Sunday mass, Zisman "got violent." At the church, the group "got kicked out" because Zisman was "very belligerent." Zisman then "started slapping and punching" defendant. On both of these occasions, James never saw defendant be aggressive or physically strike Zisman.

¶ 22 The jury found defendant guilty of aggravated domestic battery and domestic battery. Defendant filed a written motion for a new trial, which the trial court denied, reasoning, "[t]he most compelling witness in this case, which completely put the issue to bed for me and I believe

[1] As James Kazluski has the same last name as defendant, we will refer to him as "James."

the jury, was the testimony of Karina Quintana." The court sentenced defendant to eight years' imprisonment for aggravated domestic battery. Defendant filed a timely notice of appeal.

¶ 23 On appeal, defendant argues the trial court failed to comply with Supreme Court Rule 431(b) when it did not ask the jurors whether they "accepted" the principles of law contained in that Rule. As an initial matter, the parties agree that defendant failed to raise the issue in the trial court and it is therefore forfeited. However, defendant asserts we may review the issue under the plain-error doctrine because the evidence presented at trial was closely balanced.

¶ 24 Under the plain-error doctrine, unpreserved claims of error can be reviewed when (1) the evidence at trial is closely balanced, or (2) the error is so serious it affected the fairness of the trial and challenged the integrity of the judicial process. *People v. Sebby*, 2017 IL 119445, ¶ 48. Defendant asserts first-prong error, which requires a reviewing court to determine whether "the defendant has shown that the evidence was so closely balanced the error alone severely threatened to top the scales of justice." *Sebby*, 2017 IL 119445, ¶ 51. When a defendant fails to establish plain error, that procedural default must be honored. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008). The first step under either prong of the plain-error doctrine is to determine whether there was a clear or obvious error. *Id.* ¶ 49.

¶ 25 Supreme Court Rule 431(b) provides:

> "The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) 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; however, no inquiry of a prospective juror shall be made into the defendant's decision not to testify when the defendant objects.
>
> The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." Ill. S. Ct. R. 431(b) (eff. July 1, 2012).

¶ 26 Rule 431(b) sets forth what are commonly referred to as the *Zehr* principles. See *Sebby*, 2017 IL 119445, ¶¶ 6, 49 (citing *People v. Zehr*, 103 Ill. 2d 472 (1984)). The trial court must ask potential jurors whether they both understand and accept these principles contained in Rule 431(b). See *People v. Wilmington*, 2013 IL 112938, ¶ 32; *People v. Thompson*, 238 Ill. 2d 598, 607 (2010). We review the trial court's compliance with Supreme Court Rule 431(b) *de novo*. *Wilmington*, 2013 IL 112938, ¶ 26.

¶ 27 Defendant concedes the trial court properly inquired of the jurors whether they understood the *Zehr* principles. He argues, however, that the trial court did not ask whether they "accept" each particular principle. The State acknowledges the court did not explicitly ask whether the jurors "accept[ed]" each particular principle, but asserts that asking whether they "could not or would not follow" each principle is tantamount to asking whether they "accept" it.

¶ 28 In *People v. Belknap*, 2014 IL 117094, our supreme court noted "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." *Belknap*, 2014 IL 117094, ¶ 46 ((concluding "the court's failure to ask whether the jurors understood the principles constitutes error alone" (citing *Wilmington*, 2013 IL 112938, ¶ 32)). Here, the court's questions to the potential jurors of

whether they "could not or would not follow that principle of law" goes beyond the inquiry *Belknap* found arguably sufficient to satisfy the acceptance requirement. See *Belknap*, 2014 IL 117094, ¶ 44 (explaining that the *Wilmington* court noted that asking jurors whether they agreed with or had any quarrel with the principles of law and getting no disagreement is arguably the equivalent of the jurors' acceptance of Rule 431(b) principles). The court's inquiry here explicitly required the jurors to respond if they were unable or refused to follow each *Zehr* principle. Mere acceptance, on the other hand, does not reflect whether a juror will, in fact, follow the particular principle of law. Arguably, a juror may "accept" the premise of a statement of law, but otherwise refuse to apply it to the case at hand.

¶ 29 Nevertheless, assuming *arguendo* the trial court failed to inquire of the jurors whether they accepted the principles contained in Rule 431(b), defendant cannot show the evidence was closely balanced as required to establish plain error. See *Wilmington*, 2013 IL 112938, ¶ 43 ("The defendant bears the burden of persuasion under both prongs of plain-error analysis"). To the contrary, in this case, the evidence against defendant was overwhelming.

¶ 30 To determine whether the evidence was closely balanced, we "evaluate the totality of the evidence and conduct a qualitative, commonsense assessment of it within the context of the case." *Sebby*, 2017 IL 119445, ¶ 53. This involves assessing the evidence on the charged offenses, along with any evidence regarding the witnesses' credibility. *Id.*

¶ 31 In order to prove defendant guilty of aggravated domestic battery, the jury had to find: (1) defendant and Zisman were family or household members; (2) defendant intentionally or knowingly caused great bodily harm to Zisman; and (3) defendant was not justified in using force. 720 ILCS 5/12-3.3(a), 12-3.2(a)(1) (West 2014). Defendant concedes he and Zisman were

"family or household members," but asserts the evidence was closely balanced as to whether he intentionally or knowingly inflicted great bodily harm on her and whether he was not justified in using force.

¶ 32 Defendant relies on *Sebby* to argue that, because defendant's and Zisman's conflicting versions of the events were credible, the evidence is therefore closely balanced. In *Sebby*, after reviewing the evidence on the elements of the charged offense, our supreme court held the issue "does not involve the sufficiency of close evidence but rather the closeness of sufficient evidence." *Sebby*, 2017 IL 119445, ¶ 60. The court found that neither the prosecution nor defense accounts of the events were fanciful, both were plausible, and neither version was supported by corroborating evidence. *Id.* ¶¶ 61-62. The court held that the "case turned on how the finder of fact resolved a 'contest of credibility' " and, "because both versions were credible, the evidence was closely balanced." *Id.* ¶ 63 (quoting and citing *Naylor*, 229 Ill. 2d at 606-07, 608).

¶ 33 Here, Zisman's and defendant's versions of the events are initially similar. Zisman and defendant attended the Oktoberfest street festival and drank continuously throughout its duration. When they were leaving, defendant wanted to go to a motel but Zisman did not. The parties disagree over what happened next.

¶ 34 Zisman testified defendant's "tone had changed. He was getting more upset," and she wanted to "get away" because she had seen signs of defendant's anger throughout the history of their relationship. She started to light a cigarette and the next thing she knew, she was on the ground, feeling as if she had been hit by "a big Mack truck."

¶ 35 Defendant testified Zisman did not want to leave the festival. As he was guiding Zisman out of the festival, she became "aggravated," started to yell at him, and "got mad and *** struck [him] in the face." Defendant told Zisman to stop, but she hit defendant a second time with the pineapple drink defendant had bought her, which caused a bruise on his face. Defendant was in fear of the aggressor Zisman because she was attempting to hit him again. Defendant pushed his hand out to block the strike and "guess[ed] [his] hand *** touched her and she went to the ground." He made contact with Zisman with an open hand, and she fell back and hit her face directly on the ground.

¶ 36 Detective Roth's testimony regarding his conversation with defendant both contradicts and corroborates parts of defendant's testimony. Roth testified that defendant told him that he and Zisman were drinking at the festival and, when it closed, Zisman did not want to leave. Defendant grabbed her arm to make her leave, but Zisman punched him once and struck him in the upper body. Contrary to defendant's testimony, Roth testified that defendant told him he punched Zisman once, "not very hard." Roth testified that after he confronted defendant about Zisman's injuries, defendant responded, "oh, I didn't know I hit her that hard."

¶ 37 If this were the only evidence presented, perhaps we would reach the conclusion that the evidence was closely balanced, as it was a mere "credibility contest" of two plausible versions of events with no other corroborating evidence. See *Sebby*, 2017 IL 119445, ¶¶ 62-63. However, Quintana also testified, and her testimony explains how Zisman ended up on the ground with, as Dr. Santiago testified, fractures to her face and a contusion on the back of her head. Quintana testified that after hearing defendant screaming at Zisman, she saw defendant punch Zisman in the face and Zisman fall backward. She did not see Zisman striking defendant prior to the punch.

There was no evidence that Quintana knew defendant or Zisman, or otherwise harbored any bias towards them. Instead, the evidence showed Quintana was a disinterested worker at the Oktoberfest, who upon hearing an argument, observed defendant, unprovoked, punch Zisman in the face.

¶ 38 Defendant minimizes the testimony of Quintana and suggests that it is plausible that she arrived after the argument began and missed seeing Zisman's initial physical aggression. But Quintana's testimony does not support this assertion. After hearing a man screaming, Quintana exited the tent and observed defendant and Zisman facing each other, one foot apart. There was nothing obstructing Quintana's view. Defendant was much taller than the Zisman and was "hovering" over her. Defendant screamed, "I'm going to ask you one more time" and pulled his fist back. Defendant then punched the woman with a closed fist directly in the face. Quintana testified that Zisman did not strike, push, punch, or yell at defendant. Thus, contrary to defendant's testimony that he pushed his hand out to block a strike from Zisman, Quintana did not observe Zisman strike or attempt to strike defendant. Rather, it was defendant who, after screaming at Zisman, punched her in the face.

¶ 39 Moreover, the evidence overwhelmingly showed Zisman suffered great bodily harm. Dr. Santiago testified that he treated Zisman for facial injuries, including fractures around her eyes, cheek, and mandible, and found evidence of a contusion to the back of her head. Santiago's expert opinion was that Zisman suffered these injuries from severe blunt trauma caused by extreme force. Zisman had to undergo surgery to her nose and remained at the hospital for four days. Taken with Quintana's testimony that defendant punched Zisman in the face unprovoked,

the evidence was not closely balanced as to whether defendant intentionally or knowingly struck Zisman causing great bodily harm and whether he was not justified in using that force.

¶ 40 Contrary to defendant's assertion, James's testimony did not "support" defendant's version of events. James, defendant's brother, was not present at the Oktoberfest and consequently did not observe the incident in question. James merely testified to two previous occasions where he observed Zisman be violent towards defendant after drinking alcohol. As James was not present when the incident occurred, his testimony does not make the evidence regarding whether defendant committed aggravated domestic violence closely balanced.

¶ 41 Viewing the evidence in a commonsense manner, in the context of the totality of the circumstances, we find the evidence was not closely balanced. As the evidence was not closely balanced, defendant cannot establish plain error. See *Belknap*, 2014 IL 117094, ¶ 62; *Wilmington*, 2013 IL 112938, ¶¶ 42-43.

¶ 42 For the reasons set forth above, we affirm the judgment of the circuit court of Cook County.

¶ 43 Affirmed.