2019 IL App (1st) 163034-U

No. 1-16-3034

Order filed August 9, 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. 13 CR 2580
	)	
LARRY SOUTHERN,	)	Honorable
	)	Thomas M. Davy,
Defendant-Appellant.	)	Judge, presiding.

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

ORDER

¶ 1 *Held*: The trial court did not err in admonishing the venire regarding the principles outlined in *People v. Zehr*, 103 Ill. 2d 472 (1984), and Supreme Court Rule 431(b) (eff. July 1, 2012).

¶ 2 Following a jury trial, defendant Larry Southern was found guilty of attempted first degree murder and personally discharging a firearm that proximately caused great bodily harm to the victim (720 ILCS 5/8-4, 9-1(a)(1) (West 2012)), as well as aggravated battery with a firearm (720 ILCS 5/12-3.05(e)(1) (West 2012)). The trial court imposed a sentence of 38 years in prison

for attempted first degree murder and personally discharging a firearm that proximately caused great bodily harm to the victim.[1] On appeal, defendant contends that this court should reverse and remand for a new trial because the trial court failed to comply with Supreme Court Rule 431(b) (eff. July 1, 2012) when questioning the venire. For the reasons that follow, we affirm.[2]

¶ 3 Defendant's conviction arose from the December 6, 2012, shooting of Dejuan Robinson in Chicago. Following their arrest, defendant and codefendant, Lavangelist Powell, were charged by indictment with attempted first degree murder and aggravated battery. Defendant, but not codefendant, was also charged with one count of attempted first degree murder and personally discharging a firearm that proximately caused great bodily harm to Robinson. The case proceeded to a joint jury trial.

¶ 4 Robinson testified that he was riding a bike to meet up with some friends, including Marshawn Green, when a black van approached him from behind and cut him off. Through the van's open rear sliding door, Robinson could see defendant, whom he knew as "Larry," crouched inside, pointing a silver handgun at him. Robinson had known defendant for a number of years. Though the two played basketball together several times a week, their relationship had become less friendly due to rising tensions between their respective gangs. Robinson also saw codefendant, whom he knew as "JuJu," in the driver's seat, looking at him "with a smirk on his face." Robinson had met codefendant through a mutual friend two years prior to the date in question. They saw each other about twice a week and sometimes spoke. As with defendant,

[1] Although the trial court did not indicate orally or in writing that the guilty findings merged, the court specified at sentencing that it was imposing sentence on the count that charged attempted first degree murder and personally discharging a firearm that caused great bodily harm to the victim. The mittimus also reflects that sentence was imposed only on that count.

[2] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.

Robinson said his relationship with codefendant had become less friendly due to the rising tensions between the gangs. Robinson also stated that he instantly recognized both defendant and codefendant.

¶ 5 Robinson dropped his bike in the street and "ran for his life." He heard two gunshots and almost immediately fell backwards and felt a burning sensation in his neck. Unable to move his arms or legs, Robinson looked up and saw defendant standing about 10 feet outside of the van. Robinson observed smoke escaping from the firearm in defendant's hand. Defendant fired two more times.

¶ 6 Paramedics arrived on the scene, and Robinson lost consciousness. After regaining consciousness in the emergency room, he spoke with two detectives. During the conversation, he identified "Larry" and "JuJu" as his assailants. The following day, he identified codefendant in a photographic array. Three days later, he identified defendant in a photographic array. The next month, Robinson told a detective that he did not recall identifying codefendant. In response, the detective provided another array from which Robinson identified codefendant as the driver of the van.

¶ 7 A number of officers testified that they secured the crime scene after the paramedics removed Robinson from the area. No firearms evidence, such as bullets, expended shell casings, or fired cartridge cases, was found on the scene.

¶ 8 Chicago police detective Marc Delfavero testified that when he spoke with Robinson in the emergency room on the day of the shooting, Robinson reported that he was riding his bike when a dark-colored minivan drove toward him and attempted to run him over; that the rear sliding door of the van opened and "Larry" exited the vehicle; that he jumped off the bike, but

defendant chased after him while shooting at him; and that the driver of the van was "JuJu." Delfavero conducted a computer search for individuals identified as "JuJu" and "Larry" living in the area of the shooting. Based on this search, he prepared two photographic arrays and returned to the hospital. Delfavero presented the two photographic arrays to Robinson, who identified codefendant as the driver of the van in the second array.

¶ 9 The next day, Delfavero interviewed Robinson's friend, Green, at the hospital. He told Green he was attempting to learn the identity of "Larry." After speaking to Green, Delfavero created an additional photographic array. Delfavero went back to the hospital three days later and showed Robinson that array. Robinson identified a photograph of defendant as "Larry," the individual that shot him. During another interview a few days later, Robinson reported that the shooting involved a gang feud. He stated he was associated with some members of one of the feuding gangs, but did not admit he was a member of that gang.

¶ 10 Chicago police detective Thomas Dineen testified that he interviewed Robinson about a month after the shooting, at a rehabilitation center. Robinson related to Dineen that he did not recall viewing the photographic array the day after the shooting. Dineen left the rehabilitation facility, created a new photographic array at the police station, and returned to the rehabilitation facility later in the day with the new array. Robinson viewed the array and positively identified codefendant as the driver of the van. Robinson again denied being a gang member.

¶ 11 The parties stipulated that, if called as a witness, a doctor who examined and treated Robinson on the day of the shooting would have testified that he suffered nine gunshot wounds: four to the neck, one to the back, two to the flank and pelvis, and two to the wrist. Robinson

could not move his limbs and "had altered sensation with no sensation below the level of his nipples." Based on imaging tests, Robinson was diagnosed with quadriplegia at the C5 level.

¶ 12 Robinson's friend, Marshawn Green, testified for the defense. He stated that on the date of the shooting, while Robinson was riding a bike toward him, he observed a "kind of dark" green van approaching Robinson. He was unable to identify the driver. However, he observed an individual exit the van and shoot Robinson. Green denied seeing defendant, whom he knew, on the date in question. According to Green, he was unable to view the shooter's face. He only observed the shooter's outline. Green testified that the shooter was wearing a hoodie and was tall and heavier, and approximated the shooter was 6 feet, 3 inches and 210 pounds.

¶ 13 Green testified that three days after the shooting, Delfavero interviewed him and presented him with a photo advisory form, which he signed. Green identified defendant in the photographic array as the "Larry" identified by Robinson. Green additionally identified defendant in a lineup a few days later. Green again explained that he merely identified defendant based on Robinson's identification of the shooter. Green insisted he did not observe the shooter's face. He admitted he never told the police that defendant was not the shooter, and further admitted he was serving a 12-year sentence for armed robbery.

¶ 14 The jury found defendant guilty of attempted first degree murder, attempted first degree murder and personally discharging a firearm that proximately caused great bodily harm to Robinson, and aggravated battery. Defendant filed a motion for a new trial, which the trial court denied. The court subsequently sentenced defendant to 38 years in prison on the count charging defendant with attempted first degree murder and personally discharging a firearm that proximately caused great bodily harm to Robinson. Though the court did not indicate orally or

on the mittimus that the guilty findings merged, it did specify both orally and on the mittimus that sentence was entered on the single count. Thereafter, the court denied defendant's motion to reconsider sentence. This appeal followed.

¶ 15 On appeal, defendant contends that this court should reverse and remand for a new trial because the trial court failed to comply with Supreme Court Rule 431(b) (eff. July 1, 2012) when questioning the venire. Defendant argues that the trial court improperly "short-circuited" Rule 431(b)'s inquiry by "collapsing" its four separate principles into one statement of law. Defendant acknowledges that he did not object to the trial court's admonishments either during *voir dire* or in his posttrial motion, but asserts that the error is nevertheless reversible under the plain error doctrine because the evidence at trial was closely balanced.

¶ 16 Ordinarily, a defendant must both object at trial and include the alleged error in a written posttrial motion in order to preserve an issue for appeal. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). However, under the plain error doctrine, this court may reach an unpreserved issue 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 when "(2) a clear or obvious error occurred and that 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." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The first step in plain error analysis is determining whether an error actually occurred. *People v. Cosby*, 231 Ill. 2d 262, 273 (2008). This is because absent error, there can be no plain error. *People v. Wooden*, 2014 IL App (1st) 130907, ¶ 10.

¶ 17 Under Rule 431(b), the trial court must question prospective jurors, individually or in a group, if they understand and accept the principles outlined in *People v. Zehr*, 103 Ill. 2d 472, 477 (1984). Specifically, the court must ask prospective jurors if they understand and accept that (1) a defendant is presumed innocent; (2) the defendant must be proved guilty beyond a reasonable doubt; (3) the defendant is not required to offer any evidence on his own behalf; and (4) if a defendant does not testify on his own behalf, it cannot be held against him. Ill. S. Ct. R. 431(b) (eff. July 1, 2012).

¶ 18 Here, the trial court admonished the venire regarding the first and second *Zehr* principles as follows:

> "[Defendant] and [codefendant], as with other persons charged with crimes, are presumed to be innocent of the charges that bring them before you, as presumption is [*sic*] with them now at the beginning of the trial, will continue throughout the course of the proceedings; that is, during jury selection, during the opening statements that the attorneys will be given an opportunity to make to you, during the presentation of evidence, during the closing arguments the attorneys may give, during the instructions of law that I will read and provide to you and onto deliberations, unless and until you individually and collectively are convinced beyond a reasonable doubt that either or both of the defendants are guilty.
>
> It is absolutely essential, as we select this jury, that each of you understand and embrace these fundamental principles; that is, that all persons charged with a

> crime are presumed to be innocent. It is the burden of the State, which has brought the charges, to prove a defendant guilty beyond a reasonable doubt."

¶ 19 The trial court made the following statements with regard to the third and fourth *Zehr* principles:

> "The defendant has no obligation to testify on his own behalf or call any witnesses in his defense. He may simply sit here and rely upon what he and his attorneys perceive to be the inability of the State to present sufficient evidence to meet their burden. Should that happen, you will have to decide the case on the basis of the evidence presented by the prosecution. If a defendant does not testify, in fact, that must not be considered by you in any way in arriving at your verdict."

¶ 20 The trial court then reiterated all four *Zehr* principles:

> "The bottom line, however, is defendants are presumed innocent. It is the State's burden to prove them guilty beyond a reasonable doubt. Defendant does not have to testify or introduce evidence on his own behalf, and if a defendant does not testify, that cannot be held against him."

¶ 21 Following its summary, the trial court asked the venire if they understood and accepted the four *Zehr* principles:

> "Does anyone not understand the fundamental principles of American law; namely, the defendants are presumed innocent of the charges, that the State must prove the defendant -- each defendant separately guilty beyond a reasonable doubt, that a defendant is not required to offer any evidence in his behalf, and if a

defendant does not testify, it cannot be held against him. Does anyone not understand those principles?

Record will reflect that no jurors indicated they do not understand that.

Does anyone not accept those fundamental principles of American law? In other words, will you follow those principles of American law?

No one has indicated they would not accept those."

¶ 22 Defendant argues that the trial court erred in "collapsing" the four *Zehr* principles into a broad statement of law, rather than providing each juror an opportunity to respond to specific questions concerning each principle. Because this contention requires us to construe a supreme court rule, our review is *de novo*. *People v. Willhite*, 399 Ill. App. 3d 1191, 1194 (2010).

¶ 23 In *People v. Thompson*, 238 Ill. 2d 598, 607 (2010), our supreme court held that Rule 431(b) mandates a specific question and response process in that the trial court "must ask each potential juror whether he or she understands and accepts each of the principles in the rule." The *Thompson* also court noted that while the rule may be performed in a group, it still "requires an opportunity for a response from each prospective juror on their understanding and acceptance of those principles." *Id.* Moreover, a trial court may not simply give a broad statement of the applicable law followed by a general question concerning the jurors' willingness to follow the law. *Id.*

¶ 24 However, the plain language of Rule 431(b) does not require the trial court to ask jurors individually about each principle or receive their answers one by one. *Willhite*, 399 Ill. App. 3d at 1196. Similarly, *Thompson* does not hold that a trial court is required to address each Rule 431(b) principle individually when questioning prospective jurors. As this court observed in

People v. Smith, 2012 IL App (1st) 102354, ¶ 105, there is no "special magic language" that a trial court must use in relaying the Rule 431(b) principles, and while "[i]deally, it may be appropriate to question the venire about each *Zehr* principle in a piece-meal fashion, *** separate questions are not mandated." This court has repeatedly found that a trial court does not commit error when it combines two or more *Zehr* principles into one inquiry. See, *e.g.*, *Smith*, 2012 IL App (1st) 102354, ¶ 105; *People v. Ware*, 407 Ill. App. 3d 315, 355-56 (2011); *People v. Davis*, 405 Ill. App. 3d 585, 589-90 (2010); *Willhite*, 399 Ill. App. 3d at 1196-97.

¶ 25 In this case, the trial court admonished the potential jurors in detail regarding all four *Zehr* principles, reiterated those principles, asked the venire if they understood the principles, and then asked the venire if they accepted and would follow the principles. We find that the trial court's questioning was sufficiently broad so that if any member of the venire had made a statement, raised a hand, or shaken his or her head, it would have shown the juror's failure to accept one of the principles and thereby prompted the trial court to inquire further. *Smith*, 2012 IL App (1st) 102354, ¶ 105. Consistent with both Rule 431(b) and *Thompson*, the trial court engaged in a "specific question and response process." In these circumstances, we find no error in the trial court's "collapsing" of the *Zehr* principles. Accordingly, the plain error doctrine does not apply. See *People v. Wooden*, 2014 IL App (1st) 130907, ¶ 10 (without error, there can be no plain error). Defendant's contention is forfeited.

¶ 26 Defendant's citations to *People v. McCovins*, 2011 IL App (1st) 081805, and *People v. Johnson*, 408 Ill. App. 3d 157 (2010), do not change our determination. Both cases are distinguishable from the instant case. In *McCovins*, 2011 IL App (1st) 081805, ¶ 36, the trial court "merely provided the prospective jurors with a broad statement of legal principles

interspersed with commentary on courtroom procedure and the trial schedule, and then concluded with a general question about the potential jurors' willingness to follow the law." In *Johnson*, 408 Ill. App. 3d at 171, the trial court "failed to ascertain whether the potential jurors understood and accepted each of the four *Zehr* principles" and "entirely omitted the fourth principle." We also reject defendant's argument that any reliance on *Smith*, 2012 IL App (1st) 102354, and *Willhite*, 399 Ill. App. 3d at 1191, which we have cited above, is "problematic" because both of those cases relied upon a vacated decision. In *Smith*, the defendant's petition for leave to appeal was denied (see *Smith*, 2012 IL App (1st) 102354, *appeal denied*, No. 115292 (Ill. Jan. 30, 2013)), no appeal appears to have been taken in *McCovins*, and both cases remain good law.

¶ 27 In summary, we find that the trial court did not err in asking the venire about their acceptance and understanding of the *Zehr* principles. As such, no further analysis under the plain error doctrine is warranted. For the reasons explained above, we affirm the judgment of the circuit court.

¶ 28 Affirmed.