NOTICE
Decision filed 05/23/19. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2019 IL App (5th) 160194-U

NO. 5-16-0194

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Saline County.
	)	
v.	)	No. 14-CF-233
	)	
JEDADIAH I. RUSSEL,	)	Honorable
	)	Walden E. Morris,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Presiding Justice Overstreet and Justice Cates concurred in the judgment.

ORDER

¶ 1 *Held*: We summarily affirm the defendant's unchallenged conviction and sentence for aggravated domestic battery; with regard to the conviction and sentence for criminal damage to property over $300, because the State concedes the trial judge erred with regard to his recitation of the *Zehr* principles, and concedes the evidence was closely balanced on this charge, we reverse and remand for a new trial.

¶ 2 The defendant, Jedadiah I. Russel, appeals his conviction and sentence for the offense of criminal damage to property over $300, following a jury trial[1] in the circuit

[1]At the same jury trial, the defendant also was convicted of aggravated domestic battery. The defendant does not contest his conviction or sentence for aggravated domestic battery. Accordingly, he has forfeited any contentions related thereto (see Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018) (argument must contain the contentions of the appellant, the reasons therefor, and the citation of authorities; points

court of Saline County. For the following reasons, we affirm in part, reverse in part, and remand for a new trial.

¶ 3 FACTS

¶ 4 The facts necessary to our disposition of this appeal follow. On September 25, 2014, the defendant was charged by information with, *inter alia*, criminal damage to property over $300. The information alleged that the defendant "knowingly damaged property" —specifically, the front windshield of a 1999 Volkswagen. At the outset of the trial that followed, the trial judge admonished the potential jurors with regard to the four principles of law set forth in Illinois Supreme Court Rule 431(b) (eff. July 1, 2012), commonly known among practicing criminal law attorneys as the "*Zehr* principles."[2] Thereafter, of relevance to this appeal, testimony was adduced from Steve Shoemaker, who testified that he was the owner of The Glass Doctor in Harrisburg, and was primarily in the windshield business. He testified that in the course of his business, he prepared estimates at the request of customers, and the estimates usually included "[t]he make and model of the car, the name of the person and the price." He testified that on September 23, 2014, The Glass Doctor prepared an estimate for Kasey Potts "to take out and put a new windshield in" on what "looked like a 1999 Volkswagen Jetta, four-door sedan." He was then asked, "Did you examine that or someone who worked for you examine that?"

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not argued in an opening brief are forfeited and shall not be raised in the reply brief, in oral argument, or in a petition for a rehearing)), and therefore we summarily affirm his conviction and sentence for aggravated domestic battery.

[2]Because the State concedes in its brief on appeal that "the trial court erred in its recitation of the *Zehr* principles," and because we agree with this concession, we need not discuss in detail the judge's admonishments.

Shoemaker testified, "I don't know. I'm sure that someone did, but I didn't. I didn't examine it."

¶ 5 When Shoemaker was subsequently asked what the cost of repair was, defense counsel objected, noting lack of foundation. The objection was sustained. The State then asked Shoemaker if he was the custodian of the records at The Glass Doctor. He testified no. The State then asked if he was the keeper and custodian of the records. He again testified no. He was then asked if he and his workers prepared estimates for customers. He testified yes. He subsequently testified that in the regular course of his business, he kept copies of the estimates, and that he did so in this case. He testified that the total estimate for the repair of Potts' windshield in this case was $378.73. On cross-examination, Shoemaker testified that ultimately The Glass Doctor did not install a windshield for Potts. When subsequently asked if someone could have gotten the repair done "cheaper" somewhere else, Shoemaker testified that he did not know, then added, "You know, everything is cheaper in life, isn't it, whatever a person wants to do. I don't know." The estimate was ultimately entered into evidence, over objection.

¶ 6 Subsequent testimony, from a different witness, was that the defendant admitted to breaking the windshield with a concrete block. Testimony was also elicited, from the defendant's brother, that the defendant's brother replaced the broken windshield himself, after paying $120 for the replacement windshield, and an additional $20-$30 for a "seal to seal the windshield into the car." He further testified that he had installed windshields before, and knew how to do it. He testified that he obtained the windshield from a salvage yard in Evansville. He admitted that he did not have receipts showing he purchased the

windshield and seal, but insisted that he purchased and installed them. He testified, in detail, as to the process of removing the old windshield and replacing it with the new windshield and seal. The owner of the car, Kasey Potts, likewise testified that the defendant's brother replaced the windshield.

¶ 7 After the State rested its case, defense counsel asked for a directed verdict on the charge of criminal damage to property over $300. The trial judge denied the request, stating that there was sufficient evidence for the jury to decide the question. Following deliberations, the jury found the defendant guilty of both aggravated domestic battery and criminal damage to property over $300. Following a sentencing hearing, the defendant was sentenced to 10 years in the Illinois Department of Corrections for his aggravated domestic battery conviction, and 3 years for his criminal damage to property over $300 conviction, with each sentence to be followed by the requisite period of mandatory supervised release, and with the sentences to run concurrently, not consecutively. On April 15, 2016, the defendant's motion to reconsider his sentence was denied. This timely appeal followed.

¶ 8 ANALYSIS

¶ 9 On appeal, the defendant contends, *inter alia*, that with regard to his conviction and sentence for criminal damage to property over $300, the trial judge committed reversible error in his recitation of the *Zehr* principles.[3] The defendant failed in the trial

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[3]In addition, in his opening brief on appeal, the defendant argued that multiple monetary assessments against him should be vacated because they were improperly imposed by the circuit clerk, who lacked authority to do so. Thereafter, the defendant withdrew this argument, conceding that pursuant to *People v. Vara*, 2018 IL 121823, the appellate court does not have jurisdiction to consider it. Of course,

court to raise the issue of an error with regard to the *Zehr* principles; accordingly, he must now seek plain-error review from this court. As we have noted in previous cases, where, as here, a defendant asks this court to conduct a plain-error review, the first question we must address is whether any error occurred at all. See, *e.g.*, *People v. Mueller*, 2015 IL App (5th) 130013, ¶ 23. In this case, as noted above, the State concedes in its brief on appeal that "the trial court erred in its recitation of the *Zehr* principles," a concession with which we agree. Accordingly, we next must address whether, under the plain-error doctrine, the error requires reversal and remand for a new trial. See *id.* ¶ 24. Under well-established Illinois case law, if "the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant," an error is subject to plain-error review on appeal, and to reversal and remand for a new trial. *Id.* ¶¶ 24, 41. Reversal and remand for a new trial is warranted upon such a finding because "in cases such as this, a reviewing court must 'deal with probabilities, not certainties,' and 'with risks and threats to the defendant's rights.' " *Id.* ¶ 41 (quoting *People v. Herron*, 215 Ill. 2d 167, 193 (2005)). Accordingly, " '[w]hen there is error in a close case, we choose to err on the side of fairness, so as not to convict an innocent person.' " *Id.* (quoting *Herron*, 215 Ill. 2d at 193).

¶ 10 In this case, the State concedes in its brief on appeal that, as a factual matter, the evidence concerning whether the monetary damage to the property in question was over $300 "was closely balanced," and that accordingly, pursuant to the foregoing principles of law, "this court may remand this charge for retrial." We accept the State's concession

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the defendant may raise this issue with the circuit court on remand.

as accurate both factually and legally. The State also notes that this court could reduce the defendant's conviction from criminal damage to property over $300 to the lesser included offense of criminal damage to property under $300, contending that the evidence that the latter offense was committed was "overwhelming." To support this potential remedy, the State points to Illinois Supreme Court Rule 615(b)(3) (eff. Aug. 27, 1999), which allows a court of review to "reduce the degree of the offense of which the appellant was convicted." The State's brief, however, is silent with regard to whether, if we took such an action, we should also reduce the defendant's sentence on this charge, and if so, to what extent. The defendant's reply brief is silent on this point as well.

¶ 11 We note that this court has held, with regard to the difference between criminal damage to property over $300 and criminal damage to property under $300, that the monetary amount of damage "is material in the sentencing context." *People v. Schneider*, 139 Ill. App. 3d 222, 225 (1985); see also *People v. Grass*, 126 Ill. App. 3d 540, 544 (1984) (monetary amount of damage "is material in the sentencing context and a defendant, as a substantial part of his constitutional right to trial by jury [citation], has the right to have value determined by the jury, as it determines the severity of his punishment"). Accordingly, we decline to invoke Rule 615(b)(3). In light of the trial judge's *Zehr* principles errors, we agree with the position taken by the defendant in his reply brief, wherein he asks this court, in his prayer for relief, to "remand this case to the circuit court for a new trial on" the charge of criminal damage to property over $300.

¶ 12 The defendant also argues on appeal that he is entitled to additional credit against his fines and fees, specifically $5 per day of credit for time spent in presentence custody.

Because we are remanding this cause for a new trial on the charge of criminal damage to property over $300, the defendant may raise his argument with the circuit court on remand, just as he may raise his other fines and fees issues.

¶ 13 CONCLUSION

¶ 14 For the foregoing reasons, we summarily affirm the defendant's unchallenged conviction and sentence for aggravated domestic battery; with regard to the conviction and sentence for criminal damage to property over $300, because the State concedes the trial judge erred with regard to his recitation of the *Zehr* principles, and concedes the evidence was closely balanced on this charge, we reverse and remand for a new trial on this charge. We reiterate that on remand, the defendant may raise the various issues he has with the fines and fees assessed against him, as well as his entitlement to credit, against his fines and fees, of $5 per day for time spent in presentence custody, in accordance with applicable law.

¶ 15 Affirmed in part and reversed in part; cause remanded.