2020 IL App (2d) 180422-U
No. 2-18-0422
Order filed September 15, 2020

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. KRYSTYNA ANGELONI, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 16-CM-1139 Honorable James John Konetski, Judge, Presiding.

JUSTICE BRIDGES delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: In appeal of retail-theft conviction, plain-error review did not excuse defendant's forfeiture of her contentions regarding her jury waiver and the trial court's *Zehr* questioning of the jury; first, defendant properly waived her right to a 12-person jury in favor of a panel of 6; second, although the court's *Zehr* questioning amounted to error, the evidence at trial was not closely balanced.

¶ 2 Following a trial before a six-person jury, defendant, Krystyna Angeloni, was convicted of retail theft (720 ILCS 5/16-25(a)(1) (West 2016)). She timely appeals, arguing that she (1) did not knowingly waive her right to a 12-person jury trial and (2) the trial court erred when it failed to

properly question the six jurors pursuant to Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). We affirm.

¶ 3 I. BACKGROUND

¶ 4 In proceedings before defendant's trial began, the trial court and the parties discussed a jury trial numerous times. The day before trial, the court asked defense counsel, in defendant's presence, how many people she expected to have on the jury. Counsel apologized for not addressing the matter previously and advised the court that she "believe[d] it would be 12, but there might be a possibility for six."

¶ 5 The day trial started, the trial court again asked defense counsel how many people would be on the jury. Defense counsel told the court, in defendant's presence, that there would be six people on the jury. The court confirmed that number, and then the court and the parties proceeded with questioning the jury pool.

¶ 6 Pursuant to Rule 431(b), the trial court asked the jury pool a variety of questions about (1) defendant being presumed innocent of the charges brought against her, (2) the State proving defendant's guilt beyond a reasonable doubt, (3) defendant not having to offer evidence, and (4) not holding it against defendant if she chose not to testify. Concerning the six jurors who were ultimately picked and reached a verdict, the trial court asked, with regard to these questions, whether the jurors "underst[oo]d and accept[ed]" them, "underst[oo]d" them, "agree[d with] and accept[ed]" them, or, after asking if the juror "underst[oo]d and accept[ed]" them, whether it was "true" that the juror would not act contrary to them. The jurors responded to these questions with "yes," "I agree," or "[t]hat's true."

¶ 7 Caitlyn Horn testified that, on March 23, 2016, she was working as store manager at an Aldi in Villa Park. Horn stated that there are four aisles in that Aldi, and at the back of the store

are coolers. The store has two entrance doors and two exit doors. The entrance doors are located at one end of the store, by aisle one, while the exit doors are located at the other end of the store, past the cash registers. The doors are programmed so that no one can exit through the entrance doors or enter through the exit doors.

¶ 8 At about 11 a.m. on March 23, Horn was putting items into the coolers when she saw defendant at the end of aisle two. Defendant was pacing around and constantly looking at Horn while Horn was working. Defendant's actions alerted Horn, so she began watching defendant more closely. As Horn was doing so, she saw defendant put Easter candy and corned beef in a large bag she was carrying, which is how many people shop at Aldi. Defendant also took a hydrangea plant and a kit to make Easter baskets. The cost of all the items defendant collected was $43.11.

¶ 9 Horn followed defendant as defendant walked up aisle one toward the entrance doors. From that point, Horn never took her eyes off defendant. Defendant tried to exit through one of the entrance doors, but that door did not open. Defendant then stood by that entrance door, looking at nearby merchandise. After approximately 20 seconds, a customer entering Aldi held the entrance door open for defendant. Defendant walked past the customer, exited the store "fast," walked straight to her car, "put the stuff in her car," and drove off. Horn wrote down the license plate number of the car defendant was driving and called the police. Horn testified that defendant never stopped at any of the registers before she left the store.

¶ 10 Two hours later, defendant called Horn at Aldi, telling her that "the police told her that there was a miscommunication." Defendant asked Horn if she could bring "the stuff" back to the store, and Horn replied, "Absolutely."

¶ 11 Twenty minutes later, defendant arrived at Aldi and spoke to Horn. Defendant did not have any Aldi merchandise with her. Defendant apologized and asked if there was anything Horn could

do so that the incident did not appear on defendant's criminal record. Horn told defendant that there was nothing she could do, as upper management had decided to press charges. Defendant persisted in trying to persuade Horn to drop the charges, getting loud and angry with Horn when she was not persuaded. Horn testified that, during her conversation with defendant, defendant never explained what had happened.

¶ 12 Officer Bruce Easton spoke with defendant after she left Aldi. Defendant told Easton that she had bought a few items at Aldi, including some meat, but she could not remember how much these items cost. Defendant paid cash for the items and did not have a receipt, as she had thrown the receipt away.

¶ 13 During the following weeks, Easton and defendant spoke over the phone five or six times. All of their phone calls were basically the same. "[Defendant] expressed to [Easton] over and over again that she wanted to be able to pay the money to Aldi and she could not be arrested." When Easton had had "enough of going back and forth with her about what [Easton] felt [defendant] needed to do," Easton obtained a warrant for defendant's arrest.

¶ 14 Defendant testified that she ran several errands on March 23, 2016, which was right before Easter. Two places that she went were the two Aldis in Villa Park. She went to the first Aldi to get two plants. Because there was only one plant at that location that defendant liked, she bought that plant there and proceeded to the second Aldi to buy a second plant.

¶ 15 Defendant denied leaving an Aldi store on March 23 without paying for any merchandise. Rather, defendant explained that, while she was shopping at the second Aldi, she discovered that her wallet was missing, and she panicked. She "placed everything that [she] had in [her] possession from the store down" in aisle one and proceeded to the closest door. When that door, which was

an entrance door, did not open, defendant went to the other end of the store and exited through an exit door. Defendant had no merchandise with her when she exited the store.

¶ 16 At her car, defendant found her wallet in the backseat, and she was relieved. Rather than return to the store and buy the items she had left there; defendant decided to leave and finish her Easter shopping later. However, before going home, defendant went to Kohl's. She did not buy anything there.

¶ 17 At home, defendant checked her mail and found a card informing her to call the police. Defendant called, spoke to Easton, and learned that someone at Aldi had accused her of shoplifting. Defendant, who did not know what Easton was talking about, eventually learned to which Aldi Easton was referring. Defendant never told Easton about misplacing her wallet, because she thought Easton was referring to the other Aldi. Moreover, she did not explain what had happened because she "wasn't sure what [she] should do," "didn't know if [she] could," "didn't know that [her] talking to [Easton] any further about what happened and what didn't happen would do anything," and "just decided [she was] not going to talk to them about anything further."

¶ 18 Defendant talked to Horn, but she never apologized for taking items, agreed to bring items back to the store, or offered to pay for any items. However, when Horn suggested that defendant pay for the merchandise, defendant agreed to do so, as her "main concern was to clear this up."

¶ 19 Before the parties proceeded with closing arguments, defense counsel advised the trial court that defendant had not executed a written waiver of a 12-person jury. Thus, defense counsel tendered defendant's written waiver at that point. The written waiver, which defendant signed, was a preprinted form addressing a defendant's waiver of a jury trial. Where the form provided that defendant was "giving up [her] right to have a trial with a jury," someone had written in "of 12" after the word "jury."

¶ 20 The jury found defendant guilty of retail theft. Defendant obtained new counsel and moved for a new trial. In that motion, defendant contended, among other things, that she was never admonished about or waived her right to a 12-person jury. Defendant did not argue in her motion that the trial court did not properly question the jury pursuant to Rule 431(b). Following a hearing, the trial court denied that motion and sentenced defendant to six months of court supervision.

¶ 21 II. ANALYSIS

¶ 22 On appeal, defendant argues that she (1) did not knowingly waive her right to a 12-person jury trial and (2) the trial court erred when it failed to properly question the six jurors pursuant to Illinois Supreme Court Rule 431(b). In making these arguments, defendant recognizes that she did not object at trial to proceeding with a six-person jury and neither objected when the court questioned the prospective jurors nor raised any issue regarding that questioning in her posttrial motion. Accordingly, defendant asks that we review each issue pursuant to the plain-error rule.

¶ 23 A. Plain-Error Rule

¶ 24 To preserve an issue for this court's review, a defendant must object at trial and include the alleged error in a written posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). When these steps are not followed, we may consider an issue on appeal if the defendant, who bears the burden of persuasion, satisfies the plain-error rule. *People v. McDonald*, 2016 IL 118882, ¶ 45; *People v. Herron*, 215 Ill. 2d 167, 187 (2005).

¶ 25 The plain-error rule "permits a reviewing court to consider unpreserved error 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 (2) a clear or obvious error occurred and the 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. ” *McDonald*, 2016 IL 118882, ¶ 48. Although the rule provides for the review of unpreserved errors in two instances, our first step is not considering whether the defendant has satisfied either prong of the plain-error rule. Rather, our first step is to determine whether error occurred at all. *People v. Walker*, 232 Ill. 2d 113, 124 (2009).

¶ 26 With these principles in mind, we turn to the issues defendant raises on appeal.

¶ 27 B. Waiver of 12-Person Jury

¶ 28 The first issue we address is whether defendant knowingly waived her right to a 12-person jury. Both the federal and state constitutions guarantee a defendant the right to a jury trial in a criminal case. U.S. Const., amend. VI; Ill. Const. 1970, art. I, §§ 8, 13. A jury of six members is of sufficient size to satisfy the federal constitutional right to a jury. *People v. Quinn*, 46 Ill. App. 3d 579, 581 (1977) (citing *Williams v. Florida*, 399 U.S. 78 (1970)). Under the Illinois constitution and statutes, a defendant has the right to a 12-member jury but can waive that right. *Quinn*, 46 Ill. App. 3d at 581-82.

¶ 29 Section 115-1 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-1 (West 2016)) provides that “[a]ll prosecutions except on a plea of guilty or guilty but mentally ill shall be tried by the court and a jury unless the defendant waives a jury trial in writing.” Although this provision of the Code clearly requires a writing, our supreme court has never found a valid jury waiver based solely on a written waiver. See *People v. Scott*, 186 Ill. 2d 283, 285 (1999) (“We have never found a valid jury waiver where the defendant was not present in open court when a jury waiver, written or otherwise, was at least discussed.”). Conversely, the failure to file a written waiver does not by itself require reversal. *Id.* Rather, as section 103-6 of the Code (725 ILCS 5/103-6 (West 2016)) makes clear, a defendant validly waives the right to a jury trial if and only if the waiver is made (1) understandingly and (2) in open court. See *Scott*, 186 Ill. 2d at 285.

¶ 30 If a defendant elects to be tried by a jury, "[t]he jury shall consist of 12 members." 725 ILCS 5/115-4(b) (West 2016). Although the Code provides for a 12-person jury, that right is not absolute, as, under Illinois law, a defendant's right to waive a jury in its entirety necessarily includes the right to accept a jury consisting of fewer than 12 members. *People v. Dereadt*, 2013 IL App (2d) 120323, ¶ 15; see also *Quinn*, 46 Ill. App. 3d at 582. As with the waiver of the right to a jury in its entirety, a defendant's waiver of a jury of 12 people in favor of a jury of fewer members is valid if the waiver is affirmatively shown on the record. *Dereadt*, 2013 IL App (2d) 120323, ¶ 15.

¶ 31 A trial court need not give any specific admonishments to effectuate a valid waiver of a jury consisting of less than 12 members. *People v. Bracey*, 213 Ill. 2d 265, 270 (2004). Rather, the record must show that the defendant was aware of the right to a 12-person jury and agreed to a jury consisting of fewer than 12 members or acquiesced in the decision to waive a 12-person jury. *People v. Matthews*, 304 Ill. App. 3d 415, 419-20 (1999). Given that a defendant typically speaks and acts through his attorney, jury waivers are generally valid when made by defense counsel in a defendant's presence and the defendant does not object. *People v. Frey*, 103 Ill. 2d 327, 332 (1984). We review *de novo* the validity of a waiver of a 12-person jury. See *People v. Rincon*, 387 Ill. App. 3d 708, 717 (2008).

¶ 32 Here, the evidence revealed that defendant, with her attorney, the prosecutor, and the trial court, discussed a jury trial several times before defendant's jury trial commenced. The day before defendant's trial started, defense counsel advised the court, while in defendant's presence, that she would be proceeding with a 12-person jury, but possibly a 6-person jury. On the day of trial, defense counsel advised the court, again in defendant's presence, that the jury would consist of six members. Although no written jury waiver was submitted at that point, defense counsel did tender

one during defendant's six-person jury trial. That waiver, which defendant signed, indicated, though perhaps unartfully, that defendant was waiving her right to a 12-person jury. At no point before the jury reached a verdict did defendant object to proceeding with a six-person jury. In light of these facts, we must conclude that defendant was aware of her right to a 12-person jury and acquiesced in the waiver of that right. See *People v. Manning*, 2020 IL App (2d) 180042, ¶ 25 ("Only if the record does not affirmatively show such a waiver or acquiescence will courts look further to ensure that a defendant was at least aware of the right to a 12-person jury.").

¶ 33 Because no error arose when defendant proceeded with a six-person jury, we do not consider whether this issue is reviewable under either prong of the plain-error rule. *People v. Wilson*, 404 Ill. App. 3d 244, 247 (2010) ("There can be no plain error if there was no error at all.").

¶ 34 C. Rule 431(b) Questioning

¶ 35 The second issue we address is whether the trial court properly questioned the six jurors pursuant to Rule 431(b). Rule 431(b) contains the four commonly known "*Zehr* principles." See *People v. Zehr*, 103 Ill. 2d 472, 477 (1984). Rule 431(b) provides:

> "(b) The court shall ask each potential juror, individually or in a group, whether that juror 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 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." Ill. S. Ct. R. 431(b) (eff. July 1, 2012).

¶ 36 As the rule indicates, the court's inquiry shall provide each prospective juror an opportunity to respond to specific questions about the principles delineated in the rule. *Zehr*, 103 Ill. 2d at 477. The questions may be asked of prospective jurors individually or in a group, but in either event, Rule 431(b) contemplates " 'a specific question and response process.' " *People v. Wilmington*, 2013 IL 112938, ¶ 32 (quoting *People v. Thompson*, 238 Ill. 2d 598, 607 (2010)).

¶ 37 Although Rule 431(b) provides that the trial court must determine whether the prospective juror "understands and accepts" the delineated principles, case law permits the court's questions to deviate slightly from the rule's specific language. *People v. McCovins*, 2011 IL App (1st) 081805-B, ¶ 33. For example, no error arose when the court asked prospective jurors whether they could " 'abide by' " or " 'dispute[d]' " the principles (*id.* ¶¶ 32-33); " 'had a problem' " with or " 'disagreed' " with the principles (*People v. Digby*, 405 Ill. App. 3d 544, 548 (2010)); or had any " 'difficulty or quarrel' " with the principles (*People v. Ingram*, 401 Ill. App. 3d 382, 393 (2010)).

¶ 38 Here, the court queried all six jurors about each *Zehr* principle. In its questions, the court varied slightly from the rule's specific verbiage, but the deviations were acceptable. The problem is that the court did not verify with each juror whether he or she both understood *and* agreed with the principles. For example, the court asked some jurors only whether they "underst[oo]d" the principles and other jurors only whether they essentially "agree[d]" with the principles. Our supreme court has determined that this is error. See, *e.g.*, *Thompson*, 238 Ill. 2d at 607 (failure to ask jurors whether they accepted principles constituted error); see also *People v. Daniel*, 2018 IL App (2d) 160018, ¶ 25 (failure to ask jurors whether they understood principles constituted error).

¶ 39 That said, the mere fact that this is error does not end our inquiry. Rather, because defendant failed to object to this error at trial and raise it in her posttrial motion, she is entitled to relief only if she satisfies either prong of the plain-error rule. Defendant claims that the trial court's

failure to properly question all the jurors amounts to plain error because "the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant." *McDonald*, 2016 IL 118882, ¶ 48.

¶ 40 Whether the evidence is closely balanced is a separate question from whether the evidence is sufficient to sustain a conviction against a reasonable-doubt challenge. *People v. Piatkowski*, 225 Ill. 2d 551, 566 (2007). In determining whether the evidence is closely balanced, we evaluate the totality of the evidence and conduct a qualitative, commonsense assessment of the evidence within the context of the case. *People v. Sebby*, 2017 IL 119445, ¶ 53. To accomplish this, we look at the evidence on the elements of the charged offenses along with any evidence regarding the witnesses' credibility. *Id.*

¶ 41 With these principles in mind, we turn to the circumstances of this case. Defendant was convicted of retail theft (720 ILCS 5/16-25(a)(1) (West 2016)). A defendant commits retail theft when she knowingly takes possession of or carries away merchandise displayed or offered for sale in a retail mercantile establishment with the intention of retaining such merchandise or of permanently depriving the merchant of the possession, use, or benefit of such merchandise without paying its full retail value. *Id.*

¶ 42 Essentially, at issue here is whether defendant knowingly took merchandise from Aldi with the intent to permanently deprive Aldi of that merchandise. A defendant acts with "knowledge" when she is "consciously aware" that her conduct is "practically certain" to cause the result. 720 ILCS 5/4-5(b) (West 2016). Whether a defendant acted with knowledge is a question of fact. See *People v. Schmalz*, 194 Ill. 2d 75, 81 (2000). Moreover, knowledge is usually proved by circumstantial, rather than direct, evidence. *People v. Ortiz*, 196 Ill. 2d 236, 260 (2001). Thus, knowledge may be established by evidence of the defendant's acts, statements, or conduct, as well

as the surrounding circumstances, that supports a reasonable inference that the defendant was consciously aware that the result was practically certain to be caused. See *People v. Fleming*, 2013 IL App (1st) 120386, ¶ 75; *People v. Herr*, 87 Ill. App. 3d 819, 822 (1980).

¶ 43 A defendant "intends, or acts intentionally or with intent, to accomplish a result or engage in conduct described by the statute defining the offense, when h[er] conscious objective or purpose is to accomplish that result or engage in that conduct." 720 ILCS 5/4-4 (West 2016). Like knowledge, intent is a question of fact that is often established through circumstantial evidence. See *People v. Tabb*, 374 Ill. App. 3d 680, 691-92 (2007).

¶ 44 With these principles in mind, we turn to the facts presented here. Horn testified that she did not take her eyes off defendant once she saw defendant acting oddly. Horn saw defendant put Aldi merchandise in the bag defendant had with her. Defendant then proceeded to the front of the store, and Horn followed her as defendant walked up aisle one with the Aldi merchandise in her bag. Horn never testified that she saw defendant either place her bag on the floor or remove the merchandise from her bag. Horn stated that defendant did not pay for the items at the cash registers before attempting to walk out the entrance doors and exiting through them only after another customer held the door open for her. Horn saw defendant walk past that customer, walk quickly to her car, put the Aldi merchandise in the car, and then drive away.

¶ 45 Defendant disputed all of this, offering different accounts of what allegedly happened. At trial, she claimed that she placed all the merchandise on the floor in aisle one after she discovered that her wallet was missing. She contended that she found her wallet in her car, but instead of returning to Aldi to purchase the items she allegedly left there, she decided to leave. However, instead of going home after being frazzled by thinking that she had lost her wallet, she went to yet another store.

¶ 46 When defendant spoke to Easton, she did not tell him any of this and offered at trial various implausible explanations for why she did not (*supra* ¶ 17). During the police investigation, defendant told Easton that she had paid cash for the items she bought at the Aldi and threw the receipt away. However, when asked how much she had spent, she could not offer even a rough estimation. And, defendant never told Horn that she had paid for the merchandise.

¶ 47 Although defendant claimed that she did not take any merchandise, defendant, according to Horn, apologized for taking items from the store and offered to bring the merchandise back or pay for what she took. Defendant did neither, opting instead to repeatedly stress to both Horn and Easton that she did not want her criminal record tarnished by this incident. To explain away the illogicality of her actions, defendant claimed that she was confused about which Aldi Easton was referring to. But, any confusion related to this was cleared up within hours after the incident and many days before defendant was ultimately arrested. The evidence in its totality was not closely balanced.

¶ 48 Defendant argues that (1) she and Horn each presented a plausible version of events, (2) Easton's testimony lent support to each account, and (3) there was no extrinsic evidence to support either account. Defendant suggests that, "because this case came down to a credibility contest between ** two versions," the evidence was closely balanced. We disagree. Defendant's account was implausible; hence, the fact that it contradicted the State's evidence does not make the evidence closely balanced for purposes of the plain-error doctrine. See *People v. Olla*, 2018 IL App (2d) 160118, ¶ 35 (there is no " 'credibility contest' " when one party's version is implausible). After taking a commonsense assessment of the evidence, we must conclude that the evidence was not closely balanced. Therefore, the plain-error doctrine does not excuse defendant's forfeiture of her argument on jury questioning.

¶ 49 III. CONCLUSION

¶ 50 For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

¶ 51 Affirmed.