2012 IL App (1st) 103690-U

THIRD DIVISION
November 30, 2012

No. 1-10-3690

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09-5002570
	)	
OFELIA GARCIA,	)	The Honorable
	)	Nicholas Ford,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE SALONE delivered the judgment of the court.
Justices Neville and Sterba concurred in the judgment.

O R D E R

Held: The trial court did not abuse its discretion, in a jury trial of defendant for heinous battery, by admitting and allowing the jury to see graphic photographs of the victim's injuries, where the State was required to prove defendant knowingly caused severe and permanent disfigurement to the victim to sustain the charge of heinous battery, and the court determined the probative value of the photographs outweighed their prejudicial nature. Under a plain error analysis, the court's failure to admonish the prospective jurors about the fourth *Zehr* principle, that defendant's failure to testify cannot be held against her, constitutes non-compliance with Rule 431(b), but does not warrant relief where defendant failed to meet her burden of persuasion with respect to prejudice. Lastly, defendant's 44-year sentence, one year less than the statutory maximum, is not excessive in light of the seriousness of the crime and, specifically, defendant's long-term planning and solicitation of others to carry out the crime.

¶ 1 Defendant Ofelia Garcia appeals her conviction, following a jury trial, of heinous battery for orchestrating an attack on victim, Esperanza Medina, that resulted in Esperanza being burned with sulfuric acid. The charges stemmed from an attack in which three juvenile co-defendants, Jose Avila, Mariela Duran and Jennifer Ruiz, who were recruited by defendant and aided by co-offenders, Maria Garcia-Olvera and Linda Dirzo[1], threw sulfuric acid on Esperanza, severely burning and disfiguring her as a result. Defendant was sentenced to 44 years in prison, just one year shy of the maximum statutory sentence. 720 ILCS 5/12-4.1(b) (West 2008).

¶ 2 BACKGROUND

¶ 3 Defendant was tried before separate juries at a partially severed trial with co-defendant Maria Garcia-Olvera, her ex-daughter-in-law. The main witnesses against defendant were Mariela Duran, Jennifer Ruiz, and Jose Avila. All three entered plea agreements with the State in which they agreed to cooperate and testify against defendant in exchange for a juvenile adjudication of heinous battery.

¶ 4 Gustavo Alvarez, defendant's common law husband, testified that he began a relationship with defendant in 1975 and resided with her until 2007. Gustavo and defendant have two grown sons and owned an apartment together. Gustavo testified that during the last ten years of his relationship with defendant, he had a series of affairs with other women, including Maria Garcia-Olvera. Gustavo testified he maintained a romantic relationship with Garcia-Olvera for a year and a half. Gustavo testified he and Garcia-Olvera informed defendant of their relationship.

[1] Linda Dirzo died before trial.

Gustavo began a romantic relationship with Esperanza in September 2007.

¶ 5 Gustavo testified he moved out of the home he shared with defendant in November 2007 and had no further contact with her after that. He testified he did not tell defendant were he was moving and he stopped financially supporting her. Gustavo moved in with Esperanza in Logan Square. About a month later, he received a phone call from defendant asking him to move back in with her; he refused. Gustavo testified he transferred his legal share of the home he shared with defendant to her and their two sons on December 11, 2007, after being contacted by an attorney.

¶ 6 Private detective Paulino Villarreal testified that in December 2007, he received a telephone call from defendant requesting his services. Villarreal met with defendant on December 22, 2007, along with his wife, and a woman Villarreal understood to be Linda Dirzo. Villarreal testified defendant told him she was looking for Esperanza because they owned a piece of property together in Cicero, which needed to be sold. Villarreal informed defendant he would need verification of the joint ownership to move forward with the investigation. Defendant said she would provide it later; she never did. Defendant informed Villarreal Esperanza could be found near Fullerton and Milwaukee and provided a telephone number where she could be reached, (708) 222-3706. She further informed Villarreal that Esperanza was an acquaintance of Gustavo. Villarreal testified defendant wanted him to follow both Esperanza and Gustavo, but "primarily Esperanza." Villarreal testified he informed defendant he would not provide her with any information from his investigation until he received payment in full. Defendant never paid Villarreal.

¶ 7 Gustavo testified that in June 2008, he and Esperanza went to Mexico for a vacation for about two weeks. During that time, he introduced her to his family.

¶ 8 Mariela Duran testified that in July 2008, she was sixteen years old. She was dating Garcia-Olvera's son, Armando Alvarez and was classmates with Jennifer Ruiz, who was fifteen at the time. Mariela testified that a few days before the acid attack, Garcia-Olvera telephoned her and told her that her mother-in-law, defendant, had a cleaning job for Mariela.

¶ 9 Jose Avila testified he was fifteen years old at the time of the attack. He attended a party at Garcia-Olvera's home in Cicero a few days before the attack. Defendant was there as well. Jose testified defendant informed him that she had a lot of problems with her husband because he had left for Mexico with another woman. Defendant asked Jose if he would do "a job" for her. Jose inquired what kind of job and defendant replied that she wanted him to rob a lady. Defendant told Jose she would pay him "very well."

¶ 10 Mariela and Jennifer testified that the day before the attack, they went to defendant's house in Cicero around 8 p.m. believing she had a cleaning job for them. Mariela testified defendant spoke to them "about hurting somebody." Mariela testified defendant told them she had a friend she had worked with that she suspected her husband "was messing" with. Jennifer testified defendant said there was a woman she did not like and wanted that woman harmed. Jennifer testified defendant wanted Mariela to "throw something in a bottle" at the woman and take her purse to make it appear as if it was a robbery.

¶ 11 Mariela testified she asked to leave defendant's house, but defendant refused, saying she would take Mariela and Jennifer to the job. Mariela testified defendant denied her request to use

the telephone. She testified defendant told her that her friend would give Mariela a bottle which she was to use to "splash on the victim." Mariela testified defendant told her to be careful with the contents of the bottle and make sure not to spill it on herself because it would burn. Mariela testified she initially refused to do as defendant requested, but claimed defendant told her she knew where Mariela's family lived and that she knew Mariela's sister.

¶ 12 Mariela testified defendant then went in to her kitchen and when she returned, was even angrier. Mariela testified she tried to leave with Jennifer, but they were stopped by defendant and told they would be staying the night at her house. Mariela and Jennifer stayed the night at defendant's house.

¶ 13 The night before the acid attack, Jose returned to Garcia-Olvera's house. Jose testified Garcia-Olvera called him and told him he was going to do "a job" for her and that he needed to come to her house and spend the night. Early the next morning, Garcia-Olvera woke Jose. Jose testified that as he and Garcia-Olvera walked to her car, she told him to grab the bat lying in the backyard. Garcia-Olvera told Jose they had to drive to her mother-in-law's house. Garcia-Olvera made a telephone call and told the person on the other end to "call the other two girls" because she and Jose were almost in front of their house. Jose testified Garcia-Olvera drove him to defendant's house.

¶ 14 On the morning of July 28, 2008, defendant awakened Mariela and Jennifer and provided them with clothes to wear. Mariela and Jennifer left defendant's house and got in to Garcia-Olvera's car, which was parked in the driveway. Mariela testified she sat in the passenger seat and Jennifer sat in the back with Jose. They drove from Cicero toward Chicago. They made one

stop, so Jose could pick up tamales and hot chocolate. Garcia-Olvera stopped at a bus stop and told the three juveniles to get out and wait. Jose and Jennifer testified Garcia-Olvera told them she had to go to work and that a woman named Linda would pick them up. About twenty minutes later, a gray truck pulled up and a woman named Linda called them over. The three juveniles got in to her car.

¶ 15 Mariela testified the driver, Linda Dirzo, had a big bottle of bleach or Clorox by her side. Dirzo drove them about two or three blocks away, stopped at a corner and said, "Get out, there she is," and "Don't forget the purse." Mariela testified she got out of the car and started running toward the woman. She testified Jose ran towards her with a bat in his hands, so Mariela feared he was going to hurt her and Jennifer if they did not do what defendant and Dirzo told them to.

¶ 16 All three of the juveniles testified that as Esperanza bent down to get something from her car, Mariela opened the bottled and splashed its contents on Esperanza's chest. Jose approached and hit Esperanza on the back with the bat. Jose claimed he slipped on the liquid on the ground and some splashed on his body, burning him. Mariela splashed Esperanza again on the back and then grabbed her purse. All the juveniles testified Esperanza was screaming and crying. Mariela, Jose, and Jennifer ran toward Dirzo's car, which was about a block away, got in and, then, they drove away.

¶ 17 At trial, Mariela identified herself, Jose and Jennifer in a video immediately prior to and following the acid attack. In the video, Jose is seen running with a bat and Mariela is carrying Esperanza's purse and holding the bottle that held the acid.

¶ 18 Mariela testified that when they got back in the car, Dirzo used her cellular telephone to

call someone. Mariela's shirt was ripped and she had splashed the liquid on herself during the attack and it was burning. Dirzo drove them to defendant's house and they went inside. As Dirzo recounted the attack, she was laughing with defendant. Defendant gave Mariela eggs to put on her burning skin. While Mariela was in the bathroom with Jennifer tending to her burns, she heard Dirzo tell defendant Esperanza was crying and screaming during the attack.

¶ 19 Defendant tried to give Mariela and Jennifer money for their role in the attack, but they refused. Mariela testified she left and went home. When she arrived home, her sister told her that their parents went to the police to report her missing. When her parents returned, Mariela lied to them by telling them she burned herself at a friend's house while cleaning with chemicals. Her mother called an ambulance and the Cicero police came to their house. Mariela testified she lied to the police and hospital staff about what had occurred.

¶ 20 Mariela testified that three days later, defendant and Dirzo came to see her and told her to leave the state. She testified she went to California, where she was eventually arrested. She gave a statement to the police and then was transported back to Chicago.

¶ 21 Jennifer testified that a few days after the attack, defendant and Garcia-Olvera came to her house. Defendant told her not to tell anybody defendant was involved. Jennifer went to Indiana and was arrested on August 27, 2008. Jennifer signed a plea agreement, providing her testimony in exchange for a sentence of juvenile probation.

¶ 22 Mariela testified she pled guilty to heinous battery and cooperated with the State in exchange for a sentence in which she would remain at an Illinois youth center until her 21st birthday. Mariela acknowledged that when she first spoke with the police and her parents, she

lied about what had happened. She further testified that in her videotaped statement to the San Joaquin, California police, she did not mention either defendant or Garcia-Olvera. However, she did inform the police that the woman who arranged the attack was in her 40s, and approximately 5'5" or 5'6", and 130 pounds; a description matching Garcia-Olvera. Mariela testified the first time she mentioned defendant's name was in her statement to the Chicago police on August 25, 2008. Mariela acknowledged she lied in her statement to the Chicago police too because she did not mention Garcia-Olvera's involvement. Mariela was impeached with her plea statement, in which she failed to state that defendant told her she had to stay the night at defendant's house prior to the attack or that defendant would hurt her family.

¶ 23 After Mariela testified, the defense moved *in limine* to bar the admission or publication of any of the fourteen photographs of Esperanza's injuries. The trial court ruled that all of the photographs could be admitted, and chose five to publish to the jury. In doing so, the court looked at each photograph individually and determined, "they were admissible even though they show extreme injury because the allegation in this case and the charge, heinous battery, requires disfigurement, one of the counts." The court noted that it allowed the publication of five photographs because "[i]n each of those circumstances, the probative weight outweighs any prejudicial value that they may have. In addition, those that I did not allow to be published or will not allow to be published were duplicative of other shots that had been taken or were of no evidentiary value."

¶ 24 Jose's testimony concerning the attack on Esperanza was consistent with Mariela's version. Jose was arrested on November 7, 2008, and that February, agreed to plead guilty to

heinous battery and cooperate with the State in exchange for sentencing as a juvenile.

¶ 25 Jose testified that when he first spoke with the police in November 2008, he lied by failing to tell the police of Garcia-Olvera's involvement. In his handwritten statement, he told the police of Garcia-Olvera's involvement, but failed to tell the police that when defendant asked him to do a job for her, she said it was a robbery.

¶ 26 Charles Shepard, an evidence technician, testified that he swabbed a substance that was found on Esperanza's car and then inventoried it. Allan Osaba, a forensic chemist, testified he received the inventoried sample, which he concluded contained sulfuric acid.

¶ 27 Dawn Friloux, an intelligence analyst, testified she reviewed telephone records in this case. The records showed 34 telephone calls between a cellular telephone registered to Linda Dirzo, one registered to "Deroberto Juarez," and one to "Ma. Consuelo Olvera" during the period of July 27, 2008 at 8 p.m. through July 28, 2008 at 8 p.m. Ms. Filoux clarified that the record told her nothing concerning who placed those calls and what was said during them.

¶ 28 Esperanza testified that on the morning of July 28, 2008, she left her home in Logan Square to go to work. At the time, Esperanza was living with her boyfriend, Gustavo Alvarez. As Esperanza attempted to enter her car, she heard someone say, "hey." Esperanza testified that when she turned around, a girl said, "this is for you." The girl threw what Esperanza believed to be hot coffee on her. Esperanza tried to block the liquid with her arm and started screaming in pain. She testified she pulled her shirt off. She then felt "a hit on my back." She fell to the ground and as she tried to get up, was hit on her neck and back of the head. Esperanza testified she thought to herself, "if I get up, they're going to kill me."

¶ 29 Gustavo testified he heard Esperanza screaming. He testified that when he went outside, he saw Esperanza's "face was changing colors and her clothes were destroyed." Gustavo testified that when he touched her hair, he knew someone had thrown acid on her because he had previously worked with acid. Gustavo took Esperanza inside, undressed her and put her in the shower.

¶ 30 Initially, Esperanza was transported to Illinois Masonic hospital and then later transported to Stroger Hospital, where she remained for two months in a medically induced coma because, as she testified, " the doctor said that it's the worst pain a human being can endure." Esperanza remained in the hospital for four months and underwent numerous skin grafts. She suffered burns over 25% of her body. Because of her injuries, Esperanza is no longer able to work.

¶ 31 Shirley Medina, Esperanza's daughter, testified she visited her mother at the hospital several times a day, every day, during her hospital stay. Shirley identified fourteen photographs of Esperanza, which showed the injuries she sustained as a result of the acid attack.

¶ 32 Defendant did not testify. The defense presented evidence by way of stipulations. The parties stipulated to the foundation for Mariela's videotaped statement to the San Joaquin police. The parties also stipulated to several of the State's witnesses' prior inconsistent statements. Following the stipulations, the defense played Mariela's videotaped statement. The defense then rested.

¶ 33 The jury found defendant guilty of heinous battery and she was sentenced to 44 years in prison. Defendant's motion to reconsider sentence and her motion for a new trial were denied. Defendant timely appealed.

¶ 34 ANALYSIS

¶ 35 Photographs of the Victim

¶ 36 Defendant contends she was denied her due process rights to a fair trial when the trial court allowed five photographs depicting Esperanza's injuries to be admitted and published to the jury. Defendant contends allowing the jury to see graphic photographs of Esperanza's injuries was prejudicial where the question of permanent disfigurement was not an issue and, therefore, the photographs only served to inflame the jurors' passions.

¶ 37 The decision of whether to allow the jury to view photographs is at the trial court's discretion and, as a reviewing court, we will not reverse that decision, absent an abuse of discretion. *People v. Shum,*117 Ill.2d 317, 353 (1987). Photographs are admissible, and may be shown to the jury, if they are relevant to prove facts at issue, unless the prejudicial nature of the photographs outweighs their probative value. *People v. Heard,* 187 Ill. 2d 36, 77 (1999). "If photographs could aid the jury in understanding the testimony, they may be admitted, even if cumulative of that testimony." *People v. Chapman*, 194 Ill. 2d 186, 220 (2000) (citing *Heard,* 187 Ill. 2d at 77). Even if the photographs are gruesome and inflammatory, they may be admitted if sufficiently probative. See *People v. Simms,* 143 Ill. 2d 154 (1991) (the court did not abuse its discretion by admitting photographs of the victim's partially naked body, of stab wounds in the victim's neck, and of bloodstains in the victim's apartment because they were probative of the defendant's mental state); *People v. Armstrong,* 183 Ill. 2d 130 (1998) (photographs that showed the shattered pieces of the victim's skull were properly admitted to the jury); *People v. Anderson,* 237 Ill. App. 3d 621 (1992) (the trial court did not err in allowing crime scene and autopsy

photos to be submitted to the jury).

¶ 38 In the present case, the photographs of Esperanza's extensive injuries after being doused with sulfuric acid were relevant and admissible. These photographs were relevant to establish the nature and extent of Esperanza's injuries and the manner in which the injuries had been inflicted. To sustain a conviction for heinous battery, the State must show,

> "A person who, in committing a battery, knowingly causes severe and permanent disability, great bodily harm or disfigurement by means of a caustic or flammable substance, a poisonous gas, a deadly biological or chemical contaminant or agent, a radioactive substance, or a bomb or explosive compound commits heinous battery." 720 ILCS 5/12-4.1(a) (West 2008).

The State submitted fourteen photographs, five of which were published to the jury, to sustain that burden.

¶ 39 Defendant contends that because Esperanza appeared in court and testified concerning her injuries and treatment, permanent disfigurement was not at issue and, therefore, allowing the jury to see the graphic photographs only served to inflame the jurors' passions and prejudice them against her. Defendant argues the graphic photographs were irrelevant to the only issue before the jury, *i.e.* whether defendant was accountable for Mariela's actions. We disagree.

¶ 40 The State is not precluded from proving every element of the charged offense and every fact relevant to that proof, even if the defendant is willing to stipulate to certain facts. *People v. Bounds*, 171 Ill. 2d 1, 46 (1995). Here, defendant offered no stipulation, but even if we accept

defendant's contention that she did not dispute the nature of Esperanza's injuries, the photographs were properly considered relevant. The photographs challenged by defendant provided evidence of the victim's "permanent disability, great bodily harm or disfigurement" as required for the offense of heinous battery. 720 ILCS 5/12-4.1(a) (West 2008).

¶ 41 Moreover, it would be irresponsible to allow a jury to conclude that a victim's physical disfigurement, as seen from the witness stand, was the result of the defendant's actions without actually linking the defendant's actions to the result; the photographs here do just that. The photographs informed the jury of the extent and nature of Esperanza's injuries more accurately than her testimony and physical presence in court, years after the attack. Many of Esperanza's injuries were on areas of her body not visible to the jury and the disfigurement that was visible had changed over time because of the extensive medical treatment she received.

¶ 42 The trial court deliberately weighed the probative value against the prejudicial effect of the State's fourteen offered photographs, allowing only five to be published. The trial court allowed the five photographs because they showed different injuries to Esperanza: Exhibit 7 showed the acid burns on her back; Exhibit 9 showed her post-op skin transplant; Exhibit 10 showed the acid burns of her face; Exhibit 11 showed the burns to her chest; and Exhibit 15 showed the post-op burns on her right arm. In allowing the photographs, the court determined the jury was entitled to see the extent and severity of the damage done by the acid attack as it appeared immediately following the attack. The court stated, "I have to say that in my view in light of the charge I have to allow them to be shown and I don't think just showing the victim here today obviously after many surgeries would have adequately explained the nature of the

original injury[.]" The trial court ruled the photographs were necessary evidence to allow the State to prove the elements of heinous battery.

¶ 43 Defendant argues that *People v. Garlick,* 46 Ill. App. 3d 216 (1977), is instructive. In *Garlick,* the appellate court reversed the defendant's conviction because a single "gruesome, color photograph of the deceased's massive head wound" went to the jury. *Garlick,* 46 Ill. App. 3d at 224. In doing so, this court found the photograph served no purpose other than "to inflame and prejudice the jury in the grossest manner possible." *Garlick,* 46 Ill. App. 3d at 224.

¶ 44 *Garlick* is easily distinguishable from the present case. In *Garlick,* the defendant was only arguing insanity, as he had admitted guilt. Therefore, the photograph was not admitted to show the manner in which the murder had been committed. Unlike *Garlick,* at issue in this case is the manner in which Esperanza was injured. Therefore, we find *Garlick* inapposite and hold that the trial court did not abuse his discretion in admitting the photographs.

¶ 45 The photograph's of Esperanza's injuries were not admitted solely to inflame the jury. We agree with the trial court that their probative value outweighed their prejudicial effect. Only five photographs of Esperanza's injuries were published to the jury, and each helped to show the nature, location, and extent of her injuries. The photographs were particularly necessary to show the extent of her injuries, especially those not visible while she was clothed. The photographs aided the jury in understanding the "severe and permanent disability, great bodily harm or disfigurement" Esperanza suffered because of the acid attack and, therefore, even if cumulative of Esperanza's testimony, properly admitted. See *Chapman*, 194 Ill. 2d at 220.

¶ 46 We reject defendant's contention that the photographs of Esperanza's injuries were

unfairly prejudicial. Although the photographs were graphic in their depiction of Esperanza's injuries, they were relevant to the elements of the charged crime. The prejudicial effect of the photographs did not outweigh their probative value and, therefore, the trial court did not abuse its discretion in allowing the jury to view them.

¶ 47 Supreme Court Rule 431(b)

¶ 48 Defendant next argues the trial court erred in conducting *voir dire* by failing to ascertain each individual jurors' understanding and acceptance of the *Zehr* principles in violation of amended Illinois Supreme Court Rule 431(b) (Ill. S. Ct. Rule 431(b) (eff. May 1, 2007)), thereby depriving her of her constitutional right to a fair and impartial jury.

¶ 49 In *People v. Zehr*, 103 Ill. 2d 472 (1984), our supreme court held the trial court erred by refusing defense counsel's request to ask certain questions during *voir dire*. *Zehr*, 103 Ill. 2d at 476-78. The supreme court determined:

> "[E]ssential to the qualification of jurors in a criminal case is that they know that a defendant is presumed innocent, that he is not required to offer any evidence in his own behalf, that he must be proved guilty beyond a reasonable doubt, and that his failure to testify in his own behalf cannot be held against him." *Zehr*, 103 Ill. 2d at 477.

The supreme court found these guarantees go to the " 'heart of a particular bias or prejudice which would deprive defendant of his right to a fair and impartial jury' " and, thus, must be covered during *voir dire* when requested by defense counsel. *Zehr*, 103 Ill. 2d at 477-78 (quoting

People v. Zehr, 110 Ill. App. 3d 458, 461, 442 N.E.2d 581 (1982)). After *Zehr* was decided, the Illinois Supreme Court amended Rule 431(b) in 1997 to require a trial court to question venire members regarding the *Zehr* principles when so requested by the defendant. In 2007, the rule was once again amended to eliminate the need for a request by a defendant before such questions must be asked. See *People v. Gilbert*, 379 Ill. App. 3d 106, 110 (2008).

¶ 50 Defendant admits her trial counsel did not object during *voir dire* or include this issue in her posttrial motion; defendant seeks to invoke the plain error doctrine. The plain error doctrine was outlined by our supreme court in *People v. Herron*, 215 Ill. 2d 167 (2005).

> "[T]he plain-error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." *Herron*, 215 Ill. 2d at 186-87.

Under both prongs, defendant bears the burden of persuasion. *Herron*, 215 Ill. 2d at 187. Defendant concentrates her challenge of the trial judge's compliance with Rule 431(b) under the first prong, claiming the evidence in this case was closely balanced.

¶ 51 Before considering plain error, we must first determine " 'whether error occurred at all.' " *People v. Harris*, 225 Ill. 2d 1, 31(2007) (quoting *People v. Wade*, 131 Ill. 2d 370, 376 (1989)). Defendant's claim requires this court to construe a Supreme Court Rule and, therefore, our review is *de novo*. *People v. Campbell*, 224 Ill. 2d 80, 84 (2006).

¶ 52 The entire jury selection process conducted by the court is contained in the record.

The court questioned two separate groups of prospective jurors from which the jury was picked. The court provided the following admonishments to the entire *venire*:

> "THE COURT: The State has the burden of proving Defendant's guilt beyond a reasonable doubt. Does everyone understand that?
>
> (No audible response)
>
> Under the law the Defendant is presumed to be innocent of the charges against her. This presumption remains with her throughout every stage of the proceedings and is not overcome unless from all the evidence in the case you were convinced beyond a reasonable doubt that the defendant is guilty.
>
> The State has the burden of proving the guilt of the defendant beyond a reasonable doubt. This burden remains on the State throughout the case. The defendant is not required to prove her innocence nor is she required to present any evidence in her own behalf. She may rely simply on her presumption of innocence. Does everybody that's up in the jury box and the 14 seats in front understand that?
>
> (No audible response)
>
> THE COURT: And do you all accept that proposition?
>
> (No audible response)

> THE COURT: Is there anyone among you that take any issue with it at all? No. No one is indicating.

¶ 53 Additionally, the prospective jurors were questioned in seven panels of four. The panels received further admonishment, but the admonishments were inconsistent among panels. The first panel was admonished about principles one and two. The second panel was further admonished concerning principles one and four. Panels three through six were admonished regarding principles two through four, but not principle one. No further questions regarding whether the prospective jurors accepted the principles were made. No prospective juror indicated any difficulty in understanding or accepting any of the *Zehr* principles. The jury was impaneled and instructed as follows:

> "The defendant is presumed to be innocent of the charge against her. This presumption remains with her throughout every stage of the trial and during your deliberations on the verdict and is not overcome unless from all the evidence in this case you are convinced beyond a reasonable doubt that she is guilty.
>
> The State has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden remains on the State throughout the case. The defendant is not required to prove her innocence."

The entire *venire* was never admonished, nor were they asked about the fourth principle, that defendant's failure to testify cannot be held against her. Therefore, the court's failure to address

this principle constitutes non-compliance with Rule 431(b); the State concedes this point. ¶ 54

While conceding the trial court's admonishment may have informed the prospective jurors *en masse* of the first three principles outlined in *Zehr*, defendant contends the selection process followed by the court did not comply with the goal of Rule 431(b) of ensuring that each of the prospective jurors understood and accepted each of the principles. Defendant argues the court's failure to make an individual inquiry of each prospective juror violated the rule.

¶ 55 We reject defendant's contentions that the court's questioning of the venire fell short of the requirements of Rule 431(b). In accordance with Rule 431(b), the court directly questioned the prospective jurors, "in a group" on three out of the four *Zehr* principles. Ill. S. Ct. Rule 431(b) (eff. May 1, 2007). In *People v. Thompson,* 238 Ill. 2d 598, 607 (2010), our supreme court has specifically rejected the proposition that each juror must be individually admonished or present an individual response of acceptance. "The questioning may be performed either individually or in a group, but the rule requires an opportunity for a response from each prospective juror on their understanding and acceptance of those principles." *Thompson*, 238 Ill. 2d at 607. That the prospective jurors here did not indicate any concern with the admonishments is inconsequential; the court properly allowed them an opportunity to do so. Thus, the court fully complied with the dictates of Rule 431(b) as related to the inquiry and response process.

¶ 56 We turn our attention now to the court's failure to admonish the prospective jurors about the fourth principle, that defendant's failure to testify cannot be held against her. As stated above, the court's failure to address this principle constitutes non-compliance with Rule 431(b). However, non-compliance does not automatically mandate relief. Under a plain error analysis,

the defendant must meet her burden of persuasion with respect to prejudice. *People v. Woods*, 214 Ill. 2d 455, 471 (2005). The defendant must show 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." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 57 We are unpersuaded by defendant's claims that the evidence in this case was closely balanced because she did not make "any statements admitting involvement in this offense, and there was absolutely no physical evidence linking her to the crime." The evidence at trial established defendant's role as the orchestrator of this crime. Defendant planned and directed the three juveniles to throw sulfuric acid on Esperanza because she was jealous of the relationship Esperanza was having with her former lover. Defendant hired a private investigator to find Esperanza. When defendant met with the private investigator, she lied about why she wanted Esperanza found, claiming it was because they shared property which needed to be sold. Under the pretense of hiring Mariela and Jennifer for a cleaning job, defendant informed them of her plan. The night before the attack, defendant told Mariela that she wanted Mariela to hurt someone and that she suspected her "husband was messing" with another woman. Jennifer testified she heard defendant say there was a woman she did not like and that she wanted harmed. Defendant told both Mariela and Jennifer that she wanted Mariela to "throw something in a bottle" at this woman, and then take her purse to make it look like a robbery. Defendant understood the danger of the acid. She warned Mariela to be careful with the contents of the bottle because contact with it could cause a burn.

¶ 58 Jose Avila, the third juvenile co-offender, testified that at a party a few days before the

attack, defendant informed him that she had a lot of problems because her "husband" left for Mexico with another woman. Defendant asked Jose to do a "job" for her and when asked what kind of job, replied that she wanted him to rob a woman. Defendant told Jose he would be paid "very well."

¶ 59 On the morning of the attack, defendant provided Mariela and Jennifer with clothes to wear. Defendant told the girls that her friend was outside waiting to drive them. Garcia-Olvera drove Jose, Mariela, and Jennifer to Logan Square. Linda Dirzo picked them up and transported them to Esperanza's house. While in the car, Dirzo handed Mariela a bottle which contained sulfuric acid. When Esperanza left her house and approached her car, Dirzo yelled at the juveniles to "[g]et out. There she is." Jose, Mariela, and Jennifer approached Esperanza and Mariela splashed the sulfuric acid on her.

¶ 60 Dirzo drove the juveniles back to defendant's house immediately after the attack. En route, Dirzo made a phone call, reporting to the person on the other end that "the job had already been done" and that "everything turned out good."

¶ 61 When they arrived back at defendant's house, Dirzo and defendant helped Mariela and Jose put eggs on their burned skin. Dirzo told defendant the attack resulted in screams and cries from Esperanza; defendant laughed. Defendant asked the juveniles how much they wanted for their role.

¶ 62 Two days after the attack, defendant and Garcia-Olvera visited Jennifer's house. Defendant told Jennifer to keep quiet about defendant's role because she was "too old. She didn't want to spend the rest of her days in jail." After this confrontation, Jennifer fled to Indiana. The

following day, defendant and Dirzo visited Mariela's house and told her to leave Illinois. The women told Mariela that if she was caught, no one would believe her. Mariela fled to California.

¶ 63 The phone analysis conducted showed unusually high activity between the phones used by defendant, Garcia-Olvera and Dirzo on the morning of the attack.

¶ 64 Based on the evidence in the record, defendant cannot sustain her burden of establishing prejudice. Because the evidence in this case was not closely balanced, but rather, overwhelming, defendant's forfeiture cannot be excused. Reversal is not required under the plain-error doctrine. The court's error in not admonishing the prospective jurors on the fourth *Zehr* principle does not require relief because the evidence was not "so closely balanced that the error alone threatened to tip the scales of justice against the defendant." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 65 Sentencing

¶ 66 Defendant contends that the 44-year sentence imposed by the trial court was excessive. Defendant acknowledges that the sentencing range for heinous battery was 6 to 45 years in prison (720 ILCS 5/12-4.1(b) (West 2008)), but claims that because the court chose a sentence just one year shy of the maximum, the sentence is excessive in light of her age and, particularly, her lack of criminal history. In support of her argument, defendant notes that because she was 59 years old when the attack occurred and is required to serve at least 85% of the sentence (730 ILCS 5/3-6-3(a)(2)(ii) (West 2008)), she will be 96 years old when she can be released. Defendant argues she effectively received a life sentence, which she claims was not justified.

¶ 67 The trial court's sentencing determination is entitled to great deference because the trial court is generally in a better position than the reviewing court to determine the appropriate

sentence and to balance the need to protect society with the rehabilitation potential of the defendant. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). As a reviewing court, we cannot substitute our judgment for that of the sentencing court merely because we would have weighed the factors differently. *Stacey*, 193 Ill. 2d at 209. Furthermore, the existence of mitigating factors does not automatically require the sentencing court to reduce the sentence from the maximum. *People v. Powell*, 159 Ill. App. 3d 1005, 1011 (1987).

¶ 68 However, even where the sentence imposed is within the statutory range, this court will find an abuse of discretion and reduce the sentence when it is "greatly at variance with the purpose and spirit of the law." *People v. Center*, 198 Ill. App. 3d 1025, 1032 (1990). All penalties are to be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. *People v. Moss*, 206 Ill. 2d 503, 520 (2003). The trial court's decision will not be disturbed absent an abuse of discretion. *People v. Streit*, 142 Ill. 2d 13, 19 (1991).

¶ 69 Defendant argues her sentence does not adequately reflect that this was her first and only offense. Defendant contends, "[t]he constitutionally mandated objective of restoring [her] back to useful citizenship has been entirely thwarted by a sentence particularly ensuring [she] will spend the rest of her life in prison." Defense counsel also noted other mitigation factors, including defendant's advanced age and deteriorating health and her relationship with her three sons.

¶ 70 Defendant relies on *People v. Cooper*, 283 Ill. App. 3d 86 (1996), as support for a reduction of her sentence. In *Cooper*, the defendant scalded his girlfriend's baby in a hot bath

because the baby had defecated on himself. *Cooper*, 283 Ill. App. 3d 89. The baby suffered second-degree burns from mid-chest down, including his thighs, buttocks, scrotum and penis. *Cooper*, 283 Ill. App. 3d 86. Following a jury trial, the defendant was convicted of heinous battery and sentenced to 30 years in prison, the maximum penalty allowed. *Cooper*, 283 Ill. App. 3d 95. On appeal, this court reduced the defendant's sentence to 15 years, stating,

> "[w]e are appalled by the cruelty of defendant's conduct and in no way diminish the seriousness of his offense. As judges, however, we are required to ensure that a particular sentence is designed to further both retributive and rehabilitative ends. We find that the trial court did not properly balance the dual purposes of incarceration in this case." *Cooper*, 283 Ill. App. 3d 95.

¶ 71 Prior to imposing defendant's sentence in the present case, the trial court spoke at great length about how it arrived at the sentence. The trial court found it especially compelling that

> "[t]his crime didn't effect just [Esperanza]. It effected these young women and the man involved. I call them women and men, but they were a few years older than teens. Their lives have been altered too. *** I am totally flabbergasted by this idea that adults could encourage children, older children, to engage in this act and that's what I believe happened. That's what I believe the evidence supported and victimization of [Esperanza]; also to ascertain extent involving the victimization of these children for engaging in these

> acts. They didn't know the victim. They didn't have any connection with the case other than the woman, the two women, that I saw here a month ago. That will be considered."

The court also emphasized the "strong degree of preparation, of coordination, or organized activity, a degree of organized activity that lays to rest any notion that this was in any sense of the word a crime of passion. Rather, this crime was something that was cold and calculated, that took place over time." The court stressed the nature of Esperanza's injury. The court found "it was an extremely costly injury, both spiritually and financially[.]" The sentencing court stated, "I believe my sentence in this case should deter or should endeavor to deter this conduct by any other person out there." The court specifically stated,

> "I am also considering factors in mitigation, things like the fact that she had limited involvement in the criminal justice system, no involvement in the criminal justice system. That can't be denied. But, in certain circumstances, mind you, such as this, the magnitude of the offense, the coordination and brutality of the acts, heartlessness of it all makes it necessary to think more about punishment for rehabilitation and that's sadly profounding.[sic]"

¶ 72 Although *Cooper* is instructive, there are significant differences in the facts of the present case that do not warrant the same result as those in *Cooper*. Unlike the defendant in *Cooper*, defendant spent months organizing and planning the crime and solicited the assistance of juveniles to carry out her plan. The long-term planning and solicitation of others were significant

factors in the sentencing court's decision to impose a 44-year sentence.

¶ 73 Here, the trial court chose a sentence authorized by law for the offense of heinous battery. The sentence defendant received was within the statutory range, albeit one year shy of the maximum. The record shows the sentencing court considered both the aggravating and mitigating factors presented during the sentencing hearing, including defendant's lack of a criminal history. The trial court acknowledged the sentence only fell "one year short of the maximum under the law. That one year is a reflection of the mitigation that I heard here by way of the fact that she has limited interactions with [the] criminal justice system prior to today." The sentencing court found that the brutal nature of the offense supported the sentence. We agree.

¶ 74 We find the sentence defendant received to be proportionate to the serious nature of the offense she committed and consistent with the purpose of the law, including the balancing of the seriousness of the offense with the defendant's rehabilitative potential. We therefore hold that defendant's sentence was proper as there was no abuse of discretion in this case. For the foregoing reasons, we affirm defendant's sentence in all aspects.

¶ 75 CONCLUSION

¶ 76 The trial court did not abuse its discretion by publishing five graphic photographs of the victim's injuries to the jury, where the State was required to prove defendant knowingly caused severe and permanent disfigurement to the victim to sustain the charge of heinous battery. The court's failure to admonish the prospective jurors about the fourth *Zehr* principle, that defendant's failure to testify cannot be held against her, constitutes non-compliance with Rule 431(b), but does not warrant relief where defendant failed to meet her burden of persuasion with respect to

prejudice under the plain error doctrine. Lastly, we uphold defendant's 44-year sentence, finding the trial court did not abuse its discretion in so fashioning it because the sentence is proportionate to the serious nature of the offense and consistent with the purpose of the law.

¶ 77 Affirmed.