

No. 1-10-0381

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 14843
	)	
KEITH HARDIMAN,	)	Honorable
	)	William T. O'Brien,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE JOSEPH GORDON delivered the judgment of the court.  
Presiding Justice Epstein and Justice McBride concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Although the trial court did not ask potential jurors if they understood and accepted principles set out in Supreme Court Rule 431(b), such error did not constitute plain error because defendant did not establish resulting prejudice; defendant's convictions were affirmed and cause remanded for recalculation of amount of fines and fees owed.
- ¶ 2 Following a jury trial, defendant Keith Hardiman was convicted of aggravated battery causing bodily harm to a peace officer and resisting arrest. Based on his previous convictions, defendant was sentenced as a Class X offender to six years in prison, and defendant was assessed \$630 in fees and fines. On appeal, defendant contends his convictions should be reversed and

this case remanded for a new trial because the trial judge failed to comply with Supreme Court Rule 431(b) (eff. May 1, 2007) during jury selection. Defendant also challenges the assessment of various fees and fines. We affirm defendant's convictions but vacate the imposition of several fines and fees and remand for a recalculation of the amount owed.

¶ 3 Defendant's convictions arose from an altercation with Chicago police. At trial, Chicago police officer Lawrence Aikin testified that at about 7:30 a.m. on July 24, 2008, he and fellow officer Brendan McCormack were patrolling the Cabrini Green housing project. The officers stopped to investigate a report of drug use by three people in the area. Officers Aikin and McCormack stopped their car near a courtyard. In response to the officers' radio request for backup, a second police car arrived, carrying Chicago police officers Martin O'Flaherty and Patrick Bryant.

¶ 4 Officer Aikin testified that as the second police car pulled up, he saw defendant walking into the courtyard carrying a glass bottle bearing the letters "VS" partially wrapped in a brown paper bag. According to Officer Aikin, defendant took a drink of brown liquid from the bottle as he walked in the officers' general direction. Because Officer Aikin believed the bottle contained alcohol, he asked defendant to approach the vehicle. Defendant ignored the officer's first request.

¶ 5 When Officer Aikin asked defendant a second time, defendant gave him a "bad look" and walked toward the officers. Officer Aikin testified that defendant approached Officer O'Flaherty from behind and pushed the officer in the left shoulder blade area using his right shoulder.

¶ 6 Officer Aikin took hold of defendant's left arm to apply handcuffs and arrest him, at which point defendant became "very verbally abusive" and shouted profanities. Defendant "locked his arms up in front where [the officers] couldn't get his arm out" and "started flailing his upper body" to resist arrest.

¶ 7 Defendant continued to struggle as he stood facing a police car with his back to the officers. Defendant was bent over the car as the officers attempted to handcuff him, and defendant kicked out behind him in a "mule kick," striking Officer O'Flaherty in the left leg. Officer O'Flaherty responded by striking defendant twice in the back of the head with an open hand to stun defendant so he could be handcuffed. Defendant kicked the officer in the right leg, and after being taken to the ground and handcuffed, he kicked the officer a third time.

¶ 8 Officer Bryant testified as to the events preceding defendant's arrest and described defendant's actions consistent with Officer Aikin's testimony. Officer Bryant retrieved the bottle after the incident and found that it contained alcohol. Officer Aikin told defendant he was being arrested for drinking on a public way.

¶ 9 Officer O'Flaherty also testified about defendant's arrest, stating that when defendant struck him from behind, he "stumbled forward" about two steps. As they tried to handcuff defendant, defendant said he would "kick [their] asses." Officer O'Flaherty described and demonstrated the manner in which defendant kicked him. He sustained bruising, swelling and a cut on his palm and identified photographs of his injuries that were entered into evidence.

¶ 10 In his defense, defendant testified he was walking to a local restaurant that morning to meet someone to discuss a job. As he walked toward the courtyard, he noticed the paper bag containing the bottle and picked it up to dispose of it in a trash can. As defendant entered the courtyard, he walked around four police officers detaining three people in a police car. When one of the officers said, "Hey, get over here," defendant continued walking because he did not know the officer was speaking to him. When an officer asked what was in the paper bag, defendant stopped and gave him the bag.

¶ 11 Defendant denied drinking in public when the officer accused him of doing so. The officer told defendant to put his hands on the police car, and defendant stood at the police car,

facing it. Officer O'Flaherty took the back of defendant's collar and kicked at defendant's legs to force defendant to spread them.

¶ 12 Officer O'Flaherty took defendant's wallet from his back pocket and retrieved defendant's identification. Defendant said that although the officer had been about to handcuff him, the officer instead took the handcuffs away and spun defendant "around from off the car."

Defendant fell to the ground and caught himself with his left hand, which he cut on a piece of glass on the ground. Defendant said Officer O'Flaherty struck him on both sides of his face with his forearm. Defendant fell to the ground and "balled" himself up at the officers kicked him.

¶ 13 Defendant denied kicking Officer O'Flaherty in the leg. He also denied swearing at the officers or resisting arrest; however, he acknowledged there may have been incidental contact. Defendant said Officer O'Flaherty then hit him in the back of the head. At that point, defendant was lying on the ground and asked the officers what he should do about his finger. Photographs of defendant's injuries were entered into evidence. Defendant received four stitches in his finger. On cross-examination, defendant stated he never drank from the bottle.

¶ 14 The defense presented four additional witnesses. Deborah Velasco, an emergency room nurse, testified defendant received stitches for a laceration on his hand. Another nurse working that morning, Jay Pamintuan, testified that he treated Officer O'Flaherty for an injury to his right hand; however, the officer did not complain of any leg pain or injuries. Defendant acknowledged in his cross-examination that he did not tell Velasco about any other injuries sustained by being kicked or struck by the police but said he was concerned about his finger at that point. He also acknowledged there were no blood stains on the front of his white T-shirt even though he cradled his bloody hand in his shirt as he was on the ground.

¶ 15 Dwayne Abram, an investigator at the Cook County jail, testified that he interviewed defendant upon his arrival at the jail and documented his injuries. Photographs taken by Abram

of defendant's injured finger, elbow and knee were identified and entered into evidence. Ralph Metz testified as an investigator for the office of the Cook County public defender in September 2008, he was unable to locate the three people detained near where defendant was arrested.

¶ 16 On appeal, defendant argues a new trial is warranted because the trial judge failed to comply with Supreme Court Rule 431(b). That rule requires the trial court to inform potential jurors of four principles first set forth in *People v. Zehr*, 103 Ill. 2d 472 (1984). The court must tell potential jurors that: (1) the defendant is presumed innocent of the charges against him; (2) the State must prove the defendant's guilt beyond a reasonable doubt; (3) the defendant is not required to offer any evidence on his own behalf; and (4) the defendant's failure to testify cannot be held against him. In addition, the trial court is required to ask each potential juror, either individually or in a group, if he or she understands and accepts those principles. Ill. S. Ct. R. 431(b) (eff. May 1, 2007). Defendant's trial took place in November 2009.

¶ 17 Defendant points out that the trial court described those concepts but did not ask the venire members, either individually or as a group, whether they understood and accepted those principles.<sup>1</sup> He contends that omission constituted plain error, apparently conceding he failed to preserve this issue for appeal.

¶ 18 The plain error rule allows a reviewing court to consider an unpreserved issue when a clear or obvious error occurred and either: (1) 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) 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. *People v. Hanson*, 238 Ill. 2d 74, 113 (2010). Defendant challenges the court's omission under

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<sup>1</sup> Although defendant also points out the trial court did not inform the venire of the fourth principle, *i.e.*, that his failure to testify could not be held against him, he concedes that omission did not prejudice him because he testified at trial.

the first prong of plain error review, arguing the evidence in this case was closely balanced and the court's failure to ascertain the jurors' understanding and acceptance of the State's burden of proof could have affected the jury's verdict.

¶ 19 The first step in plain error analysis is to determine whether any error occurred. *People v. Walker*, 232 Ill. 2d 113, 124-25 (2009). If an error occurred, the defendant bears the burden of demonstrating he was prejudiced by the error. *People v. McLaurin*, 235 Ill. 2d 478, 495 (2009).

¶ 20 Rule 431(b) requires that potential jurors be questioned as to whether they both understand and accept each of the enumerated principles. *People v. Thompson*, 238 Ill. 2d 598, 607 (2010). Because those inquiries did not occur here, the trial court violated Rule 431(b). See *Thompson*, 238 Ill. 2d at 607.

¶ 21 We disagree with defendant's characterization of the evidence in this case as closely balanced. Three police officers presented testimony from which the jury could conclude that defendant walked past the officers carrying alcohol, threatened the officers upon being detained and kicked Officer O'Flaherty during that incident. We recognize that the question of whether the evidence is closely balanced is distinct from a sufficiency of the evidence challenge. See *People v. Piatkowski*, 225 Ill. 2d 551, 566 (2007). Although defendant testified to a different version of events than that presented by the State, the existence of contrary testimony does not mean the evidence was so closely balanced that the jury's guilty verdict arose from that error and not from the evidence.

¶ 22 Moreover, defendant bears the burden of showing he was prejudiced by the error. See *McLaurin*, 235 Ill. 2d at 495. Defendant argues that because the trial court did not ask whether jurors understood and accepted the State's burden of proof and that the defense did not need to present any evidence, that omission "could have affected the outcome of this case." He asserts

that it "is possible that some jurors might have misunderstood, or might not have accepted, that the burden of proof lies with the State, and not with Hardiman."

¶ 23 The report of proceedings indicates the State's burden of proof was described to the jury at each stage of trial. Before jury selection began, the venire members were told:

"The State has the burden of proving the guilt of the defendant beyond a reasonable doubt. The State carries this burden throughout the case. The defendant is not required to prove his innocence. The defendant need not present any evidence at all. The defendant may rely upon this presumption of innocence."

¶ 24 After the jury was selected, and before opening statements, the court reiterated those standards to the seated jury:

"State has the burden of proof in this case, therefore, they will present their evidence first. After the State concludes with all the evidence, the [d]efense will have an opportunity to present evidence. Remember, however, that the defendant is presumed innocent and does not have to present any evidence at all.

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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 his innocence. He's not required to testify, to cross-examine any of the State's witnesses or to present any evidence on his own behalf. He may rely on the presumption of innocence throughout this case."

¶ 25 Given those repeated descriptions of the State's burden of proof, we reject defendant's unsupported assertion that the court's failure to ascertain the jurors' understanding and acceptance of those tenets, and the fact that he was ultimately convicted, establishes that the jury misunderstood the State's burden of proving defendant's guilt. Therefore, the trial court's omission did not constitute reversible error under the first prong of plain error.

¶ 26 In the balance of defendant's brief, he challenges several fines and fees imposed against him and also argues he is entitled to a reduction in those fines for time spent in custody prior to sentencing. The State concedes several of the points raised by defendant; however, the State does not address defendant's assertion that the revised total should be \$341.

¶ 27 As to the specific assessments challenged by defendant, the State correctly agrees the \$25 Violent Crime Victim's Assistance Fine (725 ILCS 240/10(c)(1) (West 2008)) should be not have been imposed because other fines were assessed against defendant. The State agrees that a \$4 charge should have been assessed instead pursuant to another subsection of that statute. See 725 ILCS 240/10(b) (West 2008).

¶ 28 Second, the State correctly agrees the assessment of the \$20 preliminary hearing charge (55 ILCS 5/4-2002.1(a) (West 2008)) should be vacated because no probable cause hearing was held in this case.

¶ 29 Third, the State correctly concedes that the \$200 DNA analysis fee pursuant to section 5-4-3(j) of the Unified Code of Corrections (730 ILCS 5/5-4-3(j) (West 2008)) should not have been charged. Defendant already submitted a sample after a previous conviction and therefore is not required to submit a new sample. See *People v. Marshall*, 242 Ill. 2d 285, 301-02 (2011). Because that charge is not being imposed, we need not consider defendant's alternative argument that the fee can be offset by pre-sentencing credit.

¶ 30 Fourth, defendant asserts that the \$25 court services fee imposed pursuant to section 5-1103 of the Counties Code (55 ILCS 5/5-1103 (West 2008)) should not have been assessed against him because that fee applies to offenses enumerated in that statute and he was not convicted of one of those crimes. This court has considered that contention several times and has concluded the court services fee can be assessed even if the offense for which the defendant was convicted is not listed in the statute. See *People v. Lattimore*, 2011 IL App (1st) 093238, ¶ 105 (2011) (and cases cited therein). Therefore, the imposition of the \$25 court services fee is affirmed.

¶ 31 Defendant's fifth and final contention on this point is that he is entitled to a \$5-per-day credit for time spent in custody prior to sentencing, which reduced the amount of fines that he owes. The clerk of the circuit court has issued a corrected mittimus to indicate 548 days spent in custody before sentencing, which entitles defendant to credit of \$234 against any fines imposed.

¶ 32 In summary, we vacate the \$20 preliminary hearing charge and the \$200 DNA analysis fee and reduce the Violent Crime Victims Assistance Fine from \$25 to \$4. Despite the \$234 credit for defendant's time spent in custody before sentencing, the only remaining fine assessed against defendant is the Children's Advocacy Center fine of \$30. Therefore, defendant's credit for pre-sentencing custody should be \$30.

¶ 33 Accordingly, this case is remanded to the trial court for recalculation of defendant's fines and fees and the corresponding correction of the fines and fees order. The judgment of the trial court is affirmed in all other respects.

¶ 34 Affirmed in part and vacated in part; cause remanded.