

No. 1-09-1819

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 07 CR 1691
)	
DURRELL DAVIS,)	Honorable
)	Lawrence P. Fox,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Gallagher and Justice Lavin concurred in the judgment.

ORDER

HELD: Defendant's failure to object to the trial court's noncompliance with Supreme Court Rule 431(b) resulted in the forfeiture of this claim on appeal. Defendant's contention that the trial court was hostile to his counsel was rejected when defendant could not establish that the complained-of comments were improper.

After a jury trial, defendant Durell Davis was convicted of first degree murder and aggravated battery with a firearm. He was sentenced to 40 years in prison for the murder and to a consecutive term of 6 years for the aggravated battery. On appeal, defendant contends the trial court did not comply with Supreme Court Rule 431(b) (eff. May 1, 2007), when it failed to ask jurors whether they understood and accepted the principle that a defendant is not required to offer

evidence on his own behalf. He also contends that the court's hostility toward his counsel prejudiced him. We affirm.

On November 18, 2006, the victim, Lamont Loggins, was fatally shot and Thomas Barfield was shot in the hip. Defendant and codefendant Derec Bell were charged by indictment with, *inter alia*, first degree murder and aggravated battery with a firearm. Defendant elected to proceed to a jury trial and was tried jointly with codefendant.¹

During *voir dire*, the court explained the principles enumerated in *People v. Zehr*, 103 Ill. 2d 472 (1984), *i.e.*, a defendant (1) is presumed innocent, (2) must be proven guilty beyond a reasonable doubt, (3) is not required to offer any evidence on his own behalf, and (4) cannot be penalized by the failure to testify upon his own behalf. The court then questioned the venire regarding three of the four *Zehr* principles asking, after each principle, if anyone had a "problem" with it. The court did not ask whether potential jurors understood and accepted that a defendant is not required to present evidence on his own behalf. Defendant did not object and a jury was then selected. Before opening statements, the court reminded the jury that a defendant was not required to prove his innocence or present evidence on his own behalf. The court also stated that if a defendant chose not to testify or present evidence on his own behalf, the jury must not consider that against him.

At trial, the State presented the testimony of eyewitnesses Thomas Barfield and Marcus Beck. Both men had identified defendant and codefendant as the shooters in photographic arrays, lineups, and before the grand jury. At trial, both men recanted these identifications.

Thomas Barfield, a convicted felon, testified that he had recently been arrested for failing to appear in response to a subpoena in this case and was currently in custody. He described the shooter as a man wearing a hoody, skullcap, and blue jeans. Barfield did not know this man,

¹ Codefendant is not a party to this appeal.

although he had seen the man before. He only testified before the grand jury and identified defendant and codefendant as the shooters in a photographic array, lineup, and statement because police officers told him to do so. He complied because the officers told him he would be sent to prison if he did not and promised him probation on two unrelated cases.

The State then impeached Barfield with portions of his grand jury testimony. Before the grand jury, Barfield testified that he saw defendant and codefendant exit a white Chevy Caprice with guns in their hands and then begin shooting toward him and his car.

Marcus Beck, who admitted that he had previously been convicted of several drug offenses and was currently on probation, testified that he had no knowledge of shooting because he was at a hotel having a "threesome" that night.

Beck testified that he did not remember viewing a photographic array and he only identified codefendant and defendant in a lineup because officers told him to. With regard to the content of his written statement, he first testified that it was what the police told him to say, then asserted he did not remember making a statement at all because he takes drugs.

Beck admitted he testified before the grand jury, but claimed that he was told what to say. The State then impeached Beck with his grand jury testimony. Beck told the grand jury that he saw defendant and codefendant exit a white Caprice with guns in their hands and then begin shooting.

Detective Tom Crane testified that after he spoke to witness Darius Finley, he created a "photographic spread" which he showed to Beck. Beck identified defendant and codefendant as the men who shot the victim and Barfield. After defendant and codefendant were taken into custody, physical lineups were held. Barfield and Beck viewed the lineup separately, and each identified defendant and codefendant as the shooters. Crane denied coaching or threatening either Beck or Barfield.

LaJuan Bridges, who admitted that he had been convicted of attempted murder among other crimes, testified that he saw two men wearing hoodys exit a dark colored car. Although the men's hoods were up he could see their faces. He did not see either defendant or codefendant.

The jury ultimately convicted defendant of first degree murder and aggravated battery with a firearm. He was sentenced to 40 years in prison for the murder conviction and to a consecutive term of 6 years for the aggravated battery with a firearm.

Defendant first contends that the trial court's failure to ask potential jurors whether they understood and accepted that a defendant is not required to offer evidence on his own behalf denied him a fair trial. The State concedes that the trial court failed to question the venire as to all four *Zehr* principles, but argues that defendant has forfeited this claim on appeal because defendant failed to object at trial and to raise this issue in his posttrial motion. See, e.g., *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defendant responds that the rule of forfeiture should be relaxed because the burden of compliance with Rule 431(b) rests with the trial court and the trial court's conduct is at the center of the alleged error. In the alternative, defendant argues that his claim should be reviewed for plain error.

Our supreme court's decision in *People v. Thompson*, 238 Ill. 2d 598 (2010), is controlling. In that case, the court held that a violation of Rule 431(b) is not a structural error which requires automatic reversal. *Thompson*, 238 Ill. 2d at 611. Thus, when a defendant does not object to a trial court's failure to comply with Rule 431(b), that defendant has forfeited review of the issue on appeal. *Thompson*, 238 Ill. 2d at 611-12. The court also found that violations of Rule 431(b) were not reviewable under the second prong of the plain error doctrine when a defendant fails to show how the trial court's error affected the fairness of his trial. *Thompson*, 238 Ill. 2d at 614-15.

Here, defendant did not object to the trial court's failure to question the venire regarding its understanding and acceptance of the principle that a defendant is not required to present evidence on his own behalf, either at trial or in his posttrial motion. Accordingly, he has forfeited this issue on appeal. *Thompson*, 238 Ill. 2d at 612. While defendant argues that his procedural default should be excused because he is objecting to the trial judge's conduct, he ignores the fact that had an objection been made, the court could have ensured strict compliance with Rule 431(b). *Thompson*, 238 Ill. 2d at 612. Although defendant highlights the fact that the court "cut" codefendant's further questioning of the venire short, there is no indication that an objection would have been looked upon with disfavor by the court. Defendant also does not explain how the jury was biased by the trial court's failure to ask potential jurors whether they understood and accepted that a defendant is not required to offer evidence on his own behalf. This court cannot assume bias merely because the court failed to comply with Rule 431(b). *Thompson*, 238 Ill. 2d at 614-15.

Defendant next argues that the trial court's failure to question the venire on all four *Zehr* principles constituted plain error under the first prong of the plain error doctrine when Beck and Barfield recanted their identifications. See *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005) (forfeited errors may be addressed "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").

The fact that Beck and Barfield recanted the identifications of defendant and codefendant at trial was not fatal to the State's case when the prior identifications were admitted as substantive evidence at trial via the men's grand jury testimony. See *People v. Craig*, 334 Ill. App. 3d 426, 440-41 (2002) (finding that evidence consisting of a witness's grand jury testimony and previous statement to the police identifying defendant as the shooter, admitted under the exception for prior inconsistent statements, was sufficient to support the defendant's conviction even though

the witness recanted at trial). Beck and Barfield both identified defendant and codefendant as the shooters before the grand jury and, upon their recantations at trial, they were impeached by that testimony. Defendant's procedural default cannot be excused under either prong of plain error review.

Defendant next contends that the trial court's hostility to defense counsel denied him a fair trial.

A trial court has the duty to refrain from conveying improper impressions to the jury and a court's hostile attitude toward the defense may be prejudicial. *People v. Brown*, 172 Ill. 2d 1, 38 (1996). The court also has the inherent power to preserve its own dignity by ensuring proceedings before it take place in a dignified and orderly fashion. *People v. Griffin*, 194 Ill. App. 3d 286, 294 (1990). In order for comments by the trial court to constitute reversible error, a defendant must demonstrate that the comments constituted a material factor in the conviction or were such that an effect on the jury's verdict was the probable result. *Brown*, 172 Ill. 2d at 38-39.

Defendant first contends that the court asked Barfield a question in order to undermine defense counsel. During the cross-examination of Barfield, defense counsel asked whether Barfield had seen a photographic spread containing a picture of Dominick Jakes. When Barfield answered in the negative, defense counsel asked whether Barfield knew Jakes. When Barfield again answered in the negative, the court asked how Barfield knew whether he had viewed a photographic array with Jakes's picture. Codefendant's counsel then objected. The court sustained the objection and instructed the jury to disregard the question.

A trial court is free to examine witnesses at its discretion, provided that the court does not become an advocate. *Griffin*, 194 Ill. App. 3d at 296. Here, Barfield initially testified that Jakes's photograph was not in the photographic spread that he viewed. He subsequently testified that he did not know Jakes. Faced with this testimony, the court then asked how Barfield knew

whether Jakes was included in the photographic array if he did not know Jakes. After codefendant's counsel objected to the court's question, the court instructed the jury to disregard the question and struck it from the record. Here, the court acted within its discretion when it attempted to clarify Barfield's testimony. See *Griffin*, 194 Ill. App. 3d at 296. Moreover, any error was cured when the trial court sustained the objection.

Defendant next contends that the trial court was hostile during trial counsel's cross-examinations of Barfield and Crane. However, the record reveals that in each instance the court was attempting to maintain order in the courtroom.

During defense counsel's cross-examination of Barfield, the State objected and the following exchange took place:

"[DEFENSE COUNSEL]: He was put in handcuffs. That is an arrest.

[THE COURT]: Sustained. Those remarks are stricken and the Jury is instructed to disregard any kind of remark that Counsel makes like that other than simply making an objection and allowing me to rule on it without making some gratuitous comment in the process"

During the cross-examination of Detective Crane the record reflects that although the trial court had previously told defense counsel that he could not inquire as to the content of conversations between Detective Crane and certain officers who had not testified at trial, defense counsel repeatedly asked Crane questions on that topic. After an objection by the State, the court stated that Crane could not testify to the content of the conversations. However, defense counsel continued to question Crane regarding the content of the conversations. The State again objected. The court reminded defense counsel that the court had previously ruled counsel would not be able to offer that evidence, sustained the objection, and struck the question. The court then stated that defense counsel could call any witness counsel wanted, that there was "a proper

way to do things and there's an improper way to try to [do] them" and counsel's actions were "improper."

In both of these cases, the trial court was attempting to control the conduct of defense counsel. In the first instance, the court reminded defense counsel to permit the court to rule on objections before continuing to argue. In the second, the court chastised defense counsel for not following the court's previous instructions regarding hearsay testimony and then stated that attempting to determine the content of a conversation through hearsay testimony was improper. The court then reminded defense counsel that if counsel wanted to elicit what the officers told Crane, the proper procedure would be to call those officers to testify. This court rejects defendant's argument that these comments by the trial court were improper, as the trial court was ensuring the trial proceeded in an orderly fashion (*Griffin*, 194 Ill. App. 3d at 294), by enforcing compliance with the court's own orders.

Defendant finally argues that a "heated exchange" between the court and defense counsel regarding discrepancies between Detective Crane's testimony at trial and his grand jury testimony was prejudicial. We disagree.

While the record reveals that defense counsel and the court engaged in a discussion that codefendant's counsel characterized as heated, and which, in his opinion, could "start impacting on this jury," this argument must fail as the conversation at issue took place in the trial court's chambers outside the presence of the jury. As the jury did not hear the conversation, defendant cannot demonstrate how the exchange could have affected the jury's verdict (see *Brown*, 172 Ill. 2d at 38-39).

The judgment of the circuit court of Cook County is affirmed.

Affirmed.