

No. 1-09-1965

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 19092
)	
FERREL CUNNINGHAM,)	Honorable
)	Michael Brown,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CAHILL delivered the judgment of the court.
Justices McBride and R.E. Gordon concurred in the judgment.

ORDER

Held: Trial court's judgment affirmed where no error occurred in trial court's inquiries to potential jurors in accordance with Supreme Court Rule 431(b), defendant could not invoke plain error doctrine, and even if error was committed, supreme court has declined to deem it a structural error warranting automatic reversal.

Following a jury trial, defendant Ferrel Cunningham was convicted of aggravated criminal sexual assault. Based on his previous convictions, defendant was sentenced as a habitual criminal to natural life in prison. On appeal, defendant contends his conviction should be reversed and this case remanded for a new trial because the trial court did not admonish

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potential jurors in accordance with Illinois Supreme Court Rule 431(b) (eff. May 1, 2007). We affirm.

Because the only issue raised on appeal does not involve defendant's sexual assault conviction, we dispense with a recitation of those facts and set out below only the portions of the record that are relevant to his Rule 431(b) claim. Defendant contends that: (1) the court failed to ask potential jurors whether they understood and accepted all four of the principles as set out in Rule 431(b); and (2) the court erroneously collapsed the first three principles into one inquiry as opposed to setting them out individually.

Rule 431(b) 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: (1) the defendant is presumed innocent of the charges; (2) the State must prove the defendant's guilt beyond a reasonable doubt; (3) the defendant is not required to offer evidence on his own behalf; and (4) the defendant's failure to testify cannot be held against him. The trial court is also 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).

The jury in defendant's case was selected in March 2009. The record shows the trial judge first asked venire members if any of them knew him, defendant or any witnesses or attorneys involved in defendant's case or if any potential juror was a party to a currently pending court case. The trial judge then continued:

"Folks, the third question for you all is this. As I have previously stated, the defendant is presumed innocent and does not have to offer any evidence in his own behalf but must be proven guilty beyond a reasonable doubt by the State. Does anyone here have any problem with those concepts? If so, please stand up. Record should reflect no one has stood up.

Folks, the fourth and final question for you is this. As I have previously

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stated, the defendant does not have to testify on his own behalf. If the defendant decides not to testify, you must not hold that against the defendant.

If the defendant decides not to testify, is there anyone here who believes that regardless of what I just said you would hold that decision against the defendant? If so, please stand up."

Defendant acknowledges he did not object to these purported errors contemporaneously or include these claims in his post-trial motion, and he invokes the plain error doctrine. That doctrine allows 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 that 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).

When conducting a plain error analysis, the first step is to determine whether an error occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Defendant argues the court failed to ask venire members if they understood and accepted the four principles set out in Rule 431(b). The *voir dire* set out above establishes that the trial court explained three principles and asked if "anyone here [has] any problem with those concepts."

This court has observed that no "magic words" are required to ascertain a potential juror's understanding and acceptance of one of the *Zehr* principles. See *People v. Ware*, No. 1-09-0338, slip op. at 64 (Ill. App. Feb. 10, 2011). In *People v. Davis*, 405 Ill. App. 3d 585, 589 (2010), this court concluded that an inquiry by the trial court similar to the inquiry made here, by the court asking if anyone had "a problem" with each principle, "was broad enough to invite any juror who either did not understand or did not accept the referred-to principle to indicate as such." We likewise have rejected the contention that the court commits error by combining two or more

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Zehr principles into one inquiry. See *Davis*, 405 Ill. App. 3d at 589-90.

Even were we to agree with defendant that the court committed error in its Rule 431(b) inquiries, his position on appeal is that such a violation should be reviewed as structural error under the second alternative of plain error. During the pendency of this appeal, our supreme court has rejected the contention that a trial court's failure to fully comply with Rule 431(b) constitutes a structural error that would require automatic reversal of a defendant's conviction. *People v. Thompson*, 238 Ill. 2d 598, 611 (2010); see also *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009).

Defendant's reply brief was filed after the supreme court issued its decision in *Thompson* in October 2010. In that brief, defendant recognizes *Thompson's* application to his original arguments and the supreme court's rejection of a bright-line rule of reversal for all cases in which Rule 431(b) was violated. See *Thompson*, 238 Ill. 2d at 616.

Defendant still points out the jury in *Thompson* was selected only two weeks after the current version of Rule 431(b) took effect in 2007, and the jury here was selected almost two years later in 2009. Defendant contends any "adjustment period" deemed necessary in the immediate wake of *Thompson* has expired, and a bright-line rule is still needed to ensure compliance with the rule.

In declining to impose a bright-line rule of reversal of every case in which Rule 431(b) was not followed, the supreme court stated in *Thompson*:

"[W]e do not believe that drastic step is necessary. We will not impose automatic reversal for every violation of Rule 431(b) simply to send a message to our trial courts to comply with the amended rule." *Thompson*, 238 Ill. 2d at 616.

To accept defendant's contention would be to ignore supreme court precedent, which we are bound to follow. *People v. Gersch*, 135 Ill. 2d 384, 396 (1990); see also *People v. Fish*, 381 Ill. App. 3d 911, 917 (2008).

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In conclusion, the trial court's questioning of potential jurors under Rule 431(b) did not constitute error. Even if such error occurred, the supreme court has expressly declined to adopt a bright-line rule of reversal for such violations.

The judgment of the trial court is affirmed.

Affirmed.