

No. 1-09-0925

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).

FIRST DIVISION
February 14, 2011

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. 08 CR 9413
)	
LANIER JOSEPH,)	The Honorable
)	Stanley J. Sacks,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Hall and Justice Rochford concurred in the judgment.

O R D E R

HELD: Defendant's failure to object to the trial court's alleged noncompliance with Supreme Court Rule 431(b) resulted in the forfeiture of this claim on appeal. The court properly declined to instruct the jury on a lesser-included offense when the evidence did not support the instruction. The court did not abuse its discretion in overruling defendant's objection when the State's comment in rebuttal was made in response to defendant's closing argument.

After a jury trial, defendant Lanier Joseph was convicted of

burglary and sentenced, as a Class X offender, to nine years in prison. On appeal, defendant contends the trial court failed to strictly comply with Supreme Court Rule 431(b) (eff. May 1, 2007), when it did not ask potential jurors if they understood the principles outlined in *People v. Zehr*, 103 Ill. 2d 472 (1984). He also contends the court erred when it did not instruct the jury on the lesser-included offense of criminal trespass to real property, and overruled an objection to the State's "misstatement" of the law during rebuttal argument. We affirm.

During *voir dire*, the court told the venire that jurors were required to follow and obey certain principles during a criminal trial. The court then explained the *Zehr* principles to the potential jurors. After each principle, the court asked if anyone had any "difficulty or quarrel" with that principle. There were no responses, and defendant did not object. A jury was then selected, and the matter proceeded to trial.

At trial, Dr. Satish Patel testified that he worked at the pharmacy inside the A&D medical clinic. The pharmacy is not open on Sunday. On Sunday, April 27, 2008, he received a call from the doctor who ran the clinic informing him that the building had been broken into. Satish went to the building and found that the glass in the main door was broken and the pharmacy entry door was smashed. When Satish had previously left, the bars across the

main entrance and the door to the pharmacy were locked. Although the front gate was normally locked with a removable padlock, he could not find the lock. Inside, there was trash in the hallway and the pharmacy computer was on the floor. Although the medications were usually stored on shelves, Satish saw two bags of medication on the floor. He had not given defendant permission to enter the pharmacy or to take any pills.

Officer David Andrich and his partner arrived at the building after receiving a radio call of a burglary in progress. Once there, Andrich saw a wooden door with broken glass. He also saw defendant "peek" out, then "sneak back in." The officers entered the building and told defendant to get on the floor. Initially, they had trouble handcuffing defendant, who was wearing a sock on his right hand. Once the sock was removed, defendant was handcuffed and searched. Three vials of medication were recovered during the search. Andrich and his partner subsequently searched the building. The door to the pharmacy was cracked, garbage was in the hallway, and there were bags of medication on the floor. No burglary tools were recovered from defendant.

On the way to the police station, Andrich asked defendant what he was going to do with the pills. Defendant responded that he was probably going to sell them for \$10 each. Later, when Andrich's partner asked defendant about the sock, defendant

replied that it prevented fingerprints.

Detective William Rogers testified that while meeting with defendant, defendant stated that when he noticed the door to the medical center was open, he saw "the opportunity" and went inside. While he was taking pills off the floor, officers entered and arrested him.

At the close of the State's case, defendant made a motion for a directed verdict, which was denied. The defense then rested. During the jury instruction conference, defense counsel requested that the jury be instructed on the lesser-included offense of criminal trespass to real property arguing the evidence established that defendant's decision to enter the building was "spur of the moment." The court denied defendant's request.

Before closing argument, the trial court instructed the jurors that what attorneys say during closing argument is not evidence, should not be considered as such, and they were free to accept or reject any argument made during closing argument.

The State argued it was undisputed that defendant entered the pharmacy without authority and that he committed a theft, *i.e.*, he took the pills and later admitted that he planned to sell them. Defense counsel responded that strong evidence indicated that someone else, a "real burglar," was responsible, as no burglary tools were recovered from defendant. In its

rebuttal, the State reiterated that:

"defendant is a burglar based on the law ***. He entered without authority and he intended to commit a theft therein. *** It's the entry alone that makes him the burglar.

DEFENSE COUNSEL: Objection.

THE COURT: I'll instruct the lawyers [sic] what the law is shortly. I told you this before, the lawyers can argue what they think the law is, how it applies, I'll tell the jurors shortly."

When instructing the jury, the court again told the jurors that "[n]either opening statements nor closing arguments are evidence and any statement or argument made by the attorneys which is not based on the evidence should be discarded." See Illinois Pattern Jury Instruction, Criminal, No. 1.03 (4th 2003).

The jury found defendant guilty of burglary. Defendant filed a motion for a new trial alleging, *inter alia*, that the court erred when it failed to instruct the jury on the lesser-included offense of criminal trespass to real property and to sustain his objection to the State's misstatement of the law during rebuttal. Defendant did not allege that the trial court's *voir dire* of the jury was improper.

At the hearing on the motion, the trial court indicated that

before closing argument, it had reminded the jury that arguments made by lawyers were not statements of law; rather, the court would instruct the jury as to the law. The court also noted that whether criminal trespass to real property is a lesser-included offense of burglary depended on the facts of a case and that the evidence in a particular case had to support the giving of the instruction. Based on the evidence in this case, the court found such an instruction inappropriate. The court denied the motion, and sentenced defendant, as a Class X offender, to nine years in prison.

Defendant first contends that the trial court's failure to ask potential jurors whether they understood the principles enumerated in Rule 431(b) denied him a fair trial.

Before reaching the merits of defendant's argument, we must address the State's contention that this claim is subject to forfeiture 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, rather than counsel and a "judge's conduct is at issue." 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 failed 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 use the word "understand" when explaining the *Zehr* principles to potential jurors, either at trial or in his posttrial motion, and has therefore 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 trial court could have ensured strict compliance with Rule 431(b). *Thompson*, 238 Ill. 2d at 612. Defendant also does not explain how the jury was biased by the trial court's failure to use the word understand when questioning the venire. *Thompson*, 238 Ill. 2d at 614-15. Defendant's procedural default

cannot be excused.

Defendant next contends that the trial court erred when it declined to instruct the jury as to criminal trespass to real property in addition to burglary because there was some circumstantial evidence that someone else broke into the building and that he did not form the intent to commit theft until after he had unlawfully entered.

A lesser-included offense is an offense established by proof of lesser facts, or mental state, or both, than the charged offense. *People v. Miller*, 238 Ill. 2d 161, 165-66 (2010); see also 720 ILCS 5/2-9(a) (West 2008). In order to determine whether a defendant is entitled to an instruction on a lesser-included offense, the two-part "charging instrument" test is used. *People v. Kolton*, 219 Ill. 2d 353, 361 (2006). First, the allegations in the charging instrument are reviewed in order to determine whether the description of the greater offense creates a "broad foundation" or "main outline" of the lesser offense. *Kolton*, 219 Ill. 2d at 361. Then the court must examine the evidence presented at trial in order to determine whether the evidence rationally supports a conviction for the lesser-included offense. *Kolton*, 219 Ill. 2d at 361. This court reviews whether a charged offense encompasses another as a lesser-included offense *de novo*. *Kolton*, 219 Ill. 2d at 361.

A defendant is only entitled to the instruction on the

lesser-included offense "if the evidence at trial is such that a jury could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater." *People v. Medina*, 221 Ill. 2d 394, 405 (2006); see also *People v. Monroe*, 294 Ill. App. 3d 697, 701 (1998) (when the record contains "slight evidence," which would reduce the crime to a lesser-included offense if the jury believed it, then the jury should be instructed on that lesser-included offense). The trial court must determine whether there is some evidence supporting the giving of an instruction on the lesser-included offense, and if there is, then it is an abuse of discretion for the court to refuse to so instruct the jury. *People v. Jones*, 175 Ill. 2d 126, 131-32 (1997).

Here, criminal trespass to real property was a lesser-included offense of burglary as alleged in the charging instrument. See *Kolton*, 219 Ill. 2d at 361. However, defendant was not entitled to an instruction on this lesser-included offense as the evidence at trial did not rationally support a conviction for criminal trespass to real property. *Kolton*, 219 Ill. 2d at 361. We reject defendant's assertion that a jury could have rationally determined that he did not have the intent to commit a theft when he made his unauthorized entry to the building. See *Medina*, 221 Ill. 2d at 405. The evidence at trial established that defendant entered the open building because he saw an "opportunity," he wore a sock on his hand to prevent

fingerprints, and several kinds of prescription medication were recovered from his person.

We are unpersuaded by defendant's reliance on *People v. Monroe*, 294 Ill. App. 3d 697 (1998). In that case, this court determined that the jury should have been instructed on burglary and the lesser-included offense of theft when, even though several witnesses testified that the break-in was motivated by cash, one witness testified that the defendant and his friends merely intended to mess around. *Monroe*, 297 Ill. App. 3d at 700-01.

Unlike *Monroe*, nothing in this record indicates that defendant entered the building intending to do anything other than to commit a theft. When defendant was arrested he had a sock over his right hand and several types of pills on his person. He stated that he planned to sell the pills, and later indicated that he viewed the open door as an "opportunity." When there was no foundation for an instruction on criminal trespass to real property in the evidence, the court did not abuse its discretion when it declined to give the instruction. *Jones*, 175 Ill. 2d at 131-32.

Defendant finally contends that the trial court erred when it failed to sustain his objection to the State's remark during rebuttal argument that "It's the entry alone that makes [defendant] the burglar." We disagree.

A prosecutor is permitted wide latitude during closing argument, and may comment on the evidence presented, as well as make reasonable inferences based on that evidence. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). Remarks made during closing argument must be examined in the context of those made by both the defendant and the State, although the remarks must always be based upon either the evidence presented or the reasonable inferences drawn from that evidence. *People v. Willis*, 402 Ill. App. 3d 47, 57 (2010). It is within the trial court's discretion to determine the character and scope of closing argument; a reviewing court will reverse only if the challenged comments constituted a material factor in the defendant's conviction such that without the remark the jury may have reached a different verdict. *Willis*, 402 Ill. App. 3d at 57.

The theme of defendant's closing argument was that someone else, a "real burglar," broke into the medical center whereas defendant merely made an unauthorized entry into the already open building. Based on Andrich's testimony that no burglary tools were recovered from defendant, the defense argued that defendant did not break into the building. In its rebuttal, the State asserted that defendant was a burglar in that he entered without authority and intended to commit a theft; it was "the entry alone that makes him the burglar."

The State's comment was an attempt to remind the jury that there was no requirement that a defendant "break" into a building in order to be convicted of burglary. The comment was not improper as it was clearly invited by, and in response to, defense counsel's questions at trial and comments in closing arguments, as well as the evidence adduced at trial. See *Willis*, 402 Ill. App. 3d at 58.

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

Affirmed.