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SECOND DIVISION
ORDER FILED JUNE 16, 2009
MODIFIED ORDER UPON DENIAL OF REHEARING FILED JULY 14, 2009
MODIFIED ORDER FILED JUNE 28, 2011

1-07-2831

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 1817
)	
JOHN MONTALVO,)	Honorable
)	Evelyn B. Clay
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Hoffman and Karnezis¹ concurred in the judgment.

ORDER

Held: The trial court violated Supreme Court Rule 431(b). However, the defendant has not shown that the jury was biased as a result of this error and thus the second prong of the plain error doctrine is not satisfied. Further, the trial court did not abuse its discretion when it dismissed a particular potential juror for cause. We therefore affirm the defendant's conviction and sentence.

¹Justice South concurred in the original order filed June 16, 2009, and the modified order upon denial of rehearing filed July 14, 2009, prior to her retirement. Justice Karnezis, who has reviewed the facts and the record of this case, concurs in this modified order pursuant to the Supreme Court's supervisory order entered March 7, 2011.

Following a jury trial in the circuit court of Cook County, the defendant, John Montalvo, was convicted of residential burglary (720 ILCS 5/19-3 (a)) (West 2006)) and sentenced as a Class X offender to eight years' imprisonment. On appeal, the defendant argues, (1) that in admonishing potential jurors the trial court failed to follow the fundamental principles set forth in *People v. Zehr*, 103 Ill. 2d 472, 469 N.E.2d 1062 (1984), thereby denying the defendant a fair trial; and (2) the trial court improperly dismissed a potential juror for cause during *voir dire*.

On July 14, 2009, this court entered a modified order upon the denial of the defendant's motion for a rehearing (*People v. Montalvo*, No. 1-07-2831 (2009) (unpublished order under Supreme Court Rule 23)) that reversed the judgment of the circuit court. That order was based upon our conclusion that plain error was committed by the trial court because it failed to fulfill the requirements that each of the potential jurors understood and accepted the legal principles outlined in Illinois Supreme Court Rule 431(b). Ill. S. Ct. R. 431(b) (eff. May 1, 2007). In light of our decision, we did not address the defendant's second issue regarding the trial court's dismissal of a juror for cause.

The State filed a petition for leave to appeal to the Illinois Supreme Court. In a supervisory order issued on March 2, 2011, our supreme court directed this court to vacate our judgment in *People v. Montalvo* and to reconsider the judgment in light of the ruling in *People v. Thompson*, 238 Ill. 2d 598, 939 N.E.2d 403 (2010) which was decided after our resolution of this case in July 2009. Based on our review of the facts and the holding in *Thompson*, we affirm the defendant's conviction and sentence.

BACKGROUND

The evidence adduced at trial established the following. On January 4, 2007, the Chicago police responded to a call from Emily Dennison. Dennison resided at 3458 West Wrightwood in Chicago, on the date in question. After hearing a loud noise, Dennison looked out of her window and saw someone from the waist down, entering a first floor window directly beneath her apartment. Dennison then called the police. She next recalled looking out of her window and seeing the police arrive and apprehend the man whom she saw climbing through the window. She indicated that she knew that it was the same man later identified as the defendant, by the clothing that he was wearing. Specifically, she remembered that the person who climbed through the window was wearing dirty clothing covered with paint.

Officer William LaBern testified that on January 4, 2007, he arrived at 3458 West Wrightwood in response to a 911 call. When he arrived, he observed the defendant running from the front of the building with a bulky laundry bag slung over his shoulder. Officer LaBern observed that the defendant had on dirty clothing covered with paint. Officer LaBern asked the defendant to set down the bag which he was carrying, and upon seeing the computers, jacket, and jewelry which the bag contained, he arrested the defendant and placed him in the squad car. On the way to the police station, after being informed of his *Miranda* rights, the defendant began to talk to Officer LaBern. The defendant was tearful, saying “Officer can we just work something out, please? I know I messed up. I was just trying to get up on some quick money.”

At the police station, the defendant was interviewed by Detective Sofrenovic. After Sofrenovic advised the defendant of his *Miranda* rights, the defendant informed Sofrenovic that he was aware of his rights and wanted to answer questions. According to Sofrenovic, the defendant

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admitted that he was addicted to heroin and needed money for his addiction. The defendant also admitted that he entered the apartment through a window, found a sack, filled it with items, and then left by the front door where he was apprehended. The defendant also told Detective Sofrenovic that he intended to sell the stolen items on the street, so that he could get money to buy heroin.

The apartment that the defendant burglarized belonged to Jesus Rodriguez. The police contacted Rodriguez, and he came to the police station to identify the items that were recovered from the defendant. Rodriguez indicated that he did not know the defendant and never gave the defendant permission to enter his apartment or to take his property. The defendant was indicted on one count of residential burglary.

The defendant requested a trial by jury. On July 31, 2007, the trial court began the process of selecting a jury. The court first inquired as to whether any of the potential jurors knew either the defendant or any of the attorneys involved in the case. One person was then dismissed for cause. The trial court then made the following statements to the venire.

“Ladies and gentlemen, Mr. John Montalvo, the defendant, is charged with one count of residential burglary.

The one count indictment reads as follows: that or on about January 4th, the year 2007, that John Montalvo committed the offense of residential burglary in that he knowingly and without authority entered the dwelling place of Jesus Rodriguez, located at 3458 West Wrightwood, Chicago, Cook County, Illinois, with the intent to commit therein a theft.

The indictment that I just read to you is not evidence against Mr. Montalvo. It is the formal method or machinery which is necessary to charge the defendant with the crime I have summarized and to place him on trial. The indictment is not evidence against the defendant and you must not regard it in any — as any indication of his guilt.

Mr. Montalvo, as are other persons charged with crime, is presumed to be innocent of the charge that brings him before you. The presumption of innocence cloaks him now at the beginning of the trial and will continue to cloak him throughout the course of these proceedings.

That is during jury selection, during the opening statements that the attorneys will make to you, during the presentation of the evidence, during the closing arguments of the attorneys, during the instructions of law that I will read and provide to you, and on into your deliberations, unless and until you individually and collectively as the jury are convinced beyond a reasonable doubt that the defendant is guilty.

It is absolutely essential as we select this jury that each of you understand and embrace these fundamental principals [sic]. That is all persons charged with a crime are presumed to be innocent and that

it is the burden of the State, who has brought the charges, to prove the defendant guilty beyond a reasonable doubt.

What this means is that the defendant has no obligation to testify in his own behalf or to call any witnesses in his defense. He may simply sit here and rely upon what he and his attorney perceive to be the inability of the State to meet their burden. Should that happen, you will have to decide the case on the basis of the evidence presented by the prosecution. Should the defendant not testify, you should not consider that in any way in arriving at your verdict.

However, should the defendant elect to testify or should his attorney present witnesses in his behalf, you are to consider that evidence in the same manner and by the same standards as evidence presented by the State's Attorneys. The bottom line is that there is no burden upon the defendant to prove his innocence. It is the State's burden to prove him guilty beyond a reasonable doubt."

The court then questioned the prospective jurors further as to their availability to serve, whether they had any personal relationships with the parties involved, and whether they could be fair to both sides. Next, the court posed the following to the entire venire:

"Should the State's Attorney fail to prove its case against the defendant beyond a reasonable doubt, is there anyone who would hesitate to sign a verdict of not guilty? If so, raise your hand. All

right. Let the record reflect that there are no raised hands.

Second question. Should State's Attorney prove its case against the defendant beyond a reasonable doubt, is there anyone of you who would hesitate to sign a verdict of guilty? If so, raise your hand. Again let the record reflect that there are no raised hands."

During the *voir dire*, both sides dismissed several jurors using peremptory strikes and the court dismissed several jurors for cause as well. During the course of *voir dire*, the defendant objected to the trial court's dismissal of potential juror, Anthony Crimmings. The court dismissed Crimmings for cause after the State alleged that he was untruthful on his juror questionnaire. At the end of the *voir dire*, the court then administered the oath to the jury.

The trial commenced on August 1, 2007. During the trial, the State called Jesus Rodriguez, Emily Dennison, Officer William LaBern, Detective Milorad Sofrenovic and Officer Myron Seltzer as witnesses. At the close of the State's case in chief, the defendant moved for a directed finding, arguing that the State had not met its burden of proof beyond a reasonable doubt. The trial court denied the defendant's motion for a directed finding. Defense counsel then informed the court that the defendant chose not to testify and would not offer any witnesses or evidence in his own behalf. The court and the parties next discussed the proffered jury instructions. There were no objections by either side. After closing arguments, the parties rested. The jury was given instructions and began deliberation. At the close of their deliberation, the jury found the defendant guilty of residential burglary.

On August 31, 2007, the defendant filed a motion for a new trial. In his motion, the

defendant argued that the State failed to prove him guilty beyond a reasonable doubt; that the verdict was against the manifest weight of the evidence; that he was denied due process and equal protection of the law; that he did not receive a fair and impartial trial; and that the trial court erred in overruling the defendant's motion for a directed finding at the close of the State's case. The court denied the defendant's motion for new trial.

On September 27, 2007, the defendant was sentenced as a Class X offender pursuant to (730 ILCS 5/5-5-3(C)(8)) (West 2006)) to a prison term of eight years for residential burglary (720 ILCS 5/19-3(a)) (West 2006)). The defendant has timely appealed to this court.

ANALYSIS

On appeal, the defendant alleges that he was denied a fair trial due to the absence of any inquiry by the trial court into whether the selected jurors understood and accepted the basic constitutional protections provided to the defendant in accordance with *People v. Zehr*, 103 Ill. 2d 472, 469 N.E.2d 1062 (1984). The defendant also alleges that he was denied a fair and impartial trial when the trial court dismissed potential juror, Crimmings, for cause, after it was asserted by the State that Crimmings had lied on his juror questionnaire.

We first address the defendant's contention that the trial court did not comply with the requirements set forth in *Zehr* and codified in Rule 431(b) in selecting the jury.

Initially we note that the defendant failed to preserve this issue for review. The defendant neither objected during the jury selection process nor did he include this argument in his motion for a new trial. "*Both a trial objection and a written post-trial motion raising the issue are required for alleged errors that could have been raised during trial.*" (Emphasis in original.) *People v. Naylor*,

229 Ill. 2d 584, 592, 893 N.E.2d 653, 659 (2008), citing *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1129 (1988). Thus, this issue is procedurally forfeited. However, the defendant urges us to review this issue under the plain error doctrine.

Supreme Court Rule 615(a) provides in pertinent part that plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court. Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999). Our supreme court has repeatedly interpreted the plain error doctrine. In *People v. Piatkowski*, 225 Ill. 2d 551, 870 N.E.2d 403 (2007), the court interpreted the plain error doctrine as follows:

“The plain error doctrine allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurs 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 occurs 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.” *Id.* at 565, 870 N.E.2d at 410-11. See *People v. Herron*, 215 Ill. 2d 167, 830 N.E.2d 467 (2005); *People v. Naylor*, 229 Ill. 2d 584, 893 N.E.2d 653 (2008).

Thus, in reviewing the defendant’s contentions, we must first determine if an error was committed. The defendant contends that the trial court did not properly question the potential jurors during *voir dire*. As stated above, at the beginning of jury selection in this case, the trial court made

a statement to the venire which outlined in general terms what the law requires of the prosecution, how the process works procedurally, what is expected of the jury and the rights of the defendant.

The defendant contends that the court did not comply with the principles set forth in *Zehr*. In *Zehr*, the Illinois Supreme Court upheld the appellate court's ruling that reversed the defendant's convictions and remanded the cause for a new trial. Our supreme court held that the trial court's refusal to ask questions tendered by the defendant during *voir dire* resulted in prejudicial error, because the questions went to a particular bias or prejudice which would deprive the defendant of his right to a fair and impartial jury. The *Zehr* court further held:

“We are of the opinion that essential 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. If a juror has a prejudice against any of these basic guarantees, an instruction given at the end of the trial will have little curative effect. It is also vital to the selection of a fair and impartial jury that a juror who finds that the State has failed to sustain its burden of proof of guilt beyond a reasonable doubt have no prejudices against returning a verdict of not guilty. We note parenthetically that it is equally important that a juror who finds that the State has sustained its burden of proof have no prejudice against returning a verdict of

guilty.” *Zehr*, 103 Ill. 2d at 477, 469 N.E.2d at 1064 (1984).

The Illinois Supreme Court codified the principles which it had enunciated in *Zehr* into Supreme Court Rule 431. The codification of the *Zehr* principles outlined in Rule 431 are clear and mandate the specific procedure and substance which the trial court must employ in such cases. Supreme Court Rule 431 instructs the trial court regarding *voir dire* examination. Rule 431(b) provides:

“(b) The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant’s failure to testify cannot be held against him or her; however no inquiry of a potential juror shall be made into the defendant’s failure to testify when the defendant objects.

The court’s method of inquiry *shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section.*” (Emphasis added.) Ill. S. Ct. R. 431 (b) (eff.

May 1, 2007).²

The defendant contends that the trial court never asked the jurors whether they *understood* and *accepted* the four “bedrock” principles of the criminal justice system as outlined in Rule 431. The defendant argues that although the judge mentioned the four principles outlined in *Zehr*, and codified in Rule 431(b), because the court did not specifically ask the potential jurors if they *understood* and *accepted* those principles, the defendant was denied a fair trial by an impartial jury. The defendant asserts that the questions that the trial court asked were too broad to determine whether any of the potential jurors accepted or even understood the constitutional protections outlined in Rule 431(b) and *Zehr*. The defendant contends that the broad statement by the trial court did not comply with the letter or spirit of Rule 431(b), and it was insufficient to ferret out any juror who may have disagreed with the principles or harbored bias or prejudice toward the defendant.

The trial court informed the *venire* of the principles outlined in *Zehr* in narrative form before the jurors were impaneled. The trial court did not give the potential jurors a chance to respond as to whether the jurors understood or accepted those principles. While the court did ask the potential jurors whether they could be fair to both sides and if they would have a problem signing a verdict of guilty or not guilty depending upon the evidence presented in the case, those two questions alone do not constitute compliance with Rule 431(b). The clear language of Rule 431(b) requires the court to ensure that jurors are qualified to understand and accept the enumerated principles and are

²Supreme Court Rule 431(b) was amended, effective May 1, 2007, to comply with the requirements set forth in *Zehr*. The amended rule, as shown above, is applicable in this case. The amended rule now requires that the court *sua sponte* question each juror regarding the outlined fundamental principles, rather than questioning them only if requested by the defendant.

provided with an opportunity to respond. *Zehr*, 103 Ill. 2d at 477, 469 N.E.2d at 1064. Before Rule 431(b) was amended, a trial court was only required to ask questions in accordance with *Zehr* when it was requested by the defendant. We note that in the case of *People v. Glasper*, 234 Ill. 2d 173, 917 N.E.2d 401 (2009), our supreme court construed the older version of Rule 431(b) that did not mandate *sua sponte* exploration by the trial judge of the jury's understanding of these fundamental principles unless the defendant specifically requested such action. In holding that a *Zehr* violation would not be construed to automatically require reversal of a conviction, the *Glasper* court specifically limited its holding to a construction of the old version of the rule as presented by the issue in that case. *Glasper*, 234 Ill. 2d at 200, 917 N.E.2d at 418.

The rule we now construe was amended in 2007 to require that the trial court *sua sponte* ask each potential juror whether they understand and accept the principles set forth in *Zehr* regardless of whether the defendant requests that those questions be asked. In the instant case, the trial court did just what the amended rule sought to prevent. We find that the trial court committed error because it failed to ascertain whether the potential jurors understood and accepted the principles outlined in Rule 431(b). However, the next step in our analysis requires us to determine whether the trial court's error was such that it requires automatic reversal of the defendant's conviction and sentence.

In the recent case of *People v. Thompson*, our supreme court held that a violation of Rule 431(b) does not require an automatic reversal of the defendant's conviction; reversal is required only when the error is deemed structural. *Thompson*, 238 Ill. 2d at 608, 939 N.E.2d at 411. The supreme court further held that a trial before a biased jury is a structural error requiring reversal, however,

“failure to comply with Rule 431(b) does not necessarily result in a biased jury.” *Id.* at 610, 939 N.E.2d at 412. In the *Thompson* case, the issue was reviewed under the plain error doctrine because the defendant failed to preserve it for review. Our supreme court found that although the prospective jurors had received only some of the required Rule 431(b) questions, the trial court admonished and instructed them on the principles and the defendant did not establish that the trial court’s violation resulted in a biased jury. *Id.* at 615, 939 N.E.2d at 414. Our supreme court concluded that the second prong of the plain error doctrine was not satisfied because the defendant had not established that the trial court’s violation of Rule 431(b) resulted in a biased jury that affected the fairness of his trial and challenged the integrity of the judicial process. *Id.*

Similarly, the defendant in this case has failed to show that the trial court’s violation of Rule 431(b) resulted in a biased jury. The trial court admonished the *venire* before jury selection on each of the four *Zehr* principles. The trial court asked the potential jurors if they would hesitate to sign a guilty or not guilty verdict based on the State’s ability to prove its case against the defendant beyond a reasonable doubt. The defendant does not argue, nor does the record support, a finding that the violation of Rule 431(b) resulted in a biased jury, and thus we find that the second prong of the plain error rule is not satisfied.

The defendant next argues that his right to a jury trial was impermissibly interfered with because the trial court improperly dismissed potential juror Crimmings for cause during the *voir dire* questioning. Crimmings had answered a question on the jury background form stating that he had never been accused of a crime. However, a criminal background report disclosed that someone with his name and birth date had two arrests. One of the arrests was for driving on a suspended driver’s

license and the other was for disorderly conduct with the stipulation that it was “not mandated to be reported.” The defendant points out that other potential jurors had likewise answered that they had not been accused of a crime but their criminal background reports indicated otherwise. The trial court asked the other jurors in a meeting outside of the presence of the *venire* about the discrepancies, but did not question Crimmings in that manner. In spite of defense counsel’s objection and the prosecution’s retraction of its motion to excuse, the court removed Crimmings for cause. The trial court noted that Crimmings was 40 years old and that in its opinion, Crimmings’ answer on the jury questionnaire was untruthful and was not an oversight. The court further noted that defense counsel indicated satisfaction with the fact that Crimmings was the person named in the criminal background report.

The defendant claims that the trial court’s decision to excuse Crimmings exceeded the court’s discretion and impermissibly interfered with the jury selection process. The defendant emphasizes that he has the constitutional right to a jury of qualified individuals who can follow the instructions of the court and remain fair and impartial. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, §8; *People v. Strain*, 194 Ill. 2d 467, 475, 742 N.E.2d 315, 320 (2000). The determination of whether a potential juror is qualified is within the sound discretion of the trial court and that decision will not be disturbed absent a finding of abuse of discretion. *People v. Szudy*, 262 Ill. App. 3d 695, 708, 635 N.E.2d 801, 809 (1994). A finding of an abuse of a trial court’s discretion is only warranted where, after the reviewing court has examined the record, it is clear that the trial court’s actions “thwarted the selection of an impartial jury.” *Id.* (quoting *People v. Teague*, 108 Ill. App. 3d 891, 894, 439 N.E.2d 1066, 1069 (1982)).

Defense counsel objected to Crimmings' dismissal for cause, but did not include the issue in his posttrial motion, so the issue has been forfeited. We therefore review the issue under the plain error doctrine. Because we do not characterize the evidence in this case as closely balanced, we will review the issue under the second prong of the doctrine that requires an error so serious that it affects the fairness of the defendant's trial. However, first we must determine whether the trial court committed error.

Our review of the record discloses that the trial court's decision to dismiss Crimmings for cause was not an abuse of discretion. As stated in the *Szudy* case, where the appellate court reviewed the trial court's dismissal for cause of potential jurors who had discrepancies between their answers to questions on the jurors' questionnaires and their criminal background reports:

“These potential jurors swore to tell the truth and, in the trial judge's opinion, failed to do so. After a review of the record, we cannot say that the trial judge's decision to excuse these jurors for cause because they ‘lied’ on their jury cards was against the manifest weight of the evidence or that [the trial judge] abused his discretion by refusing defendant's request that these jurors be questioned further on their failure to answer the question properly.” *Szudy*, 262 Ill. App. 3d at 709, 635 N.E.2d at 810.

A similar conclusion is warranted in this case. Because we have determined that the trial court did not commit error, our analysis ends under the plain error doctrine.

For the reasons stated, we affirm the trial court's judgment.

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Affirmed.