

2011 IL App (1st) 091022-U
No. 1-09-1022

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).

FIFTH DIVISION
June 30, 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. 07 CR 15662
)	
CARL WILLIAMS,)	Honorable
)	Marcus R. Salone,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Justices Joseph Gordon and Howse concurred in the judgment.

O R D E R

HELD: Although one principle was omitted in trial court's admonishments to potential jurors in accordance with Supreme Court Rule 431(b), supreme court has declined to deem that omission a structural error warranting automatic reversal of defendant's conviction; the trial court's judgment was affirmed.

¶ 1 Following a jury trial, defendant Carl Williams was convicted of first degree murder and was sentenced to 50 years in prison, which included a 25-year sentence enhancement for discharging a firearm that proximately caused a death. On appeal, defendant contends his conviction 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. We affirm.

¶ 2 Because the sole issue on appeal does not involve defendant's conviction, we dispense with a recitation of the underlying facts and address the record pertinent to his Rule 431(b) claim. 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: (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 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).

¶ 3 The jury in this case was selected in February 2009. The record reveals the trial judge admonished the venire members of

the first three principles set out above but did not mention the fourth tenet, *i.e.*, that the defendant's failure to testify could not be held against him. Defendant argues this omission was particularly prejudicial here because he elected not to testify.

¶ 4 Defendant acknowledges he did not object to his error contemporaneously or include this claim in his post-trial motion; however, he invokes the doctrines of harmless error and plain error to save his claim for our review. During the pendency of this appeal, our supreme court has addressed the contentions raised by defendant in *People v. Thompson*, 238 Ill. 2d 598, 611 (2010). As the *Thompson* court noted, whether an issue is reviewed as harmless error or plain error depends on whether defendant has preserved the issue for appeal. *Thompson*, 238 Ill. 2d at 611 (harmless error can be invoked when a defendant has preserved an issue for review; plain error applies when defendant has not done so).

¶ 5 Defendant first argues the harmless error rule can be used here. He asserts his failure to object to the court's omitted principle does not constitute a forfeiture of his claim because the judge's conduct was at issue. The supreme court in *Thompson* declined to apply that recognized exception to the forfeiture rule to a Rule 431(b) omission. *Thompson*, 238 Ill. 2d at 612. Therefore, defendant's attempt to do so here is rejected.

¶ 6 Defendant next contends that even if his objection on this point is deemed to be forfeited, the court's failure to comply with Rule 431(b) constitutes plain error and requires reversal of his conviction. 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).

¶ 7 Defendant only raises the second prong of plain error, asserting that the trial court's failure to fully comply with the rule denied him the right to a fair and impartial trial. However, *Thompson* held this second alternative of plain-error review did not provide a basis to excuse the defendant's procedural default. *Thompson*, 238 Ill. 2d at 614-15. The court ruled that in the absence of any evidence of jury bias offered by a defendant, who carries the burden of proving plain error, such bias against a defendant will not be presumed. *Thompson*, 238 Ill. 2d at 614-15 (noting that violation of Rule 431(b) does not implicate a fundamental right or constitutional protection, but only involves failure to comply with court rule); see also *People*

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v. Williams, No. 3-09-0355 (Ill. App. April 29, 2011) (where defendant did not testify, failure to mention fourth *Zehr* principle did not require automatic reversal under plain error rule, citing *Thompson*). Therefore, defendant's attempt to invoke the second prong of plain error is rejected.

¶ 8 In conclusion, although the court committed error in omitting one of the principles of Rule 431(b), defendant cannot prevail on either a harmless error or a plain error theory.

¶ 9 Accordingly, the judgment of the trial court is affirmed.

¶ 10 Affirmed.