

No. 1-09-2262

**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. 08 CR 5614
	)	
BRANDON LEE,	)	Honorable
	)	Thomas M. Davy,
Defendant-Appellant.	)	Judge Presiding.

---

JUSTICE ROCHFORD delivered the judgment of the court.  
Justices Hoffman and Lampkin concurred in the judgment.

ORDER

*HELD:* Defendant's conviction for aggravated vehicular hijacking and his 43-year prison sentence are affirmed, where: (1) his trial counsel did not provide ineffective assistance of counsel; (2) any error in the trial court's failure to instruct the jury to disregard certain evidence was harmless; (3) the issue of the trial court's compliance with Supreme Court Rule 431(b) was not preserved for review on appeal; and (4) the sentence imposed was not excessive and gave adequate weight to defendant's rehabilitative potential.

Defendant, Brandon Lee, was convicted of aggravated vehicular hijacking and aggravated battery with a firearm following a jury trial. Defendant's convictions were merged and he was sentenced to 43 years' imprisonment. On appeal, defendant asserts that: (1) his trial counsel provided ineffective assistance by failing to move for a directed verdict on the grounds the State did not prove the *corpus delicti* of the offense of aggravated vehicular hijacking and for failing to object to

No. 1-09-2262

inadmissible evidence; (2) he was denied a fair trial when the trial court failed to instruct the jury that certain testimony should be disregarded; (3) he is entitled to a new trial because the trial court failed to strictly comply with Illinois Supreme Court Rule 431(b) (eff. May 1, 2007); and (4) his sentence of 43 years' imprisonment was excessive. For the following reasons, we affirm.

### I. Background

In March of 2008, defendant was charged by indictment with a number of offenses, including attempted murder, aggravated vehicular hijacking, and aggravated battery with a firearm. The charges generally alleged that, in the course of taking a motor vehicle by force, defendant shot victim, Eric Gray, and caused great bodily harm. A jury trial was held in February 2009.

At trial, Mr. Gray testified that he had known defendant for a number of years. The two lived in the same neighborhood in Chicago. On February 19, 2008, Mr. Gray went to an apartment building in his neighborhood where defendant and some other people were "shooting dice, smoking weed; that stuff." Mr. Gray offered to sell his car to defendant, and the two agreed on a price of \$1,500. Defendant paid Mr. Gray \$600 and took the car, with the understanding that the balance would be paid later.

Two days later, Mr. Gray, defendant, and two other individuals were driving around in the car Mr. Gray had sold to defendant. When defendant stopped at a gas station and went inside, Mr. Gray decided to take the car back. Mr. Gray testified that defendant had not yet paid the balance due on the car, and he intended to give back the \$600 that had been paid to defendant. After Mr. Gray drove off without defendant, defendant called one of the other individuals in the car. Mr. Gray explained he would pay defendant back, but defendant responded "it's on \*\*\*." Mr. Gray testified

No. 1-09-2262

that he understood defendant to mean “watch out for him. Like it’s on. Like something is going to happen.”

Early in the evening of February 26, 2008, Mr. Gray had parked the car in an alley near where he had originally sold it to defendant. Mr. Gray had not seen defendant since taking the car back, but he now saw him walking up the alley. Defendant walked up to the driver-side door and told Mr. Gray to get out of the car. Defendant then tried to open the door, but it was locked. Just as Mr. Gray was reaching into his pocket to pull out some money to pay defendant back, he saw defendant had a gun. Defendant then shot Mr. Gray in the face through the partially opened window, with the bullet striking Mr. Gray under the left eye before it hit his nose and cheek-bone.

Mr. Gray briefly lost consciousness, and, when he regained his senses, he saw defendant walking away. Mr. Gray tried to drive the car but the alley was covered in ice and the vehicle would not move. He got out of the car and tried to find someone to help him. Mr. Gray soon saw defendant in a nearby yard, and defendant again started shooting at him with a second gun. Mr. Gray was not wounded a second time. Ultimately, Mr. Gray was able to find help from a woman he knew in a nearby apartment and an ambulance was called. Mr. Gray was taken to the hospital, where he spent over two weeks recuperating from the gunshot wound.

While Mr. Gray was at the hospital, a police detective presented him with a photo array. Mr. Gray testified that he identified defendant in the photo array as the person who had shot him. On cross-examination, Mr. Gray admitted that he did not see his car again before being taken to the hospital and he did not know who had taken his car.

Detective Gerald Hamilton testified that he was assigned to investigate the incident. When

No. 1-09-2262

Detective Hamilton arrived at the scene of the shooting later in the evening of February 26, 2008, the alley had already been secured by other police officers and he did not observe any vehicles parked in the alley. However, he did observe a number of shell casings and a blood trail. Early in the morning of February 29, 2008, Detective Hamilton was informed a person of interest was in custody and he, thereafter, met with defendant. Defendant was advised of his *Miranda* rights and agreed to speak with Detective Hamilton.

Detective Hamilton testified that, during their conversation, defendant stated that he had known Mr. Gray for over 10 years as they lived in the same neighborhood. About a week before the incident, defendant was playing a dice game when Mr. Gray offered to sell defendant his car. Defendant stated that they settled on a price of \$600, he paid Mr. Gray that amount, and he then took the car. Two days later, Mr. Gray was in the car with defendant and two other individuals. Mr. Gray drove the car off when defendant stopped at a gas station. Defendant called one of the other passengers in the car, and was relayed a message that Mr. Gray was going to keep the car and return defendant's \$600.

Defendant tried to locate Mr. Gray over the course of the next several days before he ultimately encountered him in an alley on February 26, 2008. Defendant stated that he approached the door of the car and demanded Mr. Gray return the vehicle to him, but Mr. Gray just smiled at him. When defendant tried to open the car door he found that it was locked. Angered by Mr. Gray's refusal to return the car, defendant shot Mr. Gray once through the partially open car window. After the first shot, defendant's gun jammed. Mr. Gray then exited the car and defendant stated that he drove the car away and parked it in his "hide-away."

No. 1-09-2262

Detective Hamilton also testified that defendant agreed to cooperate with the police in the retrieval of weapons at his residence. Defendant stated that two firearms could be recovered there, including a .380-caliber weapon he had bought from Mr. Gray. Finally, Detective Hamilton testified that Mr. Gray was able to identify defendant as the person who shot him in a photo array presented to him. On cross-examination, defense counsel inquired into Detective Hamilton's knowledge of Mr. Gray's possible gang affiliations. Detective Hamilton responded he believed both defendant and Mr. Gray had gang-affiliations, but this fact did not bear on his investigation as he did not believe the incident was gang-related. Defense counsel did not object to the testimony about defendant's gang affiliation.

Officer Michael Flisk testified that he was an evidence technician for the Chicago police department. On February 29, 2008, he accompanied defendant and a number of other officers to a residence to collect two firearms. Two firearms were recovered, a loaded .25-caliber pistol and a loaded .380-caliber pistol.

Officer Flisk testified that defendant identified the firearms as belonging to him. Defense counsel objected, and in a sidebar outside the presence of the jury, the trial court indicated that it would sustain the objection on the grounds the admission was not contained in the police report. The State then agreed to withdraw the question. When the sidebar concluded, the trial court indicated before the jury, that the State could proceed. Defense counsel asked the trial court "[a]re we going to go on the record to explain – ?", at which point the trial court interrupted and stated that "[i]t was on the record in the sidebar."

Finally, the State presented evidence that a fired cartridge casing was recovered in the alley

No. 1-09-2262

where the incident took place. In a nearby yard, the police recovered two more fired cartridge casings along with one unfired cartridge casing. Forensic testing confirmed the fired casings were shot from the two firearms recovered with the assistance of defendant.

Following the introduction of this evidence, the State rested. Defense counsel moved for a directed verdict on the grounds Mr. Gray's testimony was not credible and defendant's prior statement to Detective Hamilton was unreliable because it had not been transcribed or otherwise recorded. The trial court denied the motion, and defendant testified on his own behalf.

Defendant's trial testimony generally corresponded to the statement he had previously given to Detective Hamilton. However, defendant now stated that he only shot Mr. Gray in the alley after Mr. Gray produced his own firearm. Defendant testified that he shot Mr. Gray because he was afraid. After Mr. Gray was shot, he got out of the car and fired a couple of shots before dropping his gun. Defendant recovered Mr. Gray's firearm and drove off in the car.

In rebuttal, Detective Hamilton testified that defendant never told him that Mr. Gray produced a gun first, or that defendant fired his own weapon in self-defense. Additionally, defendant never told Detective Hamilton that the second gun had belonged to Mr. Gray.

At the conclusion of trial, the jury found defendant not guilty of attempted murder but guilty of aggravated vehicular hijacking and aggravated battery with a firearm. Defendant filed a number of motions for a new trial which, in part, asserted defendant's trial counsel was ineffective for failing to move for directed verdict on the charge of aggravated vehicular hijacking. The trial court denied defendant relief on any of the posttrial motions and the matter proceeded to a sentencing hearing. After hearing evidence in aggravation and mitigation, the trial court merged the convictions for

No. 1-09-2262

aggravated vehicular hijacking and aggravated battery with a firearm and sentenced defendant to 43 years' imprisonment. Defendant's motion to reconsider this sentence was denied and he now appeals.

## II. Analysis

On appeal, defendant raises a number of challenges to his conviction and sentence. We address each of these arguments in turn.

### A. Ineffective Assistance of Counsel

We first address defendant's assertions of ineffective assistance of counsel. Defendant contends that his trial counsel was ineffective in two separate respects.

To establish ineffective assistance of counsel, a defendant must show: (1) his counsel's representation fell below an objective standard of reasonableness; and (2) but for counsel's errors, there is a reasonable probability the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Evans*, 186 Ill. 2d 83, 93 (1999). While the defendant must establish both prongs of this two-part test, a reviewing court need not address counsel's alleged deficiencies if the defendant fails to establish prejudice. See *Strickland*, 466 U.S. at 687; *People v. Edwards*, 195 Ill. 2d 142, 163 (2001).

#### 1. *Corpus Delicti*

Defendant first notes his conviction for aggravated vehicular hijacking required the State to prove he took the car from the person or the immediate presence of Mr. Gray by the use of force or by threatening the imminent use of force. 720 ILCS 5/18-3(a), 18-4(a) (West 2004). Defendant notes, during the State's case in chief, Mr. Gray testified that he did not know who took his car.

No. 1-09-2262

Furthermore, defendant asserts that the only evidence presented by the State in its case in chief establishing defendant took the car was contained in the extrajudicial confession he gave to Detective Hamilton. Defendant therefore contends that the State did not prove the *corpus delicti* of the offense of aggravated vehicular hijacking, and his trial counsel was therefore ineffective in failing to move for a directed verdict on this basis. We disagree.

Our supreme court has recently reaffirmed the requirement that the State properly establish the *corpus delicti* of an offense, stating:

“[u]nder the law of Illinois, proof of an offense requires proof of two distinct propositions or facts beyond a reasonable doubt: (1) that a crime occurred, *i.e.*, the *corpus delicti*; and (2) that the crime was committed by the person charged. [Citations.] In many cases, and this is one, a defendant's confession may be integral to proving the *corpus delicti*. It is well established, however, that proof of the *corpus delicti* may not rest exclusively on a defendant's extrajudicial confession, admission, or other statement. [Citation.] Where a defendant's confession is part of the proof of the *corpus delicti*, the prosecution must also adduce corroborating evidence independent of the defendant's own statement. [Citation.] If a confession is not corroborated in this way, a conviction based on the confession cannot be sustained. [Citation.]

\*\*\*

Although the corroboration requirement demands that there be some evidence, independent of the confession, tending to show the crime did occur, that

No. 1-09-2262

evidence need not, by itself, prove the existence of the crime beyond a reasonable doubt. If the defendant's confession is corroborated, the corroborating evidence may be considered together with the confession to determine whether the crime, and the fact the defendant committed it, have been proven beyond a reasonable doubt.

[Citation.]” *People v. Sargent*, 239 Ill. 2d 166, 183 (2010).

On appeal, defendant repeatedly asserts that the State improperly failed to “prove” he drove the car away with evidence independent of defendant’s oral statement. However, this was not required. As noted above, the trier of fact is entitled to consider *both* a defendant’s confession along with other corroborating evidence to determine if the defendant actually committed the offense charged. Thus, the corroborating evidence “may consist of circumstantial evidence, need not establish the crime beyond a reasonable doubt, and need not correspond to the confession in every detail as long as it tends to confirm and strengthen the confession.” *People v. Williams*, 317 Ill. App. 3d 945, 954 (2000).

Here, the State presented evidence of defendant’s confession to Detective Hamilton that he wanted to recover the car he had purchased and actually drove off in the car after shooting Mr. Gray. This confession was corroborated by Mr. Gray’s own testimony about both the dispute over the car leading up to the incident and the circumstances of the incident itself, the physical evidence in the alley showing a shooting took place, and the circumstantial evidence that no car was parked in the alley when the police arrived on the scene to investigate the incident.

We find that defendant’s confession and the corroborating testimonial, physical, and circumstantial evidence were sufficient to withstand any possible motion for directed verdict on the

No. 1-09-2262

grounds the State did not establish the *corpus delicti* of the offense of aggravated vehicular hijacking. *People v. Cantlin*, 348 Ill. App. 3d 998, 1003 (2004) (in ruling on a motion for a directed verdict, the trial court must view the evidence in the light most favorable to the State and determine whether the evidence so viewed fails to establish defendant's guilt beyond a reasonable doubt). Therefore, defendant cannot establish his trial counsel was ineffective in failing to move for a directed verdict on this basis. As the State notes, “[d]efense counsel is not required to make losing motions or objections in order to provide effective legal assistance.” *People v. Mercado*, 397 Ill. App. 3d 622, 634 (2009).

## 2. Failure to Object to Improper Testimony

Defendant also contends that his trial counsel was ineffective in failing to object to certain inadmissible evidence. Specifically, defendant contends that his trial counsel should have objected to the evidence that he was affiliated with a gang and had both smoked marijuana and gambled. Defendant asserts that this evidence was prejudicial because it negatively impacted the credibility of his testimony that he shot Mr. Gray in self-defense.

As noted above, we can resolve an assertion of ineffective assistance on the grounds defendant has failed to establish any prejudice. *Strickland*, 466 U.S. at 687; *Edwards*, 195 Ill. 2d at 163. Furthermore, an assertion of ineffective assistance is properly denied where the evidence of a defendant’s guilt is so overwhelming, a defendant cannot show a reasonable probability that the outcome of the trial would have been different if his trial counsel had acted differently. *Mercado*, 397 Ill. App. 3d at 634-35.

In this case, the evidence established that defendant himself told Detective Hamilton that he

No. 1-09-2262

shot Mr. Gray and took the car. In his statement, defendant never indicated that Mr. Gray had a gun or drew a gun first. The contents of defendant's confession, including the fact that Mr. Gray did not draw a gun, were corroborated by the testimony of Mr. Gray at trial. Forensic evidence tied the shell casings found at the scene to the two guns located with the assistance of defendant. In light of the overwhelming evidence of defendant's guilt, we find that there is no reasonable probability that defense counsel's failure to object to the evidence of defendant's unrelated gang-affiliation, drug use, or gambling changed the outcome of the trial. See *People v. Adkins*, 239 Ill. 2d 1, 34 (2010) (reversal of conviction is not required where admission of allegedly improper evidence, including other-crimes evidence, was not a factor in defendant's conviction).

#### B. Fair Trial

Defendant next contends that he was denied a fair trial because the trial court did not instruct the jury that some of Officer Flisk's testimony should be disregarded. Specifically, defendant notes, after Officer Flisk testified that defendant identified the recovered firearms as belonging to him, defense counsel objected on the grounds this admission was not contained in the police report. Outside the presence of the jury, the trial court indicated that it would sustain the objection and the State then withdrew the question. However, the trial court never instructed the jury it should disregard Officer Flisk's testimony on this issue. Because defendant argued at trial that Mr. Gray drew his own gun first and was only shot in self-defense, he contends that his trial court's failure to instruct the jury to disregard this evidence was prejudicial to his defense and denied him a fair trial.

We disagree. A defendant is entitled to a fair trial, not a perfect trial. *People v. Easley*, 192 Ill. 2d 307, 344 (2000); Illinois Supreme Court Rule 615(a) (eff. Aug. 27, 1999) (providing that any

No. 1-09-2262

error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded on appeal). Errors at trial are considered harmless where it appears beyond a reasonable doubt the error did not contribute to the verdict obtained. *People v. Garcia-Cordova*, 392 Ill. App. 3d 468, 484 (2009). “When deciding whether error is harmless, a reviewing court may (1) focus on the error to determine whether it might have contributed to the conviction; (2) examine the other properly admitted evidence to determine whether it overwhelmingly supports the conviction; or (3) determine whether the improperly admitted evidence is merely cumulative or duplicates properly admitted evidence.” *In re Rolandis G.*, 232 Ill. 2d 13, 43 (2008).

As we have discussed above, the other properly admitted evidence - including defendant’s own confession - overwhelmingly supports defendant’s conviction for aggravated vehicular hijacking. Additionally, we also note Detective Hamilton independently testified that defendant admitted he had purchased the .380-caliber pistol used in the incident from Mr. Gray and defendant himself testified that he owned the .25-caliber firearm. Thus, Officer Flisk’s testimony was merely cumulative of the testimony of Detective Hamilton and defendant. We therefore find that any error with respect to the trial court’s handling of defendant’s objection to Officer Flisk’s testimony was harmless beyond a reasonable doubt and did not deny defendant a fair trial.

### C. Supreme Court Rule 431(b)

We next address defendant’s assertion, because the trial court failed to strictly comply with Illinois Supreme Court Rule 431(b) (eff. May 1, 2007), he is entitled to a new trial.

In *People v. Zehr*, 103 Ill. 2d 472, 477 (1984), our supreme court stated that “essential to the qualification of jurors in a criminal case is that they know that a defendant is presumed innocent, that

No. 1-09-2262

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.” These principals have been codified in Rule 431(b) (eff. May 1, 2007), which provides that, during the *voir dire* examination of prospective jurors:

“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 prospective 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.”

In this case, the trial court did not fully comply with the requirements of Rule 431(b). During its *voir dire* examination, the trial court identified the principles outlined in Rule 431(b) and then asked the prospective jurors “[d]o any of you not accept these fundamental principals of American law?” However, the trial court never asked the prospective jurors if they *understood* these principles. As our supreme court has recently stated, the clear and unambiguous language of Rule 431(b) “mandates a specific question and response process. The trial court must ask each potential juror whether he or she understands *and* accepts each of the principles in the rule. The questioning

No. 1-09-2262

may be performed either individually or in a group, but the rule requires an opportunity for a response from each prospective juror on their understanding *and* acceptance of those principles.” (Emphasis added.) *People v. Thompson*, 238 Ill. 2d 598, 607 (2010). Because the trial court did not question the prospective jurors about both their acceptance and understanding of the relevant principles, it violated Rule 431(b).

While the trial court clearly failed to comply with the requirements of Rule 431(b), it is also clear, defendant never objected to this failure in the trial court. Thus, defendant has not preserved this issue for appeal. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (to preserve a claim for review, a defendant must both object at trial and include the alleged error in a written posttrial motion). Indeed, defendant acknowledges his failure to object below. Nevertheless, defendant raises three alternative theories as to why this court should recognize the trial court’s error and remand for a new trial. We reject each of these contentions, with our analysis primarily guided by our supreme court’s recent decision in *Thompson*, 238 Ill. 2d 598.

Defendant first asserts that the mandatory nature of Rule 431(b) places the burden of ensuring compliance with its requirements upon the trial court and not upon a defendant. Defendant, thus, appears to contend that any error related to the requirements of Rule 431(b) cannot be deemed waived by a defendant’s failure to object, and any such error requires a new trial. However, our supreme court rejected just such an argument in *Thompson*.

In that case, the trial court failed to comply with the requirements of Rule 431(b), but defendant failed to object on that basis in the trial court proceedings. *Id.* at 605-07. The supreme court rejected the notion that a violation of Rule 431(b) constituted a “structural error” requiring

No. 1-09-2262

automatic reversal and refused to adopt a “bright-line” rule that any such violation required a new trial. *Id.* at 610-16. The court then proceeded to analyze the impact of the Rule 431(b) violation under the traditional rules applicable to issues not properly preserved on appeal, ultimately finding the issue waived. *Id.* at 611-16. Therefore, we must reject defendant’s contention that the trial court’s failure to fully comply with Rule 431(b) *ipso facto* requires reversal.

Defendant next asserts that the rules of forfeiture should be relaxed in situations, such as the one here, where the error involves the conduct of the trial judge. Again, our resolution of this argument is guided by the *Thompson* decision. There, our supreme court was presented with the same argument and noted that traditionally “the forfeiture rule may be relaxed when a trial judge oversteps his or her authority in the presence of the jury or when counsel has been effectively prevented from objecting because it would have ‘fallen on deaf ears.’ ” *Id.* at 612, quoting *People v. Hanson*, 238 Ill. 2d 74, 118 (2010), quoting *People v. McLaurin*, 235 Ill. 2d 478, 488 (2009). However, the court also noted that this rule should only be applied in extraordinary circumstances because it denies the trial court the opportunity to correct any errors at the time of trial. *Id.* at 612.

In refusing to overlook defendant’s failure to preserve the issue of the trial court’s compliance with Rule 431(b), our supreme court specifically stated that:

“[i]n this case, there is no indication that the trial court would have ignored an objection to the Rule 431(b) questioning. We presume that the trial court would have complied with the mandatory language of Supreme Court Rule 431(b) had the error been pointed out at trial. Moreover, defendant does not argue that the trial court

overstepped its authority in the jury's presence. A simple objection would have allowed the trial court to correct the error during voir dire. Accordingly, we conclude there is no compelling reason to relax the forfeiture rule in this case.” *Id.*

This case presents a similar situation. Defendant has not pointed to any evidence, nor does our review of the record reveal any indication, that the trial court here would have ignored an objection regarding its compliance with the requirements of Rule 431(b). Indeed, the record establishes the trial court attempted to comply with the rule, but simply did not satisfy the requirement to inquire into the prospective jurors’ understanding *and* their acceptance of the Rule 431(b) principles. Thus, we will not excuse defendant’s waiver of this issue on this basis.

Defendant's last contention regarding this issue is that the trial court’s error is subject to review under the plain-error doctrine. This doctrine "bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error \*\*\*.” *People v. Herron*, 215 Ill. 2d 167, 186 (2005). The plain-error doctrine is applied where “(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. Piatkowski*, 225 Ill. 2d 551, 565 (2007). In either circumstance, the burden of persuasion remains with the defendant. *Herron*, 215 Ill. 2d at 182.

Here, defendant claims plain error under both prongs of the doctrine. However, the first prong of the plain-error doctrine only allows review of a forfeited error where the evidence is

No. 1-09-2262

“closely balanced \*\*\*.” *Piatkowski*, 225 Ill. 2d at 565. We have already determined the evidence of defendant’s guilt in this case was overwhelming. Moreover, we also reiterate defendant has not pointed to any evidence that the jury was actually biased in any way. Thus, defendant cannot meet his burden under this prong of the plain-error doctrine.

Additionally, we find that defendant’s assertions, with respect to the second prong, are foreclosed by the *Thompson* decision. In that case, our supreme court rejected the argument that a violation of rule 431(b), on its own, constituted plain error. The court specifically reasoned as follows:

“A finding that defendant was tried by a biased jury would certainly satisfy the second prong of plain-error review because it would affect his right to a fair trial and challenge the integrity of the judicial process. Critically, however, defendant has not presented any evidence that the jury was biased in this case. Defendant has the burden of persuasion on this issue. We cannot presume the jury was biased simply because the trial court erred in conducting the Rule 431(b) questioning.” *Thompson*, 238 Ill. 2d at 614.

Similarly, here, defendant’s argument under the second prong of the plain-error doctrine consists of recognition that the trial court erred and a bald assertion that this error denied him a fair trial by an impartial jury. However, a violation of Rule 431(b) does not implicate a fundamental right or constitutional protection. *Id.* at 614-15. Here, defendant has presented no evidence of actual jury bias. As such, we must find that defendant has “failed to meet his burden of showing the error affected the fairness of his trial and challenged the integrity of the judicial process. Accordingly, the

No. 1-09-2262

second prong of plain-error review does not provide a basis for excusing defendant's procedural default." *Id.* at 615.

For all the foregoing reasons, therefore, we find that defendant has not preserved this issue and it is not subject to review before this court.

#### D. Sentencing

Finally, we consider defendant's argument that his 43-year sentence was excessive.

When a defendant challenges his sentence on appeal, we generally defer to the trial court's judgment because it had the opportunity to observe the proceedings and is, therefore, in a better position than a reviewing court. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). We will not substitute our judgment for that of the trial court merely because we would have weighed the sentencing factors differently. *Stacey*, 193 Ill. 2d at 209. Accordingly, we review the trial court's sentencing determination against an abuse of discretion standard and will reverse a sentence within the prescribed statutory limits only if it varies with "the spirit and purpose of the law" or is "manifestly disproportionate to the nature of the offense." *Stacey*, 193 Ill. 2d at 209-10.

Here, defendant was sentenced for his conviction of aggravated vehicular hijacking. This offense is a Class X felony, with a possible sentencing range of 6 to 30 years' imprisonment. 720 ILCS 5/18-4(a)(6) (West 2008); 730 ILCS 5/5-8-1(a)(3) (West 2008). Because defendant caused great bodily harm to Mr. Gray, the Criminal Code of 1961 requires an additional "25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court." 720 ILCS 5/18-4(b) (West 2008). Thus, defendant was subject to a total sentence ranging from a minimum of 31 years' imprisonment to a maximum term of natural life in prison.

On appeal, defendant contends that his 43-year sentence was excessive and reflects the trial court's failure to give adequate weight to his rehabilitative potential. Defendant notes the evidence presented at his sentencing hearing established he was only 20 years old at the time of the incident, was a high school graduate with a significant work history, and had no prior felony convictions. Defendant also apologized for his actions and showed remorse at the sentencing hearing, and asserts that, circumstances similar to those which led to the incident, were unlikely to reoccur.

A trial court may consider a number of factors to fashion an appropriate sentence, including the nature of the crime, protection of the public, deterrence, punishment, and defendant's youth, rehabilitative prospects, credibility, demeanor, and character. *People v. Kolzow*, 301 Ill. App. 3d 1, 8 (1998). The weight attributed to each factor in aggravation or mitigation in sentencing depends on the particular circumstances of each case. *Kolzow*, 301 Ill. App. 3d at 8.

The trial court below explained it considered all the relevant factors in aggravation and mitigation, specifically noting the evidence contained in the presentence report, defendant's lack of criminal history, the serious harm caused to Mr. Gray, the need for deterrence, and the fact that defendant "resolv[ed] what would, basically, be a contractual issue at the point of a gun." In the end, the trial court balanced the evidence in mitigation and the other sentencing factors and sentenced defendant to an 18-year sentence that was well within the range of possible Class X prison terms. It then added 25 years to that sentence, the minimum possible sentencing enhancement for the great bodily harm caused to Mr. Gray. In light of the record, we reject defendant's assertion that the trial court did not properly weigh his rehabilitative potential and find no abuse of discretion in the sentence imposed. See *People v. Prince*, 362 Ill. App. 3d 762, 778 (2005) (the trial court need

No. 1-09-2262

not accord greater weight to the potential for rehabilitation than to other sentencing factors).

### III. Conclusion

For the foregoing reasons, the judgment of the circuit court is affirmed.

Affirmed.