

No. 1-09-2734

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).

SIXTH 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 25473
)	
KENNETH WATKINS,)	Honorable
)	Carol A. Kipperman,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE GARCIA delivered the judgment of the court.
Justice McBride and R. E. Gordon concurred in the judgment.

ORDER

HELD: Defendant's claim that the trial court did not fully comply with Supreme Court Rule 431(b) was not subject to plain error review. We find no error in the State's rebuttal argument to support defendant's claim that he did not receive a fair trial.

After a jury trial, defendant Kenneth Watkins was convicted of aggravated battery and sentenced to 24 months of probation. 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 each

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potential juror if he or she understood and accepted the principles outlined in *People v. Zehr*, 103 Ill. 2d 472 (1984). Defendant also contends the State made numerous errors during its rebuttal argument. We affirm.

During *voir dire*, the court explained to the group of prospective jurors the principles enumerated in *People v. Zehr*, 103 Ill. 2d 472 (1984), that a defendant (1) is presumed innocent, (2) must be proven guilty beyond a reasonable doubt, (3) is not required to offer any evidence on his own behalf, and (4) cannot be penalized by the failure to testify upon his own behalf. The court then questioned the venire, in two groups, regarding the *Zehr* principles. The court questioned the first group regarding each of the four *Zehr* principles. The court then questioned the second group regarding three of the four principles. The court did not ask the second group whether it understood and accepted that a defendant is not required to present evidence on his own behalf. Defendant did not object and a jury was selected.

At trial, the State presented the testimony of Sears Auto Center employees Mark Samano and Leon Castillo. The men testified that defendant became upset when a replacement part could not be installed in his car. The Sears Auto Center manager, James Weiher, testified that he gave defendant two options, defendant could either take the car or leave it to be worked on the next day. Defendant became upset, swore, and stated that he wanted employees to stay and finish the job. Weiher felt threatened, so he called the police.

Weiher told defendant that he had called the police and that the car was being put back together. According to Weiher, defendant then began walking toward him. Weiher backed away until he hit a wall. When the brim of defendant's hat hit Weiher's forehead, he pushed defendant

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away. Defendant then punched him. Defendant continued to punch him and the two men ultimately ended up on the floor. As a result of the incident, Weiher suffered broken bones in his nose and right eye socket.

Weiher testified that the shop was under video surveillance. The parties stipulated to the accuracy of the surveillance videotape offered by the State. This videotape was published to the jury. The tape is not included in the record.

During cross-examination, Weiher admitted that defendant had said he needed the car the next day and was concerned about the vehicle's safety. Although Weiher admitted that he spit on defendant, he denied swearing at or trying to hit defendant.

Castillo testified that when he saw defendant standing over Weiher trying to hit him, he grabbed defendant and told defendant to "leave it alone."

Officer Thomas Bueneman testified that defendant admitted he became agitated when he learned that his car was not going to be fixed that night and stated that Weiher treated him like a child. Defendant indicated that after the brim of his hat touched Weiher, Weiher shoved him, so he took several steps back and then punched Weiher. Defendant felt bad, but indicated that he had acted to defend himself.

Defendant testified that he was an Army veteran and officiated at high school wrestling tournaments. He wanted a car part replaced because he planned to drive to a wrestling tournament the next day. Before going to Sears, he verified by phone that the replacement could be performed that night.

When he arrived, defendant reiterated that he needed the car the next day; he left after

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being told the repair could be done. When he returned, he saw Castillo banging on the car with a hammer. Defendant then asked Samano whether Castillo knew what he was doing. Samano assured him that the job would be completed that night; however, he was later told it could not be completed.

Defendant asked to speak to the manager. Defendant and Weiher then went to the service area where it was explained that the replacement was going to take three hours and no one was going to stay until 10 p.m. to complete the job. Defendant then questioned the safety of the vehicle because it had been banged on with a hammer. He was told to sit down. He refused and went back to the waiting area. There, he asked Samano for the contact information for the Sears corporate office. Weiher then came in and yelled at Samano to stop helping defendant.

Defendant described Weiher as using an overbearing or intimidating tone of voice. At one point, the brim of defendant's hat touched Weiher. Weiher then shoved defendant in the throat and defendant went "flying back." When he regained his balance, he saw Weiher coming toward him and felt threatened. Defendant punched Weiher, grazing the side of his jaw. Weiher got into a "fighting stance" and defendant assumed a defensive posture. During the brief struggle, Weiher yanked defendant to the floor.

Defendant admitted he yelled, used profanity, and "voiced his opinion" because he was frustrated with the poor customer service experience.

Defendant then presented the testimony of high school wrestling officials Paul Basinger, Dan Fulscher, Jason Salley, and Ray Winesburg. They described defendant's reputation within their community as that of a peaceful and law abiding individual.

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In its closing argument, the State argued that Weiher did what any decent manager should do when his employees were being harassed by a customer, he stood up to the bully, and, as a result, suffered a broken nose and other injuries. The defense then explained that defendant was frustrated with the situation and worried about the safety of his car, which accounted for this normally peaceful and law abiding citizen's actions. The defense further argued Weiher was the aggressor and defendant merely defended himself.

In rebuttal, the State argued that bad customer service did not justify defendant's actions and that he was the aggressor. The State also argued that defendant's testimony that he lost his balance when Weiher shoved him was incredible, considering defendant was an "Army guy." The State contrasted defendant's reputation in the high school wrestling community as a peaceful and law abiding citizen with wrestling, which according to the State there was "not a more violent sport out there other than boxing." The State reiterated that a defendant does not need to put on a defense, but that defendant chose to present the testimony of those particular character witnesses, as opposed to neighbors or employers. The defense objected, and the court overruled that objection. The State concluded its rebuttal by stating that there was no excuse for defendant's actions.

When instructing the jury, the court 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 aggravated battery. Defendant filed a motion for a

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new trial alleging, *inter alia*, that the State impermissibly shifted the burden of proof to defendant when it stated that defendant should have brought in defendant's neighbors as witnesses.

Defendant did not allege that the trial court's *voir dire* of the jury was improper. At the hearing on the motion, the State argued that the complained of comment was merely that, a comment on the evidence that defendant chose to present. The court denied the motion, and sentenced defendant to 24 months of probation. Defendant timely appeals.

Defendant first contends that the trial court's failure to ask each potential juror whether he or she understood and accepted each of the *Zehr* principles deprived him of a fair trial.

Defendant also points to the trial court's failure to admonish the second group of prospective jurors on all four of the *Zehr* principles. The State counters defendant forfeited this claim because he failed to object at trial and did not raise the issue in his posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defendant replies that appellate review is warranted where there is an implication of judicial misconduct. He contends that because the burden of ensuring compliance with Rule 431(b) rests upon all counsel, the State should not be permitted to benefit from its failure to ensure the court's compliance with the rule. Defendant also argues review is warranted under plain error.

Our supreme court's decision in *People v. Thompson*, 238 Ill. 2d 598 (2010), is dispositive of this claim. In *Thompson*, the supreme court rejected an argument similar to the argument defendant makes before us that review of the trial court's violation of Rule 431(b) is permitted because the error suggests judicial misconduct.

"In 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.* at 612.

The court's statements in *Thompson* apply with equal force here. Defendant did not object to the trial court's failure to ask the prospective jurors whether they "understood and accepted" the omitted *Zehr* principle. Nor did he object to the procedure the trial court following during *voir dire*, either at trial or in his posttrial motion. Accordingly, he forfeited this issue on appeal. *Thompson*, 238 Ill. 2d at 612. "When a defendant has forfeited appellate review of an issue, the reviewing court will consider only plain error." *Id.* at 611.

As in *Thompson*, defendant seeks review of the Rule 431(b) issue under the plain error doctrine. He asserts review under prong one of plain error is called for because the evidence was close. See *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005) (forfeited errors may be addressed "when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence"). We disagree.

Samano, Castillo and Weiher all testified that defendant became upset when the service to

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his car could not be completed. Weiher further testified that when he pushed defendant away after defendant backed him against a wall, defendant punched him multiple times. Although defendant testified that he only acted in self defense, Castillo testified that he had to pull defendant off Weiher. The surveillance tape of the shop was also shown to the jury, which we infer was consistent with the testimony of the State's witnesses as defendant has precluded our review because he failed to include it in the record.

We reject defendant's assertion that the evidence was closely balanced. Defendant's procedural default cannot be excused under prong one of plain error.

The supreme court in *Thompson* also made clear that a violation of Rule 431(b) cannot constitute plain error under the second prong when no showing is made that a biased jury was selected as a consequence. "Defendant has not established that the trial court's violation of Rule 431(b) resulted in a biased jury. Defendant has, therefore, failed to meet his burden of showing the error affected the fairness of his trial and challenged the integrity of the judicial process." *Thompson*, 238 Ill. 2d at 615. The second prong of plain error does not excuse defendant's procedural default of his Rule 431(b) claim.

Defendant next contends the State improperly shifted the burden of proof during rebuttal argument by questioning defendant's choice of reputation witnesses, *i.e.*, commenting that his colleagues from the high school wrestling circuit testified rather than his neighbors or employers. He also contends the State tried to inflame the jury by describing him as a bully and an "Army guy" and characterizing high school wrestling as a violent sport. While we question whether defendant's contention that the jury was inflamed was preserved, we review both claims on the

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merits.

We review each contention *de novo* under *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007). We understand defendant to contend that, as a matter of law, a shifting of the burden occurred when the State commented on the character witnesses defendant called and the jury was inflamed by the "violence" comments.

As a rule, the State's arguments will lead to reversal only if "the improper remarks constituted a material factor in a defendant's conviction." *Id.* at 123. Closing arguments "must be viewed in their entirety" and the remarks put in context. *Id.* at 122. The State may comment on the evidence presented and draw reasonable inferences from that evidence. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005); see also *People v. Kliner*, 185 Ill. 2d 81, 154 (1998) (during rebuttal, the State is entitled to respond to comments, which invite a response).

Mere comment by the State on the evidence offered by a defendant does not constitute a shifting of the burden. *People v. Phillips*, 127 Ill. 2d 499, 527 (1989) (there is a difference between an allegation that defendant did not prove himself innocent and a comment on the relevance of the evidence presented by defendant). To accept defendant's shifting of the burden claim would place certain defense evidence "beyond the reach of appropriate comment by the prosecution." *Id.* at 527. The State's comments regarding the "wrestling" witnesses the defendant called are not the equivalent of an argument that defendant had to prove his innocence. *Id.* at 527. We reject defendant's claim that the State shifted its burden to defendant when the State commented on the presentation of *character* witnesses, who, by the nature of their testimony, offered no evidence as to what occurred in the auto repair shop.

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We find defendant's claim that the State's reference to the violent nature of wrestling made during its argument likewise falls far short of demonstrating that the comments, as a matter of law, "constituted a material factor in a defendant's conviction." *Wheeler*, 226 Ill. 2d at 123. Defendant saw no reason to object to these comments at trial; the comments are no more significant on appellate review in light of the actual evidence presented against defendant. The State's comments defendant now claims should not have been made were not a material factor in defendant's conviction. The defendant was convicted because his version of the actual fight he had with Weiher was not credible. The triers of fact could not have been influenced by the comments in the State's rebuttal, which defendant seeks to give much greater significance than the actual evidence of the offense the State presented against him.

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

Affirmed.