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FIRST DIVISION
March 14, 2011

No. 1-08-2470

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 21327
)	
ERIC JOHNSON,)	Honorable
)	Matthew E. Coghlan,
Defendant-Appellant.)	Judge Presiding.
)	

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

ORDER

HELD: (1) The trial court's failure to strictly comply with Supreme Court Rule 431(b) did not entitle defendant to relief under the plain-error analysis; (2) the trial court did not err in imposing the \$200 DNA analysis fee; and (3) the trial court did err in imposing other challenged fees totaling \$45.

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Following a jury trial, defendant Eric Johnson was convicted of possession of a controlled substance with intent to deliver and sentenced to eight years in prison. On appeal, he contends the trial court: (1) committed reversible error when it failed to ensure that the prospective jurors understood and accepted the principle that his decision not to testify on his own behalf could not be used against him; and (2) erroneously imposed various fines, fees and costs against him.

For the reasons that follow, we affirm defendant's conviction, affirm the assessment of the \$200 DNA analysis fee, and vacate the imposition of other challenged fees totaling \$45.

I. BACKGROUND

Defendant and a codefendant were arrested in September of 2007 and charged with possession of a controlled substance with intent to deliver.

When jury selection began, the trial judge admonished the venire *en masse* that defendant was presumed innocent, the State bore the burden of proof beyond a reasonable doubt, and defendant need not present evidence on his behalf. Following those admonishments, the judge ensured that the venire understood and accepted those three principles. The judge, however, did not admonish the venire concerning the principle that jurors could not hold a defendant's decision not to testify on his own behalf against him.

At trial, two police officers testified concerning their surveillance on the afternoon in question based on information that two men were selling drugs out of a car at the intersection in question. One officer observed defendant and the codefendant engage in two suspect narcotics transactions. Specifically, an unknown man approached defendant and gave him money, whereupon the codefendant, who was standing nearby, went to a nearby parked car and retrieved

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a small item from a crumpled newspaper beneath the car's driver's seat. The codefendant then gave the small item to the purchaser. About two minutes later, another unknown man engaged in an identical transaction with defendant and the codefendant. After the second transaction, officers detained defendant and the codefendant, searched under the driver's seat of their car and found five ziplock baggies of suspect crack cocaine in the crumpled newspaper. The recovered substance tested positive for the presence of cocaine and weighed 1.2 grams.

On behalf of the defense, an investigator testified concerning the distance between the location of the alleged drug transactions and the police officer conducting the surveillance. The defense also introduced into evidence four photographs of the alleged crime scene. Defendant did not testify.

After closing arguments, the judge instructed the jury. One instruction stated "the fact that the defendant did not testify must not be considered by you in any way in arriving at your verdict." The jury deliberated for about 90 minutes before finding defendant guilty of possession of a controlled substance with intent to deliver. He was sentenced to eight years in prison. The trial court also issued an order imposing various costs, fees, and fines. Defendant timely appealed.

II. ANALYSIS

A. Compliance with Supreme Court Rule 431(b)

Defendant argues his conviction must be reversed and this case remanded for a new trial because the trial court failed to fully comply with Supreme Court Rule 431(b) (Official Reports Advance Sheet No. 8 (April 11, 2007), R. 431, eff. May 1, 2007). We review the trial court's

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compliance with a supreme court rule *de novo*. *People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007).

Rule 431(b) codified our supreme court's holding in *People v. Zehr*, 103 Ill. 2d 472, 477 (1984), that four inquiries must be made of potential jurors in a criminal case to determine whether a particular bias or prejudice would deprive the defendant of his right to a fair and impartial trial. This appeal is governed by the current version of Rule 431(b), which requires the trial court to issue the *Zehr* admonitions and inquiries *sua sponte*. Specifically, the trial court must 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; (2) that the State must prove him guilty beyond a reasonable doubt; (3) that he is not required to present evidence on his own behalf; and (4) that his decision not to testify may not be held against him. However, no inquiry of a prospective juror is made into the defendant's failure to testify when the defendant objects. Official Reports Advance Sheet No. 8 (April 11, 2007), R. 431, eff. May 1, 2007.

Defendant argues the trial court committed reversible error when it failed to question the prospective jurors concerning the principle that a defendant's decision not to testify may not be held against him. Defendant concedes that he failed to raise this objection during the trial or in a posttrial motion but argues that his failure is of no consequence because the trial court's error is presumptively prejudicial. According to defendant, a trial court's failure to strictly comply with Rule 431(b) is an error serious enough to deny a defendant of a substantial right and, thus, a fair trial. We do not agree.

While compliance with Rule 431(b) is important, a trial court's violation of Rule 431(b)

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is not a structural error requiring reversal. *People v. Thompson*, 238 Ill. 2d 598, 613-14 (2010). An error typically is designated as structural and, thus, compels an automatic reversal, only when it “necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” *Rivera v. Illinois*, 556 U.S. ___, ___, 173 L. Ed. 2d 320, 330-31, 129 S. Ct. 1446, 1455 (2009). See also *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009), quoting *People v. Herron*, 215 Ill. 2d 167, 186 (2005) (describing a structural error as “a systemic error which serves to ‘erode the integrity of the judicial process and undermine the fairness of the defendant’s trial’ ”). Structural errors have been found in a very limited class of cases. Specifically, a total deprivation of the right to counsel, lack of an impartial judge, unlawful exclusion of grand jurors of the defendant’s race, the right to self-representation at trial, the right to a public trial, and an erroneous reasonable doubt instruction rose to the level of structural error. *Johnson v. United States*, 520 U.S. 461, 468-69, 137 L. Ed. 2d 718, 728, 117 S. Ct. 1544, 1549-50 (1997).

The error in this case does not involve a basic, fundamental protection provided by the constitution but, rather, a right made available only by rule of our supreme court. *Glasper*, 234 Ill. 2d at 192-93. “The violation of a supreme court rule does not mandate reversal in every case,” and our supreme court has applied the harmless-error doctrine to errors stemming from the violation of its rules. *Glasper*, 234 Ill. 2d at 193. Although Rule 431(b) is designed to help ensure that defendants are tried before a fair jury, the *Zehr* questioning under that rule is not indispensable to a fair trial. Certainly, a trial before a biased tribunal would constitute structural error not subject to harmless-error review, but evidence demonstrating that a juror was biased is

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necessary. *Thompson*, 238 Ill. 2d at 613-14; *Glasper*, 234 Ill. 2d at 200. Our supreme court has rejected the idea that the trial court's failure to conduct Rule 431(b) questioning makes it inevitable that the jury was biased, particularly when the record demonstrates that the jurors were instructed about the principle erroneously omitted from the Rule 431(b) questioning. *Thompson*, 238 Ill. 2d at 610-11; *Glasper*, 234 Ill. 2d at 200-201.

Rather, courts consider a Rule 431(b) error in the context of the particular facts of an individual case to determine whether the error was harmless or plain error. See *Herron*, 215 Ill. 2d at 181-82 (plain error applies when the defendant fails to object, while harmless error applies when a timely objection is made). A plain error analysis applies here because defendant failed to timely object. "In plain-error review, the burden of persuasion rests with the defendant."

Thompson, 238 Ill. 2d at 613.

The plain error doctrine allows errors not previously challenged to be considered on appeal if either: (1) the evidence is closely balanced and the jury's guilty verdict may have resulted from the error; or (2) the error was so fundamental and of such magnitude that the defendant was denied a fair trial and the error must be remedied to preserve the integrity of the judicial process. *People v. Hudson*, 228 Ill. 2d 181, 191 (2008); *Herron*, 215 Ill. 2d at 177.

Because defendant does not argue that the evidence was closely balanced, our analysis is limited to the second prong of the plain error analysis.

The parties concede that the trial court erred when it failed to ask the prospective jurors if they understood and accepted the principle that defendant's decision not to testify on his own behalf could not be used against him. We, however, cannot presume that defendant's jury was

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biased simply based on that error. *Thompson*, 238 Ill. 2d at 614. Furthermore, the record establishes that the trial court instructed the jury after closing arguments that defendant's decision not to testify on his own behalf could not be used against him. Defendant has not presented any evidence to indicate that the trial court's violation of Rule 431(b) resulted in a biased jury. Accordingly, 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. *Thompson*, 238 Ill. 2d at 614; *People v. Stewart*, No. 1-08-3092 (December 10, 2010). Consequently, the trial court's error does not rise to the level of plain error, and we find that defendant has forfeited his claim on appeal.

B. Fees, Fines and Costs

Finally, defendant challenges the trial court's imposition of various fines, fees and costs. The State concedes, and we agree, that the following fees or fines should be vacated as a matter of law: the \$5 court system fee (55 ILCS 5/5-1101(a) (West 2006)); the \$10 Arrestee's Medical Costs Fund assessment (730 ILCS 125/17 (West 2006)); and the \$30 Children's Advocacy Center fine (55 ILCS 5/5-1101(f-5) (West 2006)). These charges total \$45 and must be vacated.

We do not agree, however, with defendant's claim that the trial court erroneously imposed the \$200 DNA analysis fee where defendant was previously convicted of felony offenses. Specifically, defendant cites *People v. Evangelista*, 393 Ill. App. 3d 395, 399 (2009), for the proposition that section 5-4-3(j) of the Unified Code of Corrections (730 ILCS 5/5-4-3(j) (West 2006)), should not be read to require payment of additional analysis fees from an offender who has already submitted, due to a prior conviction, a DNA sample and corresponding analysis

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fee payment. See also *People v. Rigsby*, No. 1-09-1461. However, recent decisions of this court have held, contrary to *Evangelista* and the majority holding in *Rigsby*, that the statute does not limit the collection of additional DNA samples or the number of fees which can be assessed. *People v. Adair*, No. 1-09-2840 (December 10, 2010); *People v. Williams*, No. 1-09-1667 (December 2, 2010); *People v. Bomar*, 405 Ill. App. 3d 139 (2010); *People v. Hubbard*, 404 Ill. App. 3d 100, 102-103 (2010); *People v. Grayer*, 403 Ill. App. 3d 797, 800-801 (2010); *People v. Marshall*, 402 Ill. App. 3d 1080, 1083 (2010), *appeal allowed*, No. 110765, 237 Ill. 2d 577 (2010).

Those recent decisions note that a new DNA sample may be required as more sophisticated DNA tests are developed. Furthermore, the statute implicitly supports the imposition of additional analysis fees because statutory provisions concerning the removal of a defendant's DNA from the sample database under certain conditions would necessitate the collection of an additional DNA sample if the defendant receives another felony conviction. In addition, the assessment of multiple analysis fees is not superfluous because the analysis fees are deposited into a fund that is available to cover a variety of costs incurred by the laboratory beyond the analysis and categorization of the DNA sample. Finally, defendant here has failed to offer any proof that he ever paid any previously assessed DNA analysis fee.

We follow this court's decisions in *Adair*, *Williams*, *Bomar*, *Hubbard*, *Grayer* and *Marshall*, and affirm the trial court's order requiring defendant to pay the DNA analysis fee.

III. CONCLUSION

Accordingly, we affirm defendant's conviction and sentence, affirm the imposition of the

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\$200 DNA analysis fee, and vacate the imposition of the other challenged fees, which totaled

\$45. Affirmed in part and vacated in part.

PRESIDING JUSTICE HALL, concurring in part and dissenting in part:

I agree with the majority's conclusion that the trial court's error in failing to strictly comply with the amended version of Supreme Court Rule 431(b) (Official Reports Advanced Sheet No. 8 (April 11, 2007), R. 431(b), eff. May 1, 2007), did not entitle defendant to relief under the second prong of the plain-error analysis. I also agree with the majority's ruling that the following fees and fines should be vacated as a matter of law: the \$5 court system fee (55 ILCS 5/5-1101(a) (West 2006)); the \$10 Arrestee's Medical Costs Fund assessment (730 ILCS (730 ILCS 125/17 (West 2006)); and the \$30 Children's Advocacy Center assessment (55 ILCS 5/5-1101(f-5) (West 2008)).

I respectfully disagree, however, with the majority's finding that the trial court did not err in assessing the \$200 DNA-analysis fee pursuant to section 5-4-3(j) of the Unified Code of Corrections (730 ILCS 5/5-4-3(j) (West 2008)). Section 5-4-3 of the Unified Code of Corrections provides that any person convicted or found guilty of any offense classified as a felony under Illinois law must submit specimens of blood, saliva, or tissue to the Illinois Department of State Police for DNA

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analysis and pay an analysis fee of \$200. 730 ILCS 5/5-4-3(a), (j) (West 2008).

One of the purposes behind the statute is to create a database of the genetic identities of recidivist criminal offenders. *People v. Burdine*, 362 Ill. App. 3d 19, 30, 839 N.E.2d 573 (2005); see also *People v. Evangelista*, 393 Ill. App. 3d 395, 399, 912 N.E.2d 1242 (2009) ("obvious purpose of the statute is to collect from a convicted defendant a DNA profile to be stored in a database").

Defendant argues that the trial court erred in requiring him to pay additional DNA analysis-fees in connection with his present conviction. Defendant contends that the statute should not be read to require payment of additional analysis fees from an offender who has already submitted DNA samples pursuant to a prior conviction and has paid a corresponding analysis fee. I agree. See *People v. Rigsby*, 940 N.E.2d 113, 113-15 (2010) (Lampkin, J., dissenting).