

March 31, 2011
Fourth Division

No. 1-09-1214

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 16452
LAJUAN HILL,)	
)	
Defendant-Appellant.)	Honorable
)	Maura Slattery Boyle,
)	Judge Presiding.

JUSTICE SALONE delivered the judgment of the court.
Justices Lavin and Pucinski concur in the judgment.

ORDER

HELD: Trial court did not err in allowing transcript of an audio tape or photo array exhibit to go into jury deliberations; defendant waived review of his claim that the trial court's error in failing to admonish the potential venire in exact accordance with Supreme Court Rule 431(b) was reversible error; some of defendant's fines, fees and costs should be amended.

Following a jury trial, defendant LaJuan Hill was convicted of delivery of less than one

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gram of heroin and was sentenced to a nine-year prison term. On appeal, defendant contends that the trial court erred in admitting and sending to the jury the transcript of an audio tape of the alleged transaction which revealed extraneous, prejudicial hearsay that was not part of the original recording. Additionally, defendant contends that the trial court erred in admitting and sending to the jury a photo array exhibit which disclosed that defendant had prior arrests. According to defendant, because the contested issue at trial was the identity of the offender recorded on the tape, this was error because this evidence bolstered the officer's identification of defendant. Defendant further contends that his conviction must be reversed where the trial court failed to ask potential jurors if they understood and accepted all four of the *Zehr* principles in violation of Supreme Court 431(b) (Ill. S. Ct. R. 431(b) (eff. May 1, 2007)), and whether defendant's fines, fees and costs should be amended. For the following reasons, we affirm in part and vacate in part.

BACKGROUND

Defendant was charged with delivery of less than one gram of heroin. During *voir dire*, the court stated to the full panel of prospective jurors:

“Mr. Hill, as with other persons charged, is presumed to be innocent of the charges that bring him here before you. That presumption cloaks him now at the onset of the trial and will continue to cloak him throughout the course of the proceedings. That is during jury selection, during opening statements that counsel will be going to make to you, during the presentation of

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evidence, during closing arguments that the attorneys may give, during the instruction of the law that I will read and provide to you, and on into your deliberations unless and until you individually and collectively are convinced beyond a reasonable doubt that the defendant is guilty. Is there any one, and I need to know this now, that has or cannot follow the presumption that the defendant is innocent until proven guilty beyond a reasonable doubt? Is there anyone here in this *voir dire* that cannot follow that principle? If you can't, please raise your hand."

None of the potential jurors raised their hands. Once prospective jurors were sworn, the trial court further stated:

"Again, these are some basic fundamentals or principles of American [jurisprudence]. One of them is the defendant is innocent until proven guilty. I have asked the *voir dire* if anyone could not follow that principle and no one raised their hands. It is absolutely essential as we select this jury that each of you understand and embrace these fundamental principles. That is that all persons charged with a crime are presumed innocent, and that is the burden of the State who has brought the charges to prove the defendant beyond a reasonable doubt. What this means is that the defendant has absolutely no obligation to testify on his own behalf

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or to call any witnesses in his defense. He may simply sit here and rely upon what he and his attorneys perceive to be the inability of the State to present sufficient evidence to meet their burden. The fact that the defendant does not chose [sic.] to testify must not be considered by you in any way in arriving at your verdict. However, should the defendant elect to testify or should his attorneys present evidence on his behalf, you are to consider that evidence in the same manner and by the same standards as the evidence presented by the state's attorney. 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. So I need to know at this point at this time is there any one in this *voir dire* that cannot follow the principle that the defendant does not have to testify? He is under no obligation. Is there anybody that cannot or does not agree with that proposition? If you could please raise your hand. Let the record reflect the *voir dire* that no one has raised their hand."

The matter then proceeded to trial. Briefly stated, the State's evidence at trial established that on April 17, 2008, Chicago police officer William Pierson was working as an undercover narcotics buy officer in Operation Greenbelt. His assignment was to engage in a controlled drug purchase with Nissan Little near the area of Iowa and Pulaski. Officer Nelson Gonzalez worked with Pierson as a surveillance officer to record video and Officer Larry Rattler worked with Pierson as a rolling surveillance officer. Pierson arrived in the target area shortly after 1:00 p.m. in a covert

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vehicle, wearing a recording device and he recorded the events of the day. Upon his arrival, Pierson saw Little, Fayon Thompson, Timothy Williams and a female standing on the southwest corner of Iowa and Pulaski. Pierson was familiar with those individuals from previous investigations during the undercover operation. He approached the group and asked for a job, which was street terminology for an entire pack of narcotics and Pierson knew that to mean seven packages of heroin in that neighborhood. After some questioning by the individuals, Pierson was told to go to Harding Street where he parked and waited for 10 to 12 minutes. He then saw a man, whom he identified in court as defendant, standing on the street. It was the first time Pierson had ever seen defendant. Officer Rattler was able to see both Pierson's vehicle and defendant from his surveillance point, which was approximately 50 feet away.

Approximately 15 minutes later defendant exited a gangway on the east side of the street behind Pierson's vehicle. Pierson could see Officer Rattler approximately 40 to 60 yards away. Subsequently, defendant entered the passenger side of Pierson's vehicle and sold Pierson \$60 worth of heroin. Pierson paid for the drugs with pre-recorded funds, and defendant exited the vehicle. From his surveillance point, Officer Rattler saw defendant exit the gangway and enter the vehicle.

After leaving the vehicle, defendant walked back towards Little, Thompson and Williams, who were still standing on the corner. Pierson drove away before he saw whether or not defendant reached the corner, however, Officer Rattler saw defendant on the corner with the others. Pierson then radioed the rest of the team that he had made a positive narcotics purchase and gave them a description of defendant. He then parked approximately two blocks from the scene and once he was informed that defendant had been detained, he drove past to identify

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defendant. Officer Brian Lonior, who was working as a enforcement officer, stopped defendant and found some of the pre-recorded funds on his person.

When Pierson returned to his unit, he viewed a photo array and positively identified defendant as the individual who had sold him the drugs. Pierson then heat sealed and inventoried the drugs he had purchased from defendant. The drugs subsequently tested positive for heroin.

At trial, the State entered into evidence the following: the pre-recorded funds sheet showing that one of the bills Pierson had with him matched the money recovered from defendant; a photo array that included a photo of defendant, along with a page indicating the name and description of each individual in the array; the drugs; a cassette recording of the conversations Pierson had with defendant and the other individuals on April 17; a transcript of the recording of the cassette which was transcribed by Pierson; a DVD of the events that took place on April 18 as recorded by Officer Sanchez; and defendant's contact card. The audio tape and DVD were published to the jury. Defendant objected to the admission of the audio tape and transcript. Defendant rested without presenting any evidence.

Defense counsel further objected to the transcript of the audio tape going back with the jury during deliberations on the basis that Pierson did not have training in transcribing. It was allowed over defendant's objection with the following instruction: "you have been provided with a transcript prepared by the State. This transcript is the State's representation of what was said in the tape. This transcript is being provided as an aid to assist you in listening to the tape. It is the tape and not the transcript which is the evidence. If your understanding of the tape diverges from the transcripts, then your own interpretation of the tape is controlling." Defendant raised no objection to the photo array exhibit going back with the jury.

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Defendant was subsequently found guilty of delivery of a controlled substance. After the denial of his posttrial motion, defendant was sentenced to a nine-year term of imprisonment.

This appeal followed.

DISCUSSION

Admission of Evidence

Defendant first contends that over the objections of his trial counsel, the trial court allowed the State to introduce a transcript of an audio tape which contained the alleged transaction and revealed extraneous, prejudicial hearsay which was not included in the original recording. Additionally, the State introduced a photo array exhibit which disclosed that defendant had prior arrests. According to defendant, because the contested issue at trial was the identity of the offender recorded on the tape, it was error to allow the jury to consider this evidence as it served to bolster the officer's testimony.

The State responds that defendant has waived review of these issues because he did not object at trial or raise them in his posttrial motion.

When a defendant fails to object to the admission of alleged hearsay during trial proceedings or raise it in a written posttrial motion, he waives it as an issue for purposes of review on appeal. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988); *People v. Palmer*, 188 Ill. App. 3d 414, 422 (1989). Here, while defendant raised an objection at trial to the admissibility of the transcript as well as in his posttrial motion, the objection was based on Officer Pierson's lack of experience as a trained transcriber and that the transcript was prepared for litigation purposes. A defendant's failure to make an argument to the trial court below is waived for purposes of review. *People v. Wilson*, 257 Ill. App. 3d 670, 701 (1993). See also *People v. Steidl*, 142 Ill. 2d

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204, 235 (1991) (issues raised for the first time on appeal are waived). Accordingly, defendant's argument is waived.

Additionally, defendant did not object to the admission of the photo array exhibit nor include it in his motion for new trial, so it is waived. *Enoch*, 122 Ill. 2d at 186. However, defendant urges this court to consider both arguments under plain error.

The plain error doctrine may be applied if the evidence is closely balanced or the error deprived the defendant of a fair and impartial trial. *Palmer*, 188 Ill. App. 3d at 422. "Absent reversible error, however, there can be no plain error." *People v. Williams*, 193 Ill. 2d 306, 349 (2000). Consequently, we shall consider whether the trial court's admission of the transcript of the audio tape and photo array exhibit constituted plain error, *i.e.*, whether it was sufficiently prejudicial to warrant reversal. *People v. Johnson*, 218 Ill. 2d 125, 139 (2005).

Here, a review of the evidence shows that it was not closely balanced. Officer Pierson, who was working undercover, made a controlled drug buy from defendant, who came and sat in his car to complete the transaction. He was sitting next to defendant during the transaction and identified him several times subsequent to the transaction. Additionally, the surveillance officer was able to identify defendant as the individual who was in the car with Pierson. Moreover, when defendant was detained, he was found with some of the pre-recorded funds on his person. The substance Pierson purchased from defendant tested positive for heroin. Contrary to defendant's assertion, the evidence was not closely balanced but overwhelming of his guilt. Thus, defendant's issues are not reviewable under the first prong of plain error.

Next, we examine whether the admission of this evidence deprived defendant of a fair and impartial trial. Defendant's contention is that the trial court erred in admitting the transcript

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of the audio tape because it contained hearsay that was not contained in the original recording. Specifically, he complains of the identification that Officer Pierson ascribed to each alleged speaker on the tape.

Hearsay evidence is evidence presented in court of a statement made out of court, such statement being offered as an assertion to show the truth of the matter asserted therein, and thus resting for its value on the credibility of the out-of-court asserter. *Palmer*, 188 Ill. App. 3d at 422. Out-of-court statements used other than for purposes of establishing the truth of the matter asserted do not rest for their value on the credibility of the out-of-court declarant and are generally admissible. *Palmer*, 188 Ill. App. 3d at 422.

Here, we find that Officer Pierson's identification of the various speakers on the tape in the written transcript are not hearsay. We begin by noting that the audio tape itself was published to the jury, so it had the opportunity to hear each voice on the tape. Additionally, Officer Pierson testified in court as to the events as he recalled them that day, which included an identification of defendant; the making of the tape and the making of the written transcript. Officer Rattler also testified concerning defendant's identity. In *People v. Beals*, 162 Ill. 2d 497, 508 (1994), our supreme court held that evidence of an out-of-court identification by a witness could be used in corroboration of an in-court identification. Further, the transcript was admitted and sent with the jury during their deliberations with a limiting instruction per this court's decision in *People v. Criss*, 307 Ill. App. 3d 888, 899 (1999). Therefore, we find that the transcript of the audio tape with the identification markings was properly admitted where Officer Pierson's testimony was subject to cross-examination and where the trial court admonished the jury as to its limited usage.

Regarding the admission of the photo array exhibit, defendant contends it was improperly

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admitted because it contained additional information that reflected other crimes evidence. As a general rule, evidence of other crimes other than the one for which a defendant is being tried is inadmissible. *People v. Dickerson*, 119 Ill. App. 3d 568, 573 (1983). However, our supreme court has found that the improper introduction of other crimes evidence is harmless error when a defendant is neither prejudiced or denied a fair trial based upon its admission. *People v. Nieves*, 193 Ill. 2d 513, 530 (2000). Here, there was no reference made to defendant's prior arrests during the trial, and we have already concluded that the evidence was not closely balanced. As such, we conclude that this error was harmless and is thus not reviewable under the second prong of plain error. Accordingly, defendant's issues relating to the admission of the transcript of the audio tape and photo array exhibit are forfeited.

Rule 431(b) Admonishments

Defendant next contends that his conviction must be reversed where the trial court failed to ask potential jurors if they understood and accepted all four of the *Zehr* principles in violation of Supreme Court 431(b) (Ill. S. Ct. R. 431(b) (eff. May 1, 2007)).

Our supreme court amended Rule 431(b), which now reads, in pertinent part:

“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

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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." Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

Thus, Rule 431(b), as amended, imposes a *sua sponte* duty on the circuit court to question each potential juror as to whether he or she understands and accepts the *Zehr* principles. Such questioning is no longer dependent upon a request by defense counsel. Where an issue concerns compliance with a supreme court rule, our review is *de novo*. *People v. Williams*, 358 Ill. App. 3d 363, 369 (2005).

We initially note that defendant did not object during *voir dire* or include this issue in his written posttrial motion, thus waiving the issue for review. *People v. Enoch*, 122 Ill. 2d 176, 189 (1988). Defendant acknowledges this, but argues that the forfeiture rule should be relaxed because this error concerns a substantial right and denied him a fair trial. However, our supreme court recently rejected this argument, concluding that under these circumstances, there is no compelling reason to relax the forfeiture rule since a simple objection would have allowed the trial judge to correct the error during *voir dire*. *People v. Thompson*, 238 Ill. 2d 598, 612 (2010).

Accordingly, we conclude that this issue has been forfeited for review. This does not end our inquiry, however, as this court may review an issue that has been waived under the plain-error doctrine. Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999). Under that rule, a procedural default can be examined for plain-error where the evidence is closely balanced or "where the error is of such magnitude that it denied the accused a fair and impartial trial." *People v. Durr*, 215 Ill. 2d 283, 298 (2005); *People v. Parchman*, 302 Ill. App. 3d 627, 633 (1998).

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Under the plain-error analysis, a defendant's conviction and sentence will stand unless the defendant shows that the error was prejudicial. *United States v. Olano*, 507 U.S. 725, 734, 123 L. Ed. 2d 508, 520, 113 S. Ct. 1770, 1778 (1993); *People v. Crespo*, 203 Ill. 2d 335, 347-48 (2001). We must first determine whether any error occurred at all. *Durr*, 215 Ill. 2d at 299.

Here, the trial court asked the potential jurors whether they disagreed with the *Zehr* principles, as opposed to asking whether they understood and accepted them. Because the rule requires questioning on whether the potential jurors both understand and accept each of the enumerated principles, we conclude that the trial court violated Rule 431(b). Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

Defendant argues plain error under the second prong of the rule. He contends that the violation of the rule concerns a substantial right and denied him a fair trial.

Under the second prong of plain error analysis, prejudice is presumed because of the importance of the right involved regardless of the strength of the evidence. *Thompson*, 238 Ill. 2d at 613. In *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009), our supreme court equated the second prong of plain error to structural error which required automatic reversal. In *Thompson*, however, our supreme court rejected the argument advanced by defendant in this appeal, finding that "a violation of Rule 431(b) does not implicate a fundamental right or constitutional protection, but only involves a violation of th[e] court's rules." *Thompson*, 238 Ill. 2d at 614-15. As such, the court concluded that despite its amendment to the rule, it could not conclude that Rule 431(b) questioning was indispensable to the selection of an impartial jury. *Thompson*, 238 Ill. 2d at 615. The supreme court further found that defendant failed to establish that the trial court's violation of Rule 431(b) resulted in a biased jury and that defendant had not met his

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burden of showing that the error affected the fairness of the trial or challenged the integrity of the judicial process, as the prospective jurors received some of the required Rule 431(b) questioning and the venire was admonished and instructed on Rule 431(b) principles. *Thompson*, 238 Ill. 2d at 615. The court then rejected defendant's request for plain error review under the second prong. *Thompson*, 238 Ill. 2d at 615.

The same result is required here. As previously noted, during jury selection, the trial court questioned the potential jurors collectively as to the *Zehr* principles. However, instead of asking whether they understood and accepted them, the trial court asked whether there was anyone that could not follow the presumption that defendant is innocent until proven guilty beyond a reasonable doubt, and asked anyone who could not follow that principle to raise their hand. Then, once the jury was sworn, the trial court stated:

“Again, these are some basic fundamentals or principles of American [jurisprudence]. One of them is the defendant is innocent until proven guilty. I have asked the *voir dire* if anyone could not follow that principle and no one raised their hands. It is absolutely essential as we select this jury that each of you understand and embrace these fundamental principles. That is that all persons charged with a crime are presumed innocent, and that is the burden of the State who has brought the charges to prove the defendant beyond a reasonable doubt. What this means is that the defendant has absolutely no obligation to testify on his own behalf or to call any witnesses in his defense. He may simply sit here and

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rely upon what he and his attorneys perceive to be the inability of the State to present sufficient evidence to meet their burden. The fact that the defendant does not chose [sic.] to testify must not be considered by you in any way in arriving at your verdict. However, should the defendant elect to testify or should his attorneys present evidence on his behalf, you are to consider that evidence in the same manner and by the same standards as the evidence presented by the state's attorney. 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. So I need to know at this point at this time is there any one in this *voir dire* that cannot follow the principle that the defendant does not have to testify? He is under no obligation. Is there anybody that cannot or does not agree with that proposition? If you could please raise your hand. Let the record reflect the *voir dire* that no one has raised their hand."

Accordingly, we conclude here, as our supreme court did in *Thompson*, that defendant failed to meet his burden of showing that the error affected the fairness of the trial or challenged the integrity of the judicial process when the record establishes that the venire was fully admonished under the *Zehr* principles.

Imposition of Fees, Fines and Costs

Finally, defendant contends that the trial court improperly imposed various fees, fines and costs and requests that his court vacate the costs order and remand for amendment. Specifically,

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he argues that the trial court improperly imposed a \$5 court system fee, a \$25 court service fee, failed to apply his presentence custody credit to his fines, and improperly imposed a \$200 DNA analysis fee. The State concedes that the \$5 court system fee should be vacated and that a \$5 per day credit should be imposed, but contends that the \$25 court service fee and the \$200 DNA analysis fee were properly imposed.

Whether fines and fees are properly imposed raises a question of statutory interpretation, subject to *de novo* review. *People v. Marshall*, 402 Ill. App. 3d 1080, 1082 (2010).

Defendant first contends that the trial court erred in assessing the \$25 court services fee because the relevant statute fails to authorize the fee for his offense. Section 5-1103 of the Counties Code expressly provides that the purpose of this fee is to defray “court security expenses incurred by the sheriff in providing court services.” 55 ILCS 5/5-1103 (West 2008). The section provides that in criminal cases, and cases involving ordinance, traffic, and conservation violations, the court services fee will be assessed upon a finding of guilt. 55 ILCS 5/5-1103 (West 2008).

Based on the language of the statute and its clear purpose of defraying court security expenses, we reject defendant’s reading of the statute as it is inconsistent with the legislature’s clear intent, expressed in the plain language of the statute, in enacting such a fee. See *People v. Adair*, ___ Ill. App. 3d ___, ___ (2010), 940 N.E. 2d 292, 302, 346 Ill. Dec. 292, 302 (2010). Accordingly, the court services fee was properly assessed following defendant’s conviction.

Defendant also contends that the trial court erred in assessing the \$200 DNA analysis fee because he has prior felony convictions and previously submitted a DNA sample. Section 5-4-3 of the Unified Code of Corrections provides that a person convicted or found guilty of a felony

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must submit DNA samples to the Department of State Police and pay an analysis fee of \$200.

730 ILCS 5/5-4-3(a), (j) (West 2008). Defendant claims that because he provided DNA samples and was assessed the analysis fee under a prior conviction, he has satisfied the requirements of the statute and another fee would be duplicative. However, the record is void of any evidence showing that defendant previously paid a DNA analysis charge. There is a difference between assessment and actual payment, and it is defendant's burden to supply this court with a sufficiently complete record to support his claim of error. Any doubts arising from the record's incompleteness must be resolved against him. *People v. Hubbard*, 404 Ill. App. 3d 100, 102 (2010). See also *People v. Hunt*, 234 Ill. 2d 49, 58 (2009). However, as defendant's claim is whether the fee may be assessed more than once, we shall consider the merits of his claim. *Hubbard*, 404 Ill. App. 3d at 102.

This court has previously considered and rejected claims substantially identical to defendant's, concluding that the statute does not expressly require a fee for every felony conviction, but also that " 'nothing in the statutory language limits the taking of DNA samples or the assessment of the analysis fee to a single instance.' " *Hubbard*, 404 Ill. App. 3d at 102 quoting *People v. Grayer*, 403 Ill. App. 3d 797, 801 (2010). See also *Marshall*, 402 Ill. App. 3d at 1083. Accordingly, we conclude that the DNA analysis fee may be assessed upon an qualifying conviction or disposition, whether or not it was previously assessed. Accordingly, this fee was properly assessed upon defendant.

We do however, remand for a recalculation of defendant's pre-sentence custody credit to his fines.

CONCLUSION

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For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed in part, vacated in part and remanded.

Affirmed in part; vacated in part; remanded.