

No. 1-09-0598

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FIRST DIVISION
May 31, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 06 CR 13609
)	
DONIAL GARRETT,)	Honorable
)	Mary Margaret Brosnahan,
Defendant-Appellee.)	Judge Presiding.

PRESIDING JUSTICE HALL delivered the judgment of the court.
Justice Hoffman concurred in the judgment.
Justice Lampkin specially concurred in the judgment.

O R D E R

HELD: Noncompliance with Supreme Court Rule 431(b) error was forfeited. Defense counsel was not ineffective for failing to request a limiting instruction. We modify the mittimus to reflect 1012 days of sentencing credit.

A jury found the defendant, Donial Garrett, not guilty of

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attempted first degree murder but guilty of aggravated battery to a child. The defendant was sentenced to a term of 20 years' imprisonment in the Department of Corrections. On appeal, the defendant contends: (1) the trial court failed to comply with Supreme Court Rule 431(b) (eff. May 1, 2007); (2) defense counsel was ineffective; and (3) the mittimus must be corrected to reflect the proper sentencing credit. The State agrees that the mittimus must be corrected to reflect 1012 days of sentencing credit.

The defendant's conviction stemmed from a beating he administered to his 15-month old daughter, Markita. The defendant does not challenge the sufficiency of the evidence. Therefore, a recitation of the facts pertinent to the issues raised on appeal will suffice.

On May 18, 2006, the defendant, Patrice Mitchell and their three children resided in a house owned by the defendant's mother. Around 10 p.m. on that date, Ms. Mitchell returned to the residence and noticed that Markita showed signs of injury. The defendant explained to Ms. Mitchell that he had spanked Markita with his hands while potty-training her. Ms. Mitchell took Markita to Stroger Hospital. The medical evidence revealed that Markita had been beaten and that she had sustained multiple serious and life-threatening injuries. Initially, Ms. Mitchell

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blamed a former boyfriend for the injuries to Markita. Later, admitting she had lied, she told police that the defendant was responsible for Markita's injuries.

The defendant waived his *Miranda* rights and gave a statement to assistant State's Attorney Maryanna Planey (ASA Planey), describing how he beat Markita on May 18, 2006, while potty-training her. He admitted that he had hit Markita on other occasions. For about three weeks prior to May 18, 2006, he struck Markita about 4 times a week on her legs and buttocks. A week prior to May 18, 2006, he had hit Markita 6 times on her buttocks with a belt. He then stopped hitting Markita until May 18, 2006, at which time he hit her harder than ever before. The defendant admitted that "he probably hit her too hard" on that date.

Sheldon Garrett, the defendant's brother, also gave a statement to ASA Planey. According to the statement, a few days prior to May 18, 2006, Mr. Garrett heard a "bumping noise" coming from an upstairs room shared by the defendant, Ms. Mitchell and their children. He listened at the door and heard the defendant yelling and screaming and Markita crying. At trial, Mr. Garrett denied telling ASA Planey about that incident.

At trial, the defendant testified on his own behalf. He denied that he hit Markita on May 18, 2006. The defendant

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maintained that Ms. Mitchell was responsible for the injuries to Markita. According to the defendant, on May 17, 2006, Ms. Mitchell and he were standing by the staircase in the residence when Markita began pulling on Ms. Mitchell's leg. Ms. Mitchell kicked Markita, causing the child to fall down the stairs. Markita was bruised but showed no further signs of injury until the next evening. The defendant maintained that he gave his statement in order to protect Ms. Mitchell and that the admissions in his statement that he hit Markita on other occasions were untrue.

ANALYSIS

I. Compliance With Rule 431(b)

The defendant contends that the trial court failed to comply with Rule 431(b) by failing to ascertain whether the prospective jurors accepted each of the principles set forth in the rule.

A. *Standard of Review*

The issue of whether there has been compliance with a supreme court rule is reviewed *de novo*. *People v. Lloyd*, 338 Ill. App. 3d 379, 384, 788 N.E.2d 1169 (2003).

B. *Discussion*

1. Forfeiture

While acknowledging that this issue was not raised in the trial court, the defendant maintains that the forfeiture rule is

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relaxed when the objection concerns the judge's conduct. The defendant reads the relaxation exception to the forfeiture rule too broadly. Our supreme court has stressed that the forfeiture rule be applied uniformly and that only the most compelling situations require relaxation of the rule. See *People v. McLaurin*, 235 Ill. 2d 478, 488, 922 N.E.2d 344 (2009). In this case, if defense counsel believed that the trial court had not questioned the prospective jurors to determine if they accepted the Rule 431(b) principles, counsel could have raised his concern to the trial judge outside of the presence of the jury. This approach would have eliminated any possible disrespect to the trial judge in the eyes of the prospective jurors. This case presents no compelling reason to relax the forfeiture rule.

Next, the defendant contends that the forfeiture rule is fundamentally inconsistent with the trial court's *sua sponte* duty to comply with the requirements of the rule. However, our supreme court has applied the forfeiture rule to a defendant's failure to preserve a Rule 431(b) noncompliance error. See *People v. Thompson*, 238 Ill. 2d 598, 939 N.E.2d 403 (2010).

2. Plain Error

The defendant argues that the error in this case cannot be considered harmless. A harmless-error review applies where the defendant has preserved an error. *Thompson*, 238 Ill. 2d at 611.

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Where a defendant has forfeited an issue for review, the court conducts a plain-error analysis. *Thompson*, 238 Ill. 2d at 611.

We may consider a forfeited error in either of two situations: (1) where the evidence is close, regardless of the error, and (2) where the error is serious, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 186-87, 830 N.E.2d 467 (2005). The defendant does not argue the closeness of the evidence. He does maintain that the failure to comply with Rule 431(b) is so serious an error that reversal for a new trial is required. The first step in a plain-error analysis is to determine if error occurred. *People v. Hudson*, 228 Ill. 2d 181, 191, 886 N.E.2d 964 (2008).

The State points out that Rule 431(b) does not require that the trial court use any specific language when addressing the principles in the rule. The State maintains that, by asking whether the prospective jurors had any problem following the Rule 431(b) principles or whether they disagreed with the principles, the trial court complied with Rule 431(b). See *People v. Digby*, 405 Ill. App. 3d 544, 939 N.E.2d 581 (2010) (asking prospective jurors whether they had a problem or disagreed with the principles enumerated in Rule 431(b) indicated to the jurors that the court was asking whether they understood and accepted them); see also *People v. Ingram*, No. 1-07-2229 (March 31, 2011); *People*

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v. *White*, No. 1-08-3090 (January 7, 2011).

Despite the decisions in *Digby*, *Ingram*, and *White*, we choose to be guided by the decision in *Thompson*, which we read as discouraging divergence from the actual language used in the rule. See *Ingram*, slip op. at 42 (Garcia, J., specially concurring, joined by Hall, P.J.). Using the language of the rule has the beneficial effect of putting an end to arguments on whether the particular words chosen by a trial judge comply with Rule 341(b). Nonetheless, our strict construction of Rule 431(b) does not aid the defendant.

The defendant does not argue that the evidence was close, and he cannot prevail on the serious-error prong of the plain-error analysis. The failure to comply with Rule 431(b) is not a structural error requiring automatic reversal. *Thompson*, 238 Ill. 2d at 611. Reversal is only required if the defendant established that the error resulted in a biased jury. *Thompson*, 238 Ill. 2d at 614-15. We may not presume that the error resulted in a biased jury. *Thompson*, 238 Ill. 2d at 614. The defendant has presented no evidence of bias on the part of the jury in this case. Therefore, he cannot satisfy the serious-error prong of the plain-error analysis.

As the defendant has failed to satisfy either prong of the plain-error analysis, there is no basis for excusing the

defendant's procedural default. The claim of error is forfeited.

II. Ineffective Assistance of Counsel

The defendant contends that defense counsel was ineffective for failing to seek a limiting instruction regarding the other crimes/bad conduct evidence. Ms. Mitchell testified that, prior to May 18, 2006, she witnessed the defendant strike Markita several times while he was attempting to potty-train her. The jury also heard Sheldon Garrett's statement, recounting his overhearing the defendant yelling and Markita crying, a few days prior to May 18, 2006.

A. *Standard of Review*

Where the facts relevant to an ineffective assistance of counsel claim are undisputed, our review is *de novo*. *People v. Bew*, 228 Ill. 2d 122, 127, 886 N.E.2d 1002 (2008).

B. *Discussion*

"To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's representation was deficient and that the asserted deficiency in counsel's performance prejudiced the defendant." *People v. Wilbert Jackson*, 357 Ill. App. 3d 313, 322-23, 828 N.E.2d 1222 (2005) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). We first address whether the failure to request a limiting instruction constituted a deficiency in defense counsel's

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performance.

While evidence of other crimes or bad conduct may be relevant for some purpose, the risk of prejudice to the defendant is that the jury may use the evidence to conclude that the defendant has a propensity to commit crime. *Wilbert Jackson*, 357 Ill. App. 3d at 321. This court has held that the best way to address this problem is to use the limiting instruction contained in Illinois Pattern Jury Instructions, Criminal No. 3.14 (4th ed. 2000), and to specify in the instruction the proper purpose for which the evidence may be considered. *Wilbert Jackson*, 357 Ill. App. 3d at 321.

The State contends that defense counsel's decision not to request the limiting instruction was made to avoid drawing the jury's attention to the evidence of the defendant's prior bad conduct. Therefore, the decision was a matter of trial strategy. As a general rule, a decision that involves a matter of trial strategy will not support a claim of ineffective representation. *People v. Simmons*, 342 Ill. App. 3d 185, 191, 794 N.E.2d 995 (2003). In *People v. Walter Jackson*, 391 Ill. App. 3d 11, 908 N.E.2d 72 (2009), this court held that counsel's choice not to seek a limiting instruction was purely a strategic decision not to emphasize to the jury evidence which, though proper, portrayed the defendant in a negative light. *Walter Jackson*, 391 Ill. App.

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3d at 34; but see *Wilbert Jackson*, 357 Ill. App. 3d at 323 (an attorney's failure to request a limiting instruction when he is entitled to one is not a matter of trial strategy).

The defendant responds that defense counsel's failure to request the limiting instruction was not part of counsel's trial strategy. The defendant points out that in closing argument defense counsel drew the jury's attention to the defendant's prior bad conduct by referencing the evidence from Ms. Mitchell and Sheldon Garrett of the defendant's prior abuse of Markita.

Even if defense counsel's failure to request a limiting instruction constituted a deficient performance, the defendant suffered no prejudice. In order to prove the prejudice-prong of the *Strickland* test, the defendant must establish that there was a reasonable probability that the outcome of the trial would have been different, or the result of the proceeding was unreliable or fundamentally unfair. *People v. Bailey*, 374 Ill. App. 3d 608, 614, 872 N.E.2d 420 (2007).

The defendant does not argue that the complained-of evidence was improperly admitted. Such evidence would not have led the jury to conclude that the defendant had a propensity to commit crime. Instead, the complained-of evidence provided relevant background to the events of May 18, 2004, and confirmed the defendant's admission that he had beaten Markita in the weeks

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leading up to the May 18, 2006, incident.

In light of the evidence in this case, there was no reasonable probability that, had the jury been given the limiting instruction, the outcome would have been different. In the absence of prejudice, the defendant failed to establish that defense counsel was ineffective.

CONCLUSION

The defendant's conviction and sentence are affirmed. We order the mittimus corrected to reflect a credit of 1012 days.

Affirmed; mittimus modified.

JUSTICE LAMPKIN, specially concurring:

I disagree with the majority's restrictive finding that the trial judge committed error by failing to expressly ask the potential jurors whether they understood and accepted the *Zehr* principles codified in Rule 431(b). Although, in *Thompson*, the supreme court held "the trial court must ask each potential juror whether he or she understands and accepts each of the principles in the rule" (*Thompson*, 238 Ill. 2d at 607), neither the rule itself nor the holding in *Thompson* restrict compliance to the rule's express language. Rule 431(b) instructs that a trial court's "method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." Ill. S. Ct. R. 431(b), eff.

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May 1, 2007. The rule *does not* prescribe precisely what form that method of inquiry must take.

While I encourage trial judges to use the words provided in Rule 431(b), I would have found the trial judge here did not commit error when he asked whether the potential jurors had any problem with or disagreed with the Rule 431(b) principles.

I, therefore, concur in the majority's judgment only.