

No. 1-08-1152

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. 05 CR 20840
)	
RAYSHAWN SAFFOLD,)	Honorable
)	Lawrence P. Fox,
Defendant-Appellant.)	Judge Presiding.

Justice Pucinski delivered the judgment of the court.*
Justices Salone and Sterba concurred in the judgment.**

*Following Justice Frossard's retirement, Justice Pucinski delivered the judgment of the court. Justice Pucinski has reviewed all relevant materials, including the court's original order filed on September 30, 2010, and the supervisory order issued by our supreme court on March 7, 2011.

**Pursuant to Justice O'Brien's retirement, Justice Salone has participated in the

ORDER

HELD: Defendant's conviction for first-degree murder upheld and his conviction for armed robbery reversed where: the evidence was sufficient to support his conviction; the trial court did not err in dismissing defendant's jury while his co-defendant cross-examined witnesses in their simultaneous jury trials; the trial court's error in administering Rule 431(b) admonishments did not prejudice defendant; and the trial court's refusal to tender special verdict forms prejudiced defendant.

¶ 1 Following a simultaneous double jury trial, the defendant Rayshawn Saffold was convicted of first degree murder and armed robbery of James Taylor. The jury also found the defendant personally discharged a firearm that proximately caused death to another person during the commission of the murder. Defendant was sentenced to consecutive terms of 50 years for first degree murder and 15 years for armed robbery. On appeal, defendant argues: (1) the evidence was insufficient to prove beyond a reasonable doubt that defendant committed any crime or that he personally discharged the firearm proximately causing the death of James Taylor; (2) the trial court committed reversible error by refusing to dismiss defendant's jury while his co-defendant, Shawnette Green cross-examined the common witnesses; (3) the trial court committed reversible error during jury selection by failing to comply with Supreme Court Rule 431(b); and (4) the trial court erred by failing to provide separate instructions and separate verdict forms for felony murder which resulted in defendant being improperly sentenced

reconsideration of this case. Pursuant to Justice Gallagher's retirement, Justice Sterba has participated in the reconsideration of this case. Justice Salone and Justice Sterba have both reviewed all relevant materials, including the original order filed on September 30, 2010, and the supervisory order issued by our supreme court on March 7, 2011.

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consecutively on the predicate felony.

¶ 2 In an order filed on September 30, 2010, this court reversed defendant's conviction, finding that the trial court's failure to properly admonish the jury in accordance with Rule 431(b) deprived defendant of his constitutional right to a fair and impartial jury trial. *People v. Saffold*, No. 1-08-1152 (September 30, 2010) (unpublished order pursuant to Supreme Court Rule 23). Thereafter, on March 7, 2011, the Illinois Supreme Court issued a supervisory order directing this court to vacate its prior judgment and reconsider its prior ruling in light of *People v. Thompson*, 238 Ill. 2d 598 (2010). On reconsideration, we affirm defendant's conviction for first degree murder and vacate his conviction for armed robbery.

¶ 3 BACKGROUND

¶ 4 Before trial, the court granted defendant's motion to sever his trial from his co-defendant, Shawnette Green. Both were tried by separate juries during a simultaneous trial.

¶ 5 During the trial, Jermaine Bates and Jessie Ellis who were friends of the victim, James Taylor testified for the prosecution. They both testified that they were in Taylor's apartment at 8122 S. Muskegon in Chicago on June 21, 2005, when James Taylor was shot. Ellis testified that while watching the NBA Finals on television there was a knock at Taylor's door. Taylor answered it and returned to the room with the defendant holding a gun to the back of Taylor's head. Ellis had seen the defendant at the apartment the night before asking to buy marijuana from Taylor who supported himself by selling marijuana from his home. Moments later, Ellis saw co-defendant Shawnette Green walk into the room. She was also holding a gun and ordered Ellis and Bates to the floor.

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¶ 6 The defendant was asking Taylor, “[w]here the shit at?” Taylor responded he did not have anything because he just bought a car. Bates testified the defendant insisted, “I ain’t playing. I’ll kill you.” While being held at gunpoint on the floor by Green, Ellis and Bates testified that they heard several gunshots. Neither Ellis nor Bates actually observed Taylor get shot. Green walked into Taylor’s bedroom where defendant asked her whether she “ha[d] everything.” Bates heard footsteps running out of the apartment, and Ellis observed defendant and Green leave Taylor’s apartment together.

¶ 7 Ellis testified he saw that Taylor was bloody, but left the apartment to avoid police because of his own outstanding warrant. Bates waited on the porch for police and informed them that only he and Taylor had been present when defendant and Green arrived in order to protect Ellis. Ellis subsequently spoke to police at the hospital, initially giving them a fake name. Bates identified Green from a photo array. On June 28, 2005 Ellis and Bates identified defendant from a photo array. They later identified Green and defendant in separate lineups.

¶ 8 At trial both Bates and Ellis were impeached with their felony convictions. Bates was also further impeached. At trial he testified he was not sure whether Green fired her gun because he was face down on the ground. However, before trial on July 1, 2005, in the grand jury proceeding Bates had testified that Green had shot at Taylor. Bates also admitted that he initially lied to the police as to who was present in the apartment in order to protect Ellis from his warrant.

¶ 9 Ellis admitted he testified before the grand jury on July 5, 2005, and that his warrant was executed on July 9, 2005. He was in custody when he identified defendant from the lineup. Ellis

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further indicated that the investigating detective said he would help him with his case, however Ellis did not think the detective in fact helped him.

¶ 10 Miles Sisnette, a longtime friend of the defendant testified for the prosecution. On June 21, 2005, he was at Green's house when defendant discussed buying some marijuana. Sisnette agreed and dropped defendant and Green at Taylor's home. He drove to a gas station to purchase "blunts" to use with the marijuana. Sisnette then returned to Taylor's neighborhood and picked up the defendant and Green, as they were walking along a street. Sisnette said he never saw defendant or Green with a gun and indicated that they seemed calm when he picked them up. After he testified, Sisnette was given a recognizance bond and his contempt case was continued to the following Monday. He had been in custody for contempt of court because he refused to return to court after being admonished to return by the trial court in this case.

¶ 11 The State also presented the testimony of Erick Tabb. He testified that in June 2005 he worked with defendant at Wabash Construction, located in Chicago at 75th Street and Yates Avenue. He also knew co-defendant Green. Tabb testified that in "late June 2005" in the "early evening hours" he was sitting in the front of the Wabash Construction shop with defendant, co-defendant Green, and other workers. Defendant had a conversation with Tabb about a "lick," which Tabb said was a "[r]obbery or something." Defendant said that the "lick" was intended to obtain "weed and money." Defendant related that on this occasion they "went somewhere" and co-defendant Green rang the doorbell. Defendant told everyone inside to "lay down." Everyone complied except one person who "got to going crazy" so defendant repeatedly shot him. Defendant told Tabb that they took 10 to 15 bags of marijuana and \$400 to \$500.

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¶ 12 Tabb admitted that he had previously been convicted of the felony of aggravated driving under the influence and was on parole for that offense at the time of his testimony. He was initially considered a suspect in the murder of the victim and the police questioned him about a gun they found in his car. He also said that the police threatened to charge him in connection with the gun and this influenced him to tell the police what he had heard defendant Saffold say. He was never charged in connection with that gun. Tabb worked at Wabash Construction with defendant in June of 2005 and also knew Green. Tabb was on parole at the time of the trial for felony aggravated driving under the influence of alcohol. Tabb testified about a conversation that occurred in late June 2005 with defendant, Green and some other co-workers. Tabb recalled defendant described a “lick” that went bad. Tabb explained a “lick” was a word used to describe a robbery. Defendant told Tabb that he and Green went somewhere to buy “weed” or something.

¶ 13 According to Tabb, defendant explained that after entering the apartment, defendant and Green “told, everybody to get down.” One person did not comply and defendant “shot him in the leg or something like that.” When the man kept yelling, defendant “shot him again, and he shot him again.” Tabb testified that defendant told him they got 10 to 15 bags of marijuana and \$400 - \$500.

¶ 14 On August 23, 2005, the defendant was arrested for the murder of Taylor. The prosecution and defense stipulated to Taylor’s autopsy report. The autopsy revealed three gunshot wounds and the medical examiner recovered two bullets from the body. Cause of death was determined to be homicide caused by multiple gunshot wounds. All of the cartridge cases and bullets recovered were fired from the same gun.

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¶ 15 The defendant chose not to testify or call any witnesses. During defendant's case, there was a stipulation to the impeachment of Jermaine Bates with his grand jury transcript. Defendant rested his case.

¶ 16 After closing arguments the jury returned guilty verdicts for first degree murder and armed robbery. The jury also found that during the commission of the offense of first degree murder the defendant "personally discharged a firearm that proximately caused death to another person." The jury found defendant not guilty of home invasion. At the sentencing hearing, after considering arguments in aggravation and mitigation, the trial court sentenced defendant to 50 years for first degree murder consecutive to 15 years for armed robbery. This appeal followed.

¶ 17 I. SUFFICIENCY OF EVIDENCE

¶ 18 Defendant first argues he was not proved guilty beyond a reasonable doubt of first degree murder and armed robbery. In support of these arguments defendant contends the State's witnesses were not credible "because the witnesses were proven liars with incentives to testify against Saffold." Alternatively, defendant seeks a reduction in sentence because the evidence was insufficient to prove beyond a reasonable doubt that he personally discharged the firearm that killed Taylor.

¶ 19 "A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *People v. Collins*, 106 Ill. 2d 237, 261 (1985). When presented with a challenge to the sufficiency of the evidence "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond

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a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 573, 99 S. Ct. 2781, 2789 (1979).

¶ 20 Defendant argues he was not proved guilty beyond a reasonable doubt of first degree murder and armed robbery. In support of these arguments defendant contends the State’s witnesses were not credible “because the witnesses were proven liars with incentives to testify against Saffold.” Alternatively, defendant seeks a reduction in sentence because the evidence was insufficient to prove beyond a reasonable doubt that he personally discharged the firearm that killed Taylor.

¶ 21 On June 21, 2005, defendant and Green went to Taylor’s apartment to buy marijuana. Jermaine Bates and Jessie Ellis testified for the prosecution. Ellis and Bates observed defendant hold a gun to Taylor’s head and heard defendant demand marijuana. Green held them at gunpoint. Ellis and Bates heard defendant say, “I ain’t playing. I’ll kill you;” and “[w]here the shit at?” While being held at gunpoint on the floor by Green, Ellis and Bates testified that they heard several gunshots. Green went to Taylor’s bedroom and defendant asked her “if she had everything.” Defendant and Green left the apartment. Ellis and Bates later identified defendant from a photo array and a lineup.

¶ 22 Miles Sisnette also testified for the prosecution. He drove Green and defendant to Taylor’s apartment and picked them up a short time later. Erick Tabb testified that defendant described a robbery that went bad. Defendant told Tabb that once they were inside Taylor’s apartment, defendant told everyone to get down. One person did not comply. Defendant said he shot the one who refused to get down and they got 10 to 15 bags of marijuana and \$400-\$500.

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¶ 23 Defendant contends all the witnesses except Sisnette, were convicted felons who had incentives to testify against him. Ellis had warrants for two drug cases and was not arrested while he cooperated with the police. After being arrested, Ellis pled guilty to a reduced charge with a reduced sentence. Defendant argues that Ellis and Bates were “proven liars” and Bates was impeached with his grand jury transcript. According to defendant, Tabb only testified because the police threatened to charge him with a gun found in his car.

¶ 24 Defendant argues the testimony of Jessie Ellis should also be rejected as inherently unreliable. Defendant relies on the fact that Ellis was a convicted felon, had outstanding warrants and left the scene of the shooting, rather than cooperate with the police. Defendant notes that Ellis gave an alias when first questioned by the police. Defendant contends that Ellis testified before the grand jury in the instant case under an expectation of leniency for his own pending criminal cases. However, each of the issues regarding the credibility of Ellis was presented to the jury. Ellis was impeached and acknowledged he was on parole for two felony convictions. He also admitted that his own criminal warrant was executed days after his appearance and testimony before the grand jury in the instant case. Accordingly, the jury had sufficient facts upon which to evaluate the credibility of Jessie Ellis.

¶ 25 Defendant further contends the testimony of Jermaine Bates and Erick Tabb was not credible. Bates lied to the police by telling them that only he and Taylor were at the apartment before Green arrived. However, at trial, Bates admitted he lied to the police to protect Ellis because Ellis had outstanding warrants. In support of the argument that Bates was not credible, defendant relies on inconsistencies in the testimony of Bates at trial. The testimony of Bates

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identifying defendant as the shooter was inconsistent with his previous grand jury testimony identifying Green as the shooter. As to credibility, defendant also points to the initial denial by Bates, but subsequent admission by Bates of using drugs on June 21, 2005.

¶ 26 As to Tabb, defendant argues his testimony is unreliable because Tabb “had incentive to testify against the defendant.” Defendant notes that Tabb admitted the police threatened to charge him with a weapons violation and argues that this threat motivated Tabb to testify against defendant. Defendant also argues that Tabb is not reliable because the detectives told him some of the facts of the case before interviewing him.

¶ 27 We note that these challenges to the credibility of each witness were previously presented to the jury. The record reflects that the jury heard cross-examinations regarding the credibility of the witnesses and the motivations they had to testify falsely. The jury was made aware of various forms of impeachment, including prior criminal records, inconsistent statements and motivations to lie. We note that the testimony of a convicted felon is not automatically to be considered as lacking credibility, rather that is a matter for the trier of fact to decide. *People v. Howard*, 376 Ill. App. 3d 322, 329 (2007). Moreover, resolution of conflicts or inconsistencies in testimony is wholly within the province of the jury, as are determinations of witness credibility. *People v. Phillips*, 127 Ill. 2d at 514 (1989).

¶ 28 In the instant case, the jury evaluated the witnesses, considered their credibility and resolved the conflicts or inconsistencies in the testimony. See *People v. Sullivan*, 366 Ill. App. 3d 770, 783 (2006); *People v. Frieberg*, 147 Ill. 2d 326, 360 (1992). After viewing the evidence in the light most favorable to the prosecution, we conclude based on the record, the evidence was

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sufficient to establish defendant's guilt beyond a reasonable doubt.

¶ 29 In the alternative, the defendant seeks a sentence reduction because the evidence was insufficient for the jury to find that he personally discharged a firearm that killed Taylor. In support of that argument defendant notes that a theory of accountability cannot be used by the prosecution to prove defendant personally discharged the firearm that killed Taylor. The State responds that the evidence demonstrated defendant was the only shooter of Taylor.

¶ 30 In support of his argument defendant relies on *People v. Lopez*, 72 Ill. App. 3d 713 (1979). In *Lopez*, identical twin brothers were convicted of attempt murder and aggravated battery with a firearm. One of the twin brothers shot at two victims, while the other brother remained by a car. In reversing the judgments against the twin brothers, the court in *Lopez* reasoned that although there was evidence proving that the man who fired the gun was one of the Lopez twins, no witness could identify which twin actually fired the gun. *People v. Lopez*, 72 Ill. App. 3d at 717. In the instant case, the defendant argues that similar to *Lopez*, the prosecution could not rely on a theory of accountability to prove defendant fired a gun, and the evidence failed to sufficiently identify defendant as the shooter.

¶ 31 We do not find *Lopez* persuasive. In the instant case, the State's main theory was not that defendant was accountable for the murder; rather, the State's theory was that defendant was in fact the only shooter. The record reflects sufficient evidence to support that theory. Unlike *Lopez*, the State was not confronted with the unusual factual context presented by the involvement of identical twins in the criminal conduct at issue here. Instead at trial, witness testimony indicated that defendant entered Taylor's apartment with gun drawn, confronted Taylor

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and stated, “I ain’t playing. I’ll kill you.” Shots rang out. Defendant and Green fled and Taylor died from multiple gunshot wounds.

¶ 32 We are mindful that Green was also armed with a gun, however forensic testing confirmed the firearms evidence related to the victim’s homicide all came from a single weapon. Moreover, Erick Tabb testified that the defendant admitted entering an apartment, ordering everyone down on the floor and admitted shooting the individual who would not get down on the floor. The record reflects that the defendant and Green worked together. When Taylor was not immediately cooperative, defendant shot him several times. While defendant is accountable for the conduct of Green, there is sufficient evidence to prove beyond a reasonable doubt that defendant was the sole shooter of Taylor.

¶ 33 The credibility of the witnesses, the weight to be given their testimony and the resolution of any conflicts in the evidence are within the province of the trier of fact and a reviewing court will not substitute its judgment for that of the trier of fact on these matters. *People v. Brooks*, 187 Ill. 2d 91, 131 (1999). In the instant case, the jury was instructed that the State must prove that during the commission of the murder, defendant personally discharged a firearm that proximately caused Taylor’s death. The jury found that during the commission of the offense of first degree murder, defendant personally discharged the firearm that proximately caused Taylor’s death. Reversal is appropriate only where the evidence is “so unsatisfactory, improbable or implausible” that it raises a reasonable doubt as to the defendant’s guilt. *People v. Slim*, 127 Ill. 2d 302, 307 (1989).

¶ 34 Given these principles and based on our review of the record, we find the evidence was

sufficient to support the verdict of the jury. Viewing the evidence in the light most favorable to the prosecution, we cannot say that the verdict of the jury was unreasonable or that the evidence was unsatisfactory, improbable or implausible. For the reasons previously discussed, we reject defendant's argument that the evidence was insufficient to prove beyond a reasonable doubt that defendant committed first degree murder and armed robbery or that the evidence was insufficient to prove defendant personally discharged the weapon that caused Taylor's death.

¶ 35

II. DOUBLE JURY PROCEDURE

¶ 36 Defendant next contends the trial court committed reversible error where, after granting a motion to sever, it refused to dismiss defendant's jury while his co-defendant cross-examined common witnesses. Defendant argues he suffered prejudice because his co-defendant's theory of the case was antagonistic to his own.

¶ 37 We note that in order "[t]o be considered antagonistic defenses, there must be a true conflict such that each defendant condemns the other but professes his own innocence. Actual hostility is required." *People v. Adams*, 176 Ill. App. 3d 197, 200 (1988). The two-jury procedure is acceptable in Illinois "where a defendant is given every opportunity to present a complete defense before one jury, cannot point to an event which confused the jury or affected its ability to render a decision fairly, and the record shows that the trial judge adequately prepared the jurors for the procedure." *People v. Gholston*, 124 Ill. App. 3d 873, 888 (1984). The reviewing court will not speculate as to the impropriety of the procedure, but rather, must be shown the prejudice that resulted from the double jury. *Gholston*, 124 Ill. App. 3d at 888.

¶ 38 Defendant recognizes that the trial court's decision regarding whether or not to grant a

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severance is reviewed for an abuse of discretion. *People v. Lekas*, 155 Ill. App. 3d 391, 401 (1987). However, defendant contends that the question as to whether the double jury procedure violated defendant's due process and fair trial rights is purely a legal question, and accordingly, we should employ a *de novo* standard of review. *People v. Burns*, 209 Ill. 2d 551, 560 (2004) ("The standard for determining whether a defendant's constitutional rights have been violated is *de novo*.") The State responds that we should use an abuse of discretion standard of review. We need not resolve this issue, because regardless of the standard used, we find no prejudice to defendant as the result of the double jury procedure in the instant case.

¶ 39 Defendant argues that prejudice occurred as the result of the cross-examinations of common witnesses performed by co-defendant's attorney. In support of that argument, defendant contends that Green's defense was to place blame upon defendant. We note that defendant's theory of defense was that he went to the apartment with Green to purchase marijuana and did not murder or rob anyone. Green's theory of defense was that she was an innocent bystander when defendant arrived and committed the crime.

¶ 40 In support of defendant's argument that Green's counsel's cross-examinations of common witnesses violated his due process rights and deprived him of a fair trial, defendant relies on the testimony of Bates and Ellis. Bates admitted that he initially lied to police about who was in Taylor's apartment. Defendant mistakenly reasons this admission implies that Bates was also lying at trial when he testified that Green arrived with defendant. Defendant also relies on testimony elicited from Ellis that Green occasionally spent the night at Taylor's to suggest that such testimony supports the implication that Green was merely an innocent

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bystander. Our review of the record does not support the conclusion that the cross-examination of the common witnesses by Green's counsel violated defendant's due process rights and deprived defendant of a fair trial. Upon review of relevant witness testimony, including direct and cross-examinations, we do not find that prejudice resulted from the double jury trial procedure used in the instant case.

¶ 41 The jurors in the instant case were not exposed to a “spectacle where the People frequently stood by and witnessed a combat in which the defendants tried to destroy each other.” *People v. Daugherty*, 102 Ill. 2d 533, 547 (1984). The jurors were not confronted with a contest in which each defendant attempted to discredit the witnesses of his co-defendant. *People v. Johnson*, 150 Ill. App. 3d 1075, 1090 (1986). Rather, than “pinning blame” on defendant, cross-examination by Green's counsel attacked the credibility of prosecution witnesses by questioning their ability to recall the event and impeaching their testimony. Cross-examination of the prosecution's witnesses by both defendants was conducted to impeach and discredit witnesses for the prosecution, not to discredit defense witnesses. As noted, the defendant in the instant case did not testify and did not call any witnesses. For the reasons previously discussed, we conclude that defendant was not prejudiced by the cross-examination of common witnesses before the combined juries by co-defendant's counsel. We also note that because we are affirming co-defendant Green's convictions in a separate order (*People v. Green*, No. 1-08-1167 (2010) (unpublished order under Supreme Court Rule 23)), this issue will not arise at defendant's retrial.

¶ 42 III. COMPLIANCE WITH SUPREME COURT RULE 431(b)

¶ 43 Defendant next argues that his convictions must be reversed and the cause remanded for a

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new trial because the trial court failed to fully comply with Ill. S. Ct. R. 431(b) (eff. May 1, 2007) because it failed to question the prospective jurors about their acceptance and understanding of each of the four principles contained therein.¹ Specifically, the trial court failed to inquire about the venire's understanding and acceptance of the principle that a defendant is not required to present evidence on his behalf. Although defendant acknowledges that he failed to properly preserve this issue for review, he urges this court to review his claim for plain error. He contends that the court's error necessarily deprived him of his right to a fair and impartial jury and constituted *per se* plain error under the second-prong of plain error review. Citing this court's prior opinions in *People v. Anderson*, 389 Ill. App. 3d 1 (2009), and *People v. Graham*, 393 Ill. App. 3d 268 (2009), defendant argues that a trial court's Rule 431(b) violation requires automatic reversal of a defendant's conviction without inquiry into the harmfulness of the error or the prejudice suffered by the defendant.

¶ 44 To properly preserve an issue for appeal, a defendant must object to the purported error at trial and specify the error in a posttrial motion. *Enoch*, 122 Ill. 2d at 186; *People v. Bannister*, 232 Ill. 2d 52, 65 (2008). A defendant's failure to abide by both requirements results in forfeiture of appellate review of his claim. *Enoch*, 122 Ill. 2d at 186; *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007). Here, it is undisputed that defendant failed to object to the trial court's

¹Rule 431(b) codifies our supreme court's holding in *People v. Zehr*, 103 Ill. 2d 472, 477 (1984), requiring that four inquiries 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.

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purported Rule 431(b) violations at trial or in a posttrial motion, and accordingly, we find that forfeiture applies.

¶ 45 The plain error doctrine, however, provides a limited exception to the forfeiture rule. Ill. S. Ct. R. 615(a); *Bannister*, 232 Ill. 2d at 65. It permits review of otherwise improperly preserved issues on appeal if the evidence is closely balanced or the error is of such a serious magnitude that it affected the integrity of the judicial process and deprived the defendant of his right to a fair trial. Ill. S. Ct. R. 615(a); *Bannister*, 232 Ill. 2d at 65. The first step in any such analysis is to determine whether any error actually occurred. *People v. Walker*, 232 Ill. 2d 113, 24-25 (2009). If an error is discovered, the defendant then bears the burden of persuasion to show that the error prejudiced him under either prong. *People v. McLaurin*, 235 Ill. 2d 478, 495 (2009).

¶ 46 Defendant's claim of error concerns the trial court's compliance with a supreme court rule, which is subject to *de novo* review. *People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007); *People v. Haynes*, 399 Ill. App. 3d 903 (2010). To determine whether an error occurred in this case, we examine amended Rule 431(b) as well as our supreme court's recent opinion interpreting the rule (*People v. Thompson*, 238 Ill. 2d 598 (2010)). Rule 431(b) provides:

“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 the specific questions concerning the principles set out in this section." (Emphasis added.) Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

¶ 47 In *Thompson*, our supreme court observed the amended rule's use of the term "shall" created a mandatory question and response process to address a jury's acceptance of each of the four enumerated principles. *Thompson*, 238 Ill. 2d at 607; see also *Haynes*, 399 Ill. App. 3d at 912 (explaining that "[i]n enacting the amended version of Rule 431(b), our supreme court imposed a *sua sponte* duty on courts to ask potential jurors individually or in a group whether they accept the [four *Zehr*] principles").² A trial court's failure to inquire as to a potential juror's acceptance and understanding of all four principles constitutes error. See *Thompson*, 238 Ill. 2d at 607; *Haynes*, 399 Ill. App. 3d at 912; *People v. Magallanes*, 397 Ill. App. 3d 83, 72 (2009).

¶ 48 Here, the trial court commenced the *voir dire* process by making prefatory comments to the entire venire, informing them of the relevant legal principles that governed defendant's trial, including the four *Zehr* principles contained in Rule 431(b). Specifically, the court stated:

"The defendant in this case and in all criminal cases is presumed

²Prior to the amendment, Rule 431(b) required questioning only "[i]f requested by defendant." See *Thompson*, 238 Ill. 2d at 608.

to be innocent of the charges against him, and that presumption remains with him throughout every stage of the trial and during your deliberation, the presumption is only overcome if from all the evidence you hear, you're convinced beyond a reasonable doubt that he is guilty. And you must keep the presumption of innocence in mind at all times during the presentation of evidence and your deliberation on your verdicts.

The State has the burden of proving the defendant's guilt in this case, and that burden is [sic] proof beyond a reasonable doubt. And that burden remains on the State throughout all stages of the trial and during the jury's deliberation, and should be kept in mind at all times during the presentation of evidence and your deliberations.

The defendant is not required to prove his innocence nor is he required to testify or present any evidence on his behalf; and if the defendant chooses not to testify or present evidence, you must not consider that against him."

¶ 49 After addressing the entire venire, the trial court then made inquiries to the first panel of potential jurors who were called upon to ascend to the jury box. Specifically, the trial court inquired as follows:

"Now I'm going to direct a series of group questions just to you 14 who are seated in the jury box. And again, I would ask if anybody would respond affirmatively or yes to any of these

questions, raise your hand so we can ask follow-up questions; otherwise, Ms. Court reporter, the record should indicate that nobody has raised his or her hand in response to any of these questions.

As I previously stated, the defendant is presumed innocent of the charges throughout every stage of the trial. Does anyone have any problem with that concept?

(NO RESPONSE)

As I also previously stated, the State has the burden of proving the defendant guilty in this case beyond a reasonable doubt. Does anyone have any problem with that concept?

(NO RESPONSE)

The defendant does not have to testify, and if he decides not to testify, you must not hold that against him. Is there anyone who would hold the decision not to testify against the defendant regardless of what I've just said to you?

(NO RESPONSE).”

¶ 50 The trial court repeated the same inquiry with the second panel of prospective jurors. Accordingly, the record reveals that the trial court admonished the venire about the four *Zehr* principles, but only made inquiries about three of those principles. Although the court's phraseology did not track the precise language in the rule, reviewing courts have observed that

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Rule 431(b) “does not dictate a particular methodology for establishing the venire’s understanding or acceptance of those principles” and have found that trial courts have met the requirements of the rule when they have utilized terminology that deviated slightly from the precise language contained in the rule. See, e.g., *People v. Digby*, 405 Ill. App. 3d 544, 548 (2010) (trial court’s questioning complied with Rule 431(b) when it inquired whether jurors “had a problem” or “disagreed” with the principles); *People v. Ingram*, 401 Ill. App. 3d 382, 393 (2010) (trial court complied with Rule 431(b) when it admonished the potential jurors of the four *Zehr* principles and inquired whether they had any “difficulty or quarrel” with the principles). Here, we find that court’s methodology sufficiently ascertained the venire’s understanding and acceptance of the defendant’s presumption of innocence, the prosecution’s burden of persuasion, and the defendant’s right not to testify. More problematic, however, is that the trial court failed to make any inquiry to ensure that all of the venire members understood and accepted the fundamental principle that a defendant is not required to present evidence.

¶ 51 In our original disposition, we held that the trial court’s failure to make this inquiry constituted error. We further found that the court’s error in failing to fully comply with Rule 431(b) deprived defendant of his right to a fair trial and constituted plain error under the second-prong of plain error review. In so holding, we relied heavily on our prior opinion in *People v. Wilmington*, 394 Ill. App. 3d 567 (2009), where we reversed the defendant’s conviction when the trial court failed to ascertain whether the jurors understood and accepted the principle protecting a defendant’s right to testify, reasoning that the error necessarily denied defendant the right to a fair and impartial trial and constituted plain error. On reconsideration, we find that the

Thompson decision compels a different result.³

¶ 52 In *Thompson*, our supreme court expressly rejected the argument that a trial court’s failure to strictly comply with amended Rule 431(b) necessarily infringes upon a defendant’s right to a fair and impartial jury and constitutes plain error under the second prong of plain-error review. *Thompson*, 238 Ill. 2d at 614. The court acknowledged that “[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,” but explained that a reviewing court “cannot presume the jury was biased simply because the trial court erred in conducting Rule 431(b) questioning.” *Id.* Although the 2007 amendment to the rule made it mandatory for trial courts to assess every potential juror’s acceptance of the four Rule 431(b) principles, the court reasoned that:

“[T]he failure to conduct Rule 431(b) questioning does not necessarily result in a biased jury, regardless of whether that questioning is mandatory or permissive under our rule. Although the amendment to the rule serves to promote the selection of an impartial jury by making questioning mandatory, Rule 431(b) questioning is only one method of helping to ensure the selection of an impartial jury. [Citation.] It is not the only means of achieving that objective. A violation of Rule 431(b) does not implicate a fundamental right or constitutional

³We note that we also reversed our decision in *Wilmington*, finding that a different result was warranted under *Thompson*. See *People v. Wilmington*, No. 1-07-2518 (June 16, 2011).

protection, but only involves a violation of this court's rules." *Id.* at 614-15.

¶ 53 Accordingly, because a trial court's Rule 431(b) violation does not necessarily result in a biased jury and constitute plain error, the court concluded that it was the defendant's burden of persuasion to show that the trial court's violation of Rule 431(b) in his case resulted in a biased jury and affected the integrity of the judicial process. *Id.* at 614. The court then observed that although the prospective jurors in the defendant's case received some, but not all, of the Rule 431(b) questions, the defendant failed to meet his burden of showing that the error affected the fairness of his trial and, accordingly, the second prong of plain-error review did not provide a basis for excusing the defendant's forfeiture. *Id.* at 615.

¶ 54 Here, as in *Thompson*, the trial court failed to strictly comply with Rule 431(b). Specifically, as in *Thompson*, the court only conducted an inquiry regarding three of the four *Zehr* principles, and failed to ascertain whether the potential jurors understood and accepted that a defendant is not required to present evidence on his own behalf. Notwithstanding the trial court's error, we find that defendant has failed to prove that the trial court's Rule 431(b) violation resulted in an unfair trial and affected the integrity of the judicial process. Although defendant did not present evidence, there is nothing in the record to indicate that the jury was biased. Defendant bears the burden of persuasion on this issue and a reviewing court will not presume the jury was biased merely because an error in Rule 431(b) questioning occurred during the *voir dire* process. *Thompson*, 238 Ill. 2d at 614. Accordingly, we find that the second prong of plain error review does not provide us with a basis to excuse defendant's procedural default. See *Thompson*, 238 Ill. 2d at 614-15; *Haynes*, 399 Ill. App. 3d at 914; *Magallanes*, 397 Ill. App.

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3d at 100.

¶ 55 Alternatively, defendant argues that the evidence against him was closely balanced and that the trial court's error constituted plain error under the first-prong of plain error review. We disagree with defendant's contention that the case was closely balanced. In finding that the evidence was sufficient to sustain defendant's conviction, we observed that trial testimony demonstrated that defendant was dropped off at the victim's apartment, that he was seen holding a gun to the victim's head, and that defendant confessed to shooting a man during a "lick" that went bad. In addition, forensic testing established that the firearms evidence came from a single weapon and was sufficient to prove that defendant was the shooter. In light of the testimonial and physical evidence, we disagree that the evidence was closely balanced and that the trial court's error constituted plain error under the first-prong of plain error review. We therefore find no basis to excuse defendant's procedural default under either prong of plain error review.

¶ 56 IV. TRIAL COURT'S REFUSAL TO SUBMIT SEPARATE VERDICT FORMS

¶ 57 Finally, defendant contends we should enter judgment on felony murder, and vacate defendant's armed robbery conviction and consecutive fifteen-year sentence.⁴ Defendant bases his argument on our supreme court's decision in *People v. Smith*, 233 Ill. 2d 1 (2009), where the court held that in the event that specific findings by a jury regarding offenses charged could result

⁴ We did not substantively address this issue in our original disposition because we found that the trial court's error in admonishing the jury in accordance with Rule 431(b) entitled defendant to a new trial. Given that we reached a different result on reconsideration, we address the substantive merit of defendant's final claim now.

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in different sentencing consequences favorable to the defendant, specific verdict forms must be provided upon defendant's request. Because defendant was charged with three types of murder, defendant argues that the trial court's improper refusal of his request made it impossible to know the theory on which he was convicted and resulted in the imposition of improper consecutive sentences.

¶ 58 Although issues pertaining to jury instructions and verdict forms are generally left to the discretion of the trial court, the issue of whether the instructions accurately reflect the law presents a legal question, which is subject to *de novo* review. *Smith*, 233 Ill. 2d at 15.

¶ 59 In Illinois, section 5/9-1 of the Criminal Code of 1961 (Criminal Code) sets forth the offense of first degree murder. 720 ILCS 5/9-1(a) (West 2008). That provision provides:

“(a) A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death:

(1) he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or

(2) he knows that such acts create a strong probability of death or great bodily harm to that individual or another; or

(3) he is attempting or committing a forcible felony other than second degree murder.” 720 ILCS 5/9-1(a) (West 2008).

¶ 60 Although the Criminal Code delineates three “ ‘types’ ” of murder, first degree murder, itself, is a single offense. *Smith*, 233 Ill. 2d at 16. The difference between the types of murder

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depends on the necessary elements that the State is required to prove. Specifically, the difference between intentional (720 ILCS 5/9-1(a)(1)) and knowing (720 ILCS 5/9-1(a)(2)) is the requisite mental state. Felony murder (720 ILCS 5/9-1(a)(3)), in contrast, does not require proof of intent or knowledge; rather, the State must simply prove that the defendant intended to commit an underlying forcible felony, and in the process of committing that felony, caused another person's death. See *People v. Battle*, 393 Ill. App. 3d 302, 314 (2009).

¶ 61 Although first degree murder is a single offense, there can be different sentencing consequences based upon the specific theory of murder proven by the State. *Smith*, 233 Ill. 2d at 17. Notably, if a defendant is convicted of felony murder, he may not be convicted of, and sentenced for, the underlying felony. *People v. King*, 66 Ill. 2d 551, 566 (1977); *Smith*, 233 Ill. 2d at 17. If, however, a defendant is convicted of intentional or knowing murder, he may also be convicted of, and sentenced, for additional offenses, including the underlying felony offense that is the basis for a felony murder charge. *Smith*, 233 Ill. 2d at 17-18.

¶ 62 Given the different sentencing consequences of the different types of first-degree murder, our supreme court held in *Smith*, that when a defendant, who is charged with multiple types of first-degree murder, requests specific verdict forms, the trial court must provide those forms and its failure to do so constitutes an abuse of discretion. *Smith*, 233 Ill. 2d at 23. The court recognized that absent separate verdict forms, pursuant to the "one-good-count" rule, when a defendant is charged with intentional, knowing, and felony murder, and a jury returns with a general verdict of guilty, the verdict is interpreted to be a finding of guilty on each count and a sentence will be imposed on intentional murder, which has the most culpable mental state.

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Smith, 233 Ill. 2d at 22-23; *People v. Moore*, 397 Ill. App. 3d 555, 564 (2009). Because general verdict forms make it impossible to determine the basis upon which the jury found the defendant guilty of first degree murder, our supreme court acknowledged that the presumption of the one-good-count rule could work to prejudice the defendant at sentencing and held that “the presumption cannot substitute for the jury’s actual findings, at least where defendants have requested that the jury make specific findings with regard to the degree of the offense.” *Smith*, 233 Ill. 2d at 23. Where a defendant’s request is denied, it is improper for the court to presume that the defendant was convicted of each first-degree murder count and to impose a sentence based on the presumption that a defendant was found guilty of intentional murder. *Smith*, 233 Ill. 2d at 27. Accordingly, the court held that when defendants are “prevented from obtaining a ruling on their theory that they were guilty only of felony murder and not intentional murder, the appropriate remedy is to interpret the general verdict as a finding on felony murder.” *Smith*, 233 Ill. 2d at 28.

¶ 63 Here, the State charged defendant under three theories of first-degree murder: intentional murder, knowing murder, and felony murder predicated upon armed robbery. Defendant’s request for separate verdict forms was denied and the jury returned with a general verdict finding defendant guilty of first degree murder and armed robbery. Accordingly, we find that the trial court abused its discretion in denying defendant’s request for special verdicts. *Smith*, 233 Ill. 2d at 23.

¶ 64 The State concedes that the trial court abused its discretion, but suggests that the trial court’s error was harmless. The State observes that in addition to the general verdicts, the jury

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also returned with a special finding, indicating that “the allegation was proven that during the commission of the offense of first degree murder the defendant personally discharged a firearm that proximately caused death to another person.” The State argues that the jury’s special finding on the firearm enhancement demonstrates that the jury found defendant guilty of intentional or knowing murder and thus his consecutive sentences for first-degree murder and armed robbery should be affirmed. We disagree.

¶ 65 In *Smith*, the court explained that the trial court’s “refusal to submit separate verdict forms is harmless error only if the jury’s findings may be ascertained from the general verdicts entered.” *Smith*, 233 Ill. 2d at 25. Here, the enhancement simply states that the jury concluded that defendant fired a firearm “during the commission of first degree murder.” The special finding, however, does not specify the type of first degree murder. Because the jury’s precise finding cannot be ascertain from the general verdicts entered, we do not find the trial court’s error in denying defendant’s request for special verdict forms was harmless. *Smith*, 233 Ill. 2d at 28 (“[W]here as here, it is impossible to tell from the general verdict whether defendant was actually convicted on each count in the indictment, it is error for the trial courts to make that presumption”). In light of the trial court’s prejudicial error, defendant’s first degree murder conviction must be interpreted as a finding of guilty on felony murder, and thus his conviction and sentence for armed robbery cannot stand. *Smith*, 233 Ill. 2d at 29; *People v. Reed*, 405 Ill. App. 3d 279, 286 (2010); *People v. Battle*, 393 Ill. App. 3d 30, 314 (2009).

¶ 66

CONCLUSION

¶ 67 For the reasons detailed herein, we affirm the trial court’s judgment in part, reverse in

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part; and correct defendant's mittimus to solely reflect one count of first degree felony murder.

¶68 Affirmed in part; reversed in part; mittimus corrected.