

No. 1-09-2319

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 Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 08 MC 451630
)	
LOREN YOUNG,)	
)	The Honorable
Defendant-Appellant.)	Gregory Robert Ginex,
)	Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Hall and Karnezis concurred in the judgment.

ORDER

¶ 1 *Held:* The defendant's conviction is reversed and the cause is remanded for a new trial because the trial court erred in (1) refusing to instruct the jury on the defendant's theory of self defense and (2) in failing to question the jurors in compliance with Supreme Court Rule 431(b), both of which constituted plain error where the evidence was closely balanced.

¶ 2 Following a jury trial, the defendant, Loren Young, was convicted of misdemeanor criminal damage to property (720 ILCS 5/21-1(1)(a) (West 2008)). The trial court sentenced him to serve one year of conditional discharge and 10 days of community service and also ordered him to pay

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\$1,249.35 in restitution. On appeal, the defendant argues that the trial court erred by (1) refusing to instruct the jury on his theory of self defense, (2) failing to properly admonish the jury pursuant to Supreme Court Rule 431(b), and (3) ordering him to pay restitution based on improper evidence. For the reasons that follow, we reverse the defendant's conviction and remand the cause for a new trial.

¶ 3 The evidence introduced at trial established that, at approximately 5:15 p.m. on May 27, 2008, the complainant, Thomas E. Carpenter, and the defendant were involved in a traffic-related altercation, during which the defendant struck the hood of the complainant's minivan with the chain from his bicycle lock, causing dents and paint scratches. The State presented the testimony of the complainant, as well as that of the complainant's 24-year-old son, Chris Carpenter, and Oak Park police officer Michael Rallidis.

¶ 4 The testimony of the complainant and his son presented the following version of events. On the evening of May 27, 2008, the complainant and his son were returning home from the grocery store. The complainant was driving his minivan, while his son rode in the front passenger seat, and they were traveling east on Lake Street in Oak Park. The complainant stopped at Marion Street to make a left turn. The light was green, and, after the oncoming traffic had cleared, the complainant began to turn, but had to stop abruptly to avoid hitting the defendant, who had run the red light while riding his bicycle north on Marion through the intersection.

¶ 5 The complainant finished his turn and proceeded to drive north on Marion behind the defendant's bicycle. The defendant was preventing the complainant from passing because he was riding in the middle of the northbound lane. He was biking very slowly and gesturing at the men in

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the van. When the southbound traffic had cleared, the complainant pulled into that lane to pass the defendant. The defendant turned his bike into the front passenger door of their van as they were passing him, scraping the paint on the door. The complainant stopped the van, and his son got out of the vehicle. The complainant and his son both testified that the defendant then picked up his bike and lunged at the complainant's son, who grabbed the bike and shoved the defendant away.

¶ 6 According to the complainant and his son, the defendant got back on his bike and continued north on Marion. The complainant's son used his cell phone to call 911, and the complainant followed the defendant so that his son could keep the 911 operator apprised of the defendant's location. After a couple of blocks, the defendant got off his bike and appeared to be adjusting something on it, but neither the complainant nor his son could see exactly what he was doing. The defendant then got back on his bike and rode north for a few yards. Thereafter, the defendant turned around and rode his bike toward them. He was swinging the chain from his bike lock over his head, and he used it to hit the hood of the van just below the windshield on the driver's side. The defendant then turned around and biked north to Chicago Avenue, where he went into an apartment building. The complainant followed him and stopped the van in a parking lot across the street from the apartment building.

¶ 7 Officer Michael Rallidis came to the parking lot and spoke to the complainant and his son. Officer Rallidis testified that he went into the apartment building, where he saw someone matching the description of the bike rider enter an apartment. He knocked on the apartment door, and the defendant spoke to the officer through the door. When he asked the defendant if he had been involved in a disturbance, and the defendant told him that a van had tried to hit him and that he was

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defending himself. Officer Rallidis stated that he asked the defendant to come out of the apartment and try to resolve the situation, but the defendant refused. He went back outside and spoke to the complainant and his son in the parking lot and later at the police station, where he prepared a report of the incident based on those conversations. About 90 minutes after the incident, the defendant voluntarily came to the police station and was arrested.

¶ 8 The defendant testified on his own behalf that, at the time of the altercation, he was biking north on Marion on his way home from work. When he got to Lake Street, the light was red, but he crossed the street against the light because there was no traffic. He saw the complainant's van at the intersection, but it was not moving, so he proceeded to cross the street and continue riding north on Marion. After the complainant turned, the van was only inches behind him, so he pulled over, stood at the curb, and gestured for it to pass. As the van did so, it scraped against his handlebar.

¶ 9 The defendant stated that the van stopped, and the complainant's son got out of the van and reached for something. Because he did not know what the young man was reaching for, he held up his bike to "keep some distance" between himself and the young man. The defendant denied that he lunged at the complainant's son with his bike. When he realized that the man only had a cell phone, he got back on his bike and rode north. The van was still following him, so he went onto the sidewalk, took the chain from his bike lock, and wrapped it around his hand because he "didn't know what this was turning into." He then rode north on the sidewalk.

¶ 10 At the next corner, the van sped up and turned in front of him, preventing him from crossing the street. The defendant stated that he turned around and went south on Marion to get away from the van. The van also turned around and followed him south. The defendant testified that he started

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to panic, and increased his speed. The van cut in front of him and almost hit him, pinning him against cars that were parked on the side of the street. The defendant stated that the van was very close to him and that he was waiving his hands and yelling "get off me, go away," at which time the chain must have hit the van. The defendant then rode to his apartment and called 911. He spoke to the police who were outside his apartment and said that a car tried to run him down, but he refused to go to the police station at that time because he wanted to call some relatives and let them know what was happening. The defendant acknowledged that his chain struck the van, but he denied swinging it above his head and also denied using it to strike the van intentionally.

¶ 11 At the jury instructions conference, the defendant requested that the jury be instructed on self defense. The trial court ruled that this instruction was not applicable because the defendant had testified that he did not intend to strike the van with the chain.

¶ 12 The jury found the defendant guilty of misdemeanor criminal damage to property. The defendant filed a motion for a new trial, asserting that he had not been proven guilty beyond a reasonable doubt. The trial court denied the post-trial motion and sentenced the defendant to serve one year of conditional discharge and 10 days of community service. In addition, the court ordered the defendant to pay \$1,249.35 in restitution to the complainant for the damage to his van. The amount of restitution was based on a written repair estimate tendered by the State that purported to have been prepared by Loro Auto Works in Oak Park. The defendant's attorney objected to the court's consideration of the repair estimate on the basis that the document was not on letterhead stationery and did not indicate who had prepared it.

¶ 13 The trial judge rejected defense counsel's argument, explaining that he was familiar with

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estimates provided by insurance companies and body shops and that there were certain codes listed on the second page of the estimate that he recognized and "deem[ed] to be corroborative and evidence of a valid insurance estimate." In response to defense counsel's inquiry as to whether the court was taking judicial notice of the codes, the court responded in the affirmative and ordered the defendant to pay \$1,249.35 in restitution.

¶ 14 The defendant subsequently sought reconsideration of the sentence, arguing that the restitution order was improper because it was based on hearsay and because the insurance codes were not a proper subject for judicial notice. The trial judge denied the defendant's motion to reconsider, and this appeal followed.

¶ 15 We initially address the defendant's argument that the trial court committed reversible error in refusing to instruct the jury on self defense. The defendant acknowledges that he has forfeited review of this issue by failing to include it in the post-trial motion (see *People v. Enoch*, 122 Ill. 2d 176, 186-87, 522 N.E.2d 1124 (1988); *People v. Simpson*, 172 Ill. 2d 117, 150, 665 N.E.2d 1228 (1996)), but he urges us to consider this claim under the plain-error doctrine (see *People v. Herron*, 215 Ill. 2d 167, 175-76, 830 N.E.2d 467 (2005); Ill. S. Ct. R. 451(c) (eff. July 1, 2006); Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999)).

¶ 16 Under the plain-error doctrine, a reviewing court may consider unpreserved errors where (1) a clear or obvious error occurs and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, or (2) a clear or obvious error occurs and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403 (2007). The first step

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of plain-error review is to determine whether any error occurred. *People v. Hudson*, 228 Ill.2d 181, 191, 886 N.E.2d 964 (2008); *Piatkowski*, 225 Ill. 2d at 565.

¶ 17 Generally, the giving of jury instructions is a matter within the sound discretion of the trial court. *People v. Jones*, 219 Ill. 2d 1, 31, 845 N.E.2d 598 (2006). However, the determination of whether a defendant has met the evidentiary minimum entitling him to an instruction on an affirmative defense is a matter of law. *People v. Everette*, 141 Ill. 2d 147, 157, 565 N.E.2d 1295 (1990). A defendant is entitled to instructions on those defenses that are supported by the evidence. *Everette*, 141 Ill. 2d at 156. Where such evidence exists, the trial court may not weigh the evidence in deciding whether an instruction is warranted. *People v. Roberts*, 265 Ill. App. 3d 400, 403, 638 N.E.2d 359 (1994). Consequently, an instruction on an affirmative defense must be given, even if the supporting evidence is "very slight" or is inconsistent with defendant's own testimony. *Everette*, 141 Ill. 2d at 156-57. Thus, a defendant is entitled to an instruction on self defense where there is some evidence in the record which, if believed by a jury, would support the defense, even where the defendant testifies that the ultimate harm was caused accidentally. *Everette*, 141 Ill. 2d at 156-57; *People v. Whitelow*, 162 Ill. App. 3d 626, 629, 515 N.E.2d 1327 (1987).

¶ 18 The defendant contends that the court should have instructed the jury that "[a] person is justified in the use of force when and to the extent that he reasonably believes that such conduct is necessary to defend himself against the imminent use of unlawful force." See 720 ILCS 5/7-1 (West 2008); Illinois Pattern Jury Instructions, Criminal, No. 24-25.06 (4th ed. 2000). The elements of self-defense include (1) that unlawful force was threatened against a person, (2) that the person threatened was not the aggressor, (3) that the danger of harm was imminent, (4) that the use of force

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was necessary, (5) that the person threatened actually and subjectively believed a danger existed that required the use of the force applied, and (6) the beliefs of the person threatened were objectively reasonable. *People v. Lee*, 213 Ill. 2d 218, 225, 821 N.E.2d 307 (2004).

¶ 19 At trial, the defendant testified that, just after he crossed Lake Street, the complainant's van sideswiped him, scraping against the handlebar of his bicycle. He also stated that, as he rode north on Marion Street, the van was following very closely and was just inches from his rear wheel. When the van continued to follow him, he moved onto the sidewalk and wrapped the chain from his bike lock around his hand because he did not know "what [the situation] was turning into." At the next corner, the van sped up and turned in front of him, blocking his path across the street. He turned around and began to ride in the opposite direction, but the van continued to follow him. The defendant testified that the van was chasing him down the street, and he felt panicked. The van subsequently cut in front of him and came close to hitting him. When the van pinned him against parked cars, he waived his arms in an effort to convince the complainant and his son to get away from him, and he accidentally struck the van with the lock chain. The defendant's testimony, if believed by a jury, was sufficient to warrant an instruction on self defense, and the trial court erred in refusing to give the tendered instruction.

¶ 20 Having concluded that the failure to instruct on self defense constituted clear error, we must next determine whether the evidence presented at trial was closely balanced. The trial in this case amounted to a contest of credibility. On the one hand, the complainant and his son testified that the defendant was the aggressor, deliberately turning his bike into their van and striking the hood of the van with the chain without any provocation. On the other hand, the defendant testified that the

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complainant and his son were the initial aggressors, who repeatedly followed him and twice cut him off as he tried to ride home. According to the defendant, he panicked when the complainant continued to chase him down the street and pinned him against parked cars. Though Officer Rallidis' testimony as to the contents of the incident report is consistent with the version of events described by the complainant and his son, that evidence does not provide any independent corroboration of their account because Rallidis did not arrive on the scene until after the incident was over. Considering the two different accounts of the incident, both of which were plausible, and the fact that no other evidence was presented to corroborate or contradict either version, the jury necessarily was required to decide whether the defendant's testimony was more credible than that of the complainant and his son. The mere fact that two people gave testimony that conflicted with that of the defendant does not mean that the evidence was not closely balanced. See generally *People v. Naylor*, 229 Ill. 2d 584, 607-08, 893 N.E.2d 653 (2008) (holding that evidence was closely balanced where it boiled down to the testimony of the two police officers against that of the defendant).

¶ 21 In reaching this conclusion, we reject the State's claim that the evidence was not closely balanced because the defendant's testimony was incredible. Contrary to the State's assertion, we do not believe the record demonstrates that the defendant's testimony was inherently implausible and "replete with absurd details" or that the testimony of the complainant and his son necessarily was more plausible and credible than that of the defendant. Based on the record presented, we conclude that evidence presented at trial was so closely balanced that the trial court's refusal to instruct the jury on self defense threatened to tip the scales of justice against him. Accordingly, we hold that the defendant was prejudiced by the error and must be afforded a new trial. See *Naylor*, 229 Ill. 2d at

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610-11.

¶ 22 The defendant also contends that the trial court violated Supreme Court Rule 431(b) (eff. May 1, 2007) by failing to adequately question the potential jurors regarding the four principles set forth in *People v. Zehr*, 103 Ill. 2d 472, 469 N.E.2d 1062 (1984). Again, the defendant acknowledges the forfeiture, but requests that we address the claim under the plain-error doctrine, despite his failure to raise the issue in the trial court. See *Enoch*, 122 Ill. 2d at 186-87; *Piatkowski*, 225 Ill. 2d at 565. Because resolution of this issue requires that we consider the trial court's compliance with a supreme court rule, our review is *de novo*. See *People v. Thompson*, 238 Ill. 2d 598, 606, 939 N.E.2d 403 (2010); *People v. Lloyd*, 338 Ill. App. 3d 379, 384, 788 N.E.2d 1169 (2003).

¶ 23 Supreme Court Rule 431(b) mandates that trial courts ask potential jurors whether they understand and accept the *Zehr* principles as follows:

“(b) 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

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respond to specific questions concerning the principles set out in this section.” Ill.

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

¶ 24 The record reflects that, at the beginning of the *voir dire*, the trial court admonished the venire members regarding the first three of the *Zehr* principles but did not advise them of the fourth principle. Also, the court did not question the venire members regarding the third and fourth principles, nor did it question all of the venire members regarding their understanding and acceptance of the first two principles. Thus, the record demonstrates that the trial court failed to comply with the requirements of Rule 431(b). See *Thompson*, 238 Ill. 2d at 607. Having previously concluded that the evidence presented at trial was closely balanced, we find that the failure to properly question the potential jurors in accordance with Rule 431(b) also constitutes plain error, requiring that the defendant be granted a new trial.

¶ 25 In light of our disposition of the above issues, we need not address the defendant's claim that the trial court erred in ordering him to pay restitution in the amount of \$1,249.35 based on the document presented at the sentencing hearing.

¶ 26 For the foregoing reasons, we reverse the defendant's conviction and remand the cause to the circuit court for a new trial.

¶ 27 Reversed and remanded.