

No. 2—09—1000
Order filed April 14, 2011

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
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of De Kalb County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 05—CF—455
)	
SCOTT A. CRAWFORD,)	Honorable
)	Kurt P. Klein,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Zenoff and Birkett concurred in the judgment.

ORDER

Held: The trial court's failure to question jurors during *voir dire*, pursuant to Supreme Court Rule 431(b), was not reversible error under the second-prong of the plain-error rule because the defendant failed to establish that the jury was biased. The prosecutor's comments during rebuttal closing, as to the credibility of a witness police officer, were not improper because the comments were provoked by defense counsel and the prosecutor did not mention a presumption in favor of any witness's testimony.

On August 3, 2009, following a trial *in absentia*, the defendant, Scott Crawford, was found guilty of driving while his driver's license was revoked (625 ILCS 5/6—303(d-3) (West 2004)). On

September 9, 2009, the trial court sentenced the defendant to one year of imprisonment. The defendant appeals from those orders. We affirm.

On July 29, 2005, the defendant was charged by information with driving while his license was revoked. He had been arrested on June 19, 2005, and released without bond. On May 16, 2006, the trial court set the trial date for August 14, 2006, and admonished the defendant that if he did not appear for trial, a warrant would issue for his arrest and the case would proceed to trial and sentencing in his absence. The defendant subsequently failed to appear for trial. On October 12, 2006, the trial court issued a warrant for the defendant's arrest. On September 25, 2008, the trial court found that the defendant was willfully avoiding trial and ordered that trial proceed in his absence.

On August 3, 2009, a jury trial commenced. At the beginning of jury selection, the trial court advised the prospective jurors that the defendant had voluntarily chosen to absent himself from the proceedings and that it was his "constitutional right to do that." The trial court also advised the prospective jurors that they should not consider the defendant's absence or hold it against the defendant or the State. The trial court further advised them of the charges against the defendant and asked the prospective jurors to raise their hand if they could not be fair or impartial for any reason. The trial court noted that none of the prospective jurors raised their hand.

Thereafter, *voir dire* started and twelve prospective jurors were called for questioning. The prospective jurors were questioned in three panels of four. Neither the State nor defense counsel requested the dismissal of any of the jurors. The three panels of four were ultimately selected as jurors. During *voir dire*, defense counsel had advised all the jurors that the defendant had the right to not testify and that the failure to testify could not be held against him. When questioned by

defense counsel, the jurors indicated that they did not have any problems with that assertion. Also upon questioning by defense counsel, the second and third panel of jurors indicated that they did not have a problem holding the State to their burden of proving the defendant guilty beyond a reasonable doubt.

Following opening statements, Sergeant Costliow of the De Kalb police department testified that on June 19, 2005, at 7 p.m., he was on patrol in a marked squad car when he noticed a 1966 black Plymouth Barracuda with an expired registration plate at the intersection of Dresser and 14th Streets. He ran the plates and learned that the car was registered to “Scott Crawford.” The information also indicated that Crawford’s license was revoked.

Sergeant Costliow conducted a traffic stop. The driver exited the vehicle and walked to the sidewalk. Sergeant Costliow testified that when the driver exited the vehicle, he recognized him from prior contact to be “Scott Crawford.” Sergeant Costliow identified a booking photo of the defendant as the person who had exited the vehicle. Sergeant Costliow testified that he addressed the driver by the name of “Scott Crawford” and the driver responded to that name. The officer asked the defendant if he knew that his license was revoked and the defendant admitted that he knew. Sergeant Costliow asked the defendant for identification and an insurance card. The defendant did not produce any identification and stated that he did not have an insurance card. The officer arrested the defendant and transported him to the police department. Sergeant Costliow testified that Crawford’s date of birth was March 1, 1971. The State admitted three exhibits: the defendant’s booking photo, a certified driver’s abstract showing that “Scott Crawford’s” driver’s license was revoked, and a certified copy of the expired car registration for the 1966 Plymouth. The registration

showed that the car was registered to the same “Scott Crawford” whose driver’s license was revoked. The driver’s abstract showed Crawford’s date of birth to be March 1, 1971.

The defense rested without presenting any evidence. During closing argument, defense counsel stated:

“MS. MC GUIRE [defense attorney]: *** This case seems very easy at first that someone is driving a car, the Sergeant sees that person, the registered owner of that car comes up revoked and that that person is Scott Crawford, my client.

But what we have is a person who gets out of the car and represents himself to be Scott Crawford. We don’t have any identification on that person. We simply have that person saying, ‘I’m Scott Crawford,’ and the Sergeant here saying, ‘I know who he is and that’s Scott Crawford.’ We don’t have any information other than that.

The State has presented nothing to connect this person in this booking photo to the revoked driver’s license of Scott Crawford issued by the Secretary of State of Illinois. I submit to you that the Sergeant’s word is not proof beyond a reasonable doubt that that was in fact Scott Crawford driving that car that day and I ask that you find him not guilty. Thank you.”

In rebuttal closing argument, the prosecutor advised the jury that they would be instructed that they are the judges of the believability of witnesses and must determine the weight to be given to a witness’s testimony. The prosecutor further stated:

“MR. ESCARCIDA [Assistant State’s Attorney]: *** You will have to consider, of course, whether or not Sergeant Costliow is willing to risk his job and his badge to come in here and fabricate a story that he in fact took Scott Crawford into custody for that offense.

So, ladies and gentlemen, I ask you to actually also consider that instruction that [the trial court] will give you and ask yourselves if Sergeant Costliow has any motivation to come in here to fabricate some sort of charges against Scott Crawford.”

Prior to deliberation, the trial court instructed the jury that the defendant was presumed innocent, the State had to prove the defendant guilty beyond a reasonable doubt, the defendant was not required to prove his innocence, and the defendant’s failure to testify could not be held against him. The jury found the defendant guilty of driving while his license was revoked and the defendant was subsequently sentenced to one year of imprisonment. Thereafter, the defendant filed a timely notice of appeal.

On appeal, the defendant argues that his conviction must be reversed and the case remanded for a new trial because (1) the trial court failed to question the prospective jurors pursuant to Supreme Court Rule 431(b) (eff. May 1, 2007) and (2) the prosecutor improperly bolstered Sergeant Costliow’s credibility during rebuttal closing argument.

The defendant’s first contention is that the trial court erred in failing to question the prospective jurors pursuant to Rule 431(b). 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 defendant argues that the trial court did not mention any of these principles or ask the jurors whether they understood or accepted these principles. The defendant acknowledges that defense counsel did address a couple of the principles during *voir dire* but argues that this was insufficient to satisfy Rule 431(b).

At the outset we note that the defendant acknowledges that the issue is forfeited for purposes of appeal because he did not object to the Rule 431(b) violation at trial and did not raise the issue in a post-trial motion. We agree that the issue is forfeited. *See People v. Thompson*, 238 Ill. 2d 598, 611 (2010) (to preserve a claim for review a defendant must object at trial and include the issue in a written post-trial motion). Nonetheless, the defendant argues that we should address the issue under the plain-error doctrine.

The plain-error doctrine allows a defendant to bypass normal forfeiture principles when plain error occurs. Plain error occurs when the error is “clear and obvious” and (1) “the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error,” or (2) “that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.” *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

In the present case, the defendant contends that the error is reversible under the second prong of the plain-error review. Specifically, the defendant argues that the violation of Rule 431(b) infringed his right to an impartial jury, thus affecting the fairness of his trial and challenging the

integrity of the judicial process. However, in *People v. Rogers*, No. 2—08—0889, slip op at 4 (Mar. 8, 2011), this court explained:

“Under the second prong of plain-error analysis, prejudice is presumed, regardless of how strong the evidence was, because of the importance of the right involved. [*People v. Herron*, 215 Ill.2d at 187. However, the defendant bears the burden of demonstrating that the error was so serious that it affected the fairness of his trial and challenged the integrity of the judicial process. *Thompson*, 238 Ill.2d at 613. Although the purpose of Rule 431(b) questioning is to help ensure an impartial jury, it is not the only means to do so, and it is therefore not indispensable to a fair trial. [*Id.*] at 614. Thus, ‘[w]e cannot presume the jury was biased simply because the trial court erred in conducting the Rule 431(b) questioning.’ [*Id.*] at 614. Therefore, in order to meet the burden of persuasion, a defendant alleging second-prong plain error for a Rule 431(b) violation must show that the violation resulted in a biased jury. [*Id.*] at 614-15.”

In the present case, the defendant has not presented any evidence that the lack of Rule 431(b) questioning resulted in a biased jury. The defendant argues only that because the jury was not questioned pursuant to Rule 431(b), “there is no way of knowing whether [he] was tried by an impartial jury.” Moreover, nothing in the record suggests that the jury was biased. During *voir dire*, the trial court advised the prospective jurors of the charges against the defendant and asked them to raise their hand if they could not be fair or impartial for any reason. The trial court noted that none of the prospective jurors raised their hand. Defense counsel questioned three panels of jurors about the defendant’s right to remain silent and two panels of jurors about the State’s burden to prove the defendant guilty beyond a reasonable doubt. All the jurors indicated that they would not hold the

defendant's failure to testify against him and the two panels questioned indicated that they did not have a problem holding the State to its burden of proof beyond a reasonable doubt. Further, defense counsel did not challenge or request the dismissal of any of the jurors. Finally, the trial court instructed the jury as to the Rule 431(b) principles at the close of trial and prior to deliberations. Accordingly, as the defendant bears the burden of persuasion, his failure to show bias precludes the second prong of plain-error doctrine from serving as a basis for excusing his procedural default. *Thompson*, 238 Ill. 2d at 615; *Rogers*, No. 2—08—0889, slip op at 5.

The defendant's second contention on appeal is that reversible error occurred when the prosecutor improperly bolstered Sergeant Costliow's credibility during rebuttal closing argument by arguing that the officer would not risk his job or his badge to fabricate charges against the defendant. The prosecution is afforded wide latitude in making closing arguments. *People v. Williams*, 192 Ill. 2d 548, 573 (2000). A prosecutor may denounce the accused, reflect upon the credibility of the witnesses, and urge the fearless administration of justice if based on the facts in the record or reasonable inferences drawn therefrom. *People v. Bennett*, 304 Ill. App. 3d 69, 72 (1999). In reviewing allegations of prosecutorial misconduct, this court must consider the arguments of both the prosecutor and the defense in their entirety and place the allegations of improper comments in context of the closing argument as a whole. *People v. Evans*, 209 Ill. 2d 194, 225-26 (2004).

The defendant acknowledges that he failed to preserve the alleged error in closing argument for appellate review because he did not object to the comments at trial or raise the issue in a post-trial motion. *Thompson*, 238 Ill. 2d at 611. The defendant again argues that we should review this contention for plain error. The first step of the inquiry under the plain-error doctrine is to determine if a challenged comment constituted error. *Piatkowski*, 225 Ill. 2d at 565. If the comment resulted

in error, then we proceed to determine whether either of the two prongs of the plain-error doctrine is satisfied. *Id.* at 566.

The defendant relies on the recent Third District case of *People v. Adams*, 403 Ill. App. 3d 995 (2010), in arguing that the prosecutor's comments were improper. However, the *Adams* court acknowledged that the districts of the Appellate Court are split on whether arguments regarding a police officer's credibility, as in the present case, are proper. *Id.* at 1003. The *Adams* court relied on *People v. Ford*, 113 Ill. App. 3d 659 (1983), in finding that similar prosecutorial comments were improper. *Id.* at 1002-03. However, in *People v. Bennett*, 304 Ill. App. 3d 69, 73 (1999), this court expressly declined to follow the reasoning in *Ford*. Rather, this court addressed the split of authority and adopted the reasoning that arguments such as this are not improper if there is a direct conflict between the testimony of a peace officer and that of the defendant, the comments are based on the facts in the record or reasonable inferences drawn from the facts, and the comments did not include mention of a presumption in favor of any witness's testimony. *Id.* at 72-73. Moreover, this court has held that if the complained-of remarks are within a prosecutor's rebuttal argument, they will not be held improper if they appear to have been provoked or invited by defense counsel's argument. *People v. Williams*, 313 Ill. App. 3d 849, 863 (2000).

In the present case, the defendant did not testify at trial, but the complained of remarks were provoked by defense counsel's argument that Sergeant Costliow's testimony was insufficient evidence of the defendant's guilt. Additionally, the prosecutor's remarks were based on facts in the record and reasonable inferences from those facts. Further, the prosecutor did not mention a presumption in favor of the officer's testimony. Accordingly, the complained-of comments were not improper. *Bennett*, 304 Ill. App. 3d at 73.

In so ruling, we note that the defendant attempts to distinguish *Bennett* on the facts. In his brief, the defendant states that, in *Bennett*, “the defendant argued only that the prosecutor’s constant references to the officer who testified as a sworn police officer unfairly bolstered her credibility.” However, the defendant confuses the facts in *Bennett* with the facts in another case, *People v. Killen* 217 Ill. App. 3d 473, 481-82 (1991). The foregoing was argued in *Killen*, not in *Bennett*. In *Bennett*, the prosecutor argued: “what in the world would their motive be to commit perjury *** to risk their career to do that?” The *Bennett* court found this argument proper. *Bennett*, 304 Ill. App. 3d at 73. The argument in *Bennett* is similar to the challenged remarks in this case. Accordingly, the defendant’s attempt to distinguish *Bennett* is unpersuasive.

The defendant also argues that the prosecutorial comments in this case are more similar to those held improper by this court in *People v. Rogers*, 172 Ill. App. 3d 471 (1988), than those held proper in *Bennett*. We disagree. In *Rogers*, the prosecutor interjected his personal opinion into the discussion of the credibility of two police officers. *Rogers*, 172 Ill. App. 3d at 476-77 (“What can I say about” the officers; “believe me *** they won't get on the stand and lie and make up something”). The *Rogers* court found this improper because the prosecutor was personally vouching for the veracity of the witnesses. *Rogers*, 172 Ill. App. 3d at 477. The comments in *Rogers* are distinguishable from the comments at issue in this case. Here, the prosecutor did not personally vouch for the credibility of Sergeant Costliow. The prosecutor merely asked the jury to consider whether the officer would have any motivation to risk his career by fabricating charges against the defendant. These comments are much closer to the comments found proper in *Bennett*.

For the foregoing reasons, the judgment of the circuit court of De Kalb County is affirmed.

Affirmed.

