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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Kane County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 08—CF—1754
)	
ANDREW GRZYBOWSKI,)	Honorable
)	Thomas E. Mueller,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Burke concurred in the judgment.

ORDER

Held: The State proved defendant guilty beyond a reasonable doubt of disorderly conduct; throwing nails onto his lawn to create a hazard in mowing his lawn and his subsequent profane confrontation with his neighbor was sufficient; the State proved defendant guilty beyond a reasonable doubt of aggravated battery (kicking a police officer); the level of insult required was not higher due to the victim's status as an officer; the trial court violated Rule 431(b) by failing to question the potential jurors whether they accepted the principles; however, defendant did not satisfy the plain-error rule as the evidence was not close, and defendant presented no evidence of a biased jury.

Following a jury trial, defendant, Andrew Grzybowski, was convicted of one count of aggravated battery (720 ILCS 5/12—4(b)(18) (West 2008)) and one count of disorderly conduct (720

ILCS 5/26—1(a)(1) (West 2008)). The trial court sentenced defendant to 24 months' probation. Defendant appeals, arguing that the State failed to prove him guilty beyond a reasonable doubt and that the trial court erred in failing to comply with Supreme Court Rule 431(b) (eff. May 1, 2007) during *voir dire*. For the reasons that follow, we affirm.

BACKGROUND

Defendant was indicted on one count of aggravated battery and one count of disorderly conduct. Count 1 alleged that defendant committed aggravated battery in that he “knowingly made contact of an insulting or provoking nature with Officer McCarthy in that he kicked Officer McCarthy about the body, knowing Officer McCarthy to be a police officer engaged in the execution of his official duties as a police officer.” Count 2 alleged that defendant committed disorderly conduct in that he “knowingly shouted profanities and threw objects, in such an unreasonable manner as to alarm and disturb William Kittner [*sic*], and provoke a breach of the peace.”

At trial, William Kittner testified as follows. On June 27, 2008, he lived across the street from defendant. That evening, Kittner looked out his window and witnessed defendant throwing nails, screws, and hardware around his (defendant's) lawn. Kittner told his wife to call the police and began taking pictures of what defendant was doing. When Kittner proceeded outside to take additional pictures, defendant saw him and “flipped [him] the bird.” Defendant crossed the street to Kittner's house and told Kittner that defendant was “protecting [Kittner's] fucking rights.” Kittner was concerned about the nails and hardware in defendant's yard because the nails could injure the children in the neighborhood the next time defendant's lawn was mowed and because the hardware could cause environmental damage to the river that ran behind defendant's house.

When the police arrived, defendant was escorted back to his property. Kittner went inside his house to complete a complaint against defendant. When he came back outside, defendant was seated in the backseat of a police squad car, yelling.

Michael Elmore gave the following testimony. He lived next door to defendant. On the evening of June 27, 2008, Elmore was sitting on his back porch when he noticed defendant throwing some hardware boxes across defendant's property. Elmore went inside his house to tell his wife to keep the children in the house. When he went back outside, Elmore saw defendant standing across the street near Kittner's property, yelling. Elmore obtained a magnetic broom from his garage to inspect his yard. Upon inspection, Elmore found two 2-inch nails near the side of his house closest to defendant's house. He also observed hardware on defendant's lawn. As Elmore brought the nails to show the police officers who had arrived, he observed defendant in handcuffs being led back across the street by an officer. Defendant was then placed in the backseat of one of the squad cars. As defendant was sitting in the back of the squad car, one of the officers gave defendant a command several times, but defendant did not comply. Three or four officers then attempted to remove defendant from the car. As they did so, defendant flailed about to prevent the officers from removing him from the car. Elmore did not observe any other contact between the officers and defendant.

David Ulm testified as follows. He lived across the street from defendant. On the evening of June 27, 2008, Ulm looked out his window and observed defendant throwing nails and boxes around his yard. Ulm proceeded upstairs and from a window there observed defendant standing across the street at Kittner's property, yelling at Kittner and waving his arms wildly. By the time Ulm got outside, the police had arrived and placed defendant in handcuffs. Defendant was screaming. Ulm did not witness any other contact between defendant and the officers.

Officer Christopher Krason of the West Dundee police department testified as follows. On June 27, 2008, he responded to a call to defendant's home. When he arrived, Krason attempted to speak with defendant while Officer Michael McCarthy spoke with Kittner. When McCarthy told Krason that Kittner would be signing a complaint for disorderly conduct, Krason, along with his sergeant, placed defendant under arrest. At first, defendant stiffened his arms to avoid being handcuffed, but eventually he cooperated so that his hands were handcuffed behind his back. When Krason attempted to place defendant in the back of the squad car, defendant stiffened his body. Eventually, however, defendant relaxed and was placed in the backseat of the car. While there, defendant screamed and yelled profanities and that the officers were violating his civil rights. At some point, Krason heard a commotion in the car. When he looked into the car, he noticed that defendant had slid his hands underneath his body so that they were in front of him. The officers removed defendant from the car and rehandcuffed him so that his hands were behind his back. When the officers attempted to place defendant back into the car, defendant refused to bring his legs into the car. When the officers picked up defendant's legs to put them in the car, defendant began kicking, striking McCarthy in the right forearm.

McCarthy gave the following testimony. On June 27, 2008, he responded with Krason to the call to defendant's home. After speaking with Kittner, McCarthy returned to defendant's property, where Krason had already placed defendant under arrest and was leading him to a squad car. McCarthy followed Krason and defendant to the squad car. When the officers attempted to place defendant in the backseat, defendant tensed his body and refused to sit down. Defendant eventually complied with the officers' commands to get into the backseat. While defendant was in the backseat, McCarthy observed him slide his hands under his body so that they were in front of him. The

officers then removed defendant from the car and repositioned his hands behind his back. When the officers attempted to place defendant back into the car, he again refused to cooperate. Defendant refused to bring his legs into the car, causing the officers to pick up his legs to put them inside the car. When the officers did this, defendant began kicking forcefully at them, hitting McCarthy in the right arm and jamming it into the sights of his gun. McCarthy felt insulted by the kick.

Defendant testified as follows. In the beginning of 2008, he and his wife experienced some marital problems, which caused him to move out of his home for a period of time. After his wife died in April 2008, defendant felt unable to live in the home and continued to stay with friends. Finally, in June 2008, defendant returned to his home. In the process of sorting through the mail that had accumulated while he was gone, defendant discovered a letter from the Village of West Dundee informing him that, if he did not mow his lawn, the Village would fine him and put a lien on his home. The following day, Village employees mowed defendant's lawn. Defendant, who was upset by the Village's actions, spraypainted anti-Village sentiments on the side of his house. After having a conversation with the police chief, defendant agreed to paint over the graffiti.

On June 27, 2008, defendant was finishing painting over the words. While doing this, defendant tripped over a can of paint, which gave him the idea to put paint cans around his yard to prevent the Village from mowing his lawn again. After deciding that someone might get hurt as a result of such actions, he instead concluded that he should put nails in his yard to puncture the tires of the Village's mowers. Using boxes of nails left over from a construction project, defendant began throwing nails around his yard. Kittner came outside and began taking pictures of defendant. Each time Kittner would take a picture of defendant, defendant would "give him the bird." When Kittner called defendant a "nut bag" and told him that the neighborhood would be glad to see him leave,

defendant crossed the street to confront Kittner. Defendant got into Kittner's face and began yelling at him for taking pictures.

Once defendant crossed back to his side of the street, he was approached by Krason and placed under arrest. As Krason walked defendant to a squad car, defendant continued to scream at the neighbors who were gathered outside. He was then placed in the backseat of the car. The car was uncomfortable, as the seat was plastic and the front seat did not provide him enough leg room. Because the handcuffs were digging into his back, defendant pulled the cuffs around so that they were in front of him. When Krason saw what defendant had done, he reached into the car and grabbed defendant by the throat. Defendant grabbed the grate on the partition between the front and back seats. Krason attempted to pull defendant out of the car by his shirt collar. When that was unsuccessful, Krason grabbed one of defendant's legs while McCarthy grabbed the other in an attempt to pull defendant out of the car. Because defendant was holding the grate on the partition and the officers were pulling on his legs, defendant was suspended in the air. Defendant denied kicking McCarthy, testifying instead that he was merely attempting to pull his leg free from McCarthy's grip and that he did not recall ever making contact with McCarthy. A third officer on the scene finally came over to support defendant's upper body so that he could let go of the grate without falling. The officers then threw defendant on the ground, jumped on top of him, recuffed him, and put him back in the squad car.

On rebuttal, McCarthy and Krason denied that Krason attacked defendant or grabbed defendant by the throat. They also denied dragging defendant out of the car by his feet and that defendant held onto anything when the officers removed him from the vehicle, testifying that the

partition between the front and back seats was solid plexiglass and did not contain any grated or caged portion.

The jury found defendant guilty on both counts, and the trial court sentenced him to 24 months' probation. Following the ruling on defendant's motion to reconsider the sentence, defendant timely appealed.

ANALYSIS

On appeal, defendant argues that (1) the State failed to prove him guilty beyond a reasonable doubt of disorderly conduct; (2) the State failed to prove him guilty beyond a reasonable doubt of aggravated battery; and (3) the trial court erred in failing to comply with Rule 431(b) during *voir dire*.

1. Disorderly Conduct

Defendant first argues that the State failed to prove him guilty beyond a reasonable doubt of disorderly conduct. We review claims of insufficient evidence to determine “ ‘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 a reasonable doubt.’ ” (Emphasis in original.) *People v. Collins*, 106 Ill. 2d 237, 261 (1985) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). A 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. *Collins*, 106 Ill. 2d at 261. It is not the function of this court to retry the defendant. *Collins*, 106 Ill. 2d at 261. The trier of fact must assess the credibility of the witnesses and the weight of their testimony, resolve conflicts in the evidence, and draw reasonable inferences from that evidence, and this court will not substitute its judgment for that of the trier of fact on these matters. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001).

A person commits disorderly conduct when he or she knowingly “[d]oes any act in such unreasonable manner as to alarm or disturb another and to provoke a breach of the peace.” 720 ILCS 5/26—1(a)(1) (West 2008). The offense of disorderly conduct “embraces a wide variety of conduct serving to destroy or menace the public order and tranquility.” *People v. B.C.*, 176 Ill. 2d 536, 552 (1997).

“ ‘The term [breach of peace] connotes conduct that creates consternation and alarm. It is an indecorum that incites public turbulence; yet violent conduct is not a necessary element. The proscribed conduct must be voluntary, unnecessary, and contrary to ordinary human conduct. On the other hand, the commonly held understanding of a breach of the peace has always exempted eccentric or unconventional conduct, no matter how irritable to others. It seems unnecessary to add that whether a given act provokes a breach of the peace depends upon the accompanying circumstances, that is, it is essential that the setting be considered in deciding whether the act offends the mores of the community.’ ” *People v. Allen*, 288 Ill. App. 3d 502, 506 (1997) (quoting *United States v. Woodard*, 376 F.2d 136, 141 (7th Cir. 1967)).

According to defendant, the State failed to prove him guilty beyond a reasonable doubt because Kittner did not testify that the profanities alarmed or disturbed him and because Kittner’s reasons for being alarmed by the throwing of the nails did not establish that defendant’s actions provoked a breach of the peace. While defendant attempts to view his acts as isolated incidents, they were not charged in that manner. Rather, the indictment alleged that defendant committed disorderly conduct in that he both threw objects and yelled profanities. While the yelling of profanities, viewed alone, might not have been sufficient to convict defendant (*People v. Douglas*, 29 Ill. App. 3d 738,

742-43 (1975)), taken with the act of throwing nails, it rose to the level of a breach of the peace (*People v. Ellis*, 141 Ill. App. 3d 632, 633 (1986) (the defendant’s obscenities, combined with his tearing down of holiday decorations, were sufficient to sustain his conviction of disorderly conduct)).

Defendant’s nail throwing was certainly contrary to ordinary human conduct and presented a danger to others in the neighborhood, especially since some of the nails made it onto the property of defendant’s neighbor. It alarmed Kittner to the extent that he called the police and began taking pictures of defendant. Defendant then followed his nail throwing with a verbal altercation with Kittner in which he “got into [Kittner’s] face” and yelled at him for taking pictures. These actions—the nail throwing and the yelling—caused defendant’s neighbors to exit their houses, gather nearby, and watch. As defendant put it, “There was a big scene. They were all out watching.” From this, a rational jury could find that defendant knowingly engaged in conduct that was so unreasonable as to alarm or disturb another and provoke a breach of the peace.

2. Aggravated Battery

Defendant next contends that the State failed to prove beyond a reasonable doubt that he was guilty of aggravated battery. To prove that defendant committed aggravated battery, the State was required to prove that defendant committed a battery while knowing “the [victim] to be an officer or employee of *** a unit of local government *** engaged in the performance of his or her authorized duties as such officer or employee.” 720 ILCS 5/12—4(b)(18) (West 2008). To prove that defendant committed a battery, the State was required to demonstrate that defendant “intentionally or knowingly without legal justification and by any means, (1) cause[d] bodily harm to [McCarthy] or (2)[made] physical contact of an insulting or provoking nature with [McCarthy].”

720 ILCS 5/12—3(a) (West 2008). However, the State alleged only that defendant made physical contact of an insulting or provoking nature with McCarthy.

Defendant argues that McCarthy, as a police officer, could not have been insulted or provoked by defendant's kicking of his arm. This argument is without merit because the statute requires not that the contact be insulting or provoking *to a police officer*, but rather that it simply be insulting or provoking. In other words, the statute does not provide for a separate standard by which to measure the insulting or provoking nature of the contact when the incident involves a police officer. In any event, McCarthy specifically testified that he was insulted by defendant's kicking of him. Although, as defendant points out, McCarthy originally testified, "I felt insulted, I suppose," he then clarified that he was, in fact, insulted by the contact:

"Q. I just want to ask you when you said that you felt insulted, are you—did you feel insulted or you're not sure that you felt insulted?

A. I was insulted by it, yes."

In addition, the evidence indicates that defendant was resisting being placed in the back of the squad car, was yelling at the officers, and was generally belligerent. Taken in this context, with McCarthy's uncontradicted testimony that he was insulted, a jury could find that defendant's kicking of McCarthy was insulting. See *People v. Bracey*, 345 Ill. App. 3d 314, 323-24 (2003) (jury could find that defendant's act of splashing a correctional officer with apple juice was insulting or provoking given the circumstances and the officer's testimony that he was insulted by the contact and did not know whether the substance was harmful), *rev'd on other grounds*, 213 Ill. 2d 265 (2004).

3. Rule 431(b)

Defendant finally argues that we should reverse his convictions and remand for a new trial, because the trial court failed to comply with Rule 431(b) during *voir dire*. Defendant did not, however, object during *voir dire*, nor did he raise the issue in his written posttrial motion. Accordingly, defendant has forfeited review of this issue. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (“*Both a trial objection and a written post-trial motion raising the issue are required for alleged errors that could have been raised during trial*” (emphases in original)).

Acknowledging that he failed to preserve this issue for review, defendant urges us to review the issue under the plain-error doctrine. Under the plain-error doctrine, we may review a forfeited error when either (1) “the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence” or (2) “the error is so serious that the defendant was denied a substantial right, and thus a fair trial.” *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). Defendant bears the burden of persuasion under both prongs. *Herron*, 215 Ill. 2d at 187. The first step in the plain-error analysis is to determine whether any error occurred. *People v. Cosby*, 231 Ill. 2d 262, 273 (2008).

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

The trial court asked the members of the entire venire, as a group, whether they understood that defendant was presumed to be innocent, the State had to prove defendant guilty beyond a reasonable doubt, defendant did not have to present any evidence on his behalf, and defendant’s failure to testify could not be held against him. None of the potential jurors indicated that they did not understand.

Although the trial court did ask if the potential jurors understood each of the four principles, it erred when it did not ask the potential jurors whether they accepted the four principles. See *People v. Thompson*, No. 109033, slip op. at 7 (Ill. Oct. 21, 2010) (finding that the trial court erred when it failed to question the potential jurors regarding their understanding and acceptance).

Having concluded that error occurred, we must now determine whether that error is reversible under the plain-error doctrine. Defendant argues both that the evidence was closely balanced and that the error was so serious that it denied him his substantial right to a fair and impartial jury. Having reviewed the record, we conclude that defendant has not demonstrated either that the evidence was closely balanced such that the error might have caused the jury to return a guilty verdict or that the error was so serious that he was denied a fair trial.

First, while the trial court’s failure to question the potential jurors regarding their acceptance of the four principles was error, we do not see how it could have affected the jury’s verdict. See *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (the error must be such that it “alone threatened to tip the scales of justice against the defendant”). Defendant testified and presented evidence; thus,

the jury could not have held against him a failure to do so. The only portion of the error that could have had any effect on the jury was the trial court's failure to ask whether the members accepted the principles that defendant was presumed innocent and that the State bore the burden of proving defendant guilty beyond a reasonable doubt. Even if the evidence was closely balanced, as defendant contends, we do not believe that the trial court's failure to specifically question the jury about its acceptance of the principles would have altered the jury's verdict.

Second, defendant contends that the error was so serious that it denied him his substantial right to a fair and impartial jury. Defendant has not, however, presented any evidence that the jury was biased. As defendant bears the burden of persuasion under the plain-error doctrine, his failure to present any evidence of a biased jury prevents the second prong of the plain-error doctrine from serving as a basis for excusing defendant's forfeiture of this issue. *Thompson*, slip op. at 13 (where the defendant failed to present any evidence of a biased jury, he failed to meet his burden under the second prong of the plain-error doctrine, and the court would not review the error). As our supreme court recently stated, “[w]e cannot presume the jury was biased simply because the trial court erred in conducting the Rule 431(b) questioning.” *Thompson*, slip op. at 12.

CONCLUSION

For the reasons stated, the judgment of the circuit court of Kane County is affirmed.

Affirmed.