

2011 IL App (2d) 091316-U
No. 2-09-1316
Order filed September 8, 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)	Appeal from the Circuit Court
OF ILLINOIS,)	of Du Page County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 08-CF-3154
)	
JAMES D. CALIENDO,)	Honorable
)	Blanche Hill Fawell,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Bowman and Zenoff concurred in the judgment.

ORDER

Held: The trial court erred when it failed to question the potential jurors on their understanding of Rule 431(b) principles, and the error was reversible under the plain-error rule because the evidence presented a credibility contest and thus was closely balanced such that the error might have affected the outcome. We reversed and remanded for a new trial.

¶ 1 Following a jury trial, defendant, James D. Caliendo, was convicted of residential burglary (720 ILCS 5/19-3 (West 2008)) and was sentenced to 12 years' imprisonment. On appeal, defendant contends that the trial court failed to comply with Illinois Supreme Court Rule 431(b) (eff. May 1, 2007) during *voir dire*. For the reasons that follow, we reverse and remand the matter for a new trial.

¶ 2

BACKGROUND

¶ 3 Defendant was charged with one count of residential burglary. The State's case against defendant primarily consisted of the testimony of Michael Grove, Dorothy Divito, and Victor Howerton. Grove testified that he drove defendant to Howerton's house (the house defendant was alleged to have burglarized) and that he heard defendant discussing his commission of the burglary. Divito (Howerton's neighbor) and Howerton both identified defendant as the person they encountered burglarizing Howerton's home. On defendant's behalf, defendant's parents testified that defendant was at his mother's house when Howerton's house was burglarized. A jury found defendant guilty, and the trial court sentenced him to 12 years' imprisonment. Defendant now appeals.

¶ 4

ANALYSIS

¶ 5 On appeal, defendant contends that the trial court erred when it failed to ask each of the potential jurors whether they both understood and accepted three of the four Rule 431(b) principles. 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)).

¶ 6 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).

¶ 7 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).

¶ 8 During *voir dire*, the trial court asked the members of the venire, as a group, the following questions:

“Is there anyone here who does not accept the principle that the defendant is presumed innocent throughout the entire case?”

Is there anyone who does not accept the principle that the State has the burden of proof of guilt beyond a reasonable doubt?

Is there anyone who does not accept the principle that no inference of guilt arises, should the defendant not testify or offer any evidence?”

None of the potential jurors indicated that they did not accept any of the principles. During individual questioning of the potential jurors, the trial court asked five of the six potential jurors whether they understood that the State bore the burden of proving defendant guilty beyond a reasonable doubt, but did not ask about the potential jurors' understanding of the other three principles.

¶9 Defendant contends that the trial court's failure to question the potential jurors regarding their understanding of subsections (1), (3), and (4) of Rule 431(b) constituted error. We agree.

¶10 In *People v. Thompson*, 238 Ill. 2d 598, 607 (2010), our supreme court held that a trial court erred when it asked potential jurors whether they understood one of the principles but did not ask whether they accepted it. In so holding, the supreme court stated that Rule 431(b) "requires questioning on whether the potential jurors *both understand and accept* each of the enumerated principles." (Emphasis added.) *Thompson*, 238 Ill. 2d at 607. Shortly thereafter, in *People v. Rogers*, 408 Ill. App. 3d 873, 876-77 (2011), we held that the trial court erred when it did not question any of the potential jurors regarding their understanding of any of the Rule 431(b) principles, instead asking only if they had any "quarrel or disagreement" with three of the four principles. Accordingly, under *Thompson* and *Rogers*, the trial court's failure to question the potential jurors in this case regarding their understanding of the principles constituted error.

¶11 Having concluded that error occurred, we must now determine whether that error is reversible under the plain-error doctrine. Defendant contends that the trial court's violation of Rule 431(b) constituted reversible error because the evidence presented at trial was closely balanced. We agree.

¶12 Although the testimony of three of the State's witnesses placed defendant at the scene of the crime, all three of those witnesses suffered from credibility issues. Grove was a felon, having been

convicted of residential burglary and aggravated battery of a police officer. Divito's testimony regarding where defendant was when she and Howerton observed him was contradicted by Howerton's testimony. In addition, photographs of the scene contradict Divito's testimony about where defendant dropped the stolen items. Howerton's identification of defendant was marred by the fact that, although he testified that he knew defendant and recognized defendant when he observed defendant exiting his house, he did not identify defendant to police as the offender and even told police that he was unable to identify the person he saw because he did not get a good look. In contrast to the testimony of the State's witnesses, the testimony of defendant's alibi witnesses—his parents—although obviously biased, was uncontroverted. The State did not present any physical evidence of defendant's guilt. Given that the question of defendant's guilt turned solely on a credibility determination and that all of the witnesses had serious credibility issues, we conclude that the evidence was closely balanced and that defendant is entitled to a new trial. See *People v. Naylor*, 229 Ill. 2d 584, 607-08 (2008) (where the evidence boiled down to a credibility contest between two different versions of events, the evidence was closely balanced and the defendant was entitled to a new trial).

¶ 13

CONCLUSION

¶ 14 For the reasons stated, the judgment of the circuit court of Du Page County is reversed and the matter is remanded for a new trial.

¶ 15 Reversed and remanded.