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IL App (3d) 090904-U

Order filed December 15, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-09-0904
ANTONIO D. ANDERSON,	)	Circuit No. 08-CF-1120
Defendant-Appellant.	)	Honorable James E. Shadid, Judge, Presiding.

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JUSTICE SCHMIDT delivered the judgment of the court.  
Justice Lytton concurred in the judgment.  
Justice Holdridge dissented in the judgment.

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**ORDER**

¶ 1 *Held:* The trial court did not err: (1) when admonishing prospective jurors; (2) in refusing to define reasonable doubt; (3) when admitting evidence of the victim's physical condition; or (4) in sentencing defendant.

¶ 2 The State charged defendant, Antonio Durrell Anderson, with committing the offenses of home invasion (720 ILCS 5/12-11(a)(5) (West 2008)) and aggravated battery with a firearm. 720 ILCS 5/12-4.2(a)(1) (West 2008). The case proceeded to a jury trial resulting in convictions on both charges. The circuit court of Peoria County sentenced defendant to consecutive terms of 55 years' incarceration for the home invasion conviction and 45 years' incarceration for the armed robbery conviction. Defendant filed a posttrial motion which the trial court denied. Defendant also filed a motion to reduce sentence which the court granted in part and denied in part. On appeal, defendant claims the trial court committed reversible error, entitling him to a new trial by: (1) failing to comply with Illinois Supreme Court Rule 431(b) (eff. May 1, 2007); (2) failing to answer the jury's request to define reasonable doubt; and (3) allowing the State to admit irrelevant and prejudicial evidence. Defendant also claims the trial court improperly considered a factor when sentencing him to the maximum allowable term of incarceration for home invasion.

¶ 3 **FACTS**

¶ 4 The State accused defendant of entering the dwelling of Joseph Pocius, while having reason to know persons were present and while being armed with a handgun, and personally discharging the gun causing great bodily harm to Joseph. Evidence adduced at trial indicated the dwelling, located on Starr Street in Peoria, was the residence of Joseph and Angela Pocius.

¶ 5 Angela testified that she was sleeping or near sleep in her bedroom at approximately 10:30 p.m. when she heard a knock at her front door. She inquired as to who was knocking at

the door and heard men respond, "police." When she opened the door, three masked men entered. One told Angela to put her head down and not look at him then pointed a gun at her. The man told her he wanted money and drugs. She responded that there were no money or drugs in the residence.

¶ 6 Angela testified that the residence had no porch light. She gave conflicting testimony regarding lighting in the house, once indicating no lights were on inside the house when she opened the door, but later testifying that the kitchen lights were on.

¶ 7 Angela stated that the three men took her to the basement of the residence where Tina and Lanny Irons were living. One of the men asked Lanny where the drugs and money were. The man repeatedly hit Lanny with the barrel of a gun while the other two rifled through the drawers of the basement. One man again told Angela to keep her face down. The man who first pointed a gun at her told her to go back upstairs with him.

¶ 8 Angela noted that when she went upstairs with the man, he was behind her. The two reached Joe's bedroom and the man told her to sit at the edge of the bed. No lights were on. She tried to wake Joe who was sleeping. The armed man then yelled, "You better wake up motherfucker or I'm going to shoot you." Joe jumped up, pushed the man and told him to get out of the house. The man then hit Joe in the face with the butt of the gun. The man then shot Joe once near the temple as Joe was falling toward the floor. Angela had a good look at the gunman at that time as nothing obstructed her view.

¶ 9 Angela noted that after the shot was fired, she heard the two other men run out of the

house. The man with the gun also started to leave but returned and said, "Now bitch, where's the money?" She went to a drawer containing a box of at least \$850 cash which she and Joe were saving to buy Christmas presents. The man left and she called 911.

¶ 10 Angela stated that she did not know the men who entered the residence. The police did not apprehend anyone at the scene nor did they find any fingerprints.

¶ 11 Angela noted that two days later, she viewed a lineup in which she failed to identify anyone associated with the crime. Defendant was not included in that lineup. The following day, Angela viewed another lineup and positively identified defendant as the shooter, based on both her observation of defendant and hearing him repeat some of the lines used during the home invasion.

¶ 12 Tina and Lanny Irons testified consistently with Angela's account of what happened in the house. They did not go upstairs until they heard Angela yell that Joe had been shot and the intruders left the residence.

¶ 13 Bobby Short and Terrance Bassett also testified in the State's case-in-chief. Short stated he was involved in the planning of the incident but did not go to the house. He previously purchased marijuana from Angela's son, Andy. He called Andy a few days prior to the offense to arrange a purchase of one-half pound of cannabis. The plan called for defendant, Bassett and Short to rob Andy of the cannabis.

¶ 14 Short noted that in preparation for the crime, he drove defendant by the house on Starr Street. Bassett was to bring a weapon to the robbery. Bassett and defendant were to go to and

from the robbery in an automobile owned by defendant's girlfriend.

¶ 15 Short reiterated that he did not go to the robbery and did not get a cut of the proceeds. He was in the first lineup viewed by Angela. For his part in planning the robbery, Short pled guilty to residential burglary in return for dismissal of the armed robbery charge.

¶ 16 Terrance Bassett testified that in exchange for his testimony, the State agreed to dismiss the home invasion charge against him and recommend a 15-year sentence of incarceration. Bassett claimed that he, the defendant and Anthony Taliaferro drove to the Starr Street residence in defendant's girlfriend's white four-door vehicle. Defendant gave him a white mask to put on, they knocked on the door, a woman asked who was at the door and they responded, "It's the police department." When the woman opened the door, the three men entered and went down to the basement.

¶ 17 Bassett continued his testimony, noting that the three found a couple in bed in the basement. He punched the man in the head, then he and Taliaferro started searching the room for drugs. Defendant left the basement and went back upstairs. Bassett heard a pop and told Taliaferro it was time to leave. As they were running from the house, defendant said, "Don't tell anybody. I just shot - - I just shot the owner of the house in the head." The three men then went to the Village Green apartment complex.

¶ 18 The State also produced three witnesses from the Village Green apartments: Claudin, Balton and McKinney. Balton testified that defendant arrived around 11 p.m. McKinney testified that defendant arrived around 10:30 p.m. and Claudin had no idea what time defendant

arrived on the night of the robbery. All three testified that defendant had a stack of money when he showed up.

¶ 19 Balton noted that defendant asked her for bleach to wash his hands after arriving at the apartment complex and that Taliaferro threw defendant's shoes in the garbage that night. Balton and McKinney stated that defendant played cards with them, then left the apartments after "a little while."

¶ 20 Claudin stated that defendant left the apartment after receiving a call from a person Claudin believed to be defendant's girlfriend. Claudin estimated defendant spent "thirty to forty-five minutes" at the apartment complex before leaving.

¶ 21 The State also called various police officers to testify at trial. The officers' testimony indicated that at 10:43 p.m., a call was dispatched regarding a home invasion and shooting on Starr Street. The police interviewed people at the scene including Angela's son, Andy. Andy told police that Bobby Short, whom he knew as "B," had been contacting Andy regarding a drug transaction. He gave the police Short's name as he had not dealt drugs to Short in almost a year, yet, Short recently began calling Andy to set up a drug deal. The police arrested Short within two days of the offense on a different matter. The police arrested defendant based on information acquired during interviews with Short.

¶ 22 Defendant presented an alibi defense. Jennifer Johnston testified that at the time of the home invasion, she was defendant's girlfriend. She noted she checked out of work at 11:15 p.m. on the night in question, and defendant was waiting to pick her up when she checked out. The

parties stipulated that the manager of her workplace would testify that time records indicate she checked out at 11:15 p.m. Defendant put forth evidence indicating it takes 23 to 24 minutes to drive from the Starr Street residence to Village Green apartments to Johnston's place of employment.

¶ 23 Approximately 48 minutes after the jury began deliberating, they sent a note with the following six questions: "What time did the 911 call come into the call center?"; "Can we get a floor plan of the entire house?"; "Where did Angela get money from, which room?"; "Was there more than one box?"; "Where was the light in relation to the shooting?"; and "What happened to the gun?". After receiving these questions and consulting with the parties, the court informed the jurors that they "must decide the case based upon the instructions you have received and the evidence you have heard."

¶ 24 Shortly thereafter, the jury sent another note asking for "a copy of the transcript of what we heard at trial." The court informed them that "preparation of a transcript is not possible. You must rely on your collective memories."

¶ 25 The jury sent one more note out on the first day of deliberations which asked if they could go home for the day and return at 9 a.m. the next day. This last note also asked, "Can someone give jurors a definition of reasonable doubt?" After reading that question, the following discussion took place between the court and the parties:

"THE COURT: Well, there is no definition of reasonable doubt. Again, they've received all of the instructions they're going

to receive. So should I simply say there is no definition of reasonable doubt?

THE STATE: Yeah.

DEFENSE COUNSEL: Yeah, if that's the standard response, because I know we get this question fairly often."

¶ 26 The court then called the jurors into the court room, instructed them to refrain from trying to find the answers to their questions by conducting their own investigation and reminded them that they were sworn to "apply the law as I gave it to you to the facts that you heard in this courtroom." The next day, the jury found defendant guilty of home invasion and armed robbery for which the trial court sentenced him to 55 years' incarceration and 45 years' incarceration, respectively. Defendant filed a posttrial motion attacking his convictions and motion to reduce sentence, both of which the trial court denied. This direct appeal followed.

¶ 27

#### ANALYSIS

¶ 28 Defendant raises four issues on appeal. Initially, defendant claims the trial court violated Illinois Supreme Court Rule 431(b) (eff. May 1, 2007) by failing to ask the jurors whether it understood the principles announced therein. Defendant further asserts that the trial court denied him a fair trial when refusing to answer the jury's question seeking a definition of reasonable doubt. Defendant also claims that the trial court allowed irrelevant and impermissibly prejudicial testimony concerning the victim's physical and mental state into evidence. Finally, defendant claims the trial court considered an improper sentencing factor when sentencing him

to the maximum allowable term and, as such, his sentence should be vacated and the cause remanded for a new sentencing hearing.

¶ 29 A. Rule 431

¶ 30 Rule 431(b) states:

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

¶ 31 Defendant’s claim of error calls upon us to interpret Rule 431(b). “The proper interpretation of our supreme court rules is reviewed de novo.” *People v. Thompson*, 238 Ill. 2d 598, 605 (2010).

¶ 32 The State claims defendant has forfeited this issue. To preserve a claim for review, a defendant must both object at trial and include the alleged error in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defendant acknowledges that he neither

contemporaneously objected to the alleged error nor included the matter in his posttrial motion.

As such, it is clear defendant has forfeited this issue for review.

¶ 33 Nevertheless, defendant asks us to review the matter under the first prong of the plain-error doctrine, claiming “the evidence here was, in fact, closely balanced.” The plain-error doctrine does not instruct a reviewing court to consider all forfeited errors. *People v. Herron*, 215 Ill. 2d 167, 177 (2005). A reviewing court may consider forfeited errors under the doctrine where 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 where the error is so serious that the defendant was denied a substantial right, and thus a fair trial. *Id.* at 179. The burden of persuasion remains with the defendant in both instances. *Id.* at 187.

¶ 34 The first step in any plain-error analysis is to determine whether error occurred at all. *People v. Piatkowski*, 225 Ill. 2d 551 (2007).

¶ 35 In *Thompson*, our supreme court noted that Rule 431(b) “mandates a specific question and response process. The trial court must ask each potential juror whether he or she understands and accepts each of the principles in the rule. The questioning may be performed either individually or in a group, but the rule requires an opportunity for a response from each prospective juror on their understanding and acceptance of those principles.” *Thompson*, 238 Ill. 2d at 607.

¶ 36 Defendant and the State agree that the record reflects that the trial court not only informed all jurors of the Rule 431 principles but also asked every juror if they accepted the

principles. The State and defendant also agree that each juror was given an opportunity to respond and, in fact, did respond that they accepted the four principles. The State and defendant part ways in their analysis of Rule 431's application in this case due to the trial court's failure to ask each juror if they "understand" the four principles.

¶ 37 Defendant notes that Rule 431(b) unequivocally states that the trial court must inquire as to whether a juror "understands and accepts" the four principles and that the *Thompson* court reiterated that mandate. As the record is clear that the trial court failed to ask the jurors if they "understood" the principles, defendant maintains he has shown the court erred by failing to adhere to Rule 431(b). The State claims one cannot accept a principle they do not understand. As such, the State maintains that the trial court complied with the rule by asking the jurors if they accepted the principles and receiving affirmative responses from all.

¶ 38 We agree with defendant. The words chosen by our supreme court when adopting Rule 431 and in *Thompson* could not be more clear. To comply with the rule, a trial court must ask jurors if they both understand and accept the four principles of law set forth in the rule. We find the trial court erred in failing to do so.

¶ 39 However, defendant has failed to satisfy his burden of showing the error amounted to plain error. Again, defendant claims he is entitled to plain-error review under the first prong of the plain-error doctrine, that being where the evidence is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence. *Herron*, 215 Ill. 2d at 177. Despite defendant's protestations to the contrary, this is not a closely balanced case.

¶ 40 Angela Pocius identified defendant as the intruder who shot her husband. She had a good look at defendant while in her bedroom with nothing obstructing her view. Defendant's coconspirators, Bobby Short and Terrance Bassett each testified regarding defendant's involvement. Bassett stated that defendant admitted while running from the victims' residence that he had shot the owner of the house. Witnesses from the Village Green apartments testified as to the stack of money defendant had upon arrival and to the actions of disposing of shoes. Defendant also requested bleach upon arrival at the apartments. When defendant received a phone call from his girlfriend, he went to pick her up from work.

¶ 41 The fact that two of the State's witnesses were accomplices does not render the evidence in this matter closely balanced. Moreover, the instant case is unlike *People v. Newell*, 103 Ill. 2d 465 (1984), cited by defendant. In *Newell*, the only evidence in the case came from the three accomplices and was contradictory with no corroboration. *Id.* Here, defendant's accomplices' testimony is corroborated in nearly every detail by the victims in the case as well as the residents of the Village Green apartments.

¶ 42 Defendant has failed to show that the evidence in this matter was closely balanced or, correspondingly, that he suffered any prejudice from the trial court's error of failing to ask the jurors if they understood the Rule 431 principles. As such, we must honor his procedural default.

¶ 43 B. Definition of Reasonable Doubt

¶ 44 Defendant asserts that the trial court denied him a fair trial by refusing to answer the

jury's request to define reasonable doubt. Defendant acknowledges he has failed to preserve this issue for review. His counsel not only failed to object to the trial court's decision not to provide the jury with such a definition but affirmatively agreed with the decision. Again, defendant asks that we review the matter for plain error. Defendant also claims his trial counsel was constitutionally ineffective for failing to properly preserve the issue for review.

¶ 45 To establish ineffective assistance of counsel, a defendant must show both a deficiency in counsel's performance and prejudice resulting from the deficiency. *Strickland v. Washington*, 466 U.S. 668 (1984). In order to satisfy the deficient-performance prong of *Strickland*, a defendant must show that his "counsel's performance was so deficient, that counsel was not functioning as the 'counsel' guaranteed by the sixth amendment. Counsel's performance is measured by an objective standard of competence under prevailing professional norms." *People v. Evans*, 186 Ill. 2d 83, 93 (1999); *People v. Griffin*, 178 Ill. 2d 65 (1997). A lawyer's conduct will not be deemed deficient for failure to make an argument that has no basis in the law. *People v. Bailey*, 232 Ill. 2d 285, 300 (2009).

¶ 46 Defendant acknowledges the long standing directive from our supreme court forbidding a trial court or trial counsel from defining reasonable doubt for a jury. *People v. Speight*, 153 Ill. 2d 365 (1992); *People v. Cagle*, 41 Ill. 2d 528 (1969); *People v. Malmenato*, 14 Ill. 2d 52 (1958); *People v. Moses*, 288 Ill. 281 (1919). "The law in Illinois is clear that neither the court nor counsel should attempt to define the reasonable doubt standard for the jury." *Speight*, 153 Ill. 2d at 374. Despite acknowledging this principle, defendant argues counsel's advocacy was

constitutionally deficient for failing to demand the trial court define reasonable doubt for the jury. Defendant claims that “Illinois courts have been clear, on the other hand, that when the jury poses an explicit question or requests clarification on a point of law, the trial court has a duty to respond and provide instruction. See *People v. Childs*, 159 Ill. 2d 217 (1994).”

Defendant further claims that Illinois law should be reconsidered in light of the United States Supreme Court decisions of *Victor v. Nebraska*, 511 U.S. 1 (1994) and *Sullivan v. Louisiana*, 508 U.S. 275 (1993). Both of these arguments have been soundly rejected by the courts of this state and, as such, we find defense counsel was not deficient for failing to raise them. Therefore, we hold defendant has not made a colorable ineffective assistance claim.

¶ 47 In *People v. Failor*, 271 Ill. App. 3d 968 (1995), Justice Steigmann addressed defendant's argument that "Illinois courts should reassess their position on defining reasonable doubt in light of" *Sullivan* and *Victor*. *Failor*, 271 Ill. App. 3d at 970-71. After citing the longstanding prohibition in Illinois against defining reasonable doubt, he noted that "neither of these cases holds that a trial court must define reasonable doubt upon request by the jury. They simply stand for the proposition that the Federal constitution does not prohibit a trial court from defining reasonable doubt. \*\*\* The law in Illinois on this subject is clear, and we decline defendant's invitation to disregard it. We also express serious doubt that the Supreme Court of Illinois would overrule its well-established – and sound– precedent." *Id.* at 971. We agree.

¶ 48 Furthermore, in *People v. Vasquez*, 368 Ill. App. 3d 241 (2006), the court soundly rejected defendant's argument that *Childs* somehow changes the prohibition of defining

reasonable doubt just because a jury requests a definition. "Although we concur with the *Childs* decision, we do not agree with defendant's claim that the jury's right to have its questions answered trumps the long-standing position in Illinois [not] to define reasonable doubt." *Vasquez*, 368 Ill. App. 3d at 254.

¶ 49 We hold that trial counsel was not constitutionally ineffective for agreeing with the trial court's decision refusing to define reasonable doubt for the jury. Similarly, we find the trial court did not commit plain error by refusing to define reasonable doubt for the jury. Again, the first step in any plain-error analysis is to determine whether error occurred at all. *People v. Piatkowski*, 225 Ill. 2d 551 (2007). The authorities cited above clearly establish no error resulted from the trial court's refusal to define reasonable doubt.

¶ 50 C. Evidentiary Claims

¶ 51 Defendant asserts that the trial court erred in allowing the State to introduce evidence regarding Joseph Pocius' current physical condition of paralysis and the extent of his injuries. Again, defendant acknowledges that he failed to properly preserve this issue for review as he did not raise it in his posttrial motion. Nevertheless, defendant requests that we find his counsel was constitutionally ineffective for failing to raise the issue and, therefore, requests we grant him a new trial or, in the alternative, review the matter for plain error.

¶ 52 Defendant bases his request to review the matter for plain error on the first prong of the plain-error doctrine. That is, defendant again claims the evidence in this matter was closely balanced that jury's verdict may have resulted from the alleged improper admission of testimony

detailing the extent of Joseph's injuries and resulting paralysis. As noted in section A of this order (slip op. at 11-12), defendant has failed to meet his burden showing the evidence in this case was closely balanced. The evidence of defendant's guilt is overwhelming and, as such, we will not review this matter under the first prong of the plain-error doctrine. *Herron*, 215 Ill. 2d at 177.

¶ 53 Moreover, we find defendant has not established a colorable ineffective assistance of counsel claim entitling him to relief on this issue. Defendant acknowledges his trial counsel sought to exclude the evidence at trial, but identifies counsel's "deficiency" as failing to include the issue in his posttrial motion and, therefore, forfeiting it.

¶ 54 Again, a lawyer's conduct will not be deemed deficient for failure to make an argument that has no basis in the law. *Bailey*, 232 Ill. 2d at 300. We find any potential argument defense counsel could have made suggesting evidence of the victim's current state of paralysis was inadmissible would have been without merit.

¶ 55 The State introduced testimony from a physician indicating that, at the time of trial, defendant "still had no sensation on his left side from head to waist and slight sensation in his left leg. The damage to his higher cognitive functioning, memory deficits and effects on his personality are not expected to improve." The State also elicited testimony from Mrs. Pocius that her husband now resided in a nursing home. Defendant argues that since these matters have "absolutely no relevance to the charges brought by the State," his counsel was ineffective for failing to argue in his posttrial motion that they were inadmissible. We disagree.

¶ 56 The State charged defendant with knowingly and without authority entering the Pocius dwelling while having reason to know persons were present "while armed with a dangerous weapon being a handgun and personally discharged said gun causing great bodily harm to Joseph Pocius \*\*\*." To prove defendant guilty of home invasion, the State had the burden of proving Joseph suffered great bodily harm. 720 ILCSS 5/12-11(a)(5) (West 2008). Clearly, the victim's physical state, both at the time of the event and thereafter, were relevant to an element of the State's case. Evidence "of what injury the victim actually received, the evidence of the nature of the extent of the victim's injury, and evidence of the treatment required" must be considered when "determining the question of whether great bodily harm has been proved beyond a reasonable doubt." *In re J.A.*, 336 Ill. App. 3d 814, 818 (2003). While defendant posits that the "constant reminders" of Joseph's physical condition rendered the evidence more prejudicial than probative, he admittedly points to only "two occasions" in the record in which the State discussed Joseph's current medical condition. Our review of the record indicates that the discussion of defendant's physical condition at trial did not render the clearly relevant and admissible evidence more prejudicial than probative. Any suggestion to the contrary has no merit and, as such, defense counsel was not constitutionally ineffective for failing to argue to the contrary in a posttrial motion.

¶ 57

#### D. Sentencing

¶ 58 Defendant's final claim on appeal is that the trial court improperly considered a factor inherent in the offense when sentencing him to the maximum 30-year term of imprisonment for

home invasion. Specifically, defendant notes that the statute under which the State charged and convicted him for home invasion reads that one who "personally discharges a firearm that proximately causes great bodily harm, permanent disability, permanent disfigurement, or death to another person within such dwelling place" is guilty of home invasion. 720 ILCS 5/12-11(a)(5) (West 2008). Defendant argues that when fashioning his sentence for home invasion, the trial court "expressly relied upon the aggravating factor of 'serious harm' in sentencing" him to the maximum, nonextended term of 30 years' imprisonment. This, defendant claims, amounted to an impermissible double enhancement.

¶ 59 Defendant acknowledges he failed to preserve this issue for review by not raising it in his postsentencing motion. Normally, a "sentencing issue is forfeited on appeal where defendant failed to object during the sentencing hearing and failed to raise the issue in a postsentencing motion." *People v. McNulty*, 383 Ill. App. 3d 553, 556 (2008) (citing *People v. Casillas*, 195 Ill. 2d 461 (2000)). However, the State does not argue to this court that defendant forfeited this argument. "The rules of waiver are applicable to the State as well as the defendant in criminal proceedings \*\*\*. [I]n order to obtain review of an argument that a defendant waived an issue for review, the State must raise this argument in its appellee's brief." *People v. Williams*, 193 Ill. 2d 309, 348 (2000). We cannot raise the issue for the State.

¶ 60 The fact that defendant discharged a firearm which caused great bodily harm during this home invasion in violation of section 12-11(a)(5) of the Criminal Code of 1961 (the Code) (720 ILCS 5/12-11(a)(5) (West 2008) triggered a mandatory additional 25 years' incarceration.

Section 12-11(c) of the Code states, "A violation of subsection (a)(5) is a Class X felony for which 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court." 720 ILCS 5/12-11(c) (West 2008).

¶ 61 Section 5-4.5-25 of the Unified Code of Corrections (Unified Code) indicates the sentencing range for a Class X felony is "not less than 6 years and not more than 30 years." 730 ILCS 5/5-4.5-25 (West 2008). The trial court sentenced defendant to 55 years' imprisonment for the home invasion evincing an intent to give defendant the maximum 30-year term under section 5-4.5-25 of the Unified Code and minimum additional 25 years pursuant to section 12-11(c) of the Code.

¶ 62 When announcing his sentence, the trial court discussed the statutory factors (see 730 ILCS 5/5-4-1(a)(1) through (a)(6) (West 2008)) considered in fashioning it. The court noted that "statutory factors in aggravation are that the defendant's conduct did cause or threaten serious harm, the defendant does have a history of prior criminal activity, [and] a sentence is necessary and mandated actually to deter others from committing the same crime." We disagree with defendant's assertion that the trial court's discussion of the aggravating factor of "serious harm" equated to improper consideration of an aggravating factor inherent in the offense.

¶ 63 Citing to *People v. Conover*, 84 Ill. 2d 400 (1981), defendant correctly notes that a trial court abuses its discretion in fashioning a sentence when it considers factors inherent in the offense itself as aggravating factors. *Id.* at 405. In *People v. Saldivar*, 113 Ill. 2d 256 (1986), our supreme court clarified its holding in *Conover*.

"Although *Conover* stands for the proposition on which the defendant relies, this court did not intend a rigid application of the rule, thereby restricting the function of a sentencing judge by forcing him to ignore factors relevant to the imposition of sentence. \*\*\*

[T]he commission of any offense, regardless of whether the offense itself deals with harm, can have varying degrees of harm or threatened harm. The legislature clearly and unequivocally intended that this varying quantum of harm may constitute an aggravating factor. While the classification of a crime determines the sentencing range, the severity of the sentence depends upon the *degree of harm* caused to the victim and as such may be considered as an aggravating factor in determining the exact length of a particular sentence, *even in cases where serious bodily harm is arguably implicit in the offense for which a defendant is convicted.*" (Emphasis in original.) *Saldivar*, 113 Ill. 2d at 268-69.

¶ 64 *Saldivar* involved a defendant convicted for voluntary manslaughter. *Id.* He argued that applying the statutory aggravating factor of serious harm was impermissible as every manslaughter involves death which, obviously, is serious harm. The *Saldivar* court disagreed

stating, "[W]e hold that in sentencing a defendant on a conviction for voluntary manslaughter it is permissible for the trial court, in applying the statutory aggravating factor that the defendant's conduct caused serious harm to the victim, to consider the force employed and the physical manner in which the victim's death was brought about." *Id.* at 271. The *Saldivar* court went on, however, to reverse defendant's conviction on the issue finding that the trial judge did not consider the manner in which defendant caused the victim's death, but "Rather, the record demonstrates that the circuit court focused primarily on the end result of the defendant's conduct, *i.e.*, the death of the victim." *Id.* at 272.

¶ 65 The defendant herein makes the same argument, that the trial judge focused exclusively on the fact that "great bodily harm" or "serious injury" resulted from defendant's conduct. The record belies defendant's argument.

¶ 66 In announcing its ruling and the fact that it considered "serious harm" as an aggravating factor, the trial judge elaborated on the manner in which defendant brought about the serious harm. The judge discussed "the blood coming from above the right eye" of the victim, Mrs. Pocious's testimony regarding "the way that Mr. Anderson and his friends came" into the house, and their actions once inside. The court even discussed possible alternative methods of causing harm, other than shooting the victim, that defendant could have engaged in such as "knocking [him] down" then stated that, "You decided to do it this way, and because you decided to do it this way with your prior record and as thought out as this was and the comments that I've referred to, clearly, a sentence more than the minimum is necessary."

¶ 67 Clearly, the court considered more than the end result of serious harm to Mr. Pocious when fashioning this sentence. The court considered the degree of harm caused and the manner in which it was caused. Such a consideration is not only permissible (*Saldivar*, 113 Ill. 2d at 268-69.), but statutorily mandated. 730 ILCS 5/5-4-1(a)(4) (West 2008). The fact that the court used the term "serious harm" does not signify to us that it abused its discretion by improperly considering an element of the offense as an aggravating factor.

¶ 68 CONCLUSION

¶ 69 For the foregoing reasons, the judgment of the circuit court of Peoria County is affirmed.

¶ 70 Affirmed.

¶ 71 JUSTICE HOLDRIDGE, dissenting:

¶ 72 I respectfully dissent. In my view, the trial court erred when it refused to define reasonable doubt in response to the jury's request. When jurors raise questions or ask for clarification on points of law during their deliberations, they are generally entitled to have their questions answered. *People v. Childs*, 159 Ill. 2d 217, 228 (1994); see also *People v. Averett*, 237 Ill.2d 1, 24 (2010); *People v. Millsap*, 189 Ill. 2d 155, 160 (2000). This is true even if the jury was properly instructed originally. *Childs*, 159 Ill. 2d at 228; see also *People v. Reid*, 136 Ill. 2d 27, 39 (1990). Although a trial court may decline to answer a question from the jury under "appropriate circumstances"— such as when the initial jury instructions are "readily understandable and sufficiently explain the relevant law" or when "additional instructions would serve no useful purpose or may potentially mislead the jury," (*Averett*, 237 Ill. 2d at 24), such circumstances were

not present in this case. Here, the jury's request for a definition of reasonable doubt indicated that the jury was confused and that the initial jury instructions did not sufficiently explain the concept of reasonable doubt. Once the jury informed the trial court that it was confused and asked for clarification, the court was obligated to clarify the concept of reasonable doubt for the jury.

¶ 73 Contrary to the majority's opinion, binding precedent does not compel a different conclusion. As the majority correctly notes, our supreme court has held that "neither the court nor counsel should attempt to define the reasonable doubt standard for the jury." *Supra*, ¶ 46 (quoting *People v. Speight*, 153 Ill. 2d 365 (1992)). Applying this principle, other districts of our appellate court have held that the jury's right to have its questions answered does not include the right to receive a definition of reasonable doubt. See *People v. Vasquez*, 368 Ill. App. 3d 241, 252-55 (2006); *People v. Tokich*, 314 Ill. App. 3d 1070, 1074-75 (2000); *People v. Failor*, 271 Ill. App. 3d 968, 970-71 (1995). I disagree. Although our supreme court has repeatedly held that a trial court should not attempt to define reasonable doubt in the initial jury instructions (see, e.g., *People v. Cagle*, 41 Ill. 2d 528, 536-37 (1969)), it has never held or implied that the trial court should not define reasonable doubt when the jury specifically requests such a definition or expresses confusion regarding the meaning of the concept of reasonable doubt. In fact, other supreme court decisions suggest just the opposite, *i.e.*, that a trial court is required to provide additional clarification under such circumstances. See, e.g., *Childs*, 159 Ill. 2d at 228-29 (holding that the trial court erred by not providing a proper response where a note from the jury during deliberations established that the jury was "confused and in need of the court's guidance on a matter of law").

¶ 74 Moreover, because the jury cannot understand the State's burden of proof without

understanding the meaning of reasonable doubt, any uncertainty about the jury's understanding of that fundamental concept raises serious questions about the fairness of the defendant's trial.

Accordingly, I would hold that the trial court's failure to clarify the meaning of reasonable doubt in response to the jury's question was a "structural" error that is reversible under the plain error doctrine regardless of the closeness of the evidence. See generally *People v. Thompson*, 238 Ill. 2d 598, 413 (2010); *Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993) (holding that a defective reasonable doubt instruction was structural error). In addition, the defendant's counsel's acquiescence in the trial court's failure to provide such clarification was, in my view, ineffective assistance of counsel.

¶ 75 One additional point bears mentioning. I agree with the majority's conclusion that the trial court's failure to ask each of the jurors whether he or she understood the principles of law set forth in Supreme Court Rule 431(b) was not reversible error under the plain error doctrine because the evidence was not closely balanced. However, I take issue with the analysis that the majority applies in deciding this issue. The first step in a plain error analysis is to determine whether a "plain error" occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 564-65 (2007). The word "plain" here "is synonymous with 'clear' and is the equivalent of 'obvious.'" *Id.* at 565 n.2 (2007).

¶ 76 If the reviewing court determines that the trial court committed a clear or obvious (or "plain") error, it proceeds to the second step in the analysis, which is to determine whether the error is reversible. Our supreme court has made it clear that plain errors are reversible only when: (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) the 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.” *Piatkowski*, 225 Ill. 2d at 565; *People v. Herron*, 215 Ill. 2d 167, 179 (2005).

¶ 77 Although the majority generally applies this analysis correctly, at times it appears to conflate “plain error” with reversible error. See *supra*, ¶¶ 38-39. Specifically, even though it determines that the trial court “erred” by failing to ask the jurors whether they both understood and accepted the Rule 431(b) principles, the majority concludes that the defendant “has failed to satisfy his burden of showing that this error amounted to plain error.” *Id.* The majority should have said, rather, that although plain error occurred in this case, it is not *reversible* because it does not fall within either of the two categories of reversible error discussed above.

¶ 78 Our court of appeals has repeatedly made the same mistake that the majority makes here. See, *e.g.*, *People v. Haynes*, 399 Ill. App. 3d 903, 914 (2010). Even our supreme court has made this mistake. See, *e.g.*, *People v. Bean*, 137 Ill. 2d 65, 80 (1990). These instances muddle what I believe to be the proper analysis under the plain error doctrine. Accordingly, I urge our courts of review to exercise greater analytical clarity in our future plain error decisions.