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2011 IL App (3d) 090572-UB

Order filed July 28, 2011
Modified Upon Denial of Rehearing November 15, 2011

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 9th Judicial Circuit,
Plaintiff-Appellee,)	Knox County, Illinois,
)	
v.)	Appeal No. 3-09-0572
)	Circuit No. 08-CF-437
MARLON BROWN,)	
)	Honorable
Defendant-Appellant.)	Stephen C. Mathers,
)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Presiding Justice Carter and Justice Holdridge concurred in the judgment.

ORDER

Held: The evidence presented at trial was sufficient for the jury to find defendant guilty of the charged offenses. The trial court erred when it did not comply with Supreme Court Rule 431(b), but the error was not reversible under the plain error doctrine.

¶ 1 The defendant, Marlon Brown, was convicted of first degree murder (720 ILCS 5/9-1(a)(1) (West 2008)), aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2008)), unlawful possession of a firearm by a felon (720 ILCS 5/24-1.1(a) (West 2008)), and

unlawful possession of firearm ammunition by a felon (720 ILCS 5/24–1.1(a) (West 2008)). The trial court sentenced defendant to 28 years' imprisonment. On appeal, defendant argues that: (1) the State failed to prove him guilty of any of the charged offenses beyond a reasonable doubt; and (2) the court committed plain error by not asking each juror if he or she understood and accepted the four principles enumerated in Illinois Supreme Court Rule 431(b) (eff. May 1, 2007). We affirm.

¶ 2

FACTS

¶ 3 On August 25, 2008, defendant was charged by information with first degree murder, aggravated discharge of a firearm, and unlawful possession of a firearm by a felon. The State later added a charge of unlawful possession of firearm ammunition by a felon. Defendant pled not guilty to the charged offenses, and the case was set for jury trial.

¶ 4 Prior to jury selection, the court informed the entire venire of the law they would be required to uphold if selected as jurors. The court emphasized that this law was so important that it would instruct the jury on it a second time at the end of the case. The court further explained the following: that defendant was presumed not guilty, he did not need to do anything to prove that he was not guilty, he need not testify, and if he did not testify it could not be held against him. Further, the court stated that the State had the burden of proving beyond a reasonable doubt that defendant committed one or more of the charged offenses.

¶ 5 When the potential jurors were interviewed during *voir dire*, the court asked them whether they would have any problem taking an oath to follow the law that it had previously given them. None of the potential jurors expressed concern. The court specifically asked the potential jurors in the fourth and sixth panels if they had a problem with the law in regards to

defendant's presumption of innocence and the State's burden of proof beyond a reasonable doubt. In questioning the fifth panel, the court referenced the fact that defendant "needs to present no defense[.]"

¶ 6 Following the questioning of the sixth panel, the case proceeded to trial. Solomon Thompson testified for the State that the shooting resulted from an altercation between the victim and Major Lemon that occurred in the parking lot of Andrew's Lounge. The incident happened in the early morning hours of August 23, 2008. While the victim was striking Lemon, Thompson saw defendant walk up to the victim and say "[g]et up off of him." Several other witnesses indicated that they heard an individual command the victim to get off of Lemon before the first shot was fired. When the victim ignored defendant's command, Thompson observed defendant shoot the victim in the face with a silver and black pistol and "saw the bullet go out the back of his head or blood scatter or whatever that was." At some points in his testimony, Thompson referred to defendant shooting the victim "in the head." The victim then purportedly stood up, stumbled for a few steps and fell to the ground. Thompson alleged that defendant then stood over the victim and said "didn't I tell you to get off of him" and fired several additional shots into the victim's torso before running off. After defendant fled the scene, Thompson approached the victim and observed swelling and a small hole in the side of the victim's head.

¶ 7 Kinlaw Hendrix corroborated Thompson's identification of the shooter and version of events. He noted that defendant pointed a black-handled silver pistol at the victim's upper body and shot the victim in the head. After the initial head shot, Hendrix alleged that defendant walked up to the fallen victim and said "I told you *** to get off of him" and fired four additional shots. After defendant fled the scene, Hendrix approached the victim and observed a

hole in the right side of the victim's forehead. He further stated that defendant left the scene in a white Chevrolet Malibu with large silver rims.

¶ 8 Following the shooting, the victim was rushed to the emergency room. The treating physician testified that the victim had received gunshot wounds to the head and torso. The head wound penetrated the back right side of the scalp, leaving a "swelling or collection of blood under the skin." The victim was pronounced dead at 2:26 a.m.

¶ 9 Dr. Violette Hnilica, the forensic pathologist, confirmed that the victim had died from gunshot wounds to the head and body. She testified that the initial shot entered the back of the skull, passed through the midbrain, and lodged under the left eye. Her final forensic pathology report noted that the shot to the victim's head was the fatal wound.

¶ 10 Three defense witnesses reported seeing Thompson inside Andrew's Lounge during or immediately after the shooting. A fourth witness, Minnie Roberson, reported that she saw a man in a white shirt get something from the back of a white car and stand behind the victim during the brawl. However, Roberson did not witness the first shot, but alleged that she later saw the man in a white shirt push the victim down, and fire four to five additional shots.

¶ 11 When police arrived at the scene, an officer heard someone say "Marlo shot my homie." Defendant's nickname was Marlo. An individual on the 911 call played for the jury also indicated that the suspect's name was Marlon and he had left the scene in a white car. While investigating the scene, police found five shell casings and four bullet fragments near the victim's body.

¶ 12 Officer Patrick Kisler testified that he drove to defendant's home when he received the dispatch to Andrew's Lounge because he recognized the description of the car as belonging to

the defendant. When he arrived at defendant's residence, he noticed a 1978 white Chevrolet Malibu with large rims parked in front. Kisler observed defendant exit the home and put his hands in the air. He then handcuffed defendant and placed him in his squad car. Kisler further testified that the hood of the white Malibu was warm, as if it had been running recently.

¶ 13 Defendant's neighbor, Michael Bailey, testified that he observed defendant's white car with large chrome wheels pull in front of defendant's home early in the morning of August 23, 2008. He then saw someone whom he believed to be the defendant walk into the backyard. However, Bailey did not mention in his written statement to the police that he thought it was the defendant who walked into the backyard. He also told defendant's private investigator that he could not identify the individual that walked into the backyard. Nevertheless, Bailey testified that he was sure he observed defendant walk to an area in the backyard where a pit bull was chained to an oak tree with a logging chain. Bailey noted that the dog was "guardful[,] but settled down as defendant allegedly approached. He then saw the individual lift up the pit bull's doghouse and leave. After defendant purportedly left the backyard, Bailey stated that the dog barked all night until animal control removed it. The police officers who observed defendant's residence until the search warrant was executed confirmed that the pit bull would bark when they exited their cars and would charge at them when they approached.

¶ 14 Police executed a search warrant on defendant's home later in the morning of August 23, 2008. Officer William Boynton, Jr., testified that he noticed the pit bull's doghouse was pushed back. When Boynton lifted up the doghouse, he discovered a silver and black semiautomatic pistol. Another officer removed the gun from under the doghouse and noted that it was loaded and ready to fire. A forensic scientist testified that a fingerprint found on the magazine inside of

the gun matched defendant's fingerprint. A second forensic scientist stated that the shell casings discovered at the scene had been ejected from the discovered gun. Further, the bullet fragments found at the scene and removed from the victim's skull were also fired by this gun.

¶ 15 At the close of evidence, the court instructed the jury that defendant was presumed innocent of the charges against him; to convict defendant the jurors must be convinced of his guilt beyond a reasonable doubt; the State had the burden of proof; defendant was not required to prove his innocence; and the jury was not allowed to consider the fact that defendant did not testify. After deliberations, the jury found the defendant guilty on all counts. The court later sentenced defendant to a total of 28 years in prison. Defendant appeals.

¶ 16 ANALYSIS

¶ 17 I. Guilt Beyond a Reasonable Doubt

¶ 18 Defendant first argues that the State failed to prove the charges against him beyond a reasonable doubt. Defendant alleges that Thompson's and Hendrix's version of events was contradicted by testimony from his witnesses and by the testimony of the treating physician and the forensic pathologist. Additionally, defendant argues that Bailey's testimony that he was sure he saw defendant hide the gun was contradicted by his written statement to the police and his statement to the private investigator.

¶ 19 When a defendant challenges the sufficiency of the evidence, the relevant question is " ' "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." ' " *People v. Collins*, 214 Ill. 2d 206, 217 (2005) (quoting *People v. Cox*, 195 Ill. 2d 378, 387 (2001) (quoting *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979))). We will set aside a

defendant's conviction only when we find the evidence was insufficient or so improbable or unsatisfactory that a reasonable doubt exists as to defendant's guilt. *People v. Ortiz*, 196 Ill. 2d 236 (2001).

¶ 20 As a court of review, it is not our role to reweigh the evidence. *People v. Hendricks*, 325 Ill. App. 3d 1097 (2001). Rather, the trier of fact is tasked with weighing testimony, resolving conflicts in evidence, drawing inferences and determining witness credibility. *People v. Williams*, 193 Ill. 2d 306 (2000).

¶ 21 Viewing the evidence in the light most favorable to the State, we find that a rational trier of fact could have found defendant guilty of the charged offenses beyond a reasonable doubt. At trial, the jury heard testimony from two witnesses who stated that they saw defendant shoot the victim. Contrary to defendant's contention, we note that this evidence was not entirely contradicted by the testimony of the medical experts. The treating physician testified that the gunshot wound to the victim's head created swelling under the scalp. This statement was corroborated by Thompson's testimony that he observed a small hole and swelling on the right side of the victim's head. Although Thompson and Hendrix also stated that they saw defendant shoot the victim in the front of the head and the medical experts stated that the victim received a gunshot wound to the back of the head, the jury was tasked with resolving this conflict. See *Williams*, 193 Ill. 2d 306. Thompson testified he saw the bullet come out of the back of the victim's head. Based on the medical testimony, a reasonable jury could have concluded the obvious: What Thompson saw was splatter caused as the bullet entered, not exited, the victim's head.

¶ 22 Testimony from the firearms experts provided additional evidence for the jury to

conclude that defendant had committed the charged offenses. The firearms experts linked the bullets and casings discovered at the crime scene to the gun Thompson and Hendrix observed defendant use to shoot the victim. Additionally, the gun had defendant's fingerprint on the magazine, and was located underneath a doghouse on the defendant's property with an aggressive pit bull chained nearby. Bailey testified that he observed defendant place the gun under the doghouse in the early morning hours of August 23, 2008. Although Bailey's testimony was discredited by his prior statements to the police and the private investigator, the jury was allowed to consider this factor in making its factual finding.

¶ 23 We are not persuaded by defendant's arguments that the conflict in the testimony between the State's witnesses and medical experts created reasonable doubt. Further, the jury properly considered Roberson's identification of an alternative shooter and weighed her version of events against those presented by the State's witnesses. Finally, the jury was properly tasked with weighing Bailey's credibility in light of his varying versions of who placed the gun under the doghouse. Notwithstanding these conflicts in the evidence, we hold that the evidence was more than sufficient for the jury to find defendant guilty of the charged offenses beyond a reasonable doubt.

¶ 24 II. Supreme Court Rule 431(b)

¶ 25 Defendant next argues that the court erred when it failed to strictly comply with Illinois Supreme Court Rule 431(b) (eff. May 1, 2007) and instead generally instructed the potential jurors on the four principles enunciated in *People v. Zehr*, 103 Ill. 2d 472 (1984). Defendant concedes that the court accurately read the jurors broad pronouncements of the law, but erred when it did not specifically ask them if they understood and accepted these principles. Although

defendant did not raise this issue during jury selection or in his posttrial motion, defendant contends that this error affected his right to a fair trial, and thus was reversible plain error.

¶ 26 The supreme court adopted Rule 431(b) to ensure compliance with its decision in *Zehr*.

The rule requires a trial court to ask potential jurors if they understand and accept

"(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[.]" Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

¶ 27 We note that Rule 431(b) is not a " 'suggestion to be complied with if convenient but rather [an] obligation[]' " which the court was required to follow. *People v. Reed*, 376 Ill. App. 3d 121, 125 (2007) (quoting *Medow v. Flavin*, 336 Ill. App. 3d 20, 36 (2002)). It is error for a trial court to fail to ask each juror if he or she understands and accepts these principles. *People v. Thompson*, 238 Ill. 2d 598 (2010).

¶ 28 However, in the present case, defendant admits that he did not properly preserve the Rule 431(b) issue. Therefore, we determine whether defendant's forfeiture of this issue may be excused under the plain error rule. Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999).

¶ 29 In *Thompson*, our supreme court instructed that an appellate court will consider an unpreserved error as reversible when:

"(1) a clear or obvious error occurred and 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) a

clear or obvious error occurred and 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.' " *Thompson*, 238 Ill. 2d at 613 (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)).

¶ 30 Relying on his argument in the first issue, defendant contends that the evidence in the present case was closely balanced. Consequently, he argues that it was plain error for the court to fail to ask each juror if they understood and accepted the four *Zehr* principles.

¶ 31 We find that the evidence was not closely balanced. As we discussed in the first issue, the State presented overwhelming evidence of defendant's guilt of the charged offenses. Therefore, we find that the evidence was not so closely balanced that the court's error tipped the scales of justice against defendant.

¶ 32 Defendant next urges us to adopt the position that the Rule 431(b) principles are so fundamental that the failure to address them should be automatically deemed plain error.

¶ 33 Since the filing of defendant's brief, our supreme court has decided this issue in *Thompson*, 238 Ill. 2d 598. The *Thompson* decision instructs "the failure to conduct Rule 431(b) questioning does not necessarily result in a biased jury[.]" *Thompson*, 238 Ill. 2d at 614. The supreme court associated the second prong of the plain error test with structural error, which requires automatic reversal only where the error is systemic and "erode[s] the integrity of the judicial process and undermine[s] the fairness of the defendant's trial." (Internal quotation marks omitted.) *Thompson*, 238 Ill. 2d at 613 (quoting *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009) (quoting *People v. Herron*, 215 Ill. 2d 167, 186 (2005))). A finding that the defendant was tried by a biased jury "would certainly satisfy the second prong of plain-error review because it

would affect his right to a fair trial and challenge the integrity of the judicial process.”

Thompson, 238 Ill. 2d at 614. However, the defendant “has the burden of persuasion on this issue,” and a court “cannot presume the jury was biased simply because the trial court erred in conducting the Rule 431(b) questioning.” *Thompson*, 238 Ill.2d at 614, 345 Ill.Dec. 560, 939 N.E.2d 403. The failure to question the jurors individually regarding the Rule 431(b) principles, standing alone, does not result in a biased jury, particularly where the trial court addresses the Rule 431(b) principles during *voir dire* and instructs the jury regarding those principles before it began its deliberations. *Thompson*, 238 Ill. 2d at 611; see also *People v. Amerman*, 396 Ill. App. 3d 586 (2009).

¶ 34 Here, the court's failure to ask each potential juror if he or she understood and accepted the four *Zehr* principles did not result in an impartial jury and unfair trial. In fact, the court emphasized these principles when it instructed the entire venire on the law they would be required to follow if any were selected as a juror. The court then asked the jurors if they could follow this law. We note that none of the jurors asked for clarification or indicated that they would have difficulty following the law. Finally, the court reemphasized these principles before deliberations when it instructed the jurors on the law. Therefore, the court's failure to directly ask each juror if he or she understood and accepted the four *Zehr* principles did not affect the integrity of defendant's trial and thus was not plain error.

¶ 35 CONCLUSION

¶ 36 For the foregoing reasons, the judgment of the circuit court of Knox County is affirmed.

¶ 37 Affirmed.