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No. 3–09–0333

Order filed June 21, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D. 2011

THE PEOPLE OF THE STATE OF)	Appeal from the Circuit Court
ILLINOIS,)	of the 10 th Judicial Circuit,
)	Peoria County, Illinois,
Plaintiff-Appellee,))
))
v.)	No. 08–CF–324
))
MONTELL NELLUM,)	Honorable
)	Glenn H. Collier and
Defendant-Appellant.)	Paul Gilfillan
)	Judges, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices O'Brien and Lytton concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred by failing to comply with Supreme Court Rule 431(b); however, reversal was not warranted because: (1) the evidence at trial was not closely balanced; and (2) the trial court's mistake was not a structural error requiring automatic reversal.

¶ 2 After a jury trial, the defendant, Montell Nellum, was convicted of domestic battery (720 ILCS 5/12--3.2(a)(1) (West 2008)) and sentenced to six years in the Department of Corrections. On appeal, he argues that a new trial is warranted because the trial court did not question the jury

venire in accordance with Illinois Supreme Court Rule 431(b) (eff. May 1, 2007). We affirm.

¶ 3

FACTS

¶ 4 The defendant's trial began on April 30, 2008, and lasted two days. After the prospective jurors assembled in the courtroom, the trial court explained some basic principles of law. The court also asked a series of questions requiring the jurors to respond with a yes or no answer. These questions included, "[i]f you believe that the State has proven the Defendant guilty beyond a reasonable doubt, would you be willing to sign a guilty verdict?" and, conversely, "[i]f you believe the State has not proven the Defendant guilty beyond a reasonable doubt, would you be willing to sign a not guilty verdict?" At no point were the jurors asked if they understood and accepted that the defendant was presumed innocent, that the defendant was not required to present any evidence, or that the defendant's refusal to testify could not be held against him.

¶ 5 During the trial, the victim, who was the mother of one of the defendant's children, testified on behalf of the State. Although she and the defendant did not live together, they were attempting to "patch things up and work it out." She testified that on the morning of the incident, the defendant was questioning her about a phone call she received at approximately 2:30 a.m. from a male friend. When she stopped responding to his questions, the defendant grabbed her neck. She described the struggle, and she said that during the altercation the defendant hit her in the face. She managed to escape to her downstairs neighbor and began banging on the door. The defendant followed her, pulled her hair, and told her to go back upstairs. She ran back to her apartment, locked the door, and called the police. The defendant punched through the glass portion of the door, and the police arrived shortly after.

¶ 6 The defendant denied hitting or choking the victim. He said that, after the victim received the phone call, they had a calm discussion about it, although the defendant admitted to

getting upset. He said things "started to get a little loud" so he left. Once outside, the defendant realized it was cold, and he went back for his jacket. He discovered that he was locked out, so he punched through the glass in order to retrieve his jacket. He then asked the victim to call the police because he was bleeding.

¶ 7 In rebuttal, the State called Kenneth Wolf, a 911 dispatcher. Wolf testified that in the early morning hours of March 16, 2008, he received two calls from the apartment building where the victim lived. The first call was from the victim's neighbor, and the second was from the victim herself. The calls were played for the jury.

¶ 8 At the end of the trial, the jurors were instructed on the presumption of innocence and the burden of proof. The jury ultimately found the defendant guilty, and he was sentenced to six years in the Department of Corrections. The defendant appealed.

¶ 9 ANALYSIS

¶ 10 The defendant argues that he was denied the right to a fair trial because the trial court failed to strictly comply with Rule 431(b). Ill. S. Ct. R. 431(b) (eff. May 1, 2007). The defendant admits that he did not object to this error during trial or raise the issue in a posttrial motion, and that failure to do so ordinarily results in forfeiture of the issue. *People v. Schaefer*, 398 Ill. App. 3d 963 (2010). Therefore, in order for the defendant to succeed, the trial court must have committed plain error. *People v. Herron*, 215 Ill. 2d 167 (2005). Under the plain error rule, we will remand for a new trial only if: (1) the evidence is closely balanced; or (2) the error was so serious it denied the defendant a fair trial. *Herron*, 215 Ill. 2d 167.

¶ 11 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." (Emphasis added.)

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

¶ 12 The State concedes that the trial court did not question the venire as required by Rule 431(b) and thus an error occurred. The issue then becomes whether the error warrants a new trial. The defendant argues: (1) that the evidence in this case was closely balanced; and (2) that the error affected the integrity of the judicial process such that automatic reversal is required. Neither argument is correct.

¶ 13 The defendant claims that the evidence in this case was closely balanced because the jury essentially had to choose either the victim's or the defendant's version of events. While both versions are somewhat problematic, the fact remains that the 911 calls corroborated the victim's story and contradicted the defendant's. The victim testified that she ran downstairs to her neighbor for help, and the first 911 call was the neighbor saying there was screaming upstairs and that someone was pounding on her door. The second call was the victim herself. In that call, she was asking for help and stated that the defendant punched through her door and pulled her hair. This contradicts the defendant's testimony that the victim called to request help for his injured arm. In addition, the photographs displaying the victim's injuries further corroborate her

testimony. See *People v. Williams*, 228 Ill. App. 3d 981 (1992) (finding evidence not closely balanced where eyewitness testimony was corroborated by physical evidence and evidence from the police officers).

¶ 14 The second issue is whether the trial court's failure to question jurors about their ability to understand and accept the four principles of law articulated in Rule 431(b) prevented the defendant from receiving a fair trial. In arguing that reversal is not required, the State relies on *People v. Glasper*, 234 Ill. 2d 173 (2009), where our supreme court held that a violation of Rule 431(b) did not implicate constitutional concerns and thus the defendant was not entitled to automatic reversal. The defendant argues that *Glasper* is inapplicable because it addressed a previous version of the rule¹. *Glasper*, 234 Ill. 2d 173.

¶ 15 After the parties submitted their briefs, our supreme court decided *People v. Thompson*, 238 Ill. 2d 598 (2010). In *Thompson*, the court held that a violation of the current version of Rule 431(b) does not automatically require a new trial. *Thompson*, 238 Ill. 2d 598. Regarding the second prong of the plain error test, the court stated:

"Rule 431(b) questioning is only one method of helping to ensure the selection of an impartial jury. [Citation.] It is not the only means of achieving that objective. A violation of Rule 431(b) does not implicate a fundamental right or constitutional protection, but only involves a violation of this court's rules. [Citation.] Despite our amendment to the rule, we cannot conclude that Rule 431(b)

¹ The prior version of the rule only required the trial court to question prospective jurors about the four principles of law at the defendant's request. *Glasper*, 234 Ill. 2d 173. The current version of the rule makes such questioning mandatory. Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

questioning is indispensable to the selection of an impartial jury."

Thompson, 238 Ill. 2d at 614-15.

¶ 16 Since reversal is not automatic, the defendant faces the "virtually impossible" burden of proving that he suffered prejudice as a result of the trial judge's error. *People v. Williams*, No. 3--09--0355, 2011 WL 1757715 (Ill. App. Apr. 29, 2011) (McDade, J., specially concurring). This is a burden the defendant simply cannot meet in this case. The jurors ultimately received instructions regarding the first and second principles of law. See *People v. Amerman*, 396 Ill. App. 3d 224 (2009) (holding that jurors were not inevitably biased where they received jury instructions on 431(b) principles before beginning deliberations). The prospective jurors were also asked if they would be able to render a not guilty verdict if the State failed to prove the defendant guilty beyond a reasonable doubt. Finally, the defendant chose to present evidence and testify, so the third and fourth principles do not apply to this case. See *People v. White*, 407 Ill. App. 3d 224 (2011). Accordingly, because the defendant cannot show prejudice under the rigorous standard imposed by our supreme court, we will not order a new trial.

¶ 17 CONCLUSION

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

¶ 19 Affirmed.