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No. 3--09--0751

Order filed May 26, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of the 14th Judicial Circuit,
)	Whiteside County, Illinois,
Plaintiff-Appellee,)	
)	
v.)	No. 09--CF--150
)	
RAFAEL S. FIGUEROA,)	Honorable
)	James J. Mesich,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice Carter and Justice Lytton concurred in the
judgment.

ORDER

Held: (1) Sufficient evidence was presented at trial for the jury to determine that the bicycle chain the defendant used to strike the victim was a deadly weapon. (2) The trial court erred in not asking every juror if they understood and accepted the principles enumerated in Illinois Supreme Court Rule 431, but this error was not plain error.

Rafael S. Figueroa, the defendant, was convicted of aggravated battery (720 ILCS 5/12--4(b)(1) (West 2008)) and sentenced to 30 months probation after a jury trial. On appeal,

the defendant argues that his conviction was in error because he did not use a deadly weapon to injure the victim and the trial court failed to ask every juror if they understood and accepted the principles enumerated in Illinois Supreme Court Rule 431(b) (eff. May 1, 2007). We affirm.

FACTS

On April 4, 2009, the police were called to the defendant's home. Upon arrival, the responding officer saw the defendant and several children standing in the kitchen. When the officer walked into the kitchen, the defendant took an item from around his neck and placed it on the counter. Not knowing what the item was, the officer handcuffed the defendant and led him out of the kitchen until backup arrived.

Upon further investigation, the officer discovered that the item the defendant placed on the counter was a bicycle chain with a cloth wrapped around one end as if to "create a handle" and a broken link at the other end. While the defendant was handcuffed, the officer observed the victim, the defendant's son, approach the defendant and say "[w]hy did you hit me? Why did you hit me with the chain? Why do you have to hit me?" When the officer asked the defendant why he struck the victim, the defendant said that he was "disciplining [his] children" and that he would "discipline them how [he saw] fit." The defendant also admitted to the officer that he struck the victim.

On April 4, 2009, the defendant was charged by information with one count of aggravated battery (720 ILCS 5/12--4(b)(1) (West 2008)), one count of domestic battery (720 ILCS 5/12--3.2 (West 2008)), and one count of endangering the life or health of a child (720 ILCS 5/12--21.6 (West 2008)). The defendant's case was tried before a jury on July 21, 2009.

During *voir dire*, the trial judge asked some of the jurors whether they understood and accepted that the defendant's failure to testify could not be held against him and that the defendant was not required to present evidence on his own behalf. The judge told the first large group of jurors, before they were sworn in, "I'll advise you now and you will hear this probably fairly often the defense doesn't have to do anything" and "[t]he defendant doesn't even have to testify." He then asked three of the four jurors on the first panel if they understood that the defendant was not required to present any evidence. In the second panel, the judge asked two of the jurors whether they understood that the defendant did not have to present any evidence on his own behalf. He asked only one of the four jurors on the final panel if he understood that the defense did not have to do anything. The judge did not ask any of the selected jurors, aside from the alternate juror, if they understood and accepted that a defendant's failure to testify cannot be held against him. The alternate juror was asked if she understood

that the defendant did not have to do anything and if he chose not to testify, it could not be held against him. However, she did not go to deliberations.

The jury was then impaneled, and the case proceeded to trial. The defendant did not object during or after *voir dire* to the trial court's failure to ask each juror if he or she understood and accepted all of the principles enumerated in Rule 431(b). The jury found the defendant guilty of all three counts. After the verdict, the trial court entered a judgment of conviction on the aggravated battery offense and sentenced the defendant to 30 months probation. The defendant did not raise the trial court's failure to comply with Rule 431(b) in a posttrial motion. The defendant appeals his conviction.

ANALYSIS

I. Deadly Weapon

On appeal, the defendant first argues that the State failed to prove beyond a reasonable doubt that the chain he used to hit the victim was a deadly weapon.

An individual commits aggravated battery when he commits a battery using "a deadly weapon." 720 ILCS 5/12--4(b)(1) (West 2008). A deadly weapon is one capable of producing death. *People v. Fort*, 119 Ill. App. 2d 350 (1970). "An instrument which is not deadly per se may become so by the manner in which it is used." *Id.* at 354. The decision of whether an item

qualifies as a deadly weapon is a question of fact. *People v. Marston*, 353 Ill. App. 3d 513 (2004).

Viewing the evidence in the light most favorable to the prosecution, we look to see if any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *People v. Young*, 128 Ill. 2d 1 (1989). We will not set aside a criminal conviction unless the evidence is so unsatisfactory as to create reasonable doubt of the defendant's guilt. *People v. Adams*, 109 Ill. 2d 102 (1985).

The defendant does not dispute that the chain he used to strike the victim could qualify as a deadly weapon. However, he contends that the State failed to prove beyond a reasonable doubt that the manner in which he allegedly used the chain qualified it as a deadly weapon. In particular, the State presented no evidence describing how the chain was used and only presented photographs showing that the victim had minor cuts or scrapes on his left leg and arm.

Despite the defendant's argument, we find the evidence was sufficient for the jury to conclude that the chain constituted a deadly weapon. We note that this was not an ordinary bicycle chain, but that it had a cloth wrapped around one end to "create a handle" and that the other end had a broken link. Further, the victim's injuries showed that the chain was used in such a manner as to constitute a deadly weapon. Contrary to the defendant's

contentions, the statute did not require the chain to inflict great bodily harm to be considered a deadly weapon. 720 ILCS 5/12--4 (West 2008).

Viewing the evidence in the light most favorable to the prosecution, we find that the State presented sufficient evidence for the jury to conclude that the chain constituted a deadly weapon.

II. Illinois Supreme Court Rule 431(b)

The defendant next argues that the trial court denied his right to a fair trial when it failed to comply with Rule 431(b). Specifically, the defendant argues that the court erred by failing to ask (1) any of the selected jurors, apart from the alternate, whether they accepted and understood that a defendant's failure to testify cannot be used against him, and (2) several of the selected jurors about whether they understood and accepted that the defendant was not required to present any evidence on his behalf.

Rule 431(b) requires a trial court to ask each potential juror whether he or she understands and accepts "that the defendant is not required to offer any evidence on his or her own behalf; and *** that the defendant's failure to testify cannot be held against him or her[.]" " 'The supreme court rules are not merely suggestions to be complied with if convenient but rather obligations which the parties and the courts are required to

follow.' " *People v. Reed*, 376 Ill. App. 3d 121, 125 (2007) (quoting *Medow v. Flavin*, 336 Ill. App. 3d 20, 36 (2002)). A trial judge's failure to ask each juror if they understand and accept these principles is error. *People v. Thompson*, 238 Ill. 2d 598 (2010).

In this case, the trial court failed to ask all of the jurors, other than the alternate, if they understood and accepted each of the principles set forth in Rule 431(b). However, the defendant did not object to the trial court's questioning during *voir dire* and did not raise the issue in a posttrial motion, and thus waived review. *People v. Allen*, 222 Ill. 2d 340 (2006). Therefore, we determine whether the defendant's waiver may be excused under the plain error rule. Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999).

"Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999). We will consider an unpreserved error as plain error 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)).

The defendant first argues that it was plain error for the trial court not to ask each juror if they understood and accepted Rule 431(b) because the evidence was closely balanced.

Specifically, he contends that the State did not present an eyewitness to attest to the battery and the circumstantial evidence presented was weak.

We are not persuaded. The defendant told the police officer that he struck the victim. Further, we found in the first issue that the State provided sufficient evidence for the jury to conclude that the chain constituted a deadly weapon. Therefore, the evidence was not so closely balanced as to require reversal.

Next, the defendant argues that the trial court's error was so serious that it affected the fairness of his trial. The defendant contends that *People v. Zehr*, 103 Ill. 2d 472 (1984) required the trial court to inform jurors of the fundamental criminal law principles stated in Rule 431(b). However, the defendant also recognizes that our initial decision in *People v. Alexander*, 396 Ill. App. 3d 563 (2009), held that a trial court's failure to follow Rule 431(b) was not plain error under the second prong. The defendant instead urges us to adopt the dissent's position in *Alexander* and find plain error.

We initially note that the *Alexander* decision relied on by the defendant and cited in the State's brief was remanded by the Illinois Supreme Court for reconsideration in light of *Thompson. People v. Alexander*, 239 Ill. 2d 556 (2011). In our 2011 *Alexander* decision, we held that a trial court's failure to comply with Rule 431(b) did not deny the defendant an impartial jury and, thus, a fair trial. *People v. Alexander*, No. 3--07--0915, 2011 WL 1346930 (Ill. App. March 29, 2011).

Here, the trial court's failure to ask each juror about the principles enumerated within Rule 431(b) also did not result in an impartial jury and unfair trial. Although the trial judge failed to comply with Rule 431(b), the resulting error was cured when the judge instructed the jurors that the defendant's decision not to testify and not to present evidence could not be used against him. *People v. Amerman*, 396 Ill. App. 3d 586 (2009). Therefore, the defendant failed to show the error affected the fairness of his trial and challenged the integrity of the judicial process. The second prong of the plain-error analysis does not excuse the defendant's waiver.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Whiteside County is affirmed.

Affirmed.