

No. 1-11-3206

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
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 10 CR 12630
)	
JOSE GARCIA,)	Honorable
)	Vincent M. Gaughan,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* Where trial court, in addressing group of potential jurors, accurately stated the law in informing the venire that no definition existed for the term "reasonable doubt" and that jurors would have to decide its meaning, no error occurred that would allow plain error review; the judgment of the trial court was affirmed.

¶ 2 Following a jury trial, defendant Jose Garcia was convicted of second degree murder and was sentenced to four years in prison. On appeal, defendant contends his due process right to a fair trial was violated when the trial court told the pool of potential jurors that no definition of "reasonable doubt" existed. He argues that the court essentially invited the jury to arrive at its

own definition of the meaning of that term. Because we find the trial court's remarks to the venire did not constitute error, we affirm.

¶ 3 Defendant was charged with the first degree murder of Jorge Flores based on a shooting in the early morning hours of June 14, 2010. The State presented the testimony of Emilio Pantoja and Juan Garnica, and it was stipulated that they, along with the deceased Flores, were members of the Latin Kings gang. Defendant owned a grocery store at 2433 South Central Park in Chicago, and he testified at trial he had previously argued with Pantoja about gang activity and attempted drug sales in front of his store.

¶ 4 Pantoja testified that before the shooting, he, Garnica, Flores and others were at a party in the backyard of 2431 South Central Park and that defendant also was drinking with the group. Pantoja denied he had argued with defendant in the past. Pantoja, Flores and defendant left the gathering to buy beer.

¶ 5 Pantoja testified that when they returned to the party, they were drinking and "having a good time" and defendant left the party and returned quickly. Pantoja said defendant approached him and started arguing and swearing. In contrast, defendant testified that Pantoja started the argument. Both Pantoja and defendant testified that Pantoja struck defendant in the face. Defendant testified that Pantoja continued beating him after he had fallen to the ground.

¶ 6 According to Pantoja, Flores had left the party at that point. After the men were separated, Pantoja called Flores on a cell phone, and Flores returned to the area. Pantoja and defendant shook hands, and defendant said he was leaving. Pantoja went inside and heard a "pop"; he then looked outside and saw Flores lying on the ground.

¶ 7 Defendant testified that after Pantoja struck him and he got off the ground, Flores approached him, grabbed him by the neck and threw him against a fence. Flores told defendant, "It's going to be really bad for you, you son of a bitch." Defendant's neighbor, Marcos Aviles,

arrived at that point. As defendant and Aviles tried to leave the area, Pantoja and Flores blocked their path, and Pantoja continued to threaten defendant. Defendant stated Pantoja called several friends on his cell phone, telling them to come over because he was going to kill defendant. The parties stipulated Pantoja's phone records showed that in the hour before the victim was shot, Pantoja made 10 outgoing calls.

¶ 8 Garnica then returned to the backyard. Defendant testified he became frightened and went to his store and retrieved a gun that he kept there for protection. When defendant left the store, two men were approaching him and one said, "That's the son of a bitch." Defendant saw Aviles walking nearby and followed Aviles, who walked next to him. Defendant testified that one of the men came toward him, and defendant thought he was going to be killed.

¶ 9 Defendant testified that he said, "Stop, no" and lifted his hand, and Aviles "bumped into" his arm, causing defendant's weapon to discharge. The jury was instructed as to first degree murder and second degree murder based on an unreasonable belief in the need for self-defense. The jury returned a verdict of second degree murder.

¶ 10 On appeal, defendant contends his due process rights were violated when the trial court instructed the jurors that they could decide the meaning of "reasonable doubt." He argues the court erroneously defined the term and invited the venire members to convict him based on a lesser standard than constitutionally required.

¶ 11 The court's remarks at issue occurred before jury selection began. The trial court read the indictment to the entire assemblage of potential jurors and explained that an indictment is a "formal method of placing a defendant on trial." The court continued:

"Under the law a defendant is presumed to be innocent of the charges against him. This presumption remains with him throughout every stage of the trial and during your deliberations on

the verdicts, and it is not overcome unless from all the evidence in this case you are convinced beyond a reasonable doubt that the defendant is guilty.

The State has the burden of proving the guilt of the defendant beyond a reasonable doubt. And this burden remains on the State throughout the case."

¶ 12 The court then described for the potential jurors the constitutional principles set out in Illinois Supreme Court Rule 431(b) (eff. May 1, 2007), beginning with the tenet that a defendant is presumed innocent of the charge against him. The court then addressed the State's burden of proof:

"Again, the burden of proof is on the State throughout every stage of the trial. And the burden of proof is proof beyond a reasonable doubt. Some of you may have sat in a civil trial, but this is a criminal trial so the burdens of proof are different. In a civil trial, if you use a scale as an analogy, all you have to do is tilt the scale. So the definition of – that's called preponderance of the evidence. The definition of preponderance of the evidence is it is more likely than not that the event occurred.

In criminal law, the proof is, again using the scale, proof beyond a reasonable doubt. *Illinois does not define 'reasonable doubt.'* *That is up for the trier of facts to determine [sic]."*

(Emphasis added.)

¶ 13 Defendant acknowledges he did not object to the court's remarks when they were made or include this argument in his motion for a new trial, which generally results in forfeiture of an

issue. See *People v. Lovejoy*, 235 Ill. 2d 97, 148 (2009), citing *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Still, defendant contends the issue should be reviewed under the plain error doctrine, which allows a reviewing court to reach an unpreserved issue in two instances: (1) where a clear and obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) where a clear and obvious error occurred that constituted a structural error 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.

People v. Piatkowski, 225 Ill. 2d 551, 565 (2007).

¶ 14 Under either plain error alternative, the burden of persuasion rests with the defendant. *People v. McLaurin*, 235 Ill. 2d 478, 495 (2009). In a plain error analysis, this court initially considers whether error occurred at all because in the absence of error, there can be no plain error. *People v. Sargent*, 239 Ill. 2d 166, 189-90 (2010).

¶ 15 Defendant focuses on two sentences in the court's remarks, *i.e.*, that Illinois does not define reasonable doubt and that the "trier of facts" should decide what that term means. Judges in Illinois courts are prohibited from defining reasonable doubt. *People v. Thompson*, 2013 IL App (1st) 113105, ¶ 87; *People v. Burman*, 2013 IL App (2d) 110807, ¶ 41; *People v. Franklin*, 2012 IL App (3d) 100618, ¶ 24 (and cases cited therein). "The law in Illinois is clear that neither the court nor counsel should attempt to define the reasonable doubt standard for the jury." *People v. Speight*, 153 Ill. 2d 365, 374 (1992). Rather, the concept of reasonable doubt has been deemed "self-defining" and requires no elaboration. *People v. Wielgos*, 220 Ill. App. 3d 812, 820 (1991). Under those standards, the trial court correctly stated the law in the first sentence of its remarks at issue when it advised the pool of potential jurors that the concept of reasonable doubt is not defined in Illinois.

¶ 16 In its second remark, the court told the group of potential jurors that "reasonable doubt" is "up for the trier of facts to determine." Defendant argues that remark impermissibly invited the jury to fashion its own definition of the reasonable doubt standard and possibly apply a lesser standard than reasonable doubt.

¶ 17 This court has considered the comments of trial judges addressing reasonable doubt to potential jurors or a deliberating jury in three recent cases. First, in *People v. Turman*, 2011 IL App (1st) 091019, ¶ 19, the jury deliberated for several hours before sending a note to the court asking for a "more explicit, expansive definition of reasonable doubt." *Id.* Defense counsel suggested the jury be instructed that reasonable doubt was not defined under Illinois law and that "it is not any doubt, only that which is reasonable." *Id.* The trial court proposed the jury be told that reasonable doubt "is not defined under Illinois law. It is for the jury to collectively determine what reasonable doubt is." *Id.* The parties agreed the jury should be given the explanation suggested by the court. *Id.* The jury was told there was no definition for reasonable doubt and that it should collectively determine the meaning of that term. *Id.*

¶ 18 Reversing and remanding for a new trial, the *Turman* court stated:

"By instructing the jurors that they should collectively determine what reasonable doubt was, the court allowed the jury to use a standard that in all likelihood was below the threshold of a reasonable doubt standard. The response offered by defense counsel *** would have been more appropriate than the explanation that was given by the trial court. The best response for the trial court to have made would have been to refuse to give the jury an additional explanation." *Id.* at 25.

¶ 19 Following *Turman*, the issue of a "reasonable doubt" instruction was addressed in *Franklin*, where this court considered remarks that the trial judge made to the assemblage of potential jurors before jury selection. *Franklin*, 2012 IL App (3d) 100618, ¶ 4. The trial court told the group that "reasonable doubt" was "what each of you individually and collectively, as 12 of you, believe is beyond a reasonable doubt." *Id.* In addition to that statement by the trial court, the prosecutor in *Franklin* stated in rebuttal closing argument:

"[The trial judge] gave you the definition of reasonable doubt. Reasonable doubt is what you believe to be reasonable doubt. You decide what reasonable doubt is. Not [defense counsel], not the State, you decide." *Id.* at ¶ 15.

¶ 20 On appeal, this court found the instruction was constitutionally deficient because the direction that jurors should collectively determine the meaning of reasonable doubt created a "reasonable likelihood that the jurors understood the instruction to allow a conviction based on proof less than a reasonable doubt." *Id.* at ¶ 28. The court noted that the trial judge's "individually and collectively" remark was almost identical to the language found to be error in *Turman*. *Id.* at ¶ 27 (also stating the error "was compounded when the prosecutor reminded the jury of the trial court's statement in closing argument").

¶ 21 However, one justice dissented from the majority opinion in *Franklin*, concluding that the trial court's instruction did not constitute error. *Id.* at ¶ 38 (Carter, J., concurring in part and dissenting in part). Noting the need to consider the court's remarks in context, the dissent set out, among other statements, a series of 16 admonitions the court made to the jury pool during jury selection, in addition to the above-described remarks the court made about reasonable doubt and the trial court's instructions to the jury about the law before the jury began deliberating. *Id.* at ¶ 39-42 (Carter, J., concurring in part and dissenting in part).

¶ 22 In rejecting the defendant's contention that the trial court erred in stating that the term "reasonable doubt" was for the jury to define, the dissent in *Franklin* acknowledged the concerns of misstating the jury's burden but noted that a defendant's due process rights are violated only if there is a reasonable likelihood that the jurors understood the instruction to allow a conviction based on proof less than a reasonable doubt. *Id.* at ¶ 48, citing *Victor v. Nebraska*, 511 U.S. 1, 5 (1993) (Carter, J., concurring in part and dissenting in part). The *Franklin* dissent noted the Supreme Court's comment in *Victor* that a reasonable doubt instruction had been found to violate the due process clause only once. *Id.* The dissent noted that the Supreme Court in *Victor* urged that no particular words be used to convey the idea of reasonable doubt but that the instructions taken as a whole should correctly set out that concept for the jury. *Id.* at ¶ 48 (Carter, J., concurring in part and dissenting in part), citing *Victor*, 511 U.S. at 5.

¶ 23 Applying that rule, the dissent in *Franklin* stated there was not a reasonable likelihood the jury in that case understood they could find the defendant guilty under a lesser standard of proof. *Franklin*, 2012 IL App (3d) 100618, ¶ 49 (Carter, J., concurring in part and dissenting in part). Noting the majority's reliance on *Turman*, the dissent pointed out the opinion in that case did not present the entire scope of the remarks and instruction to the jury; accordingly, the dissenting justice noted he was "unable either to agree or disagree" with the holding in *Turman*. *Id.* at ¶ 50 (Carter, J., concurring in part and dissenting in part).

¶ 24 Most recently, in *People v. Johnson*, 2013 IL App (1st) 111317, ¶ 52, this court found no error when it considered remarks that, in fact, were made by the same trial judge who presided in the instant case. In *Johnson*, the trial court made the following statements to the jury pool during jury selection:

"The State has the burden of proof beyond a reasonable doubt. In Illinois we do not – it is not defined by the Supreme

Court or by the State legislature. That's something for you to decide. But if any of you have served on a civil jury, if you use the analogy of a scale, all you have to do is tilt it. And that's proof beyond a preponderance of the evidence. In a criminal case, if you use the same scale, it's a balance like this. (Indicating.) Proof beyond a reasonable doubt is the highest burden that there is at law in Illinois and the United States." *Id.*

¶ 25 In holding those comments did not constitute error, the court in *Johnson* stated it did not "condone the reference and comparison to the civil standard of proof" but further noted the court told the potential jurors that reasonable doubt was the highest legal burden and that it was for them to determine its meaning. *Id.* at 54. In its holding, the *Johnson* court did not mention the recent holdings in *Turman* and *Franklin*.

¶ 26 The remarks made in the instant case are comparable to those made by the same trial judge in *Johnson*. In *Johnson*, the judge told the potential jurors during jury selection that the definition of reasonable doubt was "something for you to decide." In the case at bar, the trial court told the potential jurors, in general remarks prior to jury selection, that no definition of reasonable doubt existed, and the court stated that reasonable doubt should be determined by the "trier of facts" without suggesting that a collective definition had to be reached.

¶ 27 We find the remarks here distinguishable from those found to be error in *Turman* and *Franklin*. As opposed to addressing a room of potential jurors, as occurred here, the trial judge in *Turman* responded to a question from a deliberating jury that requested a "more explicit, expansive definition of reasonable doubt," and the parties agreed that the court should respond by telling the jury that it should "collectively" determine what reasonable doubt meant. *Turman*, 2011 IL App (1st) 091019, ¶ 19. In *Franklin*, the judge told the pool of potential jurors that

reasonable doubt was what "each of you individually and collectively" believe it to be. *Franklin*, 2012 IL App (3d) 100618, at ¶ 4. In both of those cases, the remarks were deemed error because they informed the jurors or potential jurors that they could arrive at a collective definition of reasonable doubt.

¶ 28 We find the dissent in *Franklin* persuasive; that opinion urged the reviewing court in such cases to consider the trial judge's highlighted comments in light of all of the admonitions and instructions given to the jury. *Id.* at ¶ 48 (Carter, J., concurring in part and dissenting in part). In contrast to the court's remarks in *Turman* and *Franklin*, the court here did not suggest those selected to serve on defendant's jury had to agree on a single definition of reasonable doubt, and we decline to read such a directive into the court's remarks.

¶ 29 In summary, because the trial judge's remarks to the jury pool regarding reasonable doubt did not constitute error, defendant has not established plain error. Accordingly, the judgment of the trial court is affirmed.

¶ 30 Affirmed.