SECOND DIVISION
July 21, 2015

No. 1-13-1223

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. 12 CR 6656
	)	
HERBERT VANSTEPHENS,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Simon and Justice Liu concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant has forfeited the claims that the trial court improperly tried to define "reasonable doubt" and failed to properly question the *venire*. The trial court did not abuse its discretion when it sentenced defendant to 39 years in prison for first degree murder.

¶ 2 Following a jury trial, defendant Herbert Vanstephens was found guilty of first degree murder and sentenced to 39 years in prison. On appeal, he contends that he was denied a fair trial because the trial court attempted to define "reasonable doubt" for the jury and failed to properly

question the *venire*. He also contends that his sentence is excessive in light of his age and "enormous" potential for rehabilitation. We affirm.

¶ 3 Defendant's arrest and prosecution arose out of the fatal stabbing of the victim, his boyfriend John Atkinson, on March 5, 2012. The matter proceeded to a jury trial.

¶ 4 Prior to the *voir dire* of the individual *venire* panel members, the trial judge admonished the entire group of potential jurors regarding the "basic constitutional principles" applicable to a criminal trial.

> "First off is that under the law [defendant] is presumed to be innocent of the charges against him. That means that he does not have to present any evidence on his own behalf. He may rely on the presumption of innocence.
>
> Does anybody have any qualms about that constitutional principle? Please raise their hand. Let the record indicate that nobody has raised their hand.
>
> Also another constitutional principle is that the State has the burden of proof beyond a reasonable doubt, and this burden of proof stays with the State throughout the entire case.
>
> Some of you may have had jury duty in civil cases. If you look at a balance or a scale, all you have to do is tilt, and the burden of proof in a civil case is a preponderance of the evidence. The verbal definition of preponderance is it's more likely than not that the event occurred.
>
> In criminal cases, the burden of proof is proof beyond a reasonable doubt. If we use the scale again, this would be the analogy to the burden of proof. Illinois does not define the burden of proof. That is for the trier of fact.

> Does anybody have any qualms about the State having the burden beyond a reasonable doubt and that the burden of proof stays with the State throughout the entire case? Please raise their hand. Let the record indicate nobody has raised their hand.
>
> Again, another constitutional principle is anybody charged with a criminal offense has the right to take the stand, and if [defendant] takes the stand, you judge his testimony like you would any other witness. Does anybody have any qualms about that constitutional principle? Please raise their hand. Again let the record indicate that nobody has raised their hand.
>
> On the other side of this constitutional point, anybody, including [defendant], charged with a criminal offense and put on trial has a constitutional right not to testify, and if [defendant] decides not to testify, no inference whatsoever can be drawn from his silence.
>
> Does anybody have any qualms about that constitutional principle? Please raise their hand. Again, let the record indicate that nobody raised their hand."

Defense counsel did not object, and a jury was subsequently selected.

¶ 5 Maurice Bennett, who lived with defendant and the victim, testified that his nickname for the victim was "Little John" because the victim was a "very petite little guy." Bennett described defendant, who was larger than the victim, as "very muscular" and ripped. However, the victim was healthy and the victim and defendant went to the gym as a couple.

¶ 6 When Bennett went out to dinner on the evening of March 5, 2012, the victim and defendant were home and defendant was hemming the victim's pants. When he returned, the victim and defendant were in the kitchen talking. Later, he heard the victim yell help three times

and both the victim and defendant screamed. Bennett then heard defendant calling for him. He dressed and went to the kitchen, where he saw the victim on the floor covered in blood. Defendant had bloody hands, but Bennett did not see any blood on the front of defendant's shirt. Bennett heard defendant, who was on the phone, state, "I stabbed him." Bennett stepped outside the apartment, hoping that "someone was coming to help." After a few seconds, he came back inside leaving the door open. Defendant was on the phone stating an address that was not their address. Bennett went to his room, got his phone and keys, left the apartment and called 911.

¶ 7 During cross-examination, he testified that he did not remember that the 911 operator had to ask him three times for his address as he was "freaking out." He acknowledged that defendant could have been injured too.

¶ 8 Jennifer Valdez, who lived in the second-floor apartment, testified that screams coming from downstairs woke her up around 11:30 p.m. As one of her roommates called 911, she went downstairs. The apartment door was open and she heard someone on the phone. She pushed the door open further and saw a bloody body in the kitchen and a kitchen knife next to the body. Valdez also saw a black man, wearing a green shirt, on a phone. The man came toward her, said "it's okay, the police are on their way," and "slammed" the door in her face. The man had a "smudge" of blood on his abdomen and on his forehead. Valdez went back upstairs and told her roommates what she had seen. At this point, she heard moaning and "ow" three to four times. Valdez later spoke with police and identified a green shirt. However, the shirt was cut up when she saw it at the police station.

¶ 9 Dr. Hilary McElligott testified that she performed an autopsy on the victim. The victim was 5'3" and weighed 138 pounds. McElligott catalogued 79 knife wounds to the victim's body.

¶ 10 Noel Occomy testified that he had known defendant for 23 years and considered defendant a friend. Defendant's professional reputation in the fashion design community and in a public setting was "peaceful."

¶ 11 Defendant testified that he was 53 years old and a fashion designer. After his company closed in 2005, he lived frugally from his savings. Defendant began dating the victim in May 2011, and moved in with him in December because the victim had insisted. Defendant explained that the victim wanted to keep his apartment but was not working. Although the relationship was "fantastic" at the beginning, once they moved in together, money became an issue. The victim enjoyed going out and wanted defendant to pay. Defendant did not have a problem paying when they went out or for his share of the expenses, but could not cover all of the victim's expenses. He wanted to move to a less expensive apartment, but the victim refused. The victim also wanted to see other men. Although defendant was not happy about this, he wanted the relationship to work and believed that if he accepted this, the victim's love for him would become "richer."

¶ 12 On the day of the victim's death, the victim stayed home all day and drank. Later that day, defendant hemmed the victim's pants while they watched a movie and drank wine. At one point, the victim told defendant that defendant should have more money and that he could find another man to take care of him. He then stated that defendant was a "dumb ni***," he did not know why he was with this "broke *** ass man," and he should kill defendant. The victim also stated that defendant better get the job he was interviewing for the next day if defendant wanted to stay with the victim.

¶ 13 Ultimately, defendant told the victim that he was tired of this "bullshit" and that he would be out of the apartment by the end of the week. He also said that he was going back to his old

boyfriend who knew how to love him. The victim stood up, said he was going to the kitchen and asked if defendant wanted anything to drink. The victim returned with a knife in his hand, and waved it three inches from defendant's face. The victim waved the knife back and forth with attitude, like Zorro. The victim said that before he would let "some other bi***" have defendant, he would kill defendant. Defendant told the victim he was crazy and stood up slowly. The victim then stabbed him in the stomach. Defendant pushed the victim away and ran to the kitchen to find something he could use as a weapon. He grabbed a kitchen knife. The victim followed defendant and they began "jockeying" for position. At one point, the victim stabbed defendant in the stomach a second time. Defendant responded by stabbing him. He was terrified that the victim was going to kill him.

¶ 14 The "battle" continued, and at one point, defendant threw the victim to the ground, but he got up and they continued to "try to assault each other with the knives." When defendant threw the victim to the floor a second time, he did not get up, so defendant went over, kneeled down, and called his name. The victim responded by stabbing defendant in the stomach a third time. Defendant used the knife to stop the victim from stabbing him. Ultimately, defendant called Bennett and 911. Bennett came out when he was on the phone. The call was "difficult" because he was "hysterical." He told the woman who came to the door that this was a private matter and that the police were en route. He was taken to the hospital and after an operation he told the police that the victim stabbed him in the stomach.

¶ 15 During cross-examination, defendant acknowledged that the victim was "demanding," verbally abusive, and wanted defendant to pay for everything. The victim also cheated on him, but he stayed because he loved the victim. He was taller and weighed more than the victim, but

they could lift the same weight. He did not recall whether he told the 911 operator that he had stabbed his boyfriend or that he had been stabbed. Before the paramedics arrived, defendant called his sister. As the paramedics arrived, he received a called from his niece. He said it was "over" and threw the phone away. He did not remember what he said to the police because he was "groggy" from morphine. He did not remember telling officers that when the victim stabbed him in the stomach his instincts kicked in so he went to the kitchen, grabbed a knife and knocked the victim to the floor when the victim followed him.

¶ 16 In rebuttal, Detective Steven DeSalvo testified that during a conversation with defendant at the hospital, defendant did not say that the victim called him a "broke ass black man," threatened to kill him, and waved a knife in his face; rather, defendant stated that the victim "played" with a knife and stabbed him first. Although defendant said he jumped up and went "ballistic," he then stated that ballistic was not the right word. He also stated that he went to the kitchen, grabbed a knife and knocked the victim to the floor when the victim followed him. After defendant learned how many times the victim was stabbed, he said his life was over and that he was going to jail.

¶ 17 Dr. Rebeca Rico, a trauma surgeon, testified that she operated on defendant. He had two "nicks" to the right of the abdomen. Rico had seen these types of nicks on patients who attempted to commit suicide but hesitated before stabbing. Defendant also had one large wound. Rico opined, based on the angle, that defendant's wounds were self-inflicted. On cross-examination, she admitted that it was possible that defendant's injuries were not self-inflicted.

¶ 18 Ultimately, the jury found defendant guilty of first degree murder. At sentencing, the State acknowledged that defendant had no prior criminal history, but that the victim and

defendant were in a dating relationship and defendant showed "utter disregard" for the victim's life. The defense argued in mitigation that defendant had no prior criminal history and that this kind of conduct was unlikely to reoccur. The defense further argued that the situation was a "tragedy" and asked that defendant be given the minimum sentence. Defendant expressed remorse and asked for forgiveness from the victim's family. The trial court stated that after considering the evidence at trial as well as the arguments in mitigation and aggravation, that the appropriate sentence was 39 years in prison.

¶ 19 On appeal, defendant first contends that the trial court committed reversible error when it attempted to define "reasonable doubt" for the jury, verbally and with hand gestures.

¶ 20 Initially, we note, and defendant concedes, that he failed to preserve this issue on appeal because he failed to object to the remarks during *voir dire*. See *People v. Colyar*, 2013 IL 111835, ¶ 27 (to preserve an issue for appeal, a defendant must both object at trial and include the alleged error in a written posttrial motion). However, defendant contends this issue should be reviewed under the plain error doctrine, which allows a reviewing court to reach an unpreserved issue when: "(1) 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, 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." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The burden of persuasion rests with the defendant in both instances. *People v. McLaurin*, 235 Ill. 2d 478, 495 (2009). The first step in plain error analysis is determining whether an error actually occurred. *People v. Cosby*, 231 Ill. 2d 262, 273 (2008).

¶ 21 Illinois does not define reasonable doubt and our supreme court has "consistently held that neither the trial court nor counsel should define reasonable doubt for the jury." *People v. Downs*, 2015 IL 117934, ¶ 19 (June 18, 2015). See also *People v. Speight*, 153 Ill. 2d 365, 374 (1992) ("The law in Illinois is clear that neither the court nor counsel should attempt to define the reasonable doubt standard for the jury."). Put another way, reasonable doubt is "self-defining and needs no further definition." *Downs*, 2015 IL 117934, ¶ 19. A trial court's attempt to explain reasonable doubt is improper because there is no better definition of reasonable doubt than the words themselves. *People v. Jenkins*, 89 Ill. App. 3d 395, 398 (1980) ("the concept of reasonable doubt needs no explanation").

¶ 22 In this case, during *voir dire*, the court explained the burden of proof in a civil case by analogizing it to the "tilt" of a scale and demonstrated "reasonable doubt" by referring to a scale analogy and apparently making hand gestures, although such gestures were not noted in the transcript. The court then told the potential jurors that "Illinois does not define the burden of proof. That is for the trier of fact." These comments are similar to those made by the trial court in *People v. Johnson*, 2013 IL App (1st) 111317. In that case, the court stated:

> " '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.* at ¶ 52.

¶ 23 In that case, the court found that the trial court did not err, concluding that "[a]lthough we do not condone the reference and comparison to the civil standard, we cannot say that the trial court's comments constitute error, particularly where the court told jurors that reasonable doubt was the highest burden at law and that it was for them to decide what reasonable doubt meant." *Id*., at ¶ 54.

¶ 24 Here, as in *Johnson*, the trial court used the scale analogy to contrast reasonable doubt with preponderance of the evidence, and further stated that it was for the trier of fact to decide. Although, as in *Johnson*, we do not condone the reference to, and comparison with, the civil standard of proof, we cannot conclude that the trial court's comments constituted error where the record indicates that the court indicated that the reasonable doubt standard was higher than the civil preponderance standard, and that it was for the jury to decide what reasonable doubt was. Because we agree with the reasoning of the *Johnson* court, we find no error in the trial court's similar remarks in the instant case. *Johnson,* at ¶ 54.

¶ 25 We are unpersuaded by defendant's reliance on *People v. Turman*, 2011 IL App (1st) 091019, *People v. Franklin*, 2012 IL App (3d) 100618, and *People v. Gashi*, 2015 IL App (3d) 130064, to argue that the trial court's comments to the potential jurors substantially affected defendant's rights. In *Downs*, our supreme court cited with favor *People v. Thomas*, 2014 IL App (2d) 121203, which found that to the extent that *Turman* and *Franklin* concluded that " 'simply instructing jurors that they must determine the meaning of 'reasonable doubt' is (1) a violation of

the Illinois Supreme Court's proscription against providing a definition or (2) reversible error *per se*, we find them unpersuasive.' " *Downs*, 2015 IL 117934, ¶ 23, quoting *Thomas*, 2014 IL App (2d) 121203, ¶ 48.

¶ 26 Ultimately, defendant has failed to show that a clear or obvious error occurred (*McLaurin*, 235 Ill. 2d at 495). Therefore, this court declines to apply the plain error doctrine to consider his claim, and the procedural default of this claim must be honored. *Downs*, 2015 IL 117934, ¶ 33.

¶ 27 Defendant next contends that the trial court erred because it failed to comply with Supreme Court Rule 431(b) (eff. July 1, 2012). Pursuant to Rule 431(b) the trial court must question prospective jurors, individually or in a group, if they understand and accept the principles outlined in *People v. Zehr*, 103 Ill. 2d 472, 477 (1984). Specifically, the court must ask if they understand and accept that: (1) a defendant is presumed innocent; (2) the defendant must be proved guilty beyond a reasonable doubt; (3) the defendant is not required to offer any evidence in his own behalf; and (4) if a defendant does not testify on his own behalf it cannot be held against him. Il. S. Ct. R. 431(b) (eff. July 1, 2012).

¶ 28 In the case at bar, defendant contends that the trial court erred when, after explaining each principle, the trial court asked whether anyone had any "qualms" about that principle. Defendant acknowledges that this issue must be reviewed pursuant to the plain error doctrine because he failed to object during *voir dire.* See *Colyar*, 2013 IL 111835, ¶ 27. He argues that the failure to ask whether the potential jurors accepted and understood these principles constituted plain error in light of the closeness of the evidence at trial. See *Piatkowski*, 225 Ill. 2d at 565 (under the closely balanced evidence prong of plain error review, a defendant must show

error and that the evidence was so closely balanced that the error alone threatened to tip the scales of justice against the defendant).

¶ 29 In *People v. Wilmington*, 2013 IL 112938, our supreme court found error because the trial court asked if anyone in the pool of potential jurors "disagreed" with three of the *Zehr* principles. The court noted that pursuant to its prior holding in *People v. Thompson*, 238 Ill. 2d 598 (2010), the trial court is required to ask potential jurors whether they understand and accept the principles enumerated in Rule 431(b), "mandating 'a specific question and response process.' " *Wilmington*, 2013 IL 112938, ¶ 32, quoting *Thompson*, 238 Ill. 2d at 607. Therefore, the court concluded that the trial court's questioning constituted error because although it was "arguable that the court's asking for disagreement, and getting none, is equivalent to juror *acceptance* of the principles, the trial court's failure to ask jurors if they *understood* the four Rule 431(b) principles is error in and of itself." (Emphasis in original.) *Wilmington*, 2013 IL 112938, ¶ 32. The court ultimately affirmed the defendant's conviction, however, determining that the evidence was not so closely balanced as to satisfy the first prong of plain error. *Id.*, ¶ 42.

¶ 30 Therefore, pursuant to *Wilmington*, the trial court's questioning of the *venire* in the instant case constituted error, as it did not follow the specific question and response process which would allow potential jurors to respond as to their acceptance and understanding of the principles outlined in Rule 431(b). See *Wilmington*, 2013 IL 112938, ¶ 32. That being said, we do not find that the evidence in this case was so closely balanced that the trial court's error when questioning potential jurors concerning their understanding and acceptance of the principles of Rule 431(b), resulted in defendant's conviction. See *Piatkowski*, 225 Ill. 2d at 565 (under the closely balanced evidence prong of plain error review, a defendant must show error and that the evidence was so

closely balanced that the error alone threatened to tip the scales of justice against the defendant). A "closely balanced" case is defined as one where the outcome of the case would have to be different had the impropriety not occurred. *People v. Pierce*, 262 Ill. App. 3d 859, 865 (1992).

¶ 31 In support of his argument that the evidence at trial was closely balanced, defendant relies on his testimony that he stabbed the victim because he was afraid for his life. Although defendant testified that he only stabbed the victim after the victim stabbed him, Bennett testified that he did not see any blood on defendant's shirt, Valdez only saw a smudge, and Dr. Rico testified that defendant's wounds were self-inflicted. In addition to the testimony of the State's witnesses, which contradicts defendant's testimony, the evidence at trial established that the victim, a physically smaller man, suffered 79 knife wounds. Accordingly, because defendant has failed to show that the evidence was so closely balanced (*Pierce*, 262 Ill. App. 3d at 865), that his conviction resulted from the trial court's failure to ask if the jurors understood and accepted the *Zehr* principles (*McLaurin*, 235 Ill. 2d at 495), his contention must fail.

¶ 32 Defendant finally contends that his 39-year prison sentence is excessive for a first-time offender who is unlikely to reoffend and who has "enormous" potential for rehabilitation. He argues that he had no prior criminal history, ran a successful business, and apologized to the victim's family. He asserts that his sentence should either be reduced to the statutory minimum of 20 years or vacated and the cause remanded for resentencing.

¶ 33 A trial court has broad discretion in determining the appropriate sentence for a particular defendant and its determination will not be disturbed absent an abuse of that discretion. *People v. Patterson*, 217 Ill. 2d 407, 448 (2005). A sentence within the statutory range will not be considered excessive unless it varies greatly from the spirit of the law or is manifestly

disproportionate to the nature of the offense. *People v. Brazziel*, 406 Ill. App. 3d 412, 433-34 (2010). When balancing the retributive and rehabilitative aspects of a sentence, a court must consider all factors in aggravation and mitigation including, *inter alia*, a defendant's age, criminal history, character, education, and environment, as well as the nature and circumstances of the crime and the defendant's actions in the commission of that crime. *People v. Raymond*, 404 Ill. App. 3d 1028, 1069 (2010). "Even where there is evidence in mitigation, the court is not obligated to impose the minimum sentence." *People v. Sims*, 403 Ill. App. 3d 9, 24 (2010).

¶ 34 The record reveals that at sentencing, the parties presented evidence in aggravation and mitigation including defendant's lack of a criminal record and the fact that defendant and the victim were in a dating relationship at the time of the offense. Defendant also expressed remorse and asked for forgiveness from the victim's family. In sentencing defendant, the trial court stated that it had considered the evidence presented at trial as well as the evidence in aggravation and mitigation. This court cannot say that a prison term of 39 years was an abuse of discretion when defendant stabbed the victim 79 times in their home. See *Patterson*, 217 Ill. 2d at 448.

¶ 35 Defendant contends, however, that the trial court failed to consider that a 39-year sentence is effectively a life sentence as he will be approximately 91 years old upon his release from prison and that his actions were out of character and unlikely to be repeated.

¶ 36 The seriousness of the offense is the most important factor in determining a sentence (*People v. Quintana*, 332 Ill. App. 3d 96, 109 (2002)), and a defendant's potential for rehabilitation is not entitled to greater weight (*People v. Coleman*, 166 Ill. 2d 247, 261 (1995)). It is presumed that the court properly considered the mitigating factors presented and it is the defendant's burden to show otherwise. *Brazziel*, 406 Ill. App. 3d at 434. Here, defendant cannot

meet that burden, as the trial court stated that it considered all evidence in mitigation and aggravation when determining defendant's sentence, and defendant points to nothing in the record which contradicts the court's statement. *Id*. We reject defendant's conclusion that the trial court abused its discretion merely by giving the evidence presented in mitigation a different weight than defendant would prefer; the trial court was not required to impose a minimum sentence merely because mitigation evidence exists (*Sims*, 403 Ill. App. 3d at 24).

¶ 37 Ultimately, the trial court did not abuse its discretion when it considered the evidence presented in mitigation and aggravation (*Brazziel*, 406 Ill. App. 3d at 433-34), and sentenced defendant to 39 years in prison (*Patterson*, 217 Ill. 2d at 448).

¶ 38 For the reasons stated above, we affirm the judgment of the circuit court of Cook County.

¶ 39 Affirmed.