2015 IL App (1st) 131312-U

FIRST DIVISION
June 29, 2015

No. 1-13-1312

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. PAULA HEINE, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County. No. 12 MC3 155 Honorable James N. Karahalios, Judge Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justice Cunningham concurred in the judgment.
Justice Harris dissented.

ORDER

¶ 1 ***Held:*** The trial court did not err in denying a posttrial motion filed by defendant's attorney in which she alleged her own ineffectiveness, and defendant was not entitled to new counsel or remand for a hearing on the motion. Defendant has forfeited her claim that the trial court failed to comply with Supreme Court Rule 431(b) in the jury selection process, and plain-error review of that issue is unwarranted. Finally, the trial court's refusal to issue defendant's proffered jury instruction was harmless error. The trial court is affirmed.

¶ 2 Advances in technology have changed how we go about our daily lives, by creating new ways for us to communicate, entertain ourselves, record our daily activities, and schedule our

appointments. This case presents an example of how technology is changing the way we conduct criminal trials. The entire crime was captured from start to finish on a police squad car recording device which, unlike earlier generations of such devices, captured all the relevant actions and conversations in reasonably detailed full-color video and with a clear audio track. The evidence in this recording has a substantial legal effect on our review of the errors which the defendant claims occurred in her trial.

¶ 3 Following a jury trial, defendant Paula Heine was convicted of obstructing a peace officer and resisting arrest. She was eventually sentenced to 60 days in jail. She appeals, contending that the trial court erred in: (1) denying without comment her motion for a new trial in which defense counsel alleged her own ineffectiveness; (2) failing to comply with the requirements of Supreme Court Rule 431(b); and (3) refusing her proffered jury instruction because two terms were inadvertently formatted in an italicized typeface. We affirm.

¶ 4 BACKGROUND

¶ 5 The State charged defendant with driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(2) (West 2012)), obstructing a peace officer (720 ILCS 5/31-1 (West 2012)), and resisting a peace officer (720 ILCS 5/31-1 (West 2012)).

¶ 6 Defendant's trial began on October 15, 2012. During voir dire, the trial court asked the first prospective juror the following:

> "The defendant is presumed innocent, and the defendant need not prove his or her innocence. In other words, the burden of proving the defendant guilty beyond a reasonable doubt rests with the People. ***. The defendant need not prove her innocence, and that includes the fact that the defendant may not testify if she so

> chooses not to testify. And if the defendant chooses not to testify, there is no presumption of guilt. There is no inference of guilty [*sic*]. The jury is not allowed to assess any guilt to the defendant if the defendant so chooses.
>
> Now, will you be able to follow that; and if the defendant chooses not to testify, not to hold it against her?"

The first prospective juror indicated she would be able to follow that principle. The trial judge asked some of the subsequent potential jurors individually if they remembered what he had said about following the law and whether they would hold it against defendant if she did not testify.

¶ 7 After the jury was empanelled, the State's first witness was Wheeling Police Officer Andrew Teichen. Teichen stated that, at around 3 a.m. on January 14, 2012, he was on routine patrol driving southbound on Milwaukee Avenue near Lake-Cook Road. He observed a vehicle in the northbound lanes traveling 55 miles per hour, 15 miles per hour over the speed limit. Teichen said that it was snowing, very cold, and that there was ice on the road. He turned on his siren and emergency lights, made a U-turn, and followed the vehicle. Although Teichen noted that his car was sliding on the ice while he was in pursuit, he admitted that the other car was not sliding on the roadway, and the driver of the vehicle (later identified as defendant) appeared to be in control of her car. When the vehicle pulled over, Teichen turned on the dashboard camera and walked up to the car.

¶ 8 Teichen told defendant that she had been speeding, and he asked her for her driver's license and proof of insurance. Defendant gave Teichen her Wisconsin driver's license but was unable to locate her insurance card and kept looking for it. Teichen said he could smell a "slight" odor of alcohol on her breath, but defendant said that she had left a restaurant and denied

drinking any alcohol. Teichen then stated that, due to a concern that another vehicle or a snowplow could slip on the road and strike them, he asked defendant to park her vehicle in the lot of a nearby restaurant.

¶ 9 Defendant complied, parking her car next to a "snow bank."[1] Teichen said he walked up to defendant's car, but defendant did not notice him, so he had to knock on her window. When defendant lowered the window, Teichen said he still could detect the odor of alcohol. In addition, he noticed that her eyes were "bloodshot and glassy," defendant seemed to be "slurring" her words, and she was having difficulty manipulating her wallet while she continued to look for her insurance card. Teichen requested assistance, and Wheeling Police Officer Lucas Czapla arrived. While Teichen was in his squad car checking defendant's license, he asked Czapla to speak with defendant to confirm whether Czapla noticed alcohol on defendant's breath. According to Teichen, Czapla also detected the odor of alcohol.

¶ 10 Teichen then returned to defendant's car, where defendant continued to search for her insurance card. Teichen said that defendant repeatedly told him that she had just purchased a new wallet and could not recall where she put her insurance card. Teichen told her not to worry about her insurance card and to get out of her car because he wanted to make sure she was safe to drive back to Wisconsin. Defendant responded that she was only going to Lake Zurich (Illinois), and Teichen said he needed to ensure she could return safely to Lake Zurich and again asked her to get out of her car. Defendant, however, seemed to be oblivious to all of the officer's requests and instead maintained a rather peculiar fixation on her search for the insurance card. She

[1] The video recording of the traffic stop indicates that Teichen was standing in the edge of the snow bank, where it was about 3 – 4 inches deep.

continued to search for her insurance card despite Teichen's repeated requests for her to get out of her car. Defendant eventually found her insurance card and presented it to Teichen.

¶ 11 After checking the card, Teichen again asked defendant to get out of her car, and then added, after some delay for her to comply, that if she refused to do so, he would place her under arrest for obstructing a peace officer. Teichen opened defendant's car door, but defendant still did not comply with Teichen's request that she get out of her car. Instead, defendant used her cell phone to call her brother.

¶ 12 At that point, Teichen informed defendant that she was under arrest, and he directed her to put her phone down. Defendant did not do so, and Teichen took hold of her left hand. Teichen testified that he continued to tell her to exit her car, but she did not. Defendant said, "They are pulling me out of my car," into her cell phone, and asked the officers, "Why are you doing this?" Teichen added that defendant then braced herself in the car by placing her feet on either side of the door jamb, and she also pulled her left hand toward her (while Teichen was holding it) and leaned toward the interior of the car. According to Teichen, Czapla told defendant, "we can either pull you out or you can get out nicely." Defendant, however, did not respond, and after a brief struggle, Teichen and Czapla forcibly removed defendant from the vehicle. Defendant fell into the snow and lost a shoe, which Teichen later returned. Defendant was handcuffed and placed in the back of the squad car. She was then brought to the station.

¶ 13 At the police station, Teichen administered field sobriety tests. He said that defendant "failed" the Horizontal Gaze Nystagmus (HGN) test and the nine-step walk-and-turn step test, but Teichen later conceded that he improperly administered the HGN test. In addition, defendant successfully completed the one-legged stand test. Finally, defendant refused to participate in a breathalyzer test.

¶ 14 After the tests, defendant and Teichen had a conversation in which defendant told Teichen that she had been in two prior car accidents and suffered dizzy spells. Defendant also asked Teichen if he enjoyed "ruining her life" because she was a medical doctor preparing to take her "boards." Teichen admitted on cross-examination that he told her that she should have mentioned that earlier because there is "reciprocity" between firemen, policemen, doctors, and nurses. On redirect examination, however, Teichen explained that, if a suspect was cooperative and there was insufficient probable cause for a DUI arrest—or even if the suspect's blood-alcohol concentration were "at or a little above" the legal limit—he would try to find that suspect a ride home. Teichen stated, however, that he would give someone a "break" based upon their profession "on a case-by-case basis," and added that it would depend upon whether there was probable cause to make an arrest. Teichen then confirmed that there was probable cause here.

¶ 15 Teichen further testified that, at some point defendant said, "we are going to have to do something about this." Teichen asked defendant if she were offering him a bribe, but defendant said she was not. On cross-examination, Teichen conceded that defendant's comment occurred after his comments regarding professional reciprocity, but Teichen added that her comment came later and that her comment and his related to "two separate conversations."

¶ 16 Teichen also testified that, when he told defendant she would have to post a $300 bond, defendant claimed she did not have any money, although an inventory search of her purse revealed $360. Teichen said that defendant informed him that she did not want to post this money because it was all she had. The trial court allowed the State's motion to admit and then publish to the jury a video recording of the traffic stop, including the point at which defendant was pulled from the car. The State eventually rested, and defendant presented her case in chief.

¶ 17 Fred Crawford testified that he went to a restaurant in Harwood Heights between 8:30 and 9 p.m. He saw defendant in a booth drinking water. Crawford did not smell alcohol on defendant's breath, and did not see anything that led him to believe defendant had been drinking. At some point, Crawford said defendant reported feeling ill and left to go to the bathroom for about ten minutes. When defendant returned, she looked pale, and she told Crawford that she had just thrown up. At around 12:20 a.m., they went to the "UN Club" to meet defendant's brother, where defendant had water, and they left at 2 a.m., driving separately. Defendant subsequently rested, and the jury was excused.

¶ 18 The trial court then held a "final" jury instructions conference. Defense counsel had certain jury instructions to propose, but they were not typed up. The trial court indicated it would, over the State's objection, allow defendant's request to submit Illinois Pattern Jury Instruction, Criminal, No. 3.06-3.07 (4th ed. 2000) (hereinafter IPI 3.06-3.07). The trial court, however, added, "If it's properly worded according to the I.P.I., then I'm going to give it."

¶ 19 As the jury instructions conference continued, defense counsel provided a typed copy of IPI 3.06-3.07. The following colloquy then took place:

> "THE COURT: All right. 3.06-3.07 is defendant's instruction No. 1. This instruction is not in proper form. You have things highlighted here for emphasis. And clearly—
>
> MS. FREDRICKSON-GARDNER [Defense counsel]: That's a mistake.
>
> THE COURT: I know it's a mistake. It's improper, and it's refused.
>
> [Defense counsel]: I will have her correct it.

THE COURT: I'm sorry. Objection sustained as to form.

[Defense counsel]: The only thing—

THE COURT: Refused.

[Defense counsel]: Judge, could I be heard?

* * *

[Defense counsel]: Judge, it's a new secretary.

THE COURT: You have to forgive me, but we have known about instructions since the beginning of this case. We had an instruction conference two days ago, and I asked everyone to have their instructions. That wasn't done. We didn't have them yesterday, and now we didn't have them today. And the jury has been ringing for over half an hour, specifically 35 minutes, that they're ready to come out; and I've held them back there because you were dictating on the phone and these things were being typed up. I'm a little put out, to be very candid with you. And I realize you may not have been the one to do the typing, but the ill-preparedness is not appreciated, especially when it works to delay the trial as it has in this case. And now at the eleventh hour and fifty-ninth minute, I find that the instructions are not even typed up properly.

[Defense counsel]: Judge, it will take two minutes—

THE COURT: No, it will not take two minutes, and you know that it won't take two minutes.

> [Defense counsel]: She's a new secretary.
>
> THE COURT: *** I'm sorry, *** objection sustained. Refused.
>
> [Defense counsel]: Judge, I implore you not to take this out on my client.
>
> THE COURT: I'm not taking it out on anybody. I'm saying that these things are not proper, and they're rejected because they're not proper and for no other reason. No other reason."

The trial court later instructed the jury that, in considering a witness's testimony, it may consider the witness's "ability and opportunity to observe, his memory, his manner while testifying and any interest, bias or prejudice he may have and the reasonableness of his testimony considered in light of all of the evidence in the case." Following instructions, the jury began deliberations.

¶ 20 At 3:30 p.m., approximately 30 minutes after beginning deliberations, the jury sent a note asking whether defendant was a doctor and if there was proof that she had been in two accidents. The trial court responded by telling the jury to continue deliberating. At around 4:45 p.m., the jury asked the trial court what would happen if all except for one of them agreed on a verdict. The trial court had them brought back into court and instructed them that their verdict had to be unanimous and to continue deliberating. Half an hour later, the jury informed the trial court that they agreed on two of the three charges and one juror would not change "his" mind with respect to a DUI verdict. The trial court again directed the jury to keep deliberating. The trial court reiterated this response 20 minutes later when the jury asked what the physical and mental impairments were when someone drinks alcohol.

¶ 21 The jury then requested the transcript of Crawford's testimony and asked how long it would take to obtain it. At around 6:50 p.m., the trial court indicated that it would not keep the jury past 10 p.m. and that the transcript could be ready no sooner than the following morning. At approximately 7:15 p.m., one juror wrote, "I will not change my mind." The trial court summoned the jury, and the foreperson informed the trial court that the jury was unanimous on the obstructing and resisting verdicts but not the DUI verdict, they were hopelessly deadlocked as to the DUI verdict, and further deliberations would not resolve that difference. The trial court then granted defendant's motion for a mistrial on the DUI charge, and the jury later returned guilty verdicts on the obstructing and resisting charges. The cause proceeded to sentencing, and the trial court sentenced defendant to 90 days in jail, which it later reduced to 60 days with credit for time served.

¶ 22 Defense counsel subsequently filed a motion for a new trial, which she later amended to add an allegation that she was ineffective for failing to file a motion to quash arrest and suppress evidence. The State filed its response, and defense counsel filed a motion for leave to reply. In her reply, defense counsel argued that the trial court would have granted her motion to quash arrest and suppress evidence because, based upon the facts adduced at trial, Teichen lacked reasonable grounds to ask defendant to get out of her car. At the hearing on the motion, the trial court stated that it had reviewed the motion, as well as the State's response and defense counsel's reply. The State did not argue with respect to defense counsel's ineffective assistance claim, and defense counsel also informed the trial court that she had nothing to add to her reply. The trial court denied defense counsel's motion as to the ineffective assistance claim without comment.

¶ 23 This appeal follows.

¶ 24 ANALYSIS

¶ 25 Trial Counsel's Conflict of Interest

¶ 26 On appeal, defendant first contends that the trial court erred in denying her motion for a new trial in which her trial counsel alleged her own ineffectiveness for failure to file a motion to quash arrest and suppress evidence. Specifically, defendant argues she received ineffective assistance because a *per se* conflict of interest arose when her trial counsel argued her own ineffectiveness in the motion for a new trial. Defendant asks this court to remand for appointment of new counsel to represent her on her motion for a new trial or, alternatively, remand for an inquiry as provided in *People v. Krankel*, 102 Ill. 2d 181 (1984).

¶ 27 The sixth and fourteenth amendments to the United States Constitution guarantee the right to the effective assistance of counsel. U.S. Const., Amends. VI, XIV; *Cuyler v. Sullivan*, 446 U.S. 335, 343-44 (1980); *People v. Taylor*, 237 Ill. 2d 356, 374 (2010); see also Ill. Const. 1970, art. I, §8. This includes the right to conflict-free representation. *People v. Hernandez*, 231 Ill. 2d 134, 142 (2008) (citing *People v. Morales*, 209 Ill. 2d 340, 345 (2004)); see also *People v. Gerold*, 265 Ill. 448, 477 (1914) (holding that it has "long been firmly established that an attorney cannot represent conflicting interests or undertake to discharge inconsistent duties").

¶ 28 Illinois recognizes two categories of conflicts of interest: *per se* and actual. *Hernandez*, 231 Ill. 2d at 142; *Morales*, 209 Ill. 2d at 345. Our supreme court has identified three situations where a *per se* conflict exists: (1) where defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution; (2) where defense counsel contemporaneously represents a prosecution witness; and (3) where defense counsel was a former prosecutor who had been personally involved in the prosecution of defendant. *Hernandez*, 231 Ill. 2d at 143-44; *Taylor*, 237 Ill. 2d at 374 (citing *Hernandez*;

Morales, 209 Ill. 2d at 345-46). The existence of a *per se* conflict of interest is reviewed *de novo*. *People v. Miller*, 199 Ill. 2d 541, 544 (2002).

¶ 29 The State correctly observes that none of the three situations enumerated in *Hernandez* are present here. Defendant also acknowledges that "[s]everal panels of this court" have held that a trial attorney's claim of ineffective assistance is not a *per se* conflict of interest, citing *People v. Perkins*, 408 Ill. App. 3d 752, 762 (2011), *appeal denied*, No. 112274 (Sept. 28, 2011), and *People v. Sullivan*, 2014 IL App (3d) 120312, ¶ 46 *appeal denied*, No. 117607 (Sept. 24, 2014). See also *People v. Short*, 2014 IL App (1st) 121262, ¶ 117 (rejecting an identical claim), *appeal denied*, No. 118725 (Mar. 25, 2015). Defendant asks that we not follow *Perkins* or *Sullivan*, and recommends that we follow "the rationale" of *People v. Lawton*, 212 Ill. 2d 285 (2004). We decline defendant's invitation.

¶ 30 In *Lawton*, the defendant was committed under the Sexually Dangerous Persons Act (725 ILCS 205/0.01 *et seq.* (West 2002)) (the SDP Act). *Id.* at 287. Our supreme court noted that the defendant had the same attorney at the commitment hearing and on direct appeal, but no ineffective assistance claim was raised. *Id.* at 295-96. The court noted that, although a defendant in proceedings under the SDP Act may raise claims of ineffective assistance of trial counsel on direct appeal, when the defendant's trial counsel is also counsel on appeal, "that avenue is likely to be foreclosed" because that attorney "cannot be expected to argue his own ineffectiveness." *Id.* at 295-96. The *Lawton* court then added, "That is why, for example, trial counsel's failure to assert his own ineffective representation in a posttrial motion does not waive the issue on appeal." *Id.* at 296. The court noted that the Post-Conviction Hearing Act was unavailable to the defendant because proceedings under the SDP Act are civil in nature. *Id.* at 296-97. The *Lawton* court then held that an individual committed under the SDP Act was able to

raise an ineffective assistance of counsel claim in a petition brought under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2002)). *Id.* at 299.

¶ 31 *Lawton* is distinguishable because the case before us does not involve the same trial attorney now prosecuting this appeal, nor is there any "foreclosed" avenue of relief when defendant raises a *pro se* claim of ineffective assistance of trial counsel. To be sure, there were no *pro se* claims here: The only claim of ineffective assistance came from trial counsel herself. Instead, we find this case to be analogous to *Perkins* and *Short*. In both cases, this court rejected the defendant's assertion that trial counsel's mere claim of his own ineffectiveness in a posttrial motion warrants the appointment of new counsel. *Perkins*, 408 Ill. App. 3d at 762; *Short*, 2014 IL App (1st) 121262, ¶ 117. Moreover, although she declined an opportunity to argue her motion (as did the State), we nonetheless find that she voluntarily and zealously argued her claim, notably where her written argument as to this claim comprised over one-third of the motion. Therefore, we find *Lawton* distinguishable and elect to follow *Perkins* and *Short*.

¶ 32 Finally, trial counsel's claim of ineffective assistance fails on the merits. Her claim was that, based solely upon the facts adduced at trial, a motion to quash arrest and suppress evidence (namely, that Teichen lacked probable cause to ask defendant to exit her car to perform field sobriety tests) would have been successful. The facts here, however, are that Teichen testified that he initiated the traffic stop because defendant was driving over 15 miles per hour over the speed limit under adverse driving conditions, and when Teichen spoke to defendant after she pulled over, he detected the odor of alcohol on her breath, he noticed that her eyes were "bloodshot and glassy," she seemed to be "slurring" her words, and she was having difficulty manipulating her wallet while she continued to look for her insurance card. "Probable cause to arrest exists when the facts known to the officer at the time of the arrest are sufficient to lead a

reasonably cautious person to believe that the arrestee has committed a crime." *People v. Wear*, 229 Ill. 2d 545, 563 (2008). On these facts, Teichen had probable cause to arrest defendant for DUI. See, *e.g.*, *People v. Juban*, 154 Ill. App. 3d 155, 156-57 (1987), *People v. Brodeur*, 189 Ill. App. 3d 936, 941 (1989); and *People v. Wingren*, 167 Ill. App. 3d 313, 320-21 (1988). Defendant's claim therefore is without merit.

¶ 33 In the alternative, defendant argues that remand for a *Krankel* hearing is required for an investigation of trial counsel's claim of her own ineffectiveness. Defendant's claim is problematic for several reasons.

¶ 34 When a defendant brings a *pro se* posttrial claim of ineffective assistance of counsel, the trial court must conduct an inquiry into the claim and under certain circumstances, appoint new counsel to argue the claim. *Krankel*, 102 Ill. 2d at 187-89. The trial court, however, is not required to automatically appoint new counsel merely because a defendant makes such a claim; instead, the trial court must first examine the factual basis underlying the defendant's claim. *People v. Moore*, 207 Ill. 2d 68, 77-78(2003). The trial court can base its evaluation on its knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face. *Id.* at 79. The trial court, however, need not make a formal statement that it is conducting a *Krankel* inquiry. See *People v. Dean*, 2012 IL App (2d) 110505, ¶ 15.

¶ 35 *Krankel* concerns a criminal defendant's *pro se* claims of ineffective assistance of counsel and not trial counsel's claims of her own ineffectiveness. In this case, defendant did not file a *pro se* motion alleging ineffective assistance of trial counsel, nor did she make an oral statement raising any such claim. *Krankel* is therefore factually distinct and remand for a hearing pursuant to it would be inappropriate.

¶ 36 Moreover, the record establishes that the trial court considered and rejected this claim. Trial counsel's claim only concerned the evidence at trial and there was no mention of other unspecified evidence not presented at trial. Thus, the trial court had all of the facts before it and rejected her claim. See *Moore*, 207 Ill. 2d at 79 (holding that a trial court may reject *pro se* ineffective assistance of counsel claims based upon its own observations of trial counsel's actions during trial). As the State notes, the trial court made a general comment during its discussion of another issue that defendant was "amply represented" "to the hilt." While the trial court did not state that it was conducting a *Krankel* analysis, no such formal statement is required. See *Dean*, 2012 IL App (2d) 110505, ¶ 15. As a result, the trial court was not required to conduct a hearing pursuant to *Krankel*, and defendant's claim in the alternative is meritless.

¶ 37 Supreme Court Rule 431(b)

¶ 38 Defendant also contends that she is entitled to a new trial because the trial court failed to comply with Rule 431(b). Defendant argues that the trial court only referenced some of the enumerated principles under Rule 431(b) to the first potential juror, and then asked the remaining jurors only if they recalled what it said about following the law and if they would agree not to hold it against defendant if she did not testify. Defendant adds that the trial court failed to ask the potential jurors whether they understood and accepted the four Rule 431(b) principles. Defendant acknowledges that this issue was not raised either at trial or in a posttrial motion, but asks that we review this issue for plain error. The State concedes that the trial court failed to comply with Rule 431(b), but argues that plain error review is unwarranted.

¶ 39 Supreme Court Rule 431(b) provides in relevant part that the trial court shall ask each potential juror 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 ***." Ill. S. Ct. R. 431(b) (eff. May 1, 2007). "The language of Rule 431(b) is clear and unambiguous." *People v. Thompson*, 238 Ill. 2d 598, 607 (2010). The rule requires the trial court to ask potential jurors whether they understand and accept the enumerated principles. *Id.* In essence, the rule "mandates a specific question and response process." *Id.* Notably, the committee comments emphasize that "a broad statement of the applicable law followed by a general question concerning the juror's willingness to follow the law" does not comply with the requirements of this rule. See Ill. S. Ct. R. 431(b), Committee Comments. Finally, we apply a *de novo* standard of review when considering issues raised regarding compliance with supreme court rules. *Thompson*, 238 Ill. 2d at 606-07.

¶ 40 The plain error doctrine allows a reviewing court to bypass normal forfeiture principles and consider an otherwise unpreserved error affecting substantial rights when either: "(1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." *People v. Herron*, 215 Ill. 2d 167, 187 (2005); see also Ill. S. Ct. R. 615(a). Defendant only argues that the first prong of the plain error analysis applies, *i.e.*, "where the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence." *Id.* at 178.

¶ 41 Here, the trial court clearly failed to comply with the letter of Rule 431(b). Rather than ask each potential juror whether she understood and accepted the four principles, it only asked the first potential juror whether she would "follow" three of the four principles: that defendant is presumed innocent, that the State must prove the defendant guilty beyond a reasonable doubt, and that defendant's failure to testify cannot be held against her. The trial court did not ask the

first potential juror regarding the principle that defendant did not have to produce any evidence on her behalf, although we note the trial court did inform that potential juror that the defendant did not have to "prove his or her innocence." In any event, and setting aside whether the term "follow" is an acceptable substitute for the phrase "understand and accept," the trial court failed to ask any of the remaining potential jurors whether they understood and accepted the four principles. Instead, the trial court merely asked whether those jurors remembered what he had said about "following the law" and whether they would hold it against defendant if she did not testify. In other words, the trial court did precisely what the committee comments indicated it should not do: make a broad statement of the applicable law followed by a general question as to the juror's willingness to follow the law. See Ill. S. Ct. R. 431(b), Committee Comments.

¶ 42 Since the trial court committed clear error on this issue, we must determine whether the first prong of the plain error rule is met. Under that prong, we may disregard forfeiture principles and consider an unpreserved error if the evidence is close, regardless of the seriousness of the error, or, where the evidence is so close that the jury's guilty verdict may have resulted from the error and not the evidence. *Herron*, 215 Ill. 2d at 178, 187. Here, however, the evidence as to defendant's convictions for obstruction and resisting was not closely balanced. The evidence at trial, including the video recording of the incident, overwhelmingly established that, despite repeated requests from Teichen, defendant refused to get out of her car, and when Teichen opened the door and took hold of her arm, defendant pulled her arm back, leaned in toward the center of the car (away from Teichen), and braced her feet against the door jamb. The video recording further depicts Teichen and Czalpa briefly struggling to get defendant out of her car and having to pull her with such force that defendant and Teichen fell into the snow bank near her car. Although defendant claims the evidence was closely balanced because of the

various jury questions and the fact that the jury was deadlocked on the DUI charge, the trial court granted a mistrial on that charge. By contrast, the jury indicated that it had agreed on the other two charges, *i.e.*, the obstruction and resisting charges. Since the evidence was not closely balanced, we cannot hold that the jury's verdict resulted from the trial court's clear error in complying with Rule 431(b) and not the evidence. See *id.* at 178. Plain error review is therefore unwarranted, and we must honor defendant's forfeiture of this issue.

¶ 43 Defendant's Proposed Jury Instruction

¶ 44 Finally, defendant contends that the trial court erred in refusing a proffered jury instruction. Specifically, defendant argues that the trial court, although initially agreeing to provide the instruction over the State's objection, abruptly refused the instruction because two words were inadvertently formatted in italicized typeface, and it also refused to allow defendant to immediately have the instruction resubmitted in a proper format.

¶ 45 It is axiomatic that a defendant is entitled to an instruction on her theory of the case "if there is some foundation for the instruction in the evidence, and if there is such evidence, it is an abuse of discretion for the trial court to refuse to so instruct the jury." *People v. Jones*, 175 Ill. 2d 126, 131-32 (1997). Even very slight evidence will justify the giving of an instruction. *Id.* at 132. We note, however, that jury instructions should not be misleading or confusing (*People v. Bush*, 157 Ill. 2d 248, 254 (1993)), and they are sufficient if, considered as a whole, they "fully and fairly announce the applicable law" (*People v. Bannister*, 232 Ill. 2d 52, 86 (2008)).

¶ 46 Here, defense counsel requested IPI 3.06-3.07 so that the jury would be able to weigh defendant's postarrest statements, specifically, those statements that Teichen believed was defendant's attempt to bribe him. Initially, the trial court allowed the instruction over the State's objection. At a later point during that same instructions conference, however, defense counsel

tendered a typed version of the instructions, albeit inadvertently italicizing two terms. The trial court then refused to provide the instruction despite defense counsel's plea that it would be properly retyped in a matter of minutes. While we appreciate the trial court's justifiable frustration with the delay caused by the defendant's counsel, we are compelled to find that on these facts, the trial court abused its discretion regarding this jury instruction. A defendant is entitled to a jury instruction if there is even *very slight* evidence supporting it. *Jones*, 175 Ill. 2d at 132 (citing *People v. Bratcher*, 63 Ill. 2d 534, 540 (1976)). While we may not necessarily agree with defendant's characterization of the proffered instruction as "crucial" to her defense, there was at least very slight evidence supporting it. *Id.* The fact that the jury would have had to have waited an additional two minutes beyond the 35 minutes it had already waited cannot under any reasonable set of circumstances justify the denial of the instruction.[2]

¶ 47 Even so, no reasonable argument could be made that there would have been any adverse impact upon the jury because two nonsubstantive terms (specifically, the words "the" and "complaints" in an instruction concerning the credibility of a defendant's alleged statements to a police officer) were inadvertently italicized. Typographical errors and (as here) mere errors in formatting are commonplace at all levels of writing (including judicial decisions). Therefore, even assuming, *arguendo*, that the trial court's heightened deference to the jury's impatience was warranted and a two-minute delay would have somehow doomed the proceedings, we are quite confident that submitting the written instruction as typed, warts and all, would have had no material effect on the jury's ability to render a fair verdict.

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[2] The trial court disputed defense counsel's claim that a properly formatted instruction could have been produced in two minutes. Regardless of whether it would have required an additional 2, 10, or 20 minutes, our holding is the same.

¶ 48 The State argues that the instruction was unnecessary, however, because the jury was instructed generally to take into account a witness's ability and opportunity to observe, as well as the witness's bias or interest, and the reasonableness of the testimony in light of all of the evidence. See Illinois Pattern Jury Instruction, Criminal, No. 1.02 (4th ed. 2000) (hereinafter IPI 1.02). Defendant, however, requested IPI 3.06-3.07 because the evidence in this case was that she had purportedly stated to Teichen that they would have to "do something about this," which Teichen suspected was her offer of a bribe to him, but which defendant denied. As defendant points out, attempts at bribery are admissible to show consciousness of guilt. See, *e.g.*, *People v. Hawkins*, 326 Ill. App. 3d 992, 997 (2001); *People v. Aleman*, 313 Ill. App. 3d 51, 64 (2000). Defendant's requested instruction would have allowed the jury to properly weigh defendant's alleged statements following her arrest, whereas IPI 1.02 was merely a general admonition with respect to any witness's testimony. The State's argument is therefore unavailing.

¶ 49 That, however, does not end our analysis. As the State points out, an error with respect to jury instructions is harmless where the result of the trial would not have been different had the jury been properly instructed. *People v. Kirchner*, 194 Ill. 2d 502, 557 (2000). As noted above, the evidence underlying her convictions for obstructing and resisting—in particular, Teichen's testimony and the video recording—was overwhelming. Where, as here, the result of defendant's trial would not have been different had the trial court given the refused instruction, this error was merely harmless, and defendant's claim necessarily fails. Although defendant relies strongly on her argument that the evidence was closely balanced, we reject that argument for the same reasons that we rejected it in disposing of her conflict-of-interest claim, *supra*. Consequently, we must reject defendant's final contention of error.

¶ 50 CONCLUSION

¶ 51 The trial court did not err in denying defendant's motion for a new trial without appointment of new counsel or for a hearing to investigate trial counsel's allegation of her own ineffective assistance. In addition, although the trial court erred in failing to properly admonish the potential jurors in conformity with Supreme Court Rule 431(b), defendant forfeited this error and the plain error doctrine does not rescue this claim. Finally, the trial court clearly abused its discretion in refusing defendant's proffered jury instruction due to the inadvertent italicizing of two nonsubstantive terms, especially where trial counsel offered to provide a replacement form within minutes. Defendant's claim on this point, however, is unavailing because the trial court's clear error was harmless beyond a reasonable doubt. Accordingly, we affirm the judgment of the trial court.

¶ 52 Affirmed.

¶ 53 JUSTICE HARRIS, dissenting.

¶ 54 I respectfully dissent. For whatever reason, when qualifying prospective jurors the trial court erred and continued to exercise the improper practice of making a broad statement of the applicable law followed by general questions concerning the willingness to follow the law, which we have repeatedly held does not comply with Illinois Supreme Court Rule 341(b) (eff. July 1, 2012). See *People v. Thompson*, 238 Ill. 2d 598, 607 (2010). Complying with the rule and administering it correctly couldn't be simpler. A correctly qualified jury is fundamental to a defendant's right to due process of law.

¶ 55 The Appellate Court has in the past found reason to allow the violation of this rule undoubtedly in the hope that the trial court would eventually come around. I, for one, have given up waiting. Therefore, I dissent and would reverse.