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2015 IL App (3d) 130250-U

Order filed May 15, 2015

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-13-0250
	)	Circuit No. 12-CF-1763
DONTAYLON JIMERSON,	)	
Defendant-Appellant.	)	Honorable Gerald R. Kinney, Judge, Presiding.

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JUSTICE CARTER delivered the judgment of the court.  
Justice Wright concurred in the judgment.  
Justice Holdridge specially concurred.

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**ORDER**

- ¶ 1 *Held:* The trial court erred when it did not comply with Illinois Supreme Court Rule 431(b), but the error was not plain error.
- ¶ 2 A jury convicted defendant, Dontaylon Jimerson, of unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2012)). The trial court sentenced defendant to two years' imprisonment. Defendant appeals contending the trial court committed reversible error by failing to comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). We affirm.

¶ 3

## FACTS

¶ 4

Prior to jury selection, the court informed the entire venire of the law they would be required to uphold if selected as jurors. The court began by making the following general statement of principles they would be required to uphold if selected as jurors:

"THE COURT: And under the law the defendant is presumed to be innocent of the charge. The presumption of innocence remains with him throughout every stage of the trial and during your deliberations on the verdict; and that presumption is not overcome unless from all the evidence in the 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 with proof beyond a reasonable doubt, and the burden of proof remains on the State throughout the case.

Now what does that mean? It really means the defendant is not required to prove anything, not required to prove his innocence, not required to present any evidence. He is entitled to rely on the presumption of innocence that the constitution provides him with.

Does everyone understand what I'm saying there?

THE JUROR: Yes."

The court did not follow this statement by asking the entire venire if they accepted this general statement of the principles the jurors would be required to uphold.

¶ 5

When individual jurors were interviewed during *voir dire*, each potential juror was asked in varying terms if they understood and accepted defendant was presumed innocent and the State had the burden to prove defendant guilty beyond a reasonable doubt. However, none of the

potential jurors were asked whether they understood and accepted that a defendant's failure to testify could not be held against him. In addition, none of the potential jurors were asked whether they understood and accepted that a defendant is not required to offer any evidence on his own behalf.

¶ 6 Following the questioning of the final panel, the case proceeded to trial. Officer Aaron Bandy testified for the State. On August 1, 2012, Bandy, Officer James Kilgore and Sergeant Joseph Rosado observed defendant sitting alone in a parked vehicle, which was blocking a driveway. Bandy ran a check on the vehicle's license plate number, which identified defendant as the vehicle's registered owner. Bandy exited his police vehicle and made contact with defendant because defendant was committing a parking violation. Bandy asked defendant to exit his vehicle. After defendant exited his vehicle, Bandy observed a clear plastic baggie containing a white substance on the seat defendant previously occupied. Bandy questioned defendant about the white substance in the baggie. Defendant identified the white substance as cocaine for his own personal use. At that time, Bandy placed defendant under arrest.

¶ 7 Both Kilgore and Rosado observed the clear plastic baggie containing the white substance. Kilgore testified that he secured the clear plastic baggie in an envelope and took the envelope to the evidence technician who performed forensic testing on the substance. The subsequent forensic tests confirmed that the substance in the baggie was cocaine.

¶ 8 After the evidence and arguments in the case were completed, the trial court instructed the jury that: "[t]he defendant is presumed to be innocent of the charge against him. This presumption remains with him throughout every stage of the trial and during your deliberations on the verdict and is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that he is guilty." The court also instructed the jury that "[t]he State

has the burden of proving the guilt of the defendant beyond a reasonable doubt, and the burden remains on the State throughout the case. The defendant is not required to prove his innocence." Finally, the court instructed the jury that "[t]he fact that the defendant did not testify must not be considered by you in any way in arriving at your verdict." The jurors were not provided an opportunity to respond whether they understood and accepted these instructions.

¶ 9 The jury found defendant guilty of possession of a controlled substance (720 ILCS 570/402(c) (West 2012)) and defendant was sentenced to two years' imprisonment.

¶ 10 ANALYSIS

¶ 11 On appeal, defendant contends the court committed reversible error when it failed to comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). Defendant acknowledges he failed to preserve this issue but requests that we review it under the plain error doctrine. While we agree the trial court failed to comply with Rule 431(b), we find the error does not constitute plain error.

¶ 12 The Illinois Supreme Court adopted Rule 431(b) to ensure compliance with its decision in *People v. Zehr*, 103 Ill. 2d 472 (1984). Rule 431(b) requires a trial court to ask potential jurors if they understand and accept 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 if a defendant does not testify it cannot be held against him or her[.]" Ill. S. Ct. R. 431(b) (eff. July 1, 2012).

¶ 13 We note that Rule 431(b) is not a " 'suggestion[ ] to be complied with if convenient but rather [an] obligation[ ] ' " which the court was required to follow. *People v. Reed*, 376 Ill. App.

3d 121, 125 (2007) (quoting *Medow v. Flavin*, 336 Ill. App. 3d 20, 36 (2002)). Rule 431(b) "mandates a specific question and response process": the trial court must ask the potential jurors if they understand and accept each of these principles. *People v. Thompson*, 238 Ill. 2d 598, 607 (2010). It is error for a trial court to fail to ask each juror if he or she understands and accepts these principles. *Id.*

¶ 14 In the instant case, the trial court erred when it failed to instruct the potential jurors of two of Rule 431(b)'s principles. The venire was never asked if they understood and accepted that defendant's failure to testify could not be held against him. The trial court also failed to ask every potential juror if they understood and accepted defendant was not required to offer any evidence on his own behalf.

¶ 15 In reaching our conclusion, we reject the State's contention that the trial court's broad statement of the law prior to individual juror questioning was sufficient to satisfied Rule 431(b). Specifically, this statement failed to ask the jurors if they accepted these principles. *Thompson*, 238 Ill. 2d at 607. We also reject the State's contention that the trial court cured its error by including the omitted principles in its jury instructions. The plain language of Rule 431(b) imposes upon the trial court an affirmative obligation to ask *prospective* jurors whether they understand and accept the four principles therein and, in making those inquiries the court must provide the prospective jurors an "opportunity to respond." *People v. Schaefer*, 398 Ill. App. 3d 963, 967 (2010).

¶ 16 We next consider whether the trial court's error constituted a plain error. The plain error doctrine bypasses forfeiture principles and allows a reviewing court to consider unpreserved error when: (1) the evidence is closely balanced, regardless of the seriousness of the error; or (2) the error is serious, regardless of the closeness of the evidence. *People v. Adams*, 2012 IL

111168, ¶ 21.

¶ 17 Defendant concedes the second prong of plain error analysis does not apply when reviewing a trial court's compliance with Rule 431(b). Therefore, we review defendant's challenge under the first prong of the plain error doctrine. Under the first prong, a reviewing court may consider an unpreserved error when it is clear or obvious and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant. *People v. Averett*, 237 Ill. 2d 1, 18 (2010). In the instant case, the evidence of defendant's guilt is overwhelming. Defendant was found by the police, sitting alone, in a vehicle registered in defendant's name. The cocaine, which defendant admitted belonged to him, was observed by Bandy on the exact seat defendant previously occupied. Both Kilgore and Rosado also observed Bandy remove the cocaine from defendant's vehicle. Forensic testing later confirmed that the substance in the baggie was in fact cocaine. In light of these circumstances, the trial court did not commit plain error because the evidence was not closely balanced.

¶ 18 **CONCLUSION**

¶ 19 The judgment of the circuit court of Will County is affirmed.

¶ 20 Affirmed.

¶ 21 JUSTICE HOLDRIDGE, specially concurring:

¶ 22 I agree with affirming the judgment of the trial court. I write separately to take issue with the terminology applied by the majority in its plain error analysis. Specifically, after finding that the trial court erred in failing to properly admonish potential jurors in compliance with Rule 403(b), the majority proceeds to analyse whether this error constituted “plain error.” *Supra*, ¶ 16. It appears the majority is conflating the term “plain error” and “reversible error.” The majority should have stated that, although the trial court’s failure to properly admonish potential

jurors was clear and obvious error, in this case, the error was not *reversible* because it does not fall within either of the two categories of *reversible* error. *People v. Piatowski*, 225 Ill. 2d 551, 564-65 (2007). Use of the term “plain error” rather than “reversible error” muddles what I believe to be the proper analysis under the plain error doctrine. Accordingly, I continue to urge the exercise of greater analytical clarity in our “plain error” jurisprudence.