

NOTICE
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2015 IL App (5th) 130231-U

NO. 5-13-0231

IN THE

APPELLATE COURT OF ILLINOIS

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).

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Johnson County.
)	
v.)	No. 12-CF-50
)	
TRACEY HALE,)	Honorable
)	James R. Williamson,
Defendant-Appellant.)	Judge, presiding.

JUSTICE SCHWARM delivered the judgment of the court.
Justices Goldenhersh and Stewart concurred in the judgment.

ORDER

¶ 1 *Held:* Where the Office of the State Appellate Defender can make no meritorious argument in support of the defendant's appeal, its motion to withdraw as counsel is granted, and the judgment of the circuit court is affirmed.

¶ 2 The defendant, Tracey Hale, appeals the circuit court's denial of his posttrial motion. The Office of the State Appellate Defender (OSAD) has been appointed to represent him. OSAD has filed a motion with an attached memorandum pursuant to *Anders v. California*, 386 U.S. 738 (1967), alleging that there is no merit to the appeal and requesting leave to withdraw as counsel. See *McCoy v. Court of Appeals*, 486 U.S. 429 (1988). The defendant was given proper notice and time to file briefs, objections, or

any other documents supporting his appeal. He has filed a response. We have considered OSAD's motion to withdraw and the attached memorandum, as well as the defendant's response. We have examined the entire record on appeal and find no error or potential grounds for appeal. For the following reasons, we now grant OSAD's motion to withdraw as counsel, and we affirm the judgment of the circuit court of Johnson County.

¶ 3 BACKGROUND

¶ 4 On September 26, 2012, the defendant was charged with aggravated battery, a Class 3 felony, after a fight with another inmate at the Shawnee Correctional Center. Prior to trial, the defendant indicated that he intended to assert the affirmative defense of justifiable use of force in defense of self.

¶ 5 The jury trial began on March 18, 2013. During jury selection, a prospective juror, Joey Francis, informed the court and the parties that her husband's cousin was one of the prison guards who had been listed as a potential witness. Francis said that she would not give the testimony of her husband's cousin any more weight than any other witness. Defense counsel had used his final peremptory challenge on the prospective juror immediately preceding Francis. Defense counsel moved to strike Francis for cause, and the court denied that motion. The posttrial motion did not include any issue related to Francis.

¶ 6 When the jurors had been selected, the court asked the panel as well as the alternate jurors, as a group, whether they understood the rights of the defendant, pursuant to Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). The court did not ask the jurors if they accepted that a defendant had those rights. The defendant did not object to the

court's manner of questioning the jurors, and no such issue was included in a posttrial motion.

¶ 7 The following information was adduced at trial. An inmate, Terrell Williams, started a fight with the defendant by punching the defendant in the face. Two guards stopped the fight, but when the guards turned away, the defendant struck Williams in the face, knocking Williams to the ground. The defendant then got on top of Williams and struck him again. Two guards pulled the defendant off Williams and attempted to handcuff the defendant. The defendant broke free and jumped on and struck Williams again. The defendant claimed that Williams was conscious when he was on the ground and being struck by the defendant. The defendant testified that as he was being handcuffed, he saw Williams ball up his fist and try to get up. Two guards and three inmates testified that Williams was unconscious. Williams testified that he punched the defendant and the next thing he remembered was waking up in the prison infirmary.

¶ 8 As a result of the fight, Williams' jaw was broken on both sides; he lost a tooth and suffered a concussion. The defendant had an abrasion to one of his fingers and a red mark on his face.

¶ 9 Timothy Veath, a prison employee who served on the adjustment committee, testified that during an inquiry, the defendant admitted the sequence of events, excluding whether Williams was unconscious. Terry Grissom, an investigator with the Illinois Department of Corrections (IDOC), testified that the defendant admitted the sequence of events to him as well, excluding whether Williams was unconscious. The investigation revealed that Williams was the initial aggressor and that the defendant had told the truth,

but Grissom believed that Williams was unconscious and incapable of aggression when the defendant broke free from the handcuffs and began to hit Williams again while he was on the ground.

¶ 10 The court gave the jury the following relevant jury instructions, Illinois Pattern Jury Instructions, Criminal, No. 24-25.06 (4th ed. 2000) (hereinafter, IPI Criminal 4th), "Use of Force in Defense of a Person," and IPI Criminal 4th No. 24-25.09X, "Non-Initial Aggressor–No Duty to Retreat," as well as instructions related to aggravated battery as modified by the requirement that the State must disprove lack of justification beyond a reasonable doubt. At some point during the jury deliberations, the jury sent a note to the court. The court discussed the note with the parties and sent back a reply. That note and reply are not part of the record. Through the course of its review of this case, OSAD was informed by defense counsel that the note was a request to view unadmitted evidence.

¶ 11 The only issue included in the posttrial motion was whether the State had proven the defendant guilty of aggravated battery beyond a reasonable doubt. The court denied the motion. At sentencing, the court did not choose to impose an extended-term sentence. The court sentenced the defendant to a four-year term of imprisonment to run consecutively to the sentence he had been serving at the time of the fight. The defendant appeals.

¶ 12 ANALYSIS

¶ 13 In its motion to withdraw as counsel on appeal, OSAD lists several possible issues that could be presented on appeal, but contends that those issues are without merit. We review those issues below.

¶ 14 The first issue that OSAD identifies is whether the defendant was proven guilty beyond a reasonable doubt. We must ask whether, after viewing the evidence in the light most favorable to the State, the evidence is so unsatisfactory that no rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *People v. Wheeler*, 334 Ill. App. 3d 273, 280 (2001). The sole contention raised in the posttrial motion was whether the defendant was justified when he struck Williams after Williams first struck him. When asserting the affirmative defense of justifiable use of force, the defendant cannot be the initial aggressor; he must reasonably believe that there is an imminent threat of harm, and that the amount of force he used is necessary to prevent great bodily harm to himself. *People v. Jackson*, 250 Ill. App. 3d 192, 205-06 (1993). Whether the defendant was justified in his use of force is a question to be determined by the trier of fact. *People v. Felella*, 131 Ill. 2d 525, 533-34 (1989). Here, the jury was instructed on self-defense (IPI Criminal 4th No. 24-25.06, "Use of Force in Defense of a Person") and heard multiple witnesses testify that Williams was unconscious when the defendant continued to hit him. The jury heard testimony indicating that the defendant thought Williams was conscious and was preparing to strike him again. The jury gave more weight to the testimony of multiple witnesses who testified that Williams was unconscious when the defendant was punching him. The jurors were in the best position to assess the information, and we cannot find that the jury's determination was irrational.

¶ 15 The next issue OSAD identifies is whether the court's failure to ask the prospective jurors if they accepted the Rule 431(b) principles was plain error. Rule 431(b) requires, in pertinent part, that the court ask each potential juror, either

individually or in a group, whether that juror understands and accepts (1) that the defendant is presumed innocent of the charges, (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 own behalf, and (4) that the defendant's failure to testify cannot be held against him. Ill. S. Ct. R. 431(b) (eff. July 1, 2012). It is error for a trial court to fail to ask each juror if he or she understands and accepts the principles of Rule 431(b). *People v. Thompson*, 238 Ill. 2d 598, 607 (2010). If an issue is not preserved for review, we review it for plain error. *People v. Adams*, 2012 IL 111168, ¶ 21. When the error involves Rule 431(b) principles, the defendant must show that the jury was biased by the incomplete questioning. *People v. Wilmington*, 2013 IL 112938, ¶¶ 33-34.

¶ 16 Here, the record shows that the court did not inquire if the jurors *accepted* the principles in Rule 431(b). The defendant did, however, introduce evidence and testified, and thus two Rule 431(b) principles were irrelevant during *voir dire*. The court did not ask the jurors whether they accepted that the defendant was presumed innocent and that the State had to prove the defendant's guilt beyond a reasonable doubt. However, we find that the evidence was not closely balanced, nor was the error so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process (*People v. Herron*, 215 Ill. 2d 167, 187 (2005)). The record does not reveal any instance where the defendant was biased by the court's failure to ask whether the jury accepted the Rule 431(b) principles.

¶ 17 The next issue OSAD identifies is whether the court erred in denying the defendant's motion to strike prospective juror Francis for cause. A challenge for cause is left to the discretion of the circuit court, and the court's decision is reviewed for abuse of discretion. *People v. Bowens*, 407 Ill. App. 3d 1094, 1098 (2011). If a potential juror knows a potential witness, but indicates that she can be fair and impartial when weighing testimony and evidence, the court does not abuse its discretion when it denies a motion to strike the potential juror. *People v. Suter*, 292 Ill. App. 3d 358, 369-70 (1997). In this case, the juror Francis indicated that she would not give the testimony of her husband's cousin any more weight than any other testimony. She indicated that she could be fair and impartial. Therefore, the court did not err when it denied the defendant's motion to strike juror Francis for cause.

¶ 18 The next issue OSAD identifies is whether it was error for the IDOC employees to testify as to the inculpatory statements made by the defendant. By asserting an affirmative defense, a defendant admits that he engaged in the alleged conduct, but was justified in doing so. See 720 ILCS 5/7-14 (West 2012). Here, the defendant admitted to the prison employees that he struck Williams, which is consistent with his affirmative defense of justifiable use of force. The testimony of the prison employees showed that the defendant had made a prior consistent statement (see Ill. R. Evid. 613 (eff. Jan. 1, 2011)), and thus he was not prejudiced by that testimony.

¶ 19 The next issue OSAD identifies is whether there was error in the court's answer to the question from the jury. The circuit court's decision whether to answer and how to answer questions asked by the jury during deliberations is left to the circuit court's

discretion. *People v. Falls*, 387 Ill. App. 3d 533, 537 (2008). In this case, the jury note and the court's reply are not a part of the record. A silent record is construed against the appellant. *People v. Davis*, 106 Ill. App. 3d 260, 263 (1982). Defense counsel did not object on the record to the note and did not include any issue related to the note in the posttrial motion, and thus any issue related to the note is waived.

¶ 20 The final issue OSAD identifies is whether the court abused its discretion when it sentenced the defendant to four years in prison. The circuit court has considerable discretion when imposing a sentence and such decisions will not be overturned unless there has been an abuse of discretion. *People v. Wilson*, 143 Ill. 2d 236, 250-51 (1991). Indeed, the circuit court is in the best position to determine an appropriate sentence, and a reviewing court may not substitute its own judgment for that of the circuit court. *People v. Fern*, 189 Ill. 2d 48, 53 (1999). Further, "[e]ven 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) (citing *People v. Madura*, 257 Ill. App. 3d 735, 740-41 (1994)). When a sentence falls within the statutory sentencing range, the circuit court has not abused its discretion unless the sentence is manifestly disproportionate to the nature of the offense. *People v. Hauschild*, 226 Ill. 2d 63, 90 (2007).

¶ 21 The standard sentencing range for aggravated battery, a Class 3 felony, is not less than two years and not more than five years. 730 ILCS 5/5-4.5-40(a) (West 2014). However, in this case, because the defendant had been previously convicted of a felony within 10 years of his most recent conviction, there is a possibility of an extended-term sentence of not less than 5 years and not more than 10 years. 730 ILCS 5/5-4.5-40(a)

(West 2014). The court declined to sentence the defendant to an extended-term sentence, and instead sentenced him to four years' imprisonment. Therefore, the court did not abuse its discretion when it sentenced the defendant within the statutory range.

¶ 22

CONCLUSION

¶ 23 For the foregoing reasons, the motion of OSAD to withdraw as counsel on appeal is granted, and the judgment of the circuit court of Johnson County is affirmed.

¶ 24 Motion granted; judgment affirmed.