2016 IL App (1st) 132200-U

FIFTH DIVISION
January 15, 2016

No. 1-13-2200

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JAMES PLEDGE, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County Nos. 10 CR 12881 10 CR 12884 10 CR 12885 10 CR 12886 Honorable Vincent M. Gaughan, Judge Presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justice Palmer concurred in the judgment.
Justice Lampkin dissented.

ORDER

¶ 1 *Held*: Defendant's convictions of home invasion, aggravated battery with a firearm, and armed robbery are affirmed over his claims that his right to a fair trial was violated by the court's failure to comply with Rule 431; that the court abused its discretion in its discovery violation sanction; and that counsel provided ineffective assistance at trial.

¶ 2 Following a jury trial, defendant James Pledge was found guilty of six counts of home invasion, one count of aggravated battery with a firearm, and four counts of armed robbery. He was sentenced to four concurrent terms of 45 years in the Illinois Department of Corrections. On appeal, defendant contends that the trial court committed reversible error by allowing the State to conduct *voir dire*, by reading his aliases to the venire, by suggesting a definition of reasonable doubt, and by failing to comply with Illinois Supreme Court Rule 431(b). He further contends that the trial court abused its discretion in preventing a defense witness from testifying about his hand tattoos, or in the alternative, that defense counsel was ineffective for failing to name the witness in his answer to discovery. For the reasons that follow, we affirm the judgment of the trial court.

¶ 3 BACKGROUND

¶ 4 The record demonstrates that separate indictments were filed against defendant in connection with four distinct home invasions that occurred between June 26 and July 1, 2010, on the south side of Chicago. The State initially elected to proceed on case number 10 CR 12881, the home invasion of Clevie Williams. The court, however, subsequently allowed defendant's motion to join the four cases for trial, and no objection was made by the State.

¶ 5 At the outset of jury selection, the trial court introduced the potential jurors, court staff, opposing counsel, and defendant. The trial court also read a list of the potential witnesses in the case and asked the prospective jurors if they knew any of the named individuals. None of the jurors raised their hands. During *voir dire* the trial court read the indictments, in which defendant was referred to as "James Pledge, also known as Devon Coleman, Chris Lewis," and stated:

"Ladies and gentlemen, it is very important that you understand that the charges in these

[*sic*] are contained in a document called the indictment, but you must remember that the indictment is not to be considered as any evidence against Mr. Pledge, nor does the law allow you to infer any presumption of guilt against Mr. Pledge simply because he's named in the indictment.

The indictment is merely the formal way in which a defendant is placed on trial."

¶ 6 The trial court added defendant is presumed to be innocent of the charges against him, that this presumption remains with him throughout the trial, and is not overcome unless the jury is convinced that defendant is guilty from the evidence presented in the case. The court further stated that the State bears the burden of proving defendant's guilt beyond a reasonable doubt, a burden which remains with the State throughout the trial. In addition, the court stated:

"Ladies and gentlemen what I want to do right now is discuss some basic principles of Constitutional law that apply to all criminal cases. ***

Anybody placed on trial in a criminal case is presumed to be innocent of the charges against him or her, and Mr. Pledge is placed on trial in this criminal trial [and] he is presumed to be innocent. That means that he does not have to present any evidence on his own behalf. He may rely upon the presumption of innocence. Does anybody have any qualms about that Constitutional principle, please, raise their hand."

¶ 7 The trial court noted that no one had raised their hand, then stated:

"Somebody may have served on civil juries[.] [T]here the burden of proof is a preponderance of the evidence and that's defined as more likely than not that the event occurred. If you take a scale, all you have to do is tip it, and that is what preponderance of the evidence is.

Illinois does not define reasonable doubt, but if you use the analogy in a criminal

> case the burden of proof is beyond a reasonable doubt, if you use the analogy of the scale, it would be like this. Does anybody have any qualms about that Constitutional principle that the State has the burden of proof and the burden of proof is proof beyond a reasonable doubt, please, raise your hand."

¶ 8 The trial court noted that no one had raised their hand, and explained again, that defendant is presumed to be innocent and that he could rely upon the presumption of innocence. The trial court then asked if anyone "had any qualms about that Constitutional principle," and no one raised their hand.

¶ 9 The trial court next stated defendant had the right to testify on his own behalf, and that his testimony should be judged like any other witness, then asked if anyone "had any problems with that Constitutional principle." The trial court also explained that defendant has the right not to testify, and no inference can be drawn from his decision not to do so. After asking if anyone had any qualms about that principle, and noting that none of the jurors had raised their hands, the court explained the role of the jury as fact-finder, the role of the lawyers, objections, recesses and delays, and admonished the venire that potential jurors should not discuss the case with anyone. The trial court also explained that they would receive written instructions on the law and instructions from the court.

¶ 10 The trial court informed the venire that "[v]ery shortly the lawyers will be asking you some questions about yourself," and admonished the prospective jurors not to feel that the lawyers are trying to embarrass them, put them on the spot, or pry into their personal affairs. The trial court added, "[i]t is merely our way of learning something about you so that the lawyers can make an informed decision in the jury selection process," and that they should be "frank, complete, and open in all [their] answers." The court continued, "That's the only way to insure

fairness to both sides."

¶ 11 The State then asked questions of the group, such as their county of residence and pending court cases, and the trial court asked for clarifications. The State also questioned each individual venire member about his or her background, criminal history, hobbies and interests, and whether he or she would be willing to return a verdict of guilty or not guilty based on the evidence. The trial court occasionally interjected during the questioning for clarification of a response or to explain the law. After the State was finished with questioning, defense counsel asked the venire as a group whether anyone had strong opinions on firearms, and no one raised their hand.

¶ 12 The jury was then impaneled and the case proceeded to trial. Constance Krause (Krause) testified that on the morning of June 26, 2010, she was at home alone when she heard a noise coming from the kitchen. She thought it was her husband returning from the store, but when she entered her kitchen she noticed a man, whom she identified as defendant, sitting at her kitchen table with the contents of her purse emptied on it. Defendant produced a gun and demanded money. Krause replied that there was money in her purse. He told her, "I got that already," and then walked with her from room to room looking for more items to take. Krause recalled that she had money from the Girl Scout troop she led. She retrieved that money and gave it to defendant. He then ordered Krause to open the back door and left with around $1,500. Defendant did not have his face covered while he was in Krause's house. Krause described him to police as a short black male with a short afro, wearing black clothing. On July 2, 2010, she identified defendant in a line up.

¶ 13 On cross-examination, Krause stated she did not observe any tattoos on defendant's hands at the time of the robbery. She could, however, see that he had tattoos on his hands when he was

standing three feet away from her in the courtroom. She stated, "I see a difference as far as he's standing here showing me his hands as opposed to taking money and putting it in his pocket."

¶ 14 Daniel Cerrato-Mendez (Cerrato-Mendez) testified that on June 29, 2010, he was in his home and heard noises coming from outside, where defendant was attempting to remove his air conditioner. Cerrato-Mendez went outside, and defendant, who was holding a revolver, said "move," and they both went inside the house. Defendant closed the door, then led Cerrato-Mendez from room to room, throwing things around and taking various items, such as a cell phone, jewelry, bus passes, and money. Defendant then brought Cerrato-Mendez upstairs, tied his hands behind his back with a phone cord, instructed him not to move, and left. When Cerrato-Mendez's wife returned home she called the police. Cerrato-Mendez described the intruder to them as a black male with short hair, a tattoo of a horse on his right arm, facial hair, and dressed in a dark colored t-shirt. On July 2, 2010, he identified defendant from a line up. On cross-examination, he stated that he did not observe any tattoos on defendant's hands at the time of the incident, and that he could not see tattoos on his hands in the courtroom.

¶ 15 Maria Salazar (Salazar) testified that on June 30, 2010, she was in her kitchen when defendant and an accomplice escorted her ten-year-old daughter, two sons, and her daughter's friend Brenda into the kitchen. Defendant was holding a gun and he grabbed Salazar's cell phone before she could reach for it. Using Brenda as a translator, defendant told everyone not to move or scream, and ordered them into a different room. Defendant then told Salazar, who could not speak English, that he wanted the keys to her truck and to the garage. He stated that if she did not comply, he would shoot her. When Salazar refused to give him the keys, he took her wallet, emptied it, and found her keys. Defendant then went from room to room, with Salazar and Brenda following him, and took several items. Salazar and Brenda returned to the other room

where the accomplice and children were waiting. Salazar stayed with the children while defendant continued to search the home, taking jewelry, cash, and other items. When defendant returned, he tied Brenda with a belt and Salazar and two of her children with an extension cord, told them not to move, and then left with his accomplice in Salazar's truck.

¶ 16 Salazar further testified defendant did not have anything covering his face while he was inside the house. She identified him in a line up on July 2, 2010. On cross-examination, she stated she was not sure whether defendant had any tattoos on his hands. The testimony of Salazar's daughter and her daughter's friend, Brenda, were substantially similar to that of Salazar's testimony regarding the events of the day in question.

¶ 17 Clevie Williams (Williams) testified that at around 5 p.m. on July 1, 2010, he and his wife were watching television and getting ready to eat dinner, when defendant entered their home with a gun. Defendant said, "this is a stickup." Defendant took Williams and his wife into various bedrooms in the house, collecting items such as jewelry, a watch, a credit card, money, and a revolver with bullets. Defendant also unhooked the television in the front room and began to move it. Defendant then asked Williams to take him to the bank, but Williams ran out of the house through the back porch door. Defendant followed and caught up to Williams in the backyard where the two "got into a tussle." Defendant shot Williams in the left leg. Defendant then jumped over the fence and ran off, while Williams alerted his neighbors and his wife called the police.

¶ 18 When the police and emergency personnel arrived, Williams was treated for his injuries in an ambulance. Moments later, the police brought defendant to Williams, and he identified him as the person who had robbed and shot him. Williams explained that defendant had spent over 45 minutes to an hour in the house without a face mask. On cross-examination, Williams

stated that he did not observe any tattoos on defendant's hands and that he was not looking for tattoos but at the gun in defendant's hands.

¶ 19 Chicago police officer Farias testified he and his partner Officer Dixon responded to the emergency call at the Williams residence on July 1, 2010. They found Williams in the front of the house with a gunshot wound to his left leg. Williams and his wife described the shooter. Officer Farias called for an ambulance and alerted other officers with a description of the offender. Officer Farias and his partner then headed south in the direction of the shooter and saw defendant who fit that description. Defendant was holding a blue bag along with a handgun in his right hand and a revolver in his left hand. When defendant saw the officers' patrol car, he began to run through the alley, threw the items he was holding over a wooden fence, and jumped over it. Officer Farias observed defendant being placed into custody a few minutes later, and recovered two revolvers and a blue bag containing ammunition where defendant had dropped them. He did not recall seeing any tattoos on defendant's hands.

¶ 20 Chicago police officer Robin Martin testified he and his partner observed defendant jump over a chain link fence at 6610 South Francisco Avenue. Officer Martin exited his vehicle, approached defendant on foot, drew his weapon, and ordered him to the ground. Defendant complied and Officer Martin took him into custody. Officer Martin found an Illinois identification card, credit card, and insurance card belonging to Earthie Williams, a large amount of cash, and several pieces of jewelry in defendant's pockets. Those items were inventoried and defendant was brought back to the Williams residence for identification. Chicago police officer Matthew Shea testified he assisted Officer Martin in placing defendant under arrest, and when they brought him to the Williams residence, Williams became very agitated and said, "That's him. That's him."

¶ 21 Evidence technician Swain testified that he processed the crime scene and recovered three fingerprints from the television set which defendant had moved, and were later found to match defendant's fingerprints. He also swabbed the revolvers for DNA evidence and concluded that neither of the swabs obtained from the revolvers could be excluded as a match to defendant's DNA profile. The results of a gunshot residue test conducted on defendant at the police station were negative.

¶ 22 On July 2, 2010, Detective Walsh arranged a lineup in which defendant was a participant. Krause, Salazar, and Cerrato-Mendez viewed the lineup and identified defendant as the individual who had committed the robberies on the days in question. Detective Walsh further testified that defendant did not have hand tattoos when he was arrested, but that he appeared to have hand tattoos in court, and that defense counsel brought clothing to defendant in jail according to the lock-up keeper's log records.

¶ 23 The State then rested its case and the trial court denied defendant's motion for a directed finding. The prosecutor indicated at the close of evidence that he had received a note that afternoon, informing him that the defense was seeking to put on an additional witness, Sienneh Quoi Quoi (Quoi Quoi), whose name had not been read to the jury. Defense counsel stated that Quoi Quoi's name was listed on the arrest report, and that her testimony would establish that defendant had hand tattoos prior to his arrest, and contrary to Detective Walsh's testimony, she, and not defense counsel, brought clothing to defendant in jail. The State objected because her name was not read to the jurors as a potential witness prior to trial and defense counsel had failed to include her name in his answer to discovery. The court ruled that Quoi Quoi could testify as to the clothes, but not regarding the hand tattoos. In so ruling, the court noted that the case had been on call for almost two years, and defense counsel's "professional and choreographed"

display of defendant's tattoos to the witnesses indicated that he knew that he was going to place Quoi Quoi on the stand. The court further noted that defense counsel could bring testimony about the hand tattoos into evidence by having defendant testify.

¶ 24 In defendant's case-in-chief, Alice Washington testified that she was an investigator hired by defense counsel, and spoke with Krause, Salazar, and Williams. Krause informed her that she did not see any tattoos on defendant's hands, that she later identified him out of a lineup, that there were only individuals in the lineup who resembled the description of the offender she gave to the police, and that she picked the shortest one. Williams told Washington that defendant was wearing a short-sleeved shirt and cargo jean pants, that he did not see any tattoos on defendant's hands, and he did not recognize the picture of defendant that Washington showed him. Williams then got his own picture of defendant, compared the two photographs, and said that the noses looked similar. Washington further testified that she spoke with Salazar using Salazar's daughter as a translator. Salazar told her that she did not recognize the photograph of defendant (the one Washington had previously shown to Williams), and Salazar's daughter could not recognize the photograph either. Salazar also told her that she identified defendant in a line up and that she picked the shortest person in the lineup.

¶ 25 On cross-examination, Washington testified that she had not seen the photograph of defendant taken after his arrest or the lineup photograph, and that the photograph of defendant she showed to Williams and Salazar had been given to her by defense counsel. The photograph, which was introduced into evidence, shows a blurry and dark close-up image of defendant's face with a large smile.

¶ 26 Quoi Quoi testified that she was defendant's girlfriend at the time of his arrest on July 1, 2010, and that she brought some clothes to him at the police station following his arrest. She

further testified that she had not seen defendant out on the street since July 1, 2010. The defense then rested.

¶ 27 During closing arguments, defense counsel pointed out that Quoi Quoi testified she had not seen defendant on the street since his arrest, then argued, "When did he have an opportunity to get tattoos? So the only thing to argue that he got tattoos, so he could come in here and say none of these people saw tattoos."

¶ 28 The jury returned a verdict of not guilty on the attempted first degree murder of Williams, but found defendant guilty of all the remaining charges. The trial court heard, and then denied four separate motions for a new trial, and sentenced defendant to: 20 years for armed robbery and 25 years for personally discharging a firearm during the commission of an armed robbery resulting in great bodily harm in the Williams case; 45 years for home invasion in the Salazar case; 30 years for armed robbery with a 15 year enhancement based on the age of the victim in the Krause case; and 45 years for home invasion in the Cerrato-Mendez case. The trial court also ordered the sentences to run concurrently. This appeal followed.

¶ 29 ANALYSIS

¶ 30 On appeal, defendant first contends that the combined errors by the trial court during jury selection resulted in a "complete breakdown of the jury selection process," requiring reversal and a remand for a new trial. Defendant acknowledges that he failed to preserve this issue for appellate review because he did not raise it during *voir dire* or in a posttrial motion (*People v. Enoch*, 122 Ill. 2d 176, 186 (1988)); however, he argues that this issue should be reviewed under the second, or "substantial rights" prong, of the plain-error rule.

¶ 31 The State points out that the issue here involves statements made by the trial court during *voir dire* pursuant to Supreme Court Rule 431 (eff. July 1, 2012), and not jury instructions.

Accordingly, the State argues, any failure to follow the requirements of the rule does not amount to structural error, and therefore cannot be plain error, citing *People v. Thompson*, 238 Ill. 2d 598, 609-10 (2010). See *People v. Belknap*, 2014 IL 117094, ¶ 47 (Rule 431(b) errors are not structural errors and therefore are not *per se* reversible because failure to comply with the rule does not automatically result in a biased jury). Defendant maintains, nevertheless, that even if one of the errors may not ordinarily be reached on its own under the substantial rights prong of the rule, the cumulative effect of the various trial errors deprived him of a fair trial.

¶ 32 The plain-error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved claims of error in specific circumstances. *Thompson*, 238 Ill. 2d at 613. Accordingly, the rule allows us to consider an unpreserved error when either (1) a clear or obvious error occurs and the evidence is so closely balanced that the error alone threatens to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear and obvious error occurs and that error is so serious that it affects the fairness of the defendant's trial and challenges the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Under both prongs of the plain-error analysis, the burden of persuasion remains with the defendant. *Id.* (citing *People v. Herron*, 215 Ill. 2d 167, 187 (2005)). Before we undertake a plain-error analysis, we first determine whether an error occurred, for, absent error, there can be no plain error. *People v. Wilson*, 404 Ill. App. 3d 244, 247 (2010); *People v. Lampley*, 2011 IL App (1st) 090661-B, ¶ 34.

¶ 33 Defendant first contends that the trial court abdicated its responsibility to conduct *voir dire* by passing that responsibility off to the State, thereby violating Supreme Court Rule 431(a).

¶ 34 *Voir dire* in criminal cases is governed by Rule 431. *People v. Garstecki*, 234 Ill. 2d 430, 437 (2009). Rule 431(a) provides the trial court "shall conduct *voir dire* examination of

prospective jurors by putting to them questions it thinks appropriate, touching upon their qualifications to serve as jurors in the case at trial." Ill. S. Ct. R. 431(a) (eff. July 1, 2012). The section further provides that the trial court "shall permit the parties to supplement the examination by such direct inquiry as the court deems proper for a reasonable period of time depending upon the length of examination by the court, the complexity of the case, and the nature of the charges." *Id.*

¶ 35 Our supreme court interpreted the language of Rule 431(a) in *Garstecki*. There, the court held that the rule "imposes a mandatory obligation upon trial courts;" however, the trial court still maintains its discretion to determine when to allow questioning by attorneys after considering (1) the length of examination by the court, (2) the complexity of the case, and (3) the nature of the charges. *Garstecki*, 234 Ill. 2d at 443-44. Thus, under the current version of Rule 431(a), a trial court was no longer permitted to "simply dispense with attorney questioning whenever they want." *Id.* at 444. Instead, the rule encourages trial courts to exercise discretion in favor of permitting attorney questioning. *Id.* (citing *People v. Allen*, 313 Ill. App. 3d 842, 847 (2000)). This sentiment was echoed in *People v. Adkins*, 239 Ill. 2d 1, 18 (2010), where the court stated, "Under this rule, the trial court's discretion is guided by a preference for permitting direct inquiry of prospective jurors by the attorneys if such an opportunity is sought."

¶ 36 In this case, although the trial court did not individually question the members of the venire, it explained its choice of procedure whereby venire members would be questioned by the attorneys, and also reminded them to be truthful in their responses so that the court and the parties could select a fair and impartial jury. The court then managed attorney questioning of the venire, interjecting several times to seek clarifications or explain legal concepts. At no time did defense counsel request that the trial court curtail the State's questioning. At the conclusion of

the State's questioning, defense counsel addressed the venire, asking them whether they had strong feelings regarding firearms. The record demonstrates that defense counsel was not prohibited by the trial court from asking additional questions, but instead voluntarily decided to ask only one.

¶ 37 Notably, on May 4, 2012, the day prior to jury selection, a proceeding occurred; however, the transcript of this proceeding does not appear in the record on appeal. It is in this transcript where we would expect to find a discussion between counsel and the court regarding *voir dire*, particularly where no such discussion was had in any other portion of the record. Moreover, the record does not contain the trial order memorializing any procedure regarding *voir dire*. It is the appellant's burden to provide this court with a sufficient record to grant the relief he requests on the claims that he raises. *People v. Carter*, 2015 IL 117709, ¶ 19. If he fails to do so, we will resolve all doubts arising from the incompleteness against the appellant. *Id.* (citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984)); see *In re Edgar C.*, 2014 IL App (1st) 141703, ¶ 82. Thus, based on the record before us, we conclude the trial court followed our supreme court's directive in *Garstecki* regarding questioning under Rule 431(a) and find no error. See *Garstecki*, 234 Ill. 2d at 443-44.

¶ 38 Nevertheless, defendant contends the case law supports his position that the trial court alone is to examine the venire, citing *People v. Thornton*, 54 Ill. App. 3d 202 (1977) and *Garstecki*. *Thornton*, however, is inapposite because it does not involve Rule 431(a), but instead considers section 115-4(f) of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1975, ch. 38, par. 115-4(f)). *Thornton*, 54 Ill. App. 3d at 204-05. *Garstecki* is also unavailing, and in fact contradicts defendant's argument, in that it stands for the proposition that attorneys for the parties must be allowed to perform their own direct examination, as the court deems proper, for a

reasonable period of time, depending on the length of the court's examination, the complexity of the case, and the nature of the charges. *Garstecki*, 234 Ill. 2d at 445. Thus, neither case lends support to defendant's argument.

¶ 39 Defendant next argues that the trial court erred in reading the indictments to the venire because it improperly allowed the introduction of alias evidence where it was irrelevant to any issue at trial. We disagree.

¶ 40 It is not error for the State, as it did here, to charge a defendant in his proper name and under an alias. *People v. Moton*, 277 Ill. App. 3d 1010, 1012 (1996). Moreover, as the State correctly points out, the court did not improperly allow the introduction of alias evidence into trial where it was irrelevant. The court merely read the indictment to the jury as charged, then admonished the jury that the charges in the indictment are not to be considered evidence and that the law does not allow the jury to infer any presumption of guilt against defendant simply because he is named in the indictment. No further mention was made of defendant's aliases at trial, and as our supreme court stated in *People v. Berlin*, 75 Ill. 2d 266, 268 (1979), "There certainly are, and the jury could easily have supposed, any number of innocent reasons for defendant's having adopted a different name. It is merely speculation to conclude that a jury will automatically associate an assumed name with a criminal background." Defendant has failed to cite any authority that the mere reading of the indictment resulted in a prejudiced jury and we, therefore, find no error by the trial court in doing so.

¶ 41 Defendant also contends that error occurred when the trial judge defined "reasonable doubt" to the venire by using a scale analogy. Defendant further contends that the trial court, when demonstrating the State's burden, presumably, used hand gestures to mimic the tipping of scales, although such gestures are not noted in the record.

¶ 42 Illinois is among the jurisdictions that do not define reasonable doubt. *People v. Downs*, 2015 IL 117934, ¶ 19. It is uncontested that attempts to define the term "reasonable doubt" for jurors are discouraged in Illinois. See *id.* ("This court has long and consistently held that neither the trial court nor counsel should define reasonable doubt for the jury."); *People v. Thomas*, 2014 IL App (2d) 121203, ¶ 24. The rationale behind this rule is that "reasonable doubt" is self-defining and needs no further definition. *Downs*, 2015 IL 117934, ¶ 19. In fact, no definition of reasonable doubt is provided in our pattern jury instructions and the Committee Notes recommend that no instruction be given defining the term. See Illinois Pattern Jury Instructions, Criminal, No. 2.05, Committee Note (4th ed. 2000).

¶ 43 The State asserts the trial court's comments are identical to those made in *People v. Johnson*, 2013 IL App (1st) 111317. In that case, the same trial court used the scale analogy to demonstrate the higher standard of proof beyond a reasonable doubt compared to the civil standard of proof by a preponderance of the evidence. *Id.* ¶ 52. Although we did not condone the reference and analogy, this court concluded that the trial court's comments did not constitute error. *Id.* ¶ 54. We note that similar to *Johnson*, the trial court here did not give an exact percentage or number value when discussing reasonable doubt. In that sense, the trial court did not define reasonable doubt, but rather informed the venire that it was a higher burden than the preponderance standard. See *id.* ¶ 52. At the same time the trial court correctly informed the jury that Illinois does not define the term "reasonable doubt."

¶ 44 While again we would prefer that the scale analogy not be used, we trust this practice is no longer in use. Further, we conclude that even if the trial court had committed error, such error did not deprive defendant of a fair trial. "[U]nder Illinois Supreme Court precedent, it remains the law in Illinois that defining 'reasonable doubt' is discouraged but is not reversible error *per*

se." *Thomas*, 2014 IL App (2d) 121203, ¶ 28. An instruction on the concept of reasonable doubt is reversible error if the instruction improperly minimized the State's burden of proof or attempted to shift that burden to the defendant. *Id.* ¶ 26 (citing *People v. Cagle*, 41 Ill. 2d 528, 536 (1969)). In other words, such a definition will be found to violate a defendant's due process rights "only if there is a reasonable likelihood that the jurors understood the instruction to allow conviction upon proof less than beyond a reasonable doubt." *Downs*, 2015 IL 117934, ¶ 18.

¶ 45 We conclude defendant has failed to establish the fairness of his trial was affected. The record here discloses that the trial court made subsequent pretrial and posttrial admonishments to the jury that its comments were to be disregarded and that only the evidence presented should be considered by them. Moreover, at the conclusion of the presentation of evidence, the trial court instructed the jury regarding the reasonable doubt standard without providing a definition. This was done repeatedly and consistently. We note that the jury did not express any confusion to the trial court nor did the jury ask for a definition of reasonable doubt. Thus, the record demonstrates that the trial court's comments did not suggest to the jury that the State had no burden of proof nor did it attempt to shift the burden of proof to defendant. See *People v. Speight*, 153 Ill. 2d 365, 374-75 (1992) (finding no prejudice where the prosecutor attempted to define reasonable doubt for the jury, but did not attempt to shift the burden of proof to the defendant). Nor does the record indicate that the jury used a lesser standard when determining defendant's guilt. Accordingly, the trial court's remarks during *voir dire* could not reasonably be construed as inviting the jury to convict defendant on less than the reasonable doubt standard. See *Downs*, 2015 IL 117934, ¶ 18. We further note the subsequent remarks by the trial court and its formal instructions regarding the reasonable doubt standard cured any error. See *People v. Gray*, 215 Ill. App. 3d 1039, 1052 (1991) (where the trial court misstated a jury instruction

when it was read aloud to the jury, the subsequent written instruction submitted to the jury cured any error). Therefore, the second prong of plain-error review does not provide a basis for excusing defendant's procedural default. See *Thompson*, 238 Ill. 2d at 615.

¶ 46 Defendant next contends that the trial court failed to comply with Supreme Court Rule 431(b) (eff. July 1, 2012) by not making certain each venire person understood and accepted the principles outlined in *People v. Zehr*, 103 Ill. 2d 472 (1984). We agree.

¶ 47 Pursuant to Rule 431(b), the trial court must question prospective jurors, individually or in a group, 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 on his own behalf; and (4) if a defendant does not testify on his own behalf it cannot be held against him. Ill. S. Ct. R. 431(b) (eff. July 1, 2012); *Zehr*, 103 Ill. 2d at 477. Our supreme court has held that the trial court is mandated to follow " 'a specific question and response process.' " *People v. Wilmington*, 2013 IL 112938, ¶ 32 (quoting *Thompson*, 238 Ill. 2d at 607).

¶ 48 In *Wilmington*, our supreme court found error where the trial court asked if anyone in the pool of potential jurors "disagreed" with three of the *Zehr* principles. *Wilmington*, 2013 IL 112938, ¶ 28. The court concluded that although it was "arguable that the [trial] 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." (Emphases in original.) *Id.* ¶ 32.

¶ 49 Here, the trial court presented the first and third principles together as one principle to the venire, and also asked whether anyone had "any qualms" or a "problem" with these principles by a show of hands, rather than ensuring that the venire understood and accepted the principles.

Similar to the situation in *Wilmington*, the trial court failed to follow the specific question and response process which would allow potential jurors to demonstrate their acceptance and understanding of the principles outlined in Rule 431(b). Thus, we find that the trial court's questioning of the venire constituted error. *Wilmington*, 2013 IL 112938, ¶ 32; see *Belknap*, 2014 IL 117094, ¶ 46.

¶ 50 As we have determined that the trial court erred by not asking the venire whether they understood and accepted the *Zehr* principles, we must next consider whether such an error necessitates reversal and remand for a new trial pursuant to application of second prong plain-error review, the sole basis argued by defendant. *Wilmington*, 2013 IL 112938, ¶ 33.

¶ 51 In *Wilmington*, our supreme court held that the defendant's argument of second prong plain error failed where the prospective jurors received some, but not all, of the required Rule 431(b) questioning, and defendant did not establish that the trial court's violation of Rule 431(b) resulted in a biased jury. *Id.* Likewise, the record in this case demonstrates that the venire was admonished and instructed on the *Zehr* principles, that it received some, but not all, of the required Rule 431(b) questioning, and defendant has failed to present any evidence that the trial court's violation of Rule 431(b) resulted in a biased jury. Accordingly, we find that the second prong of plain-error review does not provide a basis for excusing defendant's procedural default in this case. *Id.* (citing *Thompson*, 238 Ill. 2d at 613-15).

¶ 52 Defendant next contends that the trial court abused its discretion in precluding the testimony of a defense witness as a sanction for a discovery violation. Defendant acknowledges that he has also forfeited this issue, but asserts that it is reviewable under either prong of the plain-error doctrine. As previously discussed, we must first determine whether any error occurred. *Thompson*, 238 Ill. 2d at 613.

¶ 53 Defendant contends that the trial court erred by preventing his girlfriend Quoi Quoi from testifying that he had hand tattoos prior to his arrest on July 1, 2010. He concedes that defense counsel failed to list Quoi Quoi as a witness and, therefore, violated his discovery obligations pursuant to Illinois Supreme Court Rule 413(d)(i) (eff. July 1, 1982). He nevertheless asserts that the trial court's sanction was too harsh and a lesser sanction, such as a recess, would have been effective; that Quoi Quoi's testimony was material and it "seriously undermined" the victims' identification testimony; that the State would not be prejudiced by the testimony; and that the record does not demonstrate that defense counsel acted in bad faith.

¶ 54 An imposition of sanctions for discovery violations is reviewed for an abuse of discretion and will be disturbed only where the trial court's decision was arbitrary, fanciful, or unreasonable, such that no reasonable person would take the view adopted by the trial court. *People v. Ramsey*, 239 Ill. 2d 342, 429 (2010). The factors that the trial court should consider when determining whether to exclude evidence as a discovery sanction are (1) the effectiveness of a less severe sanction, (2) the materiality of the witness's proposed testimony to the outcome of the case, (3) the prejudice to the other party caused by the testimony, and (4) evidence of bad faith in the violation of discovery rules. *People v. Tally*, 2014 IL App (5th) 120349, ¶ 29. These factors are to be considered in the context of the factual circumstances of the case. *Id.*

¶ 55 We find that Quoi Quoi's testimony regarding the hand tattoos was not material. The record demonstrates that defendant did not wear a face mask during any of the four robberies in question. In addition, the testifying witnesses identified defendant as the offender, both in court, and where applicable, in a lineup. Further, there was ample physical evidence connecting defendant to the crimes, including fingerprints, and the recovery of stolen items from his pockets at the time of his arrest.

¶ 56 We also find that the State would have been prejudiced by allowing Quoi Quoi to testify where defense counsel presented her name at the eleventh hour, and the prosecutor did not have an opportunity to investigate her, thereby impairing an effective cross-examination of her. Additionally, defendant's last-minute production of Quoi Quoi is "at the very least, suspicious and demonstrates a willful [*sic*] disregard for rules governing discovery" (*People v. Tinoco*, 185 Ill. App. 3d 816, 826 (1989)), where, as the trial court noted, defense counsel knew he was going to have Quoi Quoi testify regarding defendant's hand tattoos for a long time and engaged in a "very professional and choreographed" display of the tattoos for each of the State's witnesses.

¶ 57 Given these circumstances, we find that the trial court did not abuse its discretion in precluding Quoi Quoi from testifying about defendant's hand tattoos and that the trial court's decision was not arbitrary, fanciful, or unreasonable such that no reasonable person would take its view. See *Ramsey*, 239 Ill. 2d at 429. Having found no error by the trial court, there can be no plain error. See *People v. Wright*, 2013 IL App (1st) 103232, ¶ 68. Accordingly, we honor defendant's forfeiture of the issue.

¶ 58 Finally, defendant contends that defense counsel was ineffective for failing to include Quoi Quoi's name in his answer to discovery. To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy the two-prong test set forth in *Strickland v. Washington,* 466 U.S. 668, 687 (1984). A defendant must demonstrate that: (1) trial counsel's representation fell below an objective standard of reasonableness; and (2) there exists a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *People v. Irvine*, 379 Ill. App. 3d 116, 129 (2008). A reviewing court may analyze the facts of the case under either prong, and if it deems that the standard for that prong is not satisfied, it need not consider the other prong. *Id.* at 130.

¶ 59 Here, we find that defendant cannot establish he sustained prejudice as a result of counsel's alleged deficient performance where, as noted above, the evidence demonstrated that he perpetrated the robberies without a face mask, the testifying witnesses identified him several times as the offender, there was physical evidence connecting him to the crimes, and the evidence against him was overwhelming. Defendant's argument also fails because he cannot demonstrate prejudice where the record reveals that Quoi Quoi testified she had not seen defendant on the streets since his arrest and where the trial court allowed defense counsel to question the identification evidence through his query during closing arguments.

¶ 60 Additionally, defendant contends that trial counsel was ineffective for failing to properly preserve the issues raised on appeal. As established above, however, the majority of defendant's assertions of error fail on their merits, and the remaining claims do not amount to prejudicial, reversible error. Accordingly, defendant has failed to demonstrate he was prejudiced by counsel's failure to preserve these errors, and his ineffective assistance claim fails.

¶ 61 CONCLUSION

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

¶ 63 Affirmed.

¶ 64 JUSTICE LAMPKIN, dissenting.

¶ 65 I disagree with the majority's statement that "the trial court did not define reasonable doubt" and conclusion that "even if the trial court had committed error, such error did not deprive defendant of a fair trial." *Supra*, ¶¶ 43, 44. I would conclude that the trial court did define reasonable doubt and defined it incorrectly, and that error, which was exacerbated by the trial court's failure to ascertain that each venire person understood and accepted the *Zehr* principles, necessitates reversal and remand for a new trial pursuant to application of second

prong plain-error review.

¶ 66 Illinois is among the jurisdictions that do not define reasonable doubt. *Downs,* 2015 IL 117934, ¶ 19. "In decisions dating back more than 100 years, [the Illinois Supreme Court] has consistently held that the term 'reasonable doubt' should not be defined for the jury, that the term, in fact, needs no definition because the words themselves sufficiently convey its meaning." *Id*. ¶ 24. "Any instruction defining reasonable doubt violates a defendant's due process rights only if there is a reasonable likelihood that the jurors understood the instruction to allow conviction upon proof less than beyond a reasonable doubt." *Id*. ¶ 18.

¶ 67 In this case, during *voir dire,* the trial judge explained the preponderance of the evidence burden of proof in a civil case by analogizing it to a "tip" toward one side of a balance scale. Next, the trial judge correctly informed the jury that Illinois does not define the term "reasonable doubt," but then erred by going on to define it. Specifically, he explained and demonstrated the reasonable doubt burden of proof in a criminal case by referring to the scale analogy again and apparently making a hand gesture. Although the gesture was not noted in the transcript, the context of the trial judge's statement that "it [reasonable doubt] would be like this" establishes that he used his hands to represent the trays or pans of an imaginary balance scale and moved one hand up and the other hand down to some degree. The record establishes that the trial judge's demonstration quantified with some specificity the weight of evidence necessary to establish reasonable doubt, and, thus, I cannot agree with the majority's statement that the trial judge did not define reasonable doubt. Unlike the majority, I find it inconsequential that the trial judge "did not give an exact percentage or number value when discussing reasonable doubt" (*supra*, ¶ 43); the trial judge's use of his hands to demonstrate the movement of a balance scale is the visual equivalent of giving the venire an exact percentage or number value. Although we do

not know how much in opposition the trial judge held his hands, I do not believe reasonable doubt could have been shown accurately by his scale analogy. This trial judge has used this scale analogy and visual demonstration in other cases, and it is not possible that he could have exactly replicated his hand gesture each time he gave this demonstration. Accordingly, I must conclude that his declaration to the venire in the instant case that reasonable doubt "would be like this" was not accurate and there is a reasonable likelihood that the jurors understood the erroneous instruction to allow conviction upon proof less than beyond a reasonable doubt.

¶ 68 The majority attempts to analogize this case to *Johnson*, 2013 IL App (1st) 111317, ¶ 54, where the appellate court reviewed the same trial judge's scale analogy and concluded that, although the appellate court did not condone the use of the scale analogy, the trial judge's comments did not constitute error. However, the instant case is distinguishable from *Johnson*, where the trial judge additionally instructed the venire that the meaning of reasonable doubt was " 'something for [the venire] to decide' " and that it " 'is the highest burden that there is at law in Illinois and the United States.' " *Id.* ¶ 52. Unlike in *Johnson*, the trial judge here did not tell the venire at *voir dire* that it was the venire's duty to decide the meaning of reasonable doubt and that reasonable doubt was the highest burden of proof. Moreover, the continued validity of the First District's 2013 holding in *Johnson* is dubious after the June 18, 2015 supreme court holding in *Downs*.

¶ 69 The erroneous reasonable doubt instruction violated defendant's due process rights because there is a reasonable likelihood that the jurors understood the instruction to allow conviction upon proof less than beyond a reasonable doubt. The trial judge gave the erroneous analogy during *voir dire*, when the potential jurors were particularly receptive to guidance concerning the burden of proof and before they began to consider other issues like the credibility

of the various witnesses and the other jury instructions concerning the relevant law and the elements of the charged offenses. Moreover, the trial was not lengthy and the erroneous analogy and visual demonstration were not a distant memory in the jurors' minds when they went to deliberate on their verdict. According to the record, the erroneous analogy and visual demonstration were made on Friday, May 11, 2012. Opening arguments were held on Monday, May 14th, and the State began presenting its case. The State continued presenting its case on Tuesday, May 15th and Wednesday, May 16th. Defendant presented his case on Wednesday, May 16th, and, on Thursday, May 17th, closing arguments were held and the jury rendered its verdict.

¶ 70 Although the majority claims that "subsequent remarks by the trial court and its formal instructions regarding the reasonable doubt standard cured any error" (*supra*, ¶ 45), the majority does not elaborate on what those curative remarks may have been. The absence of any further definition of reasonable doubt by the trial judge after *voir dire* and after the presentation of the evidence during formal jury instructions hardly served to cure the trial court's defective *voir dire* reasonable doubt analogy and demonstration, which set the framework within which the jury trial proceeded. The majority concedes that the trial court failed to comply with Supreme Court Rule 431(b) by not making certain each venire person understood and accepted the principles outlined in *Zehr*. *Supra*, ¶¶ 49-50. This error included the trial court's failure to ensure that the venire understood and accepted the principle that defendant must be proved guilty beyond a reasonable doubt. The trial court's failure to comply with Rule 431(b) compounded the trial court's serious reasonable doubt analogy error, affected the fairness of defendant's trial, and challenges the integrity of the judicial process, even though the evidence in this case was not close. The error necessitates reversal pursuant to the plain-error rule.

¶ 71 For the foregoing reasons, I respectfully dissent from the majority's judgment to affirm defendant's conviction.