FOURTH DIVISION
March 31, 2016

No. 1-13-4008

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 17762
	)	
GERALD RUFUS,	)	Honorable
	)	William H. Hooks
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice McBride and Justice Ellis concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant has forfeited the claim that the trial court failed to properly question the venire.

¶ 2 Following a jury trial, defendant Gerald Rufus was found guilty of first degree murder during which he personally discharged a firearm, and sentenced to a total of 60 years in prison.

On appeal, defendant contends that trial court erred when it failed to ask potential jurors whether they understood and accepted the principles outlined in *People v. Zehr*, 103 Ill. 2d 472, 477 (1984). Defendant also contests the imposition of a certain fine. We affirm, and correct the fines and fees order.

¶ 3 Defendant's arrest and prosecution arose out of the September 4, 2010 shooting death of the victim, his girlfriend, Teresa Russell. The matter proceeded to a jury trial.

¶ 4 During *voir dire*, the trial court admonished a group of 25 potential jurors "on some of the basic principles of law that apply to all criminal cases." The court explained, *inter alia*, that a defendant is not required to prove his innocence, is not required to present any evidence and may rely upon the presumption of innocence. The trial court then stated:

> "Now this next set of questions, I am going to have to actually, the way I do it is I will go through all the jurors. I will start with you, ma'am, the first one. After I ask the question, I will ask you whether you understand and accept the proposition that I am asking you? If you don't let me know that. If you do, so indicate and I have to go through each juror one by one until we get to the back row.
>
> Defendant is presumed to be innocent until the jury determines after deliberations the defendant is guilty beyond a reasonable doubt. Does anybody disagree with this rule of law?"

¶ 5 The trial court then asked each potential juror whether he or she "disagree[d] with this rule of law." Each person answered no. The court next stated that the "State has the burden of

proving defendant guilty of the charges beyond a reasonable doubt" and asked each individual whether "anyone disagree[d] with this rule of law." Each person answered no. The court then stated that defendant "does not have to present any evidence at all and may rely on the presumption of innocence" and asked each potential juror whether he or she "disagree[d] with the rule of law." Each person answered no. The court finally stated that "defendant does not have to testify" and asked whether "any of you hold the fact that the defendant did not testify at trial against the defendant." Each person answered no. Ultimately 11 jurors were selected from this panel. These 11 jurors were then dismissed for the day.

¶ 6 The trial court continued with jury selection. One juror and three alternates were selected from the next panel of potential jurors. At the next court date, one of the first 11 jurors was removed for cause and replaced by one of the alternates. The matter then proceeded to trial.

¶ 7 Paul Rufus, defendant's cousin, testified that in September 2010, he lived on the second floor of a two-flat with his aunt Mildred, uncle Ron, and defendant. The victim, who had been in a long-term "on and off" relationship with defendant, also stayed there. The back bedroom that opened into the kitchen was defendant's room.

¶ 8 When Paul arrived home, he saw the victim's car parked across the street. When he got inside, his aunt was in the dining room watching television. Defendant's bedroom door was closed, but he could see that a light was on. Paul went to his room, turned on the television, and got into bed. He then fell asleep. Paul opened his eyes when he heard a gunshot. He then heard defendant telling the victim to get up. Paul exited his bedroom and walked toward the back of the apartment. He saw the victim on the ground with defendant "over her" telling her to get up. The

upper portion of the victim was in the kitchen and her lower half was in defendant's bedroom. Paul checked the victim's pulse. Her heart was still beating so he went to defendant's room, grabbed the victim's car keys and ran downstairs to turn her car around. He double-parked the car in front of the building in order to put the victim inside and take her to the hospital. When Paul got back upstairs, defendant said he had called 911. Paul met the police on the stairs and showed them upstairs. He was interviewed for about 10 minutes and then left. Paul was not sure if he heard any cars speeding away after hearing the gunshot, but he did not see defendant dragging the victim into the kitchen.

¶ 9 During cross-examination, Paul testified that he could have heard voices coming from defendant's room, but that he was unsure whether it was defendant and the victim or the television. He did not hear any shouting or screaming as he fell asleep. He did not react when the heard the gunshot because he hears gunshots in his neighborhood "all the time." When he heard defendant's voice after the gunshot, defendant sounded "in shock." Defendant then started crying. When Paul got back upstairs, defendant was on the phone "telling them to hurry up." He did not see defendant with a gun and defendant did not ask him to take a gun out of the apartment.

¶ 10 Officer Robert Shoup testified that when he and his partner entered the apartment an older couple was in the dining room and defendant was straddling the victim. Shoup approached defendant and attempted to get him off the victim in order to "preserve the crime scene." When he removed defendant from the victim, Shoup noticed there was no movement in her chest. Shoup described the victim as a "large framed woman" who was bigger than defendant. When Shoup asked defendant what happened, defendant stated that he and the victim were "out front,"

there was a "drive by" and the victim was shot. Defendant stated that he carried the victim upstairs. Shoup then led defendant away from the crime scene.

¶ 11 When Shoup asked defendant a second time what had happened, defendant stated that he and the victim were on the back porch when a van drove through the alley. The victim was struck by a gunshot from the van and he then carried her inside. Shoup led defendant to the back porch. There, he again asked defendant what had happened. Defendant stated that shooters had come up the back porch stairs and fired into the apartment, striking the victim. Shoup and defendant then talked for approximately two hours while the crime scene was processed. Defendant sat in a chair, pulled his arms inside his t-shirt and wrapped them around his chest.

¶ 12 Around 5 a.m., Shoup left the back porch to speak to detective Girardi about defendant's statements. They then searched the backyard and alley for shell casings and tire tracks. Officers also searched a garage roof, a gangway and a basement. Because there were four inches of sewage in the basement, detective Girardi dragged a rake through the sewage in order to see if he could locate a weapon. Neither a weapon nor any shell casings were recovered. Girardi ultimately instructed Shoup to take defendant into custody.

¶ 13 During cross-examination, Shoup described defendant as crying and distraught. Defendant did not want to leave the victim and called 911 a second time. While placing defendant under arrest, Shoup searched him. Shoup did not recover either a gun or shell casings.

¶ 14 Forensic investigator Brian Smith testified that he and his partner processed the crime scene by examining portions of the second floor apartment and the front and back yards. No firearms evidence, such as a shell casing or a gun, was recovered. Smith further testified that

there was no evidence of blood found in the front yard, on the back porch, leading up to the second floor apartment or in the hallway leading to the kitchen, and that he did not see any bullet holes or damage to the window in Rufus's bedroom, the exterior door leading from the kitchen to the porch or the kitchen window. Smith later administered a gunshot residue test to defendant.

¶ 15 The parties stipulated that the police collected defendant's t-shirt, belt, pants and boots on September 4, 2010.

¶ 16 Forensic scientist Mary Wong testified that she analyzed the gunshot residue test performed on defendant as well as portions of his pants and t-shirt. Her analysis of the gunshot residue test indicated "that he may not have discharged a firearm with either hand." If defendant did fire a firearm, however, "the particles were removed by activity, were not deposited, or were not detected by the procedure." Her conclusion for the areas of the t-shirt and pants that were analyzed was that "the sampled areas may not have been in the vicinity of a discharged firearm or come into contact with" an item that had gunshot residue on it. However, if those items were in the vicinity of a discharged firearm, "then the particles were removed by activity, were not deposited, or [were] not detected by the procedure." Wong explained that a person who fired a gun could test negative for gunshot residue because (1) "any type of movement will cause loss of particles," (2) particles may not be deposited, and (3) her tools only analyzed particles .7 micron in diameter or larger, so smaller particles would not be detected.

¶ 17 Doctor Steven Cina, Chief Medical Examiner of Cook County, testified that the victim's autopsy was conducted by an employee no longer with the office and that he had reviewed the report. The victim suffered a single gunshot wound which "involved her left upper arm, went

through the arm and reentered the left side of her chest." Cina opined that the victim was shot by a gun that was less than six inches away because of the presence of soot around the wound.

¶ 18 After the State rested, the defense rested without presenting any witnesses. Following closing arguments, one of the jurors admitted to the court that she "did nod off" during portions of testimony and closing argument. She was excused. The second alternate was then added to the jury. During deliberations, the jury sent out a note asking for "911 info timing, tapes, phones used to call 911," Shoup's report, "any interviews of the defendant or reports given by defendant," "time of death," "accuracy of timeline," and what "time did she call" defendant to come over. The court instructed the jury that it had all the evidence and asked it to continue to deliberate.

¶ 19 Ultimately, the jury found defendant guilty of first degree murder. The jury also found that during the commission of the offense, defendant personally discharged a firearm that proximately caused the death of another person. Defendant was sentenced to 35 years in prison for the murder and to an additional 25 years because a firearm was used in the commission of the offense.

¶ 20 On appeal, defendant first contends that the trial court erred because it failed to comply with Supreme Court Rule 431(b) (eff. July 1, 2012), during the questioning of the first panel of potential jurors.

¶ 21 Pursuant to Rule 431(b) the trial court must question prospective jurors, individually or in a group, if they understand and accept the principles outlined in *People v. Zehr*, 103 Ill. 2d 472, 477 (1984). Specifically, the court must ask if they understand and accept that: (1) a defendant is

presumed innocent; (2) the defendant must be proved guilty beyond a reasonable doubt; (3) the defendant is not required to offer any evidence in his own behalf; and (4) if a defendant does not testify on his own behalf it cannot be held against him. Il. S. Ct. R. 431(b) (eff. July 1, 2012).

¶ 22 Here, defendant contends that the trial court erred when, after explaining each principle, the court did not ask each member of the venire if he or she understood and accepted that principle. Defendant acknowledges that he failed to preserve this issue on appeal because he failed to object to the remarks during *voir dire*. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (to preserve an issue for appeal, a defendant must both object at trial and include the alleged error in a written posttrial motion). However, defendant contends this issue should be reviewed under the plain error doctrine because the trial court erred and the evidence against him was closely balanced.

¶ 23 Pursuant to the plain error doctrine, this court may reach an unpreserved issue when: "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." See *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The first step in plain error analysis is determining whether an error actually occurred. *People v. Cosby*, 231 Ill. 2d 262, 273 (2008).

¶ 24 In *People v. Wilmington*, 2013 IL 112938, our supreme court found error when the trial court asked if anyone in the pool of potential jurors "disagreed" with three of the *Zehr* principles.

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

¶ 25 Therefore, pursuant to *Wilmington*, the trial court's questioning of the venire in the instant case constituted error, as it did not follow the specific question and response process which would allow potential jurors to respond as to their acceptance and understanding of the principles outlined in Rule 431(b). See *Id.*, ¶ 32.

¶ 26 We reject the State's argument that the trial court did not err because prior to questioning the *venire* about the principles outlined in Rule 431(b), the court stated that: "After I ask you the question, I will ask you whether you understand and accept the proposition that I am asking you? If you don't let me know." Here, the record reveals that the trial court did not in fact ask each individual whether he or she understood and accepted the principles of law. Rather, for three of the principles the court asked each individual whether he or she disagreed with that principle of law and for the last the court asked whether a potential juror would hold the fact that defendant

did not testify against him. Our supreme court has held that although it may be arguable that asking venire members if they "disagreed with" a principle is tantamount to asking whether they accept it, that question does not satisfy Rule 431(b)'s requirement that the court also inquire whether potential jurors understand the principle. *People v. Belknap*, 2014 IL 117094, ¶ 46, citing *Wilmington*, 2013 IL 112938, ¶ 32. Therefore, because the trial court failed to ask the potential jurors whether they understood the *Zehr* principles, the court committed error. See *Id.*

¶ 27 Accordingly, because the trial court erred, we must determine whether the error necessitates reversal pursuant to the plain error rule. Because Rule 431(b) errors are not structural errors under the second prong of plain error analysis (see *id.*, ¶ 47), defendant is entitled to reversal only if he satisfies the first prong of the plain error doctrine, that is, that the evidence is so closely balanced that the error alone threatened to tip the scales of justice against him (see *Wilmington*, 2013 IL 112938, ¶ 34). When reviewing a claim pursuant to the first prong of the plain error doctrine, "a reviewing court must undertake a commonsense analysis of all the evidence in context." *Belknap*, 2014 IL 117094, ¶ 50. The defendant has the burden of persuasion to demonstrate that the evidence was closely balanced. *Wilmington*, 2013 IL 112938, ¶ 43.

¶ 28 In support of his argument that the evidence at trial was closely balanced, defendant argues that he had no reason to shoot the victim and he was upset that she was shot. Defendant also argues that no one saw him shoot the victim and no physical evidence, such as a gun or gunshot residue, linked him to the shooting.

¶ 29 That being said, we do not find defendant has met his burden of persuasion to demonstrate that the evidence in this case was so closely balanced that the trial court's error when questioning potential jurors concerning their understanding and acceptance of the principles of Rule 431(b), in and of itself, resulted in defendant's conviction. See *Piatkowski*, 225 Ill. 2d at 565 (under the closely balanced evidence prong of plain error review, a defendant must show error and that the evidence was so closely balanced that the error alone threatened to tip the scales of justice against him). Here, the evidence at trial established, through Paul's testimony, that the victim was at home, presumably in defendant's room, because the light was on in defendant's room and Paul saw her car on the street but did not see the victim when he entered the building or the apartment. After hearing a gunshot, Paul heard defendant tell the victim to get up. When Paul exited his bedroom, defendant and the victim were alone in the back of the house, the victim's lower half was in defendant's bedroom, and defendant was straddling the victim. Doctor Cina opined that that the victim was shot by a gun that was less than six inches away based upon the presence of soot around the wound. Although the gunshot residue tests of defendant's hands and clothing were negative, Wong explained how someone could fire a gun and still test negative for residue. While neither a gun nor shell casings were recovered from defendant's home or yard, this was not fatal to the State's case. Similarly, the State was not required to provide motive evidence at trial. See *People v. Gonzalez*, 388 Ill. App. 3d 566, 586 (2008) (motive is not an essential element of murder and the State is not required to prove it in order to sustain a murder conviction).

¶ 30 The State also presented, through the testimony of Shoup, defendant's changing explanation for the circumstances of the shooting. Defendant first told Shoup that the victim was in front of the building when she was shot in a drive by. Defendant then stated that he and the victim were on the back porch when a van drove through the alley and the victim was struck by a bullet fired from the van. Defendant finally stated shooters had come up the back porch stairs and fired into the apartment, striking the victim. These statements, placing the shooter on the street or the back porch, that is, some distance from the victim, are contradicted by Doctor Cina's testimony that the victim was shot by a gun that was less than six inches away. They are further contradicted by Smith's testimony that there was no evidence of blood found in the front yard, on the back porch, leading up to the second floor apartment or in the hallway leading to the kitchen, as well as Smith's testimony that he did not see any bullet holes or damage to the window in Rufus's bedroom, the exterior door leading from the kitchen to the porch or the kitchen window. Defendant's multiple false exculpatory statements were probative of his consciousness of guilt. See *People v. Milka*, 211 Ill. 2d 150, 181 (2004); see also *People v. Shaw*, 278 Ill. App. 3d 939, 951 (1996) (a false exculpatory statement "attempting to shift blame" is probative of a defendant's consciousness of guilt).

¶ 31 Here, the evidence taken in context (see *Belknap*, 2014 IL 117094, ¶ 50), showed that immediately after the shooting defendant was alone with the victim, that defendant gave Shoup a series of inconsistent statements explaining the circumstances of the shooting, and that defendant's descriptions of where the shooter was in relation to the victim were contradicted by Doctor Cina's testimony. Defendant has therefore not persuaded us that if the jury had been

properly questioned pursuant to Rule 431(b), the outcome of his trial would have been different. See *Wilmington*, 2013 IL 112938, ¶ 43. Because defendant failed to demonstrate the evidence at trial was "so closely balanced that the error alone threatened to tip the scales of justice against" him, this court must honor his procedural default. *Belknap*, 2014 IL 117094, ¶ ¶ 48, 70.

¶ 32 Defendant next contends, and the State concedes, that the Violent Crimes Victims Assistance Fund (VCVA) assessment (see 725 ILCS 240/10 (West 2010)), should be reduced from $25 to $8 because defendant was assessed $80 in fines. See 725 ILCS 240/10(b) (West 2010) (when other fines are assessed, section 10 imposes a VCVA assessment of $4 for each $40, or fraction thereof, of fines imposed).

¶ 33 Although defendant acknowledges that he has forfeited review of this claim because he did not challenge the fines and fees order in a postsentencing motion (see *Enoch*, 122 Ill. 2d at 186), he argues that an unauthorized fine is void and may be challenged at any time. However, in *People v. Castleberry*, 2015 IL 116916, ¶¶ 11-12 (Nov. 19, 2015), our supreme court held that a void judgment, which may be attacked at any time, results from a decision in which a court lacks either personal or subject matter jurisdiction. A voidable judgment, however, is one that is entered in error by a court having jurisdiction, and is not subject to collateral attack. See *Id.*, ¶ 11. Here, defendant does not challenge the trial court's personal jurisdiction or subject matter jurisdiction. However, because the error is clear and the State does not argue that defendant has forfeited this claim on appeal, we conclude alternatively that we may reach defendant's contention on appeal pursuant to our authority under Supreme Court Rule 615(b)(1) to "reverse,

affirm, or modify the judgment or order from which the appeal is taken." See Ill. S. Ct. R. 615(b)(1) (eff. Aug. 27, 1999).

¶ 34 Therefore, pursuant to Rule 615(b)(1) (eff. Aug. 27, 1999), we order the clerk of the circuit court to correct defendant's fines and fees order to reflect the reduction of the VCVA assessment from $25 to $8, for a new total due of $390. We affirm the judgment of the circuit court of Cook County in all other aspects.

¶ 35 Affirmed; fines and fees order corrected.