

NOTICE
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2018 IL App (5th) 150309-U

NO. 5-15-0309

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Jackson County.
)	
v.)	No. 14-CF-369
)	
RONALD E. KELLEY JR.,)	Honorable
)	William G. Schwartz,
Defendant-Appellant.)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justices Goldenhersh and Chapman concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant’s convictions for attempted residential burglary and burglary of a vehicle are upheld under plain error review even though there were violations of the *Zehr* principles where the evidence was not closely balanced. Defendant is entitled to a credit toward his fines for his time spent in presentence custody.

¶ 2 The State charged defendant, Ronald E. Kelley Jr., with one count of attempted residential burglary and two counts of burglary of a vehicle for events occurring on August 31, 2014. The jury found defendant guilty of attempted residential burglary and one count of burglary of a vehicle. The court sentenced defendant to a 15-year term of

imprisonment for attempted residential burglary and to a concurrent 8-year term for burglary of a vehicle. Defendant appeals his convictions and sentences.

¶ 3 On August 31, 2014, Tabitha Ayers and her husband, Shawn Ayers, lived on South 9th Street in Murphysboro. The Ayers owned three vehicles which they kept parked in their driveway. At approximately 6 p.m., Tabitha exited her home and saw someone bent over inside of her 2012 Honda Civic. The person appeared to be either looking for something in the car or getting something out of the car. Tabitha could not see who the person was because he was bent over, and she assumed the person was her husband, Shawn. Tabitha called out to him, and the man, subsequently identified as defendant, stood up. Tabitha saw defendant holding some papers in his hand. Defendant then threw the papers into the car's seat and said "I'm sorry, I got the wrong car." Defendant immediately turned and quickly walked away. Tabitha called out to Shawn, who came outside the house. Shawn followed defendant, while Tabitha called the police. Tabitha reported the incident to the police and described defendant as a tall, African-American man, with broad shoulders, and a shaved or bald head. Tabitha stated defendant was wearing a white t-shirt with black lettering.

¶ 4 Shawn Ayers testified that he came downstairs after Tabitha called for him, and he saw defendant standing outside of the Ayers' 2012 Honda Civic. Defendant spoke to Shawn and said he thought the Civic was his car, and then hurriedly walked away. Shawn looked inside the car and saw that some paperwork had been "tossed to the side." Shawn initially followed defendant on foot, and as Shawn was following the defendant, he tried to explain to Shawn that a friend had left the car there for defendant, and that he wanted

to try his key in the car to see if it would start. Shawn asked defendant to show him the key, and defendant did not comply. Shawn returned home, retrieved his car, and resumed following defendant. Shawn unsuccessfully attempted to take a picture of defendant with his cellular phone. Defendant then ducked through a yard and Shawn gave up the chase. The Ayers did not personally know defendant, and they had not given defendant permission to enter their car. The Ayers were uncertain if anything had been taken from the vehicle.

¶ 5 Stacia Frazier lived on South Street, approximately four or five blocks from the Ayers' residence. At 6:10 p.m., she was home watching television when she heard the screen in her bathroom window moving. Frazier went to check on the noise, and saw defendant entering her home through the bathroom window. Defendant's upper body was through the window. Frazier testified that, based on defendant's position, she assumed defendant was using the air conditioner located just outside the window in order to gain leverage and access the window. Frazier yelled "What are you doing?" and defendant backed out of the window and ran away. Frazier called the police and described defendant as a black male, in his late 30s or early 40s, bald, and wearing a white t-shirt with a blue emblem on it.

¶ 6 Officer Benjamin Jones of the Murphysboro Police Department testified he was dispatched to the Ayers' residence at approximately 6:10 p.m. for a report of a criminal trespass to vehicle. The suspect was described as a bald, black male wearing a white t-shirt. En route, he received a call of an attempted burglary at Frazier's residence involving a suspect with the same physical description. Jones began searching the

surrounding area. Less than eight blocks from Frazier's home, Jones saw defendant, who matched the description of the suspects, walking fast down the street. Jones exited his squad car to make contact with defendant. Defendant immediately approached Jones, talking quickly. Defendant appeared nervous, and was sweating profusely. Defendant told Jones he was taking a walk after getting into an argument with his girlfriend, and that someone was trying to take his picture. Defendant was unable to identify where his girlfriend lived. Defendant consented to a search of his person, during which police recovered an iPod with earbuds, dollar bills, a large amount of change, a watch, a plastic case containing an identification card and a driver's license, and some keys.

¶ 7 Less than 20 minutes after receiving the dispatches, police took defendant to Frazier's residence for a showup. Frazier positively identified defendant as the man who attempted to enter her house. Officers then took defendant to the Ayers' residence for a showup. When defendant saw Shawn, defendant said to Officer Jones, "That's the guy. He can tell you I wasn't in the house." Shawn testified that when Officer Jones rolled down the window of the squad car, defendant said to him, "Tell him what I told you earlier." Shawn identified defendant as the man he saw near his vehicle. Shawn testified he recognized defendant's voice, and defendant was wearing the same clothing as the person Shawn followed. During the showup, Tabitha Ayers also identified defendant as the man she saw in her car earlier that evening. Tabitha stated defendant matched the description she gave police, and defendant was wearing the same clothing as the man she had seen near their Honda Civic.

¶ 8 Detective Michael Laughland of the Murphysboro Police Department testified he retrieved the serial number from the iPod discovered during defendant's arrest and determined it was registered to a woman named Jodi Bradley. Laughland asked defendant if the iPod belonged to him. Defendant answered affirmatively, but then stated it belonged to his girlfriend. Laughland asked defendant if he knew who Jodi Bradley was, and defendant stated he did not know her.

¶ 9 On August 31, 2014, Jodi Bradley lived on South 15th Street in Murphysboro, approximately six blocks from the Ayers' residence and one block from Frazier's residence. That evening, Bradley received a call from Detective Laughland, who inquired about her iPod. Bradley informed Laughland she had last seen her iPod a few days earlier in the center console of her vehicle, which was parked outside of her residence. After receiving the call, Bradley checked her vehicle and discovered the iPod was missing. Bradley confirmed that the serial number on her missing iPod matched the one recovered from defendant. Bradley did not see anyone take the iPod from her vehicle. Bradley did not know defendant, and did not give him, or anyone else, permission to take the iPod.

¶ 10 Detective Laughland assisted in processing the scene at Frazier's residence. Frazier's house had older, white siding with paint that could transfer to objects that came into contact with it. There were scuff marks on the siding below the bathroom window. A shoe print, made from a white substance, was on the air conditioning condenser beside the bathroom window. Laughland testified he believed the white substance on the air conditioner was transfer from the siding on the house. Laughland stated it appeared the suspect attempted to climb inside of the window by placing his feet on the siding, and

then stepping over onto the condenser. Laughland used a gel lift to capture the impression left on the condenser. Another shoe print was present on the ground, which police photographed. Police seized the shoes defendant was wearing when arrested, to compare them to the shoe prints recovered from outside Frazier's home. Police attempted to recover fingerprints from Frazier's house, but were unsuccessful. Laughland testified defendant did not have white scuffs on his shoes, hands, or shorts.

¶ 11 Thomas Gamboe, a forensic scientist for the Illinois State Police, testified he examined the photograph and the gel lift of the shoe prints taken from Frazier's residence, and compared them with defendant's shoes. Gamboe could not exclude defendant's shoes from creating the impression in the ground. Gamboe determined that defendant's right shoe could not have made the impression on the condenser. Gamboe testified it was possible that defendant's left shoe made the impression on the condenser, but that he found only one area with an indentifying characteristic. Gamboe explained the indentifying characteristic was not of a high quality, so while it was possible that defendant's shoe made the impression, he could not make a positive identification that defendant's left shoe made the impression at Frazier's residence.

¶ 12 The State rested its case. During deliberations, the jury requested a map of Murphysboro, which the court provided to the jury without objection by the parties. The jury also sent a note inquiring, "Can the charge of car burglary on the Bradley case be changed to possession of stolen property?" The court responded, "It is what it is." The jury found defendant guilty of attempted residential burglary of Frazier's home and of

burglary of the Ayers' vehicle, and not guilty of burglary of Bradley's vehicle. Defendant appeals his convictions and sentences.

¶ 13 First, defendant argues the trial court violated Illinois Supreme Court Rule 431(b) (eff. July 1, 2012), and because the evidence was closely balanced, this court should reverse and remand for a new trial. Rule 431(b) requires the trial court to ask all potential jurors whether they understand and accept four fundamental principles of criminal law: that the defendant is presumed innocent of the charges against him, that the State must prove the defendant guilty beyond a reasonable doubt, that the defendant is not required to offer any evidence on his own behalf, and that the defendant's choice not to testify cannot be held against him. Ill. S. Ct. R. 431(b) (eff. July 1, 2012). These four principles are commonly referred to as the *Zehr* principles. See *People v. Zehr*, 103 Ill. 2d 472 (1984); *People v. Seby*, 2017 IL 119445, ¶ 6. Rule 431(b) was intended to help ensure a fair and impartial jury by identifying and disqualifying from service potential jurors who are biased against these principles. *People v. Thompson*, 238 Ill. 2d 598, 609-10 (2010).

¶ 14 Here, during jury selection, the trial court questioned each of the prospective jurors individually. Defendant contends, and the State concedes, the trial court erred in administering the 431(b) admonishments. The record indicates that while the trial court inquired about the *Zehr* principles, it did not ask each prospective juror whether they both understood and accepted each of the principles. The trial court's failure to inquire whether the jurors understood and accepted the four principles constitutes error. See *People v. Mueller*, 2015 IL App (5th) 130013, ¶ 23.

¶ 15 Defendant concedes he has not preserved the issue for appeal by failing to raise the issue at trial and in a posttrial motion. See *Sebby*, 2017 IL 119445, ¶ 48 (to preserve issue for appeal, party must object to the error at trial and raise the error in a posttrial motion). Having forfeited the issue, defendant requests this court to review his claim for plain error.¹

¶ 16 The plain error doctrine allows the appellate court to review unpreserved errors when a clear or obvious error occurred, and (1) 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) the 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. *Sebby*, 2017 IL 119445, ¶ 48; Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). Absent evidence that the violation produced a biased jury, a Rule 431(b) violation is not cognizable under the second prong of the plain error doctrine. *Sebby*, 2017 IL 119445, ¶ 52. The plain error doctrine is a narrow, limited exception to the general rule of procedural default. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). The defendant has the burden of persuasion under plain error review. *Hillier*, 237 Ill. 2d at 545. Defendant only seeks review under the first prong, asserting the evidence in this case was closely balanced.

¹Defendant did not seek plain error review in his opening brief. After the State raised defendant's forfeiture in the appellee's brief, defendant argued for plain error review in his reply brief, which is sufficient to allow this court to review the issue for plain error. *People v. Ramsey*, 239 Ill. 2d 342, 412 (2010); *People v. Williams*, 193 Ill. 2d 306, 347-48 (2000).

¶ 17 The first step under the plain error doctrine is to determine whether a clear and obvious error occurred a trial. *Sebby*, 2017 IL 119445, ¶ 49. As already noted, the trial court violated Rule 431(b) by failing to ask the potential jurors whether they understood and accepted each of the *Zehr* principles, a clear error.

¶ 18 Next, when reviewing a claim under the first prong, the court must determine if the evidence was closely balanced by conducting a qualitative analysis of the evidence within the context of the case. *People v. Belknap*, 2014 IL 117094, ¶¶ 50, 53; *Mueller*, 2015 IL App (5th) 130013, ¶ 25. The defendant must demonstrate “that the evidence was so closely balanced the error alone severely threatened to tip the scales of justice.” *Sebby*, 2017 IL 119445, ¶ 51. If defendant meets this burden, the error is prejudicial. *Sebby*, 2017 IL 119445, ¶ 51.

¶ 19 As already noted, the jury acquitted defendant on the charge of burglary related to Bradley’s vehicle and convicted defendant on the charges of burglary of the Ayers’ vehicle and attempted residential burglary of Frazier’s home. A person commits burglary when he knowingly and without authority enters a motor vehicle with the intent to commit a theft. 720 ILCS 5/19-1(a) (West 2014). With respect to the burglary conviction, defendant argues the identification by Tabitha Ayers in court was tentative, and that the Ayers’ accounts were inconsistent. Even if it could be said that Tabitha Ayers’ in-court identification was tentative, Tabitha identified defendant as the man she saw in her vehicle during the showup, and Shawn identified defendant as the man he saw near his vehicle both during the showup and at trial. Furthermore, Shawn and Officer Jones both testified that defendant indicated during the showup that he recognized Shawn from their

earlier interaction. Defendant also asserts there was insufficient evidence supporting the jury's finding that he entered the vehicle with "ill intent," because nothing was taken from the vehicle, and defendant told Shawn Ayers that he thought his friend left the car there for him to borrow. Tabitha Ayers testified she stepped outside of her house and interrupted defendant as he was rifling through her vehicle, appearing to look for something. When viewed in context, the fact that defendant offered a vague, nonsensical, and unsupported excuse, after being caught and confronted, does not undermine the strength of the State's case against him. Therefore, we do not find that the evidence was closely balanced.

¶ 20 The jury also found defendant guilty of the attempted residential burglary of Frazier's residence. A person is guilty of attempt when, with the intent to commit a specific offense, he does any act that constitutes a substantial step toward the commission of that offense. 720 ILCS 5/8-4(a) (West 2014). A person commits residential burglary when he knowingly and without authority enters the dwelling place of another with the intent to commit a felony or theft. 720 ILCS 5/19-3(a) (West 2014).

¶ 21 On appeal, defendant contends the evidence on this charge was closely balanced because Frazier's identification of him as the suspect was unsupported by corroborating evidence, and the evidence supports a finding it would have been "very difficult" for him to get from the Ayers' residence to Frazier's residence based on the timeline of events. We disagree. The State presented substantial evidence at trial on the distances between the locations and the timing of events. The jury requested, and was provided by the court, a map of the area during its deliberations. Contrary to defendant's assertions on appeal,

nothing about the timeline of events indicates that defendant would have been unable to have committed both crimes. Also, it was unnecessary for Frazier's identification to be corroborated by physical evidence. Immediately after the incident, Frazier provided police with a detailed description of the suspect. Defendant, who matched the description, was detained shortly thereafter, not far from Frazier's home. Frazier positively identified defendant as the man she saw entering her home during the showup, and in court.

¶ 22 In our view, the evidence adduced against defendant at trial on these charges was overwhelming and outweighed any evidence suggesting defendant's innocence. Defendant has failed to demonstrate that the error potentially affected the outcome in the case, or that he was prejudiced. The evidence in this case was not closely balanced and, thus, there was no plain error justifying reversal of defendant's conviction for attempted residential burglary of Frazier's residence.

¶ 23 Finally, defendant argues that he is entitled to a \$5 a day credit against his fines for the time he spent in presentence custody. The trial court assessed a total of \$69.75 in fines against defendant.

¶ 24 A defendant who is incarcerated on aailable offense and who, upon conviction, is assessed a fine, is entitled to \$5 *per diem* credit against his fines for his time spent in presentence custody. 725 ILCS 5/110-14(a) (West 2014). The amount of the credit cannot exceed the amount of the fine. 725 ILCS 5/110-14(a) (West 2014).

¶ 25 The State concedes that defendant is entitled to a credit of \$69.75. We accept the State's concession. Defendant was in custody from August 31, 2014, the date of his

arrest, through sentencing on June 24, 2015, a total of 297 days. Defendant is entitled to a credit of \$69.75 toward his imposed fines.

¶ 26 Accordingly, we modify the mittimus to reflect a \$69.75 credit toward defendant's fines. See Ill. S. Ct. R. 615(b)(1) (eff. Jan. 1, 1967); *People v. McCreary*, 393 Ill. App. 3d 402, 409 (2009).

¶ 27 For the reasons stated, we affirm the judgment as modified to reflect a \$69.75 credit for time served.

¶ 28 Affirmed as modified.