No. 1-08-1574

FIFTH DIVISION
April 29, 2011

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. 06 CR 13635
	)	
RICKY REED,	)	Honorable
	)	Lawrence W. Terrell,
Defendant-Appellant.	)	Judge Presiding.

JUDGE EPSTEIN delivered the judgment of the court.*
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

ORDER

Held: Defendant was not denied a fair trial where trial court did not allow parties to question venire and trial court adequately probed potential biases of prospective jurors; defendant forfeited review of trial court's noncompliance with Supreme Court Rule 431(b); and mittimus corrected to reflect correct number of days in custody.

Defendant, Ricky Reed was convicted after a jury trial of burglary tot an automobile and sentenced to 12 years' imprisonment. He now appeals, arguing: (1) he was forced to exhaust his

peremptory challenges because of a prohibition against attorney questioning of the venire and the trial court's denial of motions to dismiss for cause; (2) the trial judge failed to comply with Supreme Court Rule 431(b); and (3) the mittimus should be corrected. Defendant does not challenge the sufficiency of the evidence.

On May 14, 2010, this court reversed and remanded the case. *People v. Reed*, No. 1-08-1574 (unpublished order pursuant to Supreme Court Rule 23). On January 26, 2011, the Illinois Supreme Court denied defendant leave to appeal, but entered a supervisory order directing this court to vacate its judgment and reconsider the appeal in light of *People v. Thompson*, 238 Ill. 2d 598, 939 N.E.2d 403 (2010). Accordingly, we vacate our prior judgment and reconsider defendant's appeal. For the following reasons, we affirm.

BACKGROUND

Defendant was indicted for burglarizing a vehicle and removing a satellite radio and a container of coins. Phillip Johnson lived on the 700 block of Monroe Avenue in River Forest, Illinois. On April 29, 2006, after running errands, he parked his Chevrolet Yukon on the parking pad next to his garage. Later that day, a River Forest police officer came to his home and showed Johnson two items, an FM satellite radio unit and a container of coins, which contained a note reading "Love you, R." The "R." referred to Johnson's significant other, Rosanne, who customarily left notes for him to find when she went out of town. He had purchased the container to consolidate and store coins. Johnson retrieved the original box from the satellite radio and compared the serial number on it to the unit in the officer's possession.

At the officer's direction, Johnson visually inspected his car without touching anything.

He observed the satellite radio was not in its cradle and the coin container was no longer in its usual place on the front seat. The satellite radio was not permanently mounted to the vehicle and could be removed, clipped to a belt, and used with headphones.

Daniel Harder also lived on the 700 block of Monroe Avenue. At approximately 5:25 p.m. on April 29, 2006, while doing dishes, Harder observed defendant proceeding down the walkway toward the rear of his property. Defendant passed a gate, stopped at Harder's car, and flipped the door handle. He continued into the alley and walked north. Harder immediately called 9-1-1, described what he saw, and provided a physical description. A police officer arrived shortly thereafter and interviewed Harder, who then accompanied the officer to the intersection of Iowa and Jackson. Defendant was standing there with another police officer. Harder identified defendant as the man he saw on his property.

While on patrol during the afternoon of April 29, 2006, Officer Michael Fries received a call about a suspicious person in the alley of the 700 block of Monroe Avenue tampering with vehicles. The person was described as a "male black in his 20s, medium build, bald with gray sweater." Officer Fries observed defendant, who matched the description, running eastbound near the intersection of Iowa and Jackson, approximately a block or two from the victim's home.

A witness arrived with another officer and positively identified defendant. Fries placed defendant under arrest and searched him. The search yielded a satellite radio and a Tupperware container filled with change and a note. Defendant claimed the note was from one of his siblings, either Michael or Maria. He further claimed the satellite radio receiver was for use with headphones, though none were attached. Defendant was then taken to the station, processed and

fingerprinted.

Evidence technician Jennifer Casey processed the car and lifted 10 latent impressions from the vehicle. Thereafter, Detective James Greenwood forwarded eight impressions suitable for comparison to forensic scientist Stephanie Bodine of the Illinois State Police Forensic Science Command requesting a review off the evidence. According to Bodine, her comparisons revealed that a partial fingerprint lifted from the Yukon was made by defendant.

At the close of the State's case, defendant's motion for a directed verdict was denied. Defendant did not present any evidence and did not testify. The jury returned a verdict of guilty on the burglary charge. In turn, defendant was sentenced, as a class X offender, to 12 years' imprisonment. This appeal followed.

ANALYSIS

Defendant's primary claims of error stem from jury selection. Prior to *voir dire*, defendant sought leave for the attorneys to directly question potential jurors. The trial judge observed the right to an impartial jury does not require allowing attorneys the opportunity to personally interrogate the venire. The judge announced he would "personally question the prospective jurors and prohibit the lawyers' from doing so. However, he permitted the parties to submit written questions, to be used in *voir dire* "if they are proper."

Four questions proposed by the State were accepted for use. Defendant submitted twenty-six questions, many containing multiple subparts. The trial judge struck eight of the questions entirely and portions of a ninth. Two of the questions stricken mirrored those delineated in Supreme Court Rule 431(b), regarding the presumption of innocence and that

defendant need not present any evidence. The trial judge accepted, *inter alia*, questions concerning whether jurors would hold defendant's failure to testify against him, and the State's burden of proving each element of the charged offense.

At the outset of jury selection, the trial judge outlined the charges against defendant. The judge then explained the presumption of innocence, the State's obligation to prove defendant guilty beyond a reasonable doubt, that the defendant was not required to offer any proof or evidence on his behalf, and the right of the defendant not to testify. He then specified the duties and obligations of the jury, as well as logistical matters and some of the nuances of jury service.

The fundamental purpose of *voir dire* is "to assure the selection of an impartial panel of jurors free from prejudice or bias." *People v. Metcalfe*, 202 Ill. 2d 544, 552, 782, N.E.2d 263, 269 (2002). *Voir dire* in criminal cases is governed by Supreme Court Rule 431, which provides:

> (a) The 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. The court may permit the parties to submit additional questions to it for further inquiry if it thinks they are appropriate and 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. Questions shall not directly or indirectly concern matters of law or instructions. The court shall acquaint prospective jurors with the general duties and responsibilities of jurors.

> (b) The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects.
>
> The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." 177 Ill. 2d R. 431 (eff. May 1, 2007).

It is well-settled from the plain language of the rule that the trial court is primarily responsible for conducting *voir dire* and adhering to the purpose of the endeavor.

While defendant's claims of error challenge the selection of his jury generally, our review of his brief and the record negates the necessity of a full review of jury selection. Instead, we focus our review on the salient aspects of the *voir dire*, as they relate to errors claimed on appeal.

Defendant maintains he was "denied his right to ascertain whether jurors were free from bias" where the attorneys were prohibited from questioning the venire and the error was compounded where the trial judge failed to explore any potential bias expressed. Defendant's claim is of dubious merit. Rule 431 does not require parties to be given the opportunity to question jurors directly. 177 Ill. 2d R. 431. Rejecting that argument, our supreme court recently

explained in *People v. Garstecki*:

> "The rule does not state that the court shall allow the attorneys to question the entire venire in every case. Rather, it provides that the court shall allow whatever attorney questioning it deems proper after considering the factors set forth in the rule." *People v. Garstecki*, 234 Ill. 2d 430, 445, 917 N.E.2d 465, 474 (2009).

According to defendant, the trial court "incorrectly instructed" venireman Thomas McDonnell by telling him to answer the questions posed with "yes" or "no," instead of narrative or editorial. When asked if there was anything about the nature of the charges against defendant that would keep him from being fair, McDonnell responded, "Yeah, I would – It puts a bit of a bad taste in my month [*sic*]." To wit, the court said, "Okay, Now, don't be – don't be too plain now. Yes or no because we don't want to infect the others, all right? Thank you."

The exchange between the trial judge and McDonnell clearly indicates the judge was doing his best to avoid tainting the venire, while maintaining control of the selection process. Importantly, the question posed to McDonnell required nothing more than a one word answer. Defendant contends, without citation, the trial judge's handling of McDonnell was error. *People v. Ward*, 215 Ill. 2d 317, 331-32, 830 N.E.2d 556, 564 (2005) (failure to cite relevant authority results in forfeiture); 210 Ill. 2d R. 341(h)(7). Nonetheless, we disagree. The trial judge's direction to McDonnell was entirely reasonable and, in fact, consonant with his exclusive control of the jury selection process as well as the abiding purpose thereof.

Defendant raises a similar challenge as to the questioning of Dalene Pojak. During Pojak's inquiry, the following occurred:

"THE COURT: Do you have any religious, moral, or ethical beliefs which would prevent you from passing judgment on the defendant?

PROSPECTIVE JUROR POJAK: Religion.

THE COURT: What's that?

PROSPECTIVE JUROR POJAK: My religion.

THE COURT: No, no.

PROSPECTIVE JUROR POJAK: Oh, yes."

Apparently sensing some confusion, the trial judge repeated the original question. Pojak responded, "Yes."

While defendant claims this was an example of the trial judge limiting Pojak's answers, we disagree with this interpretation. A review of the entire colloquy demonstrates the questioning was entirely appropriate and Pojak's responses were not limited in any way. Instead, the trial judge appropriately sought to resolve Pojak's confusion or misunderstanding. Moreover, the trial court ultimately granted a State motion, without objection, to excuse Pojak for cause. In fact, defense counsel indicated she "would probably concur" with the State's motion. Defendant's claimed error here is perplexing in light of the State's motion for cause and his concurrence therein. Thus, we discern no error in the questioning of Pojak.

Curiously, after claiming the foregoing errors, defendant offers the following:

"Although it was proper for the trial court to limit answers that could possibly prejudice the entire venire, because the court ruled that neither party could probe into answers to discover the depth and nature of the prejudice, the

> trial court had a duty to follow through with the questioning, perhaps by individually questioning *** jurors in chambers."

Defendant offers no authority to support any such duty; as such this contention is likewise forfeited. *Ward*, 215 Ill. 2d at 331-32, 830 N.E.2d at 564.

Defendant also claims the trial court's failure to probe the full extent of McDonnell's experience as a crime victim and the refusal to permit defense counsel to explain her motion for cause as to McDonnell were in error. Defendant intimates that he lacked sufficient insight about McDonnell's ability to be fair without additional questioning. McDonnell indicated he "would hope" his prior experiences as a crime victim would not interfere with his ability to be fair. Though he conceded that the charge against defendant "put a bad taste in [his] mouth," McDonnell subsequently indicated he would not hesitate to find defendant not guilty if the State failed to carry its burden.

When defendant moved to excuse McDonald for cause, the prosecutor objected, "Judge, the State would certainly contest any challenge for cause with - -." The trial judge denied the motion without further comment. In turn, the defense used its first peremptory challenge to excuse McDonnell. We are mindful decisions on motions to excuse a potential juror for cause are discretionary and will not be disturbed unless such an abuse is found. *People v. Shaw*, 186 Ill. 2d 301, 317, 713 N.E.2d 1161, 1170 (1998). A trial judge's decision whether removal for cause is appropriate is afforded great deference. *People v. Sims*, 192 Ill. 2d 592, 633, 736 N.E.2d 1048, 1069 (2000). Neither Rule 431 nor relevant case law requires trial judges to explain these decisions. Though we perceive little potential for harm resulting from permitting defense

counsel to explain her motion, we cannot say the court's curtailment of counsel's explanation constitutes error.

Defendant additionally contends the trial court failed to probe other potential jurors in light of answers tending "to show possible prejudice." Defendant points to the questioning of potential jurors Beverly Andrews, Bruce Ritchey, Pragnik Shah, Cervantes Marcelino Dircio, Ellen Markus, Margo Griffin, and Kathleen Wierzbicki as examples of situations where additional probing was necessary. Of that group, only Dircio was accepted to hear evidence and he was not the subject of a defense motion for cause. Shah and Grifffin were excused by virtue of successful defense motions for cause. Wierzbicki was excused on a State motion for cause and the State used a peremptory challenge to excuse Markus.

Defendant contends, with the aid of further probing, "it is possible many of these jurors would have been struck for cause." This is nothing more than mere conjecture or speculation. Moreover, three of these jurors were, in fact, excused for cause and a fourth was excused by the State's action. Consequently, defendant's claims are without merit.

Defendant used peremptory challenges to excuse Andrews and Ritchey after motions to remove them for cause failed. Defendant contends the trial court should have more fully probed the bias expressed by these potential juror regarding testimony by police officers. When asked whether she would weigh police testimony differently, Andrews said, "Yes, maybe more." Likewise, Ritchey indicated he would "probably give [the testimony of police officers] more" weight. Notably, this avenue of inquiry is not addressed by Rule 431(b). 177 Ill. 2d R. 431(b). This question was among the list submitted by defendant and accepted by the judge. However,

unlike several of the questions defendant proposed, it contained no subparts. If defendant believed follow-up questions were warranted, he had the opportunity to suggest them when the door was opened to submit questions. Since defendant introduced this line of inquiry, we find he cannot complain that follow-up questions were not asked. See *People v. Phillips*, 217 Ill. App. 3d 370, 373, 577 N.E.2d 527, 528 (1991) ("[A] defendant cannot complain on appeal of an alleged error which was invited or acquiesced in by him below").

Defendant likewise asserts the trial court erred in failing to question potential jurors Jimmy Meeks and Bertha Reyes whether they would give more weight to the testimony of police officers. Defendant utilized his fourth peremptory challenge to dismiss Meeks. Reyes was impaneled to hear evidence. Again, Rule 431(b) does not require jurors to be questioned about this particular issue. 177 Ill. 2d R. 431(b). Likewise, nothing in Rule 431(a) requires trial judges to ask every question submitted or approved for use during jury selection. See *Williams*, 164 Ill. 2d at 16, 645 N.E.2d at 850 ("the manner and scope of that examination rests within the discretion of [the trial] court"). Consequently, the trial judge was entirely within his authority to dictate the choice and scope of questions asked. Failing to pose this question to Meeks and Reyes was not error.

Defendant claims the failure to explore one of Murna Lopez's answers was error. Lopez was asked whether she would hesitate to return a not guilty verdict if the State failed to carry its burden and she responded, "Yes." Seemingly based on this response, defendant moved to dismiss Lopez for cause. The State objected and the trial court denied the motion. As noted, this determination is left to the sound discretion of the trial court. *Shaw*, 186 Ill. 2d at 317, 713

N.E.2d at 1170. Lopez consistently responded that she could be fair to both sides. See *Shaw*, 186 Ill. 2d at 317, 713 N.E.2d at 1170 ("[R]esponses of the venireperson must be viewed in their entirety"). Regardless, there was no obligation, much less a need, for the trial court to further explore this area.

Defendant also claims error where the trial judge struck Judith Swanson. Swanson explained her experiences as a victim of a home invasion robbery and later an assault and battery. When asked if those experiences would impair her ability to be fair to the State, she responded, "That's where I would have the problem." Subsequently questioning apparently rehabilitated her and she indicated that she would be fair to the State. Although defendant objected when the State moved to dismiss her for cause, the trial court granted the motion. Once again, this is a matter addressed firmly to the trial court's discretion. *Shaw*, 186 Ill. 2d at 317, 713 N.E.2d at 1170. The mere fact that Swanson was rehabilitated does not make the decision to dismiss her for cause on the State's motion error or abuse of discretion.

Contrary to defendant's claims, the trial court properly exercised its powers in controlling the form and fashion of jury selection. Likewise, the trial judge's rulings on motions to dismiss for cause did not demonstrate any abuse of discretion. Therefore, we find defendant's claim that he was forced to use peremptory challenges without merit.

We next address defendant's claim that the trial court erred by not strictly complying with the terms of Rule 431(b). 177 Ill. 2d R. 431(b). Specifically, he claims the trial court failed to confirm whether the prospective jurors understood and accepted that defendant did not have to present evidence on his own behalf. Defendant contends this failure was crucial because he did

not, in fact, offer any evidence.

Undeniably, all courts are bound to follow the rules promulgated by our supreme court. See *Bright v. Dicke*, 166 Ill. 2d 204, 210, 652 N.E.2d 275, 277-78 (1995). A review of the record support's defendant's contention that the trial court failed to fully comply with Rule 431(b). Rule 431(b) by its plain language states that the trial court 'shall ask' potential jurors whether they understand and accept the principles, clearly mandating an inquiry into the four enumerated areas. See *People v. Thompson*, 238 Ill. 2d at 607. Accordingly, the failure to ascertain whether the jurors both understand and accept the principles is a violation of Rule 431(b) and constitutes error. *Id*

Nonetheless, in order to preserve an issue for review a defendant must object contemporaneously as well as in a written posttrial motion. *People v. Lewis*, 234 Ill .2d 32, 40 (2009). In the instant case, defendant did not object during *voir dire* to the trial court's failure to comply with Rule 431(b) and has forfeited appellate review of his claim.

Defendant argues, however, that this court should conclude that the error is "reversible as plain error" because he was deprived of "his significant right to be tried in front of a fair and impartial jury." *People v. Herron*, 215 Ill. 2d 167, 187 (2005). Plain-error applies only

> "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." *People v. Piatkowski,* 225 Ill. 2d 551, 565 (2007). Defendant here raises the second prong. Under both prongs of the plain-error doctrine, " 'the burden of persuasion remains with the defendant.' " *Id.*, quoting *People v. Herron*, 215 Ill. 2d at 187.

Clearly, a defendant can satisfy the second prong of the plain-error doctrine by establishing that he was tried by a biased jury. See, *e.g.*, *Thompson*, 238 Ill. 2d at 610. Although defendant contends that "the trial court's failure to strictly comply with Rule 431(b) denied him his right to be tried in front of a fair and impartial jury, our supreme court has recently explained that a court "cannot presume the jury was biased simply because the trial court erred in conducting the Rule 431(b) questioning." *Thompson*, 238 Ill. 2d at 614.

As the *Thompson* court further explained:

> "Our amendment to Rule 431(b) does not indicate that compliance with the rule is now indispensable to a fair trial. As we have explained, the failure to conduct Rule 431(b) questioning does not necessarily result in a biased jury, regardless of whether that questioning is mandatory or permissive under our rule. Although the amendment to the rule serves to promote the selection of an impartial jury by making questioning mandatory, Rule 431(b) questioning is only one method of helping to ensure the selection of an impartial jury. [Citation.] It is not the only means of achieving that objective. A violation of Rule 431(b) does not implicate a fundamental right or constitutional protection, but only involves a violation of this court's rules. [Citation.] Despite our amendment to the rule, we

> cannot conclude that Rule 431(b) questioning is indispensable to the selection of an impartial jury." *Id.*

The *Thompson* court, noting that a defendant has the burden of persuasion on the issue of whether the trial court's violation of Rule 431(b) affected the fairness and integrity of his trial, held that the defendant failed to meet his burden because he failed to presented any evidence that the jury was biased in his case as a result of the violation. *Thompson*, 238 Ill.2d at 614-15. Similarly, because defendant here has not presented any evidence that the jury was biased, he has failed to meet his burden under the second prong of the plain-error doctrine. Defendant has forfeited his Rule 431(b) claim.

Next, defendant asks us to correct the mittimus to reflect 715 days in pre-trial custody, instead of the 713 days shown on the court's order. The State agrees the mittimus was in error, but contends defendant is entitled to 714 days credit. The record reveals defendant was in custody starting on May 11, 2006, and was sentenced on April 24, 2008. The period of time in custody up to April 23, 2008, is a total of 714 days. Recently, in *People v. Williams*, 239 Ill. 2d 503 (2011), in a case of first impression, our supreme court held that the date a defendant is sentenced and committed to the Department of Corrections is to be counted as a day of sentence and therefore, defendant was not entitled to an additional day of presentencing detention credit for the day on which he was sentenced. Thus, as we did in our original order, we conclude that the presentence credit is 714 days. Remandment is unnecessary since this court, pursuant to Supreme Court Rule 615(b)(1) has authority to directly order the clerk of the circuit court to make the necessary corrections. See, *e.g.*, *People v. Calhoun*, 404 Ill. App. 3d 362, 391 (2010).

Accordingly, we order the mittimus be corrected to reflect 714 days' credit for presentencing detention.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the circuit court of Cook County and the mittimus is corrected as ordered.

Affirmed; mittimus corrected.

* Justice Toomin, who delivered the original opinion, is no longer assigned to the court.