No. 1-09-0073

SECOND DIVISION
January 25, 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 MC6 2796
	)	
SHARON BALTHAZAR,	)	Honorable
	)	Thomas J. O'Hara
Defendant-Appellant.	)	Judge Presiding.

JUSTICE KARNEZIS delivered the judgment of the court.

Presiding Justice Cunningham and Justice Connors concurred in the judgment.

ORDER

HELD: Defendant was proven guilty of attempt theft beyond a reasonable doubt where the victims' identifications of defendant were positive and credible. Defense counsel was not ineffective for questioning witnesses on cross-examination regarding a missing surveillance tape where the evidence elicited coincided with defense counsel's

trial strategy. Defense counsel was likewise not ineffective for failing to request a non-IPI instruction regarding missing evidence because the outcome of the trial would not have been different had the instruction been given. Finally, defendant forfeited his claim that the trial court failed to comply with Rule 431(b).

Defendant Sharon Balthazar was convicted of attempt theft and was sentenced to one year of conditional discharge with 100 hours of community service. On appeal, she argues: (1) the State failed to prove her guilty beyond a reasonable doubt; (2) trial counsel was ineffective; and (3) the trial court violated Supreme Court Rule 431(b). For the following reasons, we affirm the judgment of the trial court.

BACKGROUND

Abby Aladdin testified that she worked as a branch manager at the Oak Forest Branch of TCF bank in December 2005. On December 12, 2005, a woman walked up to a teller window of TCF bank and presented a withdrawal slip in the amount of $4700 to be withdrawn from the account of Ellen Chiocca. Because of the amount of the withdrawal, Aladdin's assistance with the transaction was required. Aladdin approached defendant who presented her with the withdrawal slip for $4700, which bore the name of Ellen Chiocca, as well as the purported signature of Ellen Chiocca. The woman requesting the withdrawal provided an Indiana driver's license with the name Ellen Chiocca. However, Aladdin was suspicious because the customer was African American but her last name was Italian, the customer looked much younger than the age stated on the license and the driver's license number was longer than the numbers on Indiana licenses. Aladdin left the customer at the window and telephoned

the account holder. Based on that phone call to Ellen Chiocca, Aladdin determined that the woman at the window requesting the withdrawal was not the account holder. Aladdin called the police. While Aladdin was away from the window, the customer left.

Two months later, on February 21, 2006, Aladdin viewed the bank's security video with a police officer. Aladdin identified defendant as the woman who attempted to make the withdrawal.

Ellen Chiocca testified that on December 12, 2005, she received a call at home from Abby Aladdin from the Oak Forest branch of TCF bank. Aladdin asked her if she was at the Oak Forest branch attempting to withdraw $4700 from her account. Chiocca informed Aladdin that she was at her home in Evergreen Park. After the phone call, Chiocca immediately went to the TCF bank at 104th and Pulaski to close her account. She then went to the Oak Forest police station to file a report.

On or about February 23, 2006, Chiocca viewed the bank security tape and recognized defendant but noted that she was wearing a wig and sunglasses. Chiocca knew defendant from a domestic violence shelter where Chiocca worked as a pedantic nurse practitioner. Chiocca provided medical care to defendant and her son several times at the shelter. On one occasion when Chiocca was examining defendant's son, an employee of the shelter knocked on the door of the examination room and requested Chiocca's assistance with a baby. Chiocca left the room and closed the door, but left her purse containing her bank statement and her driver's license in the examining room. Chiocca identified the account number on the withdrawal slip as her account number and the driver's license number on the withdrawal slip as her driver's

license number. Chiocca testified that the signature on the withdrawal slip was not her signature and she never authorized defendant or anyone else to withdraw funds from her account.

Detective Jim Emmett, a police officer from the Oak Forest police department testified that on February 21, 2006, he got a surveillance tape from the manager of TCF bank. Detective Emmett showed the tape to Ellen Chiocca. While watching the tape, Chiocca stated she recognized defendant from the shelter and provided her name. After viewing the tape, Detective Emmett did not place the DVD in evidence, but left it on his desk where "it probably got mixed up with a whole bunch of DVD's." Detective Emmett testified that he did not purposely destroy the DVD.

The State entered the withdrawal slip into evidence over defendant's objection and rested its case.

Defendant called Sergeant William Busse of the Oak Forest police department. Sergeant Busse testified that on December 12, 2005, he spoke with Chiocca regarding an attempt theft at TCF bank in Oak Forest. This conversation took place at the Oak Forest police station. Sergeant Busse wrote a report based on that conversation and submitted the report to the Investigations division.

Defendant testified that she had never been to the Oak Forest branch of TCF bank and did not know where it was. Defendant testified that she knew Chiocca from a domestic violence shelter where defendant lived for the month of November 2005. During that month, Chiocca examined her once and her son once. She never went into Chiocca's purse or took anything from it. Defendant also testified that she never lived

in Indiana.

After hearing all of the evidence, the jury found defendant guilty of attempt theft. Defendant was subsequently sentenced to one year of conditional discharge and 100 hours of community service. It is from this judgment that defendant now appeals.

ANALYSIS

Defendant contends the identifications made by Abby Aladdin and Ellen Chiocca are weak, incredible and were insufficient to prove her guilty of attempt theft beyond a reasonable doubt. When a defendant is challenging the sufficiency of the evidence, the relevant inquiry is whether, after viewing all of the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). The trier of fact is in the best position to determine the credibility of the witnesses, to resolve any inconsistencies or conflicts in their testimony, to assess the proper weight to be given to their testimony and to draw reasonable inferences from all of the evidence. *People v. Cochran,* 323 Ill. App. 3d 669, 679 (2001).

A person commits the offense of attempt theft when he or she, with the intent to commit the offense of theft, does any act which constitutes a substantial step toward the commission of the offense of theft. 720 ILCS 5/8-4 (West 2004)). Defendant was convicted of attempt theft in this case based on the testimony of Abby Aladdin and Ellen Chiocca. Aladdin observed defendant when she was standing at the counter at TCF bank and was attempting to withdraw funds from Chiocca's account. Chiocca

identified defendant as the person who attempted to withdraw funds from her account from a bank security video. Defendant contends that this evidence is insufficient to establish that she is the person observed by Aladdin and identified by Chiocca because the woman who attempted to withdraw the money was wearing a wig and sunglasses and the identifications were made two months after the offense.

A defendant may be convicted on the testimony of even a single eyewitness if the witness viewed the accused under circumstances permitting a positive identification and the witness' testimony is positive and credible. *People v. Slim*, 127 Ill. 2d 302, 307 (1989). A vague or doubtful identification is not sufficient to support a conviction. *Slim*, 127 Ill. 2d at 307. Factors to be considered in evaluating an identification include: "(1) the opportunity the victim had to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the victim at the identification confrontation; and (5) the length of time between the crime and the identification confrontation." *Slim*, 127 Ill. 2d at 307-08, following *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).[1]

In the instant case, there is nothing vague or doubtful about Aladdin's or Chiocca's identification of defendant as the offender. Aladdin had an adequate

[1] As there was no evidence presented at trial as to any prior description of defendant, the judge agreed to remove this factor from the jury instruction on identification evidence at defense counsel's request. Therefore, this factor was not considered by the jury in determining the reliability of the identifications. Accordingly, we will not consider this factor either.

opportunity to view defendant. Aladdin testified that she was standing "on the front line" while she was looking up Chiocca's account and verifying the identification provided. Defendant was standing in front of her. Aladdin also had an opportunity to view defendant's photograph which was on the driver's license presented with the withdrawal slip. Aladdin showed an adequate degree of attention because she was suspicious of the transaction. She looked at the driver's license defendant presented and noticed that "the last name didn't match" defendant's appearance. Aladdin explained that the last name of the customer was Italian, but the lady standing in front of her was African-American. In addition, defendant appeared to be much younger than the age shown on the drivers' license. Aladdin and Chiocca were unwavering in their identification of defendant. Aladdin testified that on February 21, 2006, she viewed the surveillance tape and identified defendant as the person who attempted to withdraw funds from Chiocca's account. Aladdin also identified defendant in open court as the person who attempted to withdraw funds from Chiocca's account. Chiocca testified that she also identified defendant from the bank surveillance tape and when she viewed the tape she immediately recognized defendant and said, "oh my God, it's Sharon." Chiocca knew defendant from the domestic violence shelter where she worked. Chiocca also identified defendant in open court. Furthermore, the identifications made from the surveillance tape occurred roughly two months after the offense, which is not an unreasonable length of time. Considering all of the evidence, we find Aladdin's and Chiocca's identifications of defendant to be reliable and established proof beyond a reasonable doubt that defendant committed the offense of attempt theft.

Defendant next argues that she was denied effective assistance of counsel because trial counsel cross-examined the State's first witness, Aladdin, about whether she viewed and made an identification from the surveillance video that was missing at the time of trial and had been barred by the trial judge. Defendant also faults counsel for failing to request a missing evidence jury instruction.

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, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). A defendant must show 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. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693-94; *People v. Albanese*, 104 Ill. 2d 504, 525 (1984).

Under the first prong of the *Strickland* test, defendant must overcome a "strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance; that is, defendant must overcome the presumption that under the circumstances, the challenged action, 'might be considered sound trial strategy.' " *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694-95, quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S. Ct. 158, 164, 100 L. Ed. 2d 83, 94 (1955).
A defendant satisfies the second prong of *Strickland* if he can show that a reasonable probability exists that, had counsel not erred, the trier of fact would not have found him guilty beyond a reasonable doubt. *People v. Caballero*, 126 Ill. 2d 248, 260 (1989). Where the defendant fails to prove prejudice, the reviewing court need not determine

whether counsel's performance constituted less than reasonable assistance. *Strickland*, 466 U.S. at 697, 104 S .Ct. at 2069, 80 L. Ed.2d at 699; *People v. Flores*, 153 Ill.2d 264, 284 (1992).

Prior to trial in this case, defense counsel informed the trial judge that he had subpoenaed a surveillance tape of the December 12, 2005, attempt theft from TCF bank and was informed that TCF bank did not have the tape. A continuance was granted by the court to determine if the tape still existed. The trial court stated that the continuance date was "[f]inal status for tape. If no tape is produced, all tapes are barred." On the next court date, the State did not produce the surveillance tape so the trial judge stated that the "video tape is barred."

Despite the trial court's ruling regarding the surveillance tape, early in his cross-examination of Aladdin, defense counsel questioned her about whether she viewed and made an identification of defendant from the surveillance video. Defense counsel then went on to ask numerous other questions of Aladdin regarding when, where, and with whom she viewed the surveillance tape, as well as her knowledge about the current whereabouts of the tape. After defense counsel questioned Chiocca about the tape, the State asked her about the video. Chiocca stated that she recognized the woman on the surveillance tape as defendant, whom she knew from the domestic violence shelter. Defense counsel also asked Detective Emmett about the surveillance tape. Detective Emmett confirmed that he viewed the tape with Chiocca and that Chiocca identified the woman on the tape as someone she knew from a shelter where she worked.

It has been well-established that allegations of ineffective assistance of counsel

based on counsel's conduct during cross-examination are not subject to review, as they fall within the purview of trial strategy. *People v. Harris*, 123 Ill. 2d 113, 157 (1988). Here, the record establishes that defense counsel's strategy was to highlight the missing surveillance tape in an effort to diminish the credibility of the State's witnesses and to create a reasonable doubt in the juror's minds as to defendant's identity as the person who attempted to withdraw the funds from Chiocca's account. Not only did defense counsel question Aladdin and Detective Emmet to this end, defense counsel also attacked the State's case by highlighting the absence of the tape in closing argument. Defendant cannot establish prejudice here, where counsel's decision to question Aladdin and Detective Emmet regarding the missing surveillance tape was clearly a matter of sound trial strategy.

Similarly, defendant cannot establish prejudice as a result of what she contends is the prejudicial introduction of the security video identifications. As discussed previously, Aladdin's and Chiocca's identifications of defendant were reliable and credible and sufficient to establish proof of attempt theft beyond a reasonable doubt.

Defendant also faults counsel for not proposing a non-pattern jury instruction "that would have allowed jurors to consider the fact that the State lost the tape as favorable to Ms. Balthazar." Defendant asserts that defense counsel should have proposed an instruction on the missing evidence, similar to the one allowed in *Youngblood v. Arizona*, 488 U.S. 51, 59-60 (1988). That instruction reads: "If you find that the State has * * * allowed to be destroyed or lost any evidence whose content or quality are in issue, you may infer that the true fact is against the State's interest." *Youngblood*, 488 U.S. at 59-

60. There is no Illinois Pattern Jury Instruction for missing evidence.

Jury instructions are necessary to provide the jury with the legal principles applicable to the evidence presented so that it may reach a correct verdict. *People v. Hopp*, 209 Ill. 2d 1, 8 (2004). Supreme Court Rule 451(a) (177 Ill. 2d R. 451(a)) provides that whenever the IPI contains an applicable jury instruction and the court determines that the jury should be instructed on the subject, "the [IPI instruction] shall be used unless the court determines that it does not accurately state the law." Where no IPI instruction exists on a subject, as in this case, the court has the discretion to give a non-pattern jury instruction. *People v. Ramey*, 151 Ill. 2d 498, 536 , 805 N.E.2d 1190, 1194 (1992).

To prevail on a claim that trial counsel was ineffective for failing to propose a particular jury instruction, the defendant must show that the instruction would have been given and that the outcome of the trial would have been different. *Harris*, 123 Ill. 2d at 157. Here, defense counsel repeatedly highlighted, during cross-examination of the State's witnesses and during closing argument, that the missing tape was the result of incompetent police work and established a reasonable doubt as to defendant's guilt. Had a missing evidence instruction, similar to the one used in *Youngblood*, been given here, the result of the trial would have been no different. As previously discussed, Aladdin's and Chiocca's identifications of defendant were sufficient to establish her guilt beyond a reasonable doubt. As such, we cannot say that defendant suffered any prejudice as a result of defense counsel's failure to request the missing evidence instruction.

Finally, defendant contends that she was denied her right to an impartial jury where the trial court asked potential jurors as a group if they "disagreed" with the four *Zehr* principles as required by Supreme Court Rule 431(b) (Official Reports Advance Sheet No. 8 (April 11, 2007), R. 431(b), eff. May 1, 2007), but did not ask the panel whether they understood them. The State argues that defendant forfeited this claim and the issue can only be reviewed for plain error.

In *People v. Zehr*, 103 Ill. 2d 472, 477 (1984), our supreme court held that "essential to the qualification of jurors in a criminal case" is that they know : (1) a defendant is presumed innocent, (2) he is not required to present evidence on his own behalf, (3) the State must prove him guilty beyond a reasonable doubt, and (4) his decision not to testify may not be held against him. In 1997, our supreme court amended Rule 431(b) to embrace the *voir dire* principles established in *Zehr.* 177 Ill. 2d R. 431(b). The new rule required that if requested by defendant, the trial court was required to ask potential jurors, individually or in a group, whether that juror understood and accepted the four *Zehr* principles. 177 Ill. 2d R. 431(b).

Rule 431(b) was amended on May 1, 2007, to require the trial court to question potential jurors on the Rule 431(b) principles in every case, without defendant's prompting, as to whether they understand and accept each *Zehr* principle. *Graham*, 393 Ill. App. 3d at 273. Rule 431(b), as amended in 2007, reads:

> " '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 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.' "*People v. Arredondo*, 394 Ill. App. 3d 944, 950 (2009), quoting Official Reports Advance Sheet No. 8 (April 11, 2007), R. 431(b), eff. May 1, 2007).

The State correctly asserts that defendant has forfeited review of this alleged error because she failed to object during *voir dire* and has failed to include this issue in her posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988); see also *People v. Thompson*, No. 109033 (October 21, 2010). Consequently, we review this issue for plain error.

The plain error doctrine allows a court of review to consider a forfeited error when "(1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005).

> "In the first instance, the defendant must prove 'prejudicial error.' That is, the defendant must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him. The State, of course, can respond by arguing that the evidence was not closely balanced, but rather strongly weighted against the defendant. In the second instance, the defendant must prove there was plain

> error and that the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Herron*, 215 Ill. 2d at 187.

However, before considering plain error, we must first consider whether error occurred at all. *People v. Harris*, 225 Ill. 2d 1, 31 (2007).

In this case, the trial court went through each of the *Zehr* principles separately and asked the venire at the end of each question whether "anyone disagree[s] with this core rule of law and is unable to follow that rule of law?" The court did not ask the venire, either individually or as a whole, whether they understood the principles as stated in each question.

Rule 431(b) "mandates a specific question and response process." *People v. Thompson*, No. 109033, slip op. at 7 (October 21, 2010). "The rule requires questioning on whether the potential jurors both understand and accept each of the enumerated principles." *People v. Thompson*, No. 109033, slip op. at 7 (October 21, 2010). Accordingly, failure to ascertain whether the jurors both understand and accept the principles constitutes a violation of Rule 431(b) and therefore, error.

Defendant argues the error is reversible under the second prong of plain error review. Specifically, defendant claims that the trial court's failure to comply with Rule 431(b) was so serious that it "affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

Recently, in *People v. Thompson*, No. 109033 (October 21, 2010), our supreme

court considered whether a trial court's failure to comply with Rule 431(b) constituted reversible error under the second prong of plain error review. The *Thompson* court noted that a defendant bears the burden of persuasion in plain error review. *People v. Thompson*, No. 109033, slip op. at 11 (October 21, 2010). The court found that a defendant could satisfy the second prong of plain error review if that defendant were able to establish that he was tried by a biased jury. *People v. Thompson*, No. 109033, slip op. at 12 (October 21, 2010).

While the jurors in *Thompson* did receive some of the Rule 431(b) questioning and were instructed on the Rule 431(b) principles, the trial court in *Thompson* violated Rule 431(b). Despite this violation, the defendant in *Thompson* failed to meet his burden to establish that the error affected the fairness and integrity of his trial, where the defendant provided no evidence to show that the jury in his case was biased as a result of the violation. *People v. Thompson*, No. 109033, slip op. at 12 (October 21, 2010). As a result, the defendant's procedural default was not excused by the second prong of plain error review.

Similar to the trial court in *Thompson*, the trial court here did not follow the specific question and response process when instructing the jury on the Rule 431(b) principles. We are aware that defendant did not have the benefit of *Thompson* while briefing her case but are nevertheless convinced that there is no evidence in the record before us that would lend support to a possible claim of a biased jury. Like the defendant's claim in *Thompson*, defendant's claim here is not saved from forfeiture by the second prong of plain error review.

Based on the foregoing, the judgment of the trial court is affirmed.

Affirmed.