FIRST DIVISION
April 25, 2011

No. 1-09-0755

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 06272
	)	
DONALD EVANS,	)	Honorable
	)	Thomas V. Gainer Jr.,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE HALL delivered the judgment of the court.

Justice Hoffman concurred in the judgment.
Justice Lampkin specially concurred.

HELD: Limiting the testimony of a defense witness was an appropriate sanction for defense counsel's violation of Supreme Court Rule 413(d). Defense counsel was not ineffective for failing to disclose the defendant's alibi defense to the State. The defendant forfeited the error resulting from the trial court's failure to comply with Supreme Court Rule 431(b).

O R D E R

A jury found the defendant, Donald Evans, guilty of the offense of possession of a stolen motor vehicle (625 ILCS 5/4-103(a)(1) (West 2008)). He was sentenced to a term of five years' imprisonment in the Department of Corrections. The

defendant appeals.

On appeal, the defendant raises the following issues: (1) whether the trial court abused its discretion when it limited the testimony of a defense witness as a sanction for defense counsel's violation of Supreme Court Rule 413(d) (eff. July 1, 1982); (2) whether defense counsel's violation of Rule 413(d) deprived the defendant of the effective assistance of counsel; and (3) whether the trial court's failure to comply with Supreme Court Rule 431(b) (eff. May 1, 2007) requires that the defendant receive a new trial. The relevant trial testimony is summarized below.

On March 16, 2008, Chicago police officers Enriquez and Howe were on routine patrol in the area of 1535 West Washburne Avenue. Officer Enriquez was driving their marked police car eastbound on Washburne Avenue. At approximately 11:20 p.m., Officer Enriquez observed a vehicle with no headlights traveling westbound on Washburne Avenue. When the vehicle was a car length away, Officer Enriquez ascertained that it was a dark-colored Lexus. He was able to view the driver of the Lexus and identified the defendant as the driver. Officer Enriquez observed no other individuals in the Lexus. The Lexus turned in front of the police car and proceeded southbound. The officers activated the lights and air horn in an attempt to pull over the Lexus. The

Lexus did not stop; it continued southbound, while zigzagging as if to turn in a different direction.

The Lexus stopped at 1520 West Hastings Street; the defendant exited the Lexus and ran northbound. After pulling directly behind the Lexus, Officer Howe exited the squad car and pursued the defendant on foot. Officer Enriquez drove the squad car, paralleling the foot chase. While maintaining visual contact with both the defendant and Officer Howe, Officer Enriquez radioed for another police unit to assist them. The foot chase lasted less than a minute and covered about two blocks. Officer Enriquez then observed the defendant jump over a fence into a junkyard.

At approximately 11:30 p.m., Chicago police officer Jaszczor responded to a radio call for assistance and proceeded to 1521 West Hastings Street. When he arrived, the police officers on the scene told him the suspect was inside the junkyard. Officer Jaszczor was unable to get over the fence, and the officers could not pry open the gate to the junkyard. There was a church rectory to the east of the junkyard. The pastor of the church opened the gate to the junkyard, and Officer Jaszczor began to search. It was very dark, but with the aid of his flashlight, the officer located a person he identified as the defendant, hiding under the church porch.

Approximately four to five minutes after he last saw the defendant, Officer Enriquez observed him with Officer Jaszczor and his partner, Officer Goodrich. Officer Enriquez checked the license plates on the Lexus and learned that it had been reported stolen. At the police station, the defendant was given his *Miranda* warnings and indicated that he understood them. When Officer Enriquez asked why the defendant had fled from the Lexus, the defendant stated that he did not want to get blamed because "Stinky" (or Stink) had stolen the car.

Dominique Brooks testified on behalf of the defendant. She had known the defendant for about five years but denied being his girlfriend. On March 16, 2008, Ms. Brooks resided at 1533 West Washburne. Between 11 p.m. and 11:15 p.m. on that date, she was standing at the back door in the kitchen of her apartment looking out. She saw the defendant, and they engaged in conversation. She was sure of the time because the time was displayed on the kitchen microwave. As the defendant was walking down the alley between Washburne Avenue and Hastings Street, Ms. Brooks observed police officers arrive. There were two or three officers, and they had their guns drawn. The officers said something to the defendant, who put up his hands. Ms. Brooks thought the defendant was being arrested for being on Chicago Housing Authority property without identification. She never saw the

defendant near a black Lexus. Ms. Brooks acknowledged that she refused to speak to an investigator from the State's Attorney's office.

The defendant chose not to testify. The jury returned a verdict finding the defendant guilty of possession of a stolen motor vehicle. The trial court imposed a sentence of five years' imprisonment. This appeal followed.

ANALYSIS

I. Rule 413(b) Sanction

The defendant contends that limiting Ms. Brooks's testimony was too harsh a sanction for defense counsel's failure to disclose the defendant's alibi defense to the State in violation of Rule 413(d). Under Rule 413(d) the defendant must inform the State of any defenses he intends to raise and, in the case of an alibi, to provide specific information as to where the defendant was at the time of the alleged defense. See Ill. S. Ct. R. 413(d) (eff. July 1, 1982).

A. *Relevant Evidence*

In her opening statement, defense counsel told the jury that on March 16, 2008, the defendant and Ms. Brooks were shooting dice in her apartment. Ms. Brooks watched as the defendant

stepped outside of her apartment and began walking down the street, and she viewed his arrest by Chicago police. Defense counsel then told the jurors that they would hear testimony from the police officers that they saw the defendant driving the Lexus, pursued him and found him hiding under a church porch. According to defense counsel, "[n]one of that ever happened. Donald was never in that stolen car."

Prior to Ms. Brooks's testimony, the prosecutor requested that the trial court limit her testimony because the defendant failed to disclose an alibi defense. Defense counsel responded that the defendant was not asserting an alibi; rather, Ms. Brooks was testifying as an occurrence witness. The trial court agreed with the prosecutor that Ms. Brooks's testimony constituted alibi testimony. The court refused to allow defense counsel to elicit from Ms. Brooks that the defendant and she were together in her apartment at 11:20 p.m. Defense counsel was permitted to elicit from Ms. Brooks that she looked outside of her apartment building and witnessed the defendant being placed under arrest.

B. *Standard of Review*

The court applies the abuse of discretion standard to the imposition of sanctions for discovery violations. *People v. Brooks*, 277 Ill App. 3d 392, 398, 660 N.E.2d 270 (1996).

C. *Discussion*

The defendant concedes the violation of Rule 413(d) but contends that the sanction imposed constituted an abuse of discretion. We disagree.

The purpose of sanctions is to accomplish the purpose of discovery, but their imposition should not encroach on a defendant's right to a fair trial. *People v. Burns*, 304 Ill. App. 3d 1, 8, 709 N.E.2d 672 (1999). The exclusion of alibi testimony has been recognized as an appropriate exercise of the court's discretionary authority to impose sanctions. *Burns,* 304 Ill. App. 3d at 8-9; see Ill. S. Ct. R. 415(g). However, sanctions should be fashioned to meet the circumstances of the case. *People v. Houser*, 305 Ill. App. 3d 384, 391, 712 N.E.2d 355 (1999).

In *Houser*, the reviewing court held that a trial court abuses its discretion when it denies a defendant a fundamental right without "(a) sufficiently establishing *how* the State was unfairly prejudiced, and (b) considering alternative sanctions." (Emphasis in original.) *Houser*, 305 Ill. App. 3d at 392. Courts have also found an abuse of discretion where the sanction imposed by the court barred any testimony as to the defendant's alibi thus depriving him of his defense. See *Brooks*, 277 Ill. App. 3d at 397-98 (the discovery violation was not willful and the State did not show prejudice); *Houser,* 305 Ill. App. 3d at 392 (decision to

bar defense was not warranted absent further inquiry as to how the State would be unfairly prejudiced).

Defense counsel's failure to disclose the defendant's alibi defense appears to be a mistake as to the nature of Ms. Brooks's testimony, rather than a willful violation of Rule 413(d). However, the State asserted that it was prejudiced by the failure to disclose the alibi defense as it had no opportunity to gather evidence to challenge Ms. Brooks's testimony. The trial court's solution was to limit Ms. Brooks's testimony while still allowing her to testify that she saw the defendant between 11 p.m and 11:15 p.m. in the alley outside her residence and that she witnessed his arrest in the alley by police. That testimony countered the testimony by the police officers that at 11:20 p.m. the defendant was driving the Lexus and was arrested after he was discovered hiding under the church porch.

Limiting Ms. Brooks's testimony did not deprive the defendant of his defense and was an appropriate sanction under the circumstances. Therefore, the trial court did not abuse its discretion.

II. Ineffective Assistance of Counsel

The defendant contends that defense counsel's violation of Rule 413(d) constituted the ineffective assistance of counsel.

A. *Standard of Review*

Where the facts relevant to an ineffective assistance of counsel claim are undisputed, our review is *de novo*. *People v. Bew*, 228 Ill. 2d 122, 127, 886 N.E.2d 1002 (2008).

B. *Discussion*

To determine if a defendant has been denied the effective assistance of counsel, the court applies the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Hodges*, 234 Ill. 2d 1, 17, 912 N.E.2d 1204 (2009). The defendant must demonstrate that defense counsel's performance was deficient and that he was prejudiced as a result. *People v. Bailey*, 374 Ill. App. 3d 608, 613, 872 N.E.2d 420 (2007). The defendant must satisfy both prongs of the *Strickland* test to establish ineffective assistance of counsel. *Bailey*, 374 Ill. App. 3d at 613. If the ineffective-assistance claim can be disposed of on the ground that the defendant was not prejudiced, we need not address whether defense counsel's performance was deficient. *People v. Evans*, 186 Ill. 2d 83, 94, 708 N.E.2d 1158 (1999).

"A defendant is prejudiced if there is a reasonable probability that the outcome of the trial would have been different, or the result of the proceeding was unreliable or fundamentally unfair." *Bailey*, 374 Ill. App. 3d at 614. The sanction imposed in this case only barred that portion of Ms.

Brooks's testimony that the defendant had been in her apartment at the time of the commission of the offense. We have already determined that, in light of the events Ms. Brooks was allowed to testify about, the limiting of her testimony did not deprive the defendant of a defense. The jury also heard the testimony of the police officers recounting the pursuit and apprehension of the defendant, as well as the defendant's admission to police that he fled from the Lexus because he knew it was stolen. We conclude that there is no basis in the record for determining that the sanction imposed for defense counsel's violation of Rule 413(d) rendered the result of the trial unreliable or that there was a reasonable probability that, had the jury heard the barred portion of Ms. Brooks's testimony, the outcome of the trial would have been different.

As the defendant has failed to satisfy the prejudice-prong of the *Strickland* test, we need not address the deficiency-prong of the test. We conclude that the defendant has failed to establish that he received the ineffective assistance of counsel.

III. Compliance with Rule 431(b)

The defendant contends that the trial court failed to comply with Rule 431(b)(1) in that the court did not ascertain whether the prospective jurors understood and accepted the principles set

forth in the rule.

A. *Standard of Review*

The issue of whether a trial court complied with a supreme court rule is reviewed *de novo*. *People v. Lloyd*, 338 Ill. App. 3d 379, 384, 788 N.E.2d 1169 (2003).

B. *Discussion*

Conceding that this issue was not preserved for review, the defendant requests that we review this issue for plain error. See Ill. S. Ct. R. 615(a). The first step in a plain-error analysis is to determine whether error occurred. *People v. Hudson*, 228 Ill. 2d 181, 191, 886 N.E.2d 964 (2008).

The State does not dispute that the trial court did not specifically ask prospective jurors as to whether they understood and agreed with the principles enumerated in the rule. The State points out that the trial court did ask the prospective jurors whether they disagreed with any of the principles enumerated in Rule 431(b). As Rule 431(b)(1) does not require a specific method of inquiry, the State maintains that a procedure that substantially complies with the requirements of the rule is sufficient.

The State's position was rejected in *People v. Thompson*, 238 Ill. 2d 598, 939 N.E.2d 403 (2010). In that case, our supreme court found that the clear and unambiguous language of Rule

431(b)(1) mandated that the trial court ask each potential juror whether her or she understands and accepts each principle set forth in the rule and that failure to do so was error. *Thompson*, 238 Ill. 2d at 607.

We note the State's citation to and reliance on *People v. Vargas* for the proposition that Rule 431(b)(1) does not require particular words to satisfy its mandate. However, *Vargas* was decided prior to *Thompson*, and the opinion in that case has been vacated and the case remanded to the appellate court for reconsideration in light of *Thompson*. See *Vargas*, 396 Ill. App. 3d 465, 919 N.E.2d 414 (2009), *judgment vacated,* 239 Ill. 2d 584, 940 N.E.2d 1149 (2011).

Not all of our courts have agreed that the failure to specifically question prospective jurors as to whether they understand and accept the principles enumerated in Rule 431(b)(1) constituted error. See *People v. Digby*, 405 Ill. App. 3d 544, 939 N.E.2d 581 (2010) (no error where asking prospective jurors whether they had a problem or disagreed with the principles enumerated in Rule 431(a) indicated to the jurors that the court was asking whether they understood and accepted them); *in accord People v. Ingram*, No. 1-07-2229, (March 31, 2011); *People v. White*, No. 1-08-3090 (January 7, 2011). Nonetheless, the supreme court's holding in *Thompson*, compels us to conclude that the

trial court's failure to ascertain that the prospective jurors understood and accepted the principles enumerated in Rule 431(b)(1) violated the rule and constituted error. *Thompson*, 238 Ill. 2d at 607; *see Ingram*, slip op. at 42 (Garcia, J., specially concurring, joined by Hall, P.J.).

We may consider a forfeited error "when either (1) the evidence is close, regardless 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, 830 N.E.2d 467 (2005). The defendant does not argue that the closeness of the evidence required a finding of plain error under the first prong of the analysis. He does maintain that the violation of Rule 431(b) was so serious an error that a new trial is required, relying on this court's opinion in *People v. Graham*, 393 Ill. App. 3d 268, 913 N.E.2d 99 (2009) (finding that a violation of Rule 431(b) was so serious an error that a new trial was required).

Since the filing of the briefs in this case, the supreme court directed us to vacate our decision in *Graham*, and to consider whether *Thompson* required a different result. We concluded that it did. See *People v. Graham*, No. 1-08-0444, slip order at 3 (March 31, 2011) (error did not require a new trial where the defendant failed to establish that the jury was biased).

A trial court's failure to comply with Rule 431(b) is not a structural error requiring automatic reversal. *Thompson*, 238 Ill. 2d at 611. Reversal is only required if the defendant established that the error resulted in a biased jury. *Thompson*, 238 Ill. 2d at 614-15. The defendant argues that, due to the error in this case, there was no way to determine if the jury was biased. However, the court will not presume a jury was biased simply because the trial court erred in conducting the Rule 431(b) questioning. *Thompson*, 238 Ill. 2d at 614. As the defendant has presented no evidence establishing that the jury was biased, he cannot satisfy the second prong of the plain-error analysis.

The defendant has failed to satisfy either prong of the plain-error analysis. Therefore, there is no basis for excusing the defendant's procedural default. The claim of error is forfeited.

CONCLUSION

The defendant's conviction and sentence are affirmed.

Affirmed.

JUSTICE LAMPKIN, specially concurring:

I disagree with the majority in the restrictive finding that a trial judge commits error any time he fails to expressly ask potential jurors whether they "understand and accept" the *Zehr*

principles codified in Rule 431(b). I recognize that, in *Thompson*, the supreme court held "the trial court must ask each potential juror whether he or she understands and accepts each of the principles in the rule" (*Thompson*, 238 Ill. 2d at 607); however, neither the rule itself nor the holding in *Thompson* restrict compliance to the rule's express language. Rule 431(b) instructs that a trial court's "method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." Ill. S. Ct. R. 431(b), eff. May 1, 2007. The rule *does not* prescribe precisely what form that method of inquiry must take.

In this case, the trial judge said the following in his opening remarks:

> "Mr. Evans, as with other persons charged with crimes, is presumed to be innocent of the charges that bring him before you.
>
> That presumption cloaks him now at the onset of the trial and will continue to cloak him throughout the course of the proceedings, that is during juror selection, during the opening statements that the lawyers will make, during the presentation of the evidence and during the closing arguments that the lawyers may give at the end of all the evidence, on into the instructions that I will read to

you and provide to you in writing and into your deliberations.

And it will remain unless and until you individually and collectively are convinced beyond a reasonable doubt that Mr. Evans is guilty of the offense charged.

It is absolutely essential as we select this jury that each of you understand and embrace these fundamental principles of law.

First, that all persons charged with crimes are presumed to be innocent. And that is the burden of the State whose brought the charges to prove the defendant guilty beyond a reasonable doubt.

What this means is that the defendant has no obligation to testify in his own behalf or to call any witness in his defense.

He may simply sit here and rely upon what he and his attorneys perceive to be the inability of the State to present sufficient evidence to meet his burden.

Should that happen, you will have to decide the case on the basis of the evidence presented by the prosecution.

The fact that the defendant chooses not to testify must not be considered by you in any way in arriving at

your verdict.

However, should the defendant elect to testify or should his attorneys present evidence on his behalf, you are to consider that evidence in the same manner and by the same standard as evidence presented by the State's Attorney.

Bottom line, however, is this, there is no burden upon the defendant to prove his innocence. It is the State's burden to prove him guilty beyond a reasonable doubt."

Then, just prior to individually conducting *voir dire* of the potential jurors, the trial judge said:

"I spoke about the fact that the defendant is presumed to be innocent of the charges against him. And that this presumption stays with him throughout the trial. And is not overcome unless and until the jury determines the defendant is guilty beyond a reasonable doubt.

Is there anyone in the jury box who disagrees with these fundamental principles of law?

If so, raise your hand.

Again no hands are raised.

How about the left side of the gallery, is there

anyone who disagrees with the fundamental principle of law that the defendant is presumed to be innocent of the charges against him? That this presumption stays with him throughout the trial, is not overcome unless and until the jury determines the defendant is guilty beyond a reasonable doubt?

Anyone out there in the left side of the gallery who disagrees with this fundamental principle of law? If so, please r[a]ise your hand.

No hands raised.

Right side of the gallery, anyone who disagrees with that fundamental principle of law? If so, raise your hand.

Once again no hands are raised.

I also spoke about the fact that the State bears the burden of proving the defendant's guilt beyond a reasonable doubt.

Is there anyone in the jury box who disagrees with that fundamental principle of law? If so, raise your hand.

Again no hands are raised.

Left side of [the] gallery, anyone who disagrees with the fundamental principle of law that the State

bears the burden of proving the defendant guilty beyond a reasonable doubt? If so, raise your hand.

No hands are raised.

Right side of the gallery, anyone who disagrees with that fundamental principle of law? If so, raise your hand.

Again no hands are raised.

I also spoke about the fact that the defendant, because the defendant is presumed to be innocent, he does not have to present any evidence at all in this case.

He does not have to testify. You may not consider the fact that he does not testify, if he cho[o]ses not to, in deciding your verdict. He may simply rely on the presumption of innocence.

Is there anyone in the jury box who disagrees with those principles of law? If so, raise your hand.

Again no hands raised.

Left side of the gallery, is there anyone who disagrees with the fundamental principle of law that states the defendant is presumed to be innocent? He does not have to present any evidence at all in this case? He need not testify. And if he does not

testify, you may not consider that fact in reaching a verdict.

Anyone on the left side of the gallery who disagrees with those fundamental principles of law? If so, raise your hand.

No hands are raised.

Right side of the gallery, anyone who disagrees with those fundamental principles of law?"

My review of the record leads me to conclude that, in this case, the trial judge did not go far enough to ascertain whether the potential jurors understood and accepted the *Zehr* principles. Simply asking whether the potential jurors disagreed with any of the fundamental principles was error.

I, however, take note of the language used in the trial judge's opening remarks, namely, advising the potential jurors that they each must "understand and embrace these fundamental principles of law." Had the trial judge asked the potential jurors whether they understood and embraced each *Zehr* principle, I would have found no error despite the fact that the trial judge would have used the word "embrace" instead of "accept." In my 22 years on the trial bench, I consistently used the words provided in Rule 431(b) and I encourage other trial judges to do the same. That being said, Rule 431(b) and *Thompson* do not require the use

of the exact words "understand" and "accept" in order to ascertain the potential jurors understanding and acceptance of the *Zehr* principles. For instance, saying comprehend instead of understand and follow the law or embrace the principle of law instead of accept the principle of law is more than adequate to accomplish the goal of complying with the dictates of Rule 431(b).

As I stated, however, the trial judge here did not comply with Rule 431(b). I concur with the majority that the trial court's error did not rise to the level of plain error.