THIRD DIVISION
May 4, 2011

1-09-0894

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. 07 CR 21166
	)	
MARCELLUS SWANN,	)	Honorable
	)	Lawerence P. Fox,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE QUINN delivered the judgment of the court.

Justices Neville and Steele concurred in the judgment.

O R D E R

HELD: (1) Where defendant failed to object to the trial court's Rule 431(b) questioning of the jury, the error alone could not have tipped the scales of justice against defendant, and defendant did not present evidence of jury bias, the issue was forfeited; (2) where the trial court punished a prospective juror for admitting she would have held defendant's choice not to testify against him, but defendant was unable to show actual jury bias, the issue was forfeited; and (3) where in closing argument defense counsel commented on the credibility of the State's witnesses and defendant's credibility as a witness, the State's comments on defendant's failure to call a corroborating witness in rebuttal were proper.

After a jury trial, defendant Marcellus Swann was found guilty of robbery and sentenced to 90 months in prison. On appeal, defendant argues that he was deprived of a fair and impartial trial because: (1) the trial court failed to comply with Supreme Court Rule 431(b) (eff. May 1, 2007); (2) the trial court punished a potential juror for saying she would hold it against defendant if he chose not to testify, which discouraged the remaining potential jurors from responding to questions honestly; and (3) the State improperly commented on defendant's failure to call a nonalibi witness. We affirm.

Jury selection began on January 14, 2009. In front of the entire venire, the trial court explained that defendant had the presumption of innocence, that the presumption could only be overcome if the evidence proved he was guilty beyond a reasonable doubt, that defendant was not required to present evidence or testify on his own behalf, and that if he did not testify that could not be held against him. The trial court began with questioning the first panel of potential jurors as a whole. The court asked the potential jurors to raise their hand if they wanted to answer affirmatively. It then asked whether anyone "had a problem with" the principle that defendant is presumed innocent or that the State is required to prove defendant guilty beyond a reasonable doubt. The court also asked if anyone would hold defendant's choice not to testify against him. No one raised

their hand. Individual questioning began and seven jurors were chosen from the first panel.

Another panel was seated and the trial court again addressed the panel as a whole, using the same procedure as before. When the court reached the principle that defendant does not have to testify, the following exchange occurred:

> "THE COURT: Is there anyone who would hold the decision not to testify against the defendant regardless of what I have just said to you?
>
> PROSPECTIVE JUROR HINDS: I would.
>
> THE COURT: Pardon.
>
> HINDS: I would if he refused to speak on his own behalf.
>
> ***
>
> THE COURT: I am telling you, ma'am, that the law says that you can't hold that against the defendant. Are you telling me that you would not follow the law?
>
> HINDS: I mean, I can't help the way I feel.
>
> THE COURT: Well, then I guess you better have a seat out in the audience and we will have the sheriff call down to the Daley

> Center and see if we can find a civil case that you can serve on where that wouldn't be an issue."

The trial court again asked the panel whether anyone had a problem with defendant not testifying and no one raised their hands. The remainder of the jury was selected. During *voir dire*, both attorneys were given the opportunity to ask any additional questions of the potential jurors after the trial court individually questioned the members of each panel.

The evidence at trial established about 1 p.m. on Tuesday August 7, 2007, Alberto Salinas was robbed as he carried a plastic bag containing the lottery money from Sheldon Liquors where he worked as a manager. Sheldon was located at 111th and Halstead Streets, next to a Pepe's Mexican restaurant. The robbery occurred in Pepe's drive-thru area, which ran between the two businesses. Two Pepe's employees, Jacqueline Guzman and Celeste Arrington, witnessed the robbery and identified defendant as the offender. Defendant testified to the alibi that he was at home at the time of the robbery.

Salinas testified that the lottery money was deposited at the bank every Tuesday. On the day of the robbery, the money was counted by two Sheldon employees, Willie Haywood and Latasha Johnson, who is defendant's sister. Johnson left the store when Salinas left with the money in a black plastic bag. After

Salinas walked past the Pepe's drive-thru window to get to his car, an attacker struck him on the back of his neck and took the bag of money. Salinas fell to the ground, and saw the attacker run away and jump over a fence behind Pepe's.

Salinas did not see Latasha Johnson at Sheldon again. On August 8, 2007, detectives took Salinas to view a lineup. He was unable to identify his attacker because he never saw the attacker's face; however, Salinas identified defendant in the lineup as Johnson's brother. Salinas saw defendant in the store a few times buying a lottery ticket or picking up Johnson from work. Salinas identified the wrong person as defendant in the courtroom.

Willie Haywood testified that she works in the office at Sheldon and prepares deposits for the bank. On August 7, 2007, Haywood and Johnson counted the money. Two or three minutes after Salinas and Johnson left about 1 p.m., some men ran into Sheldon and said something had happened to Salinas. Salinas came back into Sheldon holding the back of his head and appearing shaken. Haywood did not see Johnson or defendant come into the store after Salinas was attacked. Haywood did not know defendant personally but knew he was Johnson's brother.

Jacqueline Guzman testified that on August 7, 2007, she and Arrington were working at Pepe's around 1 p.m. when defendant entered, sat in a booth, ordered water from Arrington and Guzman,

stayed a "good 20 minutes" and then walked out the south door, which faced Sheldon and the drive-thru. Guzman then saw Salinas run by the door as he was chased by defendant. From 10 to 15 feet away, Guzman saw defendant hit Salinas in the back of his head. Defendant was trying to take a black plastic bag from Salinas as he was on the ground. She saw defendant run away and jump over the back fence. Arrington called the police and told Guzman she knew defendant before the police arrived. Guzman did not know defendant before the robbery. She spoke with the police on August 7, 2007, though when testifying for a pretrial motion she denied talking to the police that day. Guzman viewed a lineup on August 8, 2007, and identified defendant as the robber.

Celeste Arrington substantially corroborated Guzman's testimony. Arrington knew defendant was Johnson's brother. When defendant asked for water the first time, Arrington told Guzman, "[d]on't charge him, that's Latasha's brother, just give him the water." Outside the window, Arrington saw a "tussle" between defendant and Salinas. Salinas and defendant were struggling over a black bag. Defendant ripped it away, then ran away and jumped over the fence. Later that day, Arrington identified defendant in a photo array. On August 8, 2007, she identified defendant in a lineup as the person involved in the robbery. Arrington did not tell the police that defendant had a scar on his forehead because "[i]t was never asked."

Sylvester Mejia testified that he was working at Pepe's on August 7, 2007, when Guzman called to him because Salinas was being robbed. He saw Salinas on the ground and then saw the attacker grab a white plastic item, run away and jump over the fence. Mejia could not see the attacker's face and was unable to identify anyone in the lineup.

Detective Edmund Beazley testified for the defense that he interviewed Guzman and Arrington on August 7, 2007. Guzman told Beazley that defendant had been in the restaurant for 8 to 10 minutes and that he ran away holding the water cup and the black bag. Arrington did not mention that she observed the struggle between defendant and Salinas. Both Guzman and Arrington told him that defendant left through the north door.

Defense witness Latasha Johnson testified that on August 7, 2007, she helped count the money then left Sheldon sometime between 12 and 1 p.m. to get lunch for the employees. Johnson spoke to the police when she returned to Sheldon and spoke with them again at the station later that day. When Johnson left the station, she called and asked defendant for a ride to Sheldon to pick up her car. They arrived between 3 and 4 p.m., and defendant went into the store with Johnson and spoke to Salinas angrily. Johnson's employment at Sheldon was terminated that day.

Defendant testified that on August 7, 2007, he woke up around 5:30 a.m. to drive his fiancee to work. At the time they

were both employed at the Jewel Osco located on 35th Street and King Drive. He dropped her off, picked up breakfast, then took it back to Jewel around 6:30 a.m. As he was leaving, he waved to Darius Young, his boss. Defendant drove back home, laid down for an hour then took his stepdaughter to school. He napped and then drove to Jewel to pick up his fiancee at 11:50 a.m. While he waited for her to get off of work, he talked to some of the employees in the parking lot. Defendant's fiancee came out at 12:33 p.m. and they went through a McDonald's drive-thru. They were back home by 1 p.m. and stayed there until defendant received the call from Johnson around 3 or 4 p.m. He learned that Sheldon had been robbed when he picked up Johnson from the police station. Defendant went into Sheldon with Johnson and asked Salinas why he had accused defendant and his brothers of robbing his store.

In closing argument, defense counsel focused on the lack of credibility of the State's witnesses, Guzman and Arrington in particular. Then, defense counsel argued:

> "[Defendant] testified openly and honestly and he was unimpeached. He's a good, hard-working father who could have come up with a much, much better alibi if he was going to tell a lie."

In rebuttal, the State stressed that defendant had no burden to bear, but his credibility as a witness could be considered in the same way as a State witness. Over defendant's objections, the State went on to say, in pertinent part:

> "What the defendant has to say is that *** he's at the Jewel, he sees Darius, he's waving at Darius, his boss.
>
> ***
>
> Darius Young. Independent person. No motive, no bias, no interest. Defendant says I waved to Darius. We know each other. I worked for him. Fiancé [*sic*] works for him. Where is Darius Young?"

The jury found defendant guilty of robbery. The trial court sentenced him to 90 months in prison.

On appeal, defendant first contends that the trial court violated Rule 431(b) because it did not ask whether the jurors understood three of the principles, and completely failed to question the jurors as to whether they understood or accepted the principle that a defendant is not required to present evidence on his own behalf.

As a threshold matter, defendant has forfeited review of this issue because he failed to preserve it. *People v. Thompson*, 238 Ill. 2d 598, 611-12 (2010). Defendant seeks review of the

issue as plain error, which requires a defendant to show that a clear and obvious error occurred and then that either: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; 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. *People v. Walker*, 232 Ill. 2d 113, 124 (2009). The defendant bears the burden of persuasion, and if he fails to meet the burden, forfeiture will be honored. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). Compliance with a supreme court rule is reviewed *de novo*. *People v. Davis*, 405 Ill. App. 3d 585, 598 (2010).

The initial inquiry in review for plain error is whether any error occurred. *Thompson*, 238 Ill. 2d at 613. Here, we find the trial court committed error when it omitted a principle from its questioning of the venire.

Rule 431(b) requires that the trial court ask each juror, either individually or as a group, whether they understand and accept the four following principles: (1) a defendant is presumed innocent; (2) a defendant must be proved guilty beyond a reasonable doubt; (3) a defendant is not required to present evidence on his own behalf; and (4) if a defendant chooses not to testify, that cannot be held against him. In addition, 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." Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

Defendant first argues that the trial court erred when it failed to specifically ask potential jurors whether they understood the first, second, and fourth principles. We disagree. The record shows that the trial court asked the potential jurors whether they had "any problem" with the concepts that defendant was presumed innocent and that he must be proved guilty beyond a reasonable doubt. It then asked whether anyone would hold it against defendant if he chose not to testify. We find that this questioning was sufficient to ascertain both the jurors' understanding and acceptance of these principles, as "acceptance implies understanding." *People v. Blankenship*, 406 Ill. App. 3d 578, __ (Ill. App. Nov. 15, 2010); see also *People v. Ware*, No. 1-09-0338, slip op. at 61-62 (Ill. App. Feb. 10, 2011) (finding no error where the trial court asked potential jurors whether they had "any difficulty" or "any problem" with the principles); *People v. Digby*, 405 Ill. App. 3d 544, 548 (2010) (the trial court did not err when it asked the potential jurors whether they "had a problem" with or "disagreed" with the principles); *Davis*, 405 Ill. App. 3d at 589-90 (the trial court asking whether anyone had "a problem" with a principle was sufficiently broad to incorporate understanding and acceptance); *contra*, *People v.*

White, No. 1-08-3090, slip op. at 8-9 (Ill. App. Jan. 7, 2011) (the trial court did not comply with Rule 431(b) when it did not specifically ask whether jurors understood the fourth principle).

Defendant next argues, and the State concedes, that the trial court erred by not questioning the potential jurors as to whether they understood and accepted the principle that defendant did not have to present evidence in his defense. See *Thompson*, 238 Ill. 2d 598, 607 (2010) (the trial court's failure to address the third principle was in error); *People v. Johnson*, No. 1-09-0879, slip op. at 21-22 (Ill. App. Nov. 24, 2010) (finding error where the trial court omitted the fourth principle). However, we find that the error did not rise to the level of plain error.

Defendant claims this issue may be reviewed under both prongs of the plain error doctrine. Under the first prong, the defendant must show that the error alone could have led to his conviction. See *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). Defendant is unable to meet this burden. Regardless of the closeness of the evidence, defendant cannot show that the trial court's failure to question the potential jurors as to whether they accepted that he did not have to present evidence tipped the scales of justice against him because he presented evidence at trial. See *White*, No. 1-08-3090, slip op. at 11-12 (no plain error under the first prong where the trial court erred by not properly questioning the jurors as to the defendant's right not

to testify and the defendant did testify at trial). Additionally, the venire was aware of the third principle as it was explained in the trial court's introductory remarks. Therefore, the trial court's failure to question the potential jurors as to the third principle did not constitute plain error under the first prong.

Under the second prong, defendant must show that he was tried by a biased jury, directly affecting his right to a fair trial. *Thompson*, 238 Ill. 2d at 613-14. "We 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. Defendant has failed to present evidence that the jury was biased by the trial court's failure to strictly comply with Rule 431(b). The trial court explained all four Rule 431(b) principles in its introductory remarks and sufficiently questioned the potential jurors about three of the principles. While the trial court did not question the potential jurors about the third principle, defendant presented evidence at trial. Without actual evidence of jury bias, under these circumstances we cannot find that defendant was deprived of a fair trial. See *People v. Atherton*, No. 2-08-1169, slip op. at 15-16 (Ill. App. Dec. 16, 2010) (the defendant's right to a fair trial was not compromised when the trial court failed to question the potential jurors about the third principle because he presented evidence at

trial). We find that defendant has failed to meet his burden of persuasion to overcome forfeiture.

Defendant next contends that he was deprived of a fair and impartial jury when the trial court punished a potential juror for saying she would hold it against defendant if he chose not to testify. Defendant argues that the trial court's comments likely intimidated other potential jurors from revealing any biases they may have had, and therefore thwarted the purpose of *voir dire*.

Defendant concedes that he did not properly preserve this issue at trial but urges us to relax the forfeiture rule as the trial court's conduct is at issue. See *People v. Young*, 248 Ill. App. 3d 491, 498 (1993) (citing *People v. Nevitt*, 135 Ill. 2d 423, 455 (1990)). In the alternative, defendant argues that this issue can be reviewed as plain error because the error was of such magnitude that it deprived him of a fair and impartial trial. In this case we find no reason to relax application of the forfeiture rule because the trial court gave defendant a chance to ensure a fair and impartial trial by allowing him to question the prospective jurors and ferret out any additional bias. See *People v. Brown*, 388 Ill. App. 3d 1, 10-11 (2009). Therefore, we will determine whether defendant's claim can be reviewed under the second prong of the plain error doctrine. See *Walker*, 232 Ill. 2d at 124.

"The purpose of *voir dire* is to assure the selection of an impartial panel of jurors free from either bias or prejudice." *People v. Williams*, 164 Ill. 2d 1, 16 (1994). The trial court has the primary responsibility of conducting *voir dire* and the manner and scope of examination lie within the court's discretion. *People v. Terrell*, 185 Ill. 2d 467, 484 (1998). On review, an abuse of discretion will be found only when the court's conduct "thwarted the selection of an impartial jury." W*illiams*, 164 Ill. 2d at 16.

Currently, there is only one Illinois case directly on point. See *Brown*, 388 Ill. App. 3d 1. In *Brown*, during *voir dire* a potential juror told the judge that he did not feel he could be fair and impartial. *Brown*, 388 Ill. App. 3d at 2-3. The judge excused the potential juror, but then ordered him to return to court the next day to get "an education as to how the system works." *Brown*, 388 Ill. App. 3d at 3. On appeal, the defendant argued that he was denied a fair and impartial trial because the trial judge's actions "discouraged prospective jurors from responding candidly and openly when she *** punished this prospective juror." *Brown*, 388 Ill. App. 3d at 4. Because the defendant failed to properly preserve the issue, this court considered whether his issue could be reviewed as plain error. *Id*. After looking to outside authority for guidance, the majority recognized that when venturing " 'into speculation over

thoughts or attitudes not manifest, there is always the chance that any jury *** may include an individual whose prejudices have not been revealed.' " *Brown*, 388 Ill. App. 3d at 10 (quoting *United States v. Colabella*, 448 F.2d 1299, 1302 (2nd Cir. 1971)). The majority further observed that nothing in the record indicated that a seated juror was not impartial and that no other potential juror expressing bias may simply indicate that no other juror was biased or prejudiced. *Brown*, 388 Ill. App. 3d at 9-10. The majority concluded that although the exchange between the judge and the potential juror was unnecessary, the defendant was not deprived of a fair trial. *Brown*, 388 Ill. App. 3d at 11.

We find no basis to depart from the well-reasoned majority opinion in *Brown*. Here, the trial court's remarks to Hinds were similar to the trial judge's remarks in *Brown*. As in *Brown*, defendant here has pointed to nothing in the record that indicates any juror was actually biased or not impartial. Moreover, defendant was given the opportunity to question individual members of the venire to further ferret out bias. Under these circumstances, we find that defendant was not deprived of a fair and impartial trial, and we honor the forfeiture of his claim.

Defendant's final contention is that he was deprived of a fair trial due to allegedly improper comments made by the State during closing arguments. Specifically, defendant argues that the

State's reference to his failure to call Darius Young as a witness to corroborate his testimony improperly shifted the burden of proof to defendant.

The trial court's determination regarding the propriety of closing arguments will be upheld absent a clear abuse of discretion. *People v. Jackson*, 391 Ill. App. 3d 11, 37 (2009). However, we review *de novo* whether a prosecutor's closing statements were so egregious as to warrant a new trial. *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007). See *People v. Johnson*, 385 Ill. App. 3d 585, 603 (2008) (observing the appellate court's citation to and application of different standards of review); *People v. Robinson*, 391 Ill. App. 3d 822, 839-40 (2009) (same). Here, we find the comments were not improper under any standard of review.

A prosecutor is generally given wide latitude in closing arguments. *People v. Evans*, 209 Ill. 2d 194, 225 (2004); *Jackson*, 391 Ill. App. 3d at 37. Statements will be considered in the context of closing arguments as a whole. *Evans*, 209 Ill. 2d at 225. Usually it is improper for a prosecutor to comment on a defendant's failure to call a nonalibi witness if there was no showing the witness was not equally available to both parties. *People v. Kubat*, 94 Ill. 2d 437, 497 (1983); *People v. Melton*, 232 Ill. App. 3d 858, 861 (1992). However, in a rebuttal argument, " 'when defense counsel provokes a response, the

defendant cannot complain that the prosecutor's reply denied him a fair trial.' " *Evans*, 209 Ill. 2d at 225 (quoting *People v. Hudson*, 157 Ill. 2d 401, 445 (1993)). Additionally, a prosecutor may comment on the credibility of a witness if it is based on the evidence or reasonable inferences drawn from it. *Jackson*, 391 Ill. App. 3d at 41.

Here, we find that the prosecutor's comments in rebuttal were proper. In closing, defense counsel not only attacked the credibility of the State's witnesses, but also commented on the "honesty" of defendant's testimony. These comments reasonably provoked the State into commenting on defendant's credibility as a witness. Defendant testified to his entire day, beginning with dropping off his fiancee at work and waving to his boss, Darius Young. Young would not have been an alibi witness, however his testimony would have potentially corroborated a part of defendant's testimony and added credibility. The State's comments about Young were reasonable inferences based on the evidence presented at trial, and only went to defendant's credibility and not the ultimate question of whether defendant committed the robbery. Based on these circumstances, we find that the State's comments in rebuttal about Young were proper.

Even if the State's comments in rebuttal were improper, we find that they would not rise to the level of reversible error. Improper comments are not reversible error unless they are a

material factor in the conviction or result in substantial prejudice to the defendant. *People v. Lawrence*, 259 Ill. App. 3d 617, 630 (1994). Here the evidence against defendant was strong enough that the State's reference to his failure to call Young would not have been a material factor in his conviction. Guzman saw defendant for an extended period of time in Pepe's before she observed the attack on Salinas from only 10 to 15 feet away. She was aware that he was Johnson's brother because Arrington told her, but had never seen him before that day. Nonetheless, she identified defendant as the attacker in the lineup. Despite minor inconsistencies, Arrington's testimony corroborated Guzman's. Arrington was familiar with defendant, identified him as Johnson's brother to Guzman, and observed him for 10 to 20 minutes before the attack. Though she may not have seen the attack, she saw the attacker running away and positively identified him as defendant. Guzman and Arrington's account is also supported by the testimony of Salinas and Mejia. Additionally, the trial court gave a limiting instruction before the jury deliberated, that closing arguments are not to be considered as evidence and any statement not based on evidence should be disregarded. See *People v. Garcia*, 231 Ill. App. 3d 460, 469 (1992) (such an instruction "tends to cure any prejudice from improper remarks"). Therefore, even if the statements were improper, they do not rise to the level of reversible error.

For the foregoing reasons, we affirm the judgment of the trial court.

Affirmed.