THIRD DIVISION
March 16, 2011

No. 1-09-1953

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 24995
SHAWN TURNER,	)	
	)	
	)	Honorable
Defendant-Appellant.	)	Thomas V. Gainer, Jr.,
	)	Judge Presiding.

JUSTICE STEELE delivered the judgment of the court.
Presiding Justice Quinn and Justice Neville concurred in the judgment.

ORDER

HELD: Defendant was not entitled to a jury instruction on second degree murder because the circumstances presented did not establish a sudden and intense passion resulting from a serious provocation; defendant waived review of his claim that the trial court's error in failing to admonish the potential venire in exact accordance with Supreme Court Rule 431(b) was reversible error; defendant's 33-year sentence was not excessive; and the mittimus is corrected to reflect credit for presentence time served in custody by defendant.

Following a jury trial, defendant Shawn Turner was convicted of first degree murder and

sentenced to a 33-year prison term. On appeal, defendant contends: (1) the trial court erred in refusing defendant's request for a jury instruction on second degree murder based on a sudden and intense passion resulting from serious provocation where there was some evidence that the argument escalated into a physical struggle after the victim threw the first punch; (2) the trial court committed reversible error when it failed to ask the venire whether they understood and accepted defendant's fundamental trial rights as required by Supreme Court Rule 431(b) (Ill. S. Ct. R. 431(b) (eff. May 1, 2007)); (3) his 33-year sentence is excessive because he had no prior criminal record, a steady work history, earned a GED, and had good character; and (4) the mittimus should be corrected to reflect the correct number of days he served in presentence custody. For the following reasons, we affirm defendant's conviction and sentence and correct the mittimus.

BACKGROUND

Defendant and codefendant Clarence Daniels were charged with two counts of first degree murder for the death of Mark Dickey.[1] Daniels subsequently pleaded guilty to second degree murder and received a 10-year prison term. Defendant proceeded to a jury trial.

The trial court admonished the venire that defendant was presumed innocent until proven guilty beyond a reasonable doubt and that the State had the burden of proving defendant guilty. The court also noted that defendant did not have to present evidence and that defendant's failure to testify could not be used against him. The court later asked the venire to raise their hands if

[1] They were initially charged with aggravated battery; however, Dickey died eight days later from his injuries.

they disagreed with any of those principles. No one in the venire did so.

The record disclosed the following. At trial, the State's evidence established that on October 1, 2006, defendant and his cousin, Daniels, who was also known as "JR," were on the porch of 5433 South Honore in Chicago. They were laughing, talking, and drinking beer and other alcohol. Daniels lived in the basement apartment of the building with his sister and his two nephews, Daron and Darrian Braboy.[2] The victim lived in the first floor apartment with his fiancé, Michelle White, her daughter, her granddaughter, and her mother, Mary White. Defendant did not live in the building but visited often.

Sometime after 11:30 p.m., defendant, Daniels, and a friend, Syrocco, were on the porch drinking and talking. Daron and Darrian were initially in the vestibule, but went outside and began wrestling with defendant and Daniels. While they wrestled, defendant bumped into one of the first floor windows and it broke. Daniels told defendant to stop banging on the window and defendant responded, "I don't give a f*** about him." The victim came out of his apartment into the vestibule and said, "Y'all ni**ers better carry that sh** somewhere else before we have a problem." Defendant approached the victim and they began to argue. As they argued, the victim moved backwards towards his apartment door because defendant and Daniels were moving toward him. The victim unsuccessfully attempted to enter his apartment as defendant and Daniels stood on each side. The victim threw a punch, Daniels hit the victim, and a fight ensued. The victim eventually broke free and ran from the porch. Defendant chased the victim, tripped him, kicked him, and stomped on his head. The victim never moved once he fell to the ground

[2] At the time of the incident, Daron was 11 years old and Darrian was 13 years old.

and he never fought back.

Meanwhile, the victim's fiancé, Michelle White, called the police twice when she heard the fighting. When the commotion died down, she went outside and everyone was gone except defendant. White walked to the sidewalk to look for the victim and saw him lying on the ground approximately one-half block away. After stomping on the victim's head, defendant walked back to the building, past Michelle, picked up his drink, and went back inside the vestibule. Shortly thereafter, the police and paramedics arrived. The police attempted to enter the building, but defendant would not let them in. Michelle called the landlord, who came and opened the door for police. Defendant was subsequently arrested.

Defendant's trial testimony differed from the State's evidence. According to defendant, everyone was drinking, including the victim. After watching the game, he and Daniels went to the porch to smoke marijuana. He and Daniels had a physical scuffle because defendant was ready to leave and Daniels wanted him to purchase more beer. According to defendant, it was possible that he was thrown against the first floor window. The victim came to the vestibule after the window was broken and was very upset. He said, "Y'all ni**ers better carry that sh** somewhere else before we have a problem." Daniels then rushed at the victim as if he wanted to start a fight. They began fighting and defendant unsuccessfully tried to intervene. Defendant tried to get the victim's family's attention during the fight, which moved to the porch and subsequently the sidewalk. Defendant again tried to intervene and stop the fight, but ended up falling on top of the victim. When the police arrived, everyone ran from the scene except him. He stood on the porch. When the police asked him what happened, defendant responded "they was fighting, he got his ass kicked, that's what he get." Defendant then went inside because he

did not want to tell on his cousin. Defendant testified that he never punched, beat or stomped on the victim.

Prior to closing arguments, defendant requested that the jury be given a jury instruction on second degree murder and provided the trial court with a memorandum in support of his tendered instruction. Following arguments by defendant and the State, the trial court found that there was "no indication of sudden and intense passion" and denied defendant's request for a second degree murder instruction.

Following closing arguments, the jury found defendant guilty of first degree murder. After defendant's posttrial motion was denied, the sentencing hearing commenced. Evidence and arguments were presented in aggravation and mitigation. Defendant was subsequently sentenced to a 33-year prison term. His post-sentencing motion was denied. This appeal followed.

DISCUSSION

Jury Instructions

Defendant first contends that the trial court erred in refusing defendant's request for a jury instruction on second degree murder based on a sudden and intense passion resulting from serious provocation where there was some evidence that the argument escalated into a physical struggle after the victim threw the first punch.

Jury instructions should guide the jury in its deliberations and help it reach the proper verdict through application of legal principles to the evidence. *People v. Moore*, 343 Ill. App. 3d 331, 338 (2003). A defendant is only entitled to a lesser-included offense instruction if an examination of the evidence reveals that it would permit a jury to rationally find the defendant

guilty of the lesser offense yet acquit the defendant of the greater offense. *People v. Williams*, 315 Ill. App. 3d 22, 31 (2000). A court's decision to decline a particular instruction is reviewed for abuse of discretion. *People v. Sipp*, 378 Ill. App. 3d 157, 163 (2008); *Moore*, 343 Ill. App. 3d at 338-39. Even if the trial court errs in denying a particular instruction, the decision is subject to a harmless error analysis and may be affirmed if evidence of defendant's guilt was so clear and convincing as to render the error harmless beyond a reasonable doubt. *Moore*, 343 Ill. App. 3d at 339.

"A person commits the offense of second degree murder when he commits the offense of first degree murder * * * [when at] the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by the individual killed." 720 ILCS 5/9-2(a)(1) (West 2008). "Serious provocation is conduct sufficient to excite an intense passion in a reasonable person." 720 ILCS 5/9-2(b) (West 2008). For defendant to be guilty of second degree murder, the State must first prove defendant guilty of first degree murder beyond a reasonable doubt. 720 ILCS 5/9-2(c) (West 2008); *Sipp*, 378 Ill. App. 3d at 166. The burden then shifts to the defendant to prove serious provocation by a preponderance of the evidence. 720 ILCS 5/9-2(c) (West 2008); *Sipp*, 378 Ill. App. 3d at 166.

The only categories of serious provocation recognized by the Illinois Supreme Court are: "(1) substantial physical injury or assault, (2) mutual quarrel or combat, (3) illegal arrest, and (4) adultery, with the offender's spouse." *Sipp*, 378 Ill. App. 3d at 166 (quoting *People v. Chevalier*, 131 Ill. 2d 66, 73 (1989)). Mutual combat is one of the recognized forms of serious provocation sufficient to reduce first degree murder to second degree murder. *Moore*, 343 Ill. App. 3d at 339. "Mutual quarrel or combat" has been defined as a fight or struggle that both parties enter into

willingly or where two persons, upon a sudden quarrel and in hot blood, mutually fight upon equal terms and where death results from the conduct. *Moore*, 343 Ill. App. 3d at 339 (citing *Williams*, 315 Ill. App. 3d at 35). The defendant's retaliation must be proportionate to the provocation. A defendant who instigates combat may not rely upon the victim's response as evidence of mutual combat sufficient to reduce first degree murder to second degree murder. *Moore*, 343 Ill. App. 3d at 339.

Contrary to defendant's assertions, the evidence does not show that he was entitled to an instruction on second degree murder. Here, the evidence shows that defendant, Daniels and Syrocco were on the porch drinking and talking. Daron and Darrian were in the vestibule, but went outside and began to wrestle with defendant and Daniels. While they were roughhousing, defendant bumped into one of the first floor windows and broke it. Daniels told defendant to stop banging on the window. Defendant responded, "I don't give a f*** about him." The victim came out of his first floor apartment and apparently said to the group, "Y'all ni**ers better carry that sh** somewhere else before we have a problem." Defendant approached the victim and they began to argue. Daniels also approached the victim. He and defendant stood on each side of the victim. The victim unsuccessfully attempted to enter his apartment before swinging a punch. Daniels then hit the victim, and subsequently the three of them began to fight. The victim broke free and ran away, however defendant followed him. Codefendant remained on the porch. When defendant caught up to the victim, he tripped him and the victim fell to the ground. Defendant repeatedly kicked the victim and threw a bottle at him. Additionally, several witnesses observed defendant stomp on the victim's head seven or eight times. The victim remained on the ground, never fought back and appeared unconscious as defendant beat him, as observed by several

witnesses.

Even if defendant's assertion that the altercation began with the victim's punch was correct, it ended when the victim ran from the porch. Defendant overlooks his initial actions of breaking the victim's window and instigating the argument as well as his further action of following the victim and restarting the fight, which unfortunately, led to the victim's death. Indeed, it was defendant who was responsible for dealing the fatal blows to the victim's head. The situation presented in the case at bar does not qualify for any of the categories of serious provocation recognized in Illinois and is insufficient to justify a second degree murder instruction. Accordingly, the trial court did not abuse its discretion in denying defendant's request for a second degree murder instruction.

Rule 431(b) Admonishments

Defendant next contends the trial court committed reversible error when it failed to specifically ask the venire whether they understood and accepted defendant's fundamental trial rights as required by Supreme Court Rule 431(b) (Ill. S. Ct. R. 431(b) (eff. May 1, 2007)).

Our supreme court amended Rule 431(b), which now reads, in pertinent part:

> "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." Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

Thus, Rule 431(b), as amended, imposes a *sua sponte* duty on the circuit court to question each potential juror as to whether he or she understands and accepts the *Zehr* principles. Such questioning is no longer dependent upon a request by defense counsel. Where an issue concerns compliance with a supreme court rule, our review is *de novo*. *People v. Williams*, 358 Ill. App. 3d 363, 369 (2005).

We initially note that defendant did not object during *voir dire* or include this issue in his written posttrial motion, thus waiving the issue for review. *People v. Enoch*, 122 Ill. 2d 176, 189 (1988). Defendant acknowledges this, but argues that the forfeiture rule should be relaxed where the basis for the objection is the trial judge's conduct. However, our supreme court recently rejected this argument, concluding that under these circumstances, there is no compelling reason to relax the forfeiture rule since a simple objection would have allowed the trial judge to correct the error during *voir dire*. *People v. Thompson*, 238 Ill. 2d 598, 612 (2010).

Accordingly, we conclude that this issue has been forfeited for review. This does not end our inquiry, however, as this court may review an issue that has been waived under the plain-error doctrine. Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999). Under that rule, a procedural default can be examined for plain-error where the evidence is closely balanced or "where the error is of such magnitude that it denied the accused a fair and impartial trial." *People v. Durr*, 215 Ill. 2d 283, 298 (2005); *People v. Parchman*, 302 Ill. App. 3d 627, 633 (1998).

Under the plain-error analysis, a defendant's conviction and sentence will stand unless the defendant shows that the error was prejudicial. *United States v. Olano*, 507 U.S. 725, 734 (1993); *People v. Crespo*, 203 Ill. 2d 335, 347-48 (2001). We must first determine whether any error occurred at all. *Durr*, 215 Ill. 2d at 299.

Here, the trial court asked the potential jurors whether they disagreed with the *Zehr* principles, as opposed to asking whether they understood and accepted them. Because the rule requires questioning on whether the potential jurors both understand and accept each of the enumerated principles, we conclude that the trial court violated Rule 431(b). Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

Defendant argues plain error under both prongs of the rule. He contends that the evidence in the case was closely balanced and that the violation of the rule infringed his right to an impartial jury which affected the fairness of his trial and challenged the integrity of the judicial process.

With regard to the first prong of the plain error analysis, we disagree that the evidence was closely balanced. As indicated previously, the evidence showed that after being confronted by the victim for breaking his apartment window, defendant approached the victim and an argument ensued. Daniels also approached the victim, and he and defendant stood on each side of the victim. The victim unsuccessfully attempted to enter his apartment before throwing a punch. Daniels then hit the victim. Subsequently, the three of them began to fight. The victim broke free and ran away; however defendant followed him while Daniels remained on the porch. When defendant caught up to the victim, he tripped him and the victim fell to the ground. Defendant repeatedly kicked the victim and threw a bottle at him. Additionally, several

witnesses observed defendant stomp on the victim's head seven or eight times. The victim remained on the ground, never fought back and appeared unconscious as defendant beat him, as observed by several witnesses. As the evidence was not closely balanced, we reject defendant's contention that the first prong of plain error applies and turn our inquiry to the second prong.

Under the second prong of plain error analysis, prejudice is presumed because of the importance of the right involved regardless of the strength of the evidence. *Thompson*, 238 Ill. 2d at 613. In *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009), our supreme court equated the second prong of plain error to structural error which required automatic reversal. In *Thompson*, however, our supreme court rejected the argument advanced by defendant in this appeal, finding that "a violation of Rule 431(b) does not implicate a fundamental right or constitutional protection, but only involves a violation of th[e] court's rules." *Thompson*, 238 Ill. 2d at 614-15. As such, the court concluded that despite its amendment to the rule, it could not conclude that Rule 431(b) questioning was indispensable to the selection of an impartial jury. *Thompson*, 238 Ill. 2d at 615. The supreme court further found that defendant failed to establish that the trial court's violation of Rule 431(b) resulted in a biased jury and that defendant had not met his burden of showing that the error affected the fairness of the trial or challenged the integrity of the judicial process, as the prospective jurors received some of the required Rule 431(b) questioning and the venire was admonished and instructed on Rule 431(b) principles. *Thompson*, 238 Ill. 2d at 615. The court then rejected defendant's request for plain error review under the second prong. *Thompson*, 238 Ill. 2d at 615.

The same result is required here. During jury selection, the trial court questioned the potential jurors collectively as to each of the *Zehr* principles. However, instead of asking

whether they understood and accepted them, the trial court asked whether they disagreed with them. Then, during opening remarks, the trial court told the venire that defendant is presumed innocent and not required to present any evidence on his own behalf, and that the State has the burden of proving him guilty beyond a reasonable doubt. Accordingly, we conclude here, as our supreme court did in *Thompson*, that defendant failed to meet his burden of showing that the error affected the fairness of the trial or challenged the integrity of the judicial process when the record establishes that the venire was fully admonished under the *Zehr* principles.

Excessive Sentence

Defendant further contends that his 33-year sentence is excessive because he had no prior criminal record, a steady work history, earned a GED, and had good character. He notes that Daniels, who pleaded guilty to second degree murder, was sentenced to a 10-year prison term. Defendant further argues that the circumstances of this offense do not warrant a sentence 13 years over the minimum because it was not a premeditated incident, but stemmed from an argument between the victim, Daniels and himself that "spun out of control."

The trial court has broad discretion in imposing sentence and the trial court's sentencing decision is entitled to great deference. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). A reviewing court will not disturb that decision absent an abuse of discretion. *People v. Carter*, 272 Ill. App. 3d 809, 811 (1995).

Here, defendant was convicted of first degree murder. 720 ILCS 5/9-1 (West 2008). The sentencing range for first degree murder is between 20 and 60 years. 730 ILCS 5/5-8-1(a)(1)(a) (West 2008). Defendant's sentence of 33 years is well within that sentencing range. The trial

court stated that it considered the presentence investigation report (PSI), the statutory factors in aggravation and mitigation, including the live testimony presented on behalf of defendant, and the circumstances surrounding the murder. Specifically, the trial court recognized the seriousness of the offense:

> "This man did nothing to you. This man came out on his porch, the porch of his home, after you broke his window and simply inquired about why the window was broken. And you and your cousin, perhaps fueled by alcohol which had been consumed, according to some, all day, decided to set upon this man and attack him in the vestibule of his own home.
>
> That wasn't good enough for you though. When the man escaped your attack, you continued down the stairs after him, while he was trying to run away from his own home. And you tripped him. When he fell, he became incapacitated to the point where he couldn't fight back, and you beat and stomped him to death."

The nature and circumstances of the offense may properly be considered in imposing sentence. *Carter*, 272 Ill. App. 3d at 813. In imposing sentence, the court has no obligation to recite and give value to each fact presented at the sentencing hearing. *People v. Baker*, 241 Ill. App. 3d 495, 499 (1993). Thus we conclude that defendant's sentence was not excessive and was not an abuse of discretion.

Mittimus Correction

Finally, defendant contends, and the State concedes, his mittimus should be amended to

reflect the correct number of days he served in presentence custody. Specifically, he argues that he served 1019 days but was only given credit for 1017 days. Accordingly, the mittimus shall be corrected to accurately reflect the number of days defendant spent in presentence custody. See *People v. McCray*, 273 Ill. App. 3d 396, 405 (1995).

CONCLUSION

For the foregoing reasons, the judgment of the circuit court is affirmed and the mittimus is corrected.

Affirmed; mittimus corrected.