No. 1-09-1957



SECOND DIVISION
June 28, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 07 CR 37 |
| | ) | |
| TRACY WILLIAMS, | ) | The Honorable |
| | ) | Stanley J. Sacks, |
| Defendant-Appellant. | ) | Judge Presiding. |

JUSTICE HARRIS delivered the judgment of the court.
Justices Karnezis and Connors concurred in the judgment.

**O R D E R**

*HELD*: (1) Where defendant asks this court to review under the plain error doctrine whether the trial court violated Illinois Supreme Court Rule 431(b) when admonishing the venire; we hold that the plain error doctrine is not applicable because the evidence in this case is not closely balanced and defendant has not put forth evidence of a biased jury. (2) Where defendant alleges the State violated Illinois Supreme Court Rule 412(a)(ii) for failing to disclose an alleged discoverable statement; we hold that a new trial is not warranted because defendant has not shown surprise or undue prejudice from the alleged violation. (3) Where defendant alleges ineffective assistance of counsel because his trial counsel did not argue during closing arguments that the jury had the option of finding defendant guilty of the lesser charge of second degree murder; we hold that defendant has not shown that defense counsel's closing argument was not a matter of trial strategy, and therefore he was not denied the effective assistance of counsel. (4) Where defendant asks this court to review under the first prong of the plain error

doctrine whether the prosecutor's alleged improper comments during rebuttal closing argument prejudiced him; we hold that the plain error doctrine is not applicable in this case because the evidence was not closely balanced.

Defendant, Tracy Williams, was found guilty by a jury of first degree murder and sentenced to 37 and one-half years in prison. He was acquitted of concealment of a homicidal death. On appeal, defendant raises the following issues: (1) whether this court should review under the plain error doctrine an alleged trial court error when admonishing the venire per Illinois Supreme Court Rule 431(b)(eff. May 1, 2007); (2) whether the State violated Illinois Supreme Court Rule 412(a)(ii) (eff. Mar.1, 2001) by failing to disclose an alleged discoverable statement made by defendant; (3) whether defendant received ineffective assistance of counsel because his trial counsel did not argue to the jury that they had the option of convicting defendant of second degree murder; and (4) whether under the plain error doctrine the prosecuting attorney's closing arguments prejudiced defendant. We hold that the plain error doctrine is not applicable to the trial court's alleged violation of Rule 431(b) because the evidence in this case is not closely balanced and defendant has not put forth evidence of a biased jury. The defendant has not shown surprise or undue prejudice for the alleged violation of Rule 412. Additionally, defendant has not shown that defense counsel's argument to the jury was not a matter of trial strategy, and therefore he was not denied the effective assistance of counsel. We also hold that defendant forfeited his claim that the prosecutor's alleged improper comments during rebuttal closing argument prejudiced him. Here the evidence was not closely balanced and the plain error doctrine is not applicable.

JURISDICTION

The circuit court sentenced defendant on July 13, 2009. Defendant timely filed his notice of appeal on July 14, 2009. Accordingly, this court has jurisdiction pursuant to article VI, section 6, of the Illinois Constitution and Illinois Supreme Court Rules 603 and 606, governing appeals from a final judgment of conviction in a criminal case entered below. Ill. Const. 1970, art. VI, §6; Ill S. Ct. R. 603 (eff. Oct. 1, 2010); R. 606 (eff. Mar. 20, 2009).

BACKGROUND

Defendant was charged with first degree murder and concealment of a homicidal death stemming from the October 28, 2006, killing of Mark Friend. Before jury selection, the trial court asked defense counsel if he would prefer the trial court not question potential jurors concerning defendant's right not to testify. The trial court made clear that under supreme court rules and our supreme court's decision in *People v. Zehr,* 103 Ill. 2d 472 (1984), he was required to question the venire regarding defendant's right not to testify, but asked defense counsel because "sometimes defense lawyers prefer I don't ask it." Defense counsel answered that he would prefer the trial court not mention to the potential jurors that defendant has a right not to testify on his own behalf.

At the outset of jury selection, the trial court admonished the potential jurors that:

> Under the law, the defendant is innocent of the charges against him and that presumption remains with him throughout every stage of the trial and during your deliberations on your verdict and it is not overcome unless from all of the evidence in

this case you are convinced beyond a reasonable doubt that [defendant] is guilty."

The State, in this case *** has the burden of proving [defendant] guilty beyond a reasonable doubt. And that burden stays on the State throughout the entire trial. The defendant is not required to prove to you he is innocent of the charges against him. He is not required to call witnesses or testify in his own behalf. He can rely on the presumption of innocence."

After the jurors were sworn the trial court further admonished the potential jurors that:

"There are certain things that apply - - principles that apply in a criminal case ***. One of those principles is that the defendant, *** is presumed innocent of the charge against him and that presumption remains with him throughout every stage of the trial and is not overcome unless by your verdict you come to the conclusion that the State has proven him guilty beyond a reasonable doubt.

Does anybody here not accept that principle or cannot abide by that principle? No hands, no response.

In addition to that, there is another principle which applies, which is that the State in this case *** has the burden of proof beyond a reasonable doubt and that burden stays on the State

throughout the entire case. The defendant is not required to prove to you he is innocent of the charges against him.

Is there anybody out there that does not accept or agree with that principle? Again, no response, no hands."

State's Case-in-Chief

Chicago Police Detective Mark Pawelski testified that on the morning of October 31, 2006, he received an assignment to investigate a body found in a garbage can behind a school at 5082 West Jackson. When he arrived at the location with Detective Suvada and Sergeant Holy, he saw a City of Chicago garbage can on its side and two legs from a body protruding out of the top of the garbage can. Near the garbage he observed a comforter and two or three pillows. After the crime lab unit processed the scene, Detective Pawelski and Detective Suvada removed the body from the garbage can. They learned that the body was that of the person, Mark Friend. After removing a skull cap, Detective Pawelski observed a deep gash in the head about five or six inches long, which appeared to have been made by some type of blunt trauma. Detective Pawelski testified that the garbage can's serial number identified it to the nearby address of 5109 West Adams. Detective Pawelski's initial search of the area around 5109 West Adams did not yield any additional useful information.

Several police officers were sent to Mark Friend's home to notify his family. The family members informed the police that three days earlier, he called them and said he was going to David Reed's house, on Adams Street. Detective Pawelski testified that after learning this information, and confirming that Reed lived at 5107 West Adams, he went to that address along

with Detective Suvada, Sergeant Holy, and two other police officers. Detective Pawelski knocked on the front door, and Reed answered. Detective Pawelski informed Reed about the police investigation. Reed denied having any knowledge of a fight or anything occurring inside his house. Detective Pawelski could see into the living room area of the house while standing in the vestibule area near the front door. He observed a couch that had similar pillows and material to the pillows he saw near the garbage can where Friend's body was found. Reed signed a consent form allowing the police to search his residence. In one of the two first floor bedrooms Detective Pawelski saw brown and red stains on one of the beds which he believed to be blood. He pulled the bed away from the wall and saw matching stains on the wall.

Detective Pawelski testified further that Reed's house is approximately a block and a half away from where Friend's body was found at 5082 West Jackson. During the investigation at Reed's house, he learned that defendant had been found by other police officers and along with Detective Suvada, and Detective Purdy traveled the one block to defendant's residence. He testified that defendant's father, Harry Williams, answered the door and signed a consent form allowing the police to search the residence. In the basement, Detective Purdy found a pair of blue jeans with reddish brown stains on them. Detective Pawelski asked Harry Williams whether the jeans were his, to which he responded that the jeans belonged to his son the defendant. On cross-examination, Detective Pawelski testified that during the police search of his house, David Reed denied that Mark Friend had been at his house, but upon further questioning Reed eventually admitted he had.

Andre Smith testified that on October 28, 2006, he was at Reed's house in the living

room having drinks with Reed, Leslie Thomas, Kenneth Cosby, Derrick Dixon, and defendant. At one point, defendant left the premises, but returned five minutes later. Smith testified that when he passed defendant on his way out the front door, defendant's arm appeared to be stiff. Smith could not make out what was by defendant's arm, but thought it looked like a stick. Smith testified that defendant was heading towards the bedrooms, in the opposite direction of Smith. On his way out the door, Smith heard arguing. When confronted with his prior grand jury testimony that he saw a bat sticking out of the defendant's sleeve, he was unable to recall it because it had been three years ago. He said that he did not know Mark Friend nor did he see him in the house that night. On cross-examination, Smith admitted that he originally told the police he did not go inside Reed's house, but that he was in and out of the house during the evening in question. Smith also testified on cross-examination that he never saw defendant go into the back bedroom and he did not know about any fight that occurred in the back bedroom.

Assistant State's Attorney (ASA) Sanju Oommen testified regarding Smith's grand jury testimony. She testified that before the grand jury, Smith testified that he saw six inches of a bat sticking out of defendant's sleeve as defendant walked toward the back bedroom. Smith testified before the grand jury that he heard what sounded like a fight in the bedroom, but that he then left along with others at the party and he could not see who was in the bedroom. ASA Oommen added that when she interviewed Smith before presenting him before the grand jury, Smith indicated to her that he saw a bat on defendant.

David Reed testified that on the day of the incident, he was at home in his bedroom smoking crack cocaine with Friend. Reed testified that he smoked crack cocaine with Friend for

about an hour and a half. Around 11:30 p.m., Derrick Dixon, Kenneth Cosby, Leslie Thomas, and Andre Smith came to the house and were socializing and drinking beer in the dining room. At some point in the evening, defendant came to the house. Reed testified that when defendant came over, Friend was in Reed's bedroom. Defendant came to the house and went to Reed's room. He then told Reed that "your friend owe me money," to which Reed responded that he "had nothing to do with that." Defendant asked Friend if he had his money; Friend responded he did not. Reed then let defendant out the front door of the house. Reed testified that defendant told him that he would be back. While Friend was still in Reed's bedroom, and Reed was in the kitchen getting ice for drinks, defendant rang the doorbell. Reed did not notice anything at this time, but let defendant in and then went to get more ice from the kitchen. Reed took the ice to the front of the house to give to the rest of his guests. Reed testified that Friend was sitting on the bed in the bedroom. As he was coming back to the kitchen to get more ice, Reed heard "a loud noise, two pop noises." Reed then ran into the bedroom where he saw defendant with a bat and Friend laying on the bed with blood on the wall. He testified that defendant was standing over Friend with a bat "Like an after swing." Reed testified that he did not see anything in Friend's hands and that he did not keep a baseball bat under the mattress in his bedroom nor had he seen the bat before.

After rushing to the bedroom after the fight, the people in the front of the house all left. Only Reed, defendant, and Friend remained. Reed then went to the couch in the front room and smoked a cigarette. Reed testified that defendant sat next to him on the couch. Reed asked defendant "why did you do this" to which defendant responded that Friend owed him $40. Reed

testified that defendant told him to not worry about it and that "I'm not going to leave you holding the trick bag," which Reed believed meant that defendant was not going to let Reed "take the wrap." Reed testified that at this time Friend was bleeding from his ears and nose and was not moving. Defendant then asked Reed to bring him a pillow from the front room to put under Friend's head, which Reed did.

At this point during Reed's testimony, defense counsel objected to Reed's testimony that after the attack, Reed asked defendant why he did it and defendant told him that Friend owed him $40. Defense counsel argued that the oral statement of defendant, as brought forth in Reed's testimony, had not been disclosed to the defense. The State argued that the information was disclosed in Detective Suvada's report. The State argued further that they did not have to disclose a transcript of the witness's testimony. Defense counsel argued that although Detective Suvada's report states that defendant told Reed that Friend owed him $40, that statement occurred before the attack. Defense counsel argued that the State did not disclose that, after the attack, defendant told Reed that he attacked Friend because he owed him $40. The trial court overruled defense counsel's objection.

Reed testified further that he then went back to the front room to continue smoking a cigarette. After smoking a cigarette, Reed went back to his bedroom but defendant and Friend were no longer there. Defendant, now on the back porch, asked Reed to let him out. Reed testified that Friend's body was also on the back porch, on a blanket from the bedroom. Reed let defendant out and then went back to the front room to smoke cigarettes. He then heard the back doorbell ring. At the back door, defendant had a City of Chicago garbage can. Defendant then

laid the garbage can on its side on the floor on the back porch and put Friend's body, head first, into the garbage can with the pillow. Reed testified that defendant was having trouble putting Friend's body into the garbage can, so he asked Reed for help. Reed initially told defendant no, but then he put his feet at the bottom of the garbage can to steady it. Defendant was then able to put Friend's body in the garbage can, along with the blanket and pillows. Reed testified that defendant then rolled the garbage can down the gangway.

When the police arrived at his house a few days later, Reed testified that he did not tell them everything right away because he was scared. However, once he got to the police station, he told the police everything that happened. On cross-examination, Reed testified that when he let defendant in, he did not see a bat. Reed also testified on cross-examination that defendant told him several times that Friend owed him $40.

Lisa Kell, a forensic scientist with the Illinois State Police, testified regarding DNA testing she conducted using the DNA profiles of defendant and Friend. The DNA was extracted from a buccal swab of defendant and from a blood sample of Friend. She testified that the DNA extracted from the blood stain on defendant's jeans was a positive match for Friend.

In addition to the above testimony, the following people testified for the State. Defendant's father, Harry Williams, testified regarding the police search that resulted in the police finding the bloody jeans. Officer Larry Goodson, a forensic investigator for the Chicago Police Department, testified regarding the inventory process of the evidence he collected from the scene. Forensic Investigator Victor Rivera of the Chicago Police Department testified that he and his partner searched the crime scene for biological and physical evidence. Officer Rivera

testified regarding the evidence he collected from the crime scene. Lynette Wilson, a forensic scientist for the Illinois State Police, testified that the stains on the jeans collected from defendant's house had blood on them, which she preserved for future testing. Police evidence technician Luis Carrizal testified that he obtained a buccal swab from defendant.

The parties stipulated that Ann Stevenson, a forensic scientist and an expert in the field of fingerprint comparison and identification, would testify that there were no latent fingerprints suitable for comparison on either the garbage can or the two pieces of wood collected from the bedroom. The parties also stipulated that Dr. Michelle A. Jorden, a medical doctor, certified forensic pathologist, and expert in forensic pathology, would testify that Friend died of craniocerebral injuries due to blunt trauma from an assault. Dr. Jorden would testify further that Friend's injuries were consistent with being hit with a bat and that the manner of death was homicide.

Defendant's Case-in-Chief

Defendant called William Bunch to testify. Bunch testified that he is a licensed private investigator and he was hired by the defense to interview Andre Smith. Bunch testified that during his interview with Smith, Smith told him that prior to going in to the grand jury, a State's attorney was "all over [him] about a bat so [he] told them [he] saw one sticking out of the sleeve of [defendant]." Bunch asked Smith to prepare what he told him into a written statement, but Smith declined. Bunch testified that Smith told him that he wanted to stand on his statement to the grand jury.

Defendant called Chicago Police Department Detective Tina Figueroa Mitchell. Detective Mitchell testified that during her interview with David Reed he denied participating in any way in the removal of Friend's body. She testified that Reed later changed his answer and told her that he helped put Friend's body in the dumpster.

Defendant then called Chicago Police Department Detective Steven Suvada. He testified that Reed told him that, prior to the incident, defendant told him that he would be back and that "I got something for you to check out." Defendant returned, Reed let him into the house, and defendant gave Reed two bags of crack. Detective Suvada testified that Reed never told him that after defendant struck Friend, defendant told him that it was because Friend owed him $40. Detective Suvada also testified that at one point in the investigation, Reed told him that he was not sure why defendant hit Friend with a bat.

Defendant testified on his own behalf. He testified that at the time of the incident, he was selling drugs "off and on" and that Friend owed him $40. He testified that he went to Reed's house later in the evening where he drank beer and cognac first in a car parked outside Reed's house, then on the porch, and eventually in Reed's living room. At one point, defendant went towards the washroom and Reed's bathroom. He entered Reed's bedroom. Reed, Reed's brother, and Friend were in the bedroom. Defendant testified that he then asked Friend if he had the money he owed him, to which Friend responded that he did not. Defendant did not say anything, but left the bedroom and went back out to the living room. Defendant testified that Reed then told him that Friend has "some more money and to bring him something back for him to buy for [defendant] to buy from me." Defendant told Reed that he did not have any drugs on

him, but that he would go to his house and come back with the drugs. Defendant then gave Reed two dime bags of cocaine.

Defendant testified that he then went back into the bedroom. He held the drugs in one hand, with that hand inside his coat pocket and that he was holding a plastic cup filled with cognac in his other hand. He opened up his hand and showed Friend the drugs stating "this is the new stuff I got." Defendant testified both he and Friend were standing at this point. Friend told him that he did not have any money, but that he wanted one bag. Defendant told Friend no, because he already owed defendant $40. Defendant testified that Friend was begging him to give him the drugs, but defendant refused. Friend then grabbed defendant. Defendant then "snatched away from him" but Friend hit defendant with a series of punches. Defendant testified that he fell to the floor. While he was on the floor, Friend came at him with a baseball bat he retrieved from under the bed. As Friend swung at him, Defendant blocked the bat with his arm. Friend then swung at defendant again, hitting him on the elbow. Friend attempted a third swing, but defendant managed to punch Friend in the nose and lip area. At this point, Friend still had the bat, but fell on the bed. Defendant then took the bat away from Friend. Friend got off the bed and came at defendant again with his hands out in front of him. Defendant then hit him with the bat to defend himself. Defendant testified that he feared for his life and that he "just did what was natural." Friend fell to the bed and hit his head. Friend attempted to stand up and defendant struck him again, causing Friend to fall back onto the bed. Defendant then hit Friend again, which defendant testified just "skinned" Friend on the shoulder and Friend fell down a final time. The other people in the house rushed into the room. When Reed arrived, defendant testified

Reed went "berserk" and screamed profanities at defendant. Defendant testified that Reed then went into the kitchen and grabbed a knife. The other people at the house held Reed back, and one of them let defendant out of the house. Defendant denied putting Friend's body in a garbage can or removing it from the house. Defendant testified that Friend was very high at the time of the incident. Defendant acknowledged on cross-examination that Friend did not have anything in his hands when he hit him with the bat and that he never saw Reed with a knife.

The parties stipulated that ASA Art Heil, if called to testify, would testify that "David Re[e]d told him that David Re[e]d states that he and [defendant] then both grabbed hold of the garbage can and turned it back upright."

Jury Instructions/ Verdict/ Post-Trial Motions

Defendant requested that the trial court instruct the jury on second degree murder which was given. However, during closing arguments, defense counsel did not mention the second degree murder instruction. The State did mention the second degree murder instruction, arguing that mitigating factors sufficient to reduce a finding of first degree murder to second degree murder did not apply in this case. After closing arguments, the jury was instructed on both first and second degree murder. The second degree murder instruction was based on self-defense and provocation. The jury found defendant guilty of first degree murder, but not guilty of concealment of a homicidal death.

Defense counsel filed a motion for a new trial. Relevant to this appeal, defense counsel argued that Reed's testimony that defendant told him that he killed Friend because he owed defendant $40 was not provided to the defense in violation of Rule 412(a)(ii). The trial court

found that no discovery violation occurred, and that even if there was a discovery violation, defendant was not prejudiced. Defendant filed a *pro se* motion for a new trial, arguing that defense counsel was ineffective, which the trial court denied. The trial court sentenced defendant to 37 and one-half years in the Illinois Department of Corrections. Defendant filed his timely notice of appeal on July 14, 2009.

ANALYSIS

On appeal, defendant argues that the trial court violated Illinois Supreme Court Rule 431(b)(eff. May 1, 2007), when admonishing the venire; that the State failed to disclose an alleged discoverable statement made by defendant in violation of Illinois Supreme Court Rule 412(a)(ii) (eff. Mar. 1, 2001); that defendant received ineffective assistance of counsel because his trial counsel failed to argue that the jury had the option of convicting defendant of second degree murder; and that the prosecuting attorney's comments during closing arguments prejudiced defendant.

Illinois Supreme Court Rule 431(b)

Defendant first argues that the trial court violated Rule 431(b) by failing to ask prospective jurors if they understood and accepted the principle that a defendant is not required to present any evidence on his behalf. Defendant also argues that although the trial court asked the potential jurors whether they accepted the principle that a defendant is presumed innocent and that the State bears the burden of proving him guilty beyond a reasonable doubt, the trial court never asked the potential jurors whether they understood those principles. Defendant concedes that this issue was not properly preserved for appellate review because he did not object at trial or

in a posttrial motion, but urges this court to consider the merits of his argument under the second prong of the plain error doctrine. In response, the State argues the trial court complied with Rule 431(b), but contends that even if the trial court did not comply with Rule 431(b), defendant has not carried his burden of proving plain error. In his reply brief, defendant acknowledges that under our supreme court's decision in *People v. Thompson,* 238 Ill. 2d 598 (2010), which was decided during the pendency of this case, he must show that he was tried by a biased jury to be successful under the second prong of the plain error doctrine. However, defendant argues that the evidence was closely balanced in this case, and, therefore, seeks review under the fist prong of the plain error doctrine.

The plain error doctrine allows this court to review a forfeited claim of error that affects a substantial right in two instances: "where the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence" and "where the error is so serious that the defendant was denied a substantial right, and thus a fair trial." *People v. Herron,* 215 Ill. 2d 167, 178-79 (2005); see also Ill. S. Ct. R. 615(a) (eff. Aug. 1, 1987) ("Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court.") Our supreme court has described the plain error doctrine as a "narrow and limited exception." *People v. Hillier,* 237 Ill. 2d 539, 545 (2010).

Under either prong of the plain error doctrine, the defendant bears the burden of persuasion. *Herron,* 215 Ill. 2d at 187. Under the first prong, "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." *Id.* Under the second prong of plain error analysis, prejudice is presumed, but "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." *Id.* However, before addressing either prong of the plain error doctrine, defendant "must first show that a clear or obvious error occurred." *Hillier,* 237 Ill. 2d at 545.

Supreme Court Rule 431(b) states:

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

431(b) (eff. May 1, 2007).[1]

To comply with Rule 431(b), the trial court must allow each prospective juror the opportunity to respond when asked whether he or she understands and accepts the principles stated in Rule 431(b). *People v. Thompson,* 238 Ill. 2d 598, 607 (2010); see also *People v. Davis,* 405 Ill. App. 3d 585, 590 (2010) ("[a] trial court complies with Rule 431(b) when it admonishes the venire regarding the four *Zehr* principles and gives the venire an opportunity to disagree with them"). "Rule 431(b), therefore, mandates a specific question and response process." *Thompson,* 238 Ill. 2d at 607. The committee comments to Rule 431(b) warn that "trial courts may not simply give 'a broad statement of the applicable law followed by a general question concerning the juror's willingness to follow the law.' " *Id.* (quoting Ill. S. Ct. R. 431(b), Committee Comments (eff. May 1, 2007)). Our review of a supreme court rule is *de novo*. *People v. Saurez,* 224 Ill. 2d 37, 41-42 (2007).

In this case, the trial court violated rule 431(b) because the trial court never asked the potential jurors whether they understood and accepted the principle that a defendant is not required to present any evidence on his behalf and because the trial court did not ask the jurors whether they understood any of the rule 431(b) principles. Our review of the record shows that the trial court never stated "that the defendant is not required to offer any evidence on his or her own behalf" in violation of rule 431(b). Ill. S. Ct. R. 431(b) (eff. May 1, 2007). Additionally,

[1] Rule 431(b) is a codification of our supreme court's holding in *People v. Zehr,* 103 Ill. 2d 472, 477 (1984). The *Zehr* principles make clear that; "essential to the qualification of jurors in a criminal case is that they know that a defendant is presumed innocent, that he is not required to offer any evidence in his own behalf, that he must be proved guilty beyond a reasonable doubt, and that his failure to testify in his own behalf cannot be held against him." *Id*.

although the trial court did ask the potential jurors whether they "accept or agree" with the other principles, the trial court never asked the potential jurors whether they *understood* any of the principles of Rule 431(b). The manner of the trial court's questioning of the potential jurors in this case resembled the " 'broad statement of *** applicable law followed by a general question concerning the juror's willingness to follow the law' " that the committee comments to the rule warn against. *Thompson,* 238 Ill. 2d at 607, (quoting Ill. S. Ct. R. 431(b), Committee Comments (eff. May 1, 2007)). It was not the "specific question and response process" that is required under Rule 431(b). *Id.* However, finding the trial court erred, is not the end of our analysis because under both prongs of the plain error doctrine, the defendant carries the burden of persuasion. *Herron,* 215 Ill. 2d at 187.

In *People v. Thompson,* our supreme court recently held that a Rule 431(b) violation does not automatically constitute structural error subject to reversal under the second prong of the plain error doctrine. *Thompson,* 238 Ill. 2d at 610. The supreme court noted that the purpose of Rule 431(b) is to insure a fair and impartial jury, and stated that " [a] finding that defendant was tried by a biased jury would certainly satisfy the second prong of plain-error review because it would affect his right to a fair trial and challenge the integrity of the judicial process." *Id.* at 614. However, it cannot be presumed that a jury was biased solely because of a Rule 431(b) violation. *Id.* In *Thompson,* the supreme court held that the defendant had not satisfied the second prong of plain error review because the defendant had not presented any evidence of a biased jury. *Id.* at 615. Because defendant in this case has not offered any evidence of a biased jury, he has not

met his burden of proof such that review under the second prong of the plain error doctrine is warranted.

Likewise, Defendant has not carried his burden of persuasion under the first prong of the plain error doctrine. In his opening brief, defendant only argued under the second prong of the plain error doctrine. In his reply brief, defendant argued that the evidence on the question of whether defendant committed first or second degree murder was very close because the State presented little evidence rebutting defendant's claim that he attacked Friend only after Friend attacked him and defendant feared for his life. We disagree. The jury was instructed on second degree murder based on provocation and self-defense. The State presented evidence to rebut the mitigating factors of provocation and self-defense. Andre Smith testified in court that during the night of the incident, when defendant re-entered the house, defendant's arm appeared to be stiff with what appeared to be a stick. The State also presented Smith's testimony before the grand jury, as testified to by ASA Oommen, that Smith saw defendant with a bat in his sleeve. David Reed testified that he saw defendant standing over Friend with a bat in a position "[l]ike an after swing." Reed also denied owning a bat or keeping one under the bed. Defendant's only evidence that he committed second degree murder came from his own testimony. Defendant has failed to show the trial court's error was prejudicial. *Herron,* 215 Ill. 2d at 187. It cannot be said that the trial court's "error alone severely threatened to tip the scales of justice" against defendant. *Id.* Accordingly, review under the first prong of the plain error doctrine is not warranted here.

Illinois Supreme Court Rule 412

Defendant next argues that the State, in violation of Illinois Supreme Court Rule 412 (a)(ii), failed to disclose to the defense David Reed's statement that defendant killed Friend because Friend owed defendant $40, and, thus, a new trial is warranted. The State maintains that it fully complied with all discovery requirements, but that even if a discovery violation occurred, a new trial is not warranted.

Illinois Supreme Court Rule 412(a)(ii) provides in relevant part:

> "(a)*** the State shall*** disclose to defense counsel the following material and information within its possession or control:
>
> ***
>
> (ii) Any written or recorded statements and the substance of any oral statements made by the accused or by a codefendant and a list of witnesses to the making and acknowledgment of such statement." Ill. S. Ct. R. 412(a)(ii) (eff. Mar. 1, 2001).

The discovery rules are designed "to protect the accused against surprise, unfairness, and inadequate preparation." *People v. Heard,* 187 Ill. 2d 36, 63 (1999). Although the requirements of discovery are mandatory, reversal is not required unless surprise or undue prejudice has been shown. *People v. Robinson,* 157 Ill. 2d 68, 78 (1993). In deciding prejudice, surprise and whether a discovery violation warrants a new trial for a criminal defendant, a reviewing court

considers, "the closeness of the evidence, the strength of the undisclosed evidence, the likelihood that prior notice could have helped the defense discredit the evidence, and the willfulness of the State in failing to disclose the new evidence." *Id.* at 81. An additional factor reviewing courts consider is whether the defendant, upon learning of a discovery violation, requested a continuance. *Id.* at 78. ("the failure to request a continuance is a relevant factor to consider in determining whether the new testimony actually surprised or unduly prejudiced the defendant.") Defendant carries the burden of showing surprise or undue prejudice. *Heard,* 187 Ill. 2d at 63. A trial court abuses its discretion if the discovery violation prejudices defendant and the trial court does not eliminate that prejudice. *People v. Weaver,* 92 Ill. 2d 545, 559 (1982). We must look to the entire record to determine whether defendant was prejudiced. *People v. Clemons,* 277 Ill. App. 3d 911, 918 (1996).

In this case, we need not determine whether the State violated Rule 412 because defendant cannot prove that he was surprised or unduly prejudiced by the alleged discovery violation.

First, the evidence in this case is not close. Defendant argues that the evidence was closely balanced on the issue of whether he acted in self-defense, had an unreasonable belief in self-defense, or acted as a result of serious provocation. Defendant relies on his own testimony that Friend grabbed a bat from under Reed's bed and began to attack him. Defendant's testimony is rebutted by Andre Smith's testimony at trial, his testimony before the grand jury, and Reed's testimony. Smith testified at trial that during the night of the incident, when defendant re-entered the house, defendant's arm appeared to be stiff with what appeared to be a stick. The State also

presented Smith's testimony before the grand jury, as testified to by ASA Oommen, that Smith saw defendant with a bat up his sleeve. ASA Oommen testified that, prior to testifying before the grand jury, Smith indicated to her that he saw defendant with a bat. Reed denied owning a baseball bat or keeping one under his bed.

Defendant's testimony also contradicts his argument that the evidence was closely balanced. Defendant admitted to hitting Friend with a bat, resulting in Friend's death. Defendant testified that after he punched Friend in the face and grabbed the bat, Friend was weaponless and had nothing in his hands when defendant hit him the first of three times with the bat. Even accepting defendant's testimony as true, defendant admitted that he had control of the bat before striking Friend three times. Defendant's testimony does not show that he acted in self-defense, with an unreasonable belief in self-defense, or as a result of serious provocation.

Although the undisclosed statement was a strong indicator of defendant's motive in killing Friend, it was in addition to other strong evidence the State presented to rebut defendant's contention that he acted in self defense or based on serious provocation. The record also clearly shows that the issue of the drug debt was widely known throughout the trial, even without the disputed statement. The police reports mention a drug debt, as did both Reed and defendant. Although Reed's testimony that defendant told him *after* the incident is a good indication of defendant's motive, the disputed police report did disclose that before the incident, Friend and defendant discussed that Friend owed defendant $40. The issue of the drug debt was pervasive throughout the trial and was not a surprise to defendant.

It is not likely that any prior notice of the undisclosed statement would have aided the

defense in discrediting the statement. Defendant could not have been surprised by the allegation of a drug debt, as it was known and disclosed to the defendant before trial. It is also unlikely defendant would have aided the defense in discrediting the statement. The only people in the room at the time of the alleged statement were Reed and defendant and, therefore, defendant would have difficulty finding any witnesses to refute Reed's statement. Defense counsel cross-examined Reed regarding the statement, put forth defendant's testimony of the incident, and presented Detective Suvada, who took Reed's statement. Detective Suvada testified that Reed did not tell him that after the incident, defendant told him that he struck Friend because he owed him $40. There is not much else defense counsel could have done to discredit the statement and prior notice would not have aided him in further discrediting the statement.

Defendant has not shown that the State acted willfully in failing to disclose the evidence. Although defendant contends the State purposefully elicited the statement from Reed, our review of the record does not show any willfulness by the State in failing to disclose the statement. Detective Suvada, who prepared the report in question, testified that defendant did not make the statement to him. Defendant is unable to show that the State knew about the statement, but willfully failed to disclose it to the defense.

The final factor that we consider is whether or not defense counsel requested a continuance once he learned of the discovery violation. Although defense counsel did object to Reed's testimony, he never requested a continuance to investigate the matter further. *Robinson,* 157 Ill. 2d at 78 ("the failure to request a continuance is a relevant factor to consider in determining whether the new testimony actually surprised or unduly prejudiced the defendant.")

Our review of the entire record shows that defendant was not surprised or unduly prejudiced by the alleged undisclosed statement. *Clemons*, 277 Ill. App. 3d at 918 (we must look to the entire record to determine whether defendant was prejudiced). Additionally, defendant has not shown surprise or undue prejudice. *Heard,* 187 Ill. 2d at 63 (defendant carries the burden of showing surprise or undue prejudice). We conclude that the trial court did not abuse its discretion when ruling on defendant's allegations of a discovery violation.

Ineffective Assistance of Counsel

Defendant next argues that he was denied the effective assistance of counsel because, after defendant requested that the jury be instructed on the lesser-included offense of second degree murder, defense counsel failed to address the second degree murder charge in his closing argument. The State argues that defense counsel provided effective representation by requesting second degree murder instructions and later presenting closing argument attacking the credibility of the State's witnesses and its failure to prove beyond a reasonable doubt that defendant was not justified in using the force that he used.

We utilize a two-prong test when reviewing ineffective assistance of counsel claims. *People v. DeLeon,* 227 Ill. 2d 322, 337 (2008) (citing *Strickland v. Washington,* 466 U.S. 668 (1984); *People v. Albanese,* 104 Ill. 2d 504 (1984)). First, a defendant must show "his counsel's performance was deficient in that 'counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.' " *People v. Clendenin,* 238 Ill. 2d 302, 317 (2010) (quoting *Strickland,* 466 U.S. at 687). Under this first prong, "a defendant must overcome the strong presumption that the challenged action or inaction

of counsel was the product of sound trial strategy and not of incompetence." *Id.* at 317. Next, under the second prong, defendant must show that he was prejudiced by counsel's deficient performance. *DeLeon,* 227 Ill. 2d at 337. Our supreme court, in describing the two prong standard, stated "the defendant must demonstrate that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Id.* at 337-38 (quoting *Strickland,* 466 U.S. at 694). A defendant must show both prongs of the *Strickland* standard have been met and failure to meet either one of the prongs defeats a claim of ineffective assistance of counsel. *Id.* at 338. If we determine defendant suffered no prejudice from his counsel's alleged deficiencies, we need not determine whether his counsel's performance was actually deficient. *People v. Edwards,* 195 Ill. 2d 142, 163 (2001) (citing *Strickland*, 466 U.S. at 697).

A decision by defense counsel to argue a certain theory of defense in a closing argument is considered a matter of trial strategy. *People v. Milton,* 354 Ill. App. 3d 283, 289-90 (2004). Defense counsel will not be found to be ineffective merely because the jury did not accept the proffered theory. *Id.* See also *People v. Franklin,* 135 Ill. 2d 78, 119 (1990) (stating, "The position defense counsel pursued in closing arguments was a matter of trial strategy. The fact that the jury did not accept that position does not mean that defense counsel was ineffective."); *People v. Davis,* 356 Ill. App. 3d 725, 730 (2005).

Our review of the record shows that defendant cannot overcome the strong presumption that defense counsel's closing argument was not the product of sound trial strategy. *Clendenin,*

238 Ill. 2d at 317 ("a defendant must overcome the strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not of incompetence.").

Defense counsel argued that the State did not prove beyond a reasonable doubt that defendant was not justified in using the force he used on Friend. In making this argument, defense counsel challenged the credibility of the State's witnesses as well as argued the facts of the case. Although the jury did not accept defense counsel's theory, that does not mean his representation of defendant was ineffective. *Davis,* 356 Ill. App. 3d at 730 ("The theory pursued by defense counsel in closing arguments is a matter of trial strategy, and the fact that the trier of fact did not accept that theory does not mean that counsel was ineffective.") Defendant has failed to show that defense counsel's strategy was incompetent or deficient and, therefore, defendant's claim of ineffective assistance of counsel is denied.

Improper Closing Arguments

Defendant's final argument is that the prosecutor, during rebuttal closing argument, argued that defendant testified that he hit Friend while Friend was sitting on the bed. The State argues that the prosecutor's argument was based on the evidence at trial. The State also argues defendant forfeited this claim. Defendant admits he did not properly preserve the issue for appeal, but urges this court to review his claim under the first prong of the plain error doctrine. Defendant argues that his claim is amenable to plain error review because the evidence in this case was closely balanced.

Our review of the record shows that the prosecutor did improperly state to the jury during rebuttal closing arguments that defendant testified that he struck Friend while Friend was sitting

on the bed. Defendant testified that immediately before striking Friend, Friend was standing. The State did provide evidence, through the testimony of David Reed, that Friend was sitting on the bed before the altercation. However, the prosecutor specifically argued during rebuttal closing argument that defendant testified Friend was sitting. Although there was evidence that Friend was sitting on the bed before the attack, the prosecutor erred in attributing this evidence to defendant's testimony. See *People v. Linscott*, 142 Ill. 2d 22, 38 (1991) ("A prosecutor must confine his arguments to the evidence and to 'reasonable inferences' that follow from it.").

However, defendant still must carry his burden under the first prong of the plain error doctrine in order for this court to review his claim on the merits. *Herron*, 215 Ill. 2d at 187. As stated above, the first prong of the plain error doctrine allows this court to review a forfeited claim of error that affects a substantial right "where the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence." *Id.* at 178. Under the first prong, "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." *Id.* at 187.

As we found earlier, this case is not such a closely balanced case "that the jury's guilty verdict may have resulted from the error and not the evidence." *Id.* 178. Although the prosecutor's comments were improper regarding who presented the evidence that Friend was sitting on the bed before he was struck by the bat, the State did present such evidence, albeit from another source. David Reed testified that immediately before the incident, Friend was in the bedroom sitting on the bed. Additionally, Defendant's own testimony shows that the evidence

was not close as it established that he struck Friend three times with a bat. Defendant also testified that Friend did not have anything in his hands when he struck him with the bat. Although defendant contends that Friend was the aggressor, this is rebutted by both David Reed's testimony and Andre Smith's testimony. Reed testified that he heard "a loud noise, two pop noises" and then saw defendant standing over Friend. Friend was laying on the bed with blood on the wall. Reed testified that defendant was standing over Friend "Like an after swing." Reed testified further that he did not own a baseball bat nor did he keep one under the bed. Andre Smith testified that defendant's arm appeared to be stiff with what appeared to be a stick. Both Reed and Smith's testimony rebuts defendant's contention that Friend attacked him with a bat. Although the prosecutor erred by misstating what defendant's testimony was, we cannot say that "the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against" defendant. *Herron,* 215 Ill. 2d at 187. Accordingly, the plain error doctrine is not applicable to defendant's claim of improper prosecutor's comments during closing argument.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Affirmed.