FOURTH DIVISION
February 20, 2014

No. 1-09-2472

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. 04 CR 28307
	)	
JOSE RIVERA,	)	Honorable
	)	Lawrence W. Terrell
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justice Pucinski and Justice Epstein concurred in the judgment.

ORDER

¶ 1 *Held*: Neither the trial court's failure to scrupulously comply with Illinois Supreme Court Rule 431 (eff. May 1, 2007), the erroneous admission of the victim's note nor the prosecutor's improper closing argument amounted to plain error. In addition, the record failed to support defendant's assertion that the trial court excluded defendant's family members from the courtroom during *voir dire*. Moreover, defendant could not demonstrate that trial counsel was ineffective where the result of trial would not have been different absent counsel's alleged deficiencies.

¶ 2 Following a jury trial, defendant Jose Rivera was convicted of multiple sex offenses involving victims J.M. and J.T. During his initial appeal to this court, defendant raised numerous issues. We reversed and remanded for a new trial on the grounds that the trial court improperly admitted defendant's plea-related statements. Our supreme court subsequently reversed that decision and remanded for this court to resolve defendant's remaining issues. We now do so. Having provided detailed facts in our original opinion, we recite only those facts necessary to understand defendant's remaining contentions.[1]

¶ 3 Following a jury trial, defendant was convicted of multiple counts of predatory criminal sexual assault, criminal sexual assault and aggravated criminal sexual abuse with respect to victims J.M. and J.T. Defendant was also convicted of possessing child pornography that did not involve either victim. He was subsequently sentenced to a cumulative sentence of 75 years' imprisonment. The evidence presented at trial generally showed that minor J.M. lived with her mother Edys Rivera and defendant, her stepfather. When she was 12 years old, defendant told J.M. that he would help her start a modeling career and form a band. Defendant said he had signed a modeling contract for her and a woman named Cindy would arrange photo shoots. In furtherance thereof, J.M. regularly performed oral sex on defendant, under the guise of testing condoms. She also performed oral sex on defendant to prevent being sent to boot camp. In addition, defendant performed oral sex on J.M., touched her breasts and licked them. Defendant recorded videos of these acts, although no such videos were recovered. Defendant also initiated vaginal intercourse and took nude photographs of J.M. Furthermore, defendant gave J.M. various reasons why she should not tell her mother about what had been happening.

[1] Justice Epstein joins this panel in place of Justice Gallagher, who was originally on the panel for this appeal but has since retired.

¶ 4 When J.M. threatened to discontinue their activities, defendant said Cindy would sue J.M. and Edys for $200,000. Defendant also said that J.M. could have a break if she found another girl to make a video with. As a result, J.M.'s friend J.T. agreed to do some "modeling" and joined in these activities, performing oral sex on defendant and J.M. Defendant also told J.T. that he had her parents' account numbers, could prevent them from buying a house, and could take her away from her parents. On one occasion, when J.M. did not agree to defendant's demand for oral sex, a woman named "Cindy" told J.M. over the phone to do what defendant said. The sexual acts continued. When J.M. refused to make another video, defendant threatened a confrontation with Cindy. J.M. then wrote a letter to a friend and spoke to a teacher, Rosanne Zuccaro, about what had been happening.

¶ 5 Edys subsequently received a call from the police, who told her to come to the police station *alone*. Edys immediately relayed this message to defendant, however. In addition, Edys subsequently accompanied the police to search the family home, where a burnt substance was in the sink as well as on a toilet seat and on a towel. The living room computer had been disassembled and the hard drive removed. Condoms were recovered from defendant's jacket, even though Edys testified that defendant did not use condoms in their relationship. In addition, the police recovered a webcam, digital camera and camcorder, as well as a CD containing pornographic images of other unknown females. During interviews with police, defendant asked what guarantees could be made if he gave a confession.

¶ 6 In support of the defense, Dora Hernandez, the mother of defendant's two daughters, testified that he was a wonderful father. Defendant's daughters testified that they would visit defendant on the weekend and never observed or heard about any inappropriate occurrences between defendant and J.M. Defendant's aunt also testified that she never observed or heard of

anything inappropriate between defendant and J.M. In addition, defendant's mother testified that she regularly saw J.M. on the weekends and that J.M. never complained about defendant.

¶ 7 Defendant testified on his own behalf. He acknowledged there were times when he had been alone with J.M. but denied that he had engaged in any sexual acts with J.M. or J.T. In addition, he had seen J.T. only once or twice. Defendant also denied J.M.'s testimony regarding the music group. In addition, while defendant and Edys were having marital problems, he was seeing a woman named Cindy Ramos. Defendant further testified that the computer had been disassembled because he was attempting to replace the hard drive. Moreover, in an attempt to create a romantic setting for his wife, he had lit a piece of paper with the stove and walked toward the bedroom to light a candle but did not make it. He turned around and threw the burning paper in the sink. Defendant later testified, however, that he actually lit the candle. Defendant also denied asking the police for any guarantee. The jury subsequently found defendant guilty of the aforementioned offenses.

¶ 8 On appeal, we reversed defendant's convictions based on the improper admittance of defendant's plea-related statements and remanded for a new trial. *People v. Rivera*, 409 Ill. App. 3d 122 (2011). We also found, however, that (1) the trial court properly denied defendant's motion to suppress; (2) a fatal variance rendered defendant's conviction for criminal sexual assault under Count XIII erroneous; (3) the evidence was otherwise sufficient to sustain defendant's convictions for the offenses involving J.M. and J.T.; (4) the evidence was insufficient to sustain defendant's conviction for possession of child pornography (720 ILCS 5/11-20.1(a)(6) (West 2008)); (5) that determination rendered defendant's challenge to the admittance of a visual recording of alleged child pornography moot; (6) the trial court failed to comply with Illinois Supreme Court Rule 431(b) (eff. May 1, 2007); (7) the trial court properly disqualified defense

counsel; (8) the trial court did not err by permitting defendant's wife to testify regarding his computer; (9) the trial court erroneously admitted a note written by J.M.; (10) the trial court did not err by admitting evidence contained in a police report; and (11) prosecutorial misconduct occurred during closing arguments. Moreover, in light of our decision to reverse and remand for a new trial, we declined to address defendant's contention that he was denied his right to a public trial and that trial counsel was ineffective.

¶ 9 The State then appealed our decision to the supreme court, solely challenging our determination that reversal and remand for a new trial was required due to the improper admittance of defendant's plea-related statements. *People v. Rivera*, 2013 IL 112467, ¶ 1. The State did not challenge any other errors found by our decision. In addition, defendant filed a cross-appeal, asserting only that the trial court improperly disqualified defense counsel. *Id*. Upon review, the supreme court determined that the trial court did not err in admitting defendant's statements because they were not plea-related discussions, and rejected defendant's challenge to the disqualification of his attorney. *Id*. As stated, the supreme court then reversed and remanded for this court to resolve the remaining issues. Once more, we consider defendant's appeal. With that said, we need not revisit our prior determinations that were not appealed by the parties and begin by determining whether any of the previously identified errors warrant reversal.

¶ 10 On our initial review, we concluded that the trial court erred by failing to comply with Rule 431(b) (eff. May 1, 2007), which codified our supreme court's decision in *People v. Zehr*, 103 Ill. 2d 472 (1984). *Rivera*, 409 Ill. App. 3d at 141. Specifically, we found the trial court failed to ask each juror whether they understood and accepted the principles recited therein. *Id*.

We also observed that defendant failed to object to this error at trial. *Id*. We now consider defendant's assertion that this unpreserved error warrants reversal under the plain error doctrine.

¶ 11 Under plain-error review, the defendant has the burden of persuasion. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). This doctrine permits an unpreserved error to be considered on appeal where (1) the evidence is closely balanced; or (2) the error was fundamental and of such magnitude so as to affect the fairness of the trial and the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Wilmington*, 2013 IL 112938, ¶ 31. Defendant contends that the trial court's failure to comply with Rule 431(b) satisfies both prongs.

¶ 12 First, we disagree with defendant's contention that the evidence was closely balanced. Both victims testified at trial and substantially corroborated each others' account of events as to what happened while the victims were together, notwithstanding that a videotape of those events was never found. Specifically, the victims divulged the sexual contact that occurred at defendant's behest. *Cf. People v. Belknap*, 396 Ill. App. 3d 183, 191-92, 206-07 (2009) (the evidence was closely balanced where the minor victim died from blunt head trauma, where the only direct evidence tying the defendant to the victim's death was the testimony of jailhouse informants who claimed the defendant had confessed to hitting the victim, and where the defendant denied making such confessions). Any discrepancies as to whether a blindfold was use, whether J.T. was picked up in a truck, and who held the video camera were minor. In addition, any impeachment regarding J.M. being a troubled youth was insubstantial.

¶ 13 Defendant further argues that J.T. gave inconsistent explanations for her delayed outcry to the police. Defendant fails to recognize, however, that having multiple reasons for one's

actions does not alone render those reasons inconsistent. J.T. could be afraid both of her parents losing their home and of Cindy. Similarly, Zuccaro's testimony that Muniz did not relay details of the girl band during her outcry statement is at most an omission, not an inconsistency.

¶ 14 Defendant further argues that J.T., as J.M.'s friend, was not an independent witness and that J.T.'s testimony was "bizarre" because she claimed to have willingly ridden her bicycle for one and one-half hours for the purpose of being a crime victim. J.T. testified, however, that she put her fear aside so that J.M. would not have to go through these events alone. Moreover, defendant's witnesses, who were primarily family members, were not independent either and his explanation of events supported the jury's implicit finding that his account of events was far more bizarre than J.T.'s. To rebut the State's suggestion that defendant destroyed evidence by disassembling his computer and burning something in the kitchen sink, defendant explained that he used the stove to set fire to a paper in order to use that paper to light a candle. Moreover, although defendant's witnesses testified they had no knowledge of inappropriate activity between defendant and J.M., no evidence directly corroborated defendant's allegations that he did not engage in the acts charged. *Cf. People v. Gray*, 406 Ill. App. 3d 466, 474 (2010) (where (1) two State witnesses identified the defendant as the shooter, (2) three defense witnesses identified a different individual as the shooter, (3) none of the witnesses were inherently incredible or severely self-contradictory, and (4) the jury sent the court a note stating the jury could not reach a consensus, the evidence was closely balanced). The jury was also aware that while at the police station, defendant had asked for guarantees. The evidence here was not closely balanced.

¶ 15 As to the second prong, we begin by considering *Thompson*. Our supreme court has held that while Rule 431(b) was intended to ensure a defendant is tried by a fair and impartial jury, questioning under the rule is not indispensible to a fair trial. *Thompson*, 238 Ill. 2d at 609.

Specifically, failure to comply with the rule does not automatically result in a biased jury. *Id*. at 610, 614. Thus, violation of Rule 431(b) does not itself constitute a structural error. *Id*. at 609-10. In contrast, "trial before a biased jury is structural error subject to automatic reversal." *Id*. at 610-11, 613-14. Accordingly, a finding that a defendant was tried by a biased jury would satisfy the second prong of the plain-error doctrine. *Id*. at 614. Where a defendant fails to show that a violation of Rule 431(b) resulted in a biased jury, thereby affecting the fairness and integrity of his trial, the second prong of the plain-error doctrine does not overcome the defendant's procedural default. *Wilmington*, 2013 IL 112938, ¶ 33 (citing *Thompson*, 238 Ill. 2d at 615); but see *People v. Owens*, 394 Ill. App. 3d 147, 150 (2009) (finding, prior to *Thompson*, that the second prong of the plain-error doctrine was satisfied where the trial court failed to question jurors regarding the four principles required by Rule 431(b)).

¶ 16 Here, during *voir dire* prospective juror Dana Cox stated that she had been the victim of a crime. Specifically, she had been mugged and her apartment had been burglarized. The offenders were never arrested. When asked if those occurrences would interfere with her ability to be fair to defendant, Cox answered, "[t]hey may." No follow up questions were asked. Outside the presence of the jury, the attorneys and the court discussed the *voir dire*.

> "MR. GOGGIN [Defense Counsel]: Judge, as to Dana Cox she indicated, according to my notes, that she would [*sic*] also may be unable to be fair in the case. That's what I wrote down.
>
> THE COURT: State.

MS. O'BRIEN [Assistant State's Attorney]: Judge, I don't have any of that. She was a chef instructor. Her husband was involved in electronics. She listened to cooking shows and PBS. I don't have that.

THE COURT: I have considered the arguments of the lawyers. Dana Cox will not be excused for cause."

As a result, Cox was chosen to serve on defendant's jury.

¶ 17 The record before us does not demonstrate that Juror Cox was actually biased. *People v. Bowens*, 407 Ill. App. 3d 1094, 1102 (2011) (a defendant must demonstrate that a juror was actually biased in order to show structural error); see also *People v. Escobedo*, 151 Ill. App. 3d 69, 88 (1987) (finding that absent proof of actual bias on the part of a juror, the court could not conclude that the defendant was deprived of a fair trial). This is because defendant did not request that juror Cox be further questioned to clarify her statement that she *may* be unable to be fair. *People v. Ward*, 32 Ill. 2d 253, 258-59 (1965) (although a defendant's guaranty of trial by jury ensures his right to have 12 impartial jurors determine the facts in controversy, this does not relieve a defendant of his duty to determine whether impartiality exists). Further questioning may have revealed that the substantial difference between the present charges and the crimes committed against Cox would alleviate her equivocation. In addition, defendant did not use a peremptory challenge to remove Cox from the jury. See also *Bowens*, 407 Ill. App. 3d at 1100-01 (observing that defense counsel may have failed to use a peremptory challenge to remove a juror in order "to plant a seed of error, the fruit from which defendant is now trying to harvest on appeal"). Even assuming Juror Cox was biased, the record does not show that the presence of a biased juror resulted from the court's failure to discover a biased juror by asking the questions

required by Rule 431(b). On the contrary, Juror Cox remained on the jury because a potential irregularity in her impartiality was discovered by defendant but not acted on.

¶ 18 Moreover, we decline defendant's invitation to assume that the jurors were biased against defendant as contemplated by *Thompson* because of a defect in the court's oral jury instructions. Specifically, the court stated that defendant's presumption of innocence is "not overcome *until* from all the evidence in this case you are convinced beyond a reasonable doubt that he is guilty." (Emphasis added.). The written jury instructions tendered to the jury stated, however, that the presumption is "not overcome *unless* from all the evidence in the case you are convinced beyond a reasonable doubt that he is guilty." (Emphasis added.) In addition, the court had provided jurors with the same admonishment during *voir dire*. Under these circumstances, defendant cannot show plain error.

¶ 19 Next, we consider whether our prior determination that the trial court erroneously admitted the note written by J.M. warrants reversal. To preserve an objection to the admission of evidence, a defendant must both object at trial and in a post-trial motion. *People v. Leach*, 2013 IL 111534, ¶ 60. Defendant failed to do so. Instead, defendant argues in a conclusory fashion that the erroneous admission of J.M.'s note constitutes plain error because "the State used the letter to bolster the victim's credibility under circumstances where there was no corroboration by physical evidence." We have already found that the evidence was not closely balanced and defendant has cited no authority for the proposition that this satisfies the second prong of the plain-error doctrine (see Ill. S. Ct. Rule 341(h)(7) (eff. June 4, 2008)). Accordingly, defendant has failed to demonstrate that this constitutes reversible error.

¶ 20 In our prior opinion, we also suggested that prosecutorial misconduct occurred during closing arguments. Specifically, the prosecutor improperly instructed the jurors, as laymen, to compare the handwritten note "Jose's Stuff" on a CD containing pornographic material, to defendant's handwritten signature on the *Miranda* waiver form. Once again, defendant asserts that this unpreserved error amounted to plain error. Again, the evidence was not closely balanced. In addition, this improper argument was most relevant to defendant's child pornography conviction, which we have already vacated. Although defendant also asserts that the State argued the visual recording buttressed the victim's testimony, defendant has provided no basis for finding that the jury would actually find the video of an anonymous female would buttress the victim's testimony regarding the specific events that happened to her, notwithstanding the State's closing argument that the jury should do so. Furthermore, defendant offers only a conclusory assertion that the error at issue satisfies the second prong of the plain error doctrine. See Ill. S. Ct. 341(h) (7) (eff. Feb. 6, 2013). Accordingly, defendant has not demonstrated that reversal is warranted.

¶ 21 We now consider for the first time defendant's contention that he was denied his sixth amendment right to a public trial. Specifically, defendant asserts his right to a public trial was denied when the trial court excluded non-witness family members from the courtroom during jury selection without making a record of the court's basis for doing so. With that said, defendant overlooks that the party seeking review has an obligation to make an adequate record and preserve his contentions for review. *People v. Townsend*, 275 Ill. App. 3d 200, 206 (1995); *People v. Chambers*, 258 Ill. App. 3d 73, 82 (1994); *People v. Rosa*, 206 Ill. App. 3d 1074, 1081 (1990). As defendant acknowledges, the transcript of the jury selection is silent with respect to his contention. Defendant did not make an adequate record of the courtroom's composition at

the time jury selection was happening. In addition, the parties have not entered into any cognizable substitute for that record as provided by Illinois Supreme Court Rule 323 (eff. Dec. 13, 2005). While defendant characterizes this event as the "exclusion" of family members, the State portrays the absence of defendant's family members somewhat differently. The State has maintained both at the hearing on defendant's motion for a new trial and now, that the prospective jurors occupied the entire courtroom and, once space became available, the family was permitted to enter. The parties' post-trial observations at the hearing on defendant's motion for a new trial are far too speculative for us to rely on with any confidence. Under these circumstances, the record does not show whether defendant's family members were actually excluded from the courtroom. As a result, we find no error.

¶ 22 Finally, we review defendant's ineffective assistance of counsel claims. Defendant asserts that trial counsel was ineffective for failing to object to (1) the admission of Zuccaro's inadmissible evidence regarding J.M.'s outcry; (2) the admission of collateral evidence regarding defendant's adult pornography collection; (3) testimony and closing argument suggesting that defendant destroyed evidence; and (4) the State's questioning of defendant regarding the credibility of an assistant State's Attorney and a police officer. Constitutional claims such as these are reviewed *de novo*. *People v. Hale*, 2013 IL 113140, ¶ 15. To demonstrate that counsel was ineffective, a defendant must demonstrate that (1) counsel's performance fell below an objective standard of reasonableness; and (2) a reasonable probability exists that the result of the proceeding would have been different but for counsel's unprofessional errors. *People v. Henderson*, 2013 IL 114040, ¶ 11. Courts may dispose of ineffective assistance of counsel claims by considering the prejudice prong first. *Hale*, 2013 IL 113140, ¶ 17.

¶ 23 Assuming counsel was deficient in these respects, defendant cannot demonstrate that a reasonable probability exists that the result of trial would have been different absent these deficiencies. As stated, the evidence was not closely balanced. In addition, while defendant asserts the admission of Zuccaro's testimony regarding J.M.'s outcry was particularly harmful because it was the only evidence corroborating J.M.'s testimony that videotapes recorded the sex acts, defendant was not charged with making videotapes of J.M. and J.T. He was charged with making sexual contact with them. In addition, it was not the only evidence corroborating J.M.'s testimony that the acts were recorded, as J.T. identified the video camera that defendant had J.T. use to record sexual activity between defendant and J.M. Thus, we are not persuaded that this corroboration made Zuccaro's testimony particularly harmful. In addition, while defendant argues that evidence regarding his adult pornography was particularly prejudicial to his child pornography conviction, we have already vacated that conviction.

¶ 24 For the foregoing reasons, we vacate defendant's conviction and sentence for criminal sexual assault under Count XIII as well as defendant's conviction for child pornography. We affirm the trial court's judgment in all other respects.

¶ 25 Affirmed in part and vacated in part.