2012 IL App (1st) 100274-U

FIFTH DIVISION
July 13, 2012

No. 1-10-0274

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. 09 CR 14732
	)	
MICHAEL SCHMITZ,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Epstein and Justice Howse concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial court did not violate Illinois Supreme Court Rule 431(b), and defendant was properly subject to a three-year term of MSR; judgment affirmed.

¶ 2 Following a jury trial, defendant Michael Schmitz was found guilty of aggravated driving while under the influence of alcohol (DUI) and sentenced as a Class X offender to 6 1/2 years' imprisonment. On appeal, defendant contends that he should receive a new trial because the trial court violated Illinois Supreme Court Rule 431(b) (eff. May 1, 2007) during jury selection. Defendant also contends that his mandatory supervised release (MSR) term should be reduced

from three to two years based on the underlying felony rather than his status as a Class X offender. We affirm.

¶ 3 Defendant was charged with multiple counts of aggravated DUI. His trial began on November 23, 2009, with the selection of the jury. The trial court admonished the jurors that:

> "Some things are always the same. And among them are that a criminal trial begins with the person accused of a crime presumed to be innocent. This is how a criminal trial starts. Whoever is accused of a crime walks into a court presumes to be innocent. We don't take the position that well, the accused must have done something wrong or else they wouldn't be held to trial. Somebody must have done something wrong or else there wouldn't be a trial. An accused begins a criminal trial in our country presumed to be innocent.
>
> Is there anybody here that has a problem with that proposition of American justice that when a criminal trial starts, the accused is presumed to be innocent. This is how the trial begins. If you have a problem with that, please raise your hand.
>
> No hands are raised.
>
> ***
>
> The only way you can be guilty again is the government who brought the charge against the accused can prove the accused guilty beyond a reasonable doubt. The government has the burden of proof. They have to prove the case beyond a reasonable doubt. You can't guess someone guilty, or think they're guilty, or make a

hunch about it. The only way someone could ever be guilty is if the government who brought the charge can prove their case beyond a reasonable doubt.

Is there anybody here who has a problem with what [*sic*] proposition, that the only way someone could be guilty in a criminal case is if the government who brought the charge can prove guilt beyond a reasonable doubt? If you have a problem with that, please raise your hand.

No hands are raised.

The last proposition I will discuss with you is that in a criminal trial, the accused does not have to prove their innocence. An accused does not have to testify. They don't have to call witnesses on their own behalf. An accused doesn't have to prove anything. In a criminal trial, the burden of proof is on the government. They have to prove guilt beyond a reasonable doubt and the accused doesn't have to prove anything at all.

Civil cases are difference [*sic*]. There, the government doesn't have to get involved. It's a different standard of proof. The accused may -- whoever is the complainant or the defendant may be called to testify. But a criminal trial is entirely different. The burden of proof is on the government. They brought the charge. They have to prove their case. An accused doesn't have to prove anything at all.

> With that said, is there anyone here who would hold it against the accused if they did not testify, which is their right, or didn't call witnesses on their own behavior [*sic*], anybody who would be prejudiced if the defendant didn't testify or didn't call witnesses, which is their right? If you have feelings like that, please raise your hand."

In response to the last question, one person raised his hand, who was subsequently stricken for cause.

¶ 4 After the jury was impaneled and trial commenced, the evidence showed that police observed defendant parked in the 6600 block of South Mozart Street in Chicago at about 11 p.m. on July 16, 2009. Defendant was sitting in the driver's seat of the vehicle with the keys in the ignition and the radio on, but the lights were off and the car was not running. After police determined that defendant did not have a driver's license or insurance, defendant was instructed to exit his vehicle, and, when he complied, police saw an empty beer bottle on the passenger's side floor. Defendant had to use the vehicle as support as he exited his vehicle and his speech was slurred. He also was very talkative, had blood shot eyes, and failed each sobriety test he was asked to perform. Without attempting to start the vehicle, police removed the keys from the ignition. According to police, the key that was in the ignition appeared to be a normal car key and there was no damage to the ignition or steering column. Defendant was subsequently transported to the police station where he admitted to drinking four beers and submitted to a breathalyzer test, which determined that his blood alcohol level was .263.

¶ 5 Susan Walker, defendant's girlfriend, testified on behalf of defendant that on July 16, 2009, Walker, defendant, and two other individuals purchased liquor and went back to her residence at 6624 South Mozart Street and began drinking. Walker drove defendant's vehicle and

parked it in the street. Walker's ex-boyfriend arrived at her residence and he and defendant got into a fight over her. To avoid a conflict, Walker left house keys with defendant, put him into his vehicle where he fell asleep, and returned to her residence to try to convince her ex-boyfriend to leave. Walker claimed that there was only one set of keys to defendant's vehicle, and that while defendant was asleep in the vehicle, she had the keys. She further claimed that prior to the incident in question, someone had broken into the vehicle and damaged the ignition. Following that incident, the radio and window could be operated if another set of keys was inserted into the ignition. However, the ignition key was still needed to start the vehicle.

¶ 6 After closing arguments, the judge instructed the jury that:

> "The defendant is presumed to be innocent of the charges against him. This presumption remains with him throughout ever [*sic*] stage of the trial and during your deliberations on your verdict, and is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt he is guilty."

The jury found defendant guilty of aggravated DUI.

¶ 7 On appeal, defendant contends a new trial is warranted by the trial court's failure to comply with Rule 431(b). He specifically maintains that the trial court's instructions improperly implied that defendant could have lost his presumption of innocence on the charges anytime after the beginning of trial, and that the trial court failed to ask whether the jury both understood and accepted all of the principles set forth in Rule 431(b) as derived from *People v. Zehr*, 103 Ill. 2d 472 (1984).

¶ 8 Initially, the State contends, and defendant concedes, that he forfeited this issue by failing to make an objection and include the issue in his posttrial motion. Nevertheless, defendant asks this court to review the issue under the first prong of the plain error doctrine, which allows us to

review an unpreserved error where the evidence is closely balanced. *People v. Davis*, 405 Ill. App. 3d 585, 590 (2010). The first step in a plain error analysis requires us to determine whether any error occurred at all (*People v. Thompson*, 238 Ill. 2d 598, 613 (2010)), and we find no error here.

¶ 9 We observe that the State does not specifically argue that the trial court complied with Rule 431(b) but, instead, assumes *arguendo* that the trial court erred and contends that no plain error occurred because the evidence of defendant's guilt was not closely balanced. We could accept the State's assumption *arguendo* and consider the issue accordingly. *E.g.*, *People v. Ramsey*, 239 Ill. 2d 342, 437-38 (2010). However, we are not required to accept the State's assumption or concession. See *e.g.*, *People v. Sykes*, 2012 IL App (4th) 100769, ¶22. For the reasons that follow, we find that the trial court sufficiently complied with Rule 431(b) and, even if a violation could be found, the evidence was not closely balanced to invoke plain error.

¶ 10 Rule 431(b) requires the trial court to ask potential jurors if they understand and accept the following principles: (1) the defendant is presumed innocent of the charges against him; (2) before a defendant is convicted, the State must prove his guilt beyond a reasonable doubt; (3) the defendant is not required to offer any evidence on his own behalf; and (4) the defendant's failure to testify cannot be held against him. The trial court is required to ask potential jurors if they understand and accept each principle and provide an opportunity to respond to each concept. Ill. S. Ct. R. 431(b) (eff. May 1, 2007); *People v. Calabrese*, 398 Ill. App. 3d 98, 120 (2010).

¶ 11 We first reject defendant's contention that the trial court improperly implied that his presumption of innocence could be lost after the start of trial. The court's statement that the "trial begins with the person accused of a crime presumed to be innocent," does not either state, convey or imply that this presumption is limited or fails to follow defendant throughout all steps of the proceedings.

¶ 12 Next, defendant contends that the court's failure to explicitly ask jurors if they both "understand" and "accept" the *Zehr* principles constitutes reversible error. In support of his claim, defendant relies primarily on *Thompson*, which held that the trial court erred because it failed to admonish prospective jurors on all four principles and neglected to ask them if they "accepted" those principles as required by Rule 431(b). *Thompson*, 238 Ill. 2d at 607. Nevertheless, the *Thompson* court found that the court's violation of Rule 431(b) did not automatically result in a biased jury or render the defendant's trial unfair, and thus found that there was no plain error. *Thompson*, 238 Ill. 2d at 610-12.

¶ 13 This court has addressed this exact issue in the wake of *Thompson* and repeatedly upheld instructions that do not mirror verbatim the language of Rule 431(b). In *People v. Martin*, 2012 IL App (1st) 093506, ¶78, the trial court asked the jurors whether they "had any quarrel" with the *Zehr* principles. In *People v. Quinonez*, 2011 IL App (1st) 092333, ¶44, the trial court asked the jurors if they "had a problem" or "disagreed" with the principles. Similarly, in *People v. Digby*, 405 Ill. App. 3d 544, 548 (2010), the trial court asked the jurors whether they "had a problem" with certain principles, if they "disagreed" with them, or whether they would hold defendant's failure to testify against him. In each case, the language used by the trial court was found sufficient to indicate that the court was asking them whether they understood and accepted the *Zehr* principles, and thus no error was found. *Martin*, 2012 IL App (1st) 093506 at ¶78; *Quinonez*, 2011 IL App (1st) 092333 at ¶50; *Digby*, 405 Ill. App. 3d at 548. We likewise have rejected the contention that the court commits error by combining two or more *Zehr* principles into one inquiry. *Davis*, 405 Ill. App. 3d at 589-90.

¶ 14 We are persuaded by the rationale in these post-*Thompson* opinions. We thus find that the language used by the court here, asking prospective jurors whether they had a problem with certain principles or would hold defendant's failure to present evidence or testify against him,

showed that the trial court was asking them whether they understood and accepted those principles.

¶ 15 Consequently, we find no error with respect to the trial court's Rule 431(b) admonitions to the jury, and, even if we did, they would nevertheless fail to rise to the level of plain error where the evidence in this case was not closely balanced. This is particularly true where the evidence here showed that police observed defendant in the driver's seat of a vehicle with the key in the ignition, and defendant admitted to drinking alcohol, had bloodshot eyes, slurred speech, failed all the field sobriety tests, and had a blood alcohol level of .263. The fact that defendant presented evidence that the key in his possession was not a car key does not serve to make the evidence close, especially here where that opposing evidence was not worthy of belief. See *People v. Pickens*, 274 Ill. App. 3d 226, 229-30 (1995) (finding an alleged error did not amount to plain error despite the fact that defendant presented opposing evidence, where that evidence was not credible).

¶ 16 Defendant finally contends that the three-year term of MSR that attached to his Class X sentence is void and should be reduced to two years because he was convicted of a Class 2 offense. Although a void sentence can be challenged at any time, we review the sentence to assess whether it is actually void. *People v. Balle*, 379 Ill. App. 3d 146, 151 (2008). For the reasons that follow, we find that it is not.

¶ 17 Section 5-8-1(d) of the Unified Code of Corrections (Code) (730 ILCS 5/5-8-1(d) (West 2008)), provides that the MSR term is three years for a Class X felony and two years for a Class 2 felony. Since defendant was convicted of a Class 2 felony, he maintains that he is only subject to a two-year term of MSR, relying on *People v. Pullen*, 192 Ill. 2d 36 (2000). *Pullen*, however, has been fully addressed by this court and found not to change the conclusion that a defendant sentenced as a Class X offender shall receive the same three-year MSR term imposed on

defendants convicted of Class X felonies. See *People v. Brisco*, 2012 IL App (1st) 101612, ¶62; *People v. Rutledge*, 409 Ill. App. 3d 22, 26 (2011); *People v. Lee*, 397 Ill. App. 3d 1067, 1073 (2010); and *People v. McKinney*, 399 Ill. App. 3d 77, 83 (2010). We agree with these decisions, and likewise conclude that the three-year MSR term was correctly applied here. In so finding, we further note that defendant's argument that the doctrine of lenity requires that he be sentenced to the two-year MSR term has been rejected by this court. See *People v. Allen*, 409 Ill. App. 3d 1058, 1078 (2011).

¶ 18 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 19 Affirmed.