FIRST DIVISION
May 7, 2012

No. 1-10-1840

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CR 15656
	)	
JAMES SEVIER,	)	Honorable
	)	John Joseph Hynes,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

ORDER

Held: We affirmed defendant's convictions of attempted murder and armed robbery where he forfeited review of the trial court's alleged Rule 431(b) violations and failed to show plain error.

¶ 1 A jury convicted defendant, James Sevier, of one count of attempted murder of a peace officer and one count of armed robbery and the trial court sentenced him to consecutive terms of 80 years' imprisonment for the attempted murder and 30 years' imprisonment for the armed robbery. On appeal, defendant contends the trial court violated Illinois Supreme Court Rule 431(b) (eff. May 1, 2007) by failing to ask the potential jurors during *voir dire* whether they understood and accepted

all four principles set forth in *People v. Zehr*, 103 Ill. 2d 472 (1984), resulting in a biased juror, Adrienne Tong, sitting on the panel. We affirm.

¶ 2 During jury selection, the trial court admonished the entire venire as follows:

> "Under the law the defendant is presumed to be innocent of the charges against him. This presumption remains with him throughout every stage of the trial and during your deliberations on the verdict and is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty.
>
> The State has the burden of proving the guilt of the defendant beyond a reasonable doubt and this burden remains on the State throughout the case. The defendant is not required to prove his or her innocence, nor is he required to present any evidence on his own behalf. The defendant may rely on the presumption of innocence."

¶ 3 Subsequently, the first panel of potential jurors, including Adrienne Tong, was given the following admonishments by the trial court:

> "Do you understand that you must follow the law as I give it to you regardless of what you think the law is or should be? Does anyone have a problem with that proposition of law? Let the record reflect no hands are raised.
>
> And do you understand that the defendant is presumed to be innocent of the charges against him and that presumption remains with the defendant throughout the trial and is not overcome unless by your verdict you find that the State has proven the defendant guilty beyond a reasonable doubt? Does anyone have a problem with that proposition of law? Let the record reflect no hands are raised.

Does anyone have any problem with the proposition that the State has the burden of proving the guilt of the defendant beyond a reasonable doubt and this burden remains with the State throughout every stage of the trial? Does anyone have any problem with that proposition of law? The record will reflect there are no hands raised.

Do you understand that the defendant is not required to prove his innocence or offer any evidence on his own behalf? Does anyone have a problem with that proposition of law? Let the record reflect no hands are raised.

Do you understand that the defendant has the absolute right to remain silent? He may elect to sit there, not testify in his own defense and rely on the presumption of innocence. You may draw no inference from that fact, the fact that the defendant chooses to remain silent either in favor of or against the defendant if he elects to remain silent. Does anyone have a problem with that proposition of law? Let the record reflect there are no hands raised."

¶ 4 Later, during individual *voir dire*, Ms. Tong answered several questions posed by the trial court, including:

"Q. Do you have any disagreement with any of the principles of law that I have stated so far?

A. No.

Q. And is there any reason at all that you can think of why you cannot give both sides a fair trial in this case?

A. No.

Q. And will you give both sides a fair trial in this case?

A. Yes."

¶ 5 After the trial court finished with individual *voir dire* of the first panel of potential jurors, defense counsel asked whether anybody "thinks that somebody who is charged with a crime must take the stand?" One of the potential jurors stated she was biased in favor of the police and that she would take a negative view of defendant's failure to testify. Defense counsel asked if anyone else felt the same way. Ms. Tong stated, "I was just going to say, kind of reiterate what she said. If he doesn't take the stand it might have an impact on me."

¶ 6 Immediately following Ms. Tong's response, the trial court addressed the panel of potential jurors as follows:

"I am going to ask all of you again here the basic principle of law and ask if you can put any of your personal feelings aside and judge this case based on the law that I give you. And you understand, as I have told you before, that the defendant in a criminal case does not have to testify and that fact cannot be held against him. Is there anybody here, you can raise your hand, that has a problem with that proposition of law?"

¶ 7 One of the potential jurors, Ms. Hletko, raised her hand. The trial court then asked:

"Other than Ms. Hletko, does anybody have a problem with that proposition of law? Can you put aside any of your personal feelings and keep an open mind in this case, the rest of you, and decide this case solely from the evidence that is presented in this witness stand and the law that I give you, one of those laws being that you can't hold the defendant, can't hold the fact that the defendant doesn't testify against him. Can you all abide by those

principles? Is there anyone with a problem with that? Let the record reflect that there are no hands raised."

¶ 8 Defense counsel subsequently engaged in the following conversation with Ms. Tong:

"Q. And do you think that your personal feelings would make it difficult to you to give [defendant] a fair trial if he chooses not to take the stand?

A. I wouldn't say it would make it difficult, no.

Q. So, it wouldn't matter to you one way or the other if he decided not to testify?

A. Well, that's what I was saying earlier. I would hope that it wouldn't matter.

Q. But you think it might.

A. It could be possible."

¶ 9 Defense counsel subsequently asked the panel, "Is there anyone for any reason that we haven't brought up yet who thinks they could not give either side, either the State or defense a fair trial in this case?" None of the potential jurors responded to defense counsel's question. Defense counsel did not ask to excuse Ms. Tong or object to her being selected for the jury. Ms. Tong was selected as a juror for defendant's trial.

¶ 10 At trial, Anthony Lisle testified that on June 26, 2007, he was working as a store manager at an Aldi grocery store located on 120th Street and Pulaski Road in Alsip, Illinois. His shift was from 5 a.m. to 11 p.m. Shortly after the store opened, Mr. Lisle was throwing away some garbage when he saw a man in a nearby field wearing dark clothes and a dark hooded sweatshirt. Mr. Lisle went inside after throwing out the garbage and, soon thereafter, the man in the dark clothing confronted him in the fourth aisle near the ice-cream. He was holding a scarf over his nose and

mouth and mumbling that he needed ice for his bloody nose. Mr. Lisle told him he had no ice. The man left the store.

¶ 11 Mr. Lisle testified that shortly before 7 p.m. that evening, he was standing in the rear of the store when he saw the man in dark clothing approximately 50 feet away from him in the fourth aisle. Mr. Lisle described him as an African-American man wearing dark pants, a dark hooded sweatshirt with the hood over his head, black shoes with a red Nike logo, and a black Zorro-type mask covering his eyes and face. Mr. Lisle saw the man pull out a gun and hold it up in the air. They made eye contact and then the man began running toward Mr. Lisle. Mr. Lisle ran to the back room and pushed the silent alarm, then ran to the back door and kicked it open, setting off an audible panic alarm. Mr. Lisle proceeded to run outside, where he fell face-first near the dumpster.

¶ 12 Mr. Lisle testified that as he tried to stand up, he turned around and saw the man pointing the gun at him. The man told him to get back in the store. Mr. Lisle obeyed the command. Inside the store, the man told Mr. Lisle to take him to the safe. Mr. Lisle led him to the office where the safe was located. After Mr. Lisle opened the safe, the man grabbed the money and put it in a small, black duffle-type bag. He then demanded the money from the cashier's drawers. Mr. Lisle explained to him that he did not have the passwords to open the other cashier's drawers, but that he did have access to his personal drawer in the office. Mr. Lisle then gave the man the money from his personal cashier's drawer. The man forced Mr. Lisle towards the back room, then told Mr. Lisle to stop, turn around, and walk to the sales floor. The man ran out the back door. Mr. Lisle testified that Aldi's had security cameras, which captured the incident. Mr. Lisle identified the surveillance video and it was entered into evidence without any objection.

¶ 13 Officer Mark Miller testified that at approximately 6:55 p.m. on June 26, 2007, he received a call about a retail theft involving a man with a gun at the Aldi at 120th Street and Pulaski Road. Officer Miller arrived there about two minutes later in his marked police car.

¶ 14 Officer Miller testified that when he arrived, he observed a man in black clothing jumping off the loading dock of the back porch of the service door. Officer Miller yelled, "Police," and the man looked at him and then ran northbound. Officer Miller pursued him on foot, but lost sight of him for about 10 seconds. Officer Miller continued running northbound towards 120th Street, where he encountered a man on a bicycle at the corner of 120th Street and Karlov Avenue. The person on the bike pointed towards the backyard of 11963 South Karlov Avenue. Officer Miller entered the yard and heard a female voice saying, "Look out, he has a gun. He is going to shoot you."

¶ 15 Yvonne Shepard testified that at approximately 7 p.m. on June 26, 2007, she was on the back deck of her home at 119th Street and Karlov Avenue with her four-year-old daughter and some other kids from the neighborhood, when she saw a person dressed in a black hooded sweat shirt, ski mask, black pants, and black shoes coming around the back end of her neighbor's garage. He had a gun in his hand. Then Ms. Shepard saw a police officer at the front of the garage with his gun out. Ms. Shepard screamed out to the police officer, "Watch it, he's got a gun." Both the man dressed in black and the police officer looked at her. The man in black shot at the police officer, who returned fire. Ms. Shepard grabbed the kids and ran to the basement.

¶ 16 Officer Miller testified that after he heard Ms. Shepard scream, he looked in the direction of the voice and saw her standing on the back porch of 11959 South Karlov Avenue. Then he looked in the direction she was looking and saw the man in black clothing (wearing a black hooded

sweatshirt and black pants and black and red shoes), charging at him from less than 10 feet away and firing his gun.

¶ 17 Officer Miller testified he returned fire and moved for cover. He exited the yard and went to the south side of a garage on 120th Street. The man in black clothing leaned around the northeast corner of the garage and fired back at Officer Miller, who again returned fire. They were about 40 feet away from each other. Officer Miller eventually moved to a backyard gate and began reloading his gun. As he was reloading, he looked up and saw the man in black clothing standing approximately four feet away. The man said, "You're dead, copper." At this point, Officer Miller was able to see the man's face, and he made an in-court identification of him as the defendant.

¶ 18 Officer Miller testified that defendant fired his gun at him, but that the shot missed, and then the officer ran into a backyard for cover. Defendant fled eastbound on 120th Street to a bank parking lot. Officer Miller chased him on foot and saw him get into the rear passenger side of a small, white, four-door vehicle at 119th Street and Pulaski Road. There was a driver in the vehicle but no other passengers. The vehicle left the scene going southbound on Pulaski Road. Multiple officers in marked police cars pursued the vehicle. Officer Miller was picked up by his sergeant in the bank parking lot at the corner of 119th Street and Pulaski Road and they, too, pursued the vehicle. The vehicle entered a Jewel food store parking lot and collided with another police car. When Officer Miller arrived at the Jewel, he saw defendant laying on the ground with his hands underneath his body. Officers asked him multiple times to show them his hands, but he refused. The officers tried to physically pull his hands out from underneath him, but he resisted and began kicking and moving around. Officers then tasered defendant three times, until he stopped resisting and they were able

to move his hands from underneath him and put him in handcuffs. Officer Miller testified that a handgun was recovered from inside the white vehicle, which he identified as the gun that defendant used to fire at him.

¶ 19 Officer James Portincaso testified that at approximately 6:55 p.m. on June 26, 2007, he responded to a call of a retail theft in progress with a man with a gun at the Aldi at 120th Street and Pulaski Road. Officer Portincaso arrived and parked his police car at the 11900 block of Karlov Avenue, where he heard several gunshots coming from the corner house at 120th Street and Karlov Avenue. Officer Portincaso followed the sound of the gunshots and entered the yard at 11963 South Karlov Avenue with his gun drawn. As he entered the yard, he saw a subject about 25 yards away, matching the description of the offender, hiding behind the garage. He was dressed in all black, black pants, black hooded sweatshirt. Officer Portincaso made an in-court identification of him as the defendant.

¶ 20 Officer Portincaso testified he screamed at defendant, "Police department, get down on the ground, get down on the ground." Defendant began to get down on one knee, but when he got halfway down, he stopped and pulled out his right hand which contained a gun. Defendant yelled, "F*** you" and shot at Officer Portincaso, who returned fire and began to back up. Defendant ran around the side of the garage and then south towards 120th Street. Officer Portincaso chased defendant on foot and saw him run northbound through a bank parking lot and enter the rear of a white, four-door vehicle on 119th Street.

¶ 21 Officer Jose Neverez testified that at approximately 7:04 p.m. on June 26, 2007, he responded to a call of an armed robbery and shots fired at police officers in the vicinity of 120th

Street and Pulaski Road in Alsip. Officer Neverez observed a white vehicle traveling southbound on Pulaski Road at a high rate of speed. He followed the vehicle to 120th Street, where it turned into a Jewel parking lot and struck another police vehicle. Officer Neverez exited his police car and looked inside the white vehicle, where he saw a female driver and he also saw defendant in the back seat wearing black clothing. Several officers ordered defendant out of the car, but he refused to move. Officers physically removed him from the vehicle. Defendant refused to go to the ground, so the officers physically pushed him down. Defendant refused to show his hands, and he was then tasered. Defendant stated there was a weapon in the back seat. A revolver and black backpack were recovered from the back seat of the vehicle.

¶ 22 The State entered a document from the secretary of state showing that the vehicle in question was a 1998 Chrysler Sirrus that was owned by defendant.

¶ 23 Larry Olson, a crime scene investigator, testified that on June 26, 2007, he received a call to process the crime scene at the 120th block of Komensky Street relating to shots fired at police officers. Mr. Olson first went to 4036 West 120th Street, where he found "many" spent shell casings laying on the ground. He then went to 11963 South Karlov Avenue, where he found more spent shell casings on the north side of the garage (a total of 29 from the two addresses). Mr. Olson also recovered a black ski mask in the middle of the grass and a plastic cell phone cover from the base of the garage on the north side.

¶ 24 Sergeant Ryan Oganovich testified he was an evidence technician on June 26, 2007, when he responded to a call involving an armed robbery at the Aldi at 120th Street and Pulaski Road. He recovered a black cash drawer from the safe room at the Aldi. He also processed the white vehicle

at the Jewel. Inside the vehicle, he recovered a black backpack containing United States currency and a black revolver with five spent shell casings. There was also a little pink bag inside the vehicle that contained another gun with a missing cylinder, and some extra rounds.

¶ 25 Sergeant Oganovich testified that when he returned to the police station to inventory the items, he examined clothing, gym shoes, and a cellular phone that had also been recovered from defendant. He also saw a phone cover at the station. Sergeant Oganovich was shown the phone and the phone cover in court, and he demonstrated that the cover fit the phone.

¶ 26 Defendant did not testify.

¶ 27 After closing arguments, the trial court instructed the jury, in pertinent part, as follows:

> "The defendant is presumed to be innocent of the charges against him. This presumption remains with him throughout every stage of the trial and during your deliberations on a verdict and is not overcome unless from all the evidence in this case you are convinced beyond a reasonable doubt that he is guilty.
>
> The State has the burden of proving the guilt of the defendant beyond a reasonable doubt and this burden remains on the State throughout the case. The defendant is not required to prove his innocence. The fact that the defendant did not testify must not be considered by you in any way in arriving at your verdict."

¶ 28 The jury returned verdicts finding defendant not guilty of the attempted murder of Officer Portincaso, guilty of the attempted murder of Officer Miller, and guilty of armed robbery. The trial judge sentenced defendant to consecutive sentences of 80 years' imprisonment for the attempted murder and 30 years' imprisonment for the armed robbery. Defendant filed this timely appeal.

¶ 29 Defendant contends the trial court violated Rule 431(b) when it failed to ask the potential jurors during *voir dire* whether they understood and accepted all four principles set forth in *Zehr*. Where an issue concerns compliance with a supreme court rule, review is *de novo*. *People v. Ware*, 407 Ill. App. 3d 315, 353 (2011).

¶ 30 In *Zehr*, our supreme court held that a trial court erred during *voir dire* by refusing defense counsel's request to ask questions about the State's burden of proof, the defendant's right not to testify and his right not to have to offer evidence in his own behalf, and the presumption of innocence. *Zehr*, 103 Ill. 2d at 476-78. The supreme court held, "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.* at 477.

¶ 31 To ensure compliance with *Zehr*, the supreme court amended Rule 431(b) in 1997 to provide, "[i]f requested by the defendant," the court shall ask the prospective jurors whether they understand and accept the *Zehr* principles. Ill. S. Ct. R. 431(b) (eff. May 1, 1997). The rule sought "to end the practice where the judge makes a broad statement of the applicable law followed by a general question concerning the juror's willingness to follow the law." Ill. S. Ct. R. 431, Committee Comments (eff. May 1, 1997).

¶ 32 Effective May 1, 2007, the supreme court again amended Rule 431(b), deleting the language "[i]f requested by the defendant" and leaving the remainder of the rule unchanged. Rule 431(b) now reads:

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

¶ 33 Thus, Rule 431(b) as amended, effective May 1, 2007, currently imposes a *sua sponte* duty on the circuit court to question each potential juror as to whether he understands and accepts the *Zehr* principles.

¶ 34 Defendant's trial took place after the effective date of the 2007 amendments. Therefore, the 2007 amended version of Rule 431(b) is controlling.

¶ 35 Defendant contends the trial court violated Rule 431(b) by failing to ascertain whether the potential jurors understood and accepted the *Zehr* principles. Defendant concedes he forfeited review by failing to object to the trial court's alleged failure to comply with Rule 431(b), but contends we should review for plain error.

¶ 36 Our supreme court recently addressed this issue in *People v. Thompson*, 238 Ill. 2d 598 (2010). In *Thompson*, the defendant, Angelo Thompson, was convicted of aggravated unlawful use of a weapon and sentenced to one year in prison. *Id.* at 601. On appeal, Mr. Thompson argued his

conviction should be reversed because the trial court failed to comply with Rule 431(b). *Id.* at 605. Specifically, the trial court did not question whether any of the prospective jurors understood and accepted that Mr. Thompson was not required to produce any evidence on his own behalf. *Id.* at 607. Further, the trial court did not ask the prospective jurors whether they accepted the presumption of innocence. *Id.* Mr. Thompson did not object to the alleged Rule 431(b) violation or include it in his posttrial motion but the appellate court found that the alleged error was subject to plain-error review. *Id.* at 605. The appellate court held that the trial court committed reversible error by failing to comply with Rule 431(b) and so reversed Mr. Thompson's conviction and remanded for a new trial. *Id.*

¶ 37 On appeal to the supreme court, the State contended that a violation of Rule 431(b) is not a structural error requiring automatic reversal. *Id.* In addressing the argument, the supreme court noted that it first must determine whether the trial court violated Rule 431(b). *Id.* at 606. The court analyzed Rule 431(b) and held, it "mandates a specific question and response process. The trial court must ask each potential juror whether he or she understands and accepts each of the principles in the rule. The questioning may be performed individually or in a group, but the rule requires an opportunity for a response from each prospective juror on their understanding and acceptance of those principles." *Id.* at 607. The supreme court held in the case before it, that the trial court failed to comply with Rule 431(b) by failing to question any of the prospective jurors whether they understood and accepted that Mr. Thompson was not required to produce any evidence on his own behalf and, whether they accepted the presumption of innocence. *Id.*

¶ 38 The supreme court held, though, that the trial court's failure to comply with Rule 431(b) did

not constitute a structural error. The supreme court noted that structural errors systemically erode the integrity of the judicial process, undermining the fairness of the defendant's trial. *Id.* at 608. "An error is typically designated as structural only if it necessarily renders a criminal trial fundamentally unfair or an unreliable means of determining guilt or innocence." *Id.* at 609. Errors have been recognized as structural only in a limited class of cases, including: a complete denial of counsel; trial before a biased judge; racial discrimination in the selection of a grand jury; denial of self-representation at trial; denial of a public trial; and a defective reasonable doubt instruction. *Id.*

¶ 39 The supreme court concluded:

> "Rule 431(b) questioning is simply one way of helping to ensure a fair and impartial jury. [Citation.] Despite the trial court's failure to comply with Rule 431(b) in this case, there is no evidence that defendant was tried by a biased jury. We also note that the trial court did address some of the Rule 431(b) requirements in its *voir dire* and *** the jury was admonished and instructed on Rule 431(b) principles.
>
> Although compliance with Rule 431(b) is important, violation of the rule does not necessarily render a trial fundamentally unfair or unreliable in determining guilt or innocence. We conclude that the trial court's violation of the amended version of Supreme Court Rule 431(b) in this case does not fall within the very limited category of structural errors and, thus, does not require automatic reversal of defendant's conviction." *Id.* at 610-11.

¶ 40 The supreme court also discussed whether the trial court's failure to comply with Rule 431(b) constituted plain error. *Id.* at 613. The plain-error doctrine is applied when: " '(1) a clear or obvious

error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.' " *Id.* (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)).

¶ 41 Mr. Thompson did not argue plain error under the first prong, but only argued under the second prong that the Rule 431(b) violation infringed his right to an impartial jury and thereby affected the fairness of his trial and the integrity of the judicial process. *Thompson*, 238 Ill. 2d at 613. The supreme court disagreed, noting it had equated the second prong of plain-error review with structural error. *Id.* at 613-14 (citing *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009)). The supreme court held:

> "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. Critically, however, defendant has not presented any evidence that the jury was biased in this case. Defendant has the burden of persuasion on this issue. We cannot presume the jury was biased simply because the trial court erred in conducting the Rule 431(b) questioning.
>
> * * *
>
> Our amendment to Rule 431(b) does not indicate that compliance with the rule is now indispensable to a fair trial. As we have explained, the failure to conduct Rule 431(b) questioning does not necessarily result in a biased jury, regardless of whether that

> questioning is mandatory or permissive under our rule. Although the amendment to the rule serves to promote the selection of an impartial jury by making questioning mandatory, Rule 431(b) questioning is only one method of helping to ensure the selection of an impartial jury. [Citation.] It is not the only means of achieving that objective. A violation of Rule 431(b) does not implicate a fundamental right or constitutional protection, but only involves a violation of this court's rules. [Citation.] Despite our amendment to the rule, we cannot conclude that Rule 431(b) questioning is indispensable to the selection of an impartial jury." *Thompson*, 238 Ill. 2d at 614-15.

¶ 42 The supreme court noted in the case before it, that the prospective jurors had received some, but not all, of the required Rule 431(b) questioning and had been admonished and instructed on Rule 431(b) principles. *Id.* at 615. The supreme court concluded Mr. Thompson had not established that the trial court's violation of Rule 431(b) resulted in a biased jury and therefore he failed to meet his burden of showing the error affected the fairness of his trial and the integrity of the judicial process. *Id*.

¶ 43 Finally, the supreme court declined Mr. Thompson's request to adopt a bright-line rule of reversal for any violation of Rule 431(b) to ensure that the trial courts will comply with the rule. *Id.* at 615-16.

¶ 44 In the present case, defendant contends the trial court failed to comply with *Thompson*'s dictate that Rule 431(b) mandates a "specific question and response process" in which the trial judge must ask each potential juror whether he or she both understands and accepts each of the four *Zehr* principles. See *Id*. at 607. Defendant contends the trial court erred when it merely asked whether

the venire had "any problem" with the *Zehr* principles. See *e.g. People v. Fountain*, 2011 IL App (1st) 083459-B, ¶ 43 (holding, "after *Thompson*, it is likely error, though not [necessarily] reversible error *** not to ask prospective jurors to respond to separate questions whether he or she 'understands' and 'accepts' each of the four principles."). However, there is a split of authority in the appellate court as to this issue, as some post-*Thompson* cases have upheld Rule 431(b) questioning asking potential jurors whether they "have a problem" or "disagree" or "have any quarrel" with the *Zehr* principles. See *e.g. People v. Martin*, 2012 IL App (1st) 093506, ¶ 78; *People v. Digby*, 405 Ill. App. 3d 544, 548-49 (2010).

¶ 45 We need not resolve the split in authority on this issue because, as in *Thompson*, defendant's failure to object at trial constituted a forfeiture of the trial court's alleged error in its Rule 431(b) questioning. Defendant seeks plain-error review. Defendant makes no argument that the case was closely balanced, so the alleged error is not reversible under the first prong. See also our recitation of the evidence *supra*, which shows that the case was not closely balanced.

¶ 46 Defendant contends, though, that the alleged error is reversible under the second prong, as he has met his burden of showing the error affected the fairness of his trial and the integrity of the judicial process. Specifically, defendant contends that due to the trial court's improper Rule 431(b) questioning, Ms. Tong failed to give any assurances that she accepted the fourth *Zehr* principle, *i.e.*, that defendant's failure to testify could not be held against him. Defendant contends Ms. Tong "made it clear that it was entirely possible that his failure to testify *would be* held against him. Nonetheless, she was seated on the jury, and [defendant] did not testify." (Emphasis in the original.) Defendant argues he "has therefore met his burden of showing that the court's failure to comply with Rule

431(b) resulted in a biased juror sitting on the panel."

¶ 47 We disagree. Defendant focuses on Ms. Tong's two isolated statements during *voir dire* that she "possibly" or "might" be impacted by defendant's failure to testify. However, in determining whether a venireperson's views would impair her performance as a juror, her remarks during *voir dire* must be considered not in isolation, but as a whole. *People v. Tenner*, 157 Ill. 2d 341, 362-63 (1993). As discussed above, the trial court began *voir dire* by instructing the entire venire as to three of the *Zehr* principles, specifically, defendant's presumption of innocence, the State's burden of proof, and defendant's right not to present evidence on his own behalf. Subsequently, the trial court instructed the first panel of potential jurors, including Ms. Tong, as to all four of the *Zehr* principles, including that defendant's right not to testify may not be held against him, and asked if anyone had any problem with any of those four principles. None of the prospective jurors, including Ms. Tong, raised their hands to indicate a problem. Later, during individual questioning by the trial court, Ms. Tong stated she did not disagree with any of the principles of law stated by the trial court and that she would give both sides a fair trial. Still later, during questioning by defense counsel, Ms. Tong stated defendant's failure to take the stand "might" have an impact on her. Immediately following this statement by Ms. Tong, the trial court addressed the entire panel and reiterated that "the defendant in a criminal case does not have to testify and that fact cannot be held against him." The court asked anyone who had "a problem with that proposition of law" to raise his or her hand. Only one potential juror, Ms. Hletko, raised her hand. The trial court then asked the rest of the panel if they could put aside any personal feelings, keep an open mind, and abide by the principle that they "can't hold the fact that the defendant doesn't testify against him." The court asked if anyone had "a

problem with that" and then noted for the record that no hands were raised. Thus, the trial court ensured that despite any personal qualms about defendant's failure to testify, Ms. Tong (and all other potential jurors except for Ms. Hletko), nevertheless, would put those feelings aside and abide by the principle that defendant's failure to testify may not be held against him.

¶ 48 Defendant points out, though, that his defense counsel subsequently asked Ms. Tong whether it would "matter" if defendant decided not to testify, and Ms. Tong stated she "hope[d] that it wouldn't matter" but it was "possible" that it might. Defendant contends these statements show Ms. Tong was biased against him. We disagree. Ms. Tong expressly told defense counsel that her personal feelings would not make it difficult to give defendant a fair trial, and her answers to defense counsel's questions were merely a reiteration of "what [she] was saying earlier." As discussed, she had earlier said that despite her personal feelings regarding a defendant's decision not to testify, she did not disagree with any of the principles of law stated by the trial court, which included that defendant's failure to testify may not be held against him. She had also indicated she would abide by the trial court's admonition not to hold defendant's failure to testify against him and that she would give both sides a fair trial.

¶ 49 Considered as a whole, Ms. Tong's remarks indicate she understood and accepted the *Zehr* principles and, in particular, that defendant's decision not to testify may not be held against him. In addition, after closing arguments, the trial court correctly instructed the jury on the *Zehr* principles, including "[t]he fact that the defendant did not testify must not be considered by you in any way in arriving at your verdict." In *Thompson*, the supreme court held that the giving of these same jury instructions was one of the factors supporting its holding that the trial court's violation of Rule

431(b) did not result in a biased jury. *Thompson*, 238 Ill. 2d at 615. Accordingly, contrary to defendant's argument, he has presented no evidence that Ms. Tong was biased in this case. Defendant makes no other arguments in support of plain-error review. Therefore, we affirm the trial court.

¶ 50 Affirmed.