2012 IL App (2d) 091000-U
No. 2-09-1000
Order filed June 15, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of De Kalb County.
Plaintiff-Appellee,	)	
v.	)	No. 05-CF-455
SCOTT A. CRAWFORD,	)	Honorable Kurt P. Klein,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Zenoff and Birkett concurred in the judgment.

ORDER

Held: The trial court's failure to question jurors during *voir dire*, pursuant to Supreme Court Rule 431(b), was not reversible error under the second prong of the plain-error rule because the defendant failed to establish that the jury was biased. The prosecutor's comments during rebuttal closing as to the credibility of a witness police officer, although improper, did not constitute plain error.

¶ 1 On August 3, 2009, following a trial *in absentia*, the defendant, Scott Crawford, was found guilty of driving while his driver's license was revoked (625 ILCS 5/6-303(d-3) (West 2004)). On September 9, 2009, the trial court sentenced the defendant to one year of imprisonment. The defendant appeals, alleging errors during *voir dire* and prosecutorial misconduct in closing argument.

On April 14, 2011, this court issued an order affirming the defendant's conviction. On March 28, 2012, the supreme court issued a supervisory order directing this court to vacate our decision and reconsider defendant's claims in light of its recent decision in *People v. Adams*, 2012 IL 111168 (2012). On reconsideration, we again affirm the defendant's conviction.

¶ 2 On July 29, 2005, the defendant was charged by information with driving while his license was revoked. He had been arrested on June 19, 2005, and released without bond. On May 16, 2006, the trial court set the trial date for August 14, 2006, and admonished the defendant that if he did not appear for trial, a warrant would issue for his arrest and the case would proceed to trial and sentencing in his absence. The defendant subsequently failed to appear for trial. On October 12, 2006, the trial court issued a warrant for the defendant's arrest. On September 25, 2008, the trial court found that the defendant was willfully avoiding trial and ordered that trial proceed in his absence.

¶ 3 On August 3, 2009, a jury trial commenced. At the beginning of jury selection, the trial court advised the prospective jurors that the defendant had voluntarily chosen to absent himself from the proceedings and that it was his "constitutional right to do that." The trial court also advised the prospective jurors that they should not consider the defendant's absence or hold it against the defendant or the State. The trial court further advised them of the charges against the defendant and asked the prospective jurors to raise their hand if they could not be fair or impartial for any reason. The trial court noted that none of the prospective jurors raised their hand.

¶ 4 Thereafter, *voir dire* started and twelve prospective jurors were called for questioning. The prospective jurors were questioned in three panels of four. Neither the State nor defense counsel requested the dismissal of any of the jurors. The three panels of four were ultimately selected as

jurors. During *voir dire*, defense counsel had advised all the jurors that the defendant had the right not to testify and that the failure to testify could not be held against him. When questioned by defense counsel, the jurors indicated that they did not have any problems with that assertion. Also upon questioning by defense counsel, the second and third panel of jurors indicated that they did not have a problem holding the State to their burden of proving the defendant guilty beyond a reasonable doubt.

¶ 5 Following opening statements, Sergeant Costliow of the De Kalb police department testified that on June 19, 2005, at 7 p.m., he was on patrol in a marked squad car when he noticed a 1966 black Plymouth Barracuda with an expired registration plate at the intersection of Dresser and 14th Streets. He ran the plates and learned that the car was registered to "Scott Crawford." The information also indicated that Crawford's license was revoked.

¶ 6 Sergeant Costliow conducted a traffic stop. The driver exited the vehicle and walked to the sidewalk. Sergeant Costliow testified that when the driver exited the vehicle, he recognized him from prior contact to be "Scott Crawford." Sergeant Costliow identified a booking photo of the defendant as the person who had exited the vehicle. Sergeant Costliow testified that he addressed the driver by the name of "Scott Crawford" and the driver responded to that name. The officer asked the defendant if he knew that his license was revoked and the defendant admitted that he knew. Sergeant Costliow asked the defendant for identification and an insurance card. The defendant did not produce any identification and stated that he did not have an insurance card. The officer arrested the defendant and transported him to the police department. Sergeant Costliow testified that Crawford's date of birth was March 1, 1971. The State admitted three exhibits: the defendant's booking photo, a certified driver's abstract showing that "Scott Crawford's" driver's license was

revoked, and a certified copy of the expired car registration for the 1966 Plymouth. The registration showed that the car was registered to the same "Scott Crawford" whose driver's license was revoked. The driver's abstract showed Crawford's date of birth to be March 1, 1971.

¶ 7 The defense rested without presenting any evidence. During closing argument, defense counsel stated:

> "MS. MC GUIRE [defense attorney]: *** This case seems very easy at first that someone is driving a car, the Sergeant sees that person, the registered owner of that car comes up revoked and that that person is Scott Crawford, my client.
>
> But what we have is a person who gets out of the car and represents himself to be Scott Crawford. We don't have any identification on that person. We simply have that person saying, 'I'm Scott Crawford,' and the Sergeant here saying, 'I know who he is and that's Scott Crawford.' We don't have any information other than that.
>
> The State has presented nothing to connect this person in this booking photo to the revoked driver's license of Scott Crawford issued by the Secretary of State of Illinois. I submit to you that the Sergeant's word is not proof beyond a reasonable doubt that that was in fact Scott Crawford driving that car that day and I ask that you find him not guilty. Thank you."

In rebuttal closing argument, the prosecutor advised the jury that they would be instructed that they were the judges of the believability of witnesses and must determine the weight to be given to a witness's testimony. The prosecutor further stated:

> "MR. ESCARCIDA [Assistant State's Attorney]: *** You will have to consider, of course, whether or not Sergeant Costliow is willing to risk his job and his badge to come in here and fabricate a story that he in fact took Scott Crawford into custody for that offense.
>
> * * *
>
> So, ladies and gentlemen, I ask you to actually also consider that instruction that [the trial court] will give you and ask yourselves if Sergeant Costliow has any motivation to come in here to fabricate some sort of charges against Scott Crawford."

Prior to deliberation, the trial court instructed the jury that the defendant was presumed innocent, the State had to prove the defendant guilty beyond a reasonable doubt, the defendant was not required to prove his innocence, and the defendant's failure to testify could not be held against him. The trial court also instructed the jury that they were the judges of the believability of witnesses and must determine the weight to be given to a witness's testimony. The jury found the defendant guilty of driving while his license was revoked and the defendant was subsequently sentenced to one year of imprisonment. Thereafter, the defendant filed a timely notice of appeal.

¶ 8 On appeal, the defendant argues that his conviction must be reversed and the case remanded for a new trial because (1) the trial court failed to question the prospective jurors pursuant to Supreme Court Rule 431(b) (eff. May 1, 2007) and (2) the prosecutor improperly bolstered Sergeant Costliow's credibility during rebuttal closing argument.

¶ 9 The defendant's first contention is that the trial court erred in failing to question the prospective jurors pursuant to Rule 431(b). Rule 431(b) provides:

> "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 defendant argues that the trial court did not mention any of these principles or ask the jurors whether they understood or accepted these principles. The defendant acknowledges that defense counsel did address a couple of the principles during *voir dire* but argues that this was insufficient to satisfy Rule 431(b).

¶ 10 At the outset we note that the defendant acknowledges that the issue is forfeited for purposes of appeal because he did not object to the Rule 431(b) violation at trial and did not raise the issue in a post-trial motion. We agree that the issue is forfeited. *See People v. Thompson*, 238 Ill. 2d 598, 611 (2010) (to preserve a claim for review a defendant must object at trial and include the issue in a written post-trial motion). Nonetheless, the defendant argues that we should address the issue under the plain-error doctrine.

¶ 11 The plain-error doctrine allows a defendant to bypass normal forfeiture principles when plain error occurs. Plain error occurs when the error is "clear and obvious" and (1) "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) "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." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 12 In the present case, the defendant contends that the error is reversible under the second prong of the plain-error review. Specifically, the defendant argues that the violation of Rule 431(b) infringed his right to an impartial jury, thus affecting the fairness of his trial and challenging the integrity of the judicial process. In *People v. Rogers*, 408 Ill. App. 3d 873, 878 (2011), this court explained:

> "Under the second prong of plain-error analysis, prejudice is presumed, regardless of how strong the evidence was, because of the importance of the right involved. [*People v.*] *Herron*, 215 Ill. 2d at 187. However, the defendant bears the burden of demonstrating that the error was so serious that it affected the fairness of his trial and challenged the integrity of the judicial process. *Thompson*, 238 Ill. 2d at 613. Although the purpose of Rule 431(b) questioning is to help ensure an impartial jury, it is not the only means to do so, and it is therefore not indispensable to a fair trial. [*Id.*] at 614. Thus, '[w]e cannot presume the jury was biased simply because the trial court erred in conducting the Rule 431(b) questioning.' [*Id.*] at 614. Therefore, in order to meet the burden of persuasion, a defendant alleging second-prong plain error for a Rule 431(b) violation must show that the violation resulted in a biased jury. [*Id.*] at 614-15."

¶ 13 In the present case, the defendant has not presented any evidence that the lack of Rule 431(b) questioning resulted in a biased jury. The defendant argues only that because the jury was not questioned pursuant to Rule 431(b), "there is no way of knowing whether [he] was tried by an impartial jury." Moreover, nothing in the record suggests that the jury was biased. During *voir dire*, the trial court advised the prospective jurors of the charges against the defendant and asked them to raise their hand if they could not be fair or impartial for any reason. The trial court noted that none

of the prospective jurors raised their hand. Defense counsel questioned three panels of jurors about the defendant's right to remain silent and two panels of jurors about the State's burden to prove the defendant guilty beyond a reasonable doubt. All the jurors indicated that they would not hold the defendant's failure to testify against him and the two panels questioned indicated that they did not have a problem holding the State to its burden of proof beyond a reasonable doubt. Further, defense counsel did not challenge or request the dismissal of any of the jurors. Finally, the trial court instructed the jury as to the Rule 431(b) principles at the close of trial and prior to deliberations. Accordingly, as the defendant bears the burden of persuasion, his failure to show bias precludes the second prong of plain-error doctrine from serving as a basis for excusing his procedural default. *Thompson*, 238 Ill. 2d at 615; *Rogers*, 408 Ill. App. 3d at 878.

¶ 14 The defendant's second contention on appeal is that reversible error occurred when the prosecutor improperly bolstered Sergeant Costliow's credibility during rebuttal closing argument by arguing that the officer would not risk his job or his badge to fabricate charges against the defendant. The prosecution is afforded wide latitude in making closing arguments. *People v. Williams*, 192 Ill. 2d 548, 573 (2000). A prosecutor may denounce the accused, reflect upon the credibility of the witnesses, and urge the fearless administration of justice if based on the facts in the record or reasonable inferences drawn therefrom. *People v. Bennett*, 304 Ill. App. 3d 69, 72 (1999).

¶ 15 The defendant acknowledges that he failed to preserve the alleged error in closing argument for appellate review because he did not object to the comments at trial or raise the issue in a post-trial motion. *Thompson*, 238 Ill. 2d at 611. The defendant again argues that we should review this contention for plain error. The first step of the inquiry under the plain-error doctrine is to determine if a challenged comment constituted error. *Piatkowski*, 225 Ill. 2d at 565. If the comment resulted

in error, then we proceed to determine whether either of the two prongs of the plain-error doctrine is satisfied. *Id.* at 566.

¶ 16 In *Adams*, our supreme court held improper a prosecutor's statements, during closing argument and rebuttal closing argument, that the testifying police officers' testimony should be believed because they would not risk their credibility, jobs, or freedom by lying on the witness stand. *Adams*, 2012 IL 111168 at ¶20. The *Adams* court reasoned that the statements were improper because "no evidence was introduced at trial from which it could be inferred that the testifying officers would risk their careers if they testified falsely." *Id.* The court further noted that the improper statements implied that a police officer had a greater reason to testify truthfully than any other witness with a different type of job, which violated the principle that a prosecutor may not argue that a witness is more credible because of his status as a police officer. *Id.*

¶ 17 In the present case, the State did not present evidence that a police officer would be at risk of losing his job or his badge if he provided false testimony. Accordingly, the complained-of prosecutorial comments during rebuttal closing argument were improper (*id.)*, and we must proceed to determine whether either of the two prongs of the plain-error doctrine is satisfied (*Piatkowski*, 225 Ill. 2d at 566).

¶ 18 As to the first prong, the defendant argues that the credibility of Officer Costliow's testimony was the only basis for a determination of his innocence or guilt and that, therefore, the improper bolstering of that testimony tipped the scales of justice against him. We disagree. "In determining whether the closely balanced prong has been met, we must make a 'commonsense assessment' of the evidence [citation] within the context of the circumstances of the individual case." *Adams*, 2012 IL 111168 at ¶22. Here, Officer Costliow testified that (1) he stopped a 1966 black Plymouth

Barracuda registered to "Scott Crawford," (2) he recognized the driver of the vehicle, from prior contact, to be Scott Crawford, (3) the driver responded to the name of "Scott Crawford" and (4) the driver admitted that his driver's license was revoked. In addition, the State admitted (1) a driver's abstract, showing that Scott Crawford's driver's license was revoked, and (2) the car's registration, which showed that the vehicle was registered to the same "Scott Crawford" whose driver's license was revoked. Based on the foregoing evidence, it is highly improbable that the person stopped and depicted in the booking photo was anyone other than the defendant. Moreover, the jury was instructed that only they were the judges of the believability of the witnesses and must determine the weight to be given to a witnesses's testimony. There was no evidence presented that would have given the jury reason to question the veracity of the officer's testimony; the defendant argued only in closing that Officer Costliow's testimony did not provide proof beyond a reasonable doubt of the charged offense. Accordingly, we cannot conclude that the evidence was so closely balanced that the prosecutor's improper comments threatened to tip the scales of justice against the defendant. *Id.*

¶ 19 As to the second prong, the defendant argues that this error, compounded with the trial court's failure to question the prospective jurors pursuant to Rule 431(b), affected the fundamental fairness of his trial. However, the defendant bears the burden of demonstrating second-prong plain error. *Thompson*, 238 Ill. 2d at 613. As explained above, the defendant has not presented any evidence that the lack of Rule 431(b) questioning resulted in a biased jury. Moreover, in *Adams*, the supreme court held that prosecutorial comments, similar to those in this case, did not amount to second-prong plain error. *Adams*, 2012 IL 111168 at ¶24. Accordingly, we cannot find that the above-described errors, individually or in combination, were "so serious that [they] affected the

fairness of the defendant's trial or challenged the integrity of the judicial process." *Piatkowski*, 225 Ill. 2d at 565.

¶ 20 For the foregoing reasons, the judgment of the circuit court of De Kalb County is affirmed.

¶ 21 Affirmed.