No. 2—09—1110
Order filed May 13, 2011



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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court of Kane County. |
| Plaintiff-Appellee, | ) | |
| v. | ) | No. 08—CF—1903 |
| JOSE L. PEREZ, | ) | Honorable Robert J. Morrow, |
| Defendant-Appellant. | ) | Judge, Presiding. |

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JUSTICE ZENOFF delivered the judgment of the court.
Justices Burke and Schostok concurred in the judgment.

**ORDER**

*Held*: (1) Even if the trial court violated Rule 431(b), the error was not reviewable under the second prong of the plain-error rule, as defendant presented no evidence of a biased jury; (2) as defendant's DNA analysis "fee" was actually a fine, we awarded him a $125 credit for his time in presentencing custody.

There are two issues raised in this appeal brought by defendant, Jose L. Perez. That is, we must consider whether (1) the forfeiture of defendant's claim that the trial court failed to comply with Illinois Supreme Court Rule 431(b) (eff. May 1, 2007) may be excused pursuant to the plain-error doctrine; and (2) defendant is entitled to a credit of $125 against his DNA analysis fee for the 25 days he served in custody prior to sentencing. For the reasons that follow, we affirm as modified.

The facts relevant to resolving this appeal are as follows. Before the jury pool was divided into smaller panels for questioning, the trial court addressed the entire jury pool *en masse*, advising them about the four principles delineated in Rule 431(b). Specifically, the court asserted that defendant was to be presumed innocent throughout every stage of the trial, including deliberations on a verdict. The court also told the entire jury pool that the State had the burden of proving defendant guilty beyond a reasonable doubt and that defendant did not have to prove his innocence or present any evidence. Moreover, the court stated that, if defendant chose not to testify, the jury could not consider that fact in any way in arriving at a verdict.

After the court made its statement, the clerk called some of the potential jurors to the jury box for questioning. Before the court asked these potential jurors any questions, it addressed the entire jury pool, advising the entire pool that questions asked of these jurors may very well be asked of later panels. The court then asked the first panel of potential jurors whether they disagreed with the principle of law that provides that a person accused of committing a crime is presumed innocent of the charges brought against him. None of the potential jurors in the first panel voiced a disagreement about this principle. The court also asked the first panel of potential jurors whether any of them objected to the principle of law that mandates that the State has the burden of proving the defendant's guilt beyond a reasonable doubt. Again, none of the potential jurors in the first panel voiced an objection about that principle. Four jurors were chosen from the first panel of potential jurors.

When the second panel of potential jurors was called to the jury box, the court merely asked whether this panel agreed with the principles of law. The court did not elaborate on the principles of law to which it was referring. None of the potential jurors from the second panel voiced an

objection. Two potential jurors were removed from the second panel, and the two replacements were asked whether they agreed with the principles that a defendant is presumed innocent and that the State bears the burden of proving the defendant's guilt beyond a reasonable doubt. Neither of the two replacements voiced an objection to either principle. At a later point, a third potential juror was excused from the second panel, and the court asked the replacement whether it was true that defendant was presumed innocent and that the State bore the burden of proving defendant's guilt beyond a reasonable doubt. The replacement indicated that it was. When the attorneys were asking questions of the potential jurors, defense counsel asked one of the potential jurors whether he could sign a not-guilty verdict if the State did not prove its case. The potential juror indicated that he could. Four jurors, including the third replacement, were chosen from the second panel.

The third panel of potential jurors was not asked any questions by the trial court about the principles delineated in Rule 431(b). However, defense counsel asked one of the potential jurors whether it would negatively affect the deliberations if defendant did not testify and did not put on any evidence in his case. That potential juror said it would not. Four jurors were chosen from the third panel, including the one whom defense counsel had questioned.

The instructions given to the jury contained many of the principles delineated in Rule 431(b). For instance, the jury was instructed that the State bore the burden of proving defendant's guilt beyond a reasonable doubt. The court also told the jury that defendant was not required to prove his innocence and that he was presumed innocent until the jury found after deliberating that the State proved his guilt beyond a reasonable doubt.

At no time did defendant object to the manner in which the jurors were advised about the Rule 431(b) principles. That is, defendant neither raised an objection at trial nor filed a posttrial motion addressing the issue.

Following the trial, the jury found defendant guilty of aggravated battery of a police officer (720 ILCS 5/12—4(b)(18) (West 2008)). Defendant was sentenced to 18 months of conditional discharge and time in jail, which time the court deemed served given the 25 days defendant served in custody prior to sentencing. Additionally, the court imposed various fines and fees, including a "DNA Fee [of] $200." Defendant never argued that he was entitled to a $125 credit against his DNA "fee" for the 25 days he served in custody prior to sentencing. This timely appeal followed.

There are two issues raised in this appeal: (1) whether the forfeiture of defendant's claim that the trial court failed to comply with Rule 431(b) may be excused pursuant to the plain-error doctrine; and (2) whether defendant is entitled to a credit of $125 against his DNA "fee." We address each of these contentions in turn.

The first issue we address is whether the forfeiture of defendant's claim that the trial court failed to comply with Rule 431(b) may be excused pursuant to the plain-error doctrine. In addressing that issue, we begin by noting that defendant did not object to the content or manner of the court's questioning to the jury during *voir dire*, nor did he raise such an issue in a written posttrial motion. Accordingly, defendant has forfeited review of his claim that the Rule 431(b) questioning was faulty. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) ("*Both* a trial objection *and* a written post-trial motion raising the issue are required for alleged errors that could have been raised during trial." (Emphases in original.)).

Acknowledging that he failed to preserve this issue for review, defendant urges us to review the issue under the plain-error doctrine. Under the plain-error doctrine, we may review a forfeited error when either (1) "the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence" or (2) "the error is so serious that the defendant was denied a substantial right, and thus a fair trial." *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). Defendant bears the burden of persuasion under both prongs. *Id.* at 187. Although this court generally determines whether there was error before it considers whether the defendant has satisfied either prong of the plain-error doctrine (*People v. Cosby*, 231 Ill. 2d 262, 273 (2008)), we deem that unnecessary here, because, even if we assume that error arose, defendant has failed to show that his claim is reviewable pursuant to the plain-error doctrine.

Defendant cites the second prong of the plain-error doctrine as the basis for our review of his claim. In *toto*, defendant asserts:

> "The jury selection process did not conform to Supreme Court mandate, but most importantly, the process did not assure the exposure of potential jurors who had misconceptions of basic rules of criminal procedure. Accordingly, [defendant] requests that this Court reverse his conviction and remand the cause for a new trial."

As can be seen, defendant has not presented any evidence that the jury was biased. Rather, defendant's claim to that effect is pure speculation at best. Because defendant bears the burden of persuasion under the plain-error doctrine, his failure to present any evidence of a biased jury prevents the second prong of the plain-error doctrine from serving as a basis for excusing defendant's forfeiture of this issue. *People v. Thompson*, 238 Ill. 2d 598, 614-15 (2010) (where the defendant failed to present any evidence of a biased jury, he failed to meet his burden under the second prong

of the plain-error doctrine, and the court would not review the error). As our supreme court recently stated, "[w]e cannot presume the jury was biased simply because the trial court erred in conducting the Rule 431(b) questioning." *Id.* at 614.

Having resolved defendant's first claim, we turn now to whether defendant is entitled to a credit of $125 against his $200 DNA "fee" for the 25 days he served in custody before sentencing. Even though defendant did not raise this issue in the trial court, we may consider it now. *People v. Woodard*, 175 Ill. 2d 435, 457 (1997). Because resolution of this issue does not require us to defer to the trial court's reasoning, our review is *de novo*. *People v. McCreary*, 393 Ill. App. 3d 402, 406 (2009).

Defendant's argument is premised on section 110—14(a) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/110—14(a) (West 2008)). That section provides:

> "Any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of $5 for each day so incarcerated upon application of the defendant. However, in no case shall the amount so allowed or credited exceed the amount of the fine."

Defendant claims that he is entitled to the credit because a DNA "fee" is a fine subject to the credit. The State claims that a DNA "fee" is, in actuality, a fee, and, thus, it is not subject to the credit. We agree with defendant. Although, as the State observes, there is authority to the contrary (see, *e.g.*, *People v. Williams*, 405 Ill. App. 3d 958, 966 (2010)), this court has held that a DNA analysis "fee" is a fine subject to the credit. See *People v. Clark*, 404 Ill. App. 3d 141, 143 (2010); see also *People v. Long*, 398 Ill. App. 3d 1028, 1033-34 (2010) (DNA analysis "fee" is a fine for

purposes of sentencing credit pursuant to section 110—14(a) of the Code). We see no reason to depart from *Clark*, wherein we relied on the reasoning in *Long*.

For these reasons, the judgment of the circuit court of Kane County is affirmed as modified to reflect a $125 credit.

Affirmed as modified.