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2019 IL App (3d) 150858-U

Order filed January 18, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
	)	Rock Island County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-15-0858
v.	)	Circuit No. 15-CF-430
	)	
BRANDEN J. SEGURA,	)	Honorable
	)	Walter D. Braud,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justice Lytton concurred in the judgment.
Justice McDade specially concurred.

ORDER

¶ 1 *Held*: (1) Circuit court's failure to properly admonish venire of Rule 431(b) principles was not reversible plain error under a second-prong analysis; (2) circuit court's admission of evidence relating to the defendant's brother was not abuse of discretion; (3) circuit court's improper admission of purported threat evidence did not constitute second-prong plain error; and (4) circuit court's imposition of DNA analysis fee was plain error.

¶ 2 The defendant, Branden J. Segura, was convicted at a jury trial of robbery and battery. The circuit court sentenced the defendant to a term of 10 years' imprisonment for robbery. On

appeal, the defendant contends that the court erred in failing to properly admonish the venire of Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) principles, admitting certain pieces of evidence, and imposing a DNA analysis fee.

¶ 3 FACTS

¶ 4 The State charged the defendant by information with aggravated battery (720 ILCS 5/12-3.05(a)(1) (West 2014)) and robbery (*id.* § 18-1(a)). The defendant proceeded *pro se* to a jury trial on October 8, 2015.

¶ 5 Immediately following *voir dire*, the circuit court addressed the prospective jury, asking:

> "Do you understand and accept that a person accused of a crime is presumed to be innocent of the charge against him, that the presumption of innocence stays with the Defendant throughout the trial and it is not overcome unless from all the evidence you believe the State proved his guilt beyond a reasonable doubt? If you agree with all of these propositions, please raise your hand."

Each prospective juror raised their hand. Following other admonishments, the jury was sworn in. The State then asked to approach the bench. Though the initial portion of that exchange is off the record, the record does show that the following colloquy ensued:

> "[THE STATE]: I don't know if you have to read that whole damn thing, but that's the instruction they talk about now. You covered a couple of them.
>
> THE COURT: I covered them all. I covered them all.
>
> [THE STATE]: Okay.
>
> THE COURT: In my way."

¶ 6 At trial, Tony Stewart testified that on June 8, 2015, he was living in Rock Island with his wife and three children. At approximately 11 a.m., he was working in his yard when the

defendant rode up on a bicycle. Tony had known the defendant for approximately eight years, from around the neighborhood and through mutual friends. The defendant asked Tony if he had any jobs the defendant could perform for him. Tony replied that he did not, but gave the defendant $10. Tony then told the defendant that he was going to get breakfast for his children, and asked if the defendant wished to join him. The defendant said "sure." Tony testified, "I remember reaching for the car door and that's the last thing I remember."

¶ 7 Tony recalled being at the hospital, and at that point noticing $850 was missing from his pocket. The $10 he had given to the defendant had come from his wallet. Tony testified that he had returned to the hospital several times since the incident, relating to a concussion, migraines, and stitches in his face and the back of his head.

¶ 8 Tony affirmed that an individual approached him at some point in time regarding the $850. He testified that the individual who approached him was the defendant's brother, and that this meeting occurred "within 24 to 48 hours after the incident occurred." The defendant's brother, Tony, stated: "He agreed to give me the money back that his brother had taken from me." Tony testified that the defendant's brother then gave him $850. When the prosecutor asked if the defendant's brother said anything else to Tony when he gave him the money, Tony replied: "He was just hoping that it would make things better so that I wouldn't come to court and testify against his brother."

¶ 9 The prosecutor then asked Tony if anything unusual had happened to his vehicle in the days leading up to the trial. Tony testified that the prior morning he found a bullet on his windshield. He interpreted the bullet as a threat.

¶ 10 On cross-examination, the defendant asked Tony about a series of Facebook posts he had made prior to trial. The posts referenced a pattern of harassment, ridicule, and threats from the defendant's friends and family toward Tony that related to the case.

¶ 11 Victoria Stewart, Tony's wife, testified that on the morning in question she was in her house while Tony was outside. Just before 11 a.m., Victoria heard a loud noise outside. She went to the window, where her view was partially obstructed by an air conditioner. She saw the defendant running toward a bicycle, then "run back over that way," then run back to the bicycle. She had known the defendant for approximately 11 years. The defendant rode away on the bicycle. She did not see anyone outside other than the defendant. Victoria went outside and saw Tony lying on the ground, partially underneath his truck, convulsing.

¶ 12 Victoria also testified that Tony had $850 in his pocket. She knew the exact amount because that was the amount they needed to pay their bills. She explained that they did not keep their bill money in a bank account out of concerns that it would be garnished for child support. Victoria recalled seeing the money when Tony dressed that morning.

¶ 13 Nicholas Pauley of the Rock Island Police Department testified that he was dispatched to assist an ambulance at Tony's house on the morning in question. He eventually spoke with Tony in the hospital later that day. Tony told Pauley that he had been with the defendant, but did not remember what happened between that time and his being in the hospital.

¶ 14 Richard Moritz, also of the Rock Island Police Department, spoke with Tony on June 10, 2015, two days after the incident. He subsequently procured an arrest warrant for the defendant. The defendant was arrested on June 18. When Moritz questioned the defendant, the defendant told him that he did not know Tony or Victoria. The defendant refused to talk to Moritz any further.

¶ 15 Tiffany Goetz testified for the defense. She and the defendant had been in an "on and off relationship" for the past four years. When asked how her day began on June 8, 2015, Goetz replied:"That morning I normally–did my normal routine. 3:29 a.m. I left 14½ Street–9th Avenue, Apartment 3. I stayed at [the defendant's]." Goetz testified that she and the defendant left the apartment at 3:29 a.m. She dropped the defendant off between 5 and 5:30 a.m. at a mall in West Burlington, Iowa, then went to work in Weaver, Iowa, approximately 1 hour and 45 minutes away from Rock Island. When the defendant asked Goetz what time they "return[ed] to Moline," Goetz testified that Moline was a 1½ hour drive from Weaver. Goetz testified that while she was at work, phone calls were placed between herself and the defendant at 9 a.m., 10 a.m., and 11:17 a.m. She left work at 4:30 p.m., then picked the defendant up from the mall at 5:30 or 5:45 p.m.

¶ 16 Goetz explained that she lived in Burlington, Iowa, and that the defendant would sometimes stay with her. On those days, he would go shopping. On the day in question, she gave him $20 for that purpose. The defendant was also tasked with finding a hotel for them for that night, but all of the hotels in Burlington were booked. Instead, they returned to Moline. The defendant introduced into evidence a receipt bearing Goetz's name and her Burlington address showing a two-night stay at a Motel 6 in Moline from June 8 through June 10, 2015. Goetz testified that they checked in around 9 p.m. She also testified that she and the defendant actually stayed at that motel through June 17, but that the further dates did not appear on the receipt because she paid in cash for those nights.

¶ 17 In closing, the prosecutor stated, "Ms. Goetz is a very nice lady. She is telling the truth. Unfortunately for [the defendant], the truth is she leaves him at 5:30 a.m., sees him again at 5:30, 6 o'clock p.m. and she has no idea where he was between those times." The prosecutor also

referenced Tony's testimony concerning the defendant's brother, stating: "[Tony] tells you that [the defendant's] brother gives him the money back, pays him the money. Does that show that money was stolen? I think it proves it, but you're going to have to decide that."

¶ 18 At the defendant's request, the circuit court instructed the jury on the lesser-included offense of battery. The jury found the defendant guilty of robbery and standard battery. The circuit court sentenced the defendant to 10 years' imprisonment for robbery. The written sentencing order directed the Illinois State Police to collect DNA from the defendant and ordered the defendant to pay a $250 analysis fee.

¶ 19 ANALYSIS

¶ 20 On appeal, the defendant raises the following four contentions of error: (1) improper Rule 431(b) admonishments, (2) erroneous admission of testimony regarding the defendant's brother, (3) erroneous admission of testimony regarding the bullet on Tony's windshield, and (4) improper assessment of the DNA analysis fee.

¶ 21 The defendant concedes that he failed to properly preserve each of these issues. However, with respect to the Rule 431(b) issue, the defendant insists that this court should excuse that failure under the *Sprinkle* doctrine. *People v. Sprinkle*, 27 Ill. 2d 398 (1963). Our supreme court has explained that the *Sprinkle* doctrine allows a reviewing court to relax forfeiture rules where, *inter alia*, "counsel has been effectively prevented from objecting because it would have ' "fallen on deaf ears." ' " *People v. Thompson*, 238 Ill. 2d 598, 612 (2010) (quoting *People v. Hanson*, 238 Ill. 2d 74, 118 (2010), quoting *People v. McLaurin*, 235 Ill. 2d 478, 488 (2009)). The court has also cautioned that such an excusal of forfeiture should be granted "only in extraordinary circumstances." *Id.*

¶ 22 In support of his argument, the defendant points out that the State apparently brought Rule 431(b) to the court's attention following the admonishments, only for the court to assure the State that it had "covered them all." The defendant posits that the court's reluctance to amend its admonishments, even at the State's request, shows that any contemporaneous objection from the defendant would have fallen on deaf ears. The State, for its part, misunderstands the defendant's contention. It argues that "defendant cites no authority supporting that the People preserve an issue for the defendant by raising it in the trial court."

¶ 23 Contrary to the State's claim, the defendant here is not suggesting that the error was preserved on his behalf by the prosecutor. He concedes that the issue was forfeited, but asks this court to relax its enforcement of the forfeiture rules. We decline to do so. It would not be prudent to infer from the circuit court's response to the State's informal mention of Rule 431(b) any potential response to a formal objection from the defendant. In other words, while the court rejected the State's implicit suggestion that it readmonish the jury, that does not show in any conclusive way that it would have been similarly unreceptive to a defense objection. More broadly, nothing in this case indicates that it involves any "extreme circumstances" that might justify relaxation of forfeiture. See *Thompson*, 238 Ill. 2d at 612.

¶ 24 Because each of the defendant's contentions of error has been forfeited, and because we find no reason to relax the rules of forfeiture, we review each for plain error. The doctrine of plain error provides a limited exception to the general rule of forfeiture. *People v. Herron*, 215 Ill. 2d 167, 177 (2005). The first step in any plain error analysis is to determine whether a clear or obvious error occurred. See *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). If a clear or obvious error is found, the burden is placed on the defendant to demonstrate that the error was prejudicial. *Thompson*, 238 Ill. 2d at 613; *McLaurin*, 235 Ill. 2d at 495.

¶ 25 In plain error review, a defendant may demonstrate prejudice in one of two ways. First, under what is commonly known as first-prong plain error, a defendant may demonstrate that the evidence at trial was so closely balanced that the error in question threatened to impact the result of the trial. *People v. Sebby*, 2017 IL 119445, ¶ 51. Under what has come to be known as the second prong of plain error, a defendant may show that an error is so grave that prejudice must be presumed, regardless of how closely balanced the evidence was at trial. *Id.* ¶ 50. To show that an error is reversible under the second prong, a defendant must demonstrate that the error "was so serious it affected the fairness of the trial and challenged the integrity of the judicial process." *Id.*

¶ 26 With this analytical framework in place, we address each of the defendant's four contentions of error in turn.

¶ 27 I. Rule 431(b) Admonishments

¶ 28 Illinois Supreme Court Rule 431(b) (eff. July 1, 2012), states:

> "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 if a defendant does not testify it cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's decision not 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."

¶ 29 In the present case, after a jury had been selected but before it had been sworn in, the court asked the jurors:

> "Do you understand and accept that a person accused of a crime is presumed to be innocent of the charge against him, that the presumption of innocence stays with the Defendant throughout the trial and it is not overcome unless from all the evidence you believe the State proved his guilt beyond a reasonable doubt? If you agree with all of these propositions, please raise your hand."

¶ 30 Clearly, the court only admonished the jury of two of the four required Rule 431(b) principles. Even when the State discreetly suggested the court had only "covered a couple of them," the court insisted it had covered them all "in [its] own way." The failure to fully comply with the clear and unambiguous language of Rule 431(b) is error. *Thompson*, 238 Ill. 2d at 607.

¶ 31 In finding clear error, we necessarily reject the State's argument that no error was committed. The State repeatedly emphasizes that the court did correctly admonish the jury of the first two principles. Of course, it is full compliance with the rule that is required, not 50%. Further, the State is actually incorrect in its assertion; the court did *not* properly admonish the jury even as to the first two principles. While the court began its admonition with the "understand and accept" language, its actual request following the recitation was that the jurors raise their hands if they "agree with all of these propositions." Thus, the court never actually discovered whether anyone understood any of the principles. *Id*. ("[T]he rule requires an opportunity for a response from each prospective juror on their understanding and acceptance of those principles."); *People v. Wilmington*, 2013 IL 112938, ¶ 32.

¶ 32 The State also argues that any error in the Rule 431(b) admonishments was cured by other references the court made to the other two principles, including references in the

predeliberation instructions. Our supreme court, however, has expressly rejected the notion that a Rule 431(b) error can be cured by jury instructions. *Sebby*, 2017 IL 119445, ¶¶ 74-75.

¶ 33 Because we find that a clear error occurred, we must consider whether the defendant suffered prejudice as a result thereof. See *People v. Darr*, 2018 IL App (3d) 150562, ¶ 48. The defendant does not argue that the improper admonishments constituted second-prong error, instead only arguing that the evidence must be deemed closely balanced under the first prong because the case "came down to a credibility contest between the State's witnesses and the defense's witness."

¶ 34 In *People v. Naylor*, 229 Ill. 2d 584, 606-09 (2008), our supreme court held that a case that is nothing more than a credibility contest must necessarily be considered closely balanced. In reaching their conclusion, the court repeatedly emphasized the evidence in that case consisted only of the defendant's testimony against that of two officers, stating that "no additional evidence was introduced to contradict or corroborate either version of events." *Id*. at 608. Our supreme court recently reaffirmed this point of law in *Sebby*, 2017 IL 119445, ¶ 63, concluding that a case must be deemed "closely balanced" where: (1) the outcome of the case turned on the fact finder's credibility determination between two opposing versions of events, (2) each version of events was credible, and (3) no extrinsic evidence was introduced that would corroborate or contradict either version of events.

¶ 35 The present case cannot be considered a credibility contest, because the jury was never presented with opposing versions of events, such that it would have to choose the more credible version. Goetz, the defendant's ostensible alibi witness, testified that at least 12 hours elapsed between the time she dropped the defendant off and the time she picked him up. Thus, for 12 hours, the defendant's whereabouts were unaccounted for. Goetz being on the phone with the

defendant from time to time throughout the day does not change that fact. The attack on Tony occurred approximately midway through that time frame. Even accepting Goetz's testimony as wholly true, it does not conflict with the testimony from Tony and Victoria.

¶ 36 Though the lack of any conflicting testimony is sufficient to deem this case not a credibility contest, it remains worth noting that Goetz had a credibility issue where Tony and Victoria did not, simply beyond her four-year relationship with the defendant. Goetz testified that the defendant had an apartment at 14½ Street and 9th Avenue, and that she stayed there with him on the night of June 7 into June 8, 2015. Though Goetz never stated where that address was located, her implication was that it was in the Quad Cities area.[1] This begs the question of why, then, Goetz and the defendant spent nine nights in a motel in Moline.

¶ 37 On the other hand, there is no apparent motive on the record for Tony or Victoria to lie about seeing the defendant immediately before and after the attack, respectively. Moreover, it is unclear why, if both Tony and Victoria *were* lying, they would still claim not to have seen the actual attack.

¶ 38 Extrinsic to his credibility contest argument, the defendant urges that we should find this case closely balanced because all of the State's evidence was circumstantial. The defendant cites to *People v. Cook*, 262 Ill. App. 3d 1005, 1019 (1994) for the proposition that, in the defendant's words, a "case is closely balanced where the evidence against the defendant is circumstantial."

¶ 39 *Cook* does not stand for that proposition. The passage from *Cook* on which the defendant likely relies states as follows: "We find that [the court's error] in this closely balanced case

[1]A cursory view of a map confirms that 14½ Street and 9th Avenue is a Rock Island address. See *Peters v. Riggs*, 2015 IL App (4th) 140043, ¶ 49 ("[A] court may take judicial notice of geographical facts and 'case law supports the proposition that information acquired from mainstream Internet sites such as MapQuest and Google Maps is reliable enough to support a request for judicial notice.' " (quoting *People v. Clark*, 406 Ill. App. 3d 622, 633 (2010))).

where the only evidence against the defendant is circumstantial constitutes plain error." *Id*. In essence, the *Cook* court was stating that the case was closely balanced and also that the only evidence against the defendant was circumstantial. At no point did the *Cook* court link the circumstantial evidence causally to the finding of closely balanced.

¶ 40 Adoption of a blanket rule that all convictions attained solely on circumstantial evidence are closely balanced would be imprudent. It is axiomatic that a conviction can be sustained on circumstantial evidence alone. *E.g.*, *People v. Saxon*, 374 Ill. App. 3d 409, 417 (2007). Indeed, the present case illustrates the notion that circumstantial evidence can be incredibly strong. Tony testified that he was with the defendant, who had ridden his bicycle to Tony's house. Tony's next memory was of him waking up in the hospital with injuries to his head. Victoria testified that after hearing a noise outside, she saw the defendant run from the area where she would later find Tony on the ground by this truck. This circumstantial evidence gives rise to the inference that it was the defendant who attacked Tony. That inference is not merely rational, but simply unavoidable.

¶ 41 Finally, the defendant argues that the evidence specifically bearing on the robbery charge should be deemed closely balanced based on Victoria's testimony that the defendant ran back to Tony after initially running to his bicycle. These actions, the defendant contends, imply that the defendant only took the $850 after first running away, thus creating "a question as to whether [the defendant] actually used force for the *purpose* of taking money from Stewart."

¶ 42 Robbery is committed where a person knowingly takes property from another "by the use of force." 720 ILCS 5/18-1(a) (West 2014). In *People v. Tiller*, 94 Ill. 2d 303, 316 (1982), the sole case upon which the defendant relies for this particular argument, the court reversed a

robbery conviction on the grounds "that the violence exerted in this case was used as a means to take the [property]."

¶ 43 In *People v. Lewis*, 165 Ill. 2d 305, 338 (1995), the court reevaluated its position regarding that very language, writing:

> "This court has since, however, expressly repudiated that statement in *Tiller* as unnecessary to its holding. (See *People v. Strickland* (1992), 154 Ill. 2d 489, 525.) The court noted in *Strickland* that the statement in *Tiller* was at odds with this court's earlier rationale in *People v. Jordan* (1922), 303 Ill. 316."

The *Lewis* court reaffirmed its decision in *Jordan*, emphasizing the following passage: " '[i]f, as the result of a quarrel, a fight occurs in which one of the parties is overcome, and the other then, *without having formed the intention before the fight began,* takes the money of the vanquished one, the offense committed is robbery.' " (Emphasis in original.) *Id.* (quoting *Jordan*, 303 Ill. at 319). Thus, the *Lewis* court concluded: "As long as there is some concurrence between the defendant's threat of force and the taking of the victim's property, a conviction for armed robbery is proper." *Id.* at 339.

¶ 44 In this case, there is certainly a concurrence between the defendant's use of force and the taking of Tony's property. Whether the defendant took the money before he first ran to his bicycle or took if after he returned, the money was taken when Tony was lying on the ground, incapacitated from the violence that the defendant had just inflicted upon him.

¶ 45 This case was not a credibility contest. The lone defense witness said nothing that contradicted any of the State's evidence. Moreover, while the State's evidence was purely circumstantial, that evidence was strong. In short, the evidence in this case was not closely

balanced. Thus, the circuit court's error in delivering the Rule 431(b) admonishments did not amount to reversible error.

¶ 46 II. Testimony Regarding the Defendant's Brother

¶ 47 The defendant next contends that the court abused its discretion in allowing Tony to testify regarding his interaction with the defendant's brother. To address this issue, it is helpful to first review that testimony: Tony testified that he encountered the defendant's brother within 24 to 48 hours of the incident, and that the defendant's brother agreed to give Tony the money the defendant had taken from him. In response to the prosecutor's questions, Tony twice affirmed that it was the defendant's brother who approached him. Tony testified that the defendant's brother hoped the money would dissuade Tony from testifying against the defendant. The defendant insists that this testimony was not relevant, or, even if it had some minimal relevance, that relevance was outweighed by substantial prejudice.

¶ 48 Evidence is only admissible if it is relevant. Ill. R. Evid. 402 (eff. Jan. 1, 2011). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ill. R. Evid. 401 (eff. Jan. 1, 2011). Even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Ill. R. Evid. 403 (eff. Jan. 1, 2011). We review the circuit court's decision to admit evidence under an abuse of discretion standard. *People v. Lerma*, 2016 IL 118496, ¶ 23. An abuse of discretion will be found only where the circuit court's decision is "arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it." *People v. Rivera*, 2013 IL 112467, ¶ 37.

¶ 49 Tony's testimony demonstrated that within 24 to 48 hours of the incident, the defendant's brother had learned that Tony had been robbed, and that the defendant had somehow been

implicated in the offense. The defendant's brother learned those facts well before the defendant was arrested on June 18 and, depending on the precise timing of events, before or just after the warrant was issued for the defendant's arrest. The jury could rationally conclude from this testimony that the defendant's brother obtained this information so soon after the incident through the defendant.

¶ 50 More importantly, the defendant's brother was actually willing to pay Tony $850 in the hopes that Tony would not testify against the defendant. The jury could rationally conclude that the defendant's brother would not take such action unless he had sufficient certainty that the defendant actually committed the offense. That is, the jury could conclude that an individual would not part with $850 based on rumors and conjecture. See *People v. Toliver*, 60 Ill. App. 3d 650, 652 (1978) ("A trier of fact may use common sense and general knowledge in considering evidence and drawing the proper inference from it."). Further, the jury could rationally infer that the most likely source for the defendant's brother to have such certainty would be communication with the defendant. This is the argument the prosecutor made in his closing argument when he suggested that the repayment of the money by defendant's brother tended to prove that the defendant had originally stolen it.

¶ 51 To be sure, the above inferences are not inescapable. The defendant's brother could have learned about the attack, robbery, and the defendant's purported involvement via a chain of word-of-mouth in the 24 hours after the incident, rather than from the defendant. Further, perhaps the defendant's brother had sufficient wealth, or was so risk-averse, that he was willing to part with $850 with no concrete knowledge, but simply on the off chance that the rumors were true. However, this does not mean, as the defendant asserts, that the inferences were "unsupported." See *People v. Funches*, 212 Ill. 2d 334, 340 (2004) ("An inference is a factual

conclusion that can rationally be drawn by considering other facts. Thus, an inference is merely a deduction that the fact finder may draw in its discretion, but is not required to draw as a matter of law."). Though the relevance of Tony's testimony hinged on allowable yet imperfect inferences, the testimony plainly met the minimal threshold for relevance.

¶ 52 Next, we must consider whether that relevance was substantially outweighed by the risk of undue prejudice. The defendant suggests that the "minimal probative value [of Tony's testimony] was overwhelmed by the State's ability to accuse [the defendant] of trying to bribe a witness through his brother." Yet, as the defendant points out repeatedly in his brief, there was no evidence that the defendant directed or even knew about his brother's actions. Nor, in fact, did the prosecutor ever invite such an inference in closing arguments. The testimony regarding the defendant's brother was probative of the brother's knowledge, as well as, inferentially, the source of that knowledge. There was no evidence or suggestion that the defendant committed another crime or bad act, and thus that Tony's testimony did not create any concern that the jury would convict the defendant merely because he was a "bad person deserving punishment." *People v. Donoho*, 204 Ill. 2d 159, 170 (2003). Insofar as the evidence showed that the defendant's brother committed a crime—namely, bribing a witness—there was simply no evidence that would lead the jury to import that wrong onto the defendant.

¶ 53 We find that Tony's testimony regarding his interaction with the defendant's brother met the minimum threshold for relevancy. See Ill. Rs. Evid. 401, 402 (eff. Jan. 1, 2011). We also find that the testimony created no significant risk of undue prejudice, and that the probative value of the testimony was therefore not substantially outweighed by any such risk. See Ill. R. Evid. 403 (eff. Jan. 1, 2011). In sum, we conclude that the circuit court did not abuse its discretion by admitting Tony's testimony. Accordingly, we find no plain error.

¶ 54 III. Testimony Regarding the Bullet

¶ 55 The defendant raises the same evidentiary argument with respect to Tony's testimony that he found a bullet on his windshield the day before trial. That is, the defendant contends that the testimony was not relevant and that if it was minimally relevant, that relevance was substantially outweighed by the risk of undue prejudice.

¶ 56 Tony's testimony regarding the bullet differed from his testimony about the defendant's brother in a number of significant ways. Primarily, there was no evidence as to who placed the bullet on his windshield. While the jury could fairly infer that it was related to the case, such an inference is not itself probative of whether the defendant actually committed the offense. Similarly, the bullet incident occurred four months after the attack on Tony and nearly as much time after the defendant was arrested. With such a large intervening time window, no inferences can be drawn as to who might have known about the incident and upcoming trial. Further, while one could infer that the defendant's brother would not have parted with $850 absent some concrete knowledge of his brother's offense, no similar inference can be drawn from the placement of a bullet on a windshield.

¶ 57 In blunt terms, evidence that an unknown person placed a bullet on Tony's windshield does nothing to show it is more or less likely that the defendant committed the offense. It simply has no bearing on that primary question. Because that testimony was plainly irrelevant, that circuit court abused its discretion in admitting it.[2]

¶ 58 We next consider whether the defendant has established prejudice under either prong of plain error. Because we have already concluded that the evidence in the case is not closely

[2]The State on appeal does not argue otherwise, conceding that the bullet "did not implicate defendant, or his family and friends." Instead, the State highlights defendant's cross-examination of Tony, including the introduction of his Facebook posts, and calls that invited error. That point, however, has no relation to defendant's actual argument on appeal.

balanced (see *supra* ¶¶ 35-45), we need only address whether the admission of the bullet testimony constituted second-prong plain error.

¶ 59 For a plain error to be reversible under the second prong, the alleged error must deprive the defendant of a fundamentally fair trial or undermine the integrity of the judicial process. *Piatkowski*, 225 Ill. 2d at 564-65. The defendant asserts—citing *People v. Jackson*, 2017 IL App (1st) 142879, ¶ 74, and *People v. Jackson*, 399 Ill. App. 3d 314, 321-22 (2010)—that other-crimes evidence is a cognizable second-prong error.

¶ 60 The defendant's argument relies on a mistaken characterization. Namely, the testimony that an unknown individual left a bullet on Tony's windshield is not "other crimes evidence" as ordinarily contemplated. Illinois Rule of Evidence 404(b) (eff. Jan 1, 2011) dictates that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Evidence of a defendant's other crimes or bad acts is especially problematic, due to the likelihood that such evidence may overpersuade the jury, leading it to convict the defendant simply because it finds him to be a bad person who deserves punishment. *Donoho*, 204 Ill. 2d at 170.

¶ 61 Here, however, it was unknown who left the bullet on Tony's windshield. The testimony could not be used to prove the character of *anyone*. There was no evidence that the defendant left the bullet, directed it to be left, or even knew about it. There was no possible inferences related to the defendant, either proper or improper, that the jury could possibly draw from the testimony about the bullet. Nor did the prosecutor encourage any such inference; in fact, the bullet went unmentioned in closing arguments. This, of course, is precisely the reason we deemed the evidence inadmissible for total lack of relevance. Our decision did not turn on any prejudice concerns, because it is unclear how the defendant could have been prejudiced by that testimony.

The introduction of merely irrelevant evidence, absent any prejudice concerns, does not render a defendant's trial unfair or undermine the integrity of the judicial process. Accordingly, we find that the plain error in admitting Tony's testimony regarding the bullet is not a reversible error under the second prong.

¶ 62 IV. DNA Analysis Fee

¶ 63 Finally, the defendant argues that the court erred in imposing the $250 DNA analysis fee. The defendant points out that under the relevant statute, an offender's DNA may only be collected once, and the resultant fee may be only be imposed once. As a result of a prior felony conviction, the defendant asserts that those requirements have presumptively been fulfilled, and that it was thus clear or obvious error for the court to impose the DNA analysis fee for a second time.

¶ 64 The Unified Code of Corrections (Code) mandates that any person convicted of a felony "be required to submit specimens of blood, saliva, or tissue to the Illinois Department of State Police." 730 ILCS 5/5-4-3(a) (West 2014). It further provides that any person from whom such collection is required shall pay a $250 analysis fee. *Id*. § 5-4-3(j). In *People v. Marshall*, 242 Ill. 2d 285, 303 (2011), our supreme court clarified that those collection and payment requirements apply to a defendant "only where that defendant is not currently registered in the DNA database."

¶ 65 There is no dispute that the defendant had been convicted of prior felony, a 2003 conviction for unlawful possession of a stolen motor vehicle. There is also no dispute that that conviction should have subjected the defendant to the mandatory DNA requirements set forth in the Code. The State points out, however, that there is no evidence on the record that the

defendant was ever actually ordered to submit his DNA and pay an analysis fee as a result of that conviction, and thus it cannot be concluded that the court in the present case necessarily erred.

¶ 66 In *People v. Leach*, 2011 IL App (1st) 090339, ¶¶ 37-38, and *People v. Anthony*, 2011 IL App (1st) 091528-B, ¶¶ 23-24, the First District held that where a defendant has been previously been convicted of a felony, such that he would be subject to the mandatory DNA requirements, it should be presumed that the court in the prior case actually imposed those requirements. This presumption was grounded in that "the trial judge knows and follows the law unless the record indicates otherwise." *People v. Gaultney*, 174 Ill. 2d 410, 420 (1996). In the present case, the State provided no indication that the defendant had somehow fallen through the cracks and avoided being subjected to the DNA requirements.[3] Accordingly, the order that the defendant's DNA be collected and that the defendant pay the resultant $250 fee was clear error.

¶ 67 The defendant contends that the error in imposing the DNA analysis fee is reversible under the second prong of plain error analysis. The State offers no counterargument. In *People v. Lewis*, 234 Ill. 2d 32, 48-49 (2009), our supreme court held that the erroneous imposition of a monetary assessment could amount to reversible plain error under the second prong. The court found that "[a]n error may involve a relatively small amount of money or unimportant matter, but still affect the integrity of the judicial process and the fairness of the proceeding if the controversy is determined in an arbitrary or unreasoned manner." *Id*. at 48. The same is no less true here. The subjugation of the defendant to DNA collection and an analysis fee, when such steps are plainly unwarranted, affects the integrity of the judicial process and the fairness of the

[3]Whether defendant actually paid the DNA analysis fee when it was presumably imposed in 2003 is irrelevant to the present analysis. See *People v. McCray*, 2016 IL App (3d) 140554, ¶ 19 ("Even if defendant has not yet paid the analysis fee in his prior case, he still owes it.").

proceeding. We therefore remand the case with instructions for the circuit court to vacate the portion of its sentencing order relating to section 5-4-3 of the Code.

¶ 68 CONCLUSION

¶ 69 The judgment of the circuit court of Rock Island County is affirmed and remanded.

¶ 70 Affirmed and remanded.

¶ 71 JUSTICE McDADE, specially concurring.

¶ 72 I agree with the majority's conclusion that the evidence in this case cannot be considered closely balanced for the purposes of first-prong plain error. Because defendant does not argue that the insufficient Rule 431(b) admonishments constituted second-prong plain error, the majority does not address that issue. Indeed, I recognize that under the existing body of law, such an error does not generally constitute a second-prong plain error. *E.g.*, *Sebby*, 2017 IL 119445, ¶ 52 ("A Rule 431(b) violation is not cognizable under the second prong of the plain error doctrine, absent evidence that the violation produced a biased jury."). For those reasons, I concur in the result in this case. However, I write separately to express concern with the circuit court's instructions in the present case, as well as with the notion that a Rule 431(b) error can almost never rise to the level of structural error.

¶ 73 Jury verdicts are, by and large, sacrosanct. Reviewing courts are extremely deferential to the jury's role as factfinder, only reviewing evidence in the light most favorable to the State following a jury conviction. *E.g.*, *People v. Evans*, 209 Ill. 2d 194, 209 (2004). Moreover, after viewing the evidence with the requisite bias, a jury's decision will only be reversed when *no* rational person could *possibly* reach the same conclusion. See *People v. Wheeler*, 226 Ill. 2d 92, 114 (2007).

¶ 74 Given this extreme deference to the jury as factfinder and the procedural hurdles attendant to any outright reversal of a jury verdict, it is imperative that certain safeguards accompany the empaneling of the jury. Rule 431(b) provides some of those safeguards. The understanding and acceptance of the Rule 431(b) principles is "essential to the qualification of jurors in a criminal case." *People v. Zehr*, 103 Ill. 2d 472, 477 (1984). It is "vital to the selection of a fair and impartial jury" that potential jurors be informed of those principles. *Id*. Each of the four admonishments " 'goes to the heart of a particular bias or prejudice which would deprive defendant of his right to a fair and impartial jury.' " *Id*. (quoting *People v. Zehr*, 110 Ill. App. 3d 458, 461 (1982)).

¶ 75 While compliance with Rule 431(b) admonishments is of vital importance, the implementation of the rule could not be easier or more straightforward. The rule requires the circuit court to inform potential jurors of four fundamental principles of law, then determine whether each potential juror both understands and accepts those principles.

¶ 76 The circuit court in the present case failed to properly admonish veniremembers of the Rule 431(b) principles. As the majority points out, the court merely asked the potential jurors to indicate if they agreed with certain principles, and made no attempt to guarantee that they *understood* those principles. This was error in itself. See *Wilmington*, 2013 IL 112938, ¶ 32. Of course, there was greater error in that the court also failed to read the final two principles to the venire at all. Thus, the jurors were not informed before being accepted and seated (1) that defendant was under no obligation to present evidence on his own behalf, and (2) that the jury could not hold against defendant his potential decision not to testify.

¶ 77 Far more egregious than the court's initial failure was its response upon being informed by the State that it "might have to read the whole damn thing" because full compliance with Rule

431(b) was necessary. Despite having unquestionably read just two of the principles only moments prior, the court insisted that it had "covered them all" in its own way. I find this deliberate disregard appalling. The circuit court, for reasons of its own, opted to ignore both supreme court precedent and an unambiguous supreme court rule, rather than simply reading the principles to the venire. The court's noncompliance denigrates the importance of Rule 431(b), which helps to protect a criminal defendant's meaningful access to justice by ensuring a fair trial before an impartial and appropriately informed jury.

¶ 78 As previously noted, our supreme court has repeatedly emphasized that Rule 431(b) errors are not cognizable under the second prong of plain error. *Sebby*, 2017 IL 119445, ¶ 52; *Wilmington*, 2013 IL 112938, ¶ 33; *Thompson*, 238 Ill. 2d at 614-15. In *Thompson*, the court reasoned that "compliance with the rule is [not] indispensable to a fair trial." *Thompson*, 238 Ill. 2d at 614. This reasoning stands in startling contrast to the court's earlier assessment in *Zehr* that this admonishment of the venire was "vital to the selection of a fair and impartial jury." *Zehr*, 103 Ill. 2d at 477. Given the significant role that the Rule 431(b) admonishments play in a criminal trial, I would advocate that any error in the delivery of those admonishments amounts to second-prong plain error.

¶ 79 It should also be noted that the courts in *Sebby*, *Wilmington*, and *Thompson* declined to discuss the various potential forms that a Rule 431(b) error might take. In other words, the court has consistently grouped all Rule 431(b) errors together. Yet, we know that a failure to comply with that rule can come in many forms, such as a failure to separate the understand and accept questions (see *Wilmington*, 2013 IL 112938, ¶ 32) or the failure to give adequate opportunity to respond (see *People v. Yusuf*, 409 Ill. App. 3d 435, 439 (2011)). The error in this case, in which

the court steadfastly refused to deliver some of the admonishments, even after the State alerted the court to its failure, would fall on the most extreme end of this spectrum.

¶ 80 Clearly, the circuit court's error, and its response thereto, "challenged the integrity of the judicial process." *Sebby*, 2017 IL 119445, ¶ 50 (defining second-prong plain error). And there can be no doubt that the right involved, defendant's right to a fair trial, is an important one—if not the most important one. Even if so-called minor errors in the delivery of the Rule 431(b) admonishments do not amount to second-prong plain error, the circuit court's refusal to advise potential jurors of all required elements of a crucial supreme court rule in the present case surely must rise to that level.

¶ 81 Finally, I am compelled to address one aspect of the DNA analysis fee discussion. The majority vacates the fine, following our supreme court's lead in holding that the erroneous imposition of that fine is a cognizable second-prong plain error. That is, "it affect[s] the integrity of the judicial process and the fairness of the proceeding" when a DNA analysis fee is imposed incorrectly. *Lewis*, 234 Ill. 2d at 48.

¶ 82 While I concur in that result, I would note that not only is the error in question relatively minor in nature, it is also easily correctible. It would be imprudent and a waste of judicial resources to allow a clearly illegal assessment to stand simply to honor forfeiture. However, reaching that result via second-prong plain error creates a ludicrous contrast: the erroneous imposition of a modest fee undermines the integrity of the judicial process, but a court's knowing and intentional refusal to comply with a supreme court rule critical to ensuring a fair trial apparently does not. If a simple assessment mistake rises to the level of second-prong plain error, the circuit court's deliberate Rule 431(b) error surely must as well.