

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

NO. 4-09-0664

Filed 1/27/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
ALAN M. HUGHEY,)	No. 09DT130
Defendant-Appellant.)	
)	Honorable
)	Jeffrey B. Ford,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Knecht and Justice Pope concurred in the judgment.

ORDER

Held: The trial court erred by failing to comply with Supreme Court Rule 431(b), but the error was not so serious as to rise to the level of plain error, as there was no evidence the jury was biased.

In June 2009, a jury found defendant, Alan M. Hughey, guilty of two counts of driving under the influence of alcohol with a blood-alcohol concentration of 0.08 or greater. In August 2009, the trial court sentenced defendant to 364 days in jail. Defendant files this direct appeal, claiming (1) the court failed to comply with Supreme Court Rule 431(b) (eff. May 1, 2007) during *voir dire*, and (2) though he failed to object to the claimed error previously, his convictions should be reversed under the plain-error doctrine based upon the seriousness of the error. We agree that the court erred but disagree that the error justifies reversal.

I. BACKGROUND

On February 21, 2009, at approximately 12:30 a.m., a Rantoul police officer was on patrol and saw a vehicle driving toward him, straddling the center line as it approached. The officer made a U-turn and followed the vehicle, observing it cross the lane markings multiple times and fluctuate considerably in speed. The officer stopped the vehicle, suspecting that the driver was under the influence of alcohol. The driver, defendant, smelled of alcohol and had slurred speech and bloodshot eyes. Defendant failed the field-sobriety tests and blew a 0.183 on the Breathalyzer test. The State charged defendant by citation with one count of driving under the influence of alcohol (625 ILCS 5/11-501(a)(2) (West 2008)) and one count of driving with a blood-alcohol concentration of 0.08 or greater (625 ILCS 5/11-501(a)(1) (West 2008)).

A jury was selected on June 18, 2009. Pursuant to Supreme Court Rule 431(b) (eff. May 1, 2007), the trial court was required to ask each potential juror whether they understood and accepted that (1) defendant was presumed innocent of the charges, (2) the State had the burden of proving him guilty beyond a reasonable doubt, (3) defendant was not required to present any evidence, and (4) his decision against testifying could not be held against him. These principles are otherwise known as the *Zehr* principles. See *People v. Zehr*, 103 Ill. 2d 472 (1984). During jury selection, the court, without objection from defendant, informed the prospective jurors as a group as follows:

"Under the law, a 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 innocence, nor is he required to present any evidence on his own behalf. He may rely on the presumption of innocence."

After these admonitions to the entire venire, the trial court addressed several smaller selected panels at a time. The court and counsel questioned each person individually. From those panels, 12 jurors were selected. Ten of the 12 impaneled jurors were individually advised of all four of the *Zehr* principals, and each was given the opportunity to respond to the court's questions regarding whether he or she understood the principles and was willing to follow them. An example of the exchange between the court and the individual juror occurred as follows:

"THE COURT: And do you understand the defendant is presumed innocent?

POTENTIAL JUROR: Yes.

THE COURT: Do you understand that the burden is on the State in a criminal case to prove the defendant guilty beyond a reasonable doubt?

POTENTIAL JUROR: Yes.

* * *

THE COURT: Do you understand that since the State

has to prove the defendant guilty beyond a reasonable doubt the defendant does not need to testify in this matter or present any evidence?

POTENTIAL JUROR: Yes.

THE COURT: Understanding that, will you hold it against the defendant if he does not testify?

POTENTIAL JUROR: No."

Two jurors were questioned as to the first three principles, but were not advised of or questioned regarding the fourth principle, *i.e.*, whether they understood and accepted the fact that defendant's failure to testify could not be held against him.

Following selection of the jury, the State presented the testimony of the arresting officer, who testified as to the facts set forth above. The State presented no further evidence. Defendant's counsel informed the trial court that he believed that defendant would testify; however, defendant did not appear for the second day of trial, the time for the defense to begin presentation of his case. The court refused to continue the trial and the defense rested without presenting evidence.

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 the verdict and is not overcome unless from all the evidence in the 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 jury found defendant guilty of both counts of driving under the influence of alcohol. Defendant filed a motion for a new trial, which did not include the issue that he now raises on appeal. The court denied defendant's motion and sentenced him to 364 days in jail. This appeal followed.

II. ANALYSIS

Defendant’s sole contention on appeal is that his convictions must be reversed because the trial court failed to specifically and fully comply with Rule 431(b). Defendant concedes he forfeited this issue by failing to raise a contemporaneous objection at trial. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (to preserve a claim for review, a defendant must both object at trial and include the error in a posttrial motion). Despite his forfeiture, he claims the issue may be reviewed here, as the court committed plain error in that the error was “so substantial it affect[ed] the fundamental fairness of the proceeding and denie[d] the defendant his right to a fair trial.”

Our supreme court recently addressed this issue and held that such an error does not necessarily render a trial fundamentally unfair or unreliable and does not require automatic reversal. *People v. Thompson*, No. 109033, slip op. at 9-10 (October 21, 2010), ___ Ill. 2d ___. In *Thompson*, the supreme court held that the trial court violated Rule 431(b) in that it failed to ask the prospective jurors if they understood and accepted the third principle and failed to ask if they accepted the first principle. *Thompson*, slip op. at

6-7, ___ Ill. 2d at _____. While compliance with Rule 431(b) is certainly important, the *Thompson* court determined, as it did in *Glasper*, that this was not a structural error requiring reversal. *Thompson*, slip op. at 9, ___ Ill. 2d at _____. Since the defendant forfeited appellate review of this issue by failing to object at trial or raise the issue in his posttrial motion, the court also considered the forfeiture rule and the plain-error doctrine. It concluded that, where there was no compelling reason to relax the forfeiture rule, such as evidence of a biased jury, the only option for review was to analyze the error and determine whether application of the plain-error rule was appropriate. *Thompson*, slip op. at 10-11, ___ Ill. 2d at _____.

In doing so, the supreme court noted that the defendant had not argued that the evidence was closely balanced, but instead claimed only that the error was so serious it affected the fairness of the trial. *Thompson*, slip op. at 11-12, ___ Ill. 2d at _____. The court noted that, despite the amendment, Rule 431(b) compliance is not indispensable to the selection of an impartial jury or the conduct of a fair trial. *Thompson*, slip op. at 12, ___ Ill. 2d at _____. Only upon the defendant's presentation of evidence that the jury was biased would his fundamental right to a fair trial be questioned. *Thompson*, slip op. at 12, ___ Ill. 2d at _____. The court confirmed its holding in *Glasper*, again finding that a Rule 431(b) violation does not always implicate a fundamental right or constitutional protection. *Thompson*, slip op. at 13, ___ Ill. 2d at _____. The defendant failed to present any evidence of jury bias, and therefore, failed to meet his burden of showing that the error affected the fairness of his trial. In other words, he did not satisfy the second prong of the plain-error doctrine. *Thompson*, slip op. at 13, ___ Ill. 2d at _____. The court concluded by rejecting the defendant's request to impose a bright-line rule of reversal upon every violation of Rule

431(b). *Thompson*, slip op. at 14, ____ Ill. 2d at ____.

Applying *Thompson* to the facts of this case, we note that the trial court failed to fully comply with Rule 431(b). Although the court specifically questioned 10 jurors regarding his or her understanding of all four principles, it did not raise the fourth principle with 2 of the jurors. Those two jurors were not advised that defendant's failure to testify could not be held against him. They were not asked whether they understood and accepted that principle. And, the subject was not included in the jury instructions. This error was heightened by the fact that defendant did not testify.

In order to fully comply with the rule, the trial court "shall provide each juror an opportunity to respond to specific questions concerning the principles." Ill. S. Ct. R. 431(b) (eff. May 1, 2007). "Rule 431(b), therefore, mandates a specific question and response process." *Thompson*, slip op. at 6, ____ Ill. 2d at _____. Trial courts may not simply give "a broad statement of the applicable law followed by a general question concerning the juror's willingness to follow the law." *Thompson*, slip op. at 6, ____ Ill. 2d at ____ (quoting Ill. S. Ct. R. 431, Committee Comments (eff. May 1, 1997)). Here, with two of the jurors, the trial court did not broach the subject at all that defendant could choose not to testify, and if he made that choice, his failure to testify could not be held against him. Therefore, we conclude the court here failed to fully comply with the spirit and explicit requirements of Rule 431(b).

Despite the trial court's error, defendant failed to object during *voir dire*. Defendant concedes forfeiture, but he urges our review under the second prong of the plain-error rule based on the severity of the error. However, as our supreme court noted in *Thompson*, we cannot presume an error so serious as to require reversal occurred based

solely on the court's failure to fully comply with the rule. See *Thompson*, slip op. at 9-10, ____ Ill. 2d at _____. Instead, defendant must present some evidence that the court's error was so serious that it deprived him of a fair trial. Defendant fails to do so. He has not presented any evidence or raised any question that the jury in his case was biased. Rather, he merely claims that the court's failure to strictly comply with the rule resulted in reversible error. In accordance with *Thompson*, defendant's unsupported conclusion is not sufficient to satisfy the second prong of the plain-error rule so as to excuse his procedural default and to justify reversal.

III. CONCLUSION

For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

Affirmed.