No. 125644

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee v. BRIAN BIRGE Defendant-Appellant.	)	Appeal from the Appellate Court of Illinois, Fourth Judicial District, No. 4-17-0341. There on Appeal from the Circuit Court of the Eleventh Judicial Circuit, Livingston County, Illinois, No. 2016-CF-159 The Honorable Jennifer H. Bauknecht, Judge Presiding.

BRIEF FOR PLAINTIFF-APPELLEE

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E-FILED
8/27/2020 11:52 AM
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POINT AND AUTHORITIES

NATURE OF THE CASE

Defendant appeals from the appellate court's judgment affirming his burglary and arson convictions. No issue is raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

1. Whether the circuit court properly admonished a group of prospective jurors by reciting Rule 431(b)'s four principles together — (1) that the defendant is presumed innocent of the charges against him; (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 — and then separately asking the group if they (a) understood and (b) accepted all four of those principles.

2. Whether this Court should remand to the circuit for a compliant restitution order.

STATEMENT OF JURISDICTION

This Court allowed defendant's petition for leave to appeal on March 25, 2020. Jurisdiction lies under Supreme Court Rules 315 and 612(b).

STATUTES INVOLVED

Ill. S. Ct. R. 431

(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 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.

730 ILCS 5/5-5-6

(b) In fixing the amount of restitution to be paid in cash, the court shall allow credit for property returned in kind, for property damages ordered to be repaired by the defendant, and for property ordered to be restored by the defendant; and after granting the credit, the court shall assess the actual out-of-pocket expenses, losses, damages, and injuries suffered by the victim named in the charge and any other victims who may also have suffered out-of-pocket expenses, losses, damages, and injuries proximately caused by the same criminal conduct of the defendant, and insurance carriers who have indemnified the named victim or other victims for the out-of-pocket expenses, losses, damages, or injuries, provided that in no event shall restitution be ordered to be paid on account of pain and suffering.

STATEMENT OF FACTS

The Livingston County State's Attorney's Office charged defendant Brian Birge with burglary and arson after he broke into Chief City Vapor, looted its merchandise, and set the store on fire. C17, 38.[1]

Before trial, the People informed the circuit court that they had previously extended a plea offer to defendant that included a 12-year prison sentence in exchange for defendant's agreement to plead guilty to both counts and pay the victim $117,230 in restitution. R106. Defense counsel counteroffered, suggesting a shorter term of imprisonment, but made no attempt to reduce the restitution order. R106-07.

The case then proceeded to jury selection. The circuit court brought in 16 prospective jurors and stated:

> This is a criminal case as I mentioned. The defendant is presumed innocent. There are a number of propositions of law that you must be willing to follow if you are going to serve as a juror in this case. So I am going to recite those for you now. Please listen carefully as I will be asking if you understand these principles and if you accept these principles of law.
>
> A person accused of a crime is presumed to be innocent of the charge against him. The fact that a charge has been made is not

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[1] Citations are as follows: "C" refers to the common law record; "R" the report of proceedings; "Peo. Exh.," the People's exhibits; "SEC C," the secured common law record; "Supp. C," the supplemental common law record; "Supp. R," the supplemental report of proceedings; "Def. Br." defendant's opening brief before this Court; "Peo. App. Br.," the People's appellee brief on direct appeal; and "Def. App. Br." defendant's appellant brief on direct appeal.

> to be considered as any evidence or presumption of guilt against the Defendant.
>
> The presumption of innocence stays with the Defendant throughout the trial and is not overcome unless from all of the evidence you believe the State proved the Defendant's guilt beyond a reasonable doubt.
>
> The State has the burden of proving the Defendant's guilt beyond a reasonable doubt. The Defendant does not have to prove his innocence. The Defendant does not have to present any evidence on his own behalf and does not have to testify if he does not wish to. If the Defendant does not testify, that fact must not be considered by you in any way in arriving at your verdict.

R112, 116-117.

The judge then asked, "by a show of hands, do each of you understand these principles of law?" R117. All 16 prospective jurors raised their hands. *Id.* The judge next asked, "do each of you accept these principles of law?" *Id.* Again, all 16 prospective jurors raised their hands. *Id.* When questioning the prospective jurors, defense counsel once again asked whether they understood that defendant is presumed innocent and that the State had to prove defendant guilty beyond a reasonable doubt. R134-35. All potential jurors raised their hands. R135. Nine jurors were selected from this first group. R153-55.

The court brought in a second group of 16 prospective jurors and admonished them as follows:

> All right. Again, I have to recite the propositions of law with you because, well, because I am required to, but also because it's very important. So please listen carefully.

> A person accused of a crime is presumed to be innocent of the charge against them. The fact that a charge has been made is not to be considered as any evidence or presumption of guilt against the Defendant.
>
> The presumption of innocence stays with the Defendant throughout the trial and is not overcome unless from all of the evidence you believe the State proved the Defendant's guilt beyond a reasonable doubt.
>
> The State has the burden of proving the Defendant's guilt beyond a reasonable doubt. The Defendant does not have to prove his innocence. The Defendant does not have to present any evidence on his own behalf and does not have to testify if he does not wish to. If the Defendant does not testify, that fact must not be considered by you in any way in arriving at a verdict.

R163-64.

After admonishing this second group of prospective jurors, the judge asked, "by a show of hands, do each of you understand these principles of law?" R164. All 16 prospective jurors raised their hands. *Id.* The judge next asked, "do each of you accept these principles of law?" *Id.* All 16 prospective raised their hands again. *Id.* When defense counsel questioned these prospective jurors, he too asked if they understood that defendant is presumed innocent and that the State must prove defendant guilty beyond a reasonable doubt. R177. All the prospective jurors raised their hands to indicate that they understood the principles. R178. The remaining three jurors and one alternate were selected from this group and the case proceeded to trial. R190-92.

The People called Sergeant Brad Baird, who testified that he was on duty on May 28, 2016 around 1:30 a.m. R208. While on patrol, he was flagged down by Willie Williams, who reported that Chief City Vapor was on fire. R208-09. Baird went to Chief City Vapor and observed that it was on fire, the glass in the front door was shattered, the door was open, and a knife lay on the floor just inside the entrance. R210-11. Nobody was in the building at the time. R212. Baird also saw a trail of merchandise leading from the store and heading southeast. R214. At the end of the trail were several boxes of merchandise addressed to Tom Roe, the owner of Chief City Vapor. R215.

Baird called the fire department and Officer John Marion. R210, 213-14. Firefighters arrived and extinguished the fire within 20 minutes of the call. R287. When Marion arrived, he saw defendant walking a block south of the store. R232, 234. Marion briefly followed defendant before stopping him at a nearby intersection. R337-38. Marion approached defendant and observed blood dripping from his left hand. R234. He asked defendant what happened, and defendant responded that he cut his hand while working on a lawnmower. R235. Marion also saw glass shards and plastic tags stuck to defendant's shirt, shorts, and legs. R235, 249. Defendant appeared nervous, was "soaked," and was "sweating profusely." R238. With defendant's consent, Marion searched him and recovered two pairs of pliers, a large amount of loose change, $115 in cash, a set of keys, and a lighter. R239.

Defendant was wearing a jacket over a hoodie, and most of these items were recovered from his hoodie. R253. Marion also noted that the hoodie's pockets were filled with broken glass. R253-54. Unprompted, defendant volunteered that he "did not start the fire," even though the fire was not visible from where they were standing. R243.

Marion further testified that only two people, Williams and defendant, were present on the street when he first arrived at the scene. R344. Marion's search of Williams, R218, uncovered neither broken glass nor large amounts of loose change, R253.

Detective Michael Henson investigated the Chief City Vapor burglary after the fire was extinguished. He observed several stacks of clear plastic tags that read "sealed for your protection" inside and outside the store. R258-59; Peo. Exhs. 26 & 27 (photographs of tags). He received similar plastic tags from Officer Marion who, in turn, had recovered them from defendant. R259-60. He also received the keys recovered from defendant and learned that they opened an exterior garage and storage unit attached to Chief City Vapor. R261-62. Finally, Henson learned that the store's surveillance system was badly damaged in the fire. R263. Evidence from the surveillance system was sent to the Illinois State Police Crime Lab, which was unable to obtain any video from the hard drive. *Id.* Henson decided against making further efforts to recover the surveillance video because it would be costly

($3,000) and the Illinois State Police had advised that he was unlikely to be successful. R265-66.

Roe testified that merchandise found strewn outside the store was previously inside the store and that nobody had permission to remove it. R278-79. He typically kept around $100 and loose change in the cash register at Chief City Vapor, kept the store's keys in his center desk drawer, and kept the clear plastic tags (used to seal bottles of vaping liquid) in the store. R278-280. Roe testified that "everything was lost" in the fire, referring to both the merchandise and the store itself. R281. To repair his store, Roe had to "gut the entire building" down to the studs. *Id.*

Arson investigator Shane Arndt opined that the Chief City Vapor fire was caused by someone introducing an open flame to the couch inside the store. R294, 305. He ruled out any accidental ignition source, such as faulty wiring or a furnace. R312-13. He also ruled out a lighter found on a countertop in the store as a potential ignition source because it was damaged by the heat and did not have any soot underneath it. R313. Both factors suggested that the lighter was on the counter at the time of the fire and was not the source of ignition. *Id.* The only potential ignition source he could not rule out was the possibility that the disposable lighter recovered from defendant had been used to set fire to the couch. R307, 313. Finally, he observed that the glass door to Chief City Vapor was broken prior to the fire because the broken glass did not have any smoke damage. R297.

Defendant testified that he had a 2010 conviction for unlawful possession of a controlled substance and a 2012 conviction for theft. R346. He claimed to remember only "bits and pieces" of the evening of the fire. *Id.* He remembered that, after being discharged from a hospital for a drug overdose, he was heavily medicated and playing the slot machines at a nearby gambling parlor on the night of the fire. R346-49. He did not know when he arrived there how much money he had, or what he was drinking, but he knew he had "some beers." R348. At some point (he could not recall when), he left the gambling parlor to walk to his sister's house, which was several blocks away. R349. She did not answer the door when he arrived, so he walked back toward the gambling parlor. R350-51. On the way, and from a distance of about four or five blocks, he saw people running back and forth from a car parked in front of Chief City Vapor. R351. The people had already driven off as defendant approached. R352. As defendant got closer to the store, he saw merchandise scattered around outside. *Id.* Amidst the scattered merchandise, he saw a jacket on the ground. *Id.* Defendant picked it up and noted that it was heavy and sounded like it was full of loose change. R353. While holding the jacket, he saw a police car drive by and noticed smoke coming from Chief City Vapor. *Id.* Defendant suspected that a crime had occurred but took the jacket anyway. *Id.* While rummaging through the pockets of the jacket, he cut his hand on broken glass inside the pockets. R353-54. He then put the jacket on over his hoodie and walked south a few

blocks from Chief City Vapor. R354. As he walked, he removed items from the jacket's pockets and put them in his hoodie pockets. R358-59. Broken glass and plastic tags also fell out of the jacket pockets and got stuck all over him. R359. He then turned around and was walking back toward the gambling parlor when he was stopped by Officer Marion. R354-55. He did not recall discussing cutting his hand on a lawnmower blade or going to Chief City Vapor. R355-56.

The jury found defendant guilty. Supp. C2-3; Supp. R40.

Prior to sentencing, the People filed a presentence investigation report, which included the recommendation that defendant be ordered to pay restitution, although the victim, Roe, had not responded to a request for an amount of the value of his loss. SEC C8. At sentencing, the People recommended that defendant's sentence include a restitution order of $117,230 to cover uninsured losses to Chief City Vapor. R372. Defense counsel neither objected to this request, nor mentioned it during his argument at sentencing. *Id.* Following the arguments of the parties, the court sentenced defendant to concurrent 24.5-year sentences on the burglary and arson counts and ordered him to pay $117,230 in restitution. C108, 110; R375-76.

Defendant appealed, arguing that the court erred when it recited all four Rule 431(b) principles to the group of prospective jurors and confirmed their understanding and acceptance of the principles together rather than

reciting them individually and asking the prospective jurors if they understood and accepted each principle after each was recited. Def. App. Br. 7-14; *People v. Birge*, 2019 IL App (4th) 170341-U, ¶ 33. He also argued that the court erred in ordering restitution without sufficient evidentiary support, or, in the alternative, that counsel was ineffective for failing to object to the People's recommended restitution order. Def. App. Br. 24, 27-29; *Birge,* 2019 IL App (4th) 170341-U, ¶¶ 54, 57. Defendant conceded that he failed to object to the Rule 431 admonishments and the restitution order, and further, that he failed to raise them in a posttrial motion, but he asked the court to consider these claims under the plain error doctrine. Def. App. Br. 14, 27-28, 32.

In response, the People argued that Rule 431(b) did not require the court to recite each principle separately, and consequently no error, much less plain error, occurred. Peo. App. Br. 5. The People conceded that the case should be remanded so the circuit court could substantiate the amount of restitution ordered. Peo. App. Br. 10.

The appellate court agreed that defendant forfeited his claims and reviewed them for plain error. *People v. Birge*, 2019 IL App (4th) 170341-U, ¶¶ 28, 57. It first found that no clear or obvious error occurred because the circuit court's admonishments complied with Rule 431(b). *Id.* ¶ 32. Specifically, it found that the circuit court complied with the "'specific question and response process' outlined in [*People v. Thompson*, 238 Ill. 2d

598 (2010)]," and *People v. Curry*, 2013 IL App (4th) 120724, in which it had recommended reading all four principles to the venire and then confirming that the prospective jurors understood and accepted those principles. As a result, the appellate court found that no error occurred.

The court also rejected defendant's request to excuse his forfeiture of the restitution argument as second-prong plain error. *Id.* ¶ 60. It first noted that an alleged error in sentencing does not automatically affect a defendant's "'fundamental right to liberty'" and that defendant had failed to provide the "'more in-depth analysis'" needed to demonstrate plain error. *Id.* (quoting *People v. Hanson*, 2014 IL App (4th) 130330, ¶ 37). The court further found that the alleged error here — lack of evidentiary support for a restitution order — was not grave enough to warrant plain error review. *Id.* It also found that counsel was not ineffective for failing to object to the restitution order because, even assuming that counsel's performance was deficient, defendant could not demonstrate prejudice, since he failed to allege that the amount of restitution was incorrect, or that the outcome of the sentencing hearing would be any different had counsel objected to the restitution order. *Id.* ¶ 55.

STANDARDS OF REVIEW

The interpretation of Supreme Court Rules, as well as defendant's claim of ineffective assistance of counsel, are reviewed de novo. *People v. Thompson*, 238 Ill. 2d 598, 606 (2010); *People v. Lofton*, 2015 IL App (2d)

130135, ¶ 24. A trial court's restitution order should be reviewed for an abuse of discretion. *People v. Brooks*, 158 Ill. 2d 260, 272 (1994).

ARGUMENT

I. The Circuit Court's Admonishment to Prospective Jurors Complied with Rule 431(b).

The circuit court admonished potential jurors in compliance with Rule 431(b). That rule requires the court to ask whether each potential juror understands and accepts four principles:

> (1) that the defendant is presumed innocent of the charge(s) against him . . . ; (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 . . . ; however, no inquiry of a prospective juror shall be made into the defendant's decision not to testify when the defendant objects.

Ill. S. Ct. R. 431(b). The circuit court recited all four of these principles to the prospective jurors, then asked them to confirm, by a show of hands, that they understood the principles. R116-17, 163-64. All of them raised their hands. R117, 164. The judge then asked if the prospective jurors accepted these principles, and once again, they all raised their hands. *Id.*

Defendant does not dispute that the circuit court recited all four principles to the prospective jurors, or that they all confirmed that they understood and accepted those principles. Instead, he contends that the court was required to recite each principle one-at-a-time and ask the jurors if they understood and accepted each principle individually. Def. Br. 13-14.

Defendant concedes that he forfeited this claim by failing to object at trial or file a posttrial motion; however, he requests plain error review. Def. Br. 11. Under the plain error doctrine, this Court may consider an unpreserved error if

> (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.

People v. Piatkowski, 225 Ill. 2d 551, 565 (2007). Under either prong, defendant bears the burden of persuasion. *Thompson*, 238 Ill. 2d at 613. Here, plain error review is unwarranted because there was no error at all, much less clear or obvious error.

A. No Error Occurred.

The first step in plain error review is to "determine whether any error occurred." *Thompson*, 238 Ill. 2d at 613. Determining whether the circuit court erred by reciting all four Rule 431(b) principles to the group of prospective jurors together requires this Court to construe Rule 431(b). *Id.* at 606. The same rules that apply to interpreting statutes apply to the construction of Supreme Court Rules. *Id.* The chief objective is to "ascertain and give effect to the drafters' intent." *Id.* "The best indication of intent is the language of the rule, given its plain and ordinary meaning." *Id.* When

the plain language of a rule is unambiguous, it is applied as written, without resorting to other aids of construction. *Id.*

This Court addressed Rule 431(b) in *Thompson* and found that its language was clear and unambiguous. *Id.* at 607.[2] *Thompson* held that, under a plain and ordinary reading of the rule, the circuit court "'shall ask' potential jurors whether they understand and accept the enumerated principles" and that the court's "method of inquiry must 'provide each juror an opportunity to respond to specific questions concerning the [Rule 431(b)] principles.'" *Id.* (alteration in original). In subsequent cases, this Court has reiterated that the circuit court must ask jurors if they both understand and accept the Rule 431(b) principles. *People v. Wilmington*, 2013 IL 112938, ¶ 32 (Rule 431(b) requires circuit court to ask if jurors understand and accept Rule 431(b) principles); *People v. Belknap*, 2014 IL 117094, ¶46 (same).

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[2] A later amendment, which merely substituted "decision not to testify" for "failure to testify," is no less clear and unambiguous. As construed in *Thompson*, Rule 431(b) provided "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." Ill. S. Ct. R. 431(b) (eff. May 1, 2007) (emphasis added). The amended Rule provides "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." Ill. S. Ct. R. 431(b) (eff. July 1, 2012). Thus, its language remains clear and unambiguous.

Notably, neither *Thompson* nor any other case has held that a circuit court must recite the principles separately to the jurors, and the plain language of the rule does not require a circuit court to explain the principles to the prospective jurors in any particular fashion. Under the plain language, a court complies with Rule 431(b) if it (1) instructs prospective jurors on the four principles, (2) asks if the prospective jurors understand those principles, and (3) asks if the prospective jurors accept those principles. In short, there is no requirement that the principles be recited separately.

This interpretation is consistent with appellate court decisions addressing the issue. Although some appellate districts recommend best practices when giving Rule 431(b) admonishments,[3] all agree that reciting the Rule 431(b) principles together satisfies its requirements. *See*, *e.g.*, *People v. Kinnerson*, 2020 IL App (4th) 170650, ¶ 62 (court need not recite each principle "separately"); *People v. Choate*, 2018 IL App (5th) 150087, ¶ 44 (combining principles not *per se* violation of Rule 431); *Smith*, 2012 IL App (1st) 102354, ¶ 105 (Rule 431(b) does not mandate separate questioning for each principle); *People v. Davis*, 405 Ill. App. 3d 585, 590 (1st Dist. 2010) (court not required to separate principles).

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[3] *See*, *e.g.*, *People v. Smith*, 2012 IL App (1st) 102354, ¶ 105 (suggesting "piece-meal" questioning may be better practice); *but see People v. Curry*, 2013 IL App (4th) 120724, ¶ 65 (recommending that courts read all four principles verbatim, then ask if jurors understand and accept those principles).

Thus, Rule 431(b)'s plain language does not dictate that the principles must be presented to the venire separately. As a result, the circuit court complied with Rule 431(b) when it recited all four principles, then separately asked whether the prospective jurors understood and accepted them. R116-17, 163-64.

Defendant's contrary interpretation both disregards this plain language and seeks to read into Rule 431(b) an additional requirement that courts recite the principles one-at-a-time and ask prospective jurors if they understand and accept each individual principle after it is read. Def. Br. 13-14. Defendant's reliance on *Thompson* to support this proposition is misplaced, for, as discussed, *Thompson* did not address how the principles should be presented to the venire. While it is true that it held that Rule 431(b) mandated a "specific question and response process," that holding referenced the requirement that the "court ask each potential juror whether he or she *understands* and *accepts* each of the principles in the rule." *Thompson*, 238 Ill. 2d at 607 (emphasis added). It did not say anything about the format of questioning. *Id.*

Defendant also cites several other cases in an attempt to illustrate a conflict among the appellate districts on how the principles ought to be presented, but none of these cases supports his position. Rather than finding error in how the court presented the four principles, each of his cited cases found error because the court failed to ask if the prospective jurors

understood and accepted all four principles or omitted a principle altogether. *See*, *e.g.*, *People v. Othman*, 2020 IL App (1st) 150823-B, ¶¶ 65-66 (court failed to ask if prospective jurors understood one principle and failed to ask if they accepted another); *People v. Lampley*, 2011 IL App (1st) 090661-B, ¶ 35 (court failed to ask if prospective jurors understood and accepted each principle); *People v. Johnson*, 408 Ill. App. 3d 157, 171 (1st Dist. 2010) (court failed to ask if the prospective jurors understood and accepted any of the principles, and omitted fourth principle altogether).

Nor is there any merit to defendant's argument that reciting the four principles together contradicts Rule 431(b)'s purpose of preventing courts from providing a "broad statement of applicable law followed by a general question concerning the juror's willingness to follow the law." Def. Br. 14-15; *see also* Ill. S. Ct. R. 431 Committee Comments. Defendant cites two cases to support this proposition, but both are distinguishable. *See People v. McCovins*, 2011 IL App (1st) 081805-B, ¶¶ 33, 36 (finding error when court "collapsed" all four principles into broader statement of law "interspersed with commentary on courtroom procedure and the trial schedule, and then concluded with a general question about the potential jurors' willingness to follow the law"); *see also People v. Hayes*, 409 Ill. App. 3d 612, 626-27 (1st Dist. 2011) (finding error when court combined first three principles into one broad principle and failed to ask if prospective jurors accepted that principle). Here, unlike *McCovins*, the judge presented the Rule 431(b) principles to the

prospective jurors without interspersing those principles with other instructions. And unlike *Hayes*, the judge thoroughly addressed each principle as a distinct proposition without paraphrasing any of them and asked if the prospective jurors both understood and accepted them.

Simply reciting the four propositions together, as the circuit court did here, did not contradict Rule 431(b)'s purpose. That is, the circuit court did not provide a "broad statement of applicable law" — rather, it provided the four principles required by Rule 431(b). Nor did it follow those four principles with "a general question concerning the juror's willingness to follow the law." Instead, in accordance with the Rule, the court first asked whether prospective jurors understood the principles, then asked whether they accepted them.

Defendant is also incorrect when he argues that reciting the four propositions together undermines Rule 431(b)'s goal of ensuring that jurors are fair and impartial. Def. Br. 15-16. Rule 431(b) codified the principles outlined in *People v. Zehr*, 103 Ill. 2d 472 (1984). Ill. S. Ct. R. 431 Committee Comments. In *Zehr*, and again in *Thompson*, this Court stated that it is the prospective jurors' understanding and acceptance of those principles that is essential to ensuring that they are fair and impartial. *Zehr*, 103 Ill. 2d at 477; *Thompson*, 238 Ill. 2d at 609. Defendant's prospective jurors unanimously expressed their understanding and acceptance of the principles.

Defendant further argues that reciting all four principles together may confuse prospective jurors. Def. Br. 16. But jurors are presented far more (and, often, far more complicated) instructions at trial — and presumed to follow those instructions. *See People v. Taylor*, 166 Ill. 2d 414, 438 (1995) (jurors presumed to follow court's instructions). In contrast, the four principles here are not beyond the comprehension of prospective jurors. Indeed, the Rule itself contemplates that prospective jurors, when asked whether they understand these principles, can and will seek clarification if they do not understand.

Moreover, nothing in the record suggests that the jurors were actually confused by the court's presentation of the Rule 431(b) principles. To the contrary, not only did the prospective jurors indicate by show of hands that they understood and accepted the Rule 431(b) principles, but defense counsel also asked follow-up questions about the presumption of innocence and burden of proof to ensure that the prospective jurors understood them. R134-35, 177-78. No prospective juror expressed any confusion about those propositions, even though the circuit court had presented them alongside the other Rule 431(b) principles. *Id.*

Finally, defendant argues that the jurors were confused when the circuit court asked if they understood and accepted each principle "by a show of hands." In addition to being forfeited at the trial level, defendant forfeited

this claim a second time by failing to raise it on appeal. *See generally* Def. App. Br.; *People v. Williams*, 235 Ill. 2d 286, 298 (2009).

Forfeiture aside, his claim is also meritless. When the judge asked if they understood the principles "by a show of hands," every prospective juror raised his or her hand. R117, 164. When asked if they accepted the principles, every prospective juror raised his or her hand again. *Id.* In follow-up questioning by the parties, the jurors continued to respond "by a show of hands." R132-35, 176-78. This case is therefore unlike *People v. Dismuke*, 2017 IL App (2d) 141203, where the court first instructed the potential jurors *not* to raise their hands if they understood, agreed with, and accepted the *Zehr* principles; then instructed the potential jurors to *raise* their hands in response to its question if they did not understand or accept the principles; and then, after reciting each principle, changed the question from "understand and accept" to "difficulty or disagreement." *Id.* ¶ 54. Not only did potential jurors receive "three different instructions about what they were supposed to do with their hands," but, more importantly, the court substituted "difficulty or disagreement" for "understand and accept." *Id.* Here, by contrast, the jurors neither received conflicting instructions nor showed any sign of confusion with the circuit court's approach, and the court did not deviate from the Rule's "understand and accept" language.

In sum, there is no requirement that the Rule 431(b) principles must be recited separately to the jury, nor should such a requirement be imposed.

The circuit court complied with Rule 431(b) when it followed its plain and ordinary language: (1) it recited the four principles to the potential jurors, (2) asked if they understood those principles, and (3) asked if they accepted the principles. R117, 164. Accordingly, there was no error, much less plain error, and this Court should enforce defendant's forfeiture.

B. The Evidence Was Not Closely Balanced

Even if this Court were to find that there was clear and obvious error, defendant's plain error argument fails because the evidence was not closely balanced. *See Thompson*, 238 Ill. 2d at 613.[4] As an initial matter, defendant incorrectly contends that the People forfeited any argument that the evidence was not closely balanced. On appeal, the People identified the two-pronged plain-error analysis and noted that the first step of plain error analysis is to determine whether any error occurred. Peo. App. Br. 1-2. The People's conclusion that no error occurred was not a separate issue but a necessary part of the first-prong plain error analysis. Peo. App. Br. 5; *see Piatkowski*, 225 Ill. 2d at 565 (first-prong plain error occurs when a clear or obvious error occurs *and* the evidence is closely balanced). Accordingly, the People did not forfeit their argument that the evidence was not closely balanced.

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[4] Defendant does not argue that his Rule 431(b) claim constitutes second-prong plain error, nor could he as this Court previously held that such errors do not "fall within the very limited category of structural errors . . . requir[ing] automatic reversal." *Thompson*, 238 Ill. 2d at 611.

Even assuming arguendo that the People forfeited the argument that the evidence was not closely balanced, because forfeiture is a limitation on the parties and not the court, this Court should consider the argument. *People v. Sophanavong*, 2020 IL 124337, ¶ 21; *see also People v. Hicks*, 181 Ill. 2d 541, 545 (1998) (Supreme Court may address issues concerning substantial rights even if not properly preserved in the trial court in the interest of "obtaining a just result and maintaining a sound body of precedent."). This Court can also affirm the circuit court on any basis contained in the record. *Beacham v. Walker*, 231 Ill. 2d 51, 61 (2008). Accordingly, no impediment exits to prevent this Court's review of whether the evidence was closely balanced.

Defendant's assertion that the evidence was closely balanced, because it boiled down to a credibility contest between him and Officer Marion, misinterprets what it means for evidence to be closely balanced. When assessing whether evidence is closely balanced, "a reviewing court must evaluate the totality of the evidence and conduct a qualitative, commonsense assessment of it within the context of the case." *People v. Sebby*, 2017 IL 119445, ¶ 53. The court considers whether two *plausible* versions of events are presented and whether corroborating evidence supports either version. *Id.* ¶¶ 60-63 (finding closely balanced evidence where the evidence consisted of two plausible versions of events without any corroborating evidence supporting either side).

For instance, in *People v. Adams*, 2012 IL 111168, this Court declined to find the evidence closely balanced despite the fact that the defendant's testimony conflicted with the arresting officer's testimony. The officer testified that he arrested defendant for driving on a suspended license and that he found a small bag of cocaine in the defendant's pocket during a search incident to arrest. *Id.* ¶ 5. Defendant testified that he was arrested and searched, and that he just happened to be standing near a bag of cocaine that was on the ground (and not in his pocket). *Id.* ¶¶ 7-9. Although defendant's testimony contradicted the officer's testimony and was "not logically impossible," this Court found that defendant's testimony was "highly improbable" and declined to find the evidence was closely balanced. *Id.* ¶ 22.

This case is similar to *Adams*. Officer Marion testified that he found defendant covered in the same plastic tags found at Chief City Vapor, his hoodie pockets were full of broken glass, and his hand was bleeding. R234-35, 253-54. After defendant consented to a search of his person, Marion recovered the keys to Chief City Vapor, two pairs of pliers, and a lighter. R239, 262. Defendant also had approximately $115 in cash and a large amount of loose change. R239. Marion testified that he recovered most of this evidence, including the broken glass, from defendant's hoodie — not the outer jacket that defendant allegedly found on the ground. R240, 253-54, 353-54. Finally, defendant volunteered to Marion that he "did not start the fire," despite being unable to see the fire from where they were standing, and

Marion observed that defendant was nervous and sweating profusely. R238, 243.

Defendant neither disputed any of the physical evidence nor Marion's testimony; instead, he offered an alternative explanation for the obvious conclusion that he had burglarized and set fire to Chief City Vapor. He explained that he had just been discharged from the hospital following a drug overdose and was still "heavily medicated" when his mother dropped him off at a gambling parlor. R346-47. There, he gambled and had "some beers." R347-48. At some point, he left and walked to his sister's house a few blocks away. R349. After she did not answer the door, he headed back toward the gambling parlor. R350. On the way, he passed by Chief City Vapor, and he saw "a couple of people" near the store who fled the scene. R351-52. Those unidentified people happened to leave behind merchandise and a jacket filled with cash, change, and other evidence of the crime. R352-53. Defendant suspected that a crime had occurred but picked up the jacket anyway. R353. He rummaged through the pockets and cut the back of his hand on broken glass. R353-54. He then donned the jacket and started removing items from its pockets, including shards of broken glass, and putting them in the pockets of his hoodie. R253 (explaining that broken glass was found in defendant's hoodie pockets), 358-59. In the process of doing so, broken glass and the plastic tags happened to fall out of the pockets and get stuck all over his body. R359.

As was true in *Adams*, defendant's testimony is "not logically impossible," but it is "highly improbable." 2012 IL 111168, ¶ 22. At sentencing, the circuit court commented that defendant's story "was perhaps not bizarre but pretty close." R374. The judge explained: "It was pretty inconsistent and not very logical which I think the jury found to not be credible, and I think based on my assessment of it I didn't think the Defendant was all that credible either." *Id.* In short, the evidence here was not closely balanced because defendant's explanation as to how he was apprehended with so much physical evidence connecting him to the crime scene was implausible.

Similarly, and contrary to defendant's argument, the arson evidence was not closely balanced. Arndt was the only witness to testify about the cause of the fire, and he consistently opined that it was incendiary, meaning it was caused by "an open flame being introduced to the couch" inside Chief City Vapor. R305. He ruled out any accidental ignition source. R312-13. He also ruled out the lighter found on the counter inside Chief City Vapor because the lighter was damaged by heat and did not have any soot underneath it, demonstrating that the lighter was on the counter at the time of the fire. R313. The only heat source he could not rule out was a flame intentionally introduced to the couch by something like the disposable lighter recovered from defendant. R307, 313.

Although Arndt addressed alternative possibilities on cross-examination, he ultimately ruled them out. First, the absence of any accelerants did not change his opinion that the fire was incendiary because the couch's padding was made of highly flammable polyurethane foam that acted "almost like a liquid gas." R305, 307, 310. Second, while he agreed that it was possible that the fire started from some source other than an open flame, such as a cigarette or a candle, Arndt concluded that was highly unlikely because he did not find any evidence to support those theories, such as a cigarette butt or a metal disk from a candle's wick. R317-18. Finally, Arndt ruled out accidental ignition sources based on the circumstances of the fire. R315. It occurred during a burglary, the damage from the fire was limited to the area surrounding the couch, and the couch itself burned completely within five to ten minutes. R307, 315-16. And the fire department extinguished the fire within 20 minutes after it was called. R287. Based on his observations and the reports of the police and fire department, Arndt concluded that there was a limited "window of opportunity" to start the fire. R315.

Thus, there was only one plausible explanation for the fire: the couch was intentionally set on fire by a flame. R307, 313. Accordingly, since the evidence of arson was not closely balanced, this Court should enforce defendant's forfeitures.

II. This Court Should Remand to the Circuit Court for Imposition of a Compliant Restitution Order.

Defendant next contends that the circuit court erred by ordering defendant to pay $117,230 in restitution, and, consequently, that he was denied a fair sentencing hearing. Before the appellate court, the People conceded that the circuit court erred in ordering restitution and requested that the case be remanded pursuant to Illinois Supreme Court Rule 472. Peo. App. Br. 10. The People continue to maintain that the circuit court erred in ordering restitution and urge this Court to vacate the restitution order and remand for the circuit court to determine the amount of restitution owed.

The restitution statute requires a trial court to consider a variety of factors, including the victim's actual out-of-pocket costs and any losses covered by insurance. 730 ILCS 5/5-5-6(b). However, alleged losses that are unsupported by the evidence cannot serve as a basis for restitution. *Adame*, 2018 IL App (2d) 150769, ¶ 14. "'The court must determine the actual costs incurred by the victim; a guess is not sufficient.'" *Id.* (quoting *People v. Dickey*, 2011 IL App (3d) 100397, ¶ 25). When a circuit court orders restitution without sufficient evidentiary support, the appropriate remedy is to vacate the order and remand with instructions for the court to properly determine the amount of restitution owed. *See id.* ¶ 33 (remanding for hearing to determine restitution owed); *People v. Guarjardo*, 262 Ill. App. 3d 747, 773 (1st Dist. 1994) (same).

People v. Lewis, 234 Ill. 2d 32 (2009), also supports this result. There, this Court addressed the appropriate street-value fine to be imposed based on the amount of seized narcotics. *Id.* at 44. The statute specifically required testimony as to the amount of narcotics seized, and, if needed, testimony about the street value of those narcotics. *Id.* This Court found that the circuit court must have "some evidentiary basis" for the street value to properly set the fine and comply with the statute. *Id.* at 46. Examples of "some evidentiary basis" included "testimony at sentencing, a stipulation to the current value, or reliable evidence presented at a previous stage of the proceedings." *Id.* Because there was no evidentiary basis for the fine imposed, imposition of the fine was second-prong plain error because arbitrarily imposing a fine "affect[s] the integrity of the judicial process and the fairness of the proceeding.'" *Id.* at 48. Accordingly, this Court vacated the fine and remanded with instructions to impose a fine based on evidence of the street value of seized narcotics. *Id.* at 49.

Like the street-value fine statute at issue in *Lewis*, the restitution statute requires a circuit court to determine the amount of restitution based on factors such as "actual out-of-pocket expenses, losses, damages" and any amounts covered by insurance. 730 ILCS 5/5-5-6(b). Although not expressly required by the statute, evidence of value is fundamental to assessing the restitution owed. Indeed, it would be nearly impossible to assess things like "actual out-of-pocket expenses" without any evidence of those expenses. At a

minimum, "some evidentiary basis" is required. In light of the prior appellate court cases addressing this issue, and this Court's analogous holding in *Lewis*, this Court should vacate the restitution order and remand for the circuit court to determine the appropriate amount of restitution owed.

For the reasons just discussed, counsel was ineffective for failing to object to the restitution order. However, the remedy is the same: the restitution order should be vacated, and the cause should be remanded for a hearing to determine the proper amount of restitution owed.

CONCLUSION

This Court should affirm that portion of the appellate court's judgment holding that the circuit court did not err in providing the Rule 431(b) admonishments. This Court should reverse the appellate court's judgment affirming the restitution order, vacate the restitution order, and remand for a hearing at which the circuit court may determine of the amount of restitution owed.

August 27, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 31 pages.

/s/ Richard J. Cook
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PROOF OF FILING AND SERVICE

Under penalty of law as provided in 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct. On August 27, 2020, the foregoing **Brief for Plaintiff-Appellee, People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system, which automatically served notice on the following persons named below:

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