No. 125644

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- BRIAN BIRGE, Petitioner-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 4-17-0341. There on appeal from the Circuit Court of the Eleventh Judicial Circuit, Livingston County, Illinois, No. 16-CF-159. Honorable Jennifer H. Bauknecht, Judge Presiding.

REPLY BRIEF FOR PETITIONER-APPELLANT

JAMES E. CHADD
State Appellate Defender

CATHERINE K. HART
Deputy Defender

EDWARD J. WITTRIG
Assistant Appellate Defender
Office of the State Appellate Defender
Fourth Judicial District
400 West Monroe Street, Suite 303
Springfield, IL 62704
(217) 782-3654
4thdistrict.eserve@osad.state.il.us

COUNSEL FOR PETITIONER-APPELLANT

ORAL ARGUMENT REQUESTED

E-FILED
9/30/2020 10:52 AM
Carolyn Taft Grosboll
SUPREME COURT CLERK

I.

The circuit court erred in admonishing the potential jurors under Rule 431(b) because, by grouping the principles into one broad statement of law, it failed to ensure that the potential jurors understood and accepted each of the four distinct, essential principles enumerated in that rule.

In his opening brief, Brian Birge ("Birge") argued that the circuit court clearly and obviously erred in its Illinois Supreme Court Rule 431(b) admonishments by collapsing the four principles into one broad statement of law and failing to ask the jurors specific questions on the separate principles. (ILSC Opening Brief, p. 11–18.) In turn, the State responds that, *inter alia*, the "plain language" of the rule does not require that the principles be recited and discussed separately and contends that its "interpretation is consistent with appellate court decisions." (ILSC Response Brief, p. 16.) The State is incorrect. Even if other appellate courts have erroneously concluded that the plain language of Rule 431(b) permits the grouping and commingling of the principles during the circuit court's admonishments, Birge's position is the only one that accomplishes the rule's purpose, which is to ensure that every juror deciding his guilt or innocence understands and accepts *each* fundamental principle enumerated therein. See *People v. Stevens*, 2018 IL App (4th) 160138, ¶ 25 (explaining that "[t]he rule ensures jurors understand and accept the bedrock principles of our criminal law, and failing to comply could threaten the integrity of the jury's verdict or cast doubt on any guilty verdict a jury might return") (internal quotations omitted).

But just as importantly, the State's claim also ignores that some appellate courts *have determined* that the plain language of Rule 431(b) dictates that the circuit court should address the principles individually rather than as a group. For instance, in interpreting the plain language of Rule 431(b), the First District found that this Court's rules must "be adhered to as written" and that "means that trial courts should advise jurors of each of the four *Zehr* principles as written in the rule, as well as ask if the jurors understand and accept each of the principles,

after each principle is read." *People v. Perry*, 2011 IL App (1st) 081228, ¶ 74 (emphasis added). To that end, the State is mistaken in its repeated assertion that Birge's interpretation–that is, the plain language of Rule 431(b) mandates circuit courts to address each principle set forth in the rule individually rather than grouped together–is without any support from prior appellate court's decisions. (ILSC Response Brief, p. 16–17); see *Perry*, 2011 IL App (1st) 081228, ¶ 74; see *People v. Lampley*, 2011 IL App (1st) 090661-B, ¶ 35 (analyzing the defendant's claim that the circuit court failed to comply with Rule 431(b) even though it addressed all four questions because "it is simply not enough to recite the principles and ask a question about them" and ultimately agreeing that the circuit court both erred in asking if any of the venire "had any problems with those concepts" and in failing to follow "*a straightforward questioning of the Zehr principles as outlined by Rule 431(b)*") (emphasis added).

In support of its own interpretation of Rule 431(b), the State additionally suggests that nothing in this Court's previous decision in *Thompson* concerns how the Rule 431(b) principles should be presented to the jurors. (ILSC Response Brief, p. 16–17); *People v. Thompson*, 238 Ill. 2d 598, 607 (2010). Yet *Thompson* specifically mandated that the circuit court's method of inquiry must "provide each juror an opportunity to respond to *specific questions* concerning the [Rule 431(b)] principles." *Thompson*, 238 Ill. 2d at 607 (quoting Ill. S. Ct. R. 431(b)).In its analysis, this Court held that Rule 431(b) thus necessitates a specific question-and-response *process*. *Id.* Because Rule 431(b) envisioned a question and response *process*, this Court concluded that a circuit court may not give a broad statement on the law followed by a general question on the juror's ability to follow the law. *Id.*

By expressly requiring *specific questions* and a question-and-response *process*, both *Thompson* and Rule 431(b) envision more than a lengthy recitation of the principles combined together into one statement of law followed by a general question on whether the jurors understand

and accept the principles grouped together. See *id.* And the circuit court's admonishing of the principles grouped together violates both *Thompson* and Rule 431(b)'s requirement that the jurors receive a meaningful opportunity to respond to each distinct principle enumerated in that rule. See *People v. Hayes*, 409 Ill. App. 3d 612, 627 (1st Dist. 2011) (holding that the circuit court clearly and obviously erred, *inter alia*, because it grouped some of the Rule 431(b) principles together and questioned the jurors if they understood those concepts grouped together, as that method of inquiry "did not allow the potential jurors to acknowledge that they understood *** each of those principles").

On this matter, the First District's opinions in *People v. Johnson*, 408 Ill. App. 3d 157 (1st Dist. 2010), and *People v. Hayes*, 409 Ill. App. 3d 612 (1st Dist. 2011), are helpful. In both *Johnson* and *Hayes*, the appellate courts found clear and obvious error because the circuit court's Rule 431(b) admonishments omitted one of the Rule 431(b) principles or did not ascertain whether the jurors accepted the four principles. *Johnson*, 408 Ill. App. 3d at 170–71; *Hayes*, 409 Ill. App. 3d at 627. But critically here, both the *Johnson* and *Hayes* courts found clear and obvious error because the circuit courts short-circuited the process envisioned by *Thompson* and Rule 431(b) by collapsing the concepts and asking the jurors about their understanding of the combined principles grouped together, essentially holding that this method of inquiry deprived the jurors of their required opportunity to respond to whether they actually understood each of the four principles set forth in Rule 431(b). See *Johnson*, 408 Ill. App. 3d at 170–71; *Hayes*, 409 Ill. App. 3d at 627. Simply, *Hayes* and *Johnson*'s prohibition on short-circuiting the Rule 431(b) inquiry by combining the principles together in the circuit court's admonishments inherently recognizes that addressing and questioning the jurors about the four principles separately is critical to ensuring that the jurors understand and accept each essential principle as required by Rule 431(b). See *Johnson*, 408 Ill. App. 3d at 170–71; *Hayes*, 409 Ill. App. 3d at 627.

In its response, the State nevertheless contends that jurors are often presented with "far more complicated" instructions at trial and the law still presumes that they follow those instructions. (ILSC Response Brief, p. 20.) To the State, there is really no need at all for the circuit court to address the distinct, yet essential, Rule 431(b) principles one at a time. (ILSC Response Brief, p. 20.) The State's point, however, ignores that the jurors are often presented with these other similarly complicated instructions in writing and given indefinite time to process the information privately in their deliberations, free from the pressure of quickly answering in front of the circuit court, the parties, court personnel, and all other potential jurors. The fact that the Rule 431(b) concepts were given to the jurors orally, in a lengthy recitation that combined multiple, distinct, and complex legal principles, interfered with the jurors' ability to meaningfully respond to circuit court's admonishments, as delineated in Birge's opening brief. (ILSC Opening Brief, p. 15–17); see *Johnson*, 408 Ill. App. 3d at 170–71; *Hayes*, 409 Ill. App. 3d at 627.

To reiterate, the principles set forth in Rule 431(b) are not intuitive concepts to a layperson unfamiliar with the law. (ILSC Opening Brief, p. 15–16); see *People v. Richardson*, 2013 IL App (1st) 111788, ¶ 33.By combining the principles in the circuit court's admonishments and questions during *voir dire*, the circuit court significantly decreases the likelihood that every juror will fully consider each distinct legal principle and give voice to their confusion or rejection of those counterintuitive concepts. Cf. *Richardson*, 2013 IL App (1st) 111788, ¶ 33.

Concerning the jurors' possible confusion in voicing their misunderstanding or rejection of the Rule 431(b) principles, Birge further argued that the circuit court muddled its Rule 431(b) questioning by not specifying to the jurors precisely what they were signifying by showing their hands in response to its questions. (ILSC Opening Brief, p. 18.) Specifically, Birge complained that the circuit court never tied what the jurors were indicating by showing their

hands, or indicated how any potential juror should respond if they accepted (or understood) only some, but less than all, of the legal principles it previously recited. (ILSC Opening Brief, p. 18.) On that matter, the State offers that Birge's claim was not properly preserved for review. (ILSC Response Brief, p. 21.) But, as the State notes, "forfeiture is a limitation on the parties and not the court," and so this Court may consider the argument. (ILSC Response Brief, p. 23.) And, given that the evidence was closely balanced, this Court should review Birge's point for plain error, notwithstanding any procedural forfeiture. See *People v. Sebby*, 2017 IL 119445, ¶¶ 63, 78 (reviewing the defendant's procedurally defaulted Rule 431(b) violation for plain error when the evidence was closely balanced).

Indeed, the evidence was closely balanced, permitting this Court to review the circuit court's Rule 431(b) violation. (ILSC Opening Brief, p. 19–24.) In its response brief before this Court, the State– for the very first time–now asserts that the evidence was not closely balanced after all. (ILSC Response Brief, p. 22–27.) In so doing, the State offers that it did not forfeit its argument against the closely balanced nature of the evidence. (ILSC Response Brief, p. 22.) In that process, the State correctly proffers that a defendant raising first-prong plain error must establish that both clear or obvious error occurred and that the evidence was closely balanced; it does not, however, explain how that requirement excuses its failure to contest Birge's claim that evidence was closely balanced before the appellate court. (ILSC Response Brief, p. 22); cf. *People v. Turner*, 2012 IL App (2d) 100819, ¶¶ 33, 44 (finding that the State forfeited its argument when it failed to present that argument at its earliest opportunity). Nor does the State address Birge's point that the prosecutor previously heralded the case as revolving around the jurors' credibility determinations, specifically whether they believed Birge's testimony. (ILSC Opening Brief, p. 20–21; ILSC Response Brief, p. 22–27; Sup. R. 30); see *People v. Naylor*, 229 Ill. 2d 584, 607 (2008) (rejecting the State's claim that the evidence was not closely balanced

when, *inter alia*, the State's own arguments acknowledged that the defendant's convictions turned on the fact-finder's assessment of the defendant's credibility).

Notwithstanding any possible forfeiture, the State's newly rendered closely balanced argument accuses Birge of "misinterpret[ing] what it means for evidence to be closely balanced" in his characterization of the case as a credibility contest. (ILSC Response Brief, p. 23.) The State's accusation ignores that Birge correctly identified his case for what it was: a case that hinged on the jurors' resolution of the witnesses' credibility because neither party's version of events was implausible or validated by objective evidence. (ILSC Opening Brief, p. 19, 22; Sup. R. 30); see *Naylor*, 229 Ill. 2d at 608 (finding that, in those circumstances, [o]f course this evidence was closely balanced" as "credibility was the only basis upon which defendant's innocence or guilt could be decided"). Rather than establishing that Birge misinterpreted the law, it appears that the State merely disagrees with his testimony's plausibility. (ILSC Response Brief, p. 23–26.)

In support of its claim that Birge's testimony was implausible, the State then cites to *People v. Adams*, 2012 IL 111168. (ILSC Response Brief, p. 24–26.) Contrary to the State's suggestion, *Adams* is inapposite and not helpful here. In *Adams*, the State's principal witness, a police officer, testified that he conducted a stop of the defendant's vehicle in a parking lot. 2012 IL 111168, ¶ 4. In that parking lot, the police officer purportedly approached the defendant, the vehicle's sole occupant, and eventually placed him under arrest for driving with a suspended license. *Id.* According to the police officer, during a search incident to the defendant's arrest, the officer found a small plastic sandwich bag containing a white powdery substance–which later tested positive for cocaine–in the defendant's left front pocket. *Id.* at ¶¶ 5–6.

In comparison, the *Adams* defendant testified that, after he pulled his vehicle into the parking lot on his way to buy ice and water, he exited the vehicle and the police officers

approached him. *Id.* at ¶ 7. After a discussion on the legality of driving on traffic citations, the police officer arrested the defendant, ordered him to place his hands behind his back, and elected not to handcuff him. *Id.* According to the defendant, during the officers' subsequent search of him, the police officer asked him "what is this[?]" *Id.* at ¶ 8. The defendant further explained:

> "[The officer] moved his foot, looked down on the ground. There was a piece of plastic laying there with a white substance in it. It wasn't sealed or tied up or nothing. It was just a piece of plastic." *Id.*

Thereafter, the defendant claimed he had never seen the plastic with the white substance on it before, disavowed that he saw the officers place the plastic on the ground, offered that he could not have dropped it because his hands were behind his back, and explained that, as it was not "knotted up or tied up or nothing," it could not have come from anybody's pocket. *Id.* at ¶¶ 8–9. The defendant further added that the police officer then informed him, that if the defendant could not provide any information about drug dealers, "killings" or guns, then he would go to prison for a couple years. *Id.* at ¶ 10.

In analyzing the above evidence, this Court reasoned that the defendant's testimony was not plausible. *Id.* at ¶ 22. On whether the defendant's testimony was plausible, this Court concluded:

> "Thus, the jury heard from defendant the following version of events: A piece of paper or plastic with cocaine on it was sitting in a parking lot. Although unsecured in any way, the cocaine powder had not been disturbed by wind, weather or traffic. By coincidence, defendant parked his car next to the cocaine. In a further coincidence, after defendant was approached by the police, he was escorted to and searched in a spot only inches from the cocaine. Then, when [the police officer] discovered the cocaine on the ground, he conspired on the spot to attribute the drugs to defendant in an apparent attempt to pressure defendant to provide information about other crimes, though there was no indication that the police had ever met defendant or would have reason to believe that he possessed such information. We think it clear from the foregoing that defendant's explanation of events, though not logically impossible, was highly improbable." *Id.*

Unlike the defendant in *Adams*, Birge's testimony did not rely on a series of highly unlikely coincidences. As a reminder, Birge testified that, late one night as he was walking near Chief City Vapor on his way to the gaming parlor, he saw "some commotion," a couple of people running from the store, smoke billowing out its windows, and several items strewn outside the store, including a discarded jacket. (R. 351–53.) Picking up the jacket, the intoxicated Birge recognized it had money in it; so he kept it, continued on his way, and explored the jacket's contents before encountering the police. (R. 349, 352, 355.)

Birge's explanation is thus not premised on an event unlikely to occur, like the possibility that loose cocaine powder was left unattended on a plastic sheet in a parking lot in the exact spot where the defendant was to be later searched, all the while remaining undisturbed by the elements, traffic, and passersby. See *id.* Instead, Birge testified that he observed others fleeing from the burning Chief City Vapor, leaving behind items taken from the building. (R. 351–52.) The fact that Birge observed others committing the offense is not, itself, implausible. Cf. *People v. Ford*, 113 Ill. App. 3d 659, 660–61 (3d Dist. 1983) (finding that it could not "so easily discount" the defendant's testimony that she did not purchase the illicit substances and instead had observed the State's witness–a police officer–conduct the purchases). Nor does it seem unreasonable that, in the offenders' haste to flee the burning building, they left the jacket used in the burglary behind. Further, given Birge's intoxicated and heavily medicated state it is believable that he picked up the discarded jacket and fumbled through its pockets for money, injuring himself. (R. 351–55.) As such, Birge's presented a reasonable explanation for his presence near Chief City Vapor with the jacket. Cf. *People v. Anderson*, 30 Ill. 2d 413, 414–15 (1964) (finding reasonable doubt that the defendant burgled some money from a nearby bakery after reviewing the unemployed defendant's claim that he received a large sum of money from a poker game with unidentified participants rather than from the burglarized bakery).

Rather than the factual circumstances of *Adams*, Birge's case more closely resembles this Court's decision in *People v. Naylor*, 229 Ill. 2d 584 (2008). In *Naylor*, the State presented, *inter alia*, the testimony of two officers, who testified that, while undercover, they bought heroin from the defendant while he was selling heroin in a building's stairwell. 229 Ill. 2d at 588–90, 607. In contrast, the defendant explained that he was merely and innocuously walking down the stairwell when he was attacked by police officers in an apparent drug raid. *Id.* at 590, 607. In comparing the competing narratives, this Court found that the evidence was closely balanced as it was a credibility contest between two plausible version of events that were not corroborated or refuted by objective evidence. *Id.* at 607–08. Just like in *Naylor*, Birge offered a logical and innocent explanation for his behavior that was consistent with the facts presented by the State's witnesses and was not refuted by any of the State's evidence. (R. 345–56.)

In arguing that Birge's testimony was implausible, the State actually ignores the logical inconsistencies in its own theory at trial. (ILSC Response Brief, p. 22–26.) For instance, there was no evidence that Birge's blood was found near Chief City's broken glass doors. It does not seem probable that, in purportedly breaking into Chief City Vapor, the intoxicated and heavily medicated Birge shattered the glass doors without injuring himself in that process. Given the absence of his blood within Chief City Vapor, it is much more believable that Birge, consistent with his testimony, found the jacket outside and cut his hand when placing it inside the pocket of this newly acquired jacket. (R. 353–54.)

As an alternative argument, the evidence was also closely balanced concerning Birge's arson conviction. (ILSC Opening Brief, p. 23–24.) The State does not agree, offering that investigator Shane Arndt ("Arndt") ruled out all other ignition sources except a flame being intentionally introduced to the couch inside Chief City Vapor. (ILSC Response Brief, p. 26–27.) In that analysis, Arndt ruled out other ignition sources–such as a candle or a cigarette–because

there was no evidence left behind to indicate that the fire was caused by an accidental ignition source. (R. 312–13, 314, 318.) The problem with Arndt's analysis is that there are accidental ignition sources that would not leave behind any evidence. (R. 316–17.) To be sure, a fire investigator would not find any evidence of the ignition source if the fire was started by an unattended and lit filterless cigarette or perhaps even a used cigar. (R. 316–17.) Given that the location was what the prosecutor classified as a "smoke shop," the presence of unattended, hand-rolled filterless tobacco products does not seem "highly unlikely" or render the evidence strongly weighted in favor of the State. (ILSC Response Brief, p. 27; R. 201.)

As a final matter, the State points to the circuit court's commentary on the evidence before it sentenced Birge as evidence that his testimony was not believable. (ILSC Response Brief, p. 26.) But the circuit court's attempts to explain its 24 year and 6 month prison sentence do not constitute any sort of adjudication that the evidence was not closely balanced. Even if the circuit court's comments can be construed as such a finding, it should be given no deference; the question of whether a forfeited claim is reviewable as plain error because the evidence was closely balanced is a question of law that is reviewed *de novo.* See *People v. Johnson*, 238 Ill. 2d 478, 485 (2010). In the end and for the reasons previously articulated, this Court, following its *de novo* review, should find that the circuit court's clear and obvious Rule 431(b) violation tipped the balance against him in this closely balanced case and remand for a new trial. See *Sebby*, 2017 IL 119445, ¶¶ 78, 80. Birge further relies on the arguments presented in his opening brief.

II.

The circuit court erred when it ordered Brian Birge to pay $117,230 in restitution because there was no evidentiary support for awarding that amount. Alternatively, defense counsel was ineffective for failing to object to a restitution award that lacked the necessary evidentiary support.

In his opening brief, Birge also contended that the circuit court's restitution award–which was entered without any evidence of the numerical amount of the actual damages–constituted second-prong plain error, was the product of his defense counsel's ineffectiveness, and required remand for a new hearing on restitution. (ILSC Opening Brief, p. 25–35.) Before this Court, the State concurs that the circuit court plainly erred in ordering restitution without evidence supporting the award, that Birge received ineffective assistance of counsel on this matter, and that this Court should remand to the circuit court for a new hearing on restitution. (ILSC Response Brief, p. 28–30.) To that end, Birge asks that this Court remand for a new hearing on the issue of restitution. See *People v. Adame*, 2018 IL App (2d) 150769, ¶ 23; *People v. Jones*, 206 Ill. App. 3d 477, 482 (2d Dist. 1990); cf. *People v. Lewis*, 234 Ill. 2d 32, 48 (2009). Birge further relies on the arguments presented in his opening brief.

CONCLUSION

For the foregoing reasons, Brian Birge ("Birge"), petitioner-appellant, respectfully requests that this Court reverse his convictions and remand for a new trial. Alternatively, Birge asks for a new hearing on the issue of restitution.

Respectfully submitted,

CATHERINE K. HART
Deputy Defender

EDWARD J. WITTRIG
Assistant Appellate Defender
Office of the State Appellate Defender
Fourth Judicial District
400 West Monroe Street, Suite 303
Springfield, IL 62704
(217) 782-3654
4thdistrict.eserve@osad.state.il.us

COUNSEL FOR PETITIONER-APPELLANT

CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is twelve pages.

/s/Edward J. Wittrig
EDWARD J. WITTRIG
Assistant Appellate Defender

No. 125644

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- BRIAN BIRGE, Petitioner-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 4-17-0341. There on appeal from the Circuit Court of the Eleventh Judicial Circuit, Livingston County, Illinois, No. 16-CF-159. Honorable Jennifer H. Bauknecht, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, eserve.criminalappeals@atg.state.il.us;

Mr. David J. Robinson, Deputy Director, State's Attorney Appellate Prosecutor, 725 South Second Street, Springfield, IL 62704, 4thdistrict@ilsaap.org;

Randy Yedinak, Livingston County State's Attorney, 110 North Main Street, Pontiac, IL 61764, lvsa@livingstoncountyil.gov;

Mr. Brian Birge, Register No. R33533, Centralia Correctional Center, P.O. Box 7711, Centralia, IL 62801

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On September 30, 2020, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the petitioner-appellant in an envelope deposited in a U.S. mail box in Springfield, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

/s/Lindsey Dutcher
LEGAL SECRETARY
Office of the State Appellate Defender
400 West Monroe Street, Suite 303
Springfield, IL 62704
(217) 782-3654
Service via email will be accepted at
4thdistrict.eserve@osad.state.il.us