2024 IL App (1st) 221505-U

No. 1-22-1505

Order filed February 28, 2024

Third Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 16 CR 12051
	)	
KENYON JONES,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE R. VAN TINE delivered the judgment of the court.
Presiding Justice Reyes and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the trial court's first-stage dismissal of defendant's postconviction petition alleging actual innocence based on his own affidavit, ineffective assistance of trial counsel for advising defendant to testify at trial, the trial court's failure to comply with Supreme Court Rule 431(b), and trial and appellate counsel's ineffective assistance for failing to raise the trial court's noncompliance with Rule 431(b).

¶ 2 Defendant Kenyon Jones appeals from the first-stage dismissal of his petition pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2022)). Following a jury trial,

defendant was found guilty of first-degree murder based on accountability and was sentenced to 38 years in prison. On direct appeal, this court affirmed his conviction over his claim that trial counsel rendered ineffective assistance by not filing a motion to suppress his inculpatory statements to police. *People v. Jones*, 2021 IL App (1st) 171623-U, ¶ 2. Defendant then filed a postconviction petition alleging that (1) he is actually innocent based on his own affidavit, (2) trial counsel rendered ineffective assistance by forcing him to testify against his wishes, and (3) the trial court's questioning of prospective jurors violated Supreme Court Rule 431(b) (eff. July 1, 2012) and that trial and appellate counsel rendered ineffective assistance by not raising the trial court's noncompliance with Rule 431(b).[1] The trial court dismissed defendant's petition at the first stage. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant and codefendants Paris Jones and Tyren Reese were charged with three counts of first-degree murder (720 ILCS 5/9-1(a)(1), (2), (3) (West 2014)), one count of attempted murder (*id.* §§ 8-4(a), 9-1(a)(1)), and one count of aggravated discharge of a firearm (*id.* § 24-1.2(a)(2)) arising out of a shooting on December 3, 2014.[2] Defendant was tried separately from his codefendants.

¶ 5 A. Trial and Direct Appeal

¶ 6 1. Preliminary Jury Instructions and Questioning

[1]As we will explain in more detail below, Rule 431(b) requires the trial court to instruct prospective jurors on four constitutional principles of criminal law, ask whether the prospective jurors understand and accept those principles, and allow prospective jurors to respond. Ill. S. Ct. R. 431(b) (eff. July 1, 2012).

[2]Defendant and Paris Jones share the same last name; they are cousins. To avoid confusion, we will refer to Paris Jones by his name and to Kenyon Jones as "defendant."

¶ 7 Prior to jury selection, the trial court instructed prospective jurors that "[t]he defendant is not required to prove his innocence nor is he required to present any evidence on his own behalf. He may rely upon the presumption of innocence." The court did not ask whether the prospective jurors understood and accepted this principle.

¶ 8 Immediately thereafter, the court instructed the prospective jurors on five constitutional principles. First, the court instructed that that "anybody placed on trial in a criminal case is presumed to be innocent of the charges against him." Second, the court explained that "[i]n a criminal case, the burden of proof is proof beyond a reasonable doubt and this is the highest burden of proof at law." Third, the court instructed that "[t]he State has the burden of proof *** and this burden of proof stays with the State throughout the entire trial." Fourth, the court explained that "anybody placed on trial in a criminal case has a constitutional right to take the stand and testify in his or her defense." Finally, the court instructed that "if [defendant] decides not to testify, no inference whatsoever can be drawn from his silence." After instructing the prospective jurors on each of these principles, the court asked if the prospective jurors had "any problems understanding" or any "qualms" or "problems" applying those principles. None of the prospective jurors raised their hands in response to the trial court's questions.

¶ 9 2. Trial Evidence

¶ 10 The evidence established that, at approximately 9:00 p.m. on December 3, 2014, Damond Avant and Takia Martin were walking along Mayfield Avenue in Chicago when Martin saw two men emerge from a gangway and walk into an alley. Both men were wearing black hoodies. As Avant and Martin approached the alley, a large burgundy vehicle drove away. Avant and Martin walked several more blocks and Martin noticed the burgundy vehicle again and heard its door

open. The two men that Martin saw emerging from the gangway shot Avant, entered the burgundy vehicle, and drove off. Martin could not see either man's face. Avant died at the hospital.

¶ 11 At approximately 9:30 p.m., Chicago Police Officer Jorge Munoz stopped a large burgundy vehicle for running a stop sign on Mayfield. Munoz saw four or five people inside the vehicle. When he asked to see the driver's hands, the vehicle sped away. Officer Richard Corona pursued the burgundy vehicle, which eventually crashed in an alley. Two or three men exited the vehicle and ran away. Corona chased after them and apprehended defendant within 10 to 15 seconds. Other officers arrested Paris Jones. Defendant was transported to a police station.

¶ 12 Police executed a search warrant on the burgundy vehicle. They recovered an Arcus 9-millimeter firearm, a Ruger 9-millimeter firearm, a .25-caliber firearm, empty pill bottles, empty bottles of alcohol, and a receipt for a .380-caliber firearm.

¶ 13 At the police station, detective Greg Swiderek advised defendant of his *Miranda* rights and defendant agreed to speak with him. The State moved a recording of defendant's interview into evidence. Swiderek asked defendant about a receipt found in his wallet for an Arcus 9-millimeter firearm and ammunition that had been purchased in Indiana on December 1, 2014. Defendant said that his girlfriend bought the firearm. When Swiderek asked him where that firearm was, defendant said that it "[s]hould be out there."

¶ 14 Regarding the events of December 3, 2014, defendant told Swiderek that he met his cousin, Paris Jones, and three other men known as Charlie, "TY," and "Kosta" that night.[3] Paris Jones drove the group to a liquor store where they bought Patrón. TY told Paris Jones to pull into an

[3]The record indicates that "TY" is codefendant Tyren Reese and "Kosta" is a man named Corey Griffin.

alley, which he did. TY left the vehicle briefly. When TY returned, he said that the group should drive through Great Lakes gang territory. Some of the occupants of the vehicle were Unknown gang members and rivals of the Great Lakes gang. Great Lakes gang members killed defendant's brother four years prior, as well as one of TY and Kosta's friends.

¶ 15 Defendant had the firearm his girlfriend recently bought when he was in the vehicle. TY or Kosta asked to see it. Defendant initially said no but eventually handed them the firearm. Defendant knew there was a "chance that [TY and Kosta] would sho[o]t somebody" given that the group was driving through rival gang territory, and he knew that TY and Kosta were arguing over "who was gonna do the shooting." TY and Kosta exited the vehicle and shot at a man and a woman. Defendant, Paris Jones, and Charlie stayed in the vehicle during the shooting. TY and Kosta ran back to the vehicle and told Paris Jones to drive away, which he did. Kosta said that he shot someone in the face. Police stopped the vehicle shortly thereafter, but Paris Jones drove away at Kosta's instruction. Kosta and Charlie jumped out of the vehicle and Jones crashed it a short time later. In his interview with Swiderek, defendant insisted that he did not shoot anyone and did not approve of the shooting but acknowledged that he "knew [TY and Kosta] were going to shoot some dude."

¶ 16 Forensic and medical evidence established that Avant was shot seven times. Seven 9-millimeter cartridge cases were recovered from the scene. Stipulated expert testimony established that the cartridge cases were fired from the Arcus 9-millimeter firearm, one bullet found in Avant's body had been fired from that same firearm, and another bullet found in Avant's body had been fired from the Ruger 9-millimeter firearm.

¶ 17 Defendant testified that he went to the doctor and was prescribed medication for bronchitis on December 3, 2014. He identified photographs of his medication bottles inside the burgundy vehicle, which belonged to his girlfriend. That night, defendant drove the burgundy vehicle to meet Paris Jones. In the vehicle, there was a firearm that defendant's girlfriend bought two days prior. The receipt for the firearm was in defendant's wallet. The group planned to celebrate the birthday of defendant's late brother, who had been killed by a Great Lakes gang member known as "Dammo" four years earlier. Defendant was an Unknown gang member "[b]ack in the day."

¶ 18 Defendant met Paris Jones, Charlie, TY, and Kosta, and Paris Jones drove the group to a liquor store where defendant bought several bottles of Patrón. When defendant returned to the vehicle, Paris Jones was playing with defendant's girlfriend's firearm, which defendant took from him. Paris Jones began driving; defendant was in the front passenger seat and Charlie, TY, and Kosta were in the rear seat. At TY's request, the group stopped at a building that TY entered briefly. When he returned to the vehicle, he began arguing with Kosta about a firearm. TY suggested going to Great Lakes gang territory. TY and Kosta asked to see defendant's firearm. Defendant asked why multiple times, but eventually placed the firearm on the center console and either TY or Kosta took it. Defendant testified that he thought TY and Kosta were just looking at the firearm, that "there never was a conversation about doing anything," and that he had no idea that TY and Kosta would jump out of the vehicle and shoot someone. On cross-examination, defendant acknowledged that he told Swiderek that he thought TY and Kosta might shoot someone but did not know for certain that they would do so.

¶ 19 3. Verdict, Sentencing, and Direct Appeal

¶ 20 The jury found defendant guilty of first-degree murder. Defendant filed a motion for a new trial, which challenged the sufficiency of the evidence with respect to his accountability for Avant's murder. The trial court denied defendant's motion and sentenced him to 38 years in prison.

¶ 21 On direct appeal, defendant argued that trial counsel rendered ineffective assistance by failing to file a motion to suppress his inculpatory statements to Swiderek. *Jones*, 2021 IL App (1st) 171623-U, ¶ 2. This court affirmed defendant's conviction. *Id.*

¶ 22 B. Postconviction Proceedings

¶ 23 In 2022, defendant, represented by private counsel, filed a postconviction petition. Defendant first argued that he was actually innocent because, according to his own affidavit, he "never handed a firearm to TY, Kosta, or anyone else and did not place the firearm on the center console." Defendant also contended that trial counsel rendered ineffective assistance by telling him that "he must testify" against his wishes and that his testimony "must not contradict his statements made to the police." Additionally, defendant argued that the trial court violated Rule 431(b) by not asking whether the prospective jurors understood and accepted that defendant was not required to introduce any evidence, and by asking whether the prospective jurors had "qualms" or "problems" with the other Rule 431(b) principles instead of whether they accepted those principles. Finally, defendant argued that trial and appellate counsel rendered ineffective assistance by not raising the trial court's noncompliance with Rule 431(b).

¶ 24 Defendant's affidavit, which is attached to his petition, states that trial counsel never discussed the possibility of him testifying until the State's final witness testified. At that point, counsel told defendant that he had to testify, even though he did not want to, and that he could not testify to anything other than what he told police after his arrest, even though what he told police

was untrue. Defendant also attests that, on the night of December 3, 2014, he never handed a firearm to anyone and never placed a firearm on the center console of the vehicle in which he was a passenger.

¶ 25 The trial court dismissed defendant's petition at the first stage. The court found that defendant's affidavit setting out his version of events was not newly discovered evidence and could not support his claim of actual innocence. The court also found that defendant's claim that trial counsel forced him to testify was conclusory and unsupported by the record. The court reviewed defendant's claim of noncompliance with Rule 431(b) for second-prong plain error and concluded that defendant failed to show that the court's Rule 431(b) questioning resulted in a biased jury. In addition, the court dismissed defendant's claim that trial counsel rendered ineffective assistance by failing to object to the Rule 431(b) questioning because defendant could not show that counsel's failure to object prejudiced him. Finally, the court dismissed defendant's claim that appellate counsel rendered ineffective assistance by failing to raise the trial court's noncompliance with Rule 431(b) because defendant could not establish that his conviction would have been reversed had counsel raised that issue.

¶ 26 Defendant timely appealed.

¶ 27 II. ANALYSIS

¶ 28 On appeal, defendant contends that the trial court erred in dismissing his postconviction petition because he stated arguable claims that (1) he is actually innocent, (2) trial counsel rendered ineffective assistance by instructing defendant to testify at trial, and (3) the trial court did not comply with Supreme Court Rule 431(b) when questioning the prospective jurors and trial and appellate counsel rendered ineffective assistance by not raising that issue.

¶ 29 The Post-Conviction Hearing Act provides a three-stage process for a defendant to assert that he suffered a substantial denial of his constitutional rights during the proceedings that resulted in his conviction. 725 ILCS 5/122-1(a)(1), 122-2.1(a), (b) (West 2022). In this case, the trial court dismissed defendant's petition at the first stage. At the first stage, the trial court must dismiss the petition if it is "frivolous or is patently without merit" (*id.* § 122-2.1(a)(2)), *i.e.*, if it has no arguable basis in law or in fact (*People v. Hodges*, 234 Ill. 2d 1, 16 (2009)). A petition lacks an arguable basis in law or fact if the claim is based on an "indisputably meritless legal theory" or its factual contentions are clearly baseless. *Id.* However, a petition need only state the "gist" of a constitutional claim to survive first-stage scrutiny. *Id.* at 9. At the first stage, courts must construe petitions liberally and take petitioners' allegations as true. *People v. Allen*, 2015 IL 113135, ¶ 25. We review the first-stage dismissal of a postconviction petition *de novo* (*People v. Hatter*, 2021 IL 125981, ¶ 24), meaning that we perform the same analysis as the trial court (*People v. Carlisle*, 2019 IL App (1st) 162259, ¶ 68).

¶ 30 A. Actual Innocence

¶ 31 Defendant first contends that his petition stated a claim of actual innocence based on his own affidavit. A defendant may raise a claim of actual innocence in a postconviction petition. *People v. Ortiz*, 235 Ill. 2d 319, 331 (2009). To establish a claim of actual innocence, a defendant's supporting evidence must be "(1) newly discovered, (2) material and not cumulative, and (3) of such conclusive character that it would probably change the result on retrial." *People v. Robinson*, 2020 IL 123849, ¶ 47. Evidence is newly discovered if it was uncovered after trial and the defendant could not have uncovered it earlier using due diligence. *Id.*

¶ 32 In support of his actual innocence claim, defendant submitted his own affidavit, attesting that he did not give anyone a firearm or place a firearm on the center console of the vehicle in which he was a passenger. That evidence is not newly discovered. "By its own terms, [a] petitioner's affidavit demonstrates that the information contained therein was known to him before trial;" therefore, it cannot constitute newly discovered evidence. *Id.* ¶ 53. Before and during trial, defendant was aware of his own memory of the events of December 3, 2014, and could have testified accordingly. Defendant cannot establish that his own account of the events leading to Avant's murder is newly discovered, so he cannot establish a claim of actual innocence.

¶ 33 Defendant argues that trial counsel forced him to give inculpatory and untrue testimony consistent with his statements to Detective Swiderek rather than testifying to his version of events reflected in the affidavit. Defendant concludes that his version of events is "newly discovered" because counsel thwarted him from presenting it at trial. The cases that defendant cites do not support the conclusion that a defendant's own testimony can constitute newly discovered evidence. See, *e.g.*, *People v. Edwards*, 2012 IL 111711, ¶¶ 38-39 (codefendant's affidavit was newly discovered evidence because codefendant's fifth amendment right not to testify rendered him legally unavailable to the defendant at trial); *People v. Costic*, 2021 IL App (3d) 180618, ¶ 22 (same); *People v. White*, 2014 IL App (1st) 130007, ¶¶ 20-22 (witness's affidavit was newly discovered evidence because witness's trial testimony inculpating the defendant was the product of death threats). Accordingly, we affirm the dismissal of defendant's actual innocence claim based on his own affidavit.

¶ 34 B. Ineffective Assistance of Trial Counsel

¶ 35 Defendant next contends that trial counsel rendered ineffective assistance by forcing him to testify against his wishes and to a version of events he now claims is untrue. When defendant filed his direct appeal, he was aware of his discussions with trial counsel about testifying. He was also aware of his own memory of the incident and how he testified at trial. Defendant could have raised this claim on direct appeal but did not; therefore, he has forfeited this claim in postconviction proceedings. See *People v. English*, 2013 IL 112890, ¶ 22; see also *People v. Jarrett*, 399 Ill. App. 3d 715, 725 (2010) (the defendant forfeited his postconviction claim of ineffective assistance of trial counsel for advising him not to testify because he did not raise it on direct appeal). Defendant's brief does not address his forfeiture of this claim. Accordingly, we find that the trial court properly dismissed defendant's postconviction claim of ineffective assistance of trial counsel based on counsel "forcing" him to testify.

¶ 36 C. Rule 431(b)

¶ 37 Finally, defendant contends that the trial court violated Supreme Court Rule 431(b) and that trial counsel and appellate counsel rendered ineffective assistance by failing to raise that issue. Rule 431(b) codifies our supreme court's decision in *People v. Zehr*, 103 Ill. 2d 472 (1984). *People v. Birge*, 2021 IL 125644, ¶ 28. Rule 431(b) requires the trial court to "ask each potential juror, individually or in a group, whether that juror understands and accepts" four constitutional principles, which are sometimes called the *Zehr* principles: that (1) the defendant is presumed innocent of the charges against him, (2) the State must prove the defendant guilty beyond a reasonable doubt, (3) the defendant is not required to offer any evidence on his own behalf, and (4) if a defendant does not testify it cannot be held against him. Ill. S. Ct. R. 431(b) (eff. July 1, 2012). Rule 431(b) imposes "an affirmative *sua sponte* duty on the trial courts to ask potential

jurors in each and every case whether they understand and accept the *Zehr* principles" and requires the trial court to give each potential juror an opportunity to respond whether he or she understands and accepts those principles. (Internal quotation marks omitted.) *People v. Magallanes*, 409 Ill. App. 3d 720, 729-30 (2011).

¶ 38 1. Forfeited Claims

¶ 39 Defendant forfeited his direct challenge to the trial court's compliance with Rule 431(b) because he did not raise that issue in his posttrial motion or on direct appeal. See *English*, 2013 IL 112890, ¶ 22; *People v. Thompson*, 238 Ill. 2d 598, 611 (2010).

¶ 40 Defendant does not claim that he did not forfeit this issue but argues that his postconviction petition sought plain error review. The plain error rule allows a court on direct appeal to review plain errors that affected the defendant's substantial rights even though the defendant did not raise those errors in the trial court. Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). However, "the plain error rule may not be invoked when a defendant collaterally attacks his conviction or sentence under the Post-Conviction Hearing Act." *People v. Owens*, 129 Ill. 2d 303, 316 (1989); see also *People v. Davis*, 156 Ill. 2d 149, 159 (1993) ("in post-conviction proceedings, the plain error rule may not be invoked to save procedurally defaulted claims"); *People v. Artis*, 232 Ill. 2d 156, 166 (2009) (citing *Davis*); *People v. Watkins*, 2019 IL App (4th) 180605, ¶ 24. Defendant cannot invoke the plain error rule in postconviction proceedings to excuse his forfeiture of the Rule 431(b) issue. Accordingly, defendant has forfeited his postconviction claim directly alleging noncompliance with Rule 431(b) and the trial court properly dismissed that claim. See *People v. Blair*, 215 Ill. 2d 427, 444-45 (2005) (a forfeited claim is frivolous and patently without merit).

¶ 41 Defendant has also forfeited his claim that trial counsel rendered ineffective assistance by not objecting to the trial court's Rule 431(b) questioning. Defendant could have raised that claim on direct appeal but did not, so he has forfeited it. See *English*, 2013 IL 112890, ¶ 22. Defendant's brief does not address his forfeiture of this claim. Accordingly, we affirm the dismissal of defendant's postconviction challenge to the trial court's compliance with Rule 431(b) and his claim of ineffective assistance of trial counsel for not raising that issue.

¶ 42 2. Ineffective Assistance of Appellate Counsel

¶ 43 Defendant's only remaining claim is that appellate counsel was ineffective for failing to raise the trial court's noncompliance with Rule 431(b). A postconviction petitioner can avoid forfeiture by framing claims that could have been raised on direct appeal as claims of ineffective assistance of appellate counsel. *People v. Addison*, 2023 IL 127119, ¶ 23. Defendant's petition alleged that his conviction is "tainted by the constitutional violation of ineffective assistance of trial and appellate counsel, in that neither trial counsel nor appellate counsel raised, objected to, or addressed the court's failure to comply with Supreme Court Rule 431(b)."[4] Defendant also alleged that if appellate counsel had raised this issue, "reversal would have occurred." Defendant has not forfeited this claim, so we will address its merits.

¶ 44 At the first stage of postconviction proceedings, a petition alleging ineffective assistance of counsel cannot be dismissed if (1) it is arguable that counsel's performance fell below an objective standard of reasonableness and (2) it is arguable that the defendant was prejudiced.

[4]Defendant's petition does not contend that appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness for failing to preserve the Rule 431(b) issue. The petition only contends that appellate counsel was ineffective for not challenging the trial court's compliance with Rule 431(b) directly.

Hodges, 234 Ill. 2d at 17. Generally, we give substantial deference to counsel's decision not to raise an issue on appeal. *People v. Harris*, 206 Ill. 2d 293, 326 (2002). Appellate counsel does not render ineffective assistance by deciding not to raise issues that, in counsel's judgment, are without merit, unless counsel is patently wrong. *People v. Simms*, 192 Ill. 2d 348, 362 (2000). The prejudice inquiry for a claim of ineffective assistance of appellate counsel requires the court to examine the merits of the underlying issue because a defendant cannot be prejudiced by appellate counsel's decision not to raise a nonmeritorious claim. *People v. Borizov*, 2019 IL App (2d) 170004, ¶ 14.

¶ 45 Defendant did not preserve for direct appeal his challenge to the trial court's compliance with Rule 431(b) because he did not object to the trial court's Rule 431(b) questioning and he did not raise that issue in his posttrial motion. See *Thompson*, 238 Ill. 2d at 612. Therefore, appellate counsel's only choice would have been to seek plain error review. See *id.* at 613. Plain error review applies when (1) there is a clear or obvious error and the evidence is so closely balanced that the error would change the outcome of the case or (2) when there is a clear or obvious error so serious that it affected the fairness of the defendant's trial. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). A claim alleging noncompliance with Rule 431(b) is limited to the first-prong plain error review, *i.e.*, the closely balanced evidence prong. *People v. Sebby*, 2017 IL 119445, ¶ 52. The first step in establishing plain error is establishing that an error occurred. *People v. Hudson*, 228 Ill. 2d 181, 191 (2008).

¶ 46 a. Error

¶ 47 The trial court's Rule 431(b) questioning of the prospective jurors was erroneous in two ways that appellate counsel should have recognized. First, the trial court omitted one of the Rule

431(b) questions entirely. The court instructed the prospective jurors that defendant was not required to present any evidence, but it never asked whether they understood and accepted that principle. Rule 431(b) requires asking that specific question and receiving a response to it. *Thompson*, 238 Ill. 2d at 607. The trial court's failure to engage in the question and response process with respect to this principle constituted error that appellate counsel could and arguably should have raised. See *id*; see also *People v. Belknap*, 2014 IL 117094, ¶ 45; *People v. Radcliff*, 2011 IL App (1st) 091400, ¶¶ 18-19. Identifying this error would not have been difficult; appellate counsel simply had to compare the trial court's language to the language of Rule 431(b).

¶ 48 Second, the trial court did not ask whether the prospective jurors accepted any of the *Zehr* principles. Rather, it asked the prospective jurors if they had "qualms" or "problems" with those principles. Case law available to appellate counsel supported a challenge to that wording when defendant's direct appeal was filed in 2017. For example, our supreme court has held that a trial court errs by asking potential jurors whether they have a "problem with" or "disagree with" the *Zehr* principles rather than whether they understand and accept those principles. *People v. Wilmington*, 2013 IL 112938, ¶ 32. In addition, this court has found that questions about whether prospective jurors have "qualms" with the *Zehr* principles do not comply with Rule 431(b). *People v. Johnson*, 2013 IL App (1st) 111317, ¶¶ 56-59. Therefore, appellate counsel arguably could have established that the trial court erred in its Rule 431(b) questioning of the prospective jurors.

¶ 49 b. Closely Balanced Evidence

¶ 50 To obtain first-prong plain error review of the Rule 431(b) issue, appellate counsel also would have been required to establish that the evidence at trial was closely balanced. See *Sebby*, 2017 IL 119445, ¶ 52. To establish that the evidence was closely balanced, a defendant must show

that the error alone severely threatened to tip the scales of justice against him. *People v. Adams*, 2012 IL 111168, ¶ 21. A reviewing court must "evaluate the totality of the evidence and conduct a qualitative, commonsense assessment of it within the context of the case." *Sebby*, 2017 IL 119445, ¶ 53.

¶ 51 The State argued that defendant was guilty of first-degree murder based on accountability. To establish accountability, the State had to show that defendant, either before or during Avant's murder, and with the intent to promote or facilitate commission of the murder, solicited, aided, abetted, agreed, or attempted to aid another person in the planning or commission of the murder. See 720 ILCS 5/5-2(c) (West 2014).

¶ 52 At trial, there was no dispute that Damond Avant was fatally shot on December 3, 2014, and that bullets from two firearms struck his body. One of those bullets was from an Arcus 9-millimeter firearm, which police recovered from defendant's girlfriend's vehicle. Police also recovered seven cartridge casings from the Arcus firearm at the scene. A receipt found in defendant's wallet established that his girlfriend bought the Arcus firearm two days before the murder. Altogether, this evidence conclusively established that the Arcus firearm belonging to defendant's girlfriend was used to murder Avant. Defendant presented no evidence suggesting that his girlfriend's firearm was not involved in Avant's murder.

¶ 53 Furthermore, there was no dispute that defendant was in the vehicle before, during, and after Avant's murder. Defendant's statement to Swiderek admitted as much and defendant was arrested within seconds of fleeing the crashed vehicle. Defendant's statement also established that he possessed the Arcus firearm in the vehicle and allowed either TY or Kosta—the shooters—to handle the firearm shortly before the murder. The evidence unquestionably established that

defendant aided TY and Kosta in murdering Avant by providing one of the two firearms they used to shoot him. See *id.*

¶ 54 The only potential dispute concerned defendant's mental state, *i.e.*, whether he intended to promote or facilitate Avant's murder. See *id.* On that issue, defendant's statements to Swiderek and his trial testimony were essentially consistent. Defendant admitted to Swiderek that he allowed TY and Kosta to handle his girlfriend's firearm as they were discussing driving through rival Great Lakes gang territory. Defendant knew that it was his late brother's birthday and that his brother had been killed by a Great Lakes gang member. He also knew that a Great Lakes gang member killed one of TY and Kosta's friends. In other words, defendant realized that TY and Kosta had a motive for shooting a Great Lakes gang member that night and were heading to an area that would give them the opportunity to do so. Most importantly, defendant admitted to Swiderek that he heard TY and Kosta discussing who was *going to be* the shooter. This evidence could only support a conclusion that defendant knew TY and Kosta were planning to shoot a Great Lakes gang member that night and that, by giving them a firearm, defendant helped that plan come to fruition.

¶ 55 There was virtually no evidence weighing against that conclusion. On direct examination, defendant claimed that he had no idea what TY and Kosta planned to do but, on cross-examination, he admitted that he told Swiderek that he knew the group was going to rival gang territory to shoot someone. Altogether, the evidence of defendant's accountability was not closely balanced; rather, it was overwhelming. Because the evidence against defendant was not even arguably closely balanced, it was reasonable for appellate counsel to decide not to seek first-prong plain error review of the trial court's noncompliance with Rule 431(b). See *Simms*, 192 Ill. 2d at 362.

¶ 56 We acknowledge that this court found the evidence against codefendant Paris Jones to be closely balanced, warranting plain error review of the Rule 431(b) violations he raised in his direct appeal. *People v. Jones*, 2021 IL App (1st) 180734-U, ¶ 48. Like defendant, Paris Jones was found guilty of first-degree murder based on accountability. *Id.* ¶ 2. However, unlike defendant, there was no evidence that Paris Jones possessed or provided a firearm to anyone on the night of December 3, 2014. In fact, Paris Jones told Swiderek that defendant gave TY the 9-millimeter firearm used to shoot Avant. *Id.* ¶ 20. Furthermore, Jones's statements to police were inconsistent. He initially denied any knowledge of the murder, then told Swiderek that he knew there were firearms in the vehicle and that TY and Griffin planned to shoot someone, then recanted that statement at trial.[5] *Id.* Jones's recantation created a credibility contest between his trial testimony and his recorded interview with Swiderek, meaning that the evidence against him was closely balanced. *Id.* ¶ 43. By contrast, in this case, defendant consistently admitted that he knew TY and Kosta were planning to shoot a Great Lakes gang member and that he gave them a firearm shortly before they shot Avant. There was no credibility contest.

¶ 57 Defendant contends that the evidence was closely balanced because his statements to Swiderek were "obtained after he had been drinking alcohol, taking medication, using marijuana, and after being in a car accident," and "over the course of a 35 hour interrogation." Those factors arguably call the accuracy of the details of defendant's statements into question, but they do not negate those statements. Whatever memory issues defendant may have had when speaking with Swiderek, he never denied involvement in Avant's murder, provided an alibi, or gave an alternate account of the events of December 3, 2014. The fact that the jury had to assess the credibility of

[5]Paris Jones referred to Griffin as "Coasta" (*id.* ¶ 19 n. 2), which may be a phonetic approximation of "Kosta."

defendant's unrebutted statements to Swiderek does not mean that the evidence was closely balanced. See *People v. Jackson*, 2019 IL App (1st) 161745, ¶ 48. Rather, evidence is closely balanced when the factfinder is presented with two competing versions of events and must choose which version to accept as true. See *People v. Hammonds*, 409 Ill. App. 3d 838, 861-62 (2011). In this case, the jury heard only one version of events in which defendant provided a firearm to TY or Kosta as they were discussing shooting a rival gang member and shortly before they murdered Avant.

¶ 58 Accordingly, we find there is no reasonable likelihood that appellate counsel could have established that the evidence against defendant was closely balanced. Because counsel could not make that showing, counsel's decision not to seek first-prong plain error review of the trial court's noncompliance with Rule 431(b) was not arguably ineffective assistance, and defendant's postconviction claim of ineffective assistance of appellate counsel was properly dismissed.

¶ 59 III. CONCLUSION

¶ 60 For the foregoing reasons, we affirm the dismissal of defendant's postconviction petition.

¶ 61 Affirmed.