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.

BRIEF AND ARGUMENT FOR PETITIONER-APPELLANT

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E-FILED
6/3/2020 2:55 PM
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POINTS AND AUTHORITIES

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.

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.

NATURE OF THE CASE

Following a jury trial, Brian Birge ("Birge") was convicted of one count of burglary and one count of arson. (C. 13.) The circuit court sentenced Birge to two Class X terms of 24 years and 6 months to be served concurrently. (C. 110.) Birge appealed, and the appellate court affirmed. (C. 132); *People v. Birge*, 2019 IL App (4th) 170341-U, ¶ 3.

This is a direct appeal from the judgment of the court below. No issue is raised challenging the charging instrument.

ISSUES PRESENTED FOR REVIEW

1. Whether the circuit court erred by collapsing the four Rule 431(b) principles into one broad statement of law when it admonished the potential jurors pursuant to that rule.

2. Whether the circuit court erred when it ordered Brian Birge to pay $117,230 in restitution when there was no evidence to support an award for that specific amount or, alternatively, whether defense counsel was ineffective for failing to object to a restitution award that lacked the necessary evidentiary support.

STATUTES AND RULES INVOLVED

Ill. S. Ct. R. 431(b) (eff. July 1, 2012):

> 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) (2017):

> § 5-5-6. In all convictions for offenses in violation of the Criminal Code of 1961 or the Criminal Code of 2012 or of Section 11-501 of the Illinois Vehicle Code in which the person received any injury to his or her person or damage to his or her real or personal property as a result of the criminal act of the defendant, the court shall order restitution as provided in this Section. In all other cases, except cases in which restitution is required under this Section, the court must at the sentence hearing determine whether restitution is an appropriate sentence to be imposed on each defendant convicted of an offense. If the court determines that an order directing the offender to make restitution is appropriate, the offender may be sentenced to make restitution. The court may consider restitution an appropriate sentence to be imposed on each defendant convicted of an offense in addition to a sentence of imprisonment. The sentence of the defendant to a term of imprisonment is not a mitigating factor that prevents the court from ordering the defendant to pay restitution. If the offender is sentenced to make restitution the Court shall determine the restitution as hereinafter set forth:
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> (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. When a victim's out-of-pocket expenses have been paid pursuant to the Crime Victims Compensation Act, the court shall order restitution be paid to the compensation program. If a defendant is placed on supervision for, or convicted of, domestic battery, the defendant shall be required to pay restitution to

any domestic violence shelter in which the victim and any other family or household members lived because of the domestic battery. The amount of the restitution shall equal the actual expenses of the domestic violence shelter in providing housing and any other services for the victim and any other family or household members living at the shelter. If a defendant fails to pay restitution in the manner or within the time period specified by the court, the court may enter an order directing the sheriff to seize any real or personal property of a defendant to the extent necessary to satisfy the order of restitution and dispose of the property by public sale. All proceeds from such sale in excess of the amount of restitution plus court costs and the costs of the sheriff in conducting the sale shall be paid to the defendant. The defendant convicted of domestic battery, if a person under 18 years of age was present and witnessed the domestic battery of the victim, is liable to pay restitution for the cost of any counseling required for the child at the discretion of the court.

STATEMENT OF FACTS

The State charged Brian Birge ("Birge") with one count of burglary and one count of arson,[1] following a fire at a Pontiac business–Chief City Vapor–that was owned by Tom Roe ("Roe"). (C. 17, 38.) The case proceeded to a two-day jury trial. (C. 12–13.)

During *voir dire*, the parties selected the jurors from two groups. (R. 111, 112, 155.) For the first group, the circuit court instructed the potential jurors as follows:

> "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 of law 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 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. So by a show of hands, do each of you understand these principles of law? [All hands raised.] Okay. And do each of you accept these principles of law? [All hands raised.] All right." (R. 116–17.)

For the second group, the circuit court recited the admonishments in a similar manner:

> "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

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[1] The State also charged Birge with one count of criminal damage to property, which was dismissed before trial. (C. 17; R. 100.)

> 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. So by a show of hands, do each of you understand these principles of law? [All hands raised.] And do each of you accept these principles of law? [All hands raised.] All hands have gone up. Thank you." (R. 163–64.)

From these two groups, all twelve jurors were selected and sworn. (R. 153, 191, 193.)

Thereafter, the evidence at trial established that, at around 1:30 am on May 28, 2016, a heavily intoxicated Willie Williams ("Williams") flagged down Officer Brad Baird ("Baird"), informing him of a fire at Chief City Vapor. (R. 208–09, 217.) Responding to Chief City Vapor, Baird noticed that the glass on Chief City Vapor's southern door was shattered, and the door was actually opened, with a green-handled knife discovered amongst the broken glass. (R. 211.) Surveying the scene, Baird found 10–12 items from the store in a trail heading east, culminating in an area where he located several boxes containing hundreds of items from the store. (R. 214, 278–79.)

Officer Jonathan Marion ("Marion") also responded to the fire, arriving just in time to prevent Williams from entering the burning store. (R. 230–31.) In the process of corralling Williams, Marion noticed a person one block to the south who was turning to walk west. (R. 231–32.) Marion returned to his police vehicle and drove, intercepting the person–later identified as Birge–one full block west of Chief City Vapor. (R. 234, 247–48.)

At trial, Birge explained that he had just been released from the hospital following an overdose and went to a gaming parlor one block west of Chief City Vapor to gamble. (R. 346–47.) At the gaming parlor, Birge was drinking and still medicated. (R. 348–49.) Leaving the gaming parlor, Birge walked by Chief City Vapor on his way to his sister's house, some blocks to the east. (R. 349–50.) Finding no one home, Birge set out west–back towards Chief City Vapor–intending to continue gambling at the gaming parlor. (R. 350.)

Nearing Chief City Vapor, Birge saw "some commotion" and that a "couple of people" were "running back and forth from a vehicle that was parked on the side there and that pulled off." (R. 351.) Birge clarified that "it looked like two individuals almost fighting or something." (R. 351.) As Birge continued toward Chief City Vapor, he discovered some "stuff"–including a black jacket–scattered across the ground. (R. 352.) Picking up the jacket, Birge felt that it was heavy and contained some change. (R. 352.) As Birge handled the jacket, he observed a police officer "come flying up" and could see a "bunch" of smoke emanating from Chief City Vapor. (R. 353.) Given Birge's criminal history–he had prior felony-theft and possession-of-a-controlled-substance convictions–he knew that a crime had been committed and that he should leave the jacket. (R. 346, 353.) Nevertheless, an intoxicated and medicated Birge put on the jacket and ambled south. (R. 353.) While walking, Birge searched the jacket, cutting his hand on the glass shards he discovered filling the pockets. (R. 353–54.) Continuing his search, Birge found change, pliers, plastic tags, keys (later identified as operating outbuildings near Chief City Vapor), and a lighter. (R. 238–39, 280, 353.) Birge moved the items around as he looked for more change. (R. 358.) Dripping blood while trying to gather his newfound belongings, Birge decided to return to the gaming parlor and started walking north. (R. 355.)

Near the gaming parlor and one block west from Chief City Vapor, Marion stopped Birge. (R. 355–56.) Birge did not remember the contents of his conversation with Marion, but he believed it was in his best interests to lie to the officer since he had walked off with the jacket. (R. 355–56, 360.) Birge denied at trial that he entered the Chief City Vapor building. (R. 356.)

According to Marion, Birge was nervous, sweaty, and dripping blood from the laceration on his hand. (R. 234, 238.) Marion confirmed that glass shards and plastic tags were stuck to Birge's body and clothes. (R. 235.) Marion asked Birge for consent to search him, and Birge

agreed. (R. 239.) Searching Birge, Marion relayed that he found two pairs of pliers, some keys, a lighter, change, and around $115 in cash. (R. 239.) Marion claimed that Birge told him he injured his hand working on a lawn mower blade and, unprompted, denied that he started the fire. (R. 235, 243.)

Thereafter, police officers photographed Birge and the scene, which were introduced into evidence. (R. 236, 257–261; E. 2–50.) Additionally, in their investigation, police officers were able to locate surveillance video, but it was damaged. (R. 265.) As the estimated cost of repairing the hard drive to play the video was $3000, the officers abandoned any salvage attempts. (R. 266.) The officers did not test the green-handled knife discovered near the broken door for fingerprints. (R. 266.) Nor was there evidence presented that any blood was found at the scene. And there were other drivers and pedestrians in the area during the fire and Birge's arrest. (R. 339, 341, 343.)

Regarding the fire, arson investigator Shane Arndt ("Arndt") opined that the fire started on a couch inside Chief City Vapor that was not located near any electrical or ignition source. (R. 304–05.) Arndt testified that, as he ruled out any other source, he believed the fire was started by an open flame introduced to the couch. (R. 311–13.) Although Arndt rejected that accelerants contributed to the fire, he concluded that the fire was incendiary. (R. 305, 307.) On cross-examination, Arndt admitted that the fire could have been caused by an unfiltered cigarette left on the couch or by a nearby candle lighter. (R. 309, 316–17.)

Roe, the owner of Chief City Vapor, testified that, although he operated the business at that location for three and a half years, he did not own the building. (R. 276–77.) Concerning the damage, Roe offered that "we had to gut the entire building down to pulling the studs, pulling the insulation, furnace[;] I mean, everything was lost." (R. 281.) Roe specified that

the losses included "[a]ll the merchandise" and "furniture." (R. 281.) Roe additionally provided that he usually kept around $100 in the store's cash register. (R. 279.)

After the presentation of the above evidence, the prosecutor urged the jurors during closing arguments to use the principle of Occam's Razor–explained by the prosecutor as "the easiest solution is most likely the answer"–to find Birge guilty of burglary and arson. (Sup. R. 7, 14–15.) In turn, Birge stressed the dearth of evidence that he entered Chief City Vapor and the lack of evidence refuting that he merely found the jacket as he explained during his testimony. (Sup. R. 15–16, 19, 23.) Responding to Birge's argument, the prosecutor concurred, assuring the jurors that "what this [case] comes down to is credibility, about believing [Birge's] story." (Sup. R. 30.)

Ultimately, the jurors found Birge guilty of burglary and arson. (Sup. R. 40.) The circuit court ordered the probation department to prepare a presentence investigation report. (Sup. R. 41.) In the subsequent presentence investigation report filed with the court, the probation officer completed the restitution section in the following manner:

> "Due to the nature of the offense, the defendant should be ordered to pay restitution for the damage done to the building along with the losses reported stolen in the theft. A letter was sent to the victim inquiring their input regarding restitution. At the time this report was filed no request has been received from the victim. It should also be noted the defendant will serve a class X length prison sentence and may have difficulty paying." (Sec. C. 8.)

At the sentencing hearing, the State did not supplement the presentence investigation report or offer any additional evidence. (R. 367, 368.) The State then recommended a sentence in excess of 20 years, as Birge was a mandatory Class X offender. (R. 372.) Further, the State recommended "restitution in the amount of $117,230 for the uninsured losses to Chief City Vapor." (R. 372) Agreeing with the State's position, the circuit court sentenced Birge to 24

years and 6 months on each count, to be served concurrently. (R. 376.) Concerning restitution, the circuit court commented:

> "And obviously I'm going to enter restitution for the $117,230 which I believe Mr. Roe fully understands he's never going to see a dime of. I mean, so I'm going to enter that order. But it, you know, you can't get blood out of a turnip. You don't have any money. You're not going to have any money because you're going to be going to prison. So he's out. It's not just the hard money he's out, but the loss of profits for however long it took him to get his business back up." (R. 375.)

Along with the judgment, the circuit court filed a written order requiring Birge to pay $117,230 in restitution to Chief City Vapor and Roe, through a lump sum payment within 12 months of his release from prison. (C. 108.)

Birge filed a motion to reconsider, arguing that his sentence was excessive and that the circuit court failed to weigh certain statutory factors in mitigation. (C. 113–14.) It was denied. (R. 424.) Birge appealed. (C. 132.)

On appeal, Birge argued that, *inter alia*, the circuit court's Rule 431(b) admonishments that grouped the principles into one broad statement of law constituted plain error in a closely balanced case, the circuit court's restitution order was plain error that deprived Birge of a fair sentencing hearing as there was no evidence in the record proving the amount awarded, and defense counsel was ineffective for failing to object to the restitution order. (Appellant's Brief, p. 7, 24, 28.) In response, the State, among other things, never contested Birge's repeated assertions that the evidence at trial was closely balanced, conceded that there was no evidence to support the restitution order and that the case must be remanded for new proceedings on that issue, and did not dispute Birge's contentions that he was deprived of a fair sentencing hearing with effective representation. (Appellee's Brief, p. 1–5, 10.)

Nevertheless, the appellate court affirmed. *People v. Birge*, 2019 IL App (4th) 170341-U, ¶ 3. In so doing, the appellate court found no clear or obvious error in the circuit court's collapsing

of the four principles into one statement of law during its Rule 431(b) admonishments. *Birge*, 2019 IL App (4th) 170341-U, ¶ 34. Further, the appellate court rejected that the circuit court's restitution order warranted plain-error review, holding that the lack of evidence or testimony supporting the restitution amount "was not sufficiently grave that it denied the defendant a fair sentencing hearing." *Id.* at ¶ 60. Concerning defense counsel's effectiveness, the appellate court determined that the absence of evidence in the record addressing the restitution amount also meant that there was no evidence that the amount awarded was incorrect, defeating Birge's claim that defense counsel's conduct prejudiced him. *Id.* at ¶ 55.

Birge petitioned for rehearing, especially urging the appellate court to reconsider reviewing the restitution order for plain error in light of *People v. Lewis*, 234 Ill. 2d 32, 42–43 (2009), which reversed, after second-prong plain-error review, a street-value fine that lacked any support in the record. (Petition for Rehearing, p. 3.) Unpersuaded, the appellate court denied Birge's petition for rehearing. Birge then petitioned this Court for leave to appeal, which this Court granted on March 25, 2020. This appeal follows.

ARGUMENT

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.

The circuit court committed clear and obvious error in admonishing the potential jurors during *voir dire* because, by grouping the four distinct yet essential Rule 431(b) principles into one broad statement of law, it failed to implement the precise question-and-response framework required by that rule. Because the circuit court's clear and obvious error tipped the scales of justice against Brian Birge ("Birge") in this closely balanced case, relief after plain-error review is warranted. Ultimately, Birge requests that this Court reverse his convictions, vacate his sentences, and remand for a new trial.

A. Standard of Review

The reviewing court examines *de novo* the question of whether the circuit court violated Rule 431(b). *People v. Wilimington*, 2013 IL 112938, ¶ 26.

B. The Circuit Court Clearly and Obviously Erred When It Collapsed the Four Distinct Rule 431(b) Principles into One Broad Statement of Law

At the onset, Birge acknowledges that he did not properly preserve his Rule 431(b) claim before the circuit court. As a result, Birge seeks plain-error review of the circuit court's Rule 431(b) violation. See Ill. S. Ct. R. 615(a). Pertinent here, the plain-error doctrine allows a reviewing court to consider a clear or obvious error that was not properly preserved when the evidence was so closely balanced that the error alone threatened to tip the scales of justice against the defendant. See *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The first step in that inquiry is to determine whether clear or obvious error occurred. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). Here, the circuit court clearly erred in its Rule 431(b) admonishments

by grouping the four distinct, yet essential, principles into one broad statement of law. R. 116–17, 163–64); see *Thompson*, 238 Ill. 2d at 607; *People v. Hayes*, 409 Ill. App. 3d 612, 627 (1st Dist. 2011) (holding that the trial court's admonishments were clear error when it collapsed the first three Rule 431(b) principles into one statement).

The United States and Illinois constitutions guarantee criminal defendants the right to a trial by a fair and impartial jury. U.S. Const. amends. VI, XIV; Ill. Const. 1970, art. I, §§ 8, 13. This constitutional guarantee of a fair and impartial jury includes the right to an adequate *voir dire* to identify and exclude unqualified jurors. *Morgan v. Illinois*, 504 U.S. 719, 729–30 (1992); *People v. Strain*, 194 Ill. 2d 467, 475–76 (2000). In examining the potential jurors' qualifications in a criminal case, it is "essential" that "they know that a defendant is presumed innocent, that he is not required to offer any evidence in his own behalf, that he must be proved guilty beyond a reasonable doubt, and that his failure to testify in his own behalf cannot be held against him." *People v. Zehr*, 103 Ill. 2d 472, 477 (1984). For each concept, asking the potential jurors if they understand and accept the principle "goes to the heart of a particular bias or prejudice which would deprive [the] defendant of his right to a fair and impartial jury." *Zehr*, 103 Ill. 2d at 477.

To that end, this Court enacted Illinois Supreme Court Rule 431(b). In its most recent iteration, Rule 431(b) provides the following:

> "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." Ill. S. Ct. R. 431(b) (eff. July 1, 2012).

The purpose of Rule 431(b) is to identify and prevent from serving on the jury any potential juror who is prejudiced against these bedrock principles of Illinois criminal law and to ultimately ensure that a criminal defendant receives a fair and impartial jury. See *People v. Stevens*, 2018 IL App (4th) 160138, ¶ 25.

Analyzing Rule 431(b), this Court, in *People v. Thompson*, determined that the rule's language was "clear and unambiguous," mandating "a specific question and response process" where the trial court "shall ask" the potential jurors whether they understand and accept *"each of the principles in the rule."* 238 Ill. 2d at 607 (emphasis added). The *Thompson* Court found that the trial court's method of inquiry shall provide the jurors with an opportunity to respond to specific questions concerning the Rule 431(b) principles. *Id.* But the *Thompson* Court expressly warned that the trial court's method of inquiry "may not simply give 'a broad statement of the applicable law followed by a general question concerning the juror's willingness to follow the law.'" *Id.* (quoting 177 Ill. 2d R. 431, Committee Comments).

In light of *Thompson*, appellate courts have disagreed whether a trial court clearly errs by collapsing the four distinct Rule 431(b) principles into one statement of law. Compare *People v. Johnson*, 408 Ill. App. 3d 157, 171 (1st Dist. 2010) (concluding that, given this Court's ruling in *Thompson*, the circuit court "[c]learly" erred when it "collaps[ed]" three of the principles into one statement of law in addition to omitting another principle entirely), with *People v. Kinnerson*, 2020 IL App (4th) 170650, ¶ 62 (ruling that neither *Thompson* nor Rule 431(b) requires a process where the trial court addresses each Rule 431(b) principle "separately"). Notwithstanding the appellate courts' disparate treatment of the matter, Rule 431(b) clearly envisions a question-and-response *process*, contemplating more than the mere rote, recitation of the principles in one long statement of law followed by a question on the grouped principles. See *Thompson*, 238 Ill. 2d at 607; cf. *People v. Lampley*, 2011 IL App (1st) 090661-B, ¶ 35

(finding that, even though the trial court admonished the entire panel on the four principles, it erred in failing to conduct a "straightforward questioning of the *Zehr* principles as outlined by Rule 431(b)"). To be sure, the framework established by Rule 431(b) demands that the potential jurors have an opportunity to respond meaningfully to each specific principle. See *Thompson*, 238 Ill. 2d at 607. Evidencing that framework, the Rule even enumerated or "set out" these principles with numbers one through four, indicating that they constitute distinct concepts that should be addressed separately. Ill. S. Ct. R. 431(b); see *People v. Perry*, 2011 IL App (1st) 081228, ¶ 74 (reasoning that Supreme Court rules "are intended to be adhered to as written," which "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*") (emphasis added).

Just as importantly, Rule 431(b) was designed to preclude the trial court from collapsing the pertinent law into one broad statement followed by general questions. See *Thompson*, 238 Ill. 2d at 607. Indeed, Rule 431(b) was structured specifically to end the practice where the trial court made "a broad statement of the applicable law followed by a general question concerning the juror's willingness to follow the law." *Id.* (quoting 177 Ill. 2d R. 431, Committee Comments); see *People v. McCovins*, 2011 IL App (1st) 081805-B, ¶ 33 (finding it problematic that the trial court essentially "collapsed" the four Rule 431(b) principles and included them into one question as it deprived the jurors of a meaningful opportunity to respond to each essential principle); *Hayes*, 409 Ill. App. 3d at 627 (holding that the trial court's decision to collapse the Rule 431(b) principles into one was rather "more like 'the broad statement of *** applicable law'" that the committee comments warn against than the "question and response process" that Rule 431(b) requires). Simply, to satisfy the design and unambiguous plain language of Rule 431(b), the trial court may not give a broad statement of the collapsed principles, but

instead must utilize a specific question-and-response process to address each of the individual principles separately. *Perry*, 2011 IL App (1st) 081228, ¶ 74; see *People v. Othman*, 2020 IL App (1st) 150823-B, ¶¶ 63–64 (holding that, in all criminal trials, trial courts are required by Rule 431(b) "to ask the venire eight simple questions: (1) defendant is presumed innocent: (a) do you understand that? (b) do you accept it?; (2) defendant is not required to offer any evidence on his own behalf: (a) do you understand that? (b) do you accept it?; (3) defendant must be proved guilty beyond a reasonable doubt by the State: (a) do you understand that? (b) do you accept it?; and (4) the failure of defendant to testify on his own behalf cannot be held against him: (a) do you understand that? (b) do you accept it?").

The conclusion that Rule 431(b) precludes the trial court from grouping the four principles into one statement of law and that the trial court should address each principle individually is also supported by the rule's purpose, which is to identify and exclude any potential juror who is prejudiced against these bedrock principles of Illinois criminal law. Cf. *Stevens*, 2018 IL App (4th) 160138, ¶ 25. These principles involve abstract and complicated concepts, which an ordinary layperson might struggle to take in even if they are presented carefully, one at a time. See *People v. Richardson*, 2013 IL App (1st) 111788, ¶ 33 (noting that jurors might struggle with "the counterintuitive principle that, even after prosecutors file charges against a defendant, they must presume the defendant innocent, and they must not treat [the defendant's] decision not to testify as evidence of guilt"); *People v. Young*, 16 P. 3d 821, 825 (Colo. 2001) (finding that "[i]t is not unusual for a juror to be confused or uncertain about the presumption of innocence because it is a difficult legal concept" after citing studies that demonstrated nearly forty to fifty percent of the jurors surveyed did not understand the concept); Lawrence T. White & Michael D. Cicchini, *Is Reasonable Doubt Self-Defining?*, 64 VILL. L. REV. 1, 8 (2019) (reviewing studies and determining that extrinsic evidence points to the conclusion that jurors

struggle with the concept of beyond a reasonable doubt).Combining these four distinct, yet complicated legal principles into one proposition, prevents the jurors from focusing their attention on each separate principle and thereby risks rendering them incomprehensible when read in immediate succession. Cf. *People v. Ware*, 407 Ill. App. 3d 315, 356 (1st Dist. 2011) (emphasizing that, by interjecting questions into its recitation of the four principles, the trial court can encourage the jurors to focus on the different principles); Walter W. Steele & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure To Communicate*, 67 N.C. L. REV. 77, 98 (1988) (testing juror comprehension of legal instructions and concluding that the instruction's organization and its prose's complexity directly impacted the jurors' ability to understand).

And, by not separating the principles, it would be remarkably difficult for jurors to accurately recall each principle when finally asked if they understood or accepted every proposition that the court had previously listed. With each additional principle commingled into its statement of law, a trial court increases the likelihood that its subsequent questions will engender confusion and impede the jurors from responding. See Christopher N. May, *"What Do We Do Now?": Helping Juries Apply the Instructions*, 28 LOY. L.A. L. REV. 869, 880 (1995) (collecting studies that demonstrate the difficulties facing jurors as they attempt to remember or recall verbal legal instructions). In essence, by listing all of the principles in one statement of law, the trial court risks rendering the Rule 431(b) admonishments into a *pro forma* exercise. See *Lampley*, 2011 IL App (1st) 090661-B, ¶ 35 (agreeing with the defendant that "it is simply not enough to recite the principles and ask a question about them").

Indeed, if the trial court combines the four principles into one recitation and only questions the jurors about the grouped principles, it discourages the give-and-take process that will more effectively root out the jurors' biases and prejudices. Direct and specific questions facilitate more opportunities for responses from the jurors and so are more likely to lead to a meaningful

discussion of the principles that will benefit both the State and the defendant. Consequently, asking individualized questions about each principle will provide a realistic possibility that a juror will give voice to his or her confusion about the principles. To the contrary, lumping the principles together, both in the trial court's recitation and in asking the questions, deprives the jurors of any meaningful opportunity to indicate understanding and acceptance of each distinct principle. See, e.g., *Hayes*, 409 Ill. App. 3d at 627 (finding error, in part, when the circuit court combined "the first three principles of Rule 431(b) into one broad principle, [as it] did not allow the potential jurors to acknowledge that they understood and accepted each of those principles"). Ultimately, given the purpose and clarity of the rule, the essential nature of the principles enumerated therein, and the need to provide a full opportunity for each juror to respond to each distinct concept, the trial court's collapsing of the principles into one statement constitutes clear error. See Ill. S. Ct. R. 431(b); *Thompson*, 238 Ill. 2d at 607; *Hayes,* 409 Ill. App. 3d at 627.

Here, the circuit court, for each group of potential jurors, collapsed the four principles into one statement of law and then asked the jurors if they understood and accepted the recited statement of law. (R. 116–17, 163–64.) Specifically, for the first group of potential jurors, the circuit court instructed them as follows:

> "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 of law 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 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. So by a show of hands, do each of you understand these principles of law? [All hands raised.] Okay. And do each of you accept these principles of law? [All hands raised.] All right." (R. 116–17.)

The circuit court admonished the second group of potential jurors in a substantially similar manner. (R. 163–64.) As a result, for each potential juror, the framing of the circuit court's admonishments lumped the Rule 431(b) principles into a long recitation of the law, followed by questions that pertained to the entire recitation, depriving the jurors of the ability to carefully consider and respond on the record to each distinct principle delineated by Rule 431(b). (R. 116–17, 163–64); see *Hayes,* 409 Ill. App. 3d at 627. As such, the circuit court clearly violated Rule 431(b). See *id.*

Although not raised below, the circuit court further muddled its admonishments by not specifying to the potential jurors what precisely they were signifying when they raised or did not raise their hands. Instead, the circuit court merely stated "[s]o by a show of hands" before asking the jurors if they each understood these principles. (R. 117, 164). Due to the circuit court's method of inquiry, there is a possibility that a juror did not know how to relay his or her lack of understanding or rejection of less than all of the listed principles. As a result, the lack of precise instructions on how to respond to the circuit court's lengthy inquiry also hindered the jurors' ability to respond effectively. Cf. *People v. Dismuke*, 2017 IL App (2d) 141203, ¶ 54 (finding the trial court's Rule 431(b) admonishments inadequate when the potential jurors received three different instructions about what they were supposed to do with their hands).

Under the circumstances, Birge asks this Court to find that, because Rule 431(b) mandates a specific question-and-response process that precludes the collapsing of the four principles

into one broad statement of law, the circuit court clearly and obviously erred in its Rule 431(b) admonishments. See *Thompson*, 238 Ill. 2d at 607; *Hayes,* 409 Ill. App. 3d at 627.

C. The Evidence Was Closely Balanced as the Case Depended on the Jury's Resolution of Birge's Credibility.

The second step in Birge's plain-error claim is to determine whether he has shown that the evidence was so closely balanced that the clear or obvious error threatened to tip the scales of justice against him. *People v. Sebby*, 2017 IL 119445, ¶ 51. If Birge carries that burden, the error is actually prejudicial. *Sebby*, 2017 IL 119445, ¶ 51.

"In determining whether the evidence adduced at trial was close, a reviewing court must evaluate the totality of the evidence and conduct a qualitative, commonsense assessment of it within the context of the case." *Id.* at ¶ 53. Accordingly, "[a] reviewing court's inquiry involves an assessment of the evidence on the elements of the charged offense or offenses, along with any evidence regarding the witnesses' credibility." *Id.* In that analysis, the evidence is closely balanced if the case boils down to a credibility contest between two competing versions of events. See *People v. Moore*, 2020 IL 124538, ¶ 52 (stating a "classic case of closely balanced evidence" occurs when the jury is faced with "two plausible versions of events that depended on witness credibility" and when "[t]he jury was tasked with deciding whose version to believe"); *People v. Naylor*, 229 Ill. 2d 584, 608 (2008) (concluding that the evidence is closely balanced where "credibility was the only basis upon which defendant's innocence or guilt could be decided"). In contrast, a case is not a credibility contest if one party's version of events was either implausible or corroborated by other evidence. See *People v. Daniel*, 2018 IL App (2d) 160018, ¶ 30; cf. *Naylor*, 229 Ill. 2d at 608 (finding it important that no additional evidence was introduced to contradict or corroborate either parties' version of events). Stated simply, when the credibility of a witness is a crucial factor underlying the jury's determination of

innocence or guilt, the evidence is closely balanced. *People v. Schaffer*, 2014 IL App (1st) 113493, ¶ 52; see *People v. Williams*, 332 Ill. App. 3d 693, 699 (3d Dist. 2002).

As an initial matter, it is significant that the State on appeal never contested Birge's repeated assertions that the evidence was closely balanced or argued that the evidence was strongly weighted against Birge. (Appellant's Brief, p. 7, 14–16; Appellee's Brief, p. 2–5.) The State's silence on the matter demonstrated that it acquiesced to Birge's contention that the evidence at his trial was closely balanced. See *People v. Bailey*, 375 Ill. App. 3d 1055, 1068–69 (2d Dist. 2007) (aff'd 232 Ill. 2d 285 (2009)) (stating that reviewing courts normally treat the State's silence as acquiescence to the defendant's arguments). As the State previously acquiesced to Birge's claim that the evidence was closely balanced, it now should be precluded from arguing to the contrary. See *People v. Holman*, 2017 IL 120655, ¶ 28 (accepting the defendant's argument that the State forfeited its claim by raising it for the first time in its response brief before this Court, as the doctrine of forfeiture applies to the State and it may forfeit an argument by not properly preserving it for review); cf. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009) (suggesting that the defendant may argue that the State failed to preserve its argument when it conceded error in the appellate court but contested the error before this Court).

The State's acquiescence on appeal is hardly surprising; before the jurors, the prosecutor acknowledged that this case was essentially a credibility contest. (Sup. R. 30.) Specifically, in closing, the prosecutor stressed to the jurors that "what [Birge's case] comes down to is credibility, about believing [Birge's] story." (Sup. R. 30.) By the prosecutor's own argument, the issue of Birge's guilt or innocence revolved around the jury's evaluation of his credibility. (Sup. R. 30.) As encouraged by the prosecutor, the jurors thus likely decided the case based on credibility. See *Naylor*, 229 Ill. 2d at 608 (holding that the evidence is closely balanced where "credibility was the only basis upon which defendant's innocence or guilt could be

decided"); *Schaffer*, 2014 IL App (1st) 113493, ¶ 52. Not only did the prosecutor claim that the evidence came down to credibility before the jurors, but the prosecutor also explicitly informed the circuit court of its stance on the matter: "[i]t's the State's position that credibility would be a key issue in this case[.]" (R. 324.)

And, most importantly, the evidence before the jurors was closely balanced. To prove that Birge committed burglary as charged, the State was required to establish beyond a reasonable doubt that he, without authority, knowingly entered Chief City Vapor with the intent to commit therein a felony or theft. (C. 17); 720 ILCS 5/19-1(a) (2016); *People v. Johnson*, 2019 IL 123318, ¶ 15. Additionally, to demonstrate that Birge committed arson as charged, the State had to prove beyond a reasonable doubt that he, without consent, knowingly damaged real property by means of fire. (C. 38); 720 ILCS 5/20-1(a)(1) (2016).

At trial, Birge did not dispute that someone entered Chief City Vapor or that it was burglarized and burned. (R. 353.) Simply, Birge denied that he entered, or started a fire in, the Chief City Vapor building. (R. 353, 356); see *People v. Mueller*, 2015 IL App (5th) 130013, ¶ 40 (finding that the evidence was closely balanced as "the defendant's theory in this case was not far-fetched or illogical at all: it was simply that he was not the person who committed a retail theft at Macy's on the date in question, and that the State had not proven that he was"). To that end, Birge testified that he observed at least two other individuals engaged in a commotion outside of Chief City Vapor as he approached the scene and saw smoke emanating from the building. (R. 351, 352.)

Birge's explanation of events on the matter was not fanciful. See *id.* Birge offered that he was heavily intoxicated, medicated, and gambling at the gaming parlor. (R. 347–49.) Birge then left to visit his sister's house nearby; but, finding no one awake, he started walking back to the gaming parlor. (R. 349–50.) As Birge passed Chief City Vapor, he saw "some commotion"

and a "couple of people" were "running back and forth from a vehicle that was parked on the side there and that pulled off" and that "it looked like two individuals almost fighting or something." (R. 351.) In that observation, Birge viewed smoke billowing out of Chief City Vapor, boxes with items strewn about near the building, and an abandoned jacket. (R. 352–53.) Birge, who had been previously convicted of felony theft, knew that a crime had been committed and that he should leave the jacket. (R. 346, 353.) Nevertheless, surveying the items, Birge noticed that the jacket contained money in its pockets; so he kept it and planned to return to the gaming parlor. (R. 352, 355.) Birge then cut his hand on the glass inside the jacket's pocket while looking for change and sorting the items therein, including pliers, keys, and a lighter. (R. 239, 353.) When stopped by Officer Jonathan Marion ("Marion"), Birge lied and denied any knowledge about the fracas outside Chief City Vapor, given his prior interactions with officers and since he had walked off with the jacket. (R. 356, 360.)

In this context, it is not implausible that a drunk, medicated gambler with a criminal history would take the jacket containing change and proceed to the gaming parlor without alerting police of the burglary that he witnessed. Cf. *People v. Horton*, 2019 IL App (1st) 142019-B, ¶ 71 (generally explaining that previous interactions with the police informs and shapes a person's behavior when confronted with a situation that may involve officers). Additionally, Chief City Vapor was located in an area near local bars and there were other people out and about, consistent with Birge's testimony that he saw someone else leave Chief City Vapor shortly before it burned. (R. 254, 339, 343.)

Nor did the State offer evidence refuting Birge's version of events or that corroborated its theory that he entered Chief City Vapor instead of finding the jacket outside the building. See *People v. Vesey*, 2011 IL App (3d) 090570, ¶ 17 (explaining that the lack of corroborating evidence suggests that the evidence was closely balanced). While the police officers discovered

damaged surveillance video from Chief City Vapor that could have provided objective evidence of Birge's purported involvement in the crime, the officers abandoned any attempts to salvage the video after learning the cost of attempting to repair the hard drive was around $3000. (R. 266.) Similarly, while the police officers found a green-handled knife amongst the ruins of the broken glass door, they did not even attempt to test the knife for fingerprints or DNA. (R. 266.) Additionally, even though Marion testified that Birge was "dripping" blood, there was no evidence presented that Birge's blood was found inside of Chief City Vapor. (R. 234.) On that matter, the State provided no evidence that Birge's DNA or fingerprints were found within the building. No witnesses observed Birge inside or around the building. The State did not indicate that there was anything recovered from Chief City Vapor that was tied to Birge that would evidence that he actually entered the building rather than finding the jacket outside closer to the street. On the whole, there was no extrinsic evidence that refuted Birge's version of events. See *Stevens*, 2018 IL App (4th) 160138, ¶ 74 (offering that the evidence is closely balanced in cases that are contests of credibility without extrinsic evidence).

Alternatively, the evidence was at least closely balanced on Birge's conviction for arson. At trial, Birge additionally challenged the findings of the arson investigator, Shane Arndt ("Arndt"), claiming that his opinion that the fire was incendiary defied common sense. (Sup. R. 22, 24.) In support of his opinion, Arndt testified that, as he ruled out any other source, he believed that the incendiary fire was started by an open flame introduced to a couch inside of Chief City Vapor. (R. 311–13.)

First, Arndt rejected that other substances were used to accelerate the fire. (R. 305, 307.) Specifically, Arndt found that the fire damage was pretty localized mainly to the area surrounding the fire's origin–the couch inside of Chief City Vapor–and the fire pattern would have been broader and more intense had an accelerant been used. (R. 307.) Yet Chief City

Vapor stored many smoking items and oils that contained an alcohol base that could have been used to intentionally increase the fire's intensity. (R. 306.) If there had been an intention to burn down the store, surely the arsonist would have used the ample material at hand to accelerate the fire.

Second, Arndt specifically acknowledged that there were other possible sources for the fire that were not incendiary. (R. 309, 316–17.) For instance, Arndt conceded that an unfiltered cigarette left on the couch could have caused the fire. (R. 309, 316–17.) But crucially, Arndt formed his opinion that the fire was incendiary because he ruled out any other source. (R. 311–13.) As he admitted that there were possible unintentional sources, Arndt's conclusion that the fire was incendiary was very suspect. (R. 305, 307, 309, 316–17.)

Ultimately, as recognized by the prosecutor, the jurors' resolution of Birge's case centered around his credibility, rendering the evidence a credibility contest between two plausible versions of events. (Sup. R. 30.) Because the evidence was closely balanced, the circuit court's Rule 431(b) error likely tipped the scales of justice against Birge by falling to ensure that the jurors who determined Birge's guilt understood and accepted the four essential, bedrock principles of criminal law enumerated therein. See *Sebby*, 2017 IL 119445, ¶ 69. In the end, Birge asks this Court to hold that the circuit court's Rule 431(b) admonishments were clear and obvious error that tipped the balance against him in this closely balanced case. See *Sebby*, 2017 IL 119445, ¶ 78; *Hayes,* 409 Ill. App. 3d at 627. Consequently, Birge requests that this Court reverse and remand his case for a new trial. See *Sebby*, 2017 IL 119445, ¶ 80.

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.

At the sentencing hearing, the circuit court ordered Birge to pay $117,230 in restitution to Chief City Vapor and Tom Roe ("Roe"). The problem is, however, there was no evidence at trial or sentencing of the numerical amount of Roe's damages. Because 730 ILCS 5/5-5-6(b) requires the circuit court to "assess" the victim's "actual" damages, the circuit court clearly and obviously erred in entering a speculative restitution order that estimated Roe's damages at $117,230 without any supporting evidence. The circuit court's unsubstantiated restitution order denied Birge a fair sentencing hearing, affecting his substantial right to be sentenced according to the law. Alternatively, defense counsel's failure to object to the unsupported restitution order deprived Birge of the effective assistance of counsel. As a result, this Court should reverse the circuit court's restitution order and remand for a new hearing on the issue.

A. Standard of Review

A reviewing court should reverse a trial court's restitution order when it has abused its discretion. *People v. Stites*, 344 Ill. App. 3d 1123, 1125 (4th Dist. 2003). A trial court may abuse its discretion when it fails to examine the relevant facts and misapplies the proper legal standards in rendering its judgment. See *People v. Peterson*, 311 Ill. App. 3d 38, 46 (1st Dist. 1999). In contrast, this Court should review the legal question of whether defense counsel rendered ineffective assistance *de novo*. *People v. Hibbler*, 2019 IL App (4th) 160897, ¶ 88.

B. The Circuit Court Clearly Erred in Entering a Restitution Award that Lacked a Sufficient Evidentiary Basis

Once again, Birge recognizes that he did not properly preserve his claim that the circuit court erred in ordering restitution. Thus, Birge seeks plain-error review of the circuit court's

erroneous restitution award. Ill. S. Ct. R. 615(a). As raised here, the plain-error doctrine allows a reviewing court to consider a clear or obvious sentencing error when that error was so egregious as to deny the defendant a fair sentencing hearing. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). Generally, the first step in a plain-error inquiry is to determine whether clear or obvious error occurred. *People v. Sargent*, 239 Ill. 2d 166, 189 (2010). Here, the circuit court clearly and obviously erred by ordering Birge to pay $117,230 when there was no evidence at trial or sentencing indicating the amount of Chief City Vapor or Roe's damages. See *People v. Jones*, 206 Ill. App. 3d 477, 482 (2d Dist. 1990) (holding that the trial court clearly erred in ordering restitution without any evidence supporting the amount awarded).

As a component of the sentence, a trial court may order a defendant to pay restitution for an economic loss caused by his criminal conduct. 730 ILCS 5/5-5-6(a) (2017); see *People v. Brooks*, 158 Ill. 2d 260, 265 (1994) (explaining that, "under our criminal statutes, restitution is a sentence and a part of the sentencing scheme"). In that order, the trial court may set the manner in which the defendant pays restitution, including tendering cash payments in either installments or as a lump sum. See *id.* In fixing the amount of restitution to be paid in cash, the restitution statute demands that "the court shall assess the actual out-of-pocket expenses, losses, damages, and injuries suffered by the victim named in the charge[.]" 730 ILCS 5/5-5-6(b) (2017).

According to the statute's plain language, the trial court must evaluate the actual costs incurred by the victim and cannot rely on conjecture or speculation as to the amount to award. See *People v. Dickey*, 2011 IL App (3d) 100397, ¶ 25 (explaining that "[t]he court must determine the actual costs incurred by the victim; a guess is not sufficient"); cf. Black's Law Dictionary (11th ed. 2019) (defining "assess" as "[t]o calculate the amount or rate of (a tax, fine, etc.)"). To satisfy that requirement, the trial court must receive sufficient information to evaluate the

accuracy of the victim's restitution claim. See *People v. Nasser*, 223 Ill. App. 3d 400, 411 (4th Dist. 1991) (aff'd *People v. Lowe*, 153 Ill. 2d 195 (1992)) (emphasizing that "the trial court should satisfy itself of the legitimacy of any claim for restitution, *as well as the amount of the claim*") (emphasis added). It is not enough for the trial court, in determining the restitution amount, to award funds that are likely to repay the costs already occurred or that rely on facts outside the record. See *People v. Guarjardo*, 262 Ill. App. 3d 747, 770 (1st Dist. 1994) (holding that the court abused its discretion in ordering a restitution amount absent any on-the-record factual or evidentiary basis to support the order). Stated differently, without any evidence of the numerical sum of the loss incurred by the victim, the trial court cannot abide by the statutory requirement that it assess the victim's actual expenses, losses, damages, or injuries. See *People v. Kirkman*, 241 Ill. App. 3d 959, 965 (1st Dist. 1993) (finding that a restitution award of $450 was erroneous as it "was made by the trial court without any information on how to calculate the exact amount as required by statute"); *People v. Behm*, 154 Ill. App. 3d 987, 998 (5th Dist. 1987) (indicating that the trial court must calculate restitution based on the evidence before it regarding the value of the victim's loss).

Before the circuit court in the present case, there was no numerical evidence of Roe's losses. Roe testified at trial that he did not own the real property at issue; his father owned it. (R. 276–77.) In describing the damages to his father's building, Roe explained that everything was lost, as the entire building was gutted down to pulling studs, insulation, and the furnace. (R. 281.) According to Roe, "[a]ll the merchandise" and "furniture" were also lost. (R. 281.) Roe additionally offered that he usually kept around $100 in the store's cash register. (R. 279.)

There was no evidence provided whether Roe recovered the $100 in the register, if someone stole the money during the burglary, or if the money was destroyed by the fire. But more importantly, Roe did not testify to the costs associated with resurrecting the "lost" building

or the losses incurred by his business. Nor did Roe's father submit any evidence as to the damages to his building.

After trial, the probation officer, in the presentence investigation report, relayed that "[a] letter was sent to the victim inquiring [his] input regarding restitution. At the time this report was filed no request has been received from the victim." (Sec. C. 8.) At the subsequent sentencing hearing, the State did not supplement the presentence investigation report, offer any testimony, or submit any additional evidence. (R. 367, 368.) Without any other explanation, the State recommended "restitution in the amount of $117,230 for the uninsured losses to Chief City Vapor," which the circuit court later adopted. (R. 372, 375.)

Crucially, there was no evidence offered at trial or sentencing that would permit the circuit court to calculate or assess the victim's actual out-of-pocket expenses, losses, damages, and injuries. See *Guarjardo*, 262 Ill. App. 3d at 770. Because there was no testimony or evidence provided on the numerical amount of Roe's injuries, there was no method for which the circuit court to test the validity of the restitution request itself or the amount requested, as required by the restitution statute. See *Nasser*, 223 Ill. App. 3d at 411. And, while Roe did testify about the damages to his merchandise, the furniture, and his father's building, his testimony merely described the general damage that occurred; it in no way assisted the circuit court in calculating the cost of his losses. See *Behm*, 154 Ill. App. 3d at 998. As the restitution amount awarded had no basis in the trial or sentencing evidence and was simply declared by the State and accepted by the circuit court, the circuit court's restitution order requiring Birge to pay $117,230 constituted clear error. See *Jones*, 206 Ill. App. 3d at 482.

In making this argument, Birge rejects that the specificity of the number requested by the State somehow evidences that there was an off-the-record basis for the order as suggested by the appellate court. See *People v. Birge*, 2019 IL App (4th) 170341-U, ¶ 60; *People v. Hanson*,

2014 IL App (4th) 130330, ¶ 40 (indicating that, because the claimed number was specific, it was likely that the State did not fabricate it, and the parties instead had stipulated to that amount). To find otherwise would require pure speculation and cause the reviewing court to decide the issue on evidence that was not before it. See *In Interest of J.A.G.*, 113 Ill. App. 3d 140, 141–42 (4th Dist. 1983) (stating that the reviewing court may not premise its decision on outside-the-record evidence). Further, the restitution statute's plain language does not demand that the defendant object or contest the restitution order to trigger the trial court's duty to conduct an on-the-record assessment of the victim's claimed damages. See 730 ILCS 5/5-5-6(b). And even if the State requested a specific number rather than a general amount of damages, the trial court's subsequent on-the-record assessment could detect and rectify any inaccurate or fraudulent calculations.

As a final matter, it is important to note that, before the appellate court, the State never contested that the circuit court erred in awarding restitution, conceded that there was no documentation of the amount of Roe's damages, and affirmatively requested that the issue return to the circuit court for additional proceedings. (Appellee's Brief, p. 10.) By conceding that both there was no documentation of Roe's damages before the circuit court and affirmatively requesting that the issue return to the circuit court, the State has waived any claim that the circuit court's restitution order should be affirmed. See *People v. Holman*, 2017 IL 120655, ¶ 28. And by not contesting Birge's repeated contentions that the circuit court's award constituted clear error, the State has forfeited any argument to the contrary. See *Holman*, 2017 IL 120655, ¶ 28.

Under the circumstances, this Court should find that the circuit court clearly and obviously erred in ordering Birge to pay $117,230 in restitution, when no evidence at trial or sentencing even suggested the amount of Roe's actual damages, which prohibited the circuit court from

discharging its statutory duty to "assess the actual out-of-pocket expenses, losses, damages, and injuries suffered" by Roe. 730 ILCS 5/5-5-6(b); see *Jones*, 206 Ill. App. 3d at 482.

C. The Circuit Court's Clear and Obvious Error Denied Birge a Fair Sentencing Hearing

The second step in Birge's plain-error claim is to determine whether he has shown that the circuit court's clear and obvious error was so egregious that it denied him a fair sentencing hearing. See *Hillier*, 237 Ill. 2d at 545. If Birge carries that burden, the error is presumed to be prejudicial given the significance of the right involved. See *People v. Lewis*, 234 Ill. 2d 32, 47 (2009).

On appeal, the State never objected to Birge's claim that the circuit court's erroneous restitution order constituted plain error that denied him a fair sentencing hearing. (Appellant's Brief, p. 27–29; Appellee's Brief, p. 10.) The State's previous silence on the matter results in the forfeiture of any argument that Birge's failure to preserve his restitution claim cannot be excused as plain error. See *Holman*, 2017 IL 120655, ¶ 28 (finding that the doctrine of forfeiture applies to the State and it may forfeit an argument by not properly preserving it for this Court's review). As a result, at this point, the State should be precluded from contending that Birge's restitution claim did not deny him a fair sentencing hearing. Cf. *Lewis*, 234 Ill. 2d at 43 (suggesting that the defendant may argue that the State failed to preserve its argument when it conceded error in the appellate court but contested the error before this Court).

The State's decision not to contest that the plain-error doctrine applied in Birge's case is understandable; reviewing courts have nearly universally found that clear and obvious errors in ordering restitution can be addressed through the plain-error doctrine. See *People v. Adame*, 2018 IL App (2d) 150769, ¶23; *People v. McCormick*, 332 Ill. App. 3d 491, 499 (4th Dist. 2002); *People v. Fitzgerald*, 313 Ill. App. 3d 76, 81 (1st Dist. 2000); *People v. Rayburn*, 258 Ill. App. 3d 331, 335 (3d Dist. 1994). Indeed, in *People v. Jones*, the appellate court specifically found

that the exact unpreserved error committed here–issuing a restitution award without any evidence to support that award–constituted plain error affecting the defendant's substantial rights, requiring a new hearing on the restitution issue. 206 Ill. App. 3d at 482. In that process, the *Jones* court necessarily held that the trial court's reliance on alleged losses that were unsupported by any evidence rendered the defendant's sentencing hearing on restitution unfair. See *id.*

In making the argument that his claim may be reviewed under the plain-error doctrine, Birge acknowledges the contrary decision in *People v. Hanson*, 2014 IL App (4th) 130330, relied on by the appellate court. *Birge*, 2019 IL App (4th) 170341-U, ¶ 60. In *Hanson*, the appellate court rejected the defendant's assertion that "the trial court committed plain error by accepting the State's representation that the restitution amount was $490.82 without requiring that further evidence be presented to prove the accuracy of that amount." 2014 IL App (4th) 130330, ¶ 40. The *Hanson* court reasoned that the restitution statute permitted the parties to stipulate to the amount of restitution, which was "essentially" what happened when neither the defendant or his counsel contested the amount. *Id.* And the *Hanson* court doubted that, given the specificity of the figure requested, the State made it up. *Id.* Ultimately, the *Hanson* court declined to address the merits of the defendant's claims as it could not accept that his claim of error was sufficiently grave that it deprived him of a fair sentencing hearing. *Id.*

Quite simply, *Hanson* was wrongly decided. First, the *Hanson* court's finding that the defendant essentially stipulated to the restitution amount by not objecting mars any meaningful distinction between waiver and forfeiture. See *Gallagher v. Lenart*, 226 Ill. 2d 208, 229 (2007) (defining forfeiture as a failure to make a timely assertion of a right and waiver as an intentional relinquishment of a known right). Second, there is no statutory requirement that the defendant object to the restitution order before the trial court is required to *assess* the victim's claim to determine his or her actual damages. See 730 ILCS 5/5-5-6(b). Third, the *Hanson* court's doubt that the State would make up an amount overlooks that the restitution statute obligates

the circuit court–not the State–to calculate the victim's damages and any meaningful assessment requires on-the-record evidence of the damages' amount.

But most importantly, the *Hanson* court did not address this Court's analogous decision in *People v. Lewis*, 234 Ill. 2d 32 (2009). See *Adame*, 2018 IL App (2d) 150769, ¶ 23 (rejecting *Hanson* in light of *Lewis* and finding that the circuit court's restitution order–that lacked the necessary supporting evidence–constituted second-prong plain error). In *Lewis*, the defendant on appeal raised an unpreserved challenge to the assessment of a street-value fine that lacked any evidentiary basis. *Lewis*, 234 Ill. 2d at 34–35. In resolving that claim, this Court noted that, as required by statute, the street-value fine "shall be levied by the court at not less than the full street value of the [drug]" which "shall be determined by the court on the basis of testimony of law enforcement personnel and the defendant as to the amount seized and such testimony as may be required by the court as to the current street value of the [drugs]." *Id.* at 44 (citing 730 ILCS 5/5-9-1.1(a) (2004)). This Court then noted that the clear statutory language required some evidentiary basis for the circuit court to determine the current street value of the drugs and, as there was no such evidence before it, the circuit court clearly erred in ordering the street-value fine. *Id.* at 46–47.

Pertinent here, this Court then analyzed the applicability of the plain-error doctrine to the erroneous street-value fine. *Id.* at 48. In so doing, this Court held:

> "The error here is more than a simple mistake in setting the fine. Rather, it is a failure to provide a fair process for determining the fine based on the current street value of the controlled substance. Plain-error review is appropriate because imposing the fine without any evidentiary support in contravention of the statute implicates the right to a fair sentencing hearing. *** The integrity of the judicial process is also affected when a decision is not based on applicable standards and evidence, but appears to be arbitrary." *Id.*

In concluding that plain-error review was appropriate, this Court further determined that "[a]n error may involve a relatively small amount of money or unimportant matter, but still affect

the integrity of the judicial process and the fairness of the proceeding if the controversy is determinated in an arbitrary or unreasoned manner." *Id.*

Just like the street-value fine, the restitution statute requires the circuit court to conduct an assessment of the victim's claim for restitution, which necessarily entails legitimate evidence establishing the amount of his or her actual damages. 730 ILCS 5/5-5-6(b). Thus, ordering restitution without any evidentiary support in contravention of the statute implicates Birge's right to a fair hearing as it causes the circuit court's decision to appear arbitrary and not based on the applicable standards and evidence. See *Lewis*, 234 Ill. 2d at 48. Not only that, the circuit court's restitution order here completely abdicated its responsibility to dutifully evaluate Roe's purported claim for restitution in favor of the State, rendering the judicial process unfair and biased against Birge. *Id.* Ultimately, Birge requests that this Court hold that the circuit court's unsupported restitution order denied him a fair sentencing hearing and remand for a new hearing on the issue. See *Adame*, 2018 IL App (2d) 150769, ¶ 23; *Jones*, 206 Ill. App. 3d at 482; cf. *Lewis*, 234 Ill. 2d at 48.

D. Alternatively, Defense Counsel Provided Ineffective Assistance of Counsel

As an alternative to plain-error review, Birge contends that his counsel's inaction in failing to object to the unsupported restitution order deprived him of his constitutional right to the effective assistance of counsel. Birge thus asks this Court to excuse any procedural forfeiture of his restitution claim as it was the result of his counsel's ineffectiveness.

In a criminal case, a defendant is constitutionally entitled to the effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8; *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *People v. Albanese*, 104 Ill.2d 504, 524–25 (1984). The standard for assessing claims of ineffective assistance of counsel is the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *People v. Henderson*, 2013 IL 114040, ¶ 11. To satisfy the two-prong *Strickland* test, the defendant must establish that his counsel's

performance was deficient and that this defective conduct prejudiced him. *Strickland*, 466 U.S. at 687; see *Henderson*, 2013 IL 114040, ¶ 11. To prove deficient conduct, the defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness as measured against the prevailing professional norms. *People v. Veach*, 2017 IL 120649, ¶ 30. To establish that his counsel's conduct was prejudicial, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; see *Henderson*, 2013 IL 114040, ¶ 11. In that analysis, a defendant need only demonstrate that his counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *People v. Manning*, 241 Ill. 2d 319, 327 (2011).

Once again, it is important that the State on appeal never contested Birge's clear claim that defense counsel was ineffective for failing to challenge the restitution order. (Appellant's Brief, p. 24–26; Appellee's Brief, p. 10.) As such, the State should be precluded from now arguing, for the first time, that defense counsel provided effective assistance during the sentencing hearing. cf. *Holman*, 2017 IL 120655, ¶ 28

Nevertheless, in Birge's case, defense counsel was ineffective for failing to object to the $117,230 restitution order because no evidence demonstrated the actual damages incurred by Roe and Chief City Vapor. As the restitution number had no evidentiary support and was simply declared by the State, there was no basis for the circuit court to discharge its statutory duty to assess the cost of Roe's actual losses; thus, the restitution order violated 730 ILCS 5/5-5-6(b). (R. 372, 375); see *Jones*, 206 Ill. App. 3d at 482. Reasonable counsel would have recognized that the restitution order required evidence to support it and objected to the circuit court's acceptance of the State-assessed restitution amount. See, e.g., *People v. Heinz*, 407 Ill. App. 3d 1016, 1024 (2d Dist. 2011) (finding defense counsel ineffective for failing to object

and include a challenge to the restitution order in the motion to reconsider the defendant's sentence). To that end, reasonable counsel would have compelled the circuit court to abide by its statutory duty to provide an assessment of the victim's claim for damages, especially as Roe did not submit any request or claim for restitution after given the opportunity to do so. (Sec. C. 8); see *Heinz*, 407 Ill. App. 3d at 1024.

Importantly, there was no strategic reason for defense counsel's failure to object. Defense counsel and the State did not stipulate to the amount awarded, so there was no agreement on the issue. Similarly, the record does not indicate that Birge received any sentencing considerations in exchange for failing to contest the restitution amount.

Additionally, defense counsel's failure to object to the restitution order prejudiced Birge in that he is now required to pay restitution in amounts that were never proven or established as the actual costs of Roe's damages. See *id.* And paying $117,230 in restitution is not a *de minimis* obligation for an indigent defendant like Birge. (C. 18); see *id.* (finding "that defendant was prejudiced as a result of defense counsel's inaction; the trial court ordered him to pay restitution in the amount of $7,000, not a small sum of money"). Further, given the large sum requested and the scope of the damage, there was an increased likelihood that there would be errors or miscalculations in any attempt to quantify Roe's damages, which could be rectified by the circuit court's assessment. In the end, this Court should excuse any procedural forfeiture as it was the result of defense counsel's ineffectiveness. See *id.*

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,

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COUNSEL FOR PETITIONER-APPELLANT

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 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, the certificate of service, and those matters to be appended to the brief under Rule 342, is 36 pages.

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

APPENDIX TO THE BRIEF

Brian Birge No. 125644

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
LIVINGSTON COUNTY, ILLINOIS

PEOPLE
Plaintiff/Petitioner

v

BIRGE, BRIAN L R33533
Defendant/Respondent

Appellate Court No: 4-17-0341
Circuit Court No: 2016CF159
Trial Judge: Baukencht

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APPEAL TO THE APPELLATE COURT OF ILLINOIS
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FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
LIVINGSTON COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Appellate Court No: 4-17-0341
	)	Circuit Court No: 2016CF159
	)	Trial Judge: Baukencht
v	)	
	)	
	)	
BIRGE, BRIAN L R33533	)	
Defendant/Respondent	)	

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APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
LIVINGSTON COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Appellate Court No: 4-17-0341
	)	Circuit Court No: 2016CF159
	)	Trial Judge: Baukencht
v	)	
	)	
	)	
BIRGE, BRIAN L R33533	)	
Defendant/Respondent	)	

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APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
LIVINGSTON COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Appellate Court No: 4-17-0341
	)	Circuit Court No: 2016CF159
	)	Trial Judge: Baukencht
v	)	
	)	
	)	
BIRGE, BRIAN L R33533	)	
Defendant/Respondent	)	

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APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
LIVINGSTON COUNTY, ILLINOIS

PEOPLE Plaintiff/Petitioner	)	Appellate Court No: 4-17-0341 Circuit Court No: 2016CF159 Trial Judge: Jennifer Bauknecht
v	)	
BIRGE, BRIAN L R33533 Defendant/Respondent	)	

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IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT,
LIVINGSTON COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,

v. NO. 16-CF-159

BRIAN BIRGE

FILED IN CIRCUIT COURT
LIVINGSTON COUNTY, ILLINOIS
MAY - 4 2017
LeAnn Quinn
CIRCUIT CLERK

NOTICE OF APPEAL

An appeal is taken from the order or judgment described below.

(1) Court to which appeal is taken: Appellate Court, Fourth District, 201 W. Monroe Street, P.O.Box 19206, Springfield, Illinois 62794-9206.

(2) Name of appellant and address to which notices shall be sent.
Name: Brian Birge R33533
Address: Centralia Correctional Center, P.O. Box 7711, Centralia, IL 62801

(3) Name and address of appellant's attorney on appeal.
Name: Appellant Defender, Fourth Judicial District
Address: 400 West Monroe, Suite 303, P.O. Box 5240, Springfield, IL 62705-5240

If appellant is indigent and has no attorney, does he want one appointed?

(4) Date of judgment or order: 2/9/2017 Jury Trial – Conviction
3/14/2017 Sentence
4/25/2017 Motion to Reconsider Sentence

(5) Offense of which convicted: Count 1 - Burglary, Class 2 Felony
Count 2 - Arson, Class 2 Felony

6) Sentence: Count 1, Burglary – 24 years 6 months DOC, 3 years MSR Concurrent
Count 2, Arson – 24 years 6 months DOC, 3 years MSR Concurrent
$117,230.00 Restitution, $835 Fines/Costs/Assessments

(7) If appeal is not from a conviction, nature of order appealed from: Conviction, Sentence, and Denial of Motion to Reconsider Sentence

(8) If the appeal is from a judgment of a circuit court holding unconstitutional a statute of the United States of this state, a copy of the court's findings made in compliance with Rule 18 shall be appended to the notice of appeal.

LeAnn Quinn
Clerk of the Circuit Court
Livingston County, Illinois

A-8

2019 IL App (4th) 170341-U

NO. 4-17-0341

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
November 22, 2019
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
BRIAN BIRGE,	)	No. 16CF159
Defendant-Appellant.	)	
	)	Honorable
	)	Jennifer H. Bauknecht,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices DeArmond and Harris concurred in the judgment.

ORDER

¶ 1 Held: The appellate court affirmed, concluding (1) the trial court properly admonished the jurors in accordance with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012), (2) the trial court did not deny defendant a fair sentencing hearing, (3) defendant was not denied effective assistance of counsel by counsel's failure to object to the restitution order, and (4) the trial court's restitution order complied with the requirements of the restitution statute.

¶ 2 In February 2017, a jury found defendant, Brian Birge, guilty of burglary (720 ILCS 5/19-1(a), (b) (West 2014)) and arson (720 ILCS 5/20-1(a)(1), (c) (West 2014)), both Class 2 felonies with mandatory Class X sentencing based on defendant's criminal history (730 ILCS 5/5-4.5-95(b) (West 2014)). The trial court sentenced defendant to concurrent terms of 24 years and 6 months' imprisonment and ordered him to pay the victim $117,230 in restitution.

¶ 3 Defendant appeals, arguing (1) the trial court failed to properly admonish the jurors in accordance with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012), (2) he was denied a fair sentencing hearing because the trial court erroneously considered (a) a factor inherent in the offense in aggravation and (b) no factors in mitigation when imposing sentence, (3) trial counsel was ineffective for failing to object to the restitution order, and (4) the restitution order is invalid for failing to set forth the manner in which restitution is to be paid. We affirm the trial court's judgment.

¶ 4 I. BACKGROUND

¶ 5 In May 2016, the State charged defendant by information with burglary (count I) (720 ILCS 5/19-1(a) (West 2014)) and criminal damage to property (count II) (720 ILCS 5/21-1 (West 2014)). In June 2016, the State charged defendant by supplemental information with arson (count III) (720 ILCS 5/20-1(a)(1) (West 2014)). All three counts stemmed from defendant allegedly entering a business, Chief City Vapor, in Livingston County at approximately 1:30 a.m. on May 28, 2016, without authority, and knowingly damaging it by means of fire. Defendant faced mandatory Class X sentencing on counts I and III because of prior convictions. See 730 ILCS 5/5-4.5-95(b) (West 2014).

¶ 6 A. Jury Trial

¶ 7 In February 2017, the case proceeded to a jury trial on counts I and III. (The State dismissed count II—criminal damage to property—prior to trial.) The State informed the trial court it 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. Defense counsel stated a counteroffer was tendered with a shorter term of imprisonment but did not reference a counteroffer reducing the amount of restitution to be paid.

¶ 8 1. Voir Dire

¶ 9 During voir dire, the trial court separated the venire into two groups and admonished each group regarding the principles enumerated in Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) as follows:

"THE COURT: 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 of law 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 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.

So by a show of hands, do each of you understand these principles of law?

PROSPECTIVE JURORS: (All hands raised.)

THE COURT: Okay. And do each of you accept these principles of law?

PROSPECTIVE JURORS: (All hands raised.)"

¶ 10 2. Evidence Presented

¶ 11 Officer Brad Baird was on duty conducting routine patrol on May 28, 2016, at approximately 1:30 a.m. when an individual flagged him down to advise him a building—identified as the location of Chief City Vapor—was on fire. Baird was approximately one hundred feet from the building and saw smoke and flames. When he approached the building, Baird noticed the south-side door was ajar, the glass on the door had been broken, and "[t]here was glass laying in front of the door and in the doorway[.]" Officer Baird then discovered a trail of approximately 10 to 12 items that "appeared to come from the Chief City Vapor building" and led "towards the railroad tracks and to the east." The trail ultimately "led to an area southeast of the *** building where there were several boxes with hundreds of items."

¶ 12 Officer Jonathan Marion was on duty conducting routine patrol on May 28, 2016, at approximately 1:30 a.m. when he responded to a report of a structure fire at Chief City Vapor. Officer Marion saw "heavy smoke in the area" and "flames showing from inside the building." Marion testified Officer Baird, another officer, and the individual who flagged down Baird were already at the scene when he arrived. The only other person in the vicinity was an individual walking down a street located one block south of Chief City Vapor. Officer Marion approached the individual and identified him in court as defendant. Officer Marion noticed defendant's hand was bleeding. Defendant told Marion he "cut it on a lawn mower blade working on a lawn mower." Marion testified defendant was wearing "a coat and a hoodie with glass shards and plastic tags stuck to his clothing and his legs." Defendant consented to a search of his person. Officer Marion recovered two pairs of pliers, a large amount of change, a set of keys, a lighter, and approximately $115 in cash. Marion also testified defendant told him he (defendant) did not

start the fire, even though Marion never asked defendant about the fire and the fire was not visible from where they were standing.

¶ 13 Tom Roe testified he owned Chief City Vapor. He did not give anyone permission to enter the building after the store closed on the night of the fire. Roe kept change and approximately $100 in cash in the store's cash register; the keys discovered on defendant's person unlocked the outbuildings on the property; and the keys were always stored in his desk located inside of the building. Roe also identified the trail of items discovered outside of the building as property of his business. When asked about the damage the fire caused, Roe testified, "We had to gut the entire building down to pulling the studs, pulling the insulation, furnace. I mean, everything was lost[,]" including the merchandise and furniture.

¶ 14 Defendant testified he "had overdosed on drugs" approximately 12 hours prior to the fire and had been hospitalized. When discharged, defendant's mother dropped him off at "Aly Anne's" to gamble, which was located close to where Officer Marion later questioned defendant. Defendant testified he did not remember many of the details from the relevant time because he was heavily medicated, drinking, and using drugs. He testified he remembered leaving Aly Anne's and walking to his sister's house. Defendant knocked on the door, but his sister did not answer so he decided to return to Aly Anne's to continue gambling. On his walk back, he observed "some commotion going on" and people "running back and forth from a vehicle" parked near Chief City Vapor. He watched as they drove away. Defendant then noticed "stuff scattered on the road over across the [railroad] tracks." One of the items was a jacket, which he put on. Defendant testified he went through the pockets of the jacket and cut his hand on glass. He remembered talking to Officer Marion "a little bit" but did not recall discussing the

cut on his hand. Defendant denied any involvement with the fire and testified he "never even set foot on that facility whatsoever."

¶ 15 Following closing arguments, the jury found the State proved defendant guilty of both counts beyond a reasonable doubt.

¶ 16 B. Sentencing Hearing

¶ 17 At a March 2017 sentencing hearing, a presentence investigation report (PSI) was admitted without objection. It showed defendant had four prior felony convictions—aggravated criminal sexual abuse, residential burglary, unlawful possession of a controlled substance, and theft—and two felony probation revocations. Defendant reported no physical or mental health issues but did report a history of substance abuse. The PSI also recommended the trial court order defendant to pay restitution to the victim. Although a letter had been sent to the victim requesting restitution information, the victim had not responded. The PSI noted defendant "may have difficulty paying" restitution.

¶ 18 The State recommended a sentence in excess of 20 years, arguing the following factors in aggravation: (1) defendant's criminal history, (2) his conduct caused serious harm, and (3) deterrence. The State also requested defendant pay $117,230 in restitution; defendant did not object to the State's request. Defendant recommended the minimum sentence permissible by statute, offering the following in mitigation: (1) he attempted suicide shortly before commission of the crimes and (2) he was under the "residual[ ]" influence of "a variety of substances" at the time.

¶ 19 The trial court stated the following in regard to the applicable aggravating and mitigating factors:

"THE COURT: *** I don't want there to be any suggestion in the record that the Court is somehow double enhancing on [defendant's] prior record. It's, it is not a good record. But in terms of an aggravating factor, I do recognize that it is the basis for the enhancement to the Class X sentencing.

But I bring that up as the first point because it is a serious, serious case; and one of the factors the Court is to consider is deterrence. That's a very strong factor I guess depending on the type of case that we're dealing with. But in this case, deterrence is a very strong factor for the Court to consider.

We see a lot of stuff in Livingston County that's not good, a lot of drug related offenses; and I understand that [defendant] believes that in part this is related to drug offenses or a drug addiction. But what we see typically with drug cases are people harming themselves or perhaps, not to minimize it, but less serious property crimes such as, you know, stealing change or something like that. Still a serious matter but the lack of respect for somebody's property when you are talking about items of change located in a car versus causing substantial harm to somebody's business I think are two very different things.

***

There simply is no set of circumstances at all that justify what happened here. *** The testimony or the story from [defendant] was perhaps not bizarre but pretty close. It was pretty inconsistent and not very logical which I think the jury found to not be credible, and I think based upon my assessment of it I didn't think [defendant] was all that credible either. And [I] say that because the other matters that get raised such as excuses for your conduct here, they don't carry a lot of

weight when it appears that you are going to say and do anything that you feel like at the moment.

You know, in general I try to have pretty, I have faith I guess in people that deep down most people want to do what's right. Most people try to do what's right. Addicts have a very difficult time with that, but primarily they hurt themselves. You're not the same type of addict that we're accustomed to dealing with in here because you don't just harm yourself. You harm the community around you in big ways. You have absolutely no respect for anybody's home, business, property. Like I said, if you are stealing change out of a car, that's one thing. Breaking into people's homes, that's a residential burglary. Breaking into people's businesses and destroying them?

* * *

So I do think that deterrence is a factor. Obviously your conduct caused serious harm. And your prior record not just the factor or not just the convictions that caused, are cause for the enhancement but your other record as well. You consistently have demonstrated a lack of regard for society, rules, other people, so there's just no way in this case that a minimum sentence would be appropriate.

I do not believe there are any [mitigating] factors here. I recognize [defendant] thinks that he might have overdosed the night before. Maybe he did. That still doesn't excuse the conduct. *** And so I can't imagine wanting to have you back here anytime soon for the protection of the community."

¶ 20 The trial court sentenced defendant on both counts to 24 years and 6 months' imprisonment, with the sentences to run concurrently. The court also ordered defendant to pay

the victim $117,230 in restitution. The written restitution order stated the following: "Defendant shall pay all said restitution ***, in any event within five (5) years after this date, and as follows: *** full payment within 12 months after defendant's release from imprisonment in this case."

¶ 21 C. Motion to Reconsider Sentence and Hearing

¶ 22 On March 23, 2017, defendant filed a motion to reconsider sentence. Defendant argued the sentence was excessive in light of the evidence presented and the court failed to consider the following mitigating factors: (1) defendant did not contemplate his criminal conduct would cause or threaten serious harm, (2) there were substantial grounds tending to excuse or justify defendant's criminal conduct "in that [he] was recently hospitalized for an attempted suicide from an overdose of medication and other substances," (3) defendant's conduct was the result of circumstances unlikely to recur if he receives the proper addiction and mental health treatment, (4) his imprisonment would entail excessive hardship to his dependents, and (5) his imprisonment would endanger his medical condition. See 730 ILCS 5/5-5-3.1(a)(2), (4), (8), (11), (12) (West 2014).

¶ 23 On April 25, 2017, the trial court conducted a hearing on defendant's motion. Defense counsel stated: "The thing we wanted the Court to reconsider really was the fact [defendant] had been recently hospitalized just prior to this incident occurring and had just been released from the emergency room *** after attempting suicide taking several medications." The trial court denied defendant's motion, reasoning as follows:

> "THE COURT: Well, there are a number of mitigating factors in this case. There's aggravating factors in this case which, all of which were discussed and weighed in great detail at the original sentencing hearing. I haven't heard

anything new here today that was not previously brought to the Court's attention or considered by the Court.

So I think the sentence is within the range prescribed by statute. I think that the Court properly balanced the factors in aggravation in mitigation, specifically the mitigating factors raised again today. And I believe that the aggravating factors here do outweigh the mitigating factors, and the sentence is appropriate so the motion to reconsider the sentence is denied."

¶ 24 This appeal followed.

¶ 25 II. ANALYSIS

¶ 26 On appeal, defendant argues (1) the trial court failed to properly admonish the jurors in accordance with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012), (2) he was denied a fair sentencing hearing because the trial court erroneously considered (a) a factor inherent in the offense in aggravation and (b) no factors in mitigation when imposing sentence, (3) trial counsel was ineffective for failing to object to the restitution order, and (4) the restitution order is invalid for failing to set forth the manner in which restitution is to be paid.

¶ 27 A. Juror Admonishments

¶ 28 Defendant first argues the trial court failed to properly admonish the prospective jurors as set forth in Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). He contends the trial court "impermissibly conflated all four principles" in the rule and asked whether the prospective jurors understood and accepted this "one broad instruction" rather than asking if the prospective jurors understood and accepted each individual principle. Defendant concedes he forfeited this argument by failing to object at trial and raise the alleged error in a posttrial motion but asks this

court to review it under the first prong of the plain-error doctrine. See People v. Sebby, 2017 IL 119445, ¶ 48, 89 N.E.3d 675.

¶ 29 Under the plain-error doctrine, we may consider a forfeited claim when "(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, 870 N.E.2d 403, 410-11 (2007). The first step in plain-error analysis is to determine whether clear or obvious error occurred. Sebby, 2017 IL 119445, ¶ 49. We will review de novo whether the trial court committed clear or obvious error by failing to comply with Rule 431(b). See People v. Thompson, 238 Ill. 2d 598, 606, 939 N.E.2d 403, 409 (2010).

¶ 30 Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) requires trial courts to read four principles of law to prospective jurors and determine whether they understand and accept those principles. It states:

> "The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that if a defendant does not testify it cannot be held against him or her; however, no

> inquiry of a prospective juror shall be made into the defendant's decision not to testify when the defendant objects.
>
> The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." Ill. S. Ct. R. 431(b) (eff. July 1, 2012).

¶ 31 Our supreme court has interpreted the language of Rule 431(b) to mandate a "specific question and response process." Thompson, 238 Ill. 2d at 607. "The trial court must ask each potential juror whether he or she understands and accepts each of the principles in the rule." Id. Next, "the rule requires an opportunity for a response from each prospective juror on their understanding and acceptance of those principles." Id. Citing Thompson, this court, in People v. Curry, 2013 IL App (4th) 120724, ¶ 65, 990 N.E.2d 1269, made the following suggestion to trial courts regarding compliance with Rule 431(b):

> "Indicate to the potential jurors the court will go over some principles of law to ensure they understand and accept the principles of law. Thereafter, read verbatim the four principles outlined in Rule 431(b). Then, ask jurors individually or in a group whether they understand and accept the principles, giving each juror an opportunity to respond in a manner that ensures his or her understanding and acceptance or lack thereof, is a matter of record."

¶ 32 The trial court in this case followed both the "specific question and response process" outlined in Thompson and this court's suggestion in Curry. The trial court first

indicated to the prospective jurors it would ask them if they understood and accepted certain principles of law. Thereafter the court read each of the four principles outlined in Rule 431(b). Then, the court asked the prospective jurors whether they understood the principles and whether they accepted the principles. The prospective jurors affirmatively responded they understood and accepted the principles. Rule 431(b) requires nothing further. See Thompson, 238 Ill. 2d at 607. Thus, we find no error occurred with the Rule 431(b) admonishments in this case.

¶ 33 Defendant nevertheless argues compliance with Rule 431(b) requires the trial court to ask for juror acceptance and understanding after recitation of each individual principle, not after recitation of all four principles. Defendant relies on People v. Othman, 2019 IL App (1st) 150823, for this proposition. In Othman, the First District stated the following regarding compliance with Rule 431(b):

> "In criminal trials, Illinois judges are required to ask the venire eight simple questions: (1) defendant is presumed innocent: (a) do you understand that? (b) do you accept it?; (2) defendant is not required to offer any evidence on his own behalf: (a) do you understand that? (b) do you accept it?; (3) defendant must be proved guilty beyond a reasonable doubt by the State: (a) do you understand that? (b) do you accept it?; and (4) the failure of defendant to testify on his own behalf cannot be held against him: (a) do you understand that? (b) do you accept it?" Id. ¶ 60.

¶ 34 To the extent Othman may be inconsistent with our conclusion here, we note we are not bound by the First District's decision. See People v. Maggio, 2017 IL App (4th) 150287, ¶ 26, 80 N.E.3d 72; see also O'Casek v. Children's Home & Aid Society of Illinois, 229 Ill. 2d

421, 440, 892 N.E.2d 994, 1006-07 (2008) ("[T]he opinion of one district, division, or panel of the appellate court is not binding on other districts, divisions, or panels."). Even if Othman was binding authority, we would not find clear or obvious error in this case as Othman was decided two years after defendant's trial. See People v. Williams, 2015 IL App (2d) 130585, ¶ 11, 33 N.E.3d 608 ("Plain-error review is reserved for errors that are clear or obvious based on law that is well settled at the time of trial; if the law was unclear at the time of the trial, but becomes clear (i.e., settled) during the appeal, then the error is not plain for purposes of the plain-error doctrine." (Internal quotation marks omitted.)). Because no clear or obvious error occurred, we need not address whether the evidence was closely balanced, and we will honor defendant's forfeiture of his Rule 431(b) argument. See People v. Naylor, 229 Ill. 2d 584, 593, 893 N.E.2d 653, 659-60 (2008).

¶ 35 B. Sentencing Hearing

¶ 36 Defendant next argues he was denied a fair sentencing hearing because the trial court erroneously considered (1) a factor inherent in the offense in aggravation and (2) no factors in mitigation when imposing his sentence.

¶ 37 1. Aggravating Factors

¶ 38 Defendant contends it "was improper for the trial court to consider in aggravation at sentencing that [he] caused 'substantial harm' to the business, to himself, and to the community" because his conduct caused no greater harm than that which was inherent in the offense. He states we "should apply the same analysis to the felony crimes of burglary and arson" but cites no authority in support of this proposition. The State concedes harm "may be" inherent in the offense of arson, but argues it is not inherent in the offense of burglary. Defendant does not respond to the State's argument in his reply brief, and we therefore decline to accept his

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conclusory assertion it is improper for a trial court to consider harm as a factor in aggravation when sentencing a defendant convicted of burglary.

¶ 39 The Unified Code of Corrections (Unified Code) (730 ILCS 5/5-5-3.1, 5-5-3.2 (West 2014)) lists mitigating and aggravating factors the trial court must consider when determining an appropriate sentence. One such factor the trial court may consider in aggravation is whether "the defendant's conduct caused or threatened serious harm ***." 730 ILCS 5/5-5-3.2(a)(1) (West 2014). The trial court cannot, generally speaking, use this factor as an aggravating factor in sentencing if it is implicit in the offense for which the defendant was convicted. See People v. Phelps, 211 Ill. 2d 1, 11-12, 809 N.E.2d 1214, 1220 (2004) ("Generally, a factor implicit in the offense for which the defendant has been convicted cannot be used as an aggravating factor in sentencing for that offense. [Citation.] Stated differently, a single factor cannot be used both as an element of an offense and as a basis for imposing 'a harsher sentence than might otherwise have been imposed.' " (quoting People v. Gonzalez, 151 Ill. 2d 79, 83-84, 600 N.E.2d 1189, 1191 (1992))). This dual use of a single factor is referred to as a "double enhancement." Id. at 12.

¶ 40 Our supreme court has explained when a trial court may diverge from the general rule and properly consider in aggravation a factor that is arguably implicit in the offense:

> "[T]he commission of any offense, regardless of whether the offense itself deals with harm, can have varying degrees of harm or threatened harm. The legislature clearly and unequivocally intended that this varying quantum of harm may constitute an aggravating factor. While the classification of a crime determines the sentencing range, the severity of the sentence depends upon the

> degree of harm caused to the victim and as such may be considered as an aggravating factor in determining the exact length of a particular sentence, even in cases where serious bodily harm is arguably implicit in the offense for which a defendant is convicted." (Emphases in original.) People v. Saldivar, 113 Ill. 2d 256, 269, 497 N.E.2d 1138, 1143 (1986).

Thus, when considering whether to find "serious harm" an aggravating factor, "the sentencing court compares the conduct in the case before it against the minimum conduct necessary to commit the offense." People v. Hibbler, 2019 IL App (4th) 160897, ¶ 67, 129 N.E.3d 755. We review de novo whether the trial court relied upon an improper factor at sentencing. See Id. ¶ 65.

¶ 41 Even assuming "serious harm" is a factor implicit in the offense of arson, the trial court properly considered that factor in aggravation because defendant's conduct caused a degree of harm far greater than that which would have been caused by the minimum conduct necessary to commit the offense. "A person commits arson when, by means of fire or explosive, he or she knowingly *** [d]amages any real property, or any personal property having a value of $150 or more, of another without his or her consent ***." 720 ILCS 5/20-1(a)(1) (West 2014). Here, defendant did not merely damage the victim's building; as the trial court noted at sentencing, defendant essentially "destroy[ed]" the building. The victim testified at trial he "had to gut the entire building down to pulling the studs, pulling the insulation, furnace." He further testified "everything was lost[,]" including all of the merchandise and furniture located in the building. Accordingly, we conclude the trial court properly considered the serious harm caused by defendant's conduct in aggravation when determining the severity of his sentence.

¶ 42 2. Mitigating Factors

¶ 43 Defendant also argues the trial court denied him a fair sentencing hearing "when it failed to find any applicable mitigating factors." Specifically, defendant contends the trial court should have considered the following mitigating factors: (1) he did not contemplate his conduct would cause or threaten serious harm, (2) his conduct was the result of circumstances unlikely to recur if he received addiction and mental health treatment, and (3) his imprisonment would endanger his medical condition. See 730 ILCS 5/5-5-3.1(a)(2), (8), (12) (West 2014).

¶ 44 As noted above, the Unified Code lists mitigating factors the trial court must consider when determining an appropriate sentence. See 730 ILCS 5/5-5-3.1 (West 2014). However, "[t]he trial court has no obligation to recite and assign value to each factor presented at a sentencing hearing. [Citation.] Where mitigating evidence is presented to the trial court during the sentencing hearing, we may presume that the trial court considered it, absent some indication *** to the contrary." People v. Hill, 408 Ill. App. 3d 23, 30, 945 N.E.2d 1246, 1253 (2011). "The defendant bears the burden to affirmatively establish that the sentence was based on improper considerations, and we will not reverse a sentence *** unless it is clearly evident the sentence was improper." People v. Etherton, 2017 IL App (5th) 140427, ¶ 29, 82 N.E.3d 693.

¶ 45 Reviewing courts give great deference to the trial court's sentencing judgment "because the trial judge, having observed the defendant and the proceedings, has a far better opportunity to consider these factors than the reviewing court, which must rely on the 'cold' record." (Internal quotation marks omitted.) People v. Alexander, 239 Ill. 2d 205, 214, 940 N.E.2d 1062, 1066 (2010). "The trial judge has the opportunity to weigh such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. [Citations.] Consequently, the reviewing court must not substitute its judgment for that of the trial court merely because it would have weighed these factors differently." (Internal

quotations and citations omitted.) Id. Accordingly, we "may not alter a defendant's sentence absent an abuse of discretion by the trial court." Id. at 212.

¶ 46 Defendant attempts to affirmatively rebut the presumption the trial court properly considered the mitigating evidence presented by pointing to an alleged contradiction between two statements made by the trial court. At the sentencing hearing, the trial court stated, "I do not believe there are any [mitigating] factors here"; yet at the hearing on defendant's motion to reconsider, the court stated, "there are a number of mitigating factors in this case." When viewing the record as a whole, these two statements do not contradict one another. The former statement merely indicates the trial court found no mitigating factors outweighed the applicable aggravating factors, not, as defendant argues, that the trial court failed to even consider the mitigating evidence presented.

¶ 47 On the contrary, the record clearly shows the trial court considered the mitigating factors defendant raises on appeal. The trial court heard the evidence presented at trial, including defendant's testimony regarding (1) the events surrounding the commission of the crime, (2) his substance abuse problems, and (3) his overdose and hospitalization prior to the night of the offense but "didn't think [defendant] was all that credible ***." The court stated it would not give much weight to the mitigating factors defendant raised as "they don't carry a lot of weight when it appears that you are going to say and do anything that you feel like at the moment." The trial court further discussed defendant's drug addiction and found it was outweighed by the serious harm he caused, especially in comparison to the harm caused by others struggling with drug addiction problems in Livingston County, and by his extensive criminal history, which included four prior felony convictions and two felony probation revocations. The record indicates the court properly considered the mitigating factors defendant raises on appeal, found

them to be outweighed by the applicable aggravating factors, and did not give them much weight because it did not find defendant credible.

¶ 48 We find defendant failed to satisfy his burden to affirmatively rebut the presumption the trial court properly considered the relevant mitigating evidence and conclude the trial court did not abuse its discretion in sentencing defendant to concurrent terms of 24 years and 6 months' imprisonment.

¶ 49 C. The Restitution Order

¶ 50 Defendant next argues the trial court's restitution order is invalid because (1) it lacks a sufficient evidentiary basis for the $117,230 amount (see 730 ILCS 5/5-5-6(b) (West 2014) ("[T]he court shall assess the actual out-of-pocket expenses, losses, damages, and injuries suffered by the victim ***.")) and (2) does not set forth the manner in which restitution is to be paid (see 730 ILCS 5/5-5-6(f) (West 2014) ("[T]he court shall determine whether restitution shall be paid in a single payment or in installments, and shall fix a period of time *** within which payment of restitution is to be paid in full.")). Defendant did not object to the restitution order in the trial court.

¶ 51 1. Compliance With Section 5-5-6(b) of the Unified Code

¶ 52 Defendant contends the trial court's restitution order is in violation of section 5-5-6(b) of the Unified Code (730 ILCS 5/5-5-6(b) (West 2014)) because the "restitution number had no evidentiary basis and was simply declared by the State and accepted by the court." Defendant argues trial counsel rendered ineffective assistance by failing to object to this alleged lack of evidentiary support for the amount. Alternatively, he contends the trial court committed plain error by entering a restitution order without a sufficient evidentiary basis.

¶ 53 a. Ineffective Assistance of Counsel

¶ 54 Criminal defendants have a constitutional right to the effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. "To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defendant." People v. Domagala, 2013 IL 113688, ¶ 36, 987 N.E.2d 767 (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). Specifically, "a defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " Id. (quoting Strickland, 466 U.S. at 694). "A defendant must satisfy both prongs of the Strickland test and a failure to satisfy any one of the prongs precludes a finding of ineffectiveness." People v. Simpson, 2015 IL 116512, ¶ 35, 25 N.E.3d 601. "When a claim of ineffective assistance of counsel was not raised at the trial court, our review is de novo." Hibbler, 2019 IL App (4th) 160897, ¶ 88.

¶ 55 Even assuming counsel's performance was deficient, defendant's ineffective-assistance claim still fails because he cannot demonstrate prejudice. Defendant makes no argument the restitution amount was incorrect. Instead, he merely asserts the result would have been different "because the restitution amount would either be supported by evidence, altered, or would not have been ordered at all." Defendant admits it is possible the amount would have been supported by evidence even if counsel had objected, and thus, the result of the proceeding would not have been different. Given the victim's testimony he "had to gut the entire building" and "everything was lost" in the fire, we believe the restitution amount is not unsupported by the evidence in the record. Defendant's failure to demonstrate he was prejudiced by counsel's performance "precludes a finding of ineffectiveness." Simpson, 2015 IL 116512, ¶ 35.

¶ 56 b. Plain Error

¶ 57 Alternatively, defendant contends the trial court committed plain error by entering a restitution order without a sufficient evidentiary basis. Relying on People v. Jones, 206 Ill. App. 3d 477, 564 N.E.2d 944 (1990), defendant asks this court to review this forfeited claim under the second prong of the plain-error doctrine because sentencing "affects [his] fundamental right to liberty." "The ultimate question of whether a forfeited claim is reviewable as plain error is a question of law that is reviewed de novo." People v. Johnson, 238 Ill. 2d 478, 485, 939 N.E.2d 475, 480 (2010).

¶ 58 In Jones, the Second District found the trial court erred by ordering the defendant to pay restitution in an amount "unsupported by the evidence ***." Jones, 206 Ill. App. 3d at 482. The Jones court further "notice[d] such error under the plain[-]error [doctrine]" because "[p]lain error may be considered where, as here, the record clearly shows that an alleged error affecting substantial rights was committed." Id. This court has declined to follow the Second District's decision in Jones. See People v. Hanson, 2014 IL App (4th) 130330, ¶ 36, 25 N.E.3d 1. In Hanson, this court stated the following:

> " '[I]t is not a sufficient argument for plain[-]error review to simply state that because sentencing affects the defendant's fundamental right to liberty, any error committed at that stage is reviewable as plain error. Because all sentencing errors arguably affect the defendant's fundamental right to liberty, determining whether an error is reviewable as plain error requires more in-depth analysis.' " Id. ¶ 37. (quoting People v. Rathbone, 345 Ill. App. 3d 305, 311, 802 N.E.2d 333, 338 (2008)).

¶ 59 This court rejected the defendant's claim in Hanson "that the trial court committed plain error by accepting the State's representation that the restitution amount was $490.82 without requiring that further evidence be presented to prove the accuracy of that amount." Id. ¶ 40. We stated further:

> "[The restitution statute] does not mandate that the court fix the amount of restitution based upon any specific type of evidence, nor does the statute prohibit the parties from stipulating as to the proper amount (which is essentially what happened here when neither defendant nor his counsel contested the $490.82 figure). Given the specificity of the *** figure, we doubt that the State just made up that amount without any basis for requesting it. The only alleged error is the absence of some type of auto-shop receipt or testimony in the record proving that the victim incurred $490.82 in damage to her car. We cannot accept that this type of error is 'sufficiently grave that it deprived the defendant of a fair sentencing hearing' [citation] or such an affront to defendant's substantial rights [citation] that it cannot be subject to forfeiture ***." Id.

¶ 60 We initially note defendant's plain error argument is simply the sentencing error "affects [his] fundamental right to liberty"; he fails to engage in the "more in-depth analysis" necessary to determine whether the alleged error is reviewable as plain error. Id. ¶ 37. Moreover, we find the alleged error here—the lack of some receipt or testimony in the record proving the restitution amount—was not sufficiently grave that it denied defendant a fair sentencing hearing.

As we noted in Hanson, the restitution statute "does not mandate that the court fix the amount of restitution based upon any specific type of evidence," and, "[g]iven the specificity of the [$117,230] figure, we doubt that the State just made up that amount without any basis for requesting it." Id. ¶ 40. It is likely the trial court simply ordered defendant to pay restitution in the stated amount without further evidentiary support because the parties had discussed restitution and agreed as to the proper amount of restitution. Neither defendant nor his counsel contested the amount of restitution referenced by the State when the parties discussed plea negotiations with the court or when the State requested restitution at the sentencing hearing. Accordingly, we conclude defendant's forfeited claim is not reviewable as plain error and we do not address it on the merits. See id. ¶ 41.

¶ 61 2. Compliance With Section 5-5-6(f) of the Unified Code

¶ 62 Defendant also contends the trial court's restitution order is in violation of section 5-5-6(f) of the Unified Code (730 ILCS 5-5-6(f) (West 2014)) because the court (1) specified "two time frames" in which the payment was to be made and (2) did not specify the manner of payment, i.e., single payment or installments. Defendant acknowledges forfeiture of this argument and asks this court to review his argument under the second prong of the plain-error doctrine. Alternatively, defendant contends counsel rendered ineffective assistance by failing to object to an invalid restitution order. Because we find no error occurred, we reject both of defendant's contentions.

¶ 63 Section 5-5-6(f) of the Unified Code provides, in pertinent part, the trial court "shall determine whether restitution shall be paid in a single payment or in installments, and shall fix a period of time not in excess of 5 years, *** not including periods of incarceration, within which payment of restitution is to be paid in full." 730 ILCS 5/5-5-6(f) (West 2014).

"Compliance with this statute is mandatory." (Internal quotation marks omitted.) Hibbler, 2019 IL App (4th) 160897, ¶ 82. "We review the validity of a restitution order de novo." People v. Moore, 2013 IL App (3d) 110474, ¶ 7, 990 N.E.2d 1264.

¶ 64 The trial court's written restitution order states the following: "Defendant shall pay all said restitution ***, in any event within five (5) years after this date, and as follows: *** full payment within 12 months after defendant's release from imprisonment in this case." Defendant contends the restitution order gives two conflicting dates by which the payment is to be made (i.e., (1) within five years of this date and (2) within 12 months after defendant's release from imprisonment). However, the language containing the five-year time period is merely an attempt to incorporate the general statutory mandate that the time period cannot be "in excess of 5 years, *** not including periods of incarceration ***." 730 ILCS 5/5-5-6(f) (West 2014). This language does not apply to defendant's specific case because the trial court indicated in his case he is to pay "within 12 months after [his] release from imprisonment," which complies with the five-year limit mandated by statute. The trial court's restitution order also properly indicates the manner in which defendant is to pay. The written order contains an option for "monthly payments" or "full payment." Here, the trial court selected "full payment," which indicates defendant is to make a single payment as opposed to installments. Thus, the order clearly indicates both (1) the time period—within 12 months of his release from prison—and (2) the manner—single payment—in which the restitution is to be paid. Accordingly, we find the trial court complied with the restitution statute and the restitution order is valid.

¶ 65 III. CONCLUSION

¶ 66 For the reasons stated, we affirm the trial court's judgment.

¶ 67 Affirmed.

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

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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 June 3, 2020, the Brief and Argument 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 Brief and Argument to the Clerk of the above Court.

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