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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Winnebago County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 16-CM-3288
)	
SHANE EUGENE BOUMA,)	Honorable
)	Brian D. Shore,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices McLaren and Burke concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court erred by failing to ask the prospective jurors whether they understood the Rule 431(b) principles, and the error was first-prong plain error, as the State's witnesses were seriously impeached; (2) the trial court did not abuse its discretion in admitting a recording of a phone conversation: defendant made what could be taken as an implicit confession, and the court reasonably concluded that the probative value was not substantially outweighed by the danger of unfair prejudice.

¶ 2 Following a jury trial in the circuit court of Winnebago County, defendant, Shane Eugene Bouma, was found guilty of violating an order of protection (720 ILCS 5/12-3.4 (West 2014)) and was sentenced to a 300-day jail term. Defendant argues that he is entitled to a new trial

because: (1) the trial court failed to properly question the prospective jurors in accordance with *People v. Zehr*, 103 Ill. 2d 472 (1984), and Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) and (2) excerpts of a recording of a conversation between defendant and his estranged wife were improperly admitted into evidence. We reverse and remand for a new trial.

¶ 3

I. BACKGROUND

¶ 4 On November 2, 2016, defendant was charged with violating an order of protection obtained by Linda Butler. Butler was the mother of defendant's estranged wife, Melisa Bouma. The charging instrument alleged that defendant violated the order by coming within 300 feet of 3103 Latham Street in Rockford. On November 8, 2016, while in custody, defendant spoke with Melisa by telephone. The conversation was recorded. Defendant filed a motion *in limine* to bar the recording from being admitted into evidence. The trial court ultimately ruled that excerpts of the recording could be admitted. In those excerpts, Melisa told defendant that he should not be coming to her house. Defendant responded that that was no reason to send him back to prison. In addition, Melisa made references to an order of protection that she obtained against defendant and to an extension of that order of protection. At one point, defendant stated that he was going to "fight it" because Butler "didn't see [defendant] over there."

¶ 5 Defendant's jury trial took place on March 21, 2017. During jury selection, the trial court explained to the prospective jurors that: (1) defendant was presumed innocent; (2) the State bore the burden of proving defendant's guilt beyond a reasonable doubt; (3) defendant was not required to prove his innocence; and (4) if defendant decided not to testify, no inference could be drawn from that decision. The trial court variously asked the prospective jurors whether they could "accept" or "adopt" those principles or whether they agreed with them.

¶ 6 Evidence admitted at trial showed that Butler's order of protection was served on defendant on May 7, 2016. Butler testified that at about 2 a.m. on October 28, 2016, she was awakened by the sound of someone knocking on Melisa's bedroom window. Butler testified that she heard defendant calling for Melisa and recognized his voice. Butler called the police and then went outside. She testified that defendant was already gone. On cross-examination, Linda was asked if it was true that she did not tell Rockford police officer Kyle Haugh that she heard and recognized defendant's voice. Linda responded that that was incorrect.

¶ 7 Melisa testified that in the early morning hours of October 28, 2016, she was sleeping in her bedroom at the Latham Street address. At around 2:20 a.m., she heard a knock on her bedroom window. When she opened the window shade, she saw defendant right outside the window. Defendant said that he needed somewhere to sleep and he asked Melisa to let him in. She refused and told him to leave. Defendant remained outside the window, and they argued for a few minutes. According to Melisa, she said "I've told you the past three times you came over here to leave." Defendant left after Melisa told him that the police had been called. Melisa testified that she had signed an affidavit in connection with another case. In the affidavit, she retracted accusations that defendant spat on her and grabbed a phone out of her hand. The affidavit indicated that she made the false allegations because she was angry that defendant had left her for someone else. Melisa acknowledged that the statements in the affidavit were not true. She signed it so that defendant would not go back to prison. She explained that defendant "ha[d] a way of being very manipulative" and making her feel guilty if something happened to him. On cross-examination, Melisa testified that she told Haugh that defendant argued with her and refused to leave.

¶ 8 Haugh was called as a witness by both parties. He testified that at about 2:20 a.m. on October 28, 2016, he responded to a report of a violation of an order of protection at the Latham Street address. After speaking with Butler and Melisa, Haugh checked outside the residence. He noticed that a back gate was open, but he did not see defendant. Haugh drove around the area near the Latham Street address, but did not see defendant. On cross-examination, Haugh testified that Butler never told him that she saw defendant or that she heard his voice. Melisa did not tell Haugh that defendant refused to leave the property.

¶ 9

II. ANALYSIS

¶ 10 Defendant first contends that the trial court's failure to comply with *Zehr* and Rule 431(b) dictates that he receive a new trial. In *Zehr*, our supreme court held that:

“[E]ssential to the qualification of jurors in a criminal case is 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.” *Zehr*, 103 Ill. 2d at 477.

To that end, our supreme court adopted Rule 431(b), which provides:

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

¶ 11 Defendant argues that the trial court’s examination of the prospective jurors was inadequate because the court did not ask them whether they *understood* the principles set forth in Rule 431(b). Defendant acknowledges that he forfeited the issue by failing to object to the examination of the prospective jurors or to include the issue in his posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (“*Both* a trial objection *and* a written post-trial motion raising the issue are required for alleged errors that could have been raised during trial.” (Emphases in original.)). However, defendant contends that we should review the issue under the plain-error rule, which “permits a reviewing court to consider unpreserved error 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 the 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. McDonald*, 2016 IL 118882, ¶ 48. Defendant argues that the evidence here was closely balanced.

¶ 12 The State agrees that the trial court failed to comply with *Zehr* and Rule 431(b), but disputes defendant’s argument that the evidence was closely balanced. We agree with defendant. The principal evidence against defendant was the testimony of Butler and Melisa, but both were seriously impeached. Melisa’s acknowledgment that she had been untruthful in prior proceedings involving defendant severely undermined her credibility. The value of Butler’s testimony depended on her identification of defendant’s voice. However, had Butler actually recognized defendant’s voice, we would expect her to have mentioned this to Haugh. “Under the rule for impeachment by omission it is permissible to use prior silence to discredit a witness’s testimony if (1) it is shown that the witness had an opportunity to make a statement and (2) the

witness fails to mention a fact under circumstances that make it reasonably probable that he or she would have mentioned them if true.” *People v. Miller*, 2017 IL App (1st) 143779, ¶ 43. Haugh contradicted Butler’s testimony that she told him she heard defendant’s voice.

¶ 13 The State’s evidence also included the excerpts of the recorded telephone conversation between defendant and Melisa. As noted, defendant challenges the admissibility of that evidence. We discuss that challenge below. For the time being, it will suffice to say that, admissible or not, the recording was not sufficiently probative of defendant’s guilt to compensate for the deficiencies in the testimony of Butler and Melisa.

¶ 14 It was therefore crucial for the jury to *understand* the presumption of innocence, the State’s burden of proof, and defendant’s right to choose not to testify without that choice being held against him. We therefore conclude that defendant is entitled to a new trial.

¶ 15 Because the issue may arise again on remand, we also consider whether the trial court erred in admitting excerpts of the recording of defendant’s telephone conversation with Melisa into evidence. Defendant argues that the excerpts were irrelevant and unduly prejudicial. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Ill. R. Evid. 401 (eff. Jan. 1, 2011). Relevant evidence is generally admissible (Ill. R. Evid. 402 (eff. Jan. 1, 2011)), but may be excluded if “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury” (Ill. R. Evid. 403 (eff. Jan. 1, 2011)). Whether evidence is relevant and admissible are matters for the trial court’s discretion. *People v. Dismuke*, 2017 IL App (2d) 141203, ¶ 63. We will not reverse the trial court’s ruling absent a clear abuse of discretion. *Id.*

¶ 16 Defendant argues that “[t]he trial court here abused its discretion by not finding the conversation between [defendant] and Melisa regarding instances of [defendant] allegedly coming to Melisa’s house to be too remote, speculative, and vague to constitute relevant evidence.” We disagree. When Melisa told defendant that he should not be coming to her house, defendant responded that that was no reason to send him back to prison. He did not deny having violated the order of protection; rather, he appeared to be upset with the harshness of the penalty for doing so. It is reasonable to view defendant’s statement as an implicit admission that he had, in fact, gone to the Latham Street address where Melisa was staying. We acknowledge that the inference is far from inescapable and that a jury might reasonably choose to give it little or no weight. That said, the evidence has at least *some* tendency make it more probable that defendant violated Butler’s order of protection. We recognize the prejudicial effect of defendant’s references to going *back* to prison, which informed the jury that defendant had already been to prison. The jury might have been more prone to draw adverse inferences from the evidence on the basis that defendant was a criminal who was likely to have defied the order of protection. Nonetheless, we cannot say that the trial court abused its discretion in concluding that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence. Furthermore, even if the trial court erred in admitting the recording, the error would be harmless. Whether or not the jurors had not heard the recorded conversation, Melisa’s testimony informed them that defendant had been in prison. She specifically testified that she had signed a false affidavit so that defendant “wouldn’t go back to prison.”

¶ 17

III. CONCLUSION

¶ 18 For the foregoing reasons, we reverse the judgment of the circuit court of Winnebago County and remand for a new trial.

¶ 19 Reversed and remanded.