APPENDIX

2019 IL App (3d) 170074-U

Order filed May 7, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 14th Judicial Circuit, Rock Island County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-17-0074 Circuit No. 13-CF-875
TRACY EUGENE JOHNSON,	)	Honorable Thomas C. Berglund,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice Schmidt and Justice O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Evidence presented at trial was sufficient for a reasonable trier of fact to find defendant guilty beyond a reasonable doubt of burglary; and (2) the circuit court's error in delivering Rule 431(b) admonishments did not amount to plain error where evidence at trial was not closely balanced.

¶ 2 Defendant, Tracy Eugene Johnson, was found guilty of burglary and sentenced to a term of 20 years' imprisonment. On appeal, he argues that the evidence presented by the State was insufficient to prove him guilty beyond a reasonable doubt. In the alternative, he contends that the Rock Island County circuit court erred in the delivery of the Rule 431(b) admonishments (see

-Appendix A-

Ill. S. Ct. R. 431(b) (eff. July 1, 2012)), and seeks remand for a new trial under the plain error doctrine. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On October 2, 2013, the State charged defendant with burglary (720 ILCS 5/19-1(a) (West 2012)). The information alleged that defendant entered a building without authority and with the intent to commit theft therein. The information also asserted that defendant was subject to Class X sentencing based on his commission of prior felonies (see 730 ILCS 5/5-4.5-95(b) (West 2012)).

¶ 5 Defendant's jury trial commenced on April 8, 2015. During *voir dire*, the court asked two panels of potential jurors whether they understood that defendant was presumed innocent. Similarly, the court asked each panel if it understood that the State must prove defendant guilty beyond a reasonable doubt, that defendant was not required to present his own evidence, and that the jury could not hold defendant's decision not to testify against him. Each potential juror was given an individual opportunity to respond to each question.

¶ 6 At trial, Jimmie Nettles testified that he was the owner of a tavern in Rock Island. He recalled that on May 23, 2013, he received a call late at night from an alarm company, which caused him to go to the tavern. When he arrived, multiple police officers were on the scene. He learned that the tavern had been robbed. Nettles testified that "all of" his change was missing, including a bag full of quarters, two cherry jars filled with nickels and dimes, and an aluminum soda can filled with pennies. Nettles denied that there was a $20 bill missing, but testified that the alarm that went off was in the cash register, and would have been triggered when a bill was removed.

¶ 7 Nettles identified as accurate a number of photographs depicting the outside of the tavern. Collectively, the photographs show that a portion of the tavern is two stories, while other portions are only one story. One section of the first-floor roof is flat, while an adjacent section of the first-floor roof is steeply angled. The photographs show that a small second-floor window overlooks the angled portion of the first-floor roof. Two air conditioner units sit on the flat portion of the roof. Nettles testified that the small second-floor window was approximately eight feet above the interior floor in the upstairs portion of the tavern. The window had previously been boarded up, but Nettles noticed on the night in question that it had been opened.

¶ 8 On cross-examination, Nettles agreed that he originally told police officers that a $20 bill and approximately $20 in change was missing from the tavern. He clarified that he had more change upstairs. He did not remember if the investigating officers went onto the roof that night.

¶ 9 Nettles also testified on cross-examination that on the day following the break-in, he asked a person to board up the window again. Nettles did not know the person. Nettles testified that he remained on the ground while the man went up a ladder toward the first-floor roof. When the man was halfway up the ladder, he informed Nettles that a pair of sandals and a baseball bat were on the roof. Nettles testified that the man brought those items down from the roof and that Nettles himself never touched them. Nettles also stated that he called the police immediately after learning about the items, and that it was the police who removed the items from the roof.

¶ 10 Willie Brown testified that he has done heating and air conditioning work for Nettles for approximately 10 years. He went to the tavern on two or three occasions in the time period around May 2013, to work on the air conditioning units, though he could not remember the exact dates. Brown recalled that on the second occasion, Nettles informed him that there had been a break-in at the tavern. Nettles asked Brown if he remembered seeing anything on the roof the

first time he was there working on the air conditioning. Brown told Nettles he had not noticed anything.

¶ 11 On cross-examination, Brown conceded it was possible that he was so focused on the air conditioning units that he would not have noticed other items on the roof. He testified that when Nettles asked him if he had seen a bat on the roof, Nettles showed him a bat. Brown did not know if the bat Nettles was showing him was the one that had been on the roof.

¶ 12 Nicholas Pauley, a patrol officer with the Rock Island Police Department, testified that he was dispatched to an alarm call at "Jimmie's Tavern" around 9 p.m. on May 23, 2013. After arriving on the scene, Pauley and another officer noticed that the front door to the tavern was open. After going into the building they confirmed that no one else was there. When Nettles arrived at the scene, they walked through the building with him. Pauley testified that the upstairs portion of the tavern was an old apartment. On that floor, Pauley observed a window from which a piece of wood had been pried off from the outside. He testified that that window was the point of entry. Pauley estimated that the window was seven feet from the interior ground, "definitely above *** where you can see out of it." Pauley did not go onto the roof that night.

¶ 13 Pauley testified that Nettles told him at the scene that a $20 bill was missing from the register, and that the removal of that bill from the register would have set off the alarm. Nettles also told Pauley that approximately $20 in change had been taken "from the register." Nettles did not mention any bags or cans containing coins.

¶ 14 On cross-examination, Pauley testified that there were no exterior stairs leading directly to the roof of the tavern. Further, Pauley did not observe any ladders near the building. He agreed that a person would not be able to simply pull themselves onto the roof.

¶ 15 Officer Tyson Nichols of the Rock Island Police Department testified that he went to the tavern around 12:30 p.m. on May 25, 2013. Nettles told him that the tavern had been broken into two days prior, and that in fixing the window on the roof he discovered some items. Nettles told him that he had not moved the items. Nichols went up a ladder to see the roof and observed those items. He then photographed the scene. Nichols admitted that the cover sheet for his collection of photographs was dated May 21, but attributed that to a clerical error. He reiterated that he visited the tavern and took the photographs on May 25.

¶ 16 The photographs depict, *inter alia*, a pair of sandals and an aluminum baseball bat on the tavern roof. The items sit on the flat portion of the first-floor roof, directly adjacent to the portion of the roof that pitches up toward the window. The photographs show that a piece of wood has been pried back from the window. Three nails are sticking out of the wood. Two air conditioning units can also be seen on the flat portion of the roof. The photographs also show that the tavern has a side door, with four steps and a banister leading up to that door. In one of the photographs, the window in question is actually boarded up. That photograph also shows a sky more overcast than the remainder of the photographs. Nichols testified that he collected the bat and sandals into evidence. The separate bags into which he placed the sandals and the bat were both labeled May 24.

¶ 17 Debra Minton, a forensic scientist, conducted DNA testing on swabs taken from the bat and sandals. Minton identified a single male DNA profile on the undersides of the straps of the sandals. That profile matched defendant's DNA profile. Minton also identified two profiles from the handle of the bat, one complete major profile and a minor profile. The major profile matched defendant's DNA profile. Minton also examined a DNA profile from Nettles, and found that it could be excluded as the minor profile found on the bat.

¶ 18 The parties stipulated that defendant had requested retesting of the items, and that they had been tested by Stephanie Beine at a private laboratory. They further stipulated that Jennifer MacRitchie, a forensic scientist with the Illinois State Police, could testify regarding the contents of Beine's report. MacRitchie testified that Beine's testing of the bat revealed a partial DNA profile from which defendant could not be excluded as a contributor. That partial profile was expected to occur in 1 in 1700 African-American individuals. Beine obtained two DNA profiles from the right sandal, one major and one minor. The major profile was identical to that of defendant. Beine found only a partial profile on the left sandal. Defendant could be excluded as a contributor to that profile.

¶ 19 Emerald Klemmer testified that defendant is her uncle. She recalled that at a time "close to summer" in 2013, she was at her sister's house. Defendant arrived at the house and asked Klemmer if she wanted to drink and get high. Klemmer declined, but asked defendant where he got money, because he had recently been broke. Klemmer testified: "He said he had went to Jimmie's and broke in." Defendant further told Klemmer that "he had got a lockbox with some change in it."

¶ 20 Klemmer testified that she was arrested for unlawful use of a credit card in November 2014. She relayed the conversation with defendant to Detective Leo Hoogerwerf in December. In doing so, Klemmer asked whether providing the information would enable her to be released from custody without posting bond. She was released on her own recognizance the next day. Klemmer's criminal case remained pending, but Klemmer had not received any offer in exchange for her testimony in defendant's case. Klemmer testified that she nevertheless hoped that she could gain some benefit by testifying. After her family had learned that she had spoken with the police about defendant, Klemmer's grandmother kicked her out of her house.

¶ 21 On cross-examination, Klemmer agreed that she told the police that defendant told her "he went up some stairs somewhere around the building and went through a window or something." She also testified that defendant did not *tell* her about a lockbox, but that he actually had a lockbox with him. She described the lockbox as little, square, and gray, with a latch on it. Klemmer admitted that she had been questioned by Hoogerwerf about a year prior, and at that time denied having any knowledge about defendant or the burglary at the tavern.

¶ 22 Hoogerwerf testified that he initially spoke with Klemmer in January 2014. At that time she denied having any knowledge of the incident in question. He testified that it would not be unusual in Rock Island County for a person charged with unlawful use of a credit card, without a prior record, to be released on recognizance. Such a result would not require "any special consideration."

¶ 23 The parties stipulated to two weather reports for Moline, Illinois. The report for May 25, 2013, indicated that the weather had been rainy, mostly cloudy, or overcast for the entire day. The report for May 21, 2013, indicated that there had been no rain that day, with the sky fluctuating between clear and cloudy.

¶ 24 The jury found defendant guilty. The circuit court sentenced him to a term of 20 years' imprisonment.

¶ 25 II. ANALYSIS

¶ 26 On appeal, defendant argues that the evidence presented at trial was insufficient to establish his guilt beyond a reasonable doubt. In the alternative, he argues that the circuit court's error in delivering the required Rule 431(b) admonishments during jury selection amounted to reversible plain error because the evidence at trial was closely balanced. We address each argument in turn.

¶ 27 A. Sufficiency of the Evidence

¶ 28 When a challenge is made to the sufficiency of the evidence at trial, we review to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Baskerville*, 2012 IL 111056, ¶ 31; *People v. Collins*, 106 Ill. 2d 237, 261 (1985). In making this determination, we review the evidence in the light most favorable to the prosecution. *Baskerville*, 2012 IL 111056, ¶ 31. All reasonable inferences from the record in favor of the prosecution will be allowed. *People v. Bush*, 214 Ill. 2d 318, 327 (2005). The relevant question is whether any rational trier of fact could have found the elements of the crime proven beyond a reasonable doubt. See *People v. Pintos*, 133 Ill. 2d 286, 292 (1989).

¶ 29 It is not the purpose of a reviewing court to retry a defendant. *People v. Milka*, 211 Ill. 2d 150, 178 (2004). Instead, great deference is given to the trier of fact. See, *e.g.*, *People v. Saxon*, 374 Ill. App. 3d 409, 416-17 (2007). Resolution of any conflicts or inconsistencies in the evidence is the responsibility of the trier of fact. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006).

¶ 30 In the present case, Nettles and Pauley testified that an alarm had gone off at Nettles's tavern and that an amount of money had been stolen from therein. After walking through the tavern, Pauley discovered a window that had been pried open on the second floor. He testified that the window had been the point of entry for the burglary. On the roof just below that point of entry, a pair of sandals and a baseball bat were discovered. The State's forensic scientist testified that a DNA profile matching that of defendant was found on both the sandals and the bat. Further, defendant's niece testified that defendant admitted to her that he had robbed the tavern.

Viewing this evidence in the light most favorable to the prosecution, a rational trier of fact could find defendant guilty beyond a reasonable doubt of burglary.

¶ 31 In reaching this conclusion, we recognize that defendant has identified a number of purported shortcomings in the State's evidence. However, many of defendant's arguments on these points amount to nothing more than the reweighing of the evidence. See *Milka*, 211 Ill. 2d at 178.

¶ 32 For example, defendant contends that Klemmer's credibility was impeached by her previous lies to the police as well as her expectation of benefitting from her testimony. The determination of a witness's credibility is the province of the jury and is entitled to great weight and deference. See *People v. Wheeler*, 226 Ill. 2d 92, 114-15 (2007). Further, the State presented evidence that Klemmer had never received, nor had she ever been offered, any benefit for testifying against defendant. Her hope that she might receive some benefit does not render a jury's finding of credibility "so unreasonable, improbable, or unsatisfactory" that we would disturb that finding on review. *People v. Smith*, 185 Ill. 2d 532, 542 (1999).

¶ 33 Similarly, defendant also contends that the contradictions between Klemmer's testimony and other evidence in the case rendered her testimony incredible. Specifically, he points out that Klemmer testified that defendant had a lockbox that he said was full of change, while there was no testimony that a lockbox was stolen. Klemmer also testified that defendant told her he had gone "up some stairs somewhere around the building and went through a window," while there were actually no stairs leading up to the roof of the tavern.

¶ 34 However, there are a number of consistent facts. While there was no testimony regarding a lockbox, defendant's indication that he had "change" comports with the testimony that it was primarily change that was taken from the tavern. Further, Klemmer's testimony that defendant

told her he entered through a window aligns with Pauley's testimony that the upstairs window had been the point of entry for the burglary. Finally, while there were no stairs that led all the way to the roof of the tavern, the State's pictures show that there were, in fact, "some stairs somewhere around the building." Klemmer did not testify that defendant told her he took stairs all the way to the roof. In short, Klemmer's testimony did not present such "serious inconsistencies" that this court would take the extreme step of undermining the factfinder's determination that she was credible. *Id.* at 545.

¶ 35 Next, defendant asserts that the State's DNA evidence should be discounted because it failed to "satisfy both physical and temporal proximity criteria." He contends that "it was unreasonable to infer that the window was the point of entry for the burglary." He also contends that the sandals and bat were discovered "well after" the burglary, in an area that had been accessible to other people.

¶ 36 Initially, we note that defendant relies primarily on the case of *People v. Rhodes*, 85 Ill. 2d 241 (1981), in making this argument. While that case deals with fingerprint evidence, defendant argues that the same reasoning applies to DNA evidence. Of more concern to us, is the *Rhodes* court's statement that: "In order to sustain a conviction *solely* on fingerprint evidence, fingerprints corresponding to the fingerprints of the defendant must have been found in the immediate vicinity of the crime under such circumstances as to establish beyond a reasonable doubt that the fingerprints were impressed at the time the crime was committed." (Emphasis added.) *Id.* at 249. In the present case, the DNA evidence was not the *sole* evidence of defendant's guilt. The connection between the statement of law in *Rhodes* and the present case is tenuous.

¶ 37 Also, Pauley testified that the second-floor window was the point of entry for the burglary. The jury was not required to infer that fact. Indeed, where a previously boarded up window is discovered, in the course of investigating a break-in, to have been pried open, the conclusion that that window was the point of entry for the break-in is not unreasonable. Furthermore, it is unclear how the passage of time between the offense and the discovery of the items on the roof is of any apparent benefit to defendant's case. While the roof was accessible to certain repairmen, there was no reason to believe that it was accessible to defendant at any time. The jury was left to determine why items containing defendant's DNA were left on the roof of the tavern, just below the window that had been the point of entry for the burglary. As the *Rhodes* court pointed out, "the trier of fact need not search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt." *Id.*

¶ 38 B. Plain Error

¶ 39 Illinois Supreme Court Rule 431(b) (eff. July 1, 2012), requires the circuit court to ask all potential jurors whether they understand and accept four enumerated principles of law. In the present case, the court asked two panels of the venire only if they understood those principles. It did not inquire as to whether the potential jurors accepted the principles. The State concedes that the court committed a clear error.

¶ 40 Defendant concedes that he failed to preserve that error for review by failing to object at trial. He argues, however, that the error is reversible under the first prong of the plain error doctrine because the evidence at trial was closely balanced. That State argues that this court should find the issue forfeited because the evidence was not closely balanced.

¶ 41 Where a defendant can show that a clear error was committed and that the evidence at trial was closely balanced, the error is reversible and the defendant is entitled to a new trial.

People v. Piatkowski, 225 Ill. 2d 551, 568, 572 (2007). "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." *People v. Sebby*, 2017 IL 119445, ¶ 53. This holistic inquiry necessarily requires "an assessment of the evidence on the elements of the charged offense or offenses, along with any evidence regarding the witnesses' credibility." *Id.* Our supreme court has held that trial evidence will not be deemed closely balanced where a "defendant's explanation of events, though not logically impossible, was highly improbable." *People v. Adams*, 2012 IL 111168, ¶ 22.

¶ 42 It was undisputed that a break-in had occurred at the tavern owned by Nettles. Pauley testified that he responded to an alarm at that location. Pauley learned from Nettles that some money had been stolen. While walking through the building with Nettles, Pauley observed that a piece of wood covering an upstairs window had been pried away. Pauley concluded that the window had been the point of entry for the burglary.

¶ 43 Defendant takes exception to that conclusion, arguing that the evidence supporting Pauley's conclusion was scant. We disagree. Neither Pauley nor Nettles testified that there had been any other signs of tampering at any other point of entry in the tavern. Pauley undertook his own commonsense assessment, just as we do here, and rationally concluded that the window that had been pried open was where the burglar had entered. Defendant also asserts that Nettles's testimony that the tavern had been broken into on prior occasions "indicated that the window may have been opened at some other point prior to the burglary." But Nettles's testimony provides no such indication.

¶ 44 A qualitative review of the evidence also demonstrates the significant weight of the State's DNA evidence. A pair of sandals and a baseball bat were found on the roof of the tavern,

as close to the point of entry for the burglary as possible. Each item contained a DNA profile matching that of defendant. The commonsense conclusion from this evidence is that defendant was on the roof of the tavern, directly adjacent to the window that was pried open in the course of the burglary.

¶ 45 The conclusion that defendant left those items on the roof in the course of the burglary is bolstered by the testimony of Brown, who had been on that roof working on the air conditioner units prior to the burglary. Brown testified that he did not notice sandals or a bat on the roof at that time. While he did allow for the *possibility* that he may simply not have noticed those items, our assessment of the photographic evidence indicates that such a possibility would have been remote. In the photographs taken by Nichols, the sandals and bat are located no more than 10 feet from the air conditioning units, and stand out against the bright white color of the roof. Moreover, the positioning of the items are such that they would be visible upon any approach to the air conditioning units.

¶ 46 As referenced above (*supra* ¶ 35), defendant raises a number of issues with regard to those items. He argues that it is unclear what day the items were discovered, what day they were photographed by police, who discovered the items, and who did or did not touch the items. None of these concerns, however, refute the fact that defendant's DNA was found on objects on the roof. There was no apparent reason for defendant or his items to be on the roof. Any potential explanation for the presence of those items, other than defendant's actual presence on the roof, is "highly improbable." *Adams*, 2012 IL 111168, ¶ 22.

¶ 47 In addition to the DNA evidence, the State presented testimony that defendant admitted to Klemmer that he had broken into the tavern. To be sure, Klemmer's credibility was imperfect. She had previously denied any knowledge of the offense, and, even though she was never

SUPREME COURT OF ILLINOIS

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September 25, 2019

In re: People State of Illinois, respondent, v. Tracy Eugene Johnson, petitioner. Leave to appeal, Appellate Court, Third District. 124930

The Supreme Court today DENIED the Petition for Leave to Appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on 10/30/2019.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

-Appendix B-

offered a tangible benefit for testifying against defendant, still hoped that one might be forthcoming. Still, her testimony demonstrated knowledge of key facts. She testified that defendant told her that he had stolen change and that he entered the tavern through a window. In any event, despite her credibility issues, Klemmer's testimony was not, as defendant argues, wholly worthless.

¶ 48 Furthermore, the State's evidence that defendant was on the roof just outside the place of entry for the burglary of the tavern was thus bolstered, even if minimally, by Klemmer's testimony that defendant had told her that he entered the tavern through a window and took change. Though it is possible that defendant's DNA was on the roof of the tavern for some other reason than defendant breaking in *and* that Klemmer falsely accused her uncle of committing that offense, it is highly improbable. See *id.* Accordingly, we find that the evidence was not closely balanced, and therefore find that issue has been forfeited by defendant.

¶ 49 III. CONCLUSION

¶ 50 The judgment of the circuit court of Rock Island County is affirmed.

¶ 51 Affirmed.

SUPREME COURT OF ILLINOIS

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September 25, 2019

In re: People State of Illinois, respondent, v. Tracy Eugene Johnson, petitioner. Leave to appeal, Appellate Court, Third District. 124930

The Supreme Court today DENIED the Petition for Leave to Appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on 10/30/2019.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

-Appendix B-

No.

IN THE
SUPREME COURT OF ILLINOIS

People of the State of Illinois, Plaintiff-Respondent,	Appeal from the Appellate Court of Illinois, Third Judicial District,
vs.	No. 3-17-0074
Tracy Eugene Johnson, Defendant-Petitioner.	There on appeal from the Circuit Court of the Fourteenth Judicial Circuit, Rock Island County, Illinois
	No. 13 CF 875
	Honorable THOMAS C. BERGLUND Judge Presiding.

PETITION FOR LEAVE TO APPEAL

Tracy Eugene Johnson
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Pro Se

No.

IN THE
SUPREME COURT OF ILLINOIS

People of the State of Illinois, Plaintiff-Respondent, vs. Tracy Eugene Johnson, Defendant-Petitioner.	Appeal from the Appellate Court of Illinois, Third Judicial District, No. 3-17-0074 There on appeal from the Circuit Court of the Fourteenth Judicial Circuit, Rock Island County, Illinois, No. 13 CF 875 Honorable THOMAS C. BERGLUND Judge Presiding.

PETITION FOR LEAVE TO APPEAL

To the Honorable Justices of the Supreme Court of the State of Illinois:

May It Please The Court:

I.

PRAYER FOR LEAVE TO APPEAL

Petitioner, Tracy E. Johnson, pro se, respectfully petitions this Honorable Court for Leave to Appeal pursuant to Supreme Court Rule 315, from the judgment of the Appellate Court of Illinois, Third Judicial District, which affirmed the judgment of conviction entered by the Circuit Court of Rock Island County, Illinois, upon the jury finding the petitioner guilty of Burglary.

II.

OPINION AND PROCEEDINGS BELOW

On January 30, 2017, Petitioner was found guilty of Burglary. Petitioner was subsequently sentenced to a 20 year prison term upon

his conviction. He appealed this conviction to the Illinois Appellate Court, Third Judicial District. On May 17, 2019, the Court delivered its opinion in said appeal, affirming the judgment of conviction and sentence. No petition for rehearing was filed.

III.

POINTS RELIED UPON FOR REVERSAL

I. The State failed to prove Tracy E. Johnson guilty of burglary of a tavern where it did not present any direct evidence that had committed the offense, and instead presented unreliable circumstantial evidence which consisted of impeached, unaccurate witness testimony and DNA evidence which proved only that Tracy Johnson had handled two items found on the roof of the tavern where other people had access.

II. The trial Court failed to ask the venire whether they agreed with the principles enumerated in Illinois Supreme Court Rule 431 (b), and where the evidence as to whether Tracy Johnson committed burglary was at least closely balanced.

IV.

STATEMENT OF FACTS

Tracy Johnson was charged with burglary in that on May 23, 2013, he, withourt authority, knowingly entered Jimmie's Rainbow Tavern in Rock Island, with the intent to commit a theft therein (C18). A jury trial was held on April 8 to 9, 2015.

During voir dire, the trial court admonished the venire of the four principles of law enumerated in Illinois Suoreme Court Rule 431 (b) (R446). The judge asked whether they understood that the defendant was presumed innocent, and each potential juror was polled and responded that they understood (R446-448,464,482-83). The judge also asked the venire whether they understood that the State must prove the defendant guilty beyond reasonable doubt, and each potential juror was polled and

responded that they understood. The same process was repeated as to the principles that defendant is not required to present evidence on his behalf, and that the jury could not hold defendant's failure to testify against him.

The State presented the following evidence against petitioner. Jimmie Nettles, who owned the Rainbow Tavern, testifed that on May 23, he went to the tavern because an alarm had gone off. This occurred some time before the tavern opened, which was usually around 9:30 or 10 pm. (R511). The police were there when he arrived. At first, Nettles said that nothing was missing, but then stated that a bag of quarters, a jar of dimes a jar of nickels, and a can of pennies were missing (R507-08). He also denied that a $20 bill was missing, but later said that it was missing (R507-08,512). The cash register had an alarm that could be triggered if someone removed a bill from it. Nettles had not given anyone permission to enter the tavern that night and take any money (R508-10).

An upstairs window that had been previously boarded up was found opened. There were no stairs to the roof, and there eas an eight-foot drop from the window to the shower stall on the other side of the window. Nettles did not recall whether the police went onto the roof that night. The next day, Nettles stopped a man who was driving by and asked him to fix the window (R513,517). Nettles had not seen the man before or since then, but he remembered that the man was Mexican (R513-14). The man went up a ladder onto the roof, told him that there were sandals and a bat there, and took the items off of the roof (R 514-15). Nettles did not go up the ladder because he had a bad knee. He later said that the man only went half-way up the ladder and did not touch the items. Nettles also denied touching the items or showing the bat to a man named Willie Brown.(R515). Nettles called the police and told them about the items (R518-19).

Willie Brown had previously worked on an air conditioning unit on the roof of the tavern in May 2013 (520-21). he came back to work on the unit at least two other times, but did not remember the exact dates. The second time, Nettles told Brown that someone had broken into the tavern, he asked Brown if he saw anything on the roof the first time he

Petitioner filed a motion for a new trial on July 28, 2015. On August 18, 2015, the trial court denied the motion.

A sentencing hearing was held on the same day. The Court sentenced petitioner to 20 years' imprisonment.

Petitioner filed a timely notice of appeal on the same day.

V.

ARGUMENT

Tracy Johnson (Petitioner) was convicted in a jury trial of Burglary of a tavern. At trial, the State did not present any direct evidence that petitioner had committed the offense. Instead, the State's circumstantial evidence consisted of impeached and inaccurate witness testimony and DNA evidence which proved only that petitioner had handled two items and not that he had entered the tavern.

Emerald Klemmer initially said that she knew nothing about the burglary, but later, after she was taken into custody for unlawful use of a credit card and expected a benefit from testifying against petitioner, she said that petitioner told her he had committed the burglary.

Klemmer's testimony also contained facts that contradicted the evidence.

The items found (sandals and aluminum bat) were found well after the alleged burglary, near a window alleged to be the point of entry for the burglary that was on a roof accessible to other people. Thus, the DNA evidence proved only that petitioner had handled the items. Looking at the evidence in the light most favorable to the State, petitioner was not proved guilty of burglary beyond a reasonable doubt.

The Fourteenth Amendment's due process clause requires the State to prove every fact necessary to establish the elements of the crime charged beyond a reasonable doubt. [Virginia, 443 U.S. at 319; People v. Wheeler, 226 Ill.2d 92, 114 (2007).] Although this Honorable Court must allow all reasonable inferences in favor of the State, it may not allow unreasonable or speculative inferences. [People v. Cunningham, 212 Ill. 2d 274, 280 (2004). If this Court finds that the evidence is so unsatisfactory that it creates a reasonable doubt of the defendant's

guilt, it must set aside the conviction. Smith, 185 Ill.2d at 542, 546; People v. Davis, 278 Ill.App.3d 532, 539,544 (1st Dist. 1996).

Here, the State did not present any direct evidence that petitioner committed the offense. What the State did was presented circumstantial evidence that failed to establish petitioner had committed the offense beyond a reasonable doubt.

The testimony of the State's key witness, Emerald Klemmer, that petitioner told her he had committed the offense, was impeached and also contradicted the evidence. While the trier of fact's determination of witness credibility is entitled to great deference, a reviewing court must set aside a defendant's conviction where the evidence raises a reasonable doubt as to a defendant's guilt. People v. Schott, 145 Ill.2d 188,206-09 (1991)(reversing defendant's conviction where key witness testimony was impeached numerous times and contained inconsistencies and contradictions).

The presence of petitioner's DNA profile on the sandals and bat circumstantially proved only that petitioner had handled them, but did not prove that he placed them there, or that they were placed there at the time of the alleged burglary. Rhodes, 85 Ill.2d at 249; King, 135 Ill.App.3d at 154.

The testimony of the State's key witness was impeached and inaccurate, and the physical and temporal proximity of the items containing petitioner's DNA evidence did not establish that petitioner had entered the building nor committed a theft therein.

Illinois Supreme Court Rule 431(b) states:

> The ourt 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 charges 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 the defendant's failure to testify cannot be held against him or her.

In petitioner's case the trial court asked the venire whether they understood that the defendant was presumed innocent, that the State must prove the defendant guilty beyond a reasonable doubt, that he is not

required to offer any evidence on his own behalf, and that the defendant's failure to testify cannot be held against him, and each venire and potential juror was polled and responded that they understood (R449-50,464,483-48).

The trial court's questions did not strictly comply with Rule 431(b). In People v. Thompson, 238 Ill.2d 598,607 (2010), the Illinois Supreme Court indicated that since Rule 431(b) was "clear and unambiguous," trial courts are required to ask potential jurors whether they understand and accept the Rule 431(b) principles. The Court explained that "the rule requires questioning on whether the potential jurors "both" understand and accept each of the enumerated principles." Thompson, 238 Ill.2d at 607. The Court has since reaffirmed the principle that Rule 431(b) is to be interpreted strictly. People v. Sebby, 2017 IL 119445, ¶ 49; People v. Belknap, 2014 IL 117094. The trial court therefore committed clear error by failing to ask the potential jurors whether they both understood and accepted the four Rule 431(b) questions. Sebby, 2017 IL 119445, ¶ 49; Belknap, 2014 IL 117094, Thompson, 238 Ill.2d at 607.

As argued above, the court's failure to properly admonish the venire was clear error.

The DNA evidence also was unreliable in that it showed only that the petitioner had handled a pair of sandals and a bat (R513-19,551-52, 590-91,604-16,620-22), but did not show that the petitioner had placed or left the items on the roof at the time of the offense.

The trial court thus committed a clear violation of Rule 431(b). Because the evidence was closely balanced, the error necessarily prejudiced the petitioner (Johnson).

VI.

CONCLUSION

WHEREFORE, Petitioner, Tracy E. Johnson, respectfully asks this Honorable Court to grant him leave to appeal the Order of the Third Judicial District Appellate Court which affirmed his conviction and sentence.

Respectfully submitted,

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