November 2011 Vol. 55, No. 1

ILLINOIS STATE BAR ASSOCIATION

Criminal Justice

The newsletter of the Illinois State Bar Association's Section on Criminal Justice

Case notes

ILLINOIS SUPREME COURT

DEFENDANT SHOULD BE ALLOWED TO PRESENT EVIDENCE OF ACQUITTAL OF "THE OTHER-CRIMES EVIDENCE CASE" TO JURY

The defendant, Perry Ward, was convicted of criminal sexual assault. In his jury trial, evidence of a different sexual assault was presented pursuant to section 115-7.3 of the Code of Criminal Procedure 725 ILCS 5/115-7.3 (West 2006). This statute allows other-crimes evidence to be used to show a defendant's propensity to commit sex crimes. As required by that statute, the trial judge conducted a hearing and applied the statutory balancing test. The trial judge allowed the other-crime evidence even though the defendant had been found not guilty in that case. The trial judge also gave a cautionary instruction before and after the other-crimes' witness testified. The defense in both cases was consent. The trial judge also granted the State's motion in limine to prevent the defense from disclosing to the jury that he had been found not guilty in the other-crimes sexual assault. The defense did ask a question of the other-crimes' witness about the fact that she had testified previously. The defendant appealed his conviction and the First District Appellate Court affirmed the conviction.

In a four to three decision, Chief Justice Kilbride, writing for the majority, reversed the appellate and trial courts and held that evidence of the acquittal of the other-crimes case should have been allowed, *People v. Ward*, 2011 Ill. LEXIS 1095.

Chief Justice Kilbride addressed the issue of whether evidence of the acquittal would have been inadmissible hearsay evidence. He wrote:

> Here, the State advocates the adoption of the principle widely applied in federal courts that acquittal evidence is generally inadmissible as either hearsay that fails to prove the defendant's actual innocence or as evidence that is unduly prejudicial and potentially confusing if used to rebut inferences based on differing evidence in the two trials. Defendant counters that those cases are contrary to Illinois law and should not be followed.
>
> We conclude we need not look to federal case law because existing Illinois law supplies the necessary answers. ….
>
> 2011 IL 108690 Pars. 33,34.

The opinion continues:

> To determine whether the trial court abused its discretion in barring the evidence of defendant's acquittal in L.S.'s case, we must apply a balancing test. Under that test, the court must weigh "the probative value of the evidence against undue prejudice to the defendant. 725 ILCS 5/115-7.3(c) (West 2006). The statute lists three factors that may be considered in applying this balancing test, namely, the proximity in time between the two acts alleged, the factual similarity between the acts, or other relevant circumstances and facts. The first two factors are inapplicable in the context of the acquittal evidence at issue in this case. See 725 ILCS 5/115-7.3 (c) (West 2006).
>
> Here the trial court appears to have applied a balancing test in barring defendant's acquittal evidence. …
>
> 2011 IL 108690 Pars. 35, 36.

The Illinois Supreme Court reasoned that the other-crimes evidence in sex cases could cause undue prejudice against the defendant. Because the other-crimes' witness had admitted on cross-examination that she had testified in a prior proceeding, the jury may speculate that the defendant was convicted in that case. The acquittal evidence would lessen the possibility of undue

INSIDE

***(Notice to librarians:** The following issues were published in Volume 54 of this newsletter during the fiscal year ending June 30, 2011: August, No. 1; November, No. 2; December, No. 3; April, No. 4; June, No. 5).*

If you're getting this newsletter by postal mail and would prefer electronic delivery, just send an e-mail to Ann Boucher at aboucher@isba.org

prejudice in the facts of this case. The court opined that a mini trial should be avoided but the evidence of acquittal in the other-crimes case should be presented to the jury. One method used as an example by the Supreme Court was " …the jury could be informed that verdict of "not guilty" may have been attributed to a number of factors and does not conclusively establish defendant's actual "innocence."" 2011 IL 108690 Par. 47.

Finally, the Supreme Court rejected the State's argument that the other-crimes evidence was harmless. The Court determined that the evidence was sufficient to convict defendant and remanded the case for a new trial.

Justice Garman wrote for the dissenting justices. She noted that the issue of collateral estoppel was not raised in the trial court but advanced to the Supreme Court. She argued that the majority opinion did not address this issue and if this issue had merit, it would have made the acquittal evidence issue moot. She reasoned that this issue would surely be raised in the trial court upon retrial and she indicated that the Court should have addressed this issue or explain why it would not address it.

Justice Garman also reasoned that the majority had added an additional test to the statutory balancing test being the "context" of the other-crimes evidence. She noted this term is not in the statute and the majority did not define it. She indicated that the statutory balancing test was properly conducted by the trial court. She opined that if the earlier trial had been an alibi defense, then the other-crimes evidence would not have been admitted because it would not have been relevant to the consent defense advanced in the case on trial.

The dissenting opinion went on to address all the issues in this case and disagreed with the holding of the majority.

—Judge John Wasilewski (ret.)
Cook County

SUPREME COURT RULES THAT DEPARTMENT OF CORRECTIONS IS NOT ENTITLED TO SEIZE PRISON-INDUSTRY-EARNED WAGES TO OFFSET COSTS OF PRISONER'S INCARCERATION

In *People v. Hawkins, 952 N.E.2d 624 (Sept. 2011)*, the primary issue at dispute was whether the State was entitled to recoup the wages that a prisoner had diligently saved over a lengthy number of years while serving his prison sentence, in order to offset the cost of the prisoner's incarceration. Though primarily a case of statutory interpretation, the case had far greater social justice and public policy significance, and it is the latter implications that will be focused upon here.

The relevant facts are as follows: Since July 1, 1983, the defendant has been incarcerated at the Stateville Correctional Center of the Illinois Department of Corrections. He is serving a 60-year sentence for of First Degree Murder, *inter alia*. During his incarceration, the defendant has worked in a prison-industries program as a furniture assembler. The money that defendant earned from the program was deposited into defendant's prison account, and the defendant began making regular transfers of money from his prison account into an account at the State Bank of Lincoln. When the action giving rise to the instant cause was filed, the defendant's State Bank of Lincoln account contained approximately $11,000 in savings.

On March 30, 2005, the Illinois Department of Corrections filed a verified complaint seeking reimbursement from defendant in the amount of $455,953.74, citing section 3–7–6 of the Unified Code of Corrections (730 ILCS 5/1–1–1 *et seq.* (West 2008)) . That section of the Code established the responsibility of a "committed person" for the costs of his or her incarceration. The complaint alleged that the amount of reimbursement sought reflected the "cost of the care, custody, treatment and rehabilitation" provided to the defendant from July 1, 1983, to March 17, 2005, and that the Department had not received "any reimbursement payment from" the defendant.

Defendant asserted as an affirmative defense that he had "dutifully contributed toward his cost of incarceration" pursuant to section 3–12–5 (730 ILCS 5/3–12–5 (West 2008)). Defendant argued that 3% of his prison wages had already been applied to the costs of his incarceration (according to an affidavit filed, defendant's total contribution was $750.60) and he argued that it would be "unjust and unfair" to apply section 3–7–6 of the Code to require him to now turn over the rest of his dutifully earned compensation as well.

On February 25, 2009, the circuit court granted summary judgment for defendant. The court held, "as Defendant has paid the amount he is obligated to pay under Section 3–12–5, …the remaining monies [deposited in the State Bank of Lincoln] he received from his participation in the Correctional Employment Programs are not to be used for reimbursement."

Following the Department's motion for reconsideration, the court modified its judgment on April 23, 2009. It entered judgment for the Department in the amount of $455,203.14. However, the court still precluded the Department from satisfying the judgment out of the defendant's State Bank of Lincoln account.

Both parties appealed.

The appellate court affirmed the judgment against defendant, but reversed the circuit court's judgment with respect to the Lincoln account. *People v. Hawkins*, 402 Ill. App.3d 204 (2010) Justice Lytton dissented, opining that defendant's Lincoln account–his only assets–are not "assets which may be used to satisfy all or part of a judgment rendered under this Act,". 402 Ill.App.3d at 214 (Lytton, J., dissenting).

Defendant appealed the Appellate Court's decision, and the Illinois Supreme Court granted the defendant's petition for leave to appeal.

In analyzing the dispute, the Illinois Supreme Court aptly looked to, *inter alia*, the legislative history of Section 3–12–5, the statutory provision upon which the Department of Corrections relied upon in support of their effort to take possession of the State Bank of Lincoln assets of the defendant. The sponsor of the bill that amended section 3–12–5 to include the offset provision explained that the bill's purpose was ensure that prisoners who are released from incarceration will have learned "a skill and a new work ethic" and also will have "saved some money to come back into the community." 86th Ill. Gen. Assem., Senate Proceedings, May 25, 1989, at 429 (statements of Senator Collins).

Based in large part upon the sponsor's expressly-stated purpose, the Court deemed that requiring a committed person who has saved money while working in prison industry, such as the defendant, to turn over all of that money to the Department of Corrections would not permit him any money "to come back into the community," thus rendering the function of the legislation a nullity.

Moreover, the Court stated that "[the Court is] not bound by the literal language of a statute if that language produces absurd or unjust results not contemplated by the

legislature." Here, the Court found, the Department's literal interpretation of sections 3–12–5 and 3–7–6 produces a result that would be absurd, unjust, and one that was not contemplated by the legislature.

Justice Karmeier, specially concurring, along with Justice Freeman, wisely added that if the Department of Corrections' position was to hold sway, once inmates realized that the extra work necessary to generate savings would benefit only the Department of Corrections, not them, they would quickly reevaluate the utility of prison employment. The result would likely be a precipitous drop in the amount of labor available to prison industries. If the number of work hours then plummeted, the various enterprises operated by prison industries would no longer be able to provide the services and produce the goods necessary to keep them economically viable. Furthermore, the income the industries generate would also evaporate, and they would no longer be able to provide any meaningful contribution toward offsetting the substantial costs of maintaining this state's prisons. In addition, he noted, any real hope of providing inmates with marketable skills, instilling a work ethic, or improving their ability to support themselves and their families following their release would be lost. In the end, virtually the entire economic burden necessary to support this state's large and growing prison population, while they are incarcerated and after their release, would then revert entirely to Illinois' taxpayers. This result, according to the Justices, would directly contravene the public policy of Illinois as expressed by the General Assembly through the provisions of the Unified Code of Corrections at issue in this case.

The Court, therefore, rejected the ambitions of Department of Corrections. Instead, the Court held that once a committed person's wages have been properly subjected to the offset provision of section 3–12–5 of the Code, the remaining wages are not subject to collection under section 3–7–6. Because the Department conceded that the Lincoln account contained only wages that had already been subjected to section 3–12–5, the Supreme Court found that the circuit court properly vacated the attachment of that account, and that the defendant was lawfully entitled to keep the remainder of his savings.

—Mark Kevin Wykoff, Sr.
Wykoff Law Office, LLC

Springfield

POSSIBILITY OF LIFETIME REGISTRATION AS A SEX OFFENDER DOES NOT ENTITLE JUVENILE TO A JURY TRIAL. *BOOSE* HEARING NOT REQUIRED WHERE JUDGE ORDERED SHACKLES REMOVED AND NO OTHER MENTION OF SHACKLING IN THE RECORD

The respondent in *In re Jonathan C.B.* 2011 Ill. LEXIS 1102, was adjudicated, at trial, a delinquent minor for the offense of criminal sexual assault and attempted robbery. The trial court sentenced the minor to the Department of Corrections, Juvenile Justice Division until he attained 21 years of age. At sentencing the minor was ordered to register as a sex offender for his natural life.

At trial, the defendant testified that he and a cohort had paid the victim for sex, and then attempted to get their money back. The perpetrators fled when police were called to the scene. The victim was inconsistent on collateral issues, such as whom she saw before and after the attack, but was consistent as to the details of the assault and promptly reported the sexual assault to the paramedic, albeit not to the police. She had previously been raped, but that assault was not prosecuted.

When the respondent testified, the judge observed him in shackles and directed that they be removed. Neither respondent, nor defense counsel made comment regarding shackling during the three-day trial. No other mention of shackling was in the record.

Jonathan appealed, arguing that the State failed to prove him guilty of criminal sexual assault beyond a reasonable doubt, that the trial court violated his due process rights under the fourteenth amendment because he was shackled without an individualized determination of necessity, and that juveniles charged with sex offenses have a constitutional right to a jury trial. The appellate court affirmed, with one justice dissenting.

The dissenting justice stated that failing to hold a *Boose* hearing in this case was plain error and that section 5-101(3) of the Juvenile Court Act of 1987 (Act) (705 ILCS 405/5-101(3) (West 2006)), as applied to juveniles charged with sex offenses, was unconstitutional because it denies juveniles the right to a jury trial.

Leave to appeal was granted by the Illinois Supreme Court where three issues were addressed.

Criminal Justice

Published at least four times per year.

Annual subscription rate for ISBA members: $20.

To subscribe, visit www.isba.org or call 217-525-1760

Office
Illinois Bar Center
424 S. Second Street
Springfield, IL 62701
Phones: 217-525-1760 OR 800-252-8908
www.isba.org

Editor
Hon. Gregory P. Vazquez
1500 Maybrook Dr., Ste. 235
Maywood, IL 60153-2430

Managing Editor/ Production
Katie Underwood
kunderwood@isba.org

Criminal Justice Section Council
Jeremy S. Karlin, Chair
Steven R. Sallerson, Vice Chair
James M. Stern, Secretary
Kelli M. Childress, Ex-Officio

Stephen W. Baker
Hon. Donald D. Bernardi
Sandra L. Byrd
Hon. Peter C. Cavenagh
Hon. Harry E. Clem
David B. Franks
Ava M. George Stewart
Hon. Patricia P. Golden
Steven A. Greenberg
Hon. Michael P. Kiley
George D. Lenard
Lori G. Levin
Ronald L. Lewis
George G. Leynaud
Hon. Daniel M. Locallo
Jameika W. Mangum
Hon. Michael P. McCuskey
Kevin P. Nolan
John J. O'Gara, Jr.
John J. Rekowski
Jesus R. Rivera
Hon. Richard D. Russo
Marcus L. Schantz
Debra A. Seaton
Frank J. Serio
Vijay R. Sharma
Kelly P. Ward
Hon. John A. Wasilewski
Marc D. Wolfe
Mark K. Wykoff, Sr.

Stephen M. Komie, Board Liaison
Mary M. Grant, Staff Liaison
Hon. Robert J. Anderson, CLE Committee Liaison

Disclaimer: This newsletter is for subscribers' personal use only; redistribution is prohibited. Copyright Illinois State Bar Association. Statements or expressions of opinion appearing herein are those of the authors and not necessarily those of the Association or Editors, and likewise the publication of any advertisement is not to be construed as an endorsement of the product or service offered unless it is specifically stated in the ad that there is such approval or endorsement.

Articles are prepared as an educational service to members of ISBA. They should not be relied upon as a substitute for individual legal research.

The articles in this newsletter are not intended to be used and may not be relied on for penalty avoidance.

Postmaster: Please send address changes to the Illinois State Bar Association, 424 S. 2nd St., Springfield, IL 62701-1779.

Issues On Appeal: 1. Sufficiency of evidence to support his conviction for criminal sexual assault; 2. Whether the trial court had a *sua sponte* duty to order a *Boose* hearing when the shackles were observed; 3. Whether the policy changes to the Juvenile Court Act in 1998 and lifetime sex offender registration justify a due process right to a jury trial under the federal or Illinois Constitution.

Majority Analysis: As the testimony of the victim and other State witnesses were consistent concerning the sexual assault, the conviction was affirmed. The Court stated: "The trier of fact, however, need not be satisfied beyond a reasonable doubt as to each link in the chain of circumstances…Rather, it is sufficient if all the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the accused's guilt"

As to the issue of shackling without holding a *Boose* hearing, the majority acknowledged the mandate for a "show cause" hearing in Supreme Court Rule 430; but held that when neither a defendant nor his counsel object and request such a hearing, the appellate court should presume no other instance of shackling during the trial occurred. They acknowledged the applicability of *Boose* protections in delinquency proceedings per *In re Staley*, 67 Ill.2d 33 (1977) and that a *Boose* violation is a structural trial defect sufficient for a plain error reversal and remand. However, the majority found: "Here, there is no affirmative indication in the record that the trial court was aware of the shackles before Jonathan was called to testify, so we presume that the trial court acted properly and did not commit error with regard to Jonathan's shackling" (slip op. page 21).

On the question of the constitutional due process right to a jury trial given the "adultification" of juvenile proceedings since 1998 in Illinois , the majority found there still were significant distinctions such to justify denial of the right to a jury trial in most juvenile proceedings in 705 ILCS 405/5-101(3). One example is the release of any juvenile offender from the custody of DJJ at age 21, without a parole term. The majority reaffirmed prior decisions holding that there is no federal or state constitutional right to a jury trial in juvenile hearings, as juvenile court is a creature of statute created after Illinois' first constitution. *In re Fucini*, 44 Ill.2d 305 (1970), in accord with *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971 plurality op.). The court rejected the defense argument that the "you're accountable" policy and terminology changes since 1999, the mandates of DNA sampling and sex offender registration, the availability of SVP commitment and elimination of confidentiality for juvenile murderers and rapists justifies a reassessment of the question. They agreed with the State that the application of the "same collateral consequences as convicted adult criminals does not equate a delinquency adjudication with a criminal conviction." (slip op. page 27). The fact that juvenile sex offenders still benefit from exclusion from the public State Police Sex Offender Registry and can apply for early SORA discharge is testament to the continued focus on rehabilitation of juveniles.

The fact that some juvenile offenders have a statutory right to a jury trial (extended juvenile jurisdiction offenders, habitual violent offenders, etc.) does not offend the equal protection clause, as they are not all similarly situated. Jonathan never would face the EJJ possibility of incarceration and parole as an adult.

Varied Dissents:

Justices Freeman and Kilbride found a plain error *Boose* violation, but likewise upheld the denial of a right to a jury trial in juvenile court. "It strains credulity that the trial judge did not learn that Jonathan was shackled in her courtroom until the third court day of the proceeding" (slip op. page 37). They found shackling runs afoul of the presumption of innocence, confuses and embarrasses a defendant, compromises the ability to communicate with counsel, and "offends the dignity of the judicial process" (slip op. page 41). Scholars recognize that "unnecessary shackling children causes not only physical harm from restraints designed for adults, but also psychological harm" (slip op. page 42).

They also opined: "Further, the trial court has the duty, in the nature of parens patriae, to ascertain whether a juvenile is physically restrained in the courtroom" (slip op. page 44). "In the present case, the trial court knew or should have known that Jonathan was shackled during his juvenile proceeding… (structural) error occurred" (slip op. page 46).

Juvenile defender advocates can take solace that Justice Burke not only found plain error in the *Boose* violation, but opined that as the Juvenile Court Act of 1987 "has undergone a number of changes over the past dozen years, juvenile proceedings are now fundamentally more criminal in nature" (slip op.page 47). She found that juvenile proceedings are now the equivalent of a criminal prosecution, as the protection of citizens from juvenile crime and holding juvenile offenders accountable for their actions are now primary goals of the Act. She recounted the "adultification" of juvenile proceedings in recent years: DNA sampling, confidentiality limits for some offenders, lifetime SORA registration. Also, she criticized blind loyalty to *stare decisis*, when much of the case law was decided prior to the Illinois Juvenile Court Act's amendment in 1998. "The notion that juveniles should have a constitutional right to a jury trial is not new. It has been considered on numerous occasions and in a number of jurisdictions, with varying results…Juveniles are afforded a jury trial by acts of the legislature in nearly half the states. In England all children over the age of 14 charged in the juvenile courts with what would be indictable offenses are accorded the right of trial by jury" (slip op. page 55). She chronicled the case law over the decades, and cited with approval the Supreme Court of Kansas which recently agreed with her analysis in *In re L.M.*, 186 P.3d 164 (2008).

Further, Justice Burke found an equal protection problem with the denial of a jury trial in most juvenile cases, as some juvenile offenders had a right to a jury trial (705 ILCS 405/6-810 EJJ jurisdiction; 705 ILCS 405/5-815 habitual juvenile offender; 705 ILCS 405/5-820 violent juvenile offender).

—Steve Baker
Office of the Cook County
Public Defender

ILLINOIS APPELLATE COURT

COURT MUST DETERMINE DEFENDANT'S ABILITY TO MAKE A KNOWING AND INTELLIGENT WAIVER OF RIGHT TO COUNSEL RATHER THAN DEFENDANT'S LEVEL OF LEGAL KNOWLEDGE AND ABILITY IN RESOLVING A DEFENDANT'S REQUEST TO PROCEED *PRO SE*

In *People v. Woodson,* 2011 Ill. App. LEXIS 694, the 4th district discussed the proper standard the trial court must utilize to resolve a defendants request to proceed *pro se*.

Sylvester Woodson was charged with unlawful possession of a controlled substance with the intent to deliver and criminal drug conspiracy. The trial court appointed the public defender to represent him. This case went to trial in July 2009 and prior to that

time the defendant repeatedly expressed his desire to proceed pro se. His requests were denied.

The retrial took place in September 2009 and the defendant was convicted of the possession with intent to deliver count. He raised on appeal one issue, that the trial court erred by denying his request to proceed pro se.

In *Woodson* the public defender filed a motion to withdraw 9 months prior to the first trial alleging, the "defendant has failed to cooperate and communicate with legal counsel". At the hearing on the motion, the defendant demanded a speedy trial and the cause was set over to another date where a new public defender appeared. Counsel for the defendant next filed a motion to determine fitness to stand trial and that was allowed over the defendant's objection that "I do not need an evaluation, Your Honor. I'm fully aware of everything that's going on." On November 24, 2008, the defendant sent another letter to the court requesting some discovery materials and again asking to fire his new attorney and to represent himself.

In February 2009, a status hearing was set and the psychiatric report showed that the defendant, "clearly understood the courtroom dynamic and the roles of the parties" and as a result counsel withdrew his fitness motion. The defendant then reiterated his desire to proceed pro se and in rejecting the request the trial court noted,

> THE COURT: Motion is denied. [The court] hope[s] you heard that. [The court has] reviewed your correspondence. You do not have the ability to represent yourself, in [the court's] judgment. [Appointed counsel] is your attorney. The only way you get another attorney is by the Public Defender.

In the same discussion with the defendant the court went on to find,

> THE COURT: [The court is] sorry. This isn't a fitness question. This has to do with whether or not you have the legal knowledge and ability to represent yourself. You do not.

In the appeal the defendant raised only one issue, that the trial court's rejection of his requests to proceed pro se denied his constitutional right to self-representation.

In reversing the trial court, the Illinois Appellate Court, made clear that a defendant has a constitutional right of self-representation, citing *Faretta v. California,* 422 U.S. 806, 834 (1975). The court noted that this decision will only be reversed if the trial court abused its discretion and this occurs when the court applies the improper legal standard, citing *Rockford Police Benevolent & Protective Ass'n v. Morrissey*, 398 Ill App 3d 145, 154 2nd district (2010).

The Illinois Appellate Court for the 4th district, resolved this issue by reference to a 20-year-old decision that outlined three possible grounds for denying a defendant's request to proceed pro se. The decision was *People v. Ward*, 208 Ill App 3d 1073 (4th Dist.1991). In *Ward* the first ground was identified as a situation where the request to proceed pro se came so late in the proceedings that granting it would be disruptive of the orderly schedule of the proceedings. The second ground permits a trial court to terminate self-representation by a defendant who engages in serious and obstructionist misconduct. Finally, the third ground is when a defendant, in the court's view, is unable to reach the level of appreciation needed for a knowing and intelligent waiver of his right to counsel. In this case the 4th district held that the trial court erroneously relied exclusively on the fact that the defendant lacked sufficient legal knowledge to represent himself. The court found that none of these reasons were cited by the trial court, consequently it applied the wrong standard and the case was reversed. Therefore, under these facts the defendant retains the right of self-representation identified in the *Faretta* decision.

—Hon. Donald Bernardi (ret.)

CONVICTION REVERSED WHERE TRIAL JUDGE LEFT THE BENCH, DID NOT CALL A RECESS AND CROSS-EXAMINATION OF A WITNESS CONTINUED. NO REVERSAL OF CONVICTION WHERE ZEHR VIOLATION DID NOT RESULT IN A BIASED JURY.

The Illinois Appellate Court, First District, in *People v. Eric Radcliff*, 2011 Ill.App. LEXIS 655, addressed two separate issues in reversing the defendant's conviction for Possession of a Stolen Motor Vehicle and remanding the case for a new trial.

The defendant was charged with Possession of Stolen Motor Vehicle and Burglary for stealing a "bait car" that had been planted on the street by the Chicago police department. The defendant was caught in the vehicle when the police, by remote control, disabled the vehicle and locked the defendant inside until he was arrested.

The appellate court had reversed the case in an earlier Rule 23 order for violation of Rule 431 (b) which requires the trial judge to ask each individual juror if they "understand" and "accept" four principles: (1) the presumption of innocence, (2) proof beyond a reasonable doubt, (3) the defendant is not required to offer evidence in his/her own defense, and (4) the defendant's failure to testify cannot be held against him/her. The Illinois Supreme Court by supervisory order directed the appellate court to reconsider its opinion in light of *People v. Thompson* 238 Ill.2d 598 (2010).

On reconsideration, the appellate court again examined the Rule 431 (b) violation in this case, first observing that the Illinois Supreme Court in *People v. Zehr*, 103 Ill.2d 472 (1984) held that the jury understanding and accepting these principles was essential to establishing that a juror was qualified to sit in judgment. The appellate court found that Rule 431(b) was violated by not determining in some affirmative way that the jurors understood and accepted three of the four *Zehr* principles at all and failing to determine whether the jury accepted a fourth principle. But since there had been no objection at trial, the Illinois Appellate Court applied the plain error doctrine that requires the error to only be considered "if either (1) the evidence is so closely balanced that the error alone threatens to tip the scales of justice against the defendant; or (2) the error was so fundamental and of such magnitude that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." The court determined the evidence was not closely balanced and then considered whether the error was fundamental applying the dictates of the Supreme Court's *Thompson* case.

Thompson held that an unbiased jury is fundamental and requires automatic reversal. However, it also held that a failure to comply with Rule 431(b) does not necessarily result in a biased jury. The appellate court did not find any evidence of a biased jury and thus declined to reverse on the basis of the admitted Rule 431(b) violation.

The Appellate Court then addressed the question of whether the Judge's brief absence during cross-examination of a police officer requires reversal. The witness was asked during cross-examination whether something would refresh his recollection. The witness responded, "The report." The

judge then interrupted the proceedings saying; "Counsel, excuse me, you can show him the report. One thing I have to take care of." The Judge then left the courtroom and the following occurred:

> Q. I'm showing you Defendant's Exhibit #1 previously shown to counsel. Officer, do you remember what this report is about? Is that the incident report from that day?
>
> Yes. That's from that day.
>
> Q. Why don't you take a look at it until the Judge gets back.

The Judge then returned and cross-examination proceeded.

Citing the Illinois Supreme Court case of *People v. Vargas*, 174 Ill.2d 355 (1966), the Court found that even though the issue was not preserved by a timely objection or raising it in the post-trial motion, the absence of the judge was "plain error" and analyzed it under the second prong of the "plain error" doctrine. The court concluded that the Judge's absence, no matter how brief, during cross-examination requires the enforcement of a *per se* rule of reversal without showing "demonstrable prejudice" because the absence of the judge is of such magnitude as to call into question the integrity of the judicial process. The court quoted *Vargas,* stating:

> First , a judge's active presence on the bench during a criminal jury trial is an essential safeguard which aids in providing a defendant with a fair trial. Second, *** a judge's absence from the bench might unduly influence the attitude of the jurors as to deny defendant an impartial trial.

Id. at 366.

The appellate court recognizes that no substantive questions were asked of the witness but held that the Supreme Court "established a bright line rule in *Vargas*" requiring reversal where the judge is absent for any of the proceedings. Only such a rule that requires reversal if the judge absents himself from the trial "will effectively remove any incentive which might otherwise exist for a judge to disregard the significant interests involved in a criminal trial." (Citations omitted).

The Court reversed defendant's conviction and remanded the case for a new trial.

—John Rekowski
Madison County Public Defender

Upcoming CLE programs

To register, go to www.isba.org/cle or call the ISBA registrar at 800-252-8908 or 217-525-1760.

December

Thursday, 12/1/11- Chicago, ISBA Chicago Regional Office—Recent Developments in State and Local Tax- 2011. Presented by the ISBA State and Local Tax Committee. 9-12.

Thursday, 12/1/11- Teleseminar—Business Planning with S Corps, Part 1. Presented by the Illinois State Bar Association. 12-1.

Friday, 12/2/11- Teleseminar—Business Planning with S Corps, Part 2. Presented by the Illinois State Bar Association. 12-1.

Friday, 12/2/11- Chicago, ISBA Chicago Regional Office—Motion Practice- From Pleadings through Post-Trial. Presented by the ISBA Civil Practice & Procedure Section. 8:50-2:15.

Thursday, 12/6/11- Teleseminar—Estate Planning for Retirement Benefits. Presented by the Illinois State Bar Association. 12-1.

Thursday, 12/8/11- Chicago, Sheraton Hotel—ISBA Basic Skills Course 6.0 Live. Presented by the Illinois State Bar Association. 9-4:30.

Friday, 12/9/11- Chicago, Sheraton Hotel—Master Series: Divine Ethics: Avoiding the Chasm of Incivility. Presented by the Illinois State Bar Association. 1:00-4:14.

Tuesday, 12/13/11- Teleseminar—Individual Liability for Corporate Obligations: Piercing the Corporate Veil. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 12/14/11- Webcast—Jury Selection. Presented by the ISBA Criminal Justice Section. 12-1.

Thursday, 12/15/11- Teleseminar—UCC Issues in Real Estate Transactions. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 12/20/11- Teleseminar—Asset Protection Strategies for Real Estate. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 12/21/11- Teleseminar—Tax Efficient Methods of Getting Money out of a Business. Presented by the Illinois State Bar Association. 12-1.

January

Thursday, 1/5/12- Teleseminar—Estate Planning in 2012: Now That the Federal Tax is a Dead Letter, Part 1. Presented by the Illinois State Bar Association. 12-1.

Friday, 1/6/12- Teleseminar—Estate Planning in 2012: Now That the Federal Tax is a Dead Letter, Part 2. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 1/10/12- Teleseminar—Dangers of Using "Units" in LLC Planning. Presented by the Illinois State Bar Association. 12-1.

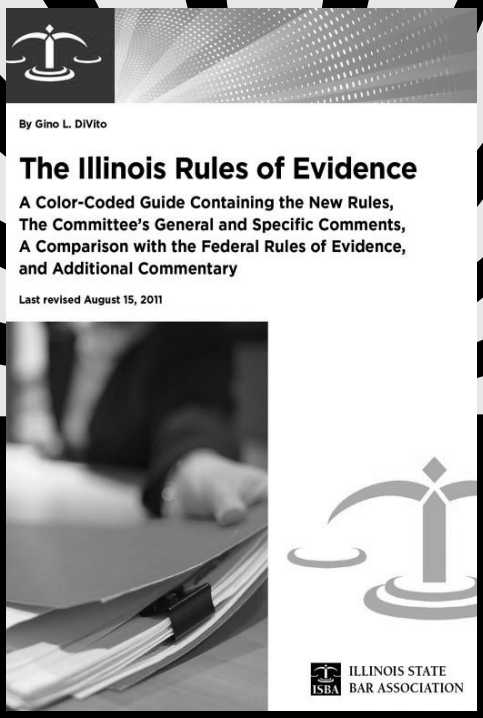
Friday, 1/13/12- Teleseminar—Bridging the Valuation Gap: "Earnouts" and Other Techniques. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 1/17/12- Teleseminar—Real Estate Finance in A World With Tight Credit and Less Leverage. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 1/18/12- Live Studio Webcast—Step-by-Step Appeals in Child Custody. Presented by the ISBA Child Law Section; co-sponsored by the ISBA Family Law Section. 11-1.

Thursday, 1/19/12- Teleseminar—Ethics, Technology and Solo and Small Firm Practitioners. Presented by the Illinois State Bar Association. 12-1. ■

Don't miss this color-coded reference guide to the rules of Illinois evidence



THE ILLINOIS RULES OF EVIDENCE: A Color-Coded Guide

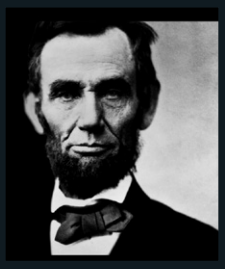
Don't be without this handy hard-copy version of Gino L. DiVito's color-coded analysis of the new Illinois Rules of Evidence, which is otherwise available only on the web. The guide compares the new Illinois rules with the FRE and provides insightful commentary. DiVito, a former appellate justice, is a member of the Special Supreme Court Committee on Illinois Evidence, the body that formulated the rules and presented them to the Illinois Supreme Court.

$35.00 mbr./ $50.00 nonmbr.
(Includes shipping and tax).

Order at
www.isba.org/store/books/rulesofevidencecolorcoded
or by calling Janice at 800-252-8908
or by emailing Janice at jishmael@isba.org

The Illinois Rules of Evidence: A Color-Coded Guide

$35.00 Members/$50.00 Non-Members
(Includes tax and shipping)



Illinois has a history of some pretty good lawyers. We're out to keep it that way.

Is your puzzle incomplete?

Advertise your product, service, or job opening in an ISBA newsletter and reach thousands of legal professionals. You could find just the piece you're missing.

Contact Nancy Vonnahmen at nvonnahmen@isba.org or 800-252-8908 to learn more.

CRIMINAL LAW
ILLINOIS BAR CENTER
SPRINGFIELD, ILLINOIS 62701-1779
NOVEMBER 2011
VOL. 55 NO. 1

Non-Profit Org.
U.S. POSTAGE
PAID
Springfield, Ill.
Permit No. 820