2011 IL App (1st) 090074-U

FIRST DIVISION
November 14, 2011

No. 1-09-0074

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	
	)	No. 06 CR 23476
DARIUS BAILEY,	)	
	)	
Defendant-Appellant.	)	Honorable
	)	Frank Zelezinski,
	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.

Presiding Justice Hoffman and Justice Karnezis concurred in the judgment.

O R D E R

¶ 1 ***Held:*** (1) Defendant forfeited his claims that the trial court erred when it failed to continue polling the jury after a juror repudiated the verdict and failed to specifically instruct the jurors to continue deliberations when they returned to the jury room. (2) While the denial of the defendant's request for separate verdict forms for felony murder was an abuse of discretion, the trial court applied the

> correct remedy by sentencing the defendant for felony murder. (3) Defendant's natural life sentence for felony murder was proper where his eligibility for the death penalty was determined by the trial court, who found the aggravating factor beyond a reasonable doubt. (4) Defendant's conviction and sentence for home invasion must be vacated as the underlying felony for defendant's felony murder conviction. (5) Defendant's Class 1 robbery conviction is reduced to a Class 2 robbery conviction and defendant resentenced for the Class 2 felony to a term of seven years' imprisonment.

¶ 2 Following a jury trial, defendant Darius Bailey was convicted of first degree murder, home invasion and robbery in connection with the death of Robert Winter. The trial court imposed sentences of natural life, 30 years and 15 years respectively. Defendant Bailey appeals, raising the following issues: (1) whether the trial court committed reversible error when it failed to continue polling the jury after one juror disavowed his guilty vote and failed to direct the jury to continue deliberations; (2) whether the trial court erred when it refused to give the jury separate verdict forms on felony murder; and (3) whether his conviction for a class 1 robbery must be reduced to a class 2 robbery and the case remanded to the trial court for resentencing.

¶ 3 PERTINENT FACTS

¶ 4 On October 12, 2006, defendant Bailey was indicted and charged with first degree murder, home invasion and robbery of a person 60 years of age or older. Count 1 of the indictment alleged that, in killing Mr. Winter, defendant Bailey acted intentionally or knowingly. Count 2 alleged that the defendant knew that his acts created a strong possibility of death or great bodily harm to Mr. Winter. Counts 3 and 4 alleged that defendant Bailey killed Mr. Winter while committing home invasion and robbery, both forcible felonies. Counts 5 and 6 alleged that defendant Bailey committed the offenses of home invasion and robbery. The State served notice that it intended to seek the death penalty.

¶ 5 According to the trial testimony, in September 2006, Mr. Winter was 80 years old. On September 20, 2006, defendant Bailey was stopped by police in connection with an unrelated investigation. At the time he was detained, defendant Bailey had in his possession Mr. Winter's checkbook and the keys to Mr. Winter's residence and car. The police went to the address in the checkbook and discovered the body of Mr. Winter. An autopsy revealed signs both manual and ligature strangulation and the cause of death was determined to be strangulation. Mr. Winter's car was missing. It was located in the area where defendant Bailey had been stopped by police. Defendant Bailey's fingerprints were found on Mr. Winter's checkbook and in his residence. Defendant Bailey gave a statement to police admitting that he had entered Mr. Winter's residence looking for money. When Mr. Winter confronted him, he tried to escape, and the two men struggled. Defendant Bailey tied Mr. Winter's legs and arms and covered him with a coat and left the residence. Defendant Bailey testified on his own behalf at trial, repudiating his confession and presenting an alternative explanation for his possession of Mr. Winter's keys and checkbook as well as the presence of his fingerprints in Mr. Winter's residence.

¶ 6 Prior to closing arguments, defense counsel requested that the jury receive specific verdict forms for felony murder. The State responded that it was submitting the Illinois Pattern Jury Instructions verdict form and objected to breaking it down into different types of murder. The trial court denied defense counsel's request, stating as follows:

> "Well, it's the Court's position at this point that the general verdict form is the current matter of which is accepted under the law. It is the I.P.I. version of how this instruction should be given and there are some instances where an independent instruction for felony

> murder might be given regarding sentencing issues, that not being a situation here, and therefore the manner and form of the general verdict form for first degree murder will be the one which is allowed and Defense request for a specific verdict form for felony murder is denied at this time."

Following closing arguments, the jury was instructed by the trial court and retired to deliberate.

¶ 7 The jury returned verdicts finding defendant Bailey guilty of first degree murder, home invasion and robbery. At the request of the defense, the trial court polled the jury by asking the jurors individually whether those were their verdicts. The first three jurors responded affirmatively. The fourth juror responded "No. *** They were, but no." The trial court then stated," [a]ll right. Please return to the jury room at this time." After the jury retired, the trial court ordered that the jury be furnished new verdict forms. When the court asked the prosecutor and defense counsel whether they had any response, defense counsel responded "No."

¶ 8 After further deliberations, the jury again notified the court that it had reached a verdict. Before the proceedings were reconvened, defense counsel moved for a mistrial, based on "the unique circumstances that occurred with the jury." The trial court denied the motion, stating as follows:

> "The jurors were provided with clean verdict forms by the Court and to simply return back to deliberate. I don't know what they are going to tell us when they return but we [will] have to wait and see but your motion for mistrial is denied. Record's made."

¶ 9 The jury returned a verdict finding defendant Bailey guilty of first degree murder, home invasion and robbery. The jury was polled, and all the jurors answered that these were their

verdicts.

¶ 10 Defendant Bailey elected to have his eligibility for the death penalty determined by the trial court. The court took judicial notice of the jury verdicts, and the parties stipulated that defendant Bailey was 20 years old at the time of the offenses. The court determined that defendant Bailey was eligible for the death penalty, based upon the fact that he was 18 years of age or older at the time of the offenses and found "beyond a reasonable doubt that the statutory factors do exist and that the murder was committed during the course of the felonies, being home invasion and robbery." The parties then presented evidence in aggravation and mitigation.

¶ 11 The trial court found that there were mitigating factors precluding the imposition of the death penalty. Based upon the evidence in aggravation and mitigation evidence, the aggravating factors presented, particularly Mr. Winter's age and the fact he was killed in his home, and the fact that defendant Bailey had been convicted of felony murder, the court sentenced defendant Bailey to natural life without the possibility of parole on count 3 of the indictment. The court then sentenced defendant Bailey to a term of 30 years' imprisonment for home invasion and to a term of 15 years' imprisonment for robbery, both to be served concurrently with his natural life sentence.

¶ 12 Defendant Bailey's amended motion for a new trial and his motion for reconsideration of sentence were denied. This appeal followed.

¶ 13 ANALYSIS

¶ 14 I. Jury Polling

¶ 15 Defendant Bailey contends that the trial court's failure to continue polling the jury after the fourth juror 's negative response and the court's failure to instruct the jurors to continue deliberating after sending them back to the jury room require that he receive a new trial. The State maintains that he forfeited this issue for appeal by failing to object at trial and by failing to raise these specific errors in his posttrial motion. In response, defendant Bailey argues that his motion for a mistrial was made at the earliest possible time and that the errors were sufficiently raised in his amended motion for a new trial. He further argues that the forfeiture rule is relaxed when the basis of the objection is the conduct of the trial court.

¶ 16 Failure to object to the polling of the jury at the time the jury is polled forfeits the error. *People v. McDonald*, 168 Ill. 2d 420, 462 (1995). Defendant Bailey's motion for a mistrial was made only after the jurors notified the trial court a second time that they had reached a verdict. Moreover, "[o]rdinarily, a defendant must both specifically object at trial and raise the specific issue again in a posttrial motion to preserve any alleged error for review." *People v. Woods*, 214 Ill. 2d 455, 470 (2005). Defendant Bailey moved for a mistrial based on "the unique circumstances that occurred with the jury." In his amended motion for a new trial, defendant Bailey alleged that the trial court erred in overruling his mistrial motion after a juror changed his verdict during questioning. Neither his motion for mistrial nor his amended motion for a new trial raised an objection to the failure of the trial court to poll the entire jury or to the court's failure to instruct the jury to deliberate further.

¶ 17 Where a trial court's conduct is involved, only the most compelling situations require

relaxation of the forfeiture rules. *People v. McLaurin*, 235 Ill. 2d 478, 488 (2009). Even if we were to determine that defendant Bailey was prevented from making a timely objection to the discontinuation of the polling procedure, his motion for a mistrial failed to assert the errors that he now raises on appeal. Therefore, defendant Bailey has forfeited appellate review of this issue.

¶ 18 In the alternative, defendant Bailey requests that this court consider the alleged errors pursuant to the plain error doctrine. See Supreme Court Rule 615(a). We may consider a forfeited error in either of two situations: (1) where the evidence is close, regardless of the error, or (2) where the error is serious, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). In a plain-error analysis, the defendant bears the burden of persuasion to show prejudice. *McLaurin*, 235 Ill. 2d at 496. We must first determine if error occurred.

¶ 19 "The purpose of polling a jury is to determine that a verdict accurately reflects each juror's vote as reached during deliberations and that the votes were not the result of force or coercion." *McDonald*, 168 Ill. 2d at 462. In polling the jury, a trial judge must not hinder a juror's expression of dissent. *McDonald*, 168 Ill. 2d at 462. The manner in which the jury is polled and the subsequent questioning is conducted are largely within the trial court's discretion, but "the trial judge must be mindful of his influence over the jury and avoid influencing or coercing the juror." *People v. Chandler*, 88 Ill. App. 3d 644, 650 (1980).

¶ 20 Defendant Bailey relies on this court's statement in *Chandler* that "[t]he polling of the jury then requires that the entire jury be polled in order to provide each juror the opportunity to dissent from the verdict." *Chandler*, 88 Ill. App. 3d at 650. He also relies on *Bianchi v.*

Mikhail, 266 Ill. App. 3d 767 (1994). In that case, the trial court twice discontinued polling the jury after the same juror was equivocal about the verdict. Relying on *Chandler*, this court determined that the court erred when it failed to continue polling the jury because it "effectively isolated the juror and conceivably could have had a coercive effect." *Bianchi*, 266 Ill. App. 3d at 778.

¶ 21 In light of *Bianchi* and *Chandler*, defendant Bailey argues that it was reversible error for the court to discontinue the poll after a juror dissented from the verdict because there was a "possibility" that the juror may have been coerced. We disagree.

¶ 22 In *Chandler*, this court rejected the defendant's argument that it was error to continue polling the jury after one juror dissented from the verdict because it isolated the dissenting juror and resulted in pressure from the trial court. This court observed that the isolation of dissenting jurors "is attendant to every jury poll. *** If the isolation and coercion of the jurors are to warrant a reversal, however, they must result from the court's own actions, not from the nature of the poll itself." *Chandler*, 88 Ill. App. 3d at 651.

¶ 23 *Chandler* did not create a rule that reversible error occurs when a trial court discontinues polling the jury after a juror has repudiated his verdict. Rather, the issue is whether, in and of itself, the trial court's determination to either discontinue the poll or to continue the polling after a juror has repudiated his verdict had a coercive effect on the dissenting juror. See *Chandler*, 88 Ill. App. 3d at 654 (supplemental opinion on denial of rehearing). In this case, there is no evidence that by discontinuing the jury poll, the trial court coerced the dissenting juror or influenced the remaining jurors into returning guilty verdicts. The jurors were sent back to the

jury room and returned with a unanimous verdict, and the entire the jury was polled. The jury polling procedure followed in this case gave each juror the opportunity to disagree with the verdict, free from any coercion or influence and thus fulfilled the purpose of polling the jury.

¶ 24 *Bianchi* is distinguishable on its facts. In that case, the first time the jury was polled, the first juror expressed doubt about the verdict, and the jury was ordered to continue to deliberate. The jury returned a second time with a unanimous verdict, but the same juror had written "protest" next to her name. The trial court polled the protesting juror first, and again the juror expressed confusion about the verdict. After a third set of deliberations, the jury returned a unanimous verdict, and when polled, all the jurors agreed with the verdict. The facts support the conclusion that the trial court's focus on the dissenting juror could have had a coercive effect on that juror, impacting her verdict. In the case before us, the trial court did not question the juror after the juror repudiated his verdict and simply ordered the jury to return to the jury room. See *Chandler*, 88 Ill. App. 3d at 654 (direct questioning by the court may have a coercive effect on a dissenting juror).

¶ 25 Defendant Bailey further maintains that the trial court's failure to instruct the jurors to deliberate when they returned to the jury room was error. He correctly notes that when a juror dissents from a verdict the proper remedy is for the trial court to order the jury to deliberate further or to declare a mistrial. *People v. Smith*, 271 Ill. App. 3d 763, 766 (1995). In *Smith*, the reviewing court held that the failure to instruct the jury to continue deliberating or declare a mistrial was error. *Smith*, 271 Ill. App. 3d at 767.

¶ 26 In the present case, the trial court did not specifically direct the jury to deliberate when

they returned to the jury room, but the court did order that the jury receive new verdict forms. Subsequently, the jury returned a unanimous verdict, which was confirmed by a polling of the entire jury. *Smith* is distinguishable. In that case, there was evidence of an improper communication between the bailiff and the jurors when they returned to the jury room. The jury did not return a new verdict but were called back to the courtroom by the trial court. The trial court did not poll the entire jury but polled only the dissenting juror and one other juror who had not dissented from the verdict when the jury was polled the first time. *Smith*, 271 Ill. App. 3d at 766-67. None of these facts are present in the case before us.

¶ 27 The mere possibility of harm to a defendant is not a sufficient ground for holding that the jury poll was improper. *Chandler*, 88 Ill. App. 3d at 651. Defendant Bailey has not established that the trial court's discontinuing the jury poll coerced or influenced the juror in this case or denied the remaining jurors the opportunity to disagree with the verdict. He also has not established that the court's failure to specifically instruct the jury to continue deliberations resulted in an untrustworthy verdict. We conclude that no error occurred.

¶ 28 Even if we were to find error, defendant Bailey cannot satisfy either prong of the plain error doctrine. The evidence against him, which included his possession of property belonging to the victim and his confession to the offenses in this case, was overwhelming. Moreover, defendant Bailey has not challenged the denial of his motion to suppress his confession or raised an issue as to the sufficiency of the evidence in this appeal.

¶ 29 As to the second prong of the plain-error analysis, the right to poll the jury has been described as a substantial right. *People v. Herron*, 30 Ill. App. 3d 788, 791 (1975). Defendant

Bailey argues that discontinuing the jury poll amounted to a denial of his right to have the jury polled. As noted above, the purpose of polling a jury is to determine that the verdict accurately reflected each jurors' vote and that the votes were not the result of force or coercion. *McDonald*, 168 Ill. 2d at 462.

¶ *30* In this case, there was no evidence that the failure to continue polling the jury and the failure to specifically instruct the jury that they were to continue to deliberate affected the accuracy of the jurors' votes and coerced or influenced their votes. When the jury returned a second time, all the jurors were polled and stated their agreement with the verdicts. The alleged errors in the polling process were not so egregious as to deprive defendant Bailey a fair trial. Therefore, defendant Bailey has failed to establish that he was deprived of a substantial right.

¶ 31 We conclude that the defendant failed to satisfy either prong of the plain error analysis. Even if the trial court did err as the defendant asserts, in the absence of plain error, there is no basis for excusing defendant Bailey's procedural default. *People v. Anderson*, 407 Ill. App. 3d 662, 679 (2011). The claim of error is forfeited.

¶ 32 II. Felony Murder Verdict

¶ 33 A. *Standard of Review*

¶ 34 Whether the trial court is required to provide separate verdict forms for felony murder when requested by a defendant is a question of law, which the court reviews *de novo*. See *People v. Smith*, 233 Ill. 2d 1, 15 (2009).

¶ 35 B. *Discussion*

¶ 36 In Illinois, first degree murder is a single offense; the three theories in the statute are merely three different ways in which first degree murder may be committed. *Smith*, 233 Ill. 2d at 16. Under the "one-good-count" rule, "a general verdict of guilty on a multiple-count indictment is interpreted to be a finding of guilt on each count." *People v. Moore*, 397 Ill. App. 3d 555, 564 (2009). In such a case, if the punishment imposed is one which is authorized punishment for the offense charged in any one or more of the counts, the verdict must be sustained. *Smith*, 233 Ill. 2d at 20. "[W]hen a defendant is charged in several counts with a single offense and multiple convictions have been entered *** [the] judgment and sentence may be entered only on the most serious offense." *Smith*, 233 Ill. 2d at 20. However, where "specific findings by the jury with regard to the offenses charged could result in different sentencing consequences favorable to the defendant, specific verdict forms must be provided upon request and the failure to provide them is an abuse of discretion." *Smith*, 233 Ill. 2d at 23. The appropriate remedy is to interpret the general verdict as a finding on felony murder. *Smith*, 233 Ill. 2d at 28; see *People v. Reed*, 405 Ill. App. 3d 279, 286 (2010) (where a defendant was charged under multiple theories of first degree murder and denied separate verdict forms, return of a general verdict of guilty must be interpreted as a finding of guilt on felony murder).

¶ 37 In accordance with *Smith*, we conclude that the trial court abused its discretion when it denied his request to give separate felony murder verdict forms in this case. However, in accordance with *Smith* and *Reed*, the trial court applied the proper remedy by sentencing defendant Bailey, based on his guilt on felony murder.

¶ 38 Defendant Bailey then maintains that the trial court erred when it sentenced him to

natural life rather than a term-of-years for felony murder. He asserts that his eligibility for a natural life sentence was based solely on his eligibility for the death penalty. Since the jury's verdict was not specific enough for a finding that he committed intentional murder, there was no basis upon which the trial court could find him eligible for the death penalty. Defendant Bailey overlooks the fact that, in this case, the trial court, not the jury, was the finder of fact in the determination of his eligibility for the death penalty. See 720 ILCS 5/9-1(h) (West 2006). Therefore, the jury' s failure to specifically find that he had committed intentional murder, did not render him ineligible for the death penalty.

¶ 39 A defendant who commits a murder in the course of a home invasion is eligible for a sentence of death when "the murdered individual was actually killed by the defendant***[and] in performing the acts which caused the death of the murdered individual ***the defendant acted with the intent to kill the murdered individual or with the knowledge that his acts created a strong probability of death or great bodily harm to the murdered individual***." 720 ILCS 5/9-1(b)(6)(a)(i), (b), (c) (West 2006). A defendant convicted of first degree murder may be sentenced to natural life if the trier of fact finds beyond a reasonable doubt that any of the aggravating factors contained in subsection (b) of section 9-1 were present. 730 ILCS 5/5-8-1(a)(1)(b) (West 2006). In this case, the State sought the death penalty based on the following statutory aggravating factors: (1) while committing an inherently violent felony, the victim was killed by the defendant, who was acting with the intent to kill the victim or with the knowledge that his acts created a strong probability of death or great bodily harm to the victim (720 ILCS 5/9-1(b)(6) (West 2006)), and (2) the victim was 60 years of age or older and the death resulted

from exceptionally brutal or heinous behavior indicative of wanton cruelty (720 ILCS 5/9-1(b)(16) (West 2006)).

¶ 40 In finding defendant Bailey eligible for the death penalty, the trial court determined beyond a reasonable doubt that the statutory factors existed. The evidence established that defendant Bailey entered Mr. Winter's home looking for money to steal. When Mr. Winter confronted him, there was a struggle. According to the autopsy report, a brown electrical cord was found tightly wound around Mr. Winter's neck, and his body showed signs of manual strangulation as well.

¶ 41 "A trial court's determination that a defendant is eligible for a sentence of natural life will not be disturbed unless ' "the evidence is so unreasonable, improbable or unsatisfactory that it does not provide proof of the findings beyond a reasonable doubt." ' " *Reed*, 405 Ill. App. 3d at 287 (quoting *People v. Jackson*, 304 Ill. App. 3d 883, 896-97 (1999), quoting *People v. Gaines*, 235 Ill. App. 3d 239, 250 (1992)). The existence of one statutory factor is sufficient to find a defendant eligible for the death penalty. See 720 ILCS 5/9-1(h) (West 2006). The evidence supported a finding beyond a reasonable doubt that, while committing the offense of home invasion, defendant Bailey acted with intent to kill Mr. Winter when he strangled him or knew that his actions in strangling Mr. Winter created a strong probability of death or great bodily harm to Mr. Winter. 720 ILCS 5/9-1(b)(6) (West 2006). The trial court's decision to sentence defendant Bailey to natural life imprisonment for felony murder was proper.

¶ 42 Finally, a defendant convicted of felony murder may not be convicted of the underlying felony. *Smith*, 233 Ill. 2d at 17. Therefore, defendant Bailey's conviction and sentence for

home invasion must be vacated.

¶ 43 III. Robbery Conviction

¶ 44 The defendant was originally charged with the robbery of an individual 60 years of age or older, a Class 1 felony. 720 ILCS 5/18-1(a)(b) (West 2006). Prior to trial, the State amended the robbery charge by withdrawing the aggravating factor of the age of the victim. The parties agree that defendant Bailey's conviction and sentence for a Class 1 felony was error. Defendant Bailey requests that the mittimus be corrected to reflect the proper offense and that the case be remanded to the trial court for resentencing on the robbery charge. We agree that the degree of the offense must be reduced but find that remand for resentencing is unnecessary.

¶ 45 The appellate court has the power to reduce the degree of a defendant's offense and, where the trial court's sentencing decision was unlawful or an abuse of discretion, the power to reduce his sentence. See Ill. S. Ct. Rs. 615 (b)(3), (b)(4). Depending on the circumstances, the court may elect to impose a new sentence rather than remand to the trial court for resentencing. *People v. Jones*, 168 Ill. 2d 367, 378 (1995). Where no new or additional evidence will be offered by the parties and the proof presented to the trial court was straight forward and uncomplicated, "it may be appropriate for the appellate court to impose sentence rather than exhaust judicial resources, as well as the resources of counsel for the State and the defense, that would be expended by ordering a new sentencing hearing." *Jones*, 168 Ill. 2d at 378.

¶ 46 In this case, remand for resentencing is unnecessary. The proof presented at the sentencing hearing was uncomplicated, and defendant Bailey does not argue that new or additional evidence will be offered if the case were remanded to the trial court. Therefore, we

elect to resentence defendant Bailey.

¶ 47 Defendant Bailey's 15-year sentence for robbery was the maximum non-extended term-of-years sentence for a Class 1 felony. We agree with the State that a term of seven years' imprisonment, the maximum nonextended term-of-years sentence for a Class 2 felony, is the appropriate sentence to impose on defendant Bailey's conviction for robbery.

¶ 48 CONCLUSION

¶ 49 We affirm defendant Bailey's conviction and sentence for murder and vacate his conviction and sentence for home invasion. Pursuant to Rule 615(b)(3) and (b)(4) (Ill. S. Ct. Rs. 615 (b)(3), (b)(4)), we order defendant Bailey's Class 1 robbery conviction reduced to a Class 2 robbery (720 ILCS 5/18-1(a) (West 2006)) and his sentence reduced to a term of seven years' imprisonment, to be served concurrently with his natural life sentence. We affirm the conviction and sentence for robbery, as modified, and order the clerk of the circuit court to correct the mittimus to reflect the proper conviction and sentence for robbery.

¶ 50 Affirmed in part as modified and vacated in part; mittimus corrected.