

No. 1-09-0668

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FIRST DIVISION
DATE February 14, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 06 CR 23416
)	
ALEJANDRO SERRANO,)	Honorable
)	Mary Margaret Brosnahan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Hall and Justice Lampkin concurred
in the judgment.

ORDER

HELD: Where jury heard evidence that defendant exited van holding weapon linked to shooting, jury could infer his role as gunman, supporting 25-year sentence enhancement; defendant forfeited issue of jury venire questioning and cannot establish plain error; defendant's conviction and sentence were affirmed.

Following a jury trial, defendant Alejandro Serrano was convicted of first degree murder and sentenced to 50 years in prison. On appeal, defendant contends the 25-year enhancement to his sentence for personally discharging the weapon that killed the victim should be vacated because the State failed to prove he fired the gun. Defendant also argues he should receive a new trial because the judge did not conduct *voir dire* in accordance with Supreme Court Rule 431(b) (eff. May 1, 2007). We affirm.

Defendant and Juan Gonzalez were tried together for the first degree murder of Julian Robles.¹ Robles was shot in the early morning hours of September 12, 2006, near 3542 24th Street in Chicago, and he died of gunshot wounds to the head, elbow and abdomen.

Omar Barbra, who was 13 years old and a friend of Robles, witnessed the shooting from the window of his family's second-floor apartment. Barbra was 15 years old at the time of trial, and he testified he stood in the window and talked to Robles just before the shooting, as Robles stood on 24th Street with his bike. After their conversation, Robles rode his bike away from Barbra's building and down 24th Street. Robles crossed the street in front of a gray van that was stopped at a stop sign near 24th and Drake.

¹ Gonzalez was tried *in absentia*. A third defendant, Corey Paige, was tried simultaneously by a separate jury.

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Barbra testified that he then saw a man in a black hooded shirt get out of the van and approach Robles. The man fired one shot, and Robles fell to the ground. The gunman fired several more shots at Robles and ran back to the van, which sped away. Omar's mother, Gladys Barbra, testified that at about 1:30 a.m. on September 12, 2006, she heard gunshots while in her bedroom. Gladys went to her son's room and saw he was distressed. Gladys looked out the window and saw a man getting into a van at the stop sign.

The State also presented the testimony of Veronica Rodriguez and Reyna Ortiz, who were in the van. Rodriguez, who was 16 years old at the time of the shooting, went to the home of Ortiz, who was 19. They drank alcohol, and Ortiz called Paige and asked if he wanted to go out drinking with them. Paige agreed to meet them at a nearby drugstore.

Paige arrived in a gray van that also was occupied by Paige's cousin, who wore a red shirt. Rodriguez identified the red-shirted man in court as defendant. When Ortiz was asked to make a similar in-court identification but could not, Ortiz confirmed her previous identification of a photo of defendant as the man in the red shirt. Paige wore a black shirt.

The two men and two women purchased two cases of beer and went to a park near Lincoln Park Zoo, where they smoked marijuana and drank the beer for about two hours. Rodriguez drank eight

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beers and shared two joints. Ortiz testified she smoked marijuana on a daily basis at that time. Rodriguez stated on cross-examination that she and Ortiz did not drink alcohol at Ortiz's residence. However, both women said they were drunk and high after consuming beer and smoking marijuana with the group.

After leaving the park, the group picked up Gonzalez. Rodriguez and Ortiz knew Paige and Gonzalez to be members of the Ambrose street gang; the men exchanged a gang sign when Gonzalez entered the van. According to Rodriguez and Ortiz, the men shot at three different gangs that night.

Rodriguez stated Paige drove the van into an alley, and defendant, who was wearing a red shirt, got out of the van and entered a building. Several minutes later, defendant returned to the driver's seat of the van with a gun, which he passed to Paige. Ortiz stated that after defendant gave the gun to Paige, Paige wiped the gun with his shirt and loaded it.

Paige resumed driving after handing the gun back to defendant. Paige drove to the area of 42nd Street and Sacramento, where he suggested shooting at members of a rival gang, the Satan Disciples. Ortiz testified defendant got out of the van at 42nd Street and shot at a group of people; however, on cross-examination, Ortiz said defendant did not fire the gun at that location.

Defendant returned to the van, and the men discussed going to 26th Street to target another rival gang, the Latin Kings. Ortiz said she thought Paige stopped the van in the area of 26th Street, and defendant and Gonzalez got out. Ortiz said defendant had the gun wrapped in a black "hoodie," or hooded shirt. Rodriguez heard four or five gunshots and heard someone say, "King killer, Ambrose love."

When defendant and Gonzalez returned to the van, defendant got in the driver's seat and was holding the gun. Rodriguez did not see any gunfire. Ortiz stated she heard four gunshots fired in close succession, and, when defendant returned to the car, he said, "I got him, I got him. He is dead." Defendant removed the gun from his hoodie and passed it to Paige.

Paige then drove to 18th Street, where the third shooting occurred. Paige stopped the van in the middle of the street and got out. Paige shouted "La Raza love" and shot at members of the La Raza street gang. Paige returned to the van, and defendant drove the van away. The van was chased and stopped by police shortly thereafter. During the pursuit, Paige emptied the bullets from the gun and threw the gun out the window. Police recovered the gun with the help of a witness who saw the weapon being thrown from the van.

Chicago police officer William Murphy testified that when he arrested defendant, defendant was wearing a red shirt. Forensic

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testing did not show gunshot residue on defendant's skin. No tests were done on defendant's red shirt or a black hooded sweatshirt found in the van. The bullet recovered from the victim was fired by the weapon recovered by police. The defense case consisted of the parties' stipulation that defendant's DNA profile was not present on the gun.

Defendant first contends that the State failed to prove that he personally discharged a firearm, so as to support the 25-year enhancement to his sentence under section 5-8-1(a)(1)(d)(iii) of the Unified Code of Corrections (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2008)).

Defendant was sentenced to 50 years in prison. The sentencing range for first degree murder is 20 to 60 years in prison. 730 ILCS 5/5-8-1(a)(1)(a) (West 2008). However, pursuant to a firearm enhancement provision, a term of 15 years shall be added to a defendant's sentence if the jury finds the defendant committed the offense while armed with a firearm. 730 ILCS 5/5-8-1(a)(1)(d)(i) (West 2008). A 25-year term shall be added to a sentence upon a finding that a defendant, during the commission of the offense, "personally discharged a firearm that proximately caused great bodily harm *** or death to another person." 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2008). Here, the jury found that defendant personally discharged the firearm that

proximately caused the death of Robles, thus requiring the court to impose the 25-year enhancement.

Defendant argues the evidence only supports a 15-year enhancement for carrying a gun during the offense and that his sentence therefore should be reduced by 10 years to reflect the shorter enhancement term. He contends no witnesses saw him shoot a gun, no physical evidence linked him to the gun, and the testimony of Rodriguez and Ortiz was unreliable and inconsistent.

Defendant therefore questions the strength of the evidence that he personally fired the weapon that killed Robles. When a defendant challenges the sufficiency of the evidence, the task of a reviewing court is to determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *People v. Ward*, 215 Ill. 2d 317, 322 (2005). Under this standard, this court will not substitute its judgment for that of the trier of fact on issues of the weight of the evidence or the credibility of witnesses. *People v. Cooper*, 194 Ill. 2d 419, 431 (2000).

The evidence was sufficient to support the jury's finding that defendant personally fired the weapon that caused the victim's death. The testimony established that defendant got out of the van in the area of 26th Street holding a gun wrapped in a

black shirt. The boy who witnessed the shooting from his window said a man in a black hooded shirt got out of a van and shot Robles. The bullets that killed Robles were matched to the weapon thrown out of the van's window, and a black hoodie was recovered from the van.

Although neither defendant's DNA nor his fingerprints were found on the gun, the testimony established that after he initially handled the weapon, Paige wiped the gun with his shirt, and defendant subsequently held the gun in his hooded shirt. Moreover, Ortiz testified that when defendant returned to the car at 26th Street, he reported, "I got him. I got him. He is dead." As to defendant's contention that neither woman saw him shoot a gun, that fact is consistent with their testimony that they were inside the van when the shooting occurred.

Defendant also argues the testimony of Rodriguez and Ortiz lacked credibility because they drank alcohol and smoked marijuana immediately before the shooting. The trier of fact is in the best position to resolve any inconsistencies and conflicts in the testimony of witnesses, assess the proper weight to be given their testimony, and draw reasonable inferences from all of the evidence. *People v. Lavelle*, 396 Ill. App. 3d 372, 382-83 (2009). Whether the women's testimony was unreliable due to their admitted alcohol and drug usage that night was a determination for the trier of fact. See *People v. Calabrese*,

398 Ill. App. 3d 98, 123-24 (2010) (despite drug or alcohol usage of witnesses, rational trier of fact could infer from witnesses' consistent testimony that defendant fired weapon). Because the jury could infer from the testimony presented that defendant was the gunman, we cannot say that the evidence was insufficient to support the jury's finding. Therefore, the 25-year sentence enhancement is affirmed.

Defendant's remaining contention on appeal is that a new trial is warranted by the trial judge's failure to comply with Supreme Court Rule 431(b). That rule requires the trial court to ask potential jurors if they understand and accept the following principles: (1) the defendant is presumed innocent of the charges against him; (2) before a defendant is convicted, the State must prove his guilt beyond a reasonable doubt; (3) the defendant is not required to offer any evidence on his own behalf; and (4) the defendant's failure to testify cannot be held against him or her. Ill. S. Ct. R. 431(b) (eff. May 1, 2007). The trial court is required to ask potential jurors if they understand and accept each principle and provide an opportunity to respond to each concept. Ill. S. Ct. R. 431(b) (eff. May 1, 2007); *Calabrese*, 398 Ill. App. 3d at 120. In the case at bar, the trial court only advised venire members of three of those principles; the court did not state the defendant was not required to offer any

evidence on his own behalf or ask the potential jurors if they understood and accepted that principle.

During the pendency of defendant's appeal, our supreme court has held that such an oversight does not constitute a structural error requiring automatic reversal. *People v. Thompson*, 238 Ill. 2d 598, 611 (2010) (trial court did not apprise potential jurors that defendant did not have to present evidence). Furthermore, although defendant acknowledges he did not raise this issue before the trial court during jury selection or at any other stage, he contends this argument should not be deemed forfeited because the error arose from the trial judge's actions. However, the supreme court in *Thompson* considered and rejected a similar assertion, reasoning that the trial judge would have complied with Rule 431(b) had the judge been notified of the omission. *Thompson*, 238 Ill. 2d at 612 (applying the *Sprinkle* doctrine, which relaxes the forfeiture rule where objection to judge would have "fallen on deaf ears," quoting *People v. McLaurin*, 235 Ill. 2d 478, 488 (2009)).

In the alternative, defendant contends the issue should be reviewed under either prong of the plain error doctrine. Under that rule, a forfeited error can be reviewed if: (1) the evidence in the case was so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence; or (2) the error was so serious that it affected the fairness of the

defendant's trial and challenged the integrity of due process. *People v. Herron*, 215 Ill. 2d 167, 187 (2005). The supreme court in *Thompson* held that incomplete questioning under Rule 431(b), similar to the instant facts, did not meet the second prong of plain error.

The fate of defendant's appeal therefore rests on a consideration of the first prong of plain error, which requires our consideration of the closeness of the evidence. On that point, defendant reiterates his challenges to the State's case, contending that he was linked to the shooting only by the unreliable and inconsistent accounts of Rodriguez and Ortiz and that no physical evidence connected him to the weapon. We do not find the evidence to be closely balanced. The State presented proof that the victim was shot with bullets from the gun thrown from the van in which defendant was riding. Defendant left the van holding a weapon in a black hooded shirt and returned to the van to report, "I got him. I got him. He is dead." In light of that testimony, defendant has not met the first prong of plain error.

Accordingly, defendant's conviction and 50-year sentence are affirmed.

Affirmed.