FOURTH DIVISION
JUNE 30, 2011

2011 IL App (1st) 092442-U
No. 1-09-2442

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 07 CR 4992
	)	
DERRIS CROSS,	)	Honorable
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin and Justice Sterba concurred in the judgment.

O R D E R

HELD: Where defendant displayed gun as he approached victims holding an open wallet, evidence supported attempted armed robbery convictions, and defendant cannot establish plain error in jury questioning or error in three-year term of mandatory supervised release following Class X sentence; defendant's convictions and sentence were affirmed.

¶ 1 Following a jury trial, defendant Derris Cross was convicted of two counts of attempted armed robbery. Defendant was sentenced as a Class X offender to 20 years in prison on each count, with those terms to be served concurrently, followed by a 3-year term of mandatory supervised release (MSR). On appeal, defendant raises three contentions: (1) the State failed to prove his intent to commit robbery or that he performed an act constituting a substantial step toward that offense; (2) 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); and (3) the trial court erred in sentencing him to a three-year MSR term when he was convicted of a Class 1 felony, which carries a two-year period of MSR. We affirm.

¶ 2 Defendant was convicted of the attempted armed robbery of Anton and Arlicia Berry. At about 5:15 a.m. on September 16, 2006, defendant, codefendant Earvie Howard and John Sylvester were driving near the intersection of Karlov and Division in Chicago. Arlicia Berry testified she and her husband Anton were walking to a bus stop to attend a car auction and they stopped on the sidewalk to make sure Anton had identification in his wallet. Arlicia testified they saw a neighbor, Juan Cancel, on the street before they stopped to look in Anton's wallet.

¶ 3 Defendant approached the Berrys holding a gun. The Berrys pushed defendant against a fence, and Anton and defendant struggled over the weapon. The gun discharged, and a bullet struck Sylvester, who later died from his injuries.

¶ 4 Anton testified that while he and his wife were looking down at his wallet, defendant was about 20 feet away and was "fidgeting" with a gun, which he held near his waist. Both Anton and Arlicia testified defendant did not speak during the encounter.

¶ 5 Cancel testified he left his home at 5:30 a.m. and walked through a nearby alley, where defendant, Howard and Sylvester got out of a car. Defendant approached Cancel holding a gun. Cancel said defendant told him to "give me what you got," and Cancel gave defendant his wallet and watch. After they drove away, Cancel heard a shot fired nearby and saw Anton struggling with defendant.

¶ 6 Defendant testified Howard drove him and Sylvester home from a club that morning and Sylvester asked Howard to pull over so he could speak to Anton. Defendant got out of the car to tell Sylvester to end his conversation because Howard wanted to leave. Sylvester and Anton began arguing and struggling with the gun as defendant approached. When the gun fell to the

ground, defendant picked up the gun to prevent Anton from reaching it. Defendant and Anton then struggled over the gun when it discharged. Defendant denied pointing a gun at Anton and Arlicia Berry or attempting to rob them.

¶ 7 The jury convicted defendant of two counts of attempted armed robbery as to Anton and Arlicia Berry. Defendant also was charged with the first degree murder of Sylvester under a felony murder theory and the armed robbery of Cancel; he was acquitted on those counts.

¶ 8 On appeal, defendant first contends the State failed to prove beyond a reasonable doubt that he had the specific intent to commit armed robbery or that he committed an act constituting a substantial step toward committing armed robbery.

¶ 9 When reviewing the sufficiency of the evidence of a criminal conviction, 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). A conviction will only be reversed when "the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt." *People v. Gabriel*, 398 Ill. App. 3d 332, 341 (2010).

¶ 10 A defendant commits attempted armed robbery when he is armed with a gun and, with the specific intent to commit a robbery, takes a substantial step toward the commission of armed robbery. 720 ILCS 5/8-4(a) (West 2006); 720 ILCS 5/18-2(a)(2) (West 2006). The intent to complete the act and commit this offense need not be expressed but may be inferred from the defendant's conduct and the surrounding circumstances. *People v. Terrell*, 99 Ill. 2d 427, 431-32 (1984).

¶ 11 In arguing the State did not prove his intent to commit a robbery, defendant points to the Berrys' testimony that he did not speak to them. A specific demand for money by the defendant is not required if the circumstances are sufficient to establish intent to commit a robbery. *People v. Murff*, 29 Ill. 2d 303, 305 (1963); *People v. Murray*, 194 Ill. App. 3d 653, 657 (1990) (defendant attacked victim shortly after victim removed money from his pocket to make bank deposit; defendant apparently mentioned money while he and victim struggled); *People v. Armour*, 15 Ill. App. 3d 529, 539 (1973).

¶ 12 Although here, unlike in *Murray*, defendant did not speak to the Berrys, he approached the Berrys holding a weapon as they were looking in their wallet. Evidence also was presented that immediately before approaching the Berrys, defendant demanded Cancel's property while holding a gun. Defendant contends his acquittal on the armed robbery count regarding Cancel indicates the jury "did not believe Cancel's testimony." However, our inquiry is whether the evidence, including circumstantial evidence, was sufficient to support the attempted armed robbery convictions against the Berrys. The circumstances surrounding defendant's behavior were sufficient to establish his intent to commit armed robbery.

¶ 13 Defendant also contends the evidence did not establish he took a substantial step towards committing armed robbery because he took no money or valuables from the Berrys. As with intent, what constitutes a substantial step toward the commission of an offense must be determined by evaluating the facts and circumstances of each particular case. *Terrell*, 99 Ill. 2d at 433-34 (and cases cited therein); see also *People v. Smith*, 148 Ill. 2d 454, 459 (1992). A defendant need not commit the last proximate act before the actual offense to be convicted of attempt. *People v. Jiles,* 364 Ill. App. 3d 320, 335 (2006).

¶ 14 Defendant's act of approaching the victims holding a gun constituted a substantial step toward committing armed robbery. The taking of property was not required for his actions to

constitute an attempt. Therefore, we conclude the evidence was sufficient to prove defendant's specific intent and his commission of a substantial step toward attempted armed robbery.

¶ 15 Defendant next asserts 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). In the case at bar, the trial court asked the entire venire if they understood the first three concepts.[1] Defendant's claim of error is that the court also was required to determine if venire members accepted those principles but only asked if they took "issue" with the first and third principles and did not ask if they accepted the second concept of the State's burden of proof beyond a reasonable doubt.

¶ 16 During the pendency of defendant's appeal, our supreme court held Rule 431(b) "requires questioning on whether the potential jurors both understand and accept each of the enumerated principles." *People v. Thompson*, 238 Ill. 2d 598, 607 (2010). Thus, the trial court's inquiries in this case violated the rule. Defendant did not raise this issue in the trial court during jury selection or at any other stage but nevertheless asks this issue 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

[1] The fourth principle, regarding the defendant's failure to testify, is not at issue in this case because defendant did testify.

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).

¶ 17 As defendant recognizes in his reply brief, the supreme court held in *Thompson* that incomplete questioning under Rule 431(b) is not reversible under the second prong of plain error. *Thompson*, 238 Ill. 2d at 570-71. As to the first plain error alternative, defendant contends the evidence was closely balanced and that the instructional error could have resulted in his conviction. The error in this case involved the instruction of the jury about its acceptance of the State's burden to prove defendant's guilt beyond a reasonable doubt. The court failed to ask potential jurors if they not only understood that principle, but also accepted it. Error therefore occurred here.

¶ 18 Defendant has the burden of showing this error was prejudicial to his case. See *People v. Piatkowski*, 225 Ill. 2d 551, 566 (2007). In invoking the first prong of plain error and arguing the evidence was closely balanced, defendant points to his version of events. However, the existence of contrary testimony does not mean the evidence was so closely balanced that the jury's guilty verdicts arose from that error and not from the evidence.

¶ 19 We note that defendant was acquitted on two counts, and therefore, the jury found the State did not meet its burden of proving beyond a reasonable doubt that defendant committed the armed robbery of Cancel and the murder of Sylvester under a felony murder theory. Defendant argues the not guilty verdicts on those two counts demonstrate the evidence was closely balanced and that the erroneous instruction "could easily have tipped the scales against [him] with regard to the attempt armed robbery charges." In other words, defendant presumes the jury could have misunderstood the State's burden only as to the counts on which he was convicted but not as to the counts on which he was acquitted. No logical basis exists to support defendant's assumption.

Defendant has not established that his convictions resulted from the court's error in instructing potential jurors as to the State's burden of reasonable doubt.

¶ 20 Defendant's remaining contention is that the trial court incorrectly sentenced him to a three-year MSR term when he was convicted of a Class 1 felony that carries a two-year MSR term. Defendant concedes he did not raise this issue in the trial court but argues a sentencing error may be raised at any time.

¶ 21 Defendant was convicted of attempted armed robbery, which is a Class 1 felony; however, defendant was sentenced as a Class X offender based on his previous convictions. As a Class X offender, defendant was subject to a MSR term of three years following his sentence. 730 ILCS 5/5-8-1(d)(1) (West 2006).

¶ 22 Defendant contends a separate subsection of the MSR statute should be applied which requires only a two-year MSR term following the completion of a sentence for a Class 1 felony. See 730 ILCS 5/5-8-1(d)(2) (West 2006). The State responds that despite the Class 1 status of defendant's underlying offense, defendant's sentencing as a Class X offender mandates the three-year MSR term because the term of MSR is considered as part of a sentence.

¶ 23 Defendant acknowledges this court has rejected his interpretation of the sentencing statutes in several cases, including *People v. Anderson*, 272 Ill. App. 3d 537 (1995), and *People v. Smart*, 311 Ill. App. 3d 415 (2000). He contends, however, that those decisions pre-date the supreme court's opinion in *People v. Pullen*, 192 Ill. 2d 36 (2000), and lack the guidance of that case. In *Pullen*, the supreme court considered the maximum aggregate, or total years, of consecutive sentences for a Class X offender who has committed Class 1 or Class 2 felonies. The court concluded in the context of the consecutive sentencing scheme that the individual sentences remained as Class 1 or Class 2 felonies, even when a defendant was eligible for sentencing as a Class X offender. *Pullen*, 192 Ill. 2d at 43.

¶ 24 In the decade since *Anderson*, *Smart* and *Pullen* were decided, this court has addressed, indeed very recently, *Pullen*'s applicability to the precise MSR issue raised in this case and has found *Pullen* distinguishable. See *People v. Rutledge*, No. 1-09-1668, slip op. at 8-9 (April 18, 2011); *People v. Holman*, 402 Ill. App. 3d 645, 652-53 (2010); *People v. McKinney*, 399 Ill. App. 3d 77, 80-81 (2010). In *McKinney*, the court rejected the defendant's assertion that *Pullen* controls which MSR term should apply to a defendant sentenced as a Class X offender for committing a lower class felony. *McKinney*, 399 Ill. App. 3d at 82-83. *McKinney* contrasted the consecutive sentencing scheme in *Pullen* to the MSR issue, noting the statute in *Pullen* "does not specify what sentence a Class X offender receives" but instead limits the combinations of separate sentences for separate offenses. *McKinney*, 399 Ill. App. 3d at 83. Defendant's assertion in the instant case that *Pullen* controls our analysis is thereby rejected.

¶ 25 A defendant sentenced as a Class X offender should receive the same MSR term as a defendant convicted of a Class X felony. *McKinney*, 399 Ill. App. 3d at 81 (MSR term is part of defendant's sentence); *Holman*, 402 Ill. App. 3d at 653 (following *McKinney*). Here, defendant was correctly subjected to a MSR term of three years as part of his sentence as a Class X offender, even though his instant offense was a Class 1 felony that would warrant a two-year MSR term under other circumstances.

¶ 26 In conclusion, the evidence was sufficient to find that defendant both had the specific intent to commit attempted armed robbery and that he took a substantial step toward the commission of that offense. In addition, although the court committed an instructional error during jury selection, that error was not prejudicial to defendant's case so as to constitute plain error, and defendant's three-year MSR term is valid.

¶ 27 Accordingly, defendant's convictions and sentence are affirmed.

¶ 28 Affirmed.