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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Kane County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 09—CF—134
)	
APRIL E. McDOWELL,)	Honorable
)	T. Jordan Gallagher,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Birkett concurred in the judgment.

ORDER

Held: The trial court committed reversible plain error when it failed to provide the jury with an accomplice-witness instruction after directing the State to prepare the instruction: clear error occurred, as the witness was certainly an accomplice and thus defendant was entitled to the instruction, and the evidence was closely balanced, as the accomplice was the State's principal witness and its case was not otherwise overwhelming.

¶ 1 Following a jury trial, defendant, April E. McDowell, was convicted of forgery (720 ILCS 5/17—3(a)(2) (West 2008)). She appeals, contending that reversible error occurred when, despite

the trial court's order that the jury receive the accomplice-witness instruction, it was not in fact given. We reverse and remand.

¶ 2 Defendant was charged after she cashed a tax-refund check payable to Jorge Gutierrez. The following evidence was adduced at defendant's jury trial.

¶ 3 Gutierrez testified that in 2005 he was awaiting his tax refund. However, he never received a check. His apartment building burned down in February 2005, while he was expecting his tax refund. There was no key for his mailbox, so anyone could gain access to it. In 2007, he filled out paperwork about the missing check. He did not know defendant or Ricardo Villa, and he never gave them permission to cash his check.

¶ 4 The State called Villa. During a sidebar, the trial court admonished Villa of his right to remain silent and appointed a lawyer for him. After initially invoking his fifth-amendment right not to testify, Villa received immunity for his testimony.

¶ 5 Villa testified that he was then serving an eight-year sentence for burglary. In 2005, he was living on the streets and "getting high a lot." He estimated that he spent \$60 per day on his cocaine habit. He had numerous aliases and had used at least three different last names. Normally, he just went by Rick or Rick Dog and did not tell people his last name.

¶ 6 In late March 2005, Villa was working for defendant. She told him that she needed a "Mexican" to sign a check and stand with her at the bank, pretending to be the person who owned the check. On the day in question, defendant drove to the bank. While defendant drove to the bank, Villa practiced signing the name on the check so he would not misspell the name when he signed the check in front of the teller.

¶ 7 At the bank, Villa signed the check and gave it to defendant, who gave it to the teller. The teller gave the money to defendant. Villa did not get any money at that time, because defendant said she needed the money to “bond out” her husband. Villa did not know Jorge Gutierrez.

¶ 8 Secret Service agent Matthew McCloskey testified that in April 2008 he was investigating check fraud. He began investigating this matter when Gutierrez filed a claim that he had not received his tax-refund check. As part of his investigation, he interviewed defendant on June 2, 2008. After receiving the *Miranda* warnings, defendant agreed to speak with McCloskey. She said that she had received the check from Rick. McCloskey interviewed defendant a second time, when she identified Villa from a photo lineup. McCloskey interviewed Villa in prison, where he admitted signing someone else’s name on the check.

¶ 9 On July 2, 2008, McCloskey interviewed defendant a third time. According to McCloskey, at this meeting, defendant said that she received \$500 from the check and that she knew it did not belong to Villa. A few days later, defendant called McCloskey and said that, after some thinking, she believed that she had received the check from a woman named Danetta.

¶ 10 Defendant testified that in 2009 she was employed as a debt collector. In 2005, however, she was on drugs and unemployed. In March of that year, she met a man she knew only as Rick with whom she used drugs. She never knew his last name, but she let him stay at her house because he had nowhere else to go.

¶ 11 One day, Rick came to defendant’s house. He was holding a check. He said that he did not have an ID and asked defendant to cash his tax-refund check for him. She noticed that the check was made out to someone named “Jorge,” but he assured her that Jorge was his real name.

¶ 12 Defendant drove to the bank, where Rick signed the check. Defendant signed the check, wrote her account number on it, and handed it to the teller along with her ID. The teller gave defendant the money, which she gave to Rick, and defendant continued depositing other checks. Rick gave defendant \$500 to buy drugs for him.

¶ 13 Three years later, two Secret Service agents came to defendant's workplace. She was nervous because she had never talked to a Secret Service agent before and had no idea why they were there. During this conversation, she learned for the first time that the check did not belong to Rick and that Rick's name was not Jorge. She never told the agents that she knew the check did not belong to Rick or that she knew his name was not Jorge.

¶ 14 At a preliminary jury-instructions conference, the trial court directed the prosecutor to prepare an accomplice-witness instruction. See Illinois Pattern Jury Instructions, Criminal, No. 3.17 (4th ed. 2000) (hereafter IPI Criminal 4th No. 3.17). Prior to closing argument, the court and the attorneys went over the jury instructions again. The court noted that "16 is the accomplice instruction. That will be given without objection." However, the written instructions in the record on appeal do not include the accomplice-witness instruction, and the court did not include the instruction in its oral charge to the jury.

¶ 15 In closing argument, defense counsel argued that defendant was confused by McCloskey's compound questions. Specifically, when McCloskey asked if she knew that the check was not hers and knew that the check did not belong to Rick, she could honestly have answered yes to the first part without incriminating herself. Only the second part of the question called for an incriminating answer.

¶ 16 The jury found defendant guilty. The court sentenced defendant to two years in prison and ordered her to pay \$3,153 restitution to West Suburban Bank. Defendant timely appeals.

¶ 17 Defendant argues that reversible error occurred when, despite the trial court's direction that IPI Criminal 4th No. 3.17 be given, it was not in fact read to the jury or included in the instructions packet that the jury received. Defendant concedes that she did not object contemporaneously to the jury instructions or include the issue in her posttrial motion. Thus, she asks that we reverse under the plain-error rule. This is appropriate, she contends, because the evidence was closely balanced. She argues that the case essentially boiled down to a credibility battle between her and Villa, so it was particularly important for the jury to understand the inherent weaknesses in accomplice testimony.

¶ 18 The State responds that the evidence was not closely balanced. It notes McCloskey's testimony that defendant admitted knowing the check did not belong to Villa. The State also points out that defendant had her own credibility problems and that her trial testimony was not convincing. The State further contends that the jury received the general witness-credibility instruction, which allowed it to properly evaluate Villa's testimony.

¶ 19 IPI Criminal 4th No. 3.17 provides as follows:

“When a witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case.”

Illinois Pattern Jury Instructions, Criminal, No. 3.17 (4th ed. 2000).

¶ 20 The accomplice-witness instruction should be given if the evidence as a whole and the reasonable inferences therefrom establish probable cause to believe that a witness participated in the

commission of the crime. *People v. Henderson*, 142 Ill. 2d 258, 314-15 (1990); *People v. Wheeler*, 401 Ill. App. 3d 304, 313 (2010). If this test is satisfied, a defendant is entitled to the accomplice instruction. *People v. Lewis*, 240 Ill. App. 3d 463, 467 (1992).

¶ 21 Neither party questions that Villa was an accomplice. He testified that he rode with defendant to the bank and signed the check, pretending to be Jorge Gutierrez. Thus, there is no question that defendant was entitled to the instruction. Indeed, the trial court *sua sponte* directed the prosecutor to prepare the instruction. The prosecutor apparently did so. However, for whatever reason, the instruction was not given to the jury, either orally by the trial court or in the packet of written instructions. Thus, error unquestionably occurred.

¶ 22 The parties' only disagreement is whether the evidence was closely balanced so that we should reverse defendant's conviction under the plain-error rule. That rule applies where "(1) a clear or obvious error occurs and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Defendant argues that the evidence was closely balanced. We agree.

¶ 23 As defendant notes, the case came down to a credibility contest between defendant and Villa. Villa was clearly an accomplice, yet he was never prosecuted for his role in the crime. He testified only after receiving immunity. See *People v. Davis*, 353 Ill. App. 3d 790, 798 (2004) ("there may be a strong motivation for a witness to provide false testimony for the State in return for immunity"); see also *People v. Carreon*, 162 Ill. App. 3d 990, 993 (1987). Thus, as the trial court initially

recognized, defendant was entitled to have the jury instructed that it should view Villa's testimony with suspicion.

¶ 24 The State, arguing that the evidence was not closely balanced, contends that defendant had her own credibility problems. The State points out that defendant was an admitted drug user who had changed her story more than once and that her trial testimony was not believable. We concede the State this point, but it merely begs the question.

¶ 25 Defendant's trial testimony—that she believed Villa, a homeless drug addict, when he suddenly appeared with a \$3,000 check made out to someone named Jorge and insisted that Jorge was his real name—was less than compelling. However, if we fault defendant for claiming to trust Villa, then we must also fault the State for presenting Villa as its principal witness. To properly evaluate Villa's testimony, the jury should have been instructed that an accomplice's testimony must be viewed with suspicion.

¶ 26 The State further contends that McCloskey's testimony overwhelmingly supports the conviction. Defendant's reported statement that she knew the check did not belong to Villa hardly qualifies as a detailed confession. Moreover, defendant testified that she was nervous about being interviewed by a Secret Service agent, but specifically denied stating that she knew the check did not belong to Villa. The State did not produce a written or videotaped confession to corroborate the making of this statement, but relied solely on McCloskey's memory.

¶ 27 In *Wheeler*, the reviewing court held that defense counsel's failure to tender an instruction based on IPI Criminal 4th No. 3.17 was not harmless, given that the evidence was closely balanced and the State's case rested on the accomplice's testimony. The accomplice was the only witness who could identify the defendant as the shooter, and no physical evidence linked the defendant to the

crime scene. *Wheeler*, 401 Ill. App. 3d at 314. In *People v. Campbell*, 275 Ill. App. 3d 993 (1995), defense counsel was ineffective for not tendering the instruction where two alleged accomplices were the only witnesses who directly placed the defendant at the crime scene. They testified against the defendant in exchange for a reduced sentence and the dismissal of charges. *Id.* at 998-99. In *People v. Butler*, 23 Ill. App. 3d 108, 112 (1974), counsel was ineffective for not tendering the instruction where, other than the accomplice's testimony, the State's case was supported by only "highly questionable circumstantial evidence." Similarly, here, the State's case turned on Villa and was not overwhelming in any event.

¶ 28 The State relies on *People v. McCallister*, 193 Ill. 2d 63 (2000), and *Davis* in arguing that reversal is not required. Those cases, however, are distinguishable simply because the evidence apart from the accomplice's testimony was much stronger. In *McCallister*, an eyewitness described in great detail the defendant's commission of the murders. Several other witnesses, as well as physical evidence, corroborated the eyewitness's account, and the defendant's own testimony was dubious. *McCallister*, 193 Ill. 2d at 67-68, 73-78. In *Davis*, the defendant's testimony was uncorroborated, contrary to other unbiased testimony, and impeached by his prior inconsistent statements. *Davis*, 353 Ill. App. 3d at 798. Here, by contrast, there was no other eyewitness testimony or physical evidence connecting defendant to the crime.

¶ 29 Finally, the State argues that the error was harmless because the jury received the general witness-credibility instruction, which tells the jurors that in evaluating a witness's testimony they may "take into account *** any interest, bias or prejudice he may have." Illinois Pattern Jury Instructions, Criminal, No. 1.02 (4th ed. 2000). However, the *Wheeler* court rejected the argument

that the general witness-credibility instruction was an adequate substitute for the accomplice-witness instruction. *Wheeler*, 401 Ill. App. 3d at 313-14.

¶ 30 *McCallister* and *Davis* both noted that the respective juries had received the witness-credibility instruction, but only after finding that the evidence supporting the convictions was essentially overwhelming. Thus, these cases show that giving the jury the witness-credibility instruction will not alone save a conviction where the evidence is closely balanced.

¶ 31 Although we reverse defendant's conviction on the instructional issue, we also note that the evidence was sufficient to prove her guilt beyond a reasonable doubt. Thus, a retrial will not violate defendant's right to be free from double jeopardy. See *People v. Jiles*, 364 Ill. App. 3d 320, 330-31 (2006).

¶ 32 The judgment of the circuit court of Kane County is reversed and the cause is remanded for a new trial.

¶ 33 Reversed and remanded.