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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	
OF ILLINOIS,)	Appeal from the Circuit Court
)	of Du Page County.
Plaintiff-Appellee,)	
)	
v.)	No. 08—CF—582
)	
JOHNNY TAYLOR,)	Honorable
)	George J. Bakalis,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Hutchinson concurred in the judgment.

ORDER

Held: Where defendant failed to meet either prong of plain-error review, he forfeited his claim that the trial court failed to comply with Rule 431(b).

Where the record is silent as to reason defendant did not testify in light of defense counsel's opening statement promises, defendant's claim of ineffective assistance of counsel should be raised in a postconviction petition.

Defendant, Johnny Taylor, appeals his conviction for retail theft (720 ILCS 5/16A—3—A (West 2008)), arguing that he is entitled to a new trial because: (1) the trial court violated Illinois Supreme Court Rule 431(b) (Ill. S. Ct. R. 431(b), eff. May 1, 2007)); and (2) he received ineffective

assistance of counsel when defense counsel promised jurors in opening statements that defendant would testify and did not deliver on that promise. We affirm.

Defendant was charged with felony retail theft for knowingly taking possession of merchandise, valued less than \$150, from a WalMart store in Naperville with the intention of permanently depriving WalMart of the use or benefit of the merchandise and without paying for the merchandise on March 4, 2008. Defendant's trial commenced on February 25, 2009, and we summarize the portions that are relevant to the resolution of the issues raised in this appeal.

A. Voir Dire

We first note that defendant neither objected at the time of *voir dire* nor raised this issue in his posttrial motion. Regardless, we may review a forfeited error under the plain-error rule if either the evidence is so closely balanced that the jury's verdict may have resulted from the error and not the evidence, or the error was so serious that the defendant was denied a substantial right and thus a fair trial. *People v. Calabrese*, 398 Ill. App. 3d 98, 119 (2010). We must first determine whether an error occurred. *People v. Blair*, 395 Ill. App. 3d 465, 467 (2009).

Rule 431(b) provides:

"The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects.

The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

Defendant argues that the trial court violated Rule 431(b) in several manners. First, when collectively admonishing juror numbers 128, 33, 212, 7 and 35, the trial court improperly (1) advised them that defendant is presumed innocent before the trial begins; (2) failed to ask these jurors whether they understood the principles; and (3) failed to ask the jurors whether they understood and accepted that defendant was not required to provide any evidence in his defense. Juror number 205 was individually questioned per Rule 431(b) but was not questioned as to whether he understood the principles and was not questioned about the principle that defendant was not required to offer any evidence in his defense. The remaining jurors, numbers 261, 20, 166, 81, 103, 32, were similarly not questioned as to whether they understood the principles but only whether they accepted them and were not questioned about the principle that defendant was not required to present evidence in his defense.

Upon review of the record, we agree that the trial court failed to question potential jurors on the third principle listed in Rule 431(b). While the trial court questioned the jurors on whether they accepted that defendant did not have to prove his innocence, that is not the same as not being required to offer any evidence at all. Therefore, we do find that the trial court erred.

We next determine whether we may review this forfeited error by determining whether (1) the evidence is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence, or (2) the error is so serious that defendant was denied a substantial right and thus a fair trial. *Blair*, 395 Ill. App. 3d at 467. Defendant in this case argues reversible error under both

prongs of plain-error review. We first address the supreme court's recent opinion in *People v. Thompson*, No. 109033 (October 21, 2010), which was issued following the parties' briefing in this case. *Thompson* directly confronted whether a Rule 431(b) violation warranted reversal under the second prong of the plain-error analysis.

In *Thompson*, without objection by the defendant, the trial court failed to individually ask any prospective juror if he understood or accepted that the defendant was not required to offer any evidence. *Thompson*, slip op. at 2-3. The defendant did not testify or present any other witnesses in his defense, and at the close of trial, the court properly instructed the jury that the fact that the defendant did not do so must not be considered in arriving at its verdict. *Thompson*, slip op. at 4. The defendant appealed, arguing that he was entitled to a new trial based on the trial court's failure to comply with Rule 431(b), and the appellate court agreed and remanded the cause for a new trial. The supreme court reversed the appellate court, holding first that a Rule 431(b) violation does not constitute a structural error that would require automatic reversal. *Thompson*, slip op. at 9. Second, the supreme court held that under the second prong of plain-error review, the defendant had the burden to establish that the Rule 431(b) violation resulted in a biased jury and that thus the error was so serious that it affected the fairness of his trial and challenged the integrity of the judicial process. *Thompson*, slip op. at 12. The defendant in *Thompson* did not present any evidence that his jury was biased. The record demonstrated that the trial court questioned the jurors in partial compliance with Rule 431(b) and properly admonished the venire regarding the principles embodied in Rule 431(b). *Thompson*, slip op. at 13. Thus, the supreme court held that the defendant did not satisfy the second prong of the plain-error analysis, and, further, it refused to adopt a bright-line rule of reversal to ensure compliance with Rule 431(b). *Thompson*, slip op. at 13-14.

Under *Thompson*, there is no structural error warranting automatic reversal when a trial court fails to comply with Rule 431(b). Further, unless defendant presents evidence that the Rule 431(b) violations resulted in a biased jury, the second prong of plain-error is not met. In this case, defendant presented no evidence that the trial court's Rule 431(b) violations resulted in a biased jury. Therefore, defendant's argument under the second prong of plain-error fails.

Unlike the defendant in *Thompson*, defendant in this case does argue that the first prong of plain-error review applies. Defendant argues that he is entitled to a new trial because the trial court's Rule 431(b) errors when coupled with the closely balanced nature of the evidence deprived him of a fair trial. He notes that there were no eyewitnesses to the crime, the videotape evidence did not contain audio, and defendant did not depart the store with any unpaid merchandise on his person. He made no incriminating statements to police. There was no accomplice testimony from his female companions pointing to his guilt. Without any overwhelming evidence of his guilt, defendant argues that he should be granted a new trial.

To show prejudicial error under the first prong, the defendant must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him. *People v. Herron*, 215 Ill. 2d 167, 187 (2005). The burden of persuasion remains with the defendant. *Id.* In a first-prong analysis, the defendant must show that the "quantum of evidence presented by the State against the defendant rendered the evidence 'closely balanced.'" *People v. Piatkowski*, 225 Ill. 2d 551, 566 (2007). "When error occurs in a close case, we will opt to 'err on the side of fairness, so as not to convict an innocent person.'" *Piatkowski*, 225 Ill. 2d at 566, quoting *Herron*, 215 Ill. 2d at 193.

We turn to evaluate the evidence adduced at defendant's trial. Jeff Prignano testified for the State. Prignano was employed with WalMart's loss prevention team. On March 4, 2008, Prignano was monitoring video surveillance for thefts. He saw defendant walk into the store in a long, quarter length jacket with a female. Defendant took a shopping cart, and he and the woman walked to the men's department. He selected a man's suit jacket and placed it in the cart. The couple then went to the women's department, near the fitting room and lingerie department. Defendant took a long nightgown off a rack and held it up. While he was looking backwards over his shoulder, the female bagged the suit jacket using a white, plastic bag she took out from her purse. Defendant and the woman proceeded to the back of the store near the infant department where Prignano lost sight of them briefly. They came out of the diaper area and walked back to the lingerie area. Defendant again took the nightgown off the hanger, held it up, blocking and shielding the cart. The female placed more items in the plastic bags. Another female met them and helped put other merchandise into the plastic bags. Shortly thereafter, the second female separated and walked away with her cart.

Prignano went to the sales floor at this point. He followed defendant and the female. The female was walking in front, carrying filled plastic bags. They left the cart inside, and the female proceeded to exit the building and defendant was right behind. They got into a car, and the Naperville police arrived and arrested both of them. Prignano identified the items that he saw on the videotape--the suit jacket, some lingerie items, footwear, diapers, and baby wipes. He also confirmed that the videotape was an accurate recording of what he saw. Prignano admitted that defendant did not carry any items out of the store. He admitted that he never saw defendant holding the purse belonging to his female companion which contained the plastic bags used to conceal merchandise.

Luke Swanson, a Naperville police officer, testified for the defense that he arrived at the Walmart store where Prignano met him in the parking lot and identified the individuals involved in the retail theft. Officer Swanson went inside the store and viewed the videotape of what Prignano had witnessed. He then arrested defendant.

In closing arguments, the State argued that defendant played the role of the "blocker," aiding the execution of the crime by using the nightgown to block anyone's view of his companion shoving merchandise in plastic bags. Accordingly, defendant was legally responsible for the person actually carrying the merchandise out of the store. Defense counsel argued that the only thing defendant was guilty of was holding up a nightgown and that maybe defendant wanted his companion to buy the nightgown. Regardless, defendant did not take any merchandise and was innocent.

The trial court admonished the jury that defendant was presumed innocent and that presumption was not overcome unless the State proved defendant's guilt beyond a reasonable doubt. The State had the burden of proving defendant's guilt beyond a reasonable doubt, and defendant was not required to prove his innocence. The court advised the jury that the fact that defendant did not testify must not be considered in any way in arriving at the verdict. The court instructed the jury that to sustain the charge of retail theft, the State had to prove: (1) that Walmart was a merchant; (2) that the merchandise was offered for sale in a retail establishment; (3) that defendant or one for whose conduct he is legally responsible knowingly took possession of the merchandise; and (4) that when he took possession, defendant or one whose conduct he is legally responsible intended to deprive the merchant permanently of the use of the merchandise without paying the full retail value of the merchandise.

During deliberations, the jury asked what would happen if they could not agree unanimously. The parties agreed that the court respond by stating "You're (sic) agreement on a verdict must be unanimous. You should continue to deliberate for a sufficient period of time to attempt to reach a verdict." Later that afternoon, the jury returned a guilty verdict.

We disagree with defendant that the jury's question proved that the evidence was closely balanced. The length of time a jury deliberates and the questions it submits are not always accurate indicators of whether the evidence in a case is closely balanced. *People v. Walker*, 211 Ill. 2d 317, 342 (2004). The length of time of deliberations is explicable here because there was not extensive evidence presented in this case but rather just the testimony of Prignano and Officer Swanson and the videotape. There was no dispute as to defendant's presence and conduct but merely whether his conduct satisfied the elements of retail theft. While that decision involved balancing the evidence, we do not agree that the trial court's error in not admonishing or questioning the jurors regarding the fact defendant was not required to present any evidence in his defense could have severely threatened to tip the scales of justice where defendant *did* present evidence in his defense. The trial court did admonish and question jurors on the fact that defendant did not have to prove his innocence. The quantum of evidence pointed to defendant having participated in the retail theft, namely the videotape of his conduct. Accordingly, we determine that defendant failed to meet the first prong of plain-error review.

B. Ineffective Assistance of Counsel

Defendant next argues that he is entitled to a new trial because his attorney rendered ineffective assistance of counsel when he promised the jury that he would present exonerating evidence but did not do so. To establish a claim of ineffective assistance of counsel, the defendant

must meet the two-prong test explained in *Strickland v. Washington*, 466 U.S. 668 (1984): (1) show counsel's performance was deficient and (2) the deficient performance resulted in prejudice. *People v. Phipps*, 238 Ill. 2d 54, 65 (2010). For the first prong, counsel's performance is deficient if it fell below an objective standard of reasonableness. *People v. Houston*, 226 Ill. 2d 135, 144 (2007). The defendant must overcome a strong presumption that, under the circumstances, counsel's conduct might be considered sound trial strategy. *Id.* To establish the second prong, there must be a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Id.* In other words, there must be a probability sufficient to undermine confidence in the outcome. *Id.* In order to prevail on a claim of ineffective assistance of counsel, a defendant must satisfy both the performance and prejudice prongs of *Strickland*. *Houston*, 226 Ill. 2d at 144-45. If a claim may be disposed of on the ground of lack of sufficient prejudice, that course should be taken and the court need not consider the quality of the attorney's performance. *People v. Everhart*, No. 1—08—3052 (November 5, 2010), slip op. at 6. When making this determination, we consider the record in its entirety and not isolated instances. *Id.* Effective assistance of counsel refers to competent, not perfect, representation. *Id.* An attorney's failure to provide promised testimony is not ineffective assistance of counsel *per se*. *Id.* at 7. The test is rather whether defense counsel's errors were so serious that, absent those errors, the result of the proceeding would likely have been different. *People v. Schlager*, 247 Ill. App. 3d 921, 932 (1993).

Defendant argues that his attorney promised jurors in opening statements that he would present exculpatory evidence instead of arguing that the State would simply not meet its burden. Prior to voir dire proceedings, the following colloquy occurred between the trial court and defense counsel, Jaime Escuder:

"THE COURT: Possible witnesses, okay. At this time Mr. Escuder, do you know if your client wishes to testify or not?

MR. ESCUDER: I don't expect that he will, your Honor.

THE COURT: You want me to inform the jury of his right not to testify?

MR. ESCUDER: Yes, please."

Two days later, defense counsel made the following remarks, in relevant part, during opening statements:

"[Defendant] is here sitting in this seat because of what two other female companions did on March 4th at a Walmart located in Naperville, Illinois. Now, [defendant] will tell you that he knew a Wanda Langston and a Patricia Johnson. And he at that time was dating Wanda Langston. And he told the police officer this. And he will tell you that Wanda asked him to take her to Walmart in order to basically shop and he did that. She couldn't drive. He has a valid license. He drove her--both to Walmart.

* * *

And too bad that the video won't have audio because I believe you will hear [defendant] trying to get Wanda to buy this nightgown. And he does this once, maybe twice. He's trying to convince her to get this nightgown that he likes. So he's holding it up. He's not shielding. He's not blocking. ***

And you'll hear that at some point, [defendant] gets a little tired of being with these women and he leaves because they start chitchatting. And he doesn't want to be bothered, so he walks out. And he goes outside. And at some point Wanda Langston and Patricia

Johnson come out of the store. They're being chased. [Defendant] had nothing on his person. ***

So I would just ask that you listen to the evidence. And at some point you're going to be asked to deliberate. And I'd ask that you find [defendant] not guilty not because the State didn't prove their case, but because he didn't do anything wrong."

After the State rested its case and defense counsel advised he would call one witness, Officer Swanson, the assistant state's attorney stated:

"Judge, one other thing. Since our intention is to go directly into closing arguments or jury instructions, the Defendant is not going to testify. There was much made of what you're going to hear about the Defendant's relationship with the people involved and what you purportedly could hear them talking about. I don't know if it's appropriate to re-admonish them that opening statements aren't evidence and--

THE COURT: They'll hear about that in the instructions."

That same day, defendant did not testify at trial and no evidence other than the testimony of Officer Swanson was presented. The record does not disclose a reason why defendant did not take the stand. Defendant does not allege that his counsel made opening remarks without consulting with him. He also does not allege that his counsel advised him not to testify. On this record, the State opines that we cannot determine whether counsel's decision to not present defendant's testimony that he was not involved in the theft was due to defendant's choice not to testify, sound trial strategy or incompetence, and we therefore should presume it was the result of trial strategy. In support, the State cites *People v. Manning*, 334 Ill. App. 3d 882, 893 (2002). However, *Manning* held that: "In sum, this court was not privy to discussions between defendant and his counsel, nor is it clear from

the record why defendant did not testify or whether he ever intended to testify. Because these matters are outside the record, they cannot be addressed on direct appeal." Thus, the *Manning* court did not address the issue on its merits, leaving it open for review in postconviction proceedings

Resolving defendant's claim, where the record is silent as to the reasons for defendant not testifying, involve matters *dehors* the record that could be more appropriately addressed in a proceeding for postconviction relief. *People v. Ligon*, No. 108855 (November 18, 2010), slip op. at 16 ("where, as here, the record is insufficient because it has not been precisely developed for the object of litigating a specific claim of ineffectiveness raised in the circuit court, thereby not allowing both sides to have an opportunity to present evidence thereon, such a claim should be brought on collateral review rather than direct appeal"). Because we decline to review defendant's claim of ineffective assistance of counsel here, the issue will not be barred by *res judicata* and the parties will be allowed to present evidence during postconviction proceedings. See *Ligon*, slip op. at 16-17.

We also find the other cases cited by the State in support of its position distinguishable in that the records in those cases were sufficient to review the defendants' claims of ineffective assistance of counsel. In *Schlager*, 247 Ill. App. 3d at 931, the hearings on the defendant's posttrial motion established that defense counsel's decision to not present certain evidence was based on sound trial strategy because the evidence lacked a proper foundation and the defendant did not testify because of severe credibility problems. *Id.* at 933. Further, defense counsel explained the reason that the defendant did not testify. *Id.* at 933-34. Similarly, in *People v. Nowicki*, 385 Ill. App. 3d 53, 84-5 (2008), the court had a sufficient record to review the defendant's claim of ineffective assistance of counsel and determine that defense counsel had elicited other testimony to raise the gist of the testimony the witness not presented.

Defendant cites to several cases in support of his ineffective assistance claim which we also find unpersuasive. In *People v. Briones*, 352 Ill. App. 3d 913, 919 (2004), the court declined to follow the reasoning in *Manning*, finding it counsel's responsibility to provide evidence in the record that he was not deficient, "i.e., that the determination was a result of the defendant's fickleness or of counsel's sound trial strategy due to unexpected events." Because the defense attorney failed to show in the record that the defendant changed his decision to testify or that because of unexpected events, sound trial strategy required breaking opening statement promises that the defendant would testify, the court found that counsel's performance was deficient. *Id.* However, the court found other errors, including allowing improper jury instructions to be given, also played a factor when it determined that the defendant was prejudiced by the reneged promise. *Id.* at 921. The State's case primarily involved the testimony of two witnesses to a fire that caused damage to property and their ability to identify the defendant in the dark. The defendant's proposed testimony that he was not at the scene of the fire would have refuted the evidence. *Id.* The court could not find that under its facts that the outcome of the defendant's trial was not affected by the reneged promise to the jury coupled with the other errors. *Id.* Distinguishably, defendant in this case does not raise other errors by counsel that should be factored into our analysis of counsel's effectiveness.

In *Hampton v. Leibach*, 347 F.3d 219, 226 (7th Cir. 2003), defense counsel made two promises: that the defendant would testify that he was present at the scene of a sexual assault at a concert but was not involved in the attack, and that the evidence would show that the defendant was neither a member of nor involved with any gang, which refuted witness testimony that a gang was responsible for the attack. The defendant did not testify and counsel did not present any evidence that refuted the defendant's alleged membership in a gang. *Hampton*, 347 F.3d at 226. The Seventh

Circuit, like the court in *Briones*, stated that when the failure to present promised testimony cannot be "chalked up to unforeseeable events, the attorney's broken promise may be unreasonable, for 'little is more damaging than to fail to produce important evidence that had been promised in an opening.' " *Hampton*, 347 F.3d at 257, quoting *Anderson v. Butler*, 858 F.2d 16, 17 (1st Cir. 1988). The damage may be particularly harmful when it is the defendant's testimony that fails to materialize because the jury's view of the defendant and his attorney may be tainted by the unfulfilled promise. *Hampton*, 347 F.3d at 257.

However, in *Hampton*, the court had the benefit of postconviction petition transcripts where defense counsel explained that he had anticipated the defendant testifying but later decided that it would be potentially harmful for the jury to hear that the defendant was present at the scene because the jury could use a "guilt by association" theory. *Hampton*, 347 F.3d at 258. The Seventh Circuit determined that the potential disadvantages of the defendant's testimony were ones that would have been obvious from the beginning and did not justify counsel's decision to make and renege on the promise to the jury. *Hampton*, 347 F.3d at 258. Further, the record contained evidence that counsel had access to evidence that would have supported his opening remarks that the defendant was not a member of a gang but counsel failed to pursue the evidence or submit it to the jury. *Hampton*, 347 F.3d at 259. Again, unlike in *Hampton*, we do not have the benefit of any posttrial motion hearings or postconviction proceedings to adequately review defendant's claim.

While defendant offers no explanation as to his decision not to testify, the State argues that the change in trial strategy and the unfulfilled promise of the expected testimony were due to "unexpected and unforeseeable circumstances." However, the State does not cite to anything in the record that supports this notion.

The State also argues that it can be inferred that the defense was vacillating about whether defendant would testify and decided not to call defendant when the State did not call other witnesses, including defendant's female companion. We cannot make such an inference based on the record because it is unclear as to the anticipated substance of the female companion's testimony.

Two days prior to making opening statements, defense counsel informed the trial court that he did not expect defendant to testify. Two days after that statement, defense counsel made repeated promises to the jury to present exculpatory testimony and evidence that defendant knew nothing about his companion's thefts. Counsel's promises were so strong that he went so far as to say that he wanted the jury to "find [defendant] not guilty not because the State didn't prove their case, but because he didn't do anything wrong." Less than a few hours later, counsel, without explanation, did not call defendant to testify. In such a short duration of time, we cannot presume sound trial strategy explains the turnabout in defense counsel's position. However, we also cannot presume that defense counsel was rendering ineffective assistance when it may well have been defendant's decisions that caused the turnabout. Rather, defendant's claim would be better suited for postconviction proceedings where evidence beyond the scope of the record may be presented.

Therefore, the judgment of the Du Page County circuit court is affirmed.

Affirmed.