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2011 IL App (3d) 100064-U

Order filed October 21, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Circuit Court
	) of the 14th Judicial Circuit,
	) Rock Island County, Illinois,
Plaintiff-Appellee,	)
	) Appeal No. 3-10-0064
v.	) Circuit No. 09-CF-815
	)
PAUL C. BARTHOLOMEW,	) Honorable
	) Frank R. Fuhr,
Defendant-Appellant.	) Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice Carter and Justice McDade concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for threatening a public official was affirmed because the trial court's failure to properly advise the jury in accordance with Supreme Court Rule 431(b) did not constitute plain error when the evidence unequivocally established defendant's guilt. Also, defense counsel was not ineffective for failing to object to admissible evidence and a prosecutor's closing argument.

¶ 2 After a jury trial, the defendant, Paul C. Bartholomew, was convicted of two counts of threatening a public official (720 ILCS 5/12-9(a)(1)(i), (ii) (West 2008)). One conviction was vacated, and the defendant was sentenced to time served, 30 months probation, and fines, costs,

and assessments. The defendant appealed, contending that: (1) the trial court violated Supreme Court Rule 431(b) by failing to ask the jury if it understood and accepted that the defendant's failure to testify could not be held against him; (2) his trial counsel rendered ineffective assistance of counsel for failing to object to the introduction of other crimes evidence and to the prosecutor's comments regarding the defendant's exercise of his right to remain silent; and (3) the defendant was entitled to $5 per day credit, satisfying the Crime Stoppers fee. We grant the $5 per day credit and otherwise affirm.

¶ 3 FACTS

¶ 4 The defendant was charged with two counts of threatening a public official. The first court was for threats made to a police officer; the second count was for threats made to the officer's police dog. During *voir dire*, the trial court informed the prospective jurors that the defendant was presumed innocent, that the State had the burden to prove the defendant's guilt beyond a reasonable doubt, and that the defendant was not required to offer any evidence in his own behalf. All the jurors indicated that they understood and accepted those principles. The trial court also advised the jurors that they would receive instructions on the law at the conclusion of the case. The trial court did not advise the jurors that the defendant's failure to testify could not be held against him. Defense counsel did not object.

¶ 5 The only witness to testify at the defendant's jury trial was police officer Brian Morrisey. Morrisey testified that on September 12, 2009, he arrested the defendant for criminal trespass at a tavern after the defendant refused to leave when the owner asked him to do so. The defendant was intoxicated. Morrisey testified that he opted to transport the defendant to the Rock Island County Jail, 20 to 30 minutes away, rather than the East Moline Police Department, which was

about a block away from the tavern. Morrisey testified that he made this decision because he was afraid that the defendant would bond out of the East Moline Police Department and return to the tavern.

¶ 6 The defendant was unhappy with Morrisey's decision, and the defendant became agitated and upset during the transport. According to Morrisey, the defendant managed to get his handcuffed hands in front of him and started screaming and banging on the partition between the front and back seats and the partition separating the K-9 kennel in the back seat. Morrisey testified that the defendant called him names and said that the next time the defendant saw Morrisey, the defendant was going to knock Morrisey out. The defendant threatened to kill the police dog. The defendant also made threats against other police officers, and stated that he knew where Morrisey and the other officers lived. The defendant also asked if Morrisey had any children. Morrisey testified that the defendant repeated the threats about a dozen times. Morrisey testified that he was concerned that the defendant actually did know where he lived. Morrisey also testified that he had been involved in a prior incident where the defendant had resisted arrest and fled, and Morrisey was injured during the pursuit. Morrisey testified that the defendant went to prison as a result of that incident.

¶ 7 On cross-examination, defense counsel acknowledged that the defendant's prior offense had been mentioned, so defense counsel asked details about the prior event. Morrisey testified that he originally ignored the defendant's yelling and threatening, until the defendant's behavior escalated. Morrisey stated that he was not worried about harm while they were in the car, but he had a reasonable apprehension of future harm by the defendant. Morrisey attempted to record the incident on his in-squad camera, but it was not functioning properly.

¶ 8 The defendant's motion for a directed verdict was denied. The defendant did not testify. During closing argument, the prosecutor stated that the defendant had "decided to stand on his right to remain silent. He can and should and that's fine. But what that does [is] leave us with the one officer who has told you what happened and I believe he has been pretty much uncontradicted." Defense counsel responded in his closing argument by noting that the defendant exercised his right to remain silent.

¶ 9 The jury was given instructions, including the instruction that the fact that the defendant did not testify could not be considered in any way in arriving at a verdict. The jury convicted the defendant of both counts. The defendant's motion for a new trial, arguing that the introduction of the prior offense was in error and that the prosecutor's comments on the defendant's failure to testify were improper, was denied. The trial court vacated the defendant's conviction on the second count (relating to the dog). The trial court sentenced the defendant to 30 months probation, 129 days in jail, with credit for 129 days of time served, and various costs, fines, and fees. The defendant appealed.

¶ 10 ANALYSIS

¶ 11 The defendant contends that the trial court erred when it failed to question the jurors in accordance with Supreme Court Rule 431(b) about whether they understood and accepted that a defendant's failure to testify cannot be held against him. The State agues that the defendant forfeited the error, and alternatively, the error did not rise to the level of plain error.

¶ 12 Rule 431(b) provides:

¶ 13 "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 ***." Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

¶ 14 The language of Rule 431(b) is clear and unambiguous and requires trial courts to ask each potential juror whether he or she understands and accepts each of the principles of the rule. *People v. Thompson*, 238 Ill. 2d 598 (2010). In this case, the trial court violated the rule by failing to question the potential jurors at the defendant's trial on the last principle, namely, that the defendant's failure to testify could not be held against him.

¶ 15 A violation of Rule 431(b), however, is not a structural error requiring automatic reversal. *Thompson*, 238 Ill. 2d at 610. Thus, we must determine if the defendant preserved the issue for review. To properly preserve an issue for appellate review, the defendant must object at trial and raise the issue in a posttrial motion. *People v. Allen*, 222 Ill. 2d 340 (2006). A defendant who fails to do both forfeits the issue on appeal. *People v. Enoch*, 122 Ill. 2d 176 (1988). In this case, the defendant forfeited the issue because defense counsel did not object during *voir dire*.

¶ 16 Plain errors affecting a defendant's substantial rights may be reviewed even when they were not brought to the attention of the trial court. Ill. S. Ct. R. 615(a) (eff. Aug. 1, 1987). Since we have already determined that the defendant failed to preserve the issue for review, and we have already determined that an error occurred, we must determine if the error is reversible under plain error review. Under the plain error rule, a reviewing court may consider a forfeited issue when: (1) the evidence is close, regardless of the nature of the error; or, (2) the error is so serious

that the defendant was denied a substantial right and a fair trial, regardless of the closeness of the evidence. *People v. Piatkowski*, 225 Ill. 2d 551 (2007). We review *de novo* the issue of compliance with a supreme court rule. *People v. Reed*, 376 Ill. App. 3d 121 (2007).

¶ 17 The defendant argues that the error is reversible under the first prong of the plain error analysis; namely, that the evidence was so closely balanced that the guilty verdict must have resulted from the error. In plain error analysis, the defendant bears the burden of persuasion. *People v. Herron*, 215 Ill. 2d 167, 187 (2005).

¶ 18 We find that the evidence unequivocally established the defendant's guilt. Morrisey testified as to the threats made by the defendant, and Morrisey was subjected to a thorough cross-examination by defense counsel. Since the defendant has failed to meet his burden of persuasion that the evidence against him was closely balanced, the error is not reversible under the plain error doctrine.

¶ 19 The defendant contends that he was denied effective assistance of counsel when his defense attorney failed to object to the other crimes evidence and to the prosecutor's closing argument comments on the defendant's failure to testify. Specifically, the defendant contends that neither were matters of trial strategy. The defendant argues that the other crimes evidence was inadmissible, particularly the fact that the defendant was imprisoned as a result. At a minimum, defense counsel should have requested a limiting instruction for the jury. The State argues that the evidence of the other crime was admissible to explain the police officer's perceived threat but, even if not, defense counsel's failure to object was trial strategy.

¶ 20 To establish a claim for ineffective assistance of counsel, a defendant must show that counsel's representation: (1) fell below an objective standard of reasonableness; and (2)

prejudiced the defendant's case. *Strickland v. Washington*, 466 U.S. 668 (1984). Under the first prong, the reviewing court must give deference to counsel's conduct within the context of the trial and without the benefit of hindsight. *People v. King*, 316 Ill. App. 3d 901 (2000). As such, the defendant must overcome a strong presumption that counsel's action or inaction was the result of sound trial strategy. *People v. Houston*, 226 Ill. 2d 135 (2007). Under the second prong, the defendant must show that, but for counsel's deficient representation, there is a reasonable probability that the outcome of the trial would have been different. *Houston,* 226 Ill. 2d at 144. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Houston*, 226 Ill. 2d at 149.

¶ 21 Evidence of other crimes is inadmissible to show a defendant's criminal propensity. *People v. Wilson*, 214 Ill. 2d 127 (2005). Propensity evidence is inadmissible because it has so much probative value that it may convince a jury to convict a defendant because he or she is a bad person and deny the defendant a fair opportunity to defend against the charged offense. *People v. Robinson*, 167 Ill. 2d 53 (1995). However, other-offenses evidence is admissible for any other purpose other than propensity, such as *modus operandi*, intent, identity, motive, or absence of mistake. *Wilson*, 214 Ill. 2d at 135-36. We review a trial court's decision to admit other-offenses evidence for an abuse of discretion. *Wilson*, 214 Ill. 2d at 136.

¶ 22 To convict a defendant of threatening a public official, the State has to prove that the public official's apprehension of bodily harm was reasonable. 720 ILCS 5/12-9(a)(1)(i) (West 2008). In this case, evidence of the prior offense was relevant to show why the police officer perceived the defendant's threats to be real. Since the evidence was admissible, the defendant cannot establish that he was prejudiced by his counsel's failure to object. See *People v.*

Thompson, 359 Ill. App. 3d 947 (2005) (defendant could not establish that he was prejudiced by the failure of his counsel to object to the admission of other-crimes evidence when the evidence was admissible).

¶ 23 The defendant also argues that he was denied effective assistance of counsel when his defense counsel failed to object to the prosecutor's comments regarding the defendant's failure to testify. The defendant contends that the comments were especially damaging when considered in light of the trial court's failure to properly *voir dire* the jurors on this issue. The State argues that the prosecutor's comments on the defendant remaining silent did not engender substantial prejudice.

¶ 24 A prosecutor's comments made during closing arguments will constitute reversible error if the comments engender substantial prejudice against the defendant so that it is impossible to determine whether the guilty verdict resulted from the comments. *People v. Hickey*, 178 Ill. 2d 256 (1997). We find that the prosecutor's acknowledgment that the defendant did not testify, and the observation that the trial consisted of the testimony of only one witness, did not engender substantial prejudice against the defendant. Thus, the defendant cannot prevail on a claim of ineffective assistance of counsel for his counsel's failure to object to the prosecutor's comments.

¶ 25 Finally, the defendant contends that he is entitled to a credit against the imposed $35 Crime Stoppers fee. The State acknowledges that the defendant is entitled to a $5 per day credit for each day of presentence incarceration, fully satisfying the fee. See 725 ILCS 5/110-14(a) (West 2008); *People v. Littlejohn*, 338 Ill. App. 3d 281 (2003) (crime stoppers' fee is a fine against which the $5 per day credit applies).

¶ 26 CONCLUSION

¶ 27 The defendant is entitled to a $5 per day credit in full satisfaction of the $35 Crime Stoppers fee imposed at sentencing. In all other respects, the judgment of the circuit court of Rock Island County is affirmed.

¶ 28 Affirmed.