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SECOND DIVISION
May 28, 2013

No. 1-11-0021
2012 IL App (1st) 110021-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 08 CR 18418-01
)	
JESSE COLEMAN,)	Honorable
)	Kevin M. Sheehan
Defendant-Appellant.)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Harris and Justice Quinn concurred in the judgment.

ORDER

Held: Where a jury was erroneously instructed on law of armed robbery, error was not reversible under the plain-error doctrine because evidence regarding defendant's use of a firearm during the crime was not closely balanced. Defendant's attorney was not ineffective for failing to object or tender the correct instruction, nor for failing to request a lesser-included instruction on simple robbery.

¶1 A jury convicted defendant Jesse Coleman of armed robbery with a firearm in violation of section 18-2(a)(2) of the Criminal Code of 1961 (720 ILCS 5/18-2(a)(2) (West 2008)). On appeal, he contends that he is entitled to a new trial because the jury was erroneously instructed on the elements of the crime, or alternatively because (1) his attorney was ineffective for failing to tender both the correct instruction and instructions for the lesser-included offense of simple

robbery, or (2) the venire was improperly questioned during *voir dire* pursuant to Illinois Supreme Court Rule 431(b) (eff. May 1, 2007). We affirm.

¶2 Late one evening in September 2008, Hosea Germany, the victim, was parking his car near a nightclub when he was approached by two men. The men spoke briefly with the victim and then one of them, whom the victim later identified as defendant, put an object up against the victim's temple. Although the victim was not completely certain, he believed that the object was a handgun. He testified that the object was about "hand-sized, like a .380," likely a semiautomatic pistol about four to five inches long. The victim stated that although he was fairly sure that the object was a handgun, he could not be entirely sure because he did not "stare the gun down to make sure it was a gun." After putting the object against the victim's head, defendant ordered the victim to get back into his car, where defendant rifled through the victim's pockets and took his wallet along with about \$55 in cash as well as the victim's wristwatch. Defendant then took some CDs from the console of the victim's vehicle. Defendant and the other man then fled.

¶3 After going inside the nightclub to call the police, the victim returned to the parking lot and flagged down two police officers who were in an unmarked patrol car. The victim explained what had happened and then accompanied the officers as they drove around the area looking for the two men. Not far away, the victim spotted two men whom he thought were the men who had robbed him. The officers cornered the men, but as they approached they saw defendant drop some items to the ground, which the victim later identified as the items that had been taken from him during the robbery. The victim also identified defendant as one of the robbers. Although the officers searched the vicinity for about 45 minutes, they were unable to find a gun. When they returned during daylight hours the next morning, however, they found a small

semiautomatic pistol near a fence about seven feet away from the spot where they had arrested defendant. Forensic testing revealed no fingerprints on the gun, but the victim later testified at trial that the gun was similar to the object that defendant had pointed at him during the robbery.

¶4 Defendant was charged by indictment with armed robbery, unlawful use of a weapon by a felon, and aggravated unlawful restraint. The State dropped the latter two charges before trial, so the case proceeded solely on the armed-robbery count.

¶5 The jury received two instructions that are relevant to this appeal. First, the jury received Illinois Pattern Instruction (IPI) (Criminal) 14.05, which defines armed robbery:

“A person commits the offense of armed robbery when he, while carrying on or about his person, or while otherwise armed with *a dangerous weapon*, knowingly takes property from the person or presence of another by use of force or by threatening the imminent use of force.” (Emphasis added.)

The jury also received IPI (Criminal) 14.06, which is the issues instruction for armed robbery.

The relevant instruction here is the third proposition, which read:

“*Third Proposition*: That the defendant, or one for whose conduct he is legally responsible, carried on or about his person *a dangerous weapon* or was otherwise armed with *a dangerous weapon* at the time of the taking.”

(Emphasis added.)

Defendant did not object to either of these instructions, and he did not request an instruction on the lesser-included offense of robbery. The jury found defendant guilty of armed robbery and the trial court sentenced him to 14 years of incarceration. Defendant appealed.

¶6 The primary issue on appeal is whether the trial court properly instructed the jury on the law of armed robbery. Armed robbery is defined by section 18-2(a) to include both the elements

of robbery as specified in section 18-1 of the Code (720 ILCS 5/18-1 (West 2008)), and one of the four additional elements listed in section 18-2(a). Defendant was charged with violating section 18-2(a)(2), which meant that the State was required to prove that he not only committed a robbery but also that during the offense he “carr[ie]d] on or about his person or [was] otherwise armed *with a firearm.*” (Emphasis added.) 720 ILCS 5/18-2(a)(2) (West 2008). Notably, defendant was not charged with a violation of subsection 18-2(a)(1), which covers situations where a defendant commits a robbery and “carries on or about his or her person or is otherwise armed with a dangerous weapon *other than a firearm.*” (Emphasis added.) 720 ILCS 5/18-2(a)(1) (West 2008).

¶7 The trial court, however, instructed the jury that in order to find defendant guilty of armed robbery, the State needed to prove only that defendant “carried on or about his person *a dangerous weapon* or was otherwise armed with *a dangerous weapon* at the time of the taking.” As can be seen from the emphasized language, this instruction conflates the elements of subsections 18-2(a)(1) and 18-2(a)(2). This is a problem because the two subsections establish separate and distinct crimes. See *People v. Barnett*, 2011 IL App (3d) 090721, ¶¶ 32-34. Moreover, armed robbery with a dangerous weapon is not a lesser-included offense of armed robbery with a firearm. See *id.* ¶ 38 (noting that the subsections are “mutually exclusive of each other”).

¶8 The armed-robbery instructions that the court gave to the jury were therefore an incorrect explanation of the law. The error is understandable, however, given the troubled history of section 18-2. Prior to 2000, armed robbery was defined simply as the commission of a robbery while carrying or otherwise armed with a dangerous weapon, which was left undefined. See 720 ILCS 5/18-2 (1998). In 2000, the legislature amended several different sections of the Code in

order to provide for enhanced sentences for crimes involving firearms. See Pub. Act 91-404 (eff. Jan. 1, 2000). The act amended section 18-2 to create the current distinction between armed robbery with a firearm and armed robbery with a dangerous weapon other than a firearm. The supreme court, however, invalidated portions of the act on proportionate-penalties grounds in 2002 and 2003. These decisions meant that the pre-2000 armed-robbery statute came back into effect. But in 2005, the supreme court reversed course and revived the 2000 amendments. The amendments remained in effect until the supreme court once again invalidated them in mid-2007. That invalidation was then cured by the legislature in an amendment that went into effect in October 2007. See generally *People v. McBride*, 2012 IL App (1st) 100375, ¶¶ 28-37 (explaining the history of the amendments to art. 18); see also *People v. Clemons*, 2012 IL 107821, ¶¶ 12-19 (explaining the effect of the 2007 legislative amendment).

¶9 So the applicable law for a particular armed-robbery case depends on the version of the statute in effect at the time of the indictment. Defendant was indicted in 2008, after the constitutional problems associated with the 2000 amendments had been sorted out by the courts and the legislature. Both parties agree that this means the trial court should have instructed the jury on the elements of section 18-2(a)(2) as it is defined in the 2000 amendments. The trial court, however, instructed the jury on the law applicable to the preamendment version of the statute. Given the fluctuations in the law the error is understandable, but it is still an error.

¶10 Yet defendant did not object to the erroneous instructions, so he has forfeited review of this issue and we can only consider it pursuant to the plain-error doctrine. See *People v. Herron*, 215 Ill. 2d 167, 175 (2005). An error is reversible under the doctrine only “(1) when a clear or obvious error occurred 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) when 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.” (Internal quotation marks omitted.) *People v. Eppinger*, 2013 IL 114121, ¶ 18. Under either prong, the defendant bears the burden of persuasion. See *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶11 Regarding the first prong, defendant argues that the evidence was closely balanced because the evidence was split on the issue of whether defendant was armed with a gun. Defendant notes that the victim was equivocal about whether the object that defendant pointed at him during the robbery was in fact a firearm, and he also notes that he was not in possession of a gun when he was arrested. Defendant points out that it was not until several hours later that the officers returned to the scene of an arrest and located a gun nearby, and even then no fingerprints were found on the gun and the victim could not positively identify the weapon as the object used during the robbery. Had the jury been properly instructed, defendant argues, it is reasonably likely that the jury would have decided that the State failed to prove that he had used a firearm during the robbery. Because of the faulty instruction, however, the State could (and, in fact, did) argue that it only needed to prove that defendant had used some dangerous weapon during the course of the crime, not that the weapon was in fact a firearm.

¶12 The problem with defendant’s argument is that there was no evidence that the object that defendant pointed at the victim’s head during the robbery was anything but a firearm. While the victim conceded under cross-examination that he was not absolutely certain that the object was a handgun, there was more than enough detail in his testimony to support the conclusion that it was. Moreover, even though defendant did not have a gun in his possession when he was arrested, a firearm very similar to the one that the victim described was found nearby after

defendant had been seen dropping items to the ground. In contrast, none of the evidence at trial indicated that the object might have been another kind of weapon or even some harmless object.

¶13 We know from the jury’s verdict that it found beyond a reasonable doubt that defendant was armed with some kind of dangerous weapon, and we also know that the evidence at trial overwhelmingly showed that the object was a handgun. It is therefore highly unlikely that the jury decided that the object was a dangerous weapon other than a firearm. Because the evidence about the nature of the object was not closely balanced, there is not a reasonable probability that the jury would have found defendant not guilty of armed robbery with a firearm had it been properly instructed. The error is therefore not reversible under the first prong of the plain-error doctrine.

¶14 Defendant also contends that the error is reversible under the second prong of the doctrine, under which “[p]rejudice to the defendant is presumed because of the importance of the right involved, regardless of the strength of the evidence.” (Internal quotation marks omitted.) *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). An error can be reversed under the second prong only when the error is “structural, *i.e.*, a systemic error which serves to erode the integrity of the judicial process and undermine the fairness of the defendant's trial.” (Internal quotation marks omitted.) *Id.* at 613-14. Structural errors are rare and have been recognized only in cases that involve “complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction.” *Id.* at 609. Jury-instruction errors, however, are not generally considered to be structural errors and are instead reviewed only under the first prong of the plain-error doctrine. See *People v. Glasper*, 215 Ill. 2d 167, 193 (2005); see also *People v. Anderson*, 2012 IL App (1st) 103288, ¶ 52. Consequently, even though the trial court’s

instruction to the jury was erroneous, it is not reversible under the second prong of the plain-error doctrine.

¶15 Defendant alternatively raises two ineffective-assistance-of-counsel claims. First, defendant contends that his attorney was ineffective for failing to object to the erroneous instruction and for failing to tender the correct instruction. In order to succeed on an ineffective-assistance-of-counsel claim, “a defendant must demonstrate that counsel's representation was objectively unreasonable and, but for the attorney's errors, there was a reasonable probability the outcome at trial would have been different. A defendant's claim must satisfy both parts of the *** test, and the failure to satisfy either part precludes a finding of ineffective assistance of counsel.” *People v. Milton*, 254 Ill. App. 3d 283, 289 (2004).

¶16 The analysis for an ineffective assistance of counsel claim is, however, similar to plain-error review under the first prong of the doctrine because in either case the defendant must show that he has been prejudiced. See *People v. White*, 2011 IL 109689, ¶ 133 (2011). But as we found above, it is not reasonably probable that the result of the trial would have been different had the proper instruction been given. Even if we were to find that defense counsel should have objected to the instruction, defense counsel’s failure to do so did not prejudice defendant. Defense counsel was therefore not ineffective for failing to object to the erroneous instruction or to offer the correct one.

¶17 Second, defendant contends that his attorney was ineffective for failing to ask for a jury instruction on the lesser-included offense of simple robbery. It is well settled, however, that an attorney’s trial strategy “is virtually unchallengeable and will generally not support an ineffective assistance of counsel claim.” *People v. Walton*, 378 Ill. App. 3d 580, 589 (2007). Importantly for this case, “[c]ounsel's decision to advance an all-or-nothing defense has been

recognized as a valid trial strategy and is generally not unreasonable unless that strategy is based upon counsel's misapprehension of the law.” *Id.*

¶18 In this case, an all-or-nothing strategy was entirely reasonable, given that it may have been defendant’s only chance of an acquittal because of the strength of the evidence against him. Defendant had been positively identified by the victim as one of the robbers and had been found in possession of the victim’s stolen property close to the scene of the crime, so it is unlikely that defendant could have avoided a conviction for simple robbery. But the State had chosen to proceed to trial on only a single count of armed robbery with a firearm, and the evidence regarding whether defendant had actually used a weapon during the robbery was the primary factual dispute. Had the State proven that defendant robbed the victim but failed to convince the jury that he had used a firearm, then defendant would have been acquitted of the sole charge against him. By not asking for a lesser-included instruction, defense counsel ensured that the State had no middle ground to fall back on in the event that it could not prove that defendant had been armed with a firearm during the crime. The fact that the strategy failed and that defendant was convicted on the greater charge does not mean that the decision was unreasonable. *Cf. id.* Defense counsel was therefore not ineffective for failing to request a lesser-included instruction on simple robbery.

¶19 The final issue that defendant raises is that the trial court erroneously questioned the jury during *voir dire* pursuant to Illinois Supreme Court Rule 431(b) (eff. May 1, 2007). Rule 431(b) requires the trial court to ask members of the venire, either individually or in groups, whether they understand and accept the four principles expounded in *People v. Zehr*, 103 Ill.2d 472, 477 (1984). In this case, not only did the trial court combine several of the principles into a single

question, but it also neglected to ask the potential jurors whether they agreed with the principle that defendant's decision not to testify cannot be held against him.

¶20 This issue is controlled by the supreme court's decision in *Thompson*. Defendant failed to object to the erroneous admonishments during voir dire, so this issue is also forfeit and may only be reviewed under the plain-error doctrine. See *Thompson*, 238 Ill. 2d at 611. The only question in determining error in this case is whether the trial court strictly complied with Rule 431(b) when questioning the jurors. The supreme court described the correct analysis as follows in *Thompson*:

“Rule 431(b) *** mandates a specific question and response process. The trial court must ask each potential juror whether he or she understands and accepts each of the principles in the rule. The questioning may be performed either individually or in a group, but the rule requires an opportunity for a response from each prospective juror on their understanding and acceptance of those principles.”
Id. at 607.

Both sides agree that the trial court neglected to ask the jurors whether they understood and accepted the fourth principle. The trial court therefore failed to comply with Rule 431(b)'s clear requirements, and that is error under *Thompson*.

¶21 Because defendant failed to preserve this issue, the remaining question is whether the error is reversible under the plain-error doctrine. As we already found above, the evidence was not closely balanced in this case, so the error is not reversible under the first prong of the doctrine. Moreover, the supreme court held in *Thompson* that a Rule 431(b) error of this kind is reversible under the second prong of the doctrine only when a defendant can demonstrate that the error resulted in impaneling a biased jury. See *Thompson*, 238 Ill. 2d at 613. However,

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defendant has not offered any evidence or argument that the jury was biased, and he has therefore failed to carry his burden under the second prong of the plain error doctrine. Therefore even though the trial court erred by failing to comply with Rule 431(b), the error does not require reversal under either prong of the plain-error doctrine.

¶22 Affirmed.