

2013 IL App (1st) 112820-U

THIRD DIVISION
July 31, 2013

No. 1-11-2820

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. 09 CR 21861
)	
JAMES WALLACE,)	Honorable
)	Neera L. Walsh,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.
Justices Pierce and Mason concurred in the judgment.

ORDER

¶ 1 *Held:* Judgment on defendant's jury convictions of armed robbery and aggravated battery affirmed where defendant waived claim that the trial court erred in failing to explicate a point of law raised by the jury during deliberations; plain error review inapplicable.

¶ 2 Following a jury trial, defendant James Wallace was found guilty of armed robbery and aggravated battery, then sentenced to concurrent, respective terms of 12 and 4 years in prison. On appeal, defendant does not contest the sufficiency of the evidence to sustain his convictions. He solely contends that the trial court committed reversible error by failing to explicate a point of law raised by the jury during deliberations; *i.e.*, the definition of "abet." He thus requests that we reverse his convictions and remand his case for a new trial.

¶ 3 The charges filed against defendant in this case stemmed from an incident that occurred in the early morning hours of November 15, 2009, in an apartment located at 1600 South St. Louis Avenue (the apartment) in Chicago, Illinois. During this incident, defendant and co-defendant Darryl Lee, who is not a party to this appeal, were involved in an altercation with Dantreon Clark, which resulted in injuries to Clark and the loss of some of his property.

¶ 4 Defendant was convicted based on evidence which established that on the night of the incident, the defendant and Lee were in the apartment when Clark arrived to loan money to Lowrell Collins, who lived there. As Clark attempted to leave the apartment, Lee and defendant physically attacked him. Lee initially hit Clark in the head with a large stick, which caused Clark to bleed profusely, then repeatedly hit him with the stick. Defendant struck Clark in the face with his fist, and told him to "break yourself," a street phrase meaning "give me everything you got." Defendant and Lee went through Clark's pockets and removed his car keys, cellular telephone, and money, then searched Clark's car and boots before leaving the scene. Clark sought help from police, and was treated for his injuries at a hospital.

¶ 5 Officer Michael Trobiani testified that when he assisted Clark on the night of the incident, he observed that Clark was battered, bleeding from the head, and was "extremely traumatized, emotional, stressed and kind of scared." Clark described the incident to Officer Trobiani and his partner, and provided the names of his attackers.

¶ 6 Collins testified for the defense that after Clark loaned him money, he went to the bathroom and remained there for four or five minutes. He did not hear any altercation during that time, but when he subsequently entered the kitchen, he saw defendant bending over Clark, who was on the floor, and it appeared that defendant was assisting him in getting up off the floor, Collins further testified that he did not see defendant take anything from Clark.

¶ 7 In rebuttal, Assistant State's Attorney Angela Carlisle testified that she memorialized a written statement which Collins agreed to give on November 17, 2009, then reviewed and signed. Therein, Collins stated that while he was in the bathroom on the night of the incident, he thought he heard a table fall to the floor. Collins further stated that when he exited the bathroom, he saw Clark lying on the floor and bleeding from the head. He also saw defendant and Lee, who was holding a large stick, standing over Clark.

¶ 8 Following the close of evidence, the State and defense presented closing arguments. The trial court then issued jury instructions, which included the following instruction:

"A person is legally responsible for the conduct of another person when, either before or during the commission of an offense, and with the intent to promote or facilitate the commission of an

offense, he knowingly solicits, aids, abets, or agrees to aids [*sic*] or attempts to aid the other person in the planning or commission of an offense. The word 'conduct' includes any criminal act done in furtherance of the planned and intended act."

¶9 The jury began its deliberations about 7:09 p.m., and, approximately two hours later, the jury submitted the following question to the trial court: "What does abet mean?" After the trial court read the question in the presence of the State and defense counsel, the following colloquy ensued:

"MR. NATHAN (Defense Counsel): I think we should tell them that they've heard all the evidence, they've been instructed and to continue to deliberate. And I can argue further if you'd like.

THE COURT: Please.

MR. NATHAN: I think the word 'abet' is commonly used, one word that is commonly understood. Further I.P.I. does not provide a definition on 'abet.' I think the absence of a definition provided by the I.P.I. committee indicates that we do not want the word "abet" further designed. I believe the accountability instruction is sufficient. And just practically, which definition do we use without guidance from the I.P.I. committee? I think it's not random but arbitrary which definition, which we would provide the jury. I think we should instruct them as I suggested.

Mr. NATHAN: And, Judge, because the accountability instruction uses disjunctives like 'aid or abet,' I think they can use the rest of the instruction to help them reach a wordable definition of 'abet.' That's why the I.P.I. phrases it that way, giving them so many disjunctions, well, it's a conjunction. I think that those are the words to help provide meaning to the word 'abet.' I think it's sufficient."

The parties then agreed that the court should instruct the jury as follows: "You have received all the instructions, continue to deliberate."

¶ 10 About ten minutes later, the jury submitted a second question: "May we please have a dictionary?" Defense counsel stated, "[t]hey're just trying to circumvent our answer to the last question." The State agreed, and defense counsel proposed that the jury be instructed to continue its deliberations. The court responded to the jury's question as follows: "Please continue to deliberate."

¶ 11 At 9:44 p.m., the jury submitted a third question, which read as follows, "May we call our homes?" The trial court stated that the jury's question was not a legal one, and noted that the jury was not supposed to have any outside communication. The parties agreed that "no," was the appropriate answer to the jury's question.

¶ 12 About 9:58 p.m., the jury sent a note stating, "[j]udge, we are agreed on one charge and deadlocked on the other," and was signed by the jury's foreperson. Defense counsel stated, "my suggestion is to tell them to continue to deliberate. It has only been two hours and forty minutes now it's too early to declare a hung jury." The parties agreed that, "please continue to deliberate," was

the appropriate response to the jury's question. Deliberations ended for the evening at 10:27 p.m., and on the following day, the jury found defendant guilty of armed robbery and aggravated battery.

¶ 13 On appeal, defendant contends that the trial court committed reversible error by failing to explicate a point of law in its responses to questions raised by the jury during deliberations. He argues that the jury's questions reflected its confusion concerning accountability, a substantive legal question that was pivotal to the State's burden of proof.

¶ 14 Before proceeding, we observe that defendant asserts that *de novo* review applies, citing *People v. Foskey*, 136 Ill. 2d 66, 76 (1990), which dealt with the issue of exigent circumstances justifying a warrantless arrest. Contrary to defendant's contention, a trial court's decision to answer or refrain from answering a question from the jury will not be disturbed absent an abuse of discretion. *People v. Reid*, 136 Ill. 2d 27, 38-39 (1990).

¶ 15 That said, the State maintains that defendant has waived the arguments he presents on appeal based on his acquiescence to the trial court's answers to the questions posed by the jury. We agree.

¶ 16 The record shows that when the trial court, the State, and defense counsel discussed the appropriate responses to each of the jury's questions, defense counsel vigorously advocated for the responses that the trial court ultimately gave. The record thus reflects that defense counsel not only agreed to the trial court's answers to the jury's questions, but actively participated in crafting those responses. Under these circumstances, defendant cannot now complain that the trial court's answers were an abuse of discretion. *People v. Averett*, 237 Ill. 2d 1, 23-24 (2010).

¶ 17 In reaching this conclusion, we have considered *People v. Morris*, 81 Ill. App. 3d 288 (1980), cited by defendant in support of his argument that "it matters not whether defense counsel, as in this case, agreed with the trial court's instruction." In *Morris*, the reviewing court found reversible error in the trial court's failure to answer the jury's question regarding accountability. *Morris*, 81 Ill. App. 3d at 290-91. In *Morris*, unlike the case at bar, no instruction on accountability was provided to the jury, and defense counsel did not actively participate in formulating the response that was given to the jury. *Morris*, 81 Ill. App. 3d at 289-90. Accordingly, we find *Morris* factually distinguishable from the case at bar.

¶ 18 In an effort to avoid the application of waiver to this issue, defendant asserts that we may consider it pursuant to the plain error doctrine. However, in doing so, he failed to present an argument on how either of the two prongs of the plain error doctrine is satisfied here, and thus forfeited plain error review of this issue. *People v. Hillier*, 237 Ill. 2d 539, 545-46 (2010).

¶ 19 Defendant additionally contends that a less rigid application of forfeiture is applied when the basis of the issue is the conduct of the trial judge. In so arguing, defendant cites *People v. Nevitt*, 135 Ill. 2d 423, 455 (1990), *People v. Sprinkle*, 27 Ill. 2d 398, 400-401 (1963), and *People v. Brown*, 200 Ill. App. 3d 566, 575 (1990). We observe, however, that these cases preceded *People v. McLaurin*, 235 Ill. 2d 478, 488 (2009), where the supreme court clarified that relaxation of the forfeiture rule for alleged judicial misconduct is applicable only under extraordinary circumstances, which defendant has failed to address or show in this case.

¶ 20 Finally, in his opening brief, defendant states, "[i]n addition, the failure to object to the circuit court's lack of response was ineffective assistance of counsel." Defendant then asserts that regardless of whether defense counsel agreed with the court's response, this issue must be reviewed under plain error, making no further mention of ineffective assistance of counsel or developing an argument thereon.

¶ 21 Under these circumstances, we need not substantively address this argument, as defendant's single mention of it was subsumed in his cursory contention that plain error is applicable here. As addressed above, by failing to discuss how either prong of the plain error doctrine applies to this case, he has forfeited the issue. *Hillier*, 237 Ill. 2d at 547.

¶ 22 Defendant's reference to *Strickland v. Washington*, 466 U.S. 668 (1984), as the standard for evaluating ineffective assistance of counsel in his reply brief does not alter our conclusion. Defendant devotes one sentence to discussing *Strickland*, and merely states that "it is clear" that counsel's deficient performance subjected him to prejudice. To the extent that this constitutes an attempt to raise a substantive argument of ineffective assistance of counsel in his reply brief, he is barred from doing so by Illinois Supreme Court Rule 341. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

¶ 23 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 24 Affirmed.