

No. 1-12-2332

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THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court
Plaintiff-Appellee,)	of Cook County
)	
v.)	No. 11 CR 7584 (01)
)	
ANTHONY BROWN,)	Honorable
)	Arthur F. Hill, Jr.
Defendant-Appellant.)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held:* On appeal following the defendant's conviction for burglary, the appellate court held the admission of testimony and references to a radio dispatch call specifying a "burglary in progress" or a "burglary call" was harmless error. Defense counsel's failure to object to the references to a "burglary in progress" did not constitute ineffective assistance of counsel.

¶ 2 Following a jury trial in the circuit court of Cook County, defendant Anthony Brown was found guilty of burglary (720 ILCS 5/19-1(a) (West 2010)). The circuit court sentenced Brown to 12 years in the Illinois Department of Corrections. Brown appeals his conviction, arguing he is entitled to a new trial where the State repeatedly relied on an out-of-court statement regarding a "burglary in progress" to bolster its theory that Brown was not a mere trespasser, but had the

1-12-2332

intent to commit theft. Brown contends the admission of the statements was plain error and his counsel's failure to object to their admission constituted ineffective assistance of counsel. For the following reasons, we affirm the judgment of the circuit court.

¶ 3

BACKGROUND

¶ 4 The record on appeal discloses the following facts. Brown, along with Leroy Williams and George James, was charged in connection with an unauthorized entry at 1827 South Drake Avenue in Chicago. Brown, Williams, and James were tried simultaneously by separate juries, commencing on April 27, 2012.

¶ 5 At Brown's trial, Estevan Navarez testified he was the former owner of the property at 1827 South Drake Avenue, which was comprised of two flats and a garden basement as rental units. As a result of some financial difficulty in April 2011, Navarez executed a warranty deed in lieu of foreclosure, transferring the property to Chase Bank, which held the mortgage on the property. Navarez fulfilled his agreement with Chase Bank, which required him to ensure the building was vacant and clean. Four days prior to the incident at issue in this case, Navarez notified Chase Bank the building was clean.

¶ 6 Navarez testified that on April 20, 2011, the Wednesday prior to the Easter Sunday at issue, the entrances and windows to the building were boarded up, although a photograph of the property depicted the basement entrance at the rear of the building was not boarded and appeared damaged. Referring to a photograph of the basement apartment¹, Navarez testified that the

¹ The record indicates these photographs were taken by a police evidence technician during the investigation of the incident and admitted into evidence during testimony from

1-12-2332

bottom portion of the drywall had been removed by contractors for the bank, because a storm had caused flooding and the drywall became moldy. Navarez did not know how many individuals the bank sent to work on the building. Navarez also testified that when he last viewed the basement apartment the weekend prior to Easter, copper pipes depicted in the photographs were not on the floor as shown in photographic exhibits. Moreover, the water heater in that apartment had not been disconnected, as depicted in the photographs. In addition, the sink had not been on the floor and a medicine cabinet had not been in the bathtub, as shown in the photographs. Navarez added he did not know Brown, Williams, or Jones and had not authorized them to enter the property.

¶ 7 James McCombs, an inspector for a company which managed foreclosed properties for Chase Bank, testified the bank obtained control over the property on April 12, 2011. McCombs also testified he did not know Brown, Williams, or Jones and had not authorized them to enter the property.

¶ 8 Chicago police officer Marlon Lima testified he was working alone at approximately 8:40 a.m. on April 24, 2011, when he and another officer received a police dispatch call assigning them to investigate a burglary in progress at 1827 South Drake Avenue. According to Officer Lima, he and Officer Herman Salgado arrived at the property at approximately the same time.

¶ 9 Over an objection from Williams's counsel Officer Lima testified they proceeded to the rear of the building because the dispatcher had stated it was a burglary in progress. According to Officer Lima, the building appeared vacant with boarded up doors and windows. The back door

Chicago police Officer Marlon Lima, who preceded Navarez in testifying at trial.

1-12-2332

to the basement apartment, however, was open and appeared to have been kicked inward.

Officer Lima observed the door jamb was damaged and the metal piece into which the dead bolt would normally slide was hanging by one screw. Officer Lima heard shuffling sounds inside the basement apartment. Entering the apartment first, Officer Lima observed copper piping piled just inside the rear entrance, as well as a tool bag on the other side of the entrance. The tool bag contained a hacksaw, keyhole saw, pliers, sheet metal cutters, phillips screwdriver, two pipe wrenches, a small flashlight, and a pointed tool designed to make punctures.

¶ 10 Because the drywall did not extend all the way to the ground, Officer Lima was able to observe someone's legs in a center room. Officer Lima announced his office. Officer Lima also announced, "I've got somebody here" to Officer Salgado and other officers arriving at the scene. Brown, whom Officer Lima identified in court, was the first person Officer Lima observed in the apartment. Officer Lima testified he placed Brown in handcuffs because Brown was inside a vacant building which the officer believed was in the process of being burglarized.

¶ 11 Subsequently, Officer Lima observed Officer Salgado place James into custody. Officer Lima left the basement and was escorting Brown into his police vehicle when he observed Officer James Tuman escorting Williams from the building. Officer Lima identified Brown, James and Williams in court.

¶ 12 Officer Salgado testified over defense objections he was working alone shortly before 9 a.m. on April 24, 2011, when he responded to a report of a burglary in progress at 1827 South Drake Avenue. Officer Salgado's testimony regarding his arrival at the scene and investigation of the building was substantially similar to Officer Lima's testimony. Officer Salgado testified he

1-12-2332

went to the basement apartment's front room, where he observed James and placed James into custody. Officer Salgado left the basement and was escorting James into his police vehicle when he observed Officers James Tuman and Kellie Doyle escorting Williams from the building.

Officer Salgado identified Williams, Brown, and James in court.

¶ 13 Following closing arguments and jury instructions, at approximately 12:50 p.m., the jury began deliberating on the case. At approximately 2:44 p.m., the jury submitted notes to the trial judge, inquiring about the time limit for a hung jury, as well as the definitions of "reasonable doubt," "circumstantial evidence," and "reasonable inference." The trial judge responded there was no time limit, the jury had its instructions and should continue to deliberate. At approximately 4:20 p.m., the jury reached a verdict, finding Brown guilty of burglary.

¶ 14 On May 30, 2012, Brown filed a posttrial motion for a new trial. On July 18, 2012, the trial court denied Brown's posttrial motion and proceeded to a sentencing hearing. After considering the materials in the presentence investigation report and the factors in aggravation and mitigation of the offense, the trial judge determined Brown's criminal record required Brown to be sentenced as a Class X offender and imposed a sentence of 12 years in the Illinois Department of Corrections. On July 25, 2012, Brown filed a timely notice of appeal to this court.

¶ 15 DISCUSSION

¶ 16 On appeal, Brown argues he is entitled to a new trial where the State repeatedly relied on an out-of-court statement regarding a "burglary in progress" to bolster its theory that Brown was not a mere trespasser, but had the intent to commit theft. Section 19-1(a) of the Illinois Criminal Code of 1961 provides that a person commits burglary "when without authority he knowingly

1-12-2332

enters or without authority remains within a building ***, with intent to commit therein a felony or theft." 720 ILCS 5/19-1(a) (West 2010). Brown's defense counsel set forth during his opening and closing arguments that the State failed to prove he entered the building with the intent to commit theft.

¶ 17 The State initially responds Brown forfeited the issue by failing to object to the argument and testimony at trial or in his posttrial motion. Brown concedes trial counsel failed to preserve the issue. In general, failure to raise an issue at trial in a posttrial motion forfeits the issue on appeal. *E.g., People v. Johnson*, 238 Ill. 2d 478, 484 (2010) (citing *People v. Enoch*, 122 Ill. 2d 176, 186 (1988)). Illinois Supreme Court Rule 615(a) allows courts of review to by-pass the rules of forfeiture to note "[p]lain errors or defects affecting substantial rights." *People v. Eppinger*, 2013 IL 114121, ¶ 18. Under Illinois' plain error doctrine, a reviewing court may consider a forfeited claim when:

" (1) 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) 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 strength of the evidence." *Johnson*, 238 Ill. 2d at 484 (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)).

The plain error doctrine is intended to ensure a defendant receives a fair trial, but it does not guarantee every defendant a perfect trial. *Johnson*, 238 Ill. 2d at 484. Rather than operating as a general savings clause, it is construed as a narrow and limited exception to the typical forfeiture

1-12-2332

rule applicable to unpreserved claims. *Id.* The burden of persuasion rests with the defendant under both prongs of the plain error analysis. *People v. Sargent*, 239 Ill. 2d 166, 190 (2010).

The ultimate question of whether a forfeited claim is reviewable as plain error is a question of law reviewed *de novo*. *Johnson*, 238 Ill. 2d at 485.

¶ 18 Generally, the first step of plain-error review is to determine whether any error occurred.

Thompson, 238 Ill. 2d at 613. A defendant is guaranteed the right to confront the witnesses against him by the confrontation clauses of both the United States and Illinois Constitutions.

U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. *People v. Smith*, 141 Ill. 2d 40, 76-77 (1990);

M. Graham, Cleary & Graham's Handbook of Illinois Evidence §§ 801, 807 (7th ed. 1999). The

fundamental reason for excluding hearsay is the lack of an opportunity to cross-examine the declarant. *People v. Shum*, 117 Ill. 2d 317, 342 (1987). Testimony about an out-of-court

statement which is used for a purpose other than to prove the truth of the matter asserted in the statement, however, is not hearsay. *People v. Williams*, 181 Ill. 2d 297, 313 (1998). For

example, an out-of-court statement is allowed where it is offered for the limited purpose of

showing the course of a police investigation where such testimony is necessary to fully explain

the State's case to the trier of fact. *Id.* (and cases cited therein). Thus, we turn to address whether

the references to a "burglary in progress" and a "burglary call" were properly admitted to explain

the police investigation. Admissibility of evidence is within the discretion of the trial court, and

its ruling will not be reversed unless there has been an abuse of discretion. *Id.*

¶ 19 This court has upheld several challenges to police radio messages. *People v. Jura*, 352 Ill. App. 3d 1080, 1086 (1st Dist. 2004); *People v. Edgecombe*, 317 Ill. App. 3d 615, 627 (1st Dist. 2000); *People v. Warlick*, 302 Ill. App. 3d 595, 598-99 (1st Dist. 1998). In *Jura*, we held the trial court erred by admitting testimony by three officers, in a gun possession case, that a police radio broadcast had provided the location and description of a person with a gun and that defendant's location and description matched it. *Jura*, 352 Ill. App. 3d at 1086-88. This court ruled the repetition of the hearsay by each officer went beyond properly explaining what investigation was undertaken. *Id.* at 1088. We observed the substance of the hearsay statements relied upon by the State directly addressed the very essence of the dispute, *i.e.*, whether the defendant was the man who committed the crime. *Id.* (citing *People v. Gacho*, 122 Ill. 2d 221, 248 (1988)). The *Jura* court also determined the error was not harmless where the improper testimony was elicited repeatedly and the State relied upon it in its opening statement and closing argument. *Jura*, 352 Ill. App. 3d at 1089-91. In *Edgecombe*, we held the trial court erred in admitting an officer's testimony about a radio call that a vehicle's occupants had fled after a vehicle stop; that the police apprehended one occupant (who later became the defendant); and that the vehicle matched the description of the getaway vehicle in an armed robbery. See *Edgecombe*, 317 Ill. App. 3d at 627 (reversing and remanding for a new trial based on remarks concerning the defendant's failure to testify). In *Warlick*, we held the trial court erred in admitting an officer's testimony that he had received a radio call about "a burglary in progress," when the sole defense at trial was that defendant had been seeking shelter, not to burglarize. *Warlick*, 302 Ill. App. 3d at 600-01. The *Warlick* court, however, held that the error was

1-12-2332

harmless, where the issue was not whether Warlick was in the building without authority, but the sufficiency of the evidence regarding Warlick's intent. *Id.* at 601. Compare with *People v. Townsend*, 275 Ill. App. 3d 200, 203, 206 (1st Dist. 1995) (a police radio dispatch about an "armed robbery in progress" was admissible, where the issue at trial was whether the defendant had committed the robbery, not whether a robbery had occurred).

¶ 20 This case is distinguishable from *Jura* and *Edgecombe*, insofar as the radio dispatch here did not contain details of the offense or describe a suspect. The State, however, also argues this case is more similar to *Townsend* than *Warlick*. We disagree. The issue in this case is identical to that in *Warlick*, *i.e.*, whether the defendant in a burglary case had the required intent. Absent the required intent, it cannot be said identity is the issue, as it was in *Townshend*. In this case, as in *Warlick*, the radio dispatch of a "a burglary in progress" had slight or no relevance when offered for a nonhearsay purpose, but a serious issue in the case was whether a burglary in fact was taking place. *Warlick*, 302 Ill. App. 3d at 600. Accordingly, the admission of the testimony, and the references to it in the State's opening statement and closing argument, were error.

¶ 21 The remaining question is whether the admission of the testimony and references were harmless error. "Erroneous admission of hearsay will not be held reversible if there is no reasonable probability the jury would have acquitted the defendant had the hearsay been excluded." *Warlick*, 302 Ill. App. 3d at 601. Moreover, in cases where testimonial hearsay has been admitted, "if an error was harmless, it most certainly cannot rise to the level of plain error." *People v. Leach*, 2012 IL 111534, ¶ 141.²

² Brown also argues the error may meet the second prong of plain-error analysis. This

¶ 22 We are mindful that in this case, as in *Jura*, the improper testimony was elicited repeatedly and the State relied upon it in its opening statement and closing argument. See *Jura*, 352 Ill. App. 3d at 1089-91. On the other hand, the detail of the improperly admitted testimony in *Jura* was more prejudicial, and thus more likely to have affected the jury, than the general dispatch in *Warlick* or this case.

¶ 23 Moreover, as in *Warlick*, the issue is the defendant's intent. "Intent is a state of mind which can be inferred from surrounding circumstances." *People v. Richardson*, 104 Ill. 2d 8, 12 (1984). "The crime of burglary requires that its elements often be proved by circumstantial evidence." *Id.* at 13. "In a burglary case, the relevant surrounding circumstances include the time, place and manner of entry into the premises, the defendant's activity within the premises, and any alternative explanations offered for his presence." *Id.* On this final point, our supreme court has observed:

"We are of the opinion that in the absence of inconsistent circumstances, proof of unlawful breaking and entry into a building which contains personal property that could

court considered this type of error under both prongs of the plain-error analysis in *People v. Singletary*, 273 Ill. App. 3d 1076, 1084 (1995). Our supreme court, however, has limited the scope of the second prong of plain-error analysis to those errors that are to be considered structural errors, and noted that most constitutional errors are subject to a harmless error analysis. See *People v. Glasper*, 234 Ill. 2d 173, 196-200 (2009). Our supreme court has also held confrontation-clause violations do not amount to structural error. See *People v. Patterson*, 217 Ill. 2d 407, 428 (2005). Thus, Brown's argument on this point fails.

be the subject of larceny gives rise to an inference that will sustain a conviction of burglary. Like other inferences, this one is grounded in human experience, which justifies the assumption that the unlawful entry was not purposeless, and, in the absence of other proof, indicates theft as the most likely purpose." *People v. Johnson*, 28 Ill. 2d 441, 443 (1963).

¶ 24 In this case, absent the specific references to a "burglary in progress," the evidence in this case establishes the police were dispatched to 1827 South Drake early on an Easter Sunday morning, when contractors for the bank were unlikely to be working. The building was vacant, with boarded up windows and doors. The exception was the rear entrance to the basement apartment which was once boarded up, but now appeared to have been forced open. Inside the basement apartment, police discovered: a pile of copper piping; a tool bag filled with tools; a water heater, sink, and medicine cabinet removed from their normal locations; and Brown with his two codefendants. No alternative explanation for Brown's presence appears in the record. Although Brown's counsel observed the lack of evidence directly linking the bag of tools to Brown, the record nevertheless established the apparent forcible entry to and Brown's unexplained presence in a building containing the copper piping and other fixtures apparently removed from their normal locations (as well as the tools, if the jury were to assume they did not belong to Brown or his codefendants).³

³ We observe in passing that the photographic exhibits depicting the basement apartment also do not suggest the removal of the pipes and fixtures was the careful work of skilled contractors. The exhibits themselves are included in the record for the pending related appeal of

¶ 25 Brown suggests the evidence was in fact closely balanced. Although we disagree for the reasons previously stated, we observe Brown attempts to bolster his argument based on the length of the jury's deliberations, as well as the notes the jury submitted to the trial judge. "We reject the general premise a lengthy deliberation necessarily means the evidence is closely balanced." *People v. Nugen*, 399 Ill. App. 3d 575, 584 (2010). We similarly reject the notion that a jury's questions and requests to review evidence are proof that the jury entertained a reasonable doubt as to the accused's guilt. See *People v. Minniweather*, 301 Ill. App. 3d 574, 580 (1998). "That the jury asked for guidance during deliberations merely indicates that the jury took its job seriously and conscientiously worked to come to a just decision." *Id.* Moreover, attempts to evaluate the strength of the evidence in a particular case by assessing a jury's conduct during deliberations ignore contingencies such as the "holdout juror" (*People v. McCoy*, 405 Ill. App. 3d 269, 278 (2010)) and further ignore that it is impermissible to impeach a verdict with evidence of the jury's motive, method, or process of deliberations (*People v. Sullivan*, 2011 IL App (4th) 100005, ¶¶ 24-26).

¶ 26 In sum, although there were repeated references to a "burglary in progress" or a "burglary call" in this case, given the circumstantial evidence of intent in the record on appeal, we conclude there is no reasonable probability the jury would have acquitted Brown had these references been

codefendant Williams, whose trial was severed from, but conducted simultaneously to, Brown's trial. This court may take judicial notice of such records. *People v. Jimerson*, 404 Ill. App. 3d 621, 634 (2010).

1-12-2332

excluded. Accordingly, we conclude the error in this case was harmless and not plain error. See *Leach*, 2012 IL 111534, ¶ 141; *Warlick*, 302 Ill. App. 3d at 601.

¶ 27 Brown further argues in passing that he received ineffective assistance of counsel because his trial counsel failed to object to the "burglary in progress" testimony and references.

Generally, in order to show ineffective assistance of counsel, a defendant must establish: (1) counsel's representation fell below an objective standard of reasonableness; and (2) counsel's alleged deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We must show great deference to the attorney's decisions as there is a strong presumption that an attorney has acted adequately. *Strickland*, 466 U.S. at 689. A defendant must overcome the strong presumption the challenged action or inaction "might have been the product of sound trial strategy." *E.g., People v. Evans*, 186 Ill. 2d 83, 93 (1999) (and cases cited therein). To satisfy the prejudice prong of the *Strickland* test, a defendant must demonstrate a reasonable probability that the outcome of the trial would have been different or that the result of the proceeding was unreliable or fundamentally unfair. *Strickland*, 466 U.S. at 687; *People v. Evans*, 209 Ill. 2d 194, 220 (2004). Such a reasonable probability "is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. If a reviewing court finds that the defendant did not suffer prejudice, it need not decide whether counsel's performance was constitutionally deficient. *People v. Buss*, 187 Ill. 2d 144, 213 (1999).

¶ 28 In this case, having determined the error was harmless, Brown cannot show a reasonable probability that the outcome of the trial would have been different or that the result of the

1-12-2332

proceeding was unreliable or fundamentally unfair. Accordingly, Brown cannot establish a claim of ineffective assistance of counsel. See *Buss*, 187 Ill. 2d at 213.

¶ 29

CONCLUSION

¶ 30 In sum, the admission of the testimony regarding a "burglary in progress," and the references thereto in the State's opening statement and closing argument was harmless error and not plain error. Given the error was harmless, Brown cannot establish a claim of ineffective assistance of counsel. For all of the aforementioned reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 31 Affirmed.