2014 IL App (3d) 120371-U

Order filed December 30, 2014

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois.
Plaintiff-Appellee,	)	
	)	Appeal No. 3-12-0371
v.	)	Circuit No. 11-CF-366
	)	
KEMA FAIR,	)	
	)	Honorable Timothy M. Lucas,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Presiding Justice Lytton and Justice McDade concurred in the judgment.

ORDER

¶ 1 *Held*: The court's improper recitation of defendant's prior crimes to show intent denied defendant a fair trial, constituting second prong plain error notwithstanding evidence of defendant's guilt.

¶ 2 A Peoria County jury found defendant, Kema Fair, guilty of two counts of unlawful possession of a controlled substance with intent to deliver.

¶ 3 At trial, the court admitted evidence of defendant's four prior convictions. The court improperly recited two of defendant's prior convictions. Defendant filed a motion for new trial,

alleging that the trial court erred by admitting other-crimes evidence to show intent, knowledge, and lack of mistake. The court denied the motion. The court sentenced defendant to 23 years' imprisonment on count I, to be served at 75% time, and 11 years on count II. Defendant filed a motion to reconsider sentence, which the court denied.

¶ 4 Defendant appeals, claiming that the trial court erred by: (1) admitting other-crimes evidence; and (2) improperly reciting two of defendant's prior convictions. Defendant also argues that trial counsel was ineffective.

¶ 5 For the following reasons, we reverse and remand.

¶ 6 BACKGROUND

¶ 7 The State charged defendant with the following four criminal counts: (1) unlawful possession with intent to deliver a controlled substance, cocaine; (2) unlawful possession with intent to deliver a controlled substance, heroin; (3) unlawful possession of a controlled substance, cocaine; and (4) unlawful possession of a controlled substance, heroin.

¶ 8 Prior to trial, the State filed a "Notice of Intent" to use defendant's prior convictions to show evidence of intent, knowledge, and lack of mistake. Those prior convictions included: unlawful possession with intent to deliver cocaine in 2000; unlawful possession with intent to deliver cocaine in 2001; unlawful possession of heroin in 2006; and unlawful possession of cocaine in 2009. The motion included the date of the incidents, charges resulting in conviction, and the arresting authority. Defendant opposed the State's notice of intent to use defendant's prior convictions. Finding that the prior convictions were similar or identical to the instant charge, the trial judge granted the State's motion to use the prior convictions. The trial judge also found that the convictions were not so remote in time as to be irrelevant.

¶ 9 The matter proceeded to a jury trial in February 2013. At trial, Officer Richard Linthicum testified that on April 18, 2011, he obtained a warrant to search defendant and the house located at 1017 South Louisa in Peoria, Illinois. The police department set up surveillance at the Louisa residence. Officer Brett Lawrence testified that on April 19, 2011, at 5:55 a.m., he saw defendant and Marcus McCline leave the Louisa residence in a sport utility vehicle (SUV). Lawrence used his car to block defendant's car in the street. He ordered defendant and McCline out of the car. Officer Braun arrested defendant. Braun obtained a key to the Louisa house while searching defendant.

¶ 10 Officers brought McCline to a "raid van" and drove to the Louisa residence. When they arrived at the house, McCline brought a dog from the house to the garage. The officers opened the house door with the key Braun obtained from searching defendant. At the time of the search, two juveniles and a woman, Erica Miller whom the officer believed to be defendant's girlfriend, occupied the house. Linthicum testified that he found a cell phone in the master bedroom; it showed a call from defendant to Miller. He also observed a small bag of puppy food in a kitchen cabinet and adult dog food elsewhere in the kitchen. Officer Corey Miller found a nylon bag with "ropes for like a backpack" inside the puppy food bag. Inside the black nylon bag, he found a black Crown Royal bag containing baggies of suspect cocaine. Lawrence found a grinder in the kitchen cabinet, along with a plate and a card containing suspect cocaine residue. Officer Scott Jordan testified that he discovered a bill addressed to defendant on the shelf above the grinder.

¶ 11 Officer John Couve testified that he also participated in the search of the house. Couve found a black coat in the master bedroom containing five "bindles" of suspect heroin in an inside pocket of the coat. Couve also found mail addressed to defendant in the master bedroom. The

officers collected $421 pursuant to the search warrant, $351 from defendant and the remaining from the bedroom.

¶ 12 Lawrence identified all of the items he found in addition to the suspected cocaine found in the puppy food bag and suspected heroin found in the coat pocket. Lawrence testified that the baggies containing suspected cocaine were the only items submitted for fingerprint testing; no prints were found on the baggies. Michelle Dierker of the Illinois State Police forensic laboratory testified that the substance found in the puppy food bag tested positive for cocaine, totaling 107 grams; the bindles found in the coat tested positive for heroin, totaling .5 grams.

¶ 13 Following the search, Linthicum went to the station where defendant was in an interrogation room with Lawrence. During the interrogation, defendant stated that he was addicted to heroin. Defendant also said he lived in the house on Louisa since May or June of 2010; Miller and McCline occasionally stayed there.

¶ 14 Linthicum told defendant that he found cocaine in the puppy food bag in the cabinet. Defendant told the officer he owned a dog and only he fed the dog from the adult dog food bag. He further stated that any dog food in the house was his. Defendant said he knew about the puppy food, but did not know about the cocaine; the puppy food bag was in the house when he moved in. Defendant said the heroin in the coat was his; neither Miller nor McCline knew about the drugs. Defendant also told Linthicum that any drugs in the house were his, as well as the grinder. Defendant drove to Chicago every couple weeks to buy heroin. Defendant admitted to selling between 4 and 10 baggies of heroin the day prior to the search of the Louisa residence and defendant's arrest. Finally, defendant told the officers that he owned the motorcycle in the garage and that he paid $5,000 in cash for it.

¶ 15 The court deemed Sergeant Loren Marion "an expert in the area of the manufacture of cocaine and means and methods of packaging and distribution of cocaine in the Peoria area, as well as the manufacture of heroin and means and methods of packaging and distribution of heroine in the Peoria area." Marion testified that the 107 grams of cocaine recovered valued at over $10,000. He opined that such amount is consistent with the intent to distribute. Marion stated that a user might typically possess 3.5 grams of cocaine. He testified that the card found could have been used to cut the product for packaging and distribution. Marion also stated that a grinder is consistent with the packaging and sale of heroin. The amount of heroin alone would not be indicative of intent to distribute, but the fact that the heroin was in five individual packages indicated that defendant was packaging and distributing the heroin. Marion did not find the types of objects used to ingest heroin or cocaine, which suggested that the individual in possession was selling, as opposed to using, the drugs. When officers find a large amount of drugs, but a small amount of money, it is likely that the dealer has just "re-upped his supply." Marion opined that the individual in possession of the heroin and cocaine possessed the drugs with the intent to distribute.

¶ 16 The court advised the jury that it would hear evidence describing defendant's prior offenses. The trial judge stated, "[t]he evidence will be received on the issue of the defendant's intent, knowledge and absence of mistake and may be considered by you only for that limited purpose. It is for you to determine what weight should be given to this evidence on the issues of the defendant's intent, knowledge, and absence of mistake." The court told the jury that defendant had been convicted of the following crimes:

"[U]nlawful possession with intent to deliver a controlled substance, being cocaine, in Peoria County on or about the incident

date of December 28, 2000;

[U]nlawful delivery of a controlled substance, being cocaine, in Peoria County for an incident occurring on January 25, 2001;

[U]nlawful possession with intent to deliver a controlled substance in Peoria County for an incident occurring on January 26, 2006; [and]

[U]nlawful possession with intent to deliver a controlled substance, cocaine, in Peoria County for an incident occurring on January 13, 2009."

¶ 17 Defendant's 2006 and 2009 convictions involved simple possession. The court mistakenly told the jury that defendant was convicted of unlawful possession with intent to deliver in 2006 and 2009. Neither the State nor defendant alerted the court to its mistake. The State filed a motion for a directed finding, which the court denied.

¶ 18 The defense called William Cooper, who testified that he was a friend of defendant and they rode motorcycles together almost daily. Cooper said that in April of 2011, defendant lived on North Street. Cooper and defendant both kept their motorcycles in the garage at the Louisa residence. Sometimes Cooper would meet defendant at the Louisa residence. Other times, Cooper would meet defendant at the North Street house or at Cooper's house.

¶ 19 Defendant also testified at trial. He stated that he lived at 1726 North Street in April 2011. He spent time at the Louisa house with his fiancée, Erica Miller, but Miller also did not live at the Louisa residence. Defendant said McCline lived at the Louisa house and Richard Braxton occasionally resided there. Defendant's name was on the bill because the Louisa

residence was a "neutral zone meeting spot." Defendant occasionally showered and changed clothes there.

¶ 20 Defendant testified that the heroin in the coat was his; defendant uses heroin. He said he occasionally sold heroin in April of 2011, but the heroin in the coat was for his own use. Defendant admitted that he knew about the puppy food bag, but did not know what was inside the bag. He first became aware that there was cocaine in the puppy food bag while the police interrogated him.

¶ 21 The jury found defendant guilty of possession with intent to deliver heroin and cocaine. Defendant filed a motion for new trial, arguing that the court erred in admitting the other-crimes evidence to show intent, knowledge, or lack of mistake. Counsel did not address the fact that the court had wrongfully stated that 2006 and 2009 convictions were for possession with intent to deliver, as opposed to possession. The court denied the motion.

¶ 22 The court stated that the normal sentencing range for the cocaine conviction was 9 to 40 years and the cocaine conviction must be served at 75% due to truth in sentencing. 730 ILCS 5/3-6(a)(2)(V) (West 2011). The court sentenced defendant to 23 years on the cocaine conviction and 11 years on the heroin conviction, to be served concurrently. Defendant filed a motion to reconsider sentence, which the court denied.

¶ 23 Defendant appeals.

¶ 24 ANALYSIS

¶ 25 I. Recitation of Defendant's Prior Convictions.

¶ 26 Defendant argues that the trial court erred by telling the jury he had two recent convictions for possession of drugs with intent to deliver, when, in fact, he had not. The State

concedes the error, but argues that defendant forfeited the issue by failing to object to the error at trial. Alternatively, the State argues that the trial court did not commit plain error.

¶ 27 Failure to timely object at trial and raise the issue in a posttrial motion results in forfeiture of the issue on appeal. *People v. Johnson*, 218 Ill. 2d 125, 138 (2005) (citing *People v. Enoch*, 122 Ill. 2d 176, 186 (1988)). A reviewing court may consider a forfeited issue under the plain-error doctrine. *People v. Williams*, 139 Ill. 2d. 1, 14-15 (1990). We apply the plain-error doctrine to consider an unpreserved error 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 closeness of the evidence." *People v. Sargent*, 239 Ill. 2d 166, 189 (2010) (citing *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)).

¶ 28 There is no dispute that defense counsel failed to object to the improper recitation of defendant's convictions. Moreover, defendant did not raise the issue in his posttrial motion. Therefore, defendant forfeited the issue. We will review the issue under the plain-error doctrine. First, we must determine whether the trial court committed error. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). The parties do not dispute that the court erred by improperly reciting two of defendant's four prior convictions. We must now determine whether the court's error satisfies either prong of the plain-error doctrine. For the following reasons, we find that the trial court's error calls for reversal under the second prong of plain error.

¶ 29 A. Structural Error

¶ 30 The second prong of the plain-error doctrine is equated with structural error. *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009). Structural error is "a systemic error which serves to

'erode the integrity of the judicial process and undermine the fairness of the defendant's trial.' " *Id.* The supreme court has classified error as structural error in a limited class of cases. *Neder v. United States*, 527 U.S. 1, 8 (1999). Structural error includes complete denial of counsel, biased trial judge, racial discrimination in selection of grand jury, denial of self-representation at trial, denial of public trial, and defective reasonable-doubt instruction. *Thompson*, 238 Ill. 2d at 609 (citing *Washington v. Recuenco*, 548 U.S. 212, 218 n. 2 (2006)).

¶ 31 Here, the court improperly recited two of the four prior crimes. We find that the court's error denied defendant a fair trial. Our supreme court held that "[t]he erroneous admission of evidence of other crimes carries a high risk of prejudice and ordinarily calls for reversal." *People v. Lindgren*, 79 Ill. 2d 129, 140 (1980). Moreover, when setting out a list of examples of structural error, we do not think that the supreme court reasonably anticipated the likelihood of a trial judge committing the error committed here without defense counsel immediately objecting. The supreme court could not possibly have listed every error that constitutes structural error. We make it clear that we have neither the authority nor the inclination to broaden the definition of structural error. We do, however, hold that in light of the facts and issues involved in this case, the trial court's error was so far beyond the pale as to not only deny defendant a fair trial, but to also cast doubt on the integrity of the legal process. We do not find the evidence closely balanced. We are well aware that defendant testified that he sold drugs as recently as the day before his arrest. However, structural error calls for reversal regardless of the closeness of the evidence. *People v. Sargent*, 239 Ill. 2d 166 (2010).

¶ 32 The court told the jury that defendant was convicted in 2006 and 2009 for possession with intent to deliver, which is the same offense as the charged crime. The evidence of the prior convictions was offered to prove defendant's motive or intent to commit the offense for which he

was standing trial. Defendant's 2006 and 2009 convictions were actually for simple possession. Therefore, we reverse and remand this case for a new trial. We need not address the other issues on appeal.

¶ 33 CONCLUSION

¶ 34 For the foregoing reasons, the judgment of the circuit court of Peoria County is reversed and the cause is remanded for a new trial.

¶ 35 Reversed and remanded.