2015 IL App (3d) 130078-U

Order filed January 22, 2015

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IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court |
| | ) | of the 21st Judicial Circuit, |
| | ) | Iroquois County, Illinois, |
| Plaintiff-Appellee, | ) | |
| | ) | Appeal No. 3-13-0078 |
| v. | ) | Circuit No. 12-CF-154 |
| | ) | |
| JESSE V. THOMAS, | ) | Honorable |
| | ) | Gordon L. Lustfeldt, |
| Defendant-Appellant. | ) | Judge, Presiding. |

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JUSTICE CARTER delivered the judgment of the court.
Justice Wright concurred in the judgment.
Justice Holdridge specially concurred.

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**ORDER**

¶ 1 *Held*: (1) The trial court erred when it did not ask each juror if he or she understood and accepted the four Illinois Supreme Court Rule 431(b) principles, but this error was not plain error. (2) The State's misstatement of the evidence and comment on defendant's credibility did not deny defendant a fair trial.

¶ 2 After a jury trial, defendant, Jesse V. Thomas, was found guilty of unlawful delivery of a controlled substance within 1,000 feet of a school (720 ILCS 570/407(b)(3) (West 2012)). The trial court sentenced defendant to 10 years' imprisonment. On appeal, defendant argues that: (1)

his conviction must be reversed and the cause remanded for a new trial because the court did not ask all of the jurors if they both understood and accepted the principles stated in Illinois Supreme Court Rule 431(b) (eff. July 1, 2012); and (2) he was denied a fair trial because the State misstated the evidence in its closing argument and personally vouched for an informant's credibility in its rebuttal argument. We affirm.

¶ 3 FACTS

¶ 4 Defendant was charged by information with unlawful delivery of a controlled substance within 1,000 feet of a school, and the case proceeded to a jury trial.

¶ 5 Before jury selection, the court advised the venire that:

> "The State has the burden of proving the defendant guilty beyond a reasonable doubt. The defendant is presumed to be innocent of the charges against him, the defendant has the right to remain silent, is not required to testify, and if he chooses not to testify, you may not infer any guilt from his silence."

Thereafter, the court asked the first four potential jurors if they agreed and understood that: (1) the State must prove defendant guilty beyond a reasonable doubt; (2) defendant is presumed innocent of the charges against him; (3) defendant is not required to prove anything; and (4) defendant's guilt cannot be inferred from his decision not to testify. The potential jurors acknowledged that they agreed with and understood the four principles. Defense counsel and the State said that the court's inquiry was sufficient.

¶ 6 The State excused one of the first four, who was replaced by another potential juror. The court asked that person if she would "agree and accept *** that the State must prove the defendant guilty beyond a reasonable doubt and that the defendant is presumed innocent of the charges against him?" The court also asked if she agreed that defendant "doesn't have to prove

anything and if he chooses not to testify you cannot infer any guilt from his silence?" That potential juror indicated that she agreed and accepted the principles, and the State and defense accepted the first panel.

¶ 7 The next four potential jurors were called into the second *voir dire* panel. The court initially asked one of the four if she knew that: (1) the State must prove defendant's guilt beyond a reasonable doubt; (2) defendant is presumed innocent until proven guilty; (3) defendant is not required to prove anything; and (4) if defendant decides not to testify it may not be used to infer guilt. She indicated that she did not "have any problem with" and was "okay with" these principles. The court asked the other three potential jurors if they were asked the same questions, would they answer similarly. All three said they would give the same answers. The State and defense accepted the panel.

¶ 8 The four remaining jurors were then called. The court asked one of the four if he agreed that: (1) the State must prove defendant guilty beyond a reasonable doubt; (2) defendant is presumed innocent of the charges against him; (3) defendant is not required to prove anything; and (4) defendant's decision not to testify cannot be used to infer guilt. He indicated that he agreed with the principles without objection.

¶ 9 The court asked the next juror if she was "okay with the idea that the State must prove the defendant guilty beyond a reasonable doubt[;]" and "the defendant is presumed innocent until proven guilty[.]" She indicated that she was "okay with" the principles. The court then asked her if she understood that defendant was "not required to prove anything and if he chooses not to testify you may not infer any guilt from his silence?" She agreed.

¶ 10 The court asked the third panel member if she understood and agreed that the State must prove defendant guilty beyond a reasonable doubt; defendant is presumed innocent until proven

guilty; defendant is not required to offer any evidence; and if defendant does not testify it cannot be held against him. She indicated that she understood and accepted the principles. The court asked the last panel member if he agreed with the same four principles, and he said "yes."

¶ 11 At trial, Iroquois County Sheriff Investigator Clint Perzee testified that on August 28, 2012, he arranged a narcotics operation with confidential informant Avery Durflinger. Durflinger had previously told Perzee that defendant had offered to sell him heroin. Durflinger was paid $50 for his participation, and his pending criminal charges were reduced.

¶ 12 On the morning of August 28, 2012, Perzee and a second officer went to Durflinger's residence. The officers strip-searched Durflinger and found no drugs. Durflinger was then wired with a covert video camera and provided with $20 to purchase the heroin. The video recording from the covert camera was introduced into evidence and played for the jury. The video shows Durflinger walk out of the residence and meet defendant, and a $20 bill flashes across the field of view. Defendant nods and makes a thumbs up gesture. Durflinger walks back to the residence, where he stops at the front door for a few seconds and bends down toward a dog before he enters. Durflinger walks inside and hands something to Perzee, and Perzee holds a small, aluminum foil-wrapped item in front of the camera.

¶ 13 Perzee stated that once inside the residence, Durflinger handed him a cellophane wrapper that contained heroin wrapped in aluminum foil. Still pictures taken from the video were also introduced into evidence. Perzee testified that the photographs showed defendant standing in front of a school. Perzee also stated that he had watched Durflinger and defendant through a window, but was unable to see the transaction because of his position.

¶ 14 Durflinger testified that he had approached the Iroquois County sheriff's department about participating in controlled narcotics buys because he hoped that his assistance would

encourage the State to dismiss his pending criminal charges. Durflinger also wanted to "clean up the streets" because his son had found marijuana on the ground near the school.

¶ 15 On August 28, 2012, Durflinger notified the police that he had arranged a narcotics purchase from defendant. Before the sale, the officers searched Durflinger, fitted him with a covert camera, and gave him $20. Durflinger met defendant in front of his residence, gave defendant $20, and received a packet wrapped in aluminum foil and cellophane. Durflinger returned to his residence and handed the packet to Perzee. Durflinger was then strip-searched a second time.

¶ 16 Iroquois County Sheriff Investigator Eric Starkey testified that he conducted surveillance outside Durflinger's residence during the transaction. Starkey watched defendant exit a silver car and approach Durflinger. Starkey saw defendant and Durflinger talk, but he was unable to see the exchange. After Durflinger left, defendant got back into a silver car and drove away.

¶ 17 During its closing argument, the State argued that Durflinger's motivation to participate in the operation was "the story of his child coming up to him from the school across the street and saying, Daddy, what's this, and holding up a hypodermic needle." In rebuttal, the State argued that Durflinger participated in the buy, in part, because his child came to him with "this needle." The State also argued that Durflinger's testimony was not based on altruism, but his desire to "keep these drugs away from [his] family." The State believed Durflinger "when he says that[,]" and told the jury "[y]ou should, too."

¶ 18 The court instructed the jury, in part, that

> "[c]losing arguments are made by the attorneys to discuss the facts and circumstances in the case and they should be confined to the evidence and to reasonable inferences to be drawn from the evidence. Neither opening statements

nor closing arguments are evidence, and any statement or argument made by the lawyers which is not based on the evidence should be disregarded."

The court also instructed the jury that defendant is presumed innocent of the charge against him and that presumption is not overcome unless the jury is convinced beyond a reasonable doubt that defendant is guilty; the State has the burden of proving defendant guilty beyond a reasonable doubt; defendant is not required to prove his innocence; and the fact that defendant did not testify must not be considered in arriving at the verdict.

¶ 19 Following deliberations, the jury found defendant guilty of delivery of a controlled substance within 1,000 feet of a school. The court sentenced defendant to 10 years' imprisonment. Defendant appealed.

¶ 20 ANALYSIS

¶ 21 I. Rule 431(b)

¶ 22 Defendant argues that his conviction must be reversed and the case remanded for a new trial because the trial court asked only four jurors if they both understood and accepted the principles stated in Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). The State responds that defendant has forfeited this issue. Defendant agrees that he did not properly preserve this issue, but asks this court to review the issue for plain error.

¶ 23 At trial, defendant did not object to the court's questioning of the potential jurors and did not raise the issue in a posttrial motion. As a result, any claimed error can be reviewed only for plain error. See *People v. Herron*, 215 Ill. 2d 167, 181-82 (2005). The plain error doctrine allows unpreserved errors to be considered if either: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against defendant; or (2) the error was so fundamental and of such magnitude that it affected the fairness of the trial and challenged the

integrity of the judicial process, regardless of the closeness of the evidence. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The first step in plain error analysis is to determine whether error occurred. *People v. Wilmington*, 2013 IL 112938, ¶ 31.

¶ 24 Rule 431(b) requires that the trial court ask potential jurors whether they understand and accept "(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 if a defendant does not testify it cannot be held against him or her[.]" Ill. S. Ct. R. 431(b) (eff. July 1, 2012); *People v. Thompson*, 238 Ill. 2d 598, 607 (2010); see also *Wilmington*, 2013 IL 112938, ¶ 32. Prospective jurors may be questioned individually or in a group, but the method of inquiry must " 'provide each juror an opportunity to respond to specific questions concerning the [Rule 431(b)] principles.' " *Thompson*, 238 Ill. 2d at 607 (quoting Ill. S. Ct. R. 431(b) (eff. July 1, 2012)); see also *Wilmington*, 2013 IL 112938, ¶ 32.

¶ 25 In this case, the trial court questioned the jurors on the four Rule 431(b) principles, but failed to ask numerous jurors if they both understood and accepted the Rule 431(b) principles. Our supreme court has stated that Rule 431(b) mandates "a specific question and response process." *Thompson*, 238 Ill. 2d at 607; see also *Wilmington*, 2013 IL 112938, ¶ 32. The trial court's questioning of the jurors did not strictly comply with this process and, in this regard, the trial court erred. However, because this issue was forfeited, we must determine whether the error was reversible plain error.

¶ 26 Defendant only argues that the trial court's error was reversible under the first prong of the plain error doctrine, *i.e.*, that the evidence was so closely balanced that the error alone tipped the case against defendant. We disagree. In *People v. Belknap*, 2014 IL 117094, ¶ 49, the

supreme court directed reviewing courts to "undertake a commonsense analysis of all the evidence in context" when reviewing a first prong plain error argument. A "commonsense analysis" of the instant case reveals that the evidence of defendant's guilt was not close. The evidence at trial established that (1) Durflinger did not possess heroin before he interacted with defendant, (2) Perzee and Starkey watched Durflinger meet with defendant, and (3) Durflinger subsequently gave Perzee a packet containing heroin. The video recording of the incident showed Durflinger handing defendant $20 and Durflinger later handing an aluminum foil-wrapped item to Perzee. The video did not show Durflinger procuring the item from another source. Durflinger also testified that he purchased the heroin for $20 from defendant. Thus, after review of the evidence in a commonsense manner in the context of the totality of the circumstances we conclude that the evidence in this case was not closely balanced. Consequently, the evidence was not so close that the trial court's error tipped the scales of justice against defendant. See *Belknap*, 2014 IL 117094. In addition, the second prong of the plain error review does not provide a basis for excusing the procedural default because Rule 431(b) errors are not structural errors. *Thompson*, 238 Ill. 2d at 610-11, 613-15. Therefore, the trial court's error was not reversible plain error.

¶ 27 II. Closing Arguments

¶ 28 Defendant argues that he was denied a fair trial because, in its closing argument, the State misstated Durflinger's testimony and personally vouched for Durflinger's credibility. The State responds that defendant has forfeited review of this issue. Defendant asks that we review the issue for plain error.

¶ 29 As we have previously noted, the plain error doctrine bypasses the normal forfeiture principles and allows a reviewing court to consider an unpreserved error when the evidence is

close or the error is serious. *Piatkowski*, 225 Ill. 2d at 565. We have already concluded that the evidence in this case was not closely balanced. Therefore, our plain error review of this issue is limited to the second prong of the plain error doctrine. Before considering whether the plain error doctrine necessitates reversal, we must determine whether error occurred. *Wilmington*, 2013 IL 112938, ¶ 31.

¶ 30 "A prosecutor has wide latitude in making a closing argument and is permitted to comment on the evidence and any fair, reasonable inferences it yields." *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). Prosecutors may not argue assumptions or facts that are not in the record. *People v. Kliner*, 185 Ill. 2d 81, 151 (1998). A closing argument must be viewed in its entirety, and the challenged remarks must be viewed in context. *People v. Wheeler*, 226 Ill. 2d 92, 122 (2007). Generally, it is improper for a prosecutor to personally vouch for a witness' credibility, but a prosecutor may comment on a witness' credibility when such remarks are based on facts in evidence or reasonable inferences drawn therefrom. *People v. Pope*, 284 Ill. App. 3d 695, 706 (1996).

¶ 31 Here, the State acknowledges that it misstated the evidence in its closing argument, but contends that this error was not plain error. The State also argues that it did not impermissibly vouch for Durflinger's credibility.

¶ 32 The State argued in the summation portion of its closing argument that Durflinger was motivated to participate in the controlled buy because of his son's discovery of a hypodermic needle. This statement was contrary to Durflinger's testimony that his participation was derived, in part, from his son's discovery of marijuana. Thus, the State erroneously misstated the evidence. In addition, the State's comment in the rebuttal portion of its closing argument that it believed Durflinger and the jury "should[] too" was, arguably, problematic. However, even if

the comments noted were erroneous, defendant has not established that they were reversible under the plain error doctrine.

¶ 33 Our supreme court has equated the second prong of plain error review with structural error, *i.e.*, a systemic error which serves to erode the integrity of the judicial process and undermine the fairness of defendant's trial. *Thompson*, 238 Ill. 2d at 613-14. The supreme court has found structural error in a limited class of cases, such as a 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. A closing or rebuttal argument error does not fit within the limited class of cases where the supreme court has found structural error. Such an error is not so serious that it affects the fairness of defendant's trial or challenges the integrity of the judicial process. See *People v. Adams*, 2012 IL 111168 (although the prosecutor's remarks were improper, they did not amount to plain error under the fundamental-fairness prong of the plain error doctrine). Additionally, the impact of any error was limited by the court's jury instruction that closing and rebuttal arguments are not evidence and to the extent they deviate from the evidence, they are to be disregarded. The jury was presumed to follow this instruction, and there was no evidence to the contrary. *Glasper*, 234 Ill. 2d at 201. As a result, the State's attestation to Durflinger's credibility does not require reversal under the second prong of the plain error doctrine.

¶ 34 CONCLUSION

¶ 35 The judgment of the circuit court of Iroquois County is affirmed.

¶ 36 Affirmed.

¶ 37 JUSTICE HOLDRIDGE specially concurring.

¶ 38 I agree with the decision to affirm the judgment of the circuit court. I write separately to take issue with the analysis applied by the majority in reaching its decision. The first step in a plain error analysis is to determine whether a "plain error" occurred. *People v. Piatowski*, 225 Ill. 2d 551, 564-65 (2007). The word "plain" in this context "is synonymous with 'clear' and is the equivalent of 'obvious.'" *Id*. at 565 n. 2 (2007).

¶ 39 If the reviewing court determines that the trial court committed a clear or obvious (or "plain") error, it proceeds to the second step in the analysis, which is to determine whether the error is reversible. Our supreme court has made clear that plain errors are reversible only when (1) "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) the 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." *Piatkowski*, 225 Ill. 2d at 565; *People v. Herron*, 215 Ill. 2d 167, 179 (2005).

¶ 40 Although the majority generally applies this analysis correctly, at times it appears to conflate "plain error" with reversible error. See *supra*, ¶¶ 25-26. Specifically, even though it determines that the trial court "erred" by failing to ask the jurors whether they both understood and accepted the Rule 431(b) principles, the majority concludes that "the trial court's error was not reversible plain error." *Id.* The majority should have said, rather, that although the trial court's failure to properly admonish potential jurors was clear and obvious error, in this case, the error is not *reversible* because it does not fall within either of the two categories of reversible error discussed above.

¶ 41 Similarly, the plain error analysis applied by the majority in its discussion of the closing argument is also conflated and imprecise. The majority should have stated that the State's

mischaracterization of testimony and vouching for the credibility of a witness was clear and obvious error, but it is not *reversible* error because it does not fall within either of the two categories of reversible error previously discussed.

¶ 42 Our court of appeals has repeatedly made the same mistake that the majority has made here. See, *e.g.*, *People v. Haynes*, 399 Ill. App. 3d 903, 914 (2010). Even our supreme court has made this mistake. See, *e.g.*, *People v. Bean*, 137 Ill. 2d 67, 80 (1990). These instances muddle what I believe to be the proper analysis under the plain error doctrine. Accordingly, I urge our courts of review to exercise greater analytical clarity in our future plain error decisions.