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2014 IL App (3d) 130144-U

Order filed September 18, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of the 10th Judicial Circuit,
)	Peoria County, Illinois,
Plaintiff-Appellee,)	
)	Appeal No. 3-13-0144
v.)	Circuit No. 11-CF-1082
)	
LARRY HUGHES,)	Honorable
)	Stephen Kouri
Defendant-Appellant.)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justice Wright specially concurred.
Justice Schmidt dissented.

ORDER

- ¶ 1 *Held:* Defendant is entitled to a new trial where trial court did not properly admonish him regarding his right to counsel after a new charge was added.
- ¶ 2 Defendant Larry Hughes was charged with various offenses, including armed robbery, residential burglary and home invasion. Prior to trial, he waived his appointed counsel. On the day of trial, the State sought to join an unrelated forgery charge allegedly committed by Hughes against the same victims as the other charges. Hughes agreed to the joinder and trial proceeded

on all counts. The jury found Hughes guilty of two counts of armed robbery, two counts of residential burglary and one count of home invasion, and not guilty of forgery. Prior to sentencing, Hughes again sought, was granted, and then waived, posttrial counsel. The trial court sentenced Hughes to 60-year terms on the armed robbery and home invasion counts and a 30-year term on the residential burglary conviction, with the sentences to run concurrently. He appealed the convictions and sentences. We reverse and remand.

¶ 3

FACTS

¶ 4

Defendant Larry Hughes was initially charged with one count of armed robbery of Anna Dufek and counsel was appointed to represent him. 720 ILCS 5/18-2(a)(1) (West 2010). He was thereafter charged by indictment with two counts of armed robbery and three counts of home invasion; each of these counts were extended-term felonies because the victims, Anna and her husband, Edward Dufek, were both over 60 years old at the time the offenses took place. 720 ILCS 5/18-2(a)(1), 12-11(a)(1), (2) (West 2010); 730 ILCS 5/5-5-3.2(a)(8) (West 2010). Hughes was also charged with one count of residential burglary, which was elevated to a Class X offense for sentencing due to Hughes' prior convictions. 720 ILCS 5/19-3(a) (West 2010); 730 ILCS 5/5-5-3.2(b)(1) (West 2010).

¶ 5

Hughes was arraigned and informed of the charges against him. Hughes waived further reading and explanation of the charges and penalties. Defense counsel filed a motion *in limine* seeking to exclude evidence of the ongoing investigation of a forgery which Hughes was suspected of committing against the Dufeks a year earlier. Before the trial court ruled on the *in limine* motion, Hughes sought new counsel, expressing dissatisfaction with his appointed counsel. Hughes admitted he had no trial experience and the trial court warned him he would be at a disadvantage without counsel. The trial court admonished Hughes that he faced possible

extended-term mandatory sentences of 6 to 60 years, explained the classes for the charged offenses and informed Hughes of the fines and mandatory supervised release periods. At his next court date, Hughes opted to waive counsel. Prior to trial, Hughes was appointed standby counsel, which had the limited role to help Hughes with jury selection and the rules of courtroom procedure and protocol.

¶ 6 On the first day of trial, and prior to jury selection, the State filed an information charging Hughes with a 2010 forgery of a \$75 check of the Dufeks. 720 ILCS 5/17-3(a)(2) (West 2010). The State sought joinder for convenience purposes, although the forgery was a separate incident from the other charges and had occurred a year prior to the other offenses. Hughes was provided a copy of the information. The trial court read the forgery charge to Hughes and explained the nature of the charges. The State informed that Hughes was extended-term eligible on the charge and the trial court admonished Hughes that the extended-term sentencing range was 2 to 10 years, that fines could be up to \$25,000, that Hughes could receive a term of probation of up to 30 months, and that any prison sentence included a one-year period of mandatory supervised release. Hughes indicated he understood the possible penalties.

¶ 7 The trial court also informed Hughes that he could object to the joinder and have a separate trial on the forgery charge. Hughes decided he wanted a preliminary hearing set. The next day, however, Hughes agreed to joinder, stating that he wanted to have the matter concluded and did not want to wait for a separate trial. He also agreed to stipulate to the testimony of the bank teller, who would testify for the State that a check on the account of Anna and Edward Dufek was endorsed by Hughes and deposited into his account. Hughes also agreed that a copy of the check was sufficient and the original was not needed at trial.

¶ 8 At trial, the evidence established that on October 25, 2011, Hughes entered the Dufeks' home uninvited through an unlocked door in the kitchen. Edward, who was 87 years old, was cleaning the kitchen floor. Dufek asked Edward for money and hit him, cutting the side of his head. Edward could not identify his assailant, other than that he was black and had a knife. Anna was in the living room and heard Hughes asking Edward for money. She called 911 before Hughes threw her phone to the floor. She was able to see Hughes' face when he held a knife to her. Dufek took \$100 from Edward and \$200 from Anna. Evidence presented on the forgery charge established that a couple of years prior to the home invasion, Edward received a bank statement indicating two of his checks had been forged. One of the checks, at issue at trial, was made out to and endorsed by Hughes.

¶ 9 The jury found Hughes guilty on the armed robbery, home invasion, and residential burglary counts and not guilty on the forgery count. Hughes sought and was granted the appointment of posttrial counsel. He later decided to waive counsel. The trial court informed Hughes the sentencing range would be 6 to 60 years whether he was represented by counsel or proceeded *pro se*. Counsel was waived and Hughes was given trial transcripts. He filed a posttrial motion, which was denied. Sentencing took place. The trial court stated it had considered the applicable factors in mitigation and aggravation, Hughes' history and character, and the nature and circumstances of the offense. The trial court noted, "the victims in this case were 87 and 83 years old, the weakest in our society." The trial court merged the three home invasion counts and sentenced Hughes to 60-year sentences on the home invasion and armed robbery verdicts and a 30-year sentence on the residential burglary count, with the sentences to run concurrently. Hughes appealed.

¶ 10

ANALYSIS

¶ 11 The issue on appeal is whether Hughes' waivers of counsel were ineffective. He argues that he was improperly admonished regarding his right to counsel on three occasions. Specifically, he argues that his pretrial waiver of counsel was ineffective as it was not knowingly and intelligently made; that joinder of the forgery count required readmonishment of right to counsel; and that his posttrial waiver was also ineffective due to inadequate admonishments. He seeks reversal of his convictions and remand, or in the alternative, that his sentence be vacated and the case sent back for resentencing.

¶ 12 Hughes seeks plain error review, acknowledging that he failed to object or raise the issue of ineffective waiver of counsel at trial or in a posttrial motion. He maintains that his waiver of counsel was ineffective and constituted structural error necessitating plain error review. The plain error doctrine allows a reviewing court to consider forfeited error affecting substantial rights where (1) the evidence is so closely balanced that the guilty verdict may have resulted from the error and not the evidence, or (2) the error is so serious the defendant was denied a substantial right, and thus a fair trial. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). Where a defendant never waived his right to counsel and was not given any admonishments, plain error review is appropriate. *People v. Stoops*, 313 Ill. App. 3d 269, 273 (2000). As discussed below, we find that Hughes was denied his right to counsel and we will review his claim despite forfeiture.

¶ 13 Illinois Supreme Court Rule 401(a) requires that when a defendant accused of an offense punishable by imprisonment waives his right to counsel, the trial court must admonish the defendant by informing him of (1) the nature of the charges; (2) the possible penalties, including the minimum and maximum sentence and any extended term; and (3) his right to counsel and the appointment of counsel if he is indigent. Ill. S. Ct. R. 401(a) (eff. Sept. 1, 1970). The trial court

must also determine whether the defendant understands the admonishments. Ill. S. Ct. R. 401(a) (eff. Sept. 1, 1970). Rule 401(a) is designed to ensure that a defendant's waiver of counsel is knowingly and intelligently made. *People v. Haynes*, 174 Ill. 2d 204, 241 (1996). For an effective waiver of counsel, substantial compliance with the rule is sufficient; strict compliance is not required. *Haynes*, 174 Ill. 2d at 236. An improper admonishment does not require reversal where a defendant is not prejudiced by the impropriety. *People v. Baker*, 133 Ill. App. 3d 620, 622 (1985).

¶ 14 A defendant's intelligent and knowing waiver of counsel applies to all phases of trial under the continuing waiver rule, absent any significantly changed circumstances or a later request for counsel. *People v. Simpson*, 172 Ill. 2d 117, 138 (1996). Changed circumstances which constitute exceptions to the continuing waiver rule include the imposition of new charges. *Simpson*, 172 Ill. 2d at 138. Where a defendant has executed an intelligent and knowing waiver at an earlier stage of the proceedings, the waiver ends when new charges are joined. *People v. Cleveland*, 393 Ill. App. 3d 700, 705 (2009). We review *de novo* whether a trial court properly complied with Supreme Court Rule 401(a) admonishments. *People v. Campbell*, 224 Ill. 2d 80, 84 (2006).

¶ 15 Joinder of offenses is allowed where the charges are based on the same act or part of two or more acts that are part of the same transaction. 725 ILCS 5/111-4(a) (West 2010). Joinder is not permitted where the charges are unrelated, the offenses occurred during separate time periods, or no concerted plan linked the offenses. *People v. Hyche*, 63 Ill. App. 3d 575, 578 (1978). Where it appears the defendant will be prejudiced, joinder is not appropriate. 725 ILCS 5/114-8 (West 2010). Where the defendant would still have been convicted if there had been separate trials, he is not prejudiced by improper joinder of charges. *People v. Gonzalez*, 339 Ill.

App. 3d 914, 922 (2003). Where charges are completely unrelated and not part of a comprehensive transaction, it is plain error to join the charges in the same charging instrument and try them before a single jury. *People v. Karraker*, 261 Ill. App. 3d 942, 951 (1994).

¶ 16 Hughes was initially represented by appointed counsel, who was present when Hughes was arraigned and advised Hughes to waive reading of the charges. The trial court informed Hughes of the charges and sentencing possibilities, including extended-range terms. Hughes waived further reading and explanation of the charges and penalties. Hughes then sought to waive counsel. The trial court warned him about the difficulties of self-representation and allowed Hughes the weekend to consider his options. When the proceedings resumed, Hughes opted to waive appointed counsel. He had been informed of the nature of the charges and the possible sentences. Hughes was aware of the right to appointed counsel, which was who he was seeking to waive. We find the trial court's admonishments substantially complied with the requirements of Rule 401(a) and that Hughes knowingly and voluntarily waived his right to counsel prior to trial.

¶ 17 The imposition of the forgery charge on the first day of trial negated the continuing waiver rule and necessitated the trial court provide Hughes with new Rule 401(a) admonishments. Hughes was given a copy of the new information that added the forgery count and acknowledged he did not have an opportunity to read it. The trial court read the new charge to him and informed Hughes he was eligible for an extended-term sentence of 2 to 10 years on the forgery charge. The trial court explained the substance of the forgery offense. The trial court did not, however, admonish Hughes that he had a right to the appointment of counsel for the new charge. The State explained that it was appropriate to try the forgery count with the others but

that Hughes would have to waive a preliminary hearing, or in the alternative, set a trial date on the forgery charge. Hughes chose to have a preliminary hearing date set.

¶ 18 The following day he informed the court he wanted to go forward with the forgery charges with the trial on the other charges. Hughes said he had been surprised by the addition of the new forgery charge and needed some time to consider whether he wished to waive a preliminary hearing. Had the trial court admonished him regarding his right to counsel, Hughes could have also considered whether he wanted to waive that right as well. Although the trial court explained the nature of the forgery charge and explained the possible sentences and other penalties, it did not inform Hughes that he had a right to the appointment of counsel on the new charge. The trial court improperly relied on Hughes' prior waiver of counsel, which became ineffective when the State added the forgery offense. Because Hughes was not given sufficient admonishments under Rule 401(a), we find his waiver of counsel was improper and he is entitled to a new trial.

¶ 19 We acknowledge that Hughes was found not guilty on the forgery charge and was not subjected to an additional prison term or consecutive sentences based on the additional charge. Nevertheless, the joinder of the unrelated forgery charge was improper and we cannot determine that the jury's decision on the other charges would not have been different had the forgery charge not been included in the trial. Prior to his initial waiver of counsel, appointed counsel moved to exclude evidence regarding the forgery investigation. Because of the possible prejudice from the addition of the unrelated forgery charge, we can reasonably consider that counsel would have objected to joinder of the forgery charge. The offense took place in October 2010. The other offenses occurred a year later. The forgery charge did not arise from the same act and was not part of the same transaction with the other charges. Moreover, to Hughes' detriment, after the

trial court accepted his acquiescence to joinder of the forgery charge, he stipulated to the testimony of the bank teller that Hughes had endorsed a \$75 check drawn on the account of Anna and Edward Dufek and deposited it into his account. As noted in the special concurrence, this evidence would likely have been inadmissible without the joinder.

¶ 20 It was plain error for the trial court to allow joinder of the forgery charge without properly admonishing Hughes regarding his right to counsel under Rule 401(a). Because we find the admonishment insufficient, we do not address Hughes' additional claim that waiver of posttrial counsel was also ineffective. We further find that Hughes was denied his right to counsel and is entitled to a new trial.

¶ 21 For the foregoing reasons, the judgment of the circuit court of Peoria County is reversed and the cause remanded.

¶ 22 Reversed and remanded.

¶ 23 JUSTICE WRIGHT, specially concurring.

¶ 24 I write separately to emphasize, this appeal does not involve a typical joinder issue. Here, the prosecutor did not request the trial court to exercise its discretion to join two separate criminal cases for one jury trial. Instead, the State merged alleged criminal violations arising out of separate incidents in such a way that a single trial would necessarily take place *unless* defendant affirmatively objected.

¶ 25 I respectfully observe the State's decision to add the separate 2010 forgery charge to the 2011 prosecution appears to me to have been purely a strategic decision by the State. This strategic decision, developed after defendant elected to proceed *pro se*, enabled the State to present other crimes evidence to the jury that would otherwise, arguably, have been inadmissible.

I submit the evidence concerning the alleged 2010 forgery increased the likelihood of defendant's conviction for the 2011 offenses.

¶ 26 In conclusion, I agree with my respected colleagues that plain error arose when the trial court failed to provide admonishments to defendant concerning his right to counsel after the State filed an information charging defendant with a 2010 forgery in case No. 11-CF-1082. However, in defense of the trial judge, I point out that the trial court's omission is understandable. I respectfully suggest that if the 2010 charges had been separately filed by the State after the 2011 indictment, I have no doubt the trial judge would have easily recognized that new admonishments regarding defendant's right to counsel were required.

¶ 27 On this basis, I specially concur.

¶ 28 JUSTICE SCHMIDT, dissenting.

¶ 29 I would affirm defendant's conviction.

¶ 30 Defendant's claims on appeal were forfeited at trial and do not survive an analysis under either prong of the plain-error doctrine. The trial court's joinder of the unrelated forgery charge itself was error in violation of section 111-4(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/111-4(a) (West 2010)). See *People v. Fleming*, 2014 IL App (1st) 113004, ¶ 38. The trial court's failure to readmonish defendant of his right to counsel after joinder was erroneous as well. *People v. Cleveland*, 393 Ill. App. 3d 700, 705 (2009); *supra* ¶ 17. These forfeited errors, however, did not deny defendant a fair trial and therefore fail under plain-error review.

¶ 31 Under the plain-error doctrine, reviewing courts only consider forfeited errors where: (1) the evidence is closely balanced; or (2) the error is so serious that defendant was denied a substantial right, and thus a fair trial. *Supra* ¶ 12. Under both prongs of plain error, the

defendant has the burden of persuasion. *People v. Walker*, 232 Ill. 2d 113, 124 (2009) (citing *People v. Naylor*, 229 Ill. 2d 584, 593 (2008)).

¶ 32 Defendant does not argue that the evidence at trial was closely balanced. Accordingly, we need not analyze defendant's claims under the first prong of plain error. Defendant merely asserts that "[b]ecause the right to counsel is fundamental, plain-error review is warranted when the issue has not been preserved." Defendant cites to *People v. Stoops*, 313 Ill. App. 3d 269, 273 (2000), in support of this proposition.

¶ 33 The plain-error doctrine has evolved in Illinois jurisprudence since 2000. The Illinois Supreme Court has emphasized that the plain-error doctrine is a narrow and limited exception to the procedural default of forfeiture. *People v. Naylor*, 229 Ill. 2d at 593. It has further equated the second prong of plain error with structural error. *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009). Structural errors have only been found to exist by the court in a limited class of cases: 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. *People v. Thompson*, 238 Ill. 2d 598, 608-09 (2010).

¶ 34 Defendant, therefore, must establish that the errors alleged on appeal are structural. He has not. Structural errors are "systemic error[s] which serve[] to 'erode the integrity of the judicial process and undermine the fairness of the defendant's trial.'" *People v. Thompson*, 238 Ill.2d 598, 613-14 (2010) (quoting *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009)). None of the errors asserted by the defendant fit into the category of cases found by the Illinois Supreme Court to be structural. I further find that the errors asserted by defendant on appeal were not so serious that they affected the fairness of defendant's trial or challenged the integrity of the judicial process. Defendant's claims do not meet the requirements under second prong plain-

error analysis. Accordingly, defendant's forfeited issues on appeal do not survive plain-error analysis and the trial court's ruling should be affirmed.

¶ 35 The majority's analysis fails to account for the fact that defendant, although proceeding *pro se*, simultaneously had the benefit of standby counsel. *Supra* ¶ 5. A trial court need not give a defendant represented by standby counsel all Rule 401(a) admonishments. *People v. Nieves*, 92 Ill. 2d 452, 466 (1982); *People v. Johnson*, 119 Ill. 2d 119, 136 (1987); *People v. Gibson*, 304 Ill. App. 3d 923, 928-29 (1999). Here, the trial court explained to defendant that if he objected, the forgery charge would not be joined. Defendant, with the benefit of standby counsel, unequivocally stated that he wanted to proceed with the forgery charge included in his trial. In the event we were looking for prejudice in our analysis, this renders any error under defendant's Rule 401(a) claims nonprejudicial. *People v. Gibson*, 304 Ill. App. 3d at 928-29.

¶ 36 I further note that even if prejudice were the proper litmus test, defendant's claims would fail. The jury's not guilty verdict on the charge of forgery establishes that the joinder did not prejudice defendant. The jury convicted the defendant of armed robbery, home invasion, and residential burglary. In spite of the emotional nature of these crimes, defendant was found guilty of them, but not guilty of a forgery, even after he stipulated to evidence that he had endorsed the check at issue. This is hardly the telltale sign of a tainted jury. Under the circumstances, the not guilty verdict demonstrates that the jurors remained deliberative in the course of their duty. Both members of the majority conclude that the joinder did or might have prejudiced defendant on the original counts without any explanation of how.

¶ 37 Moreover, this record establishes that defendant would have waived counsel had he been admonished again at *any* point in the trial. He repeatedly waived his right to counsel in the face of the trial court's warning that he chose to do so at his own peril. Again, at sentencing,

defendant requested counsel; the trial court granted the request; defendant then waived counsel.

Nothing in the record suggests defendant would have chosen otherwise.

¶ 38 For the forgoing reasons, I respectfully dissent.