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2015 IL App (3d) 130866-U

Order filed June 30, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 9th Judicial Circuit, Knox County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-13-0866
LANISHA M. CARSON,)	Circuit No. 12-CF-268
Defendant-Appellant.)	Honorable Scott Shipplett, Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Lytton and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* Because we find that neither prong of the plain error review applies in this case, we affirm the judgment of the trial court.

¶ 2 Defendant, Lanisha M. Carson, appeals her conviction of unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2012)). Defendant was a nurse who worked at Galesburg Terrace nursing home and was charged with taking Fentanyl patches from her employer. Defendant argues that the trial court violated her constitutional right to present a

defense when it excluded testimony that Fentanyl patches were missing at the nursing home after she was terminated. We affirm.

¶ 3

FACTS

¶ 4

Defendant was charged by information with possession of a controlled substance (720 ILCS 570/402(c) (West 2012)) in that, between January 1 and April 7, 2012, defendant allegedly had in her possession less than 15 grams of a substance containing Fentanyl, a schedule II controlled substance, without a doctor's prescription and without such other authority as authorized in the Illinois Controlled Substances Act.

¶ 5

A bench trial was held. Before the start of the trial, the State asked that two witnesses who were disclosed to the State on the date of trial, Holly Mixon and Glenda Woods, be barred from testifying because "they weren't previously disclosed *** in discovery and in violation of the pre-trial discovery order." The trial court asked the defense to make an offer of proof. Defense counsel stated that defendant wanted to continue the trial. Defense counsel explained that both Mixon and Woods worked at the nursing home where defendant had been employed. Mixon and Woods allegedly would testify as to defendant's reputation for truthfulness and as to Fentanyl patches that were missing at the nursing home in the past. Defense counsel alleged that Woods might be a useful rebuttal witness regarding some of the things that Wendi Queen, a State witness, said to her.¹

¶ 6

The trial court stated that it was going to start the trial and hear the State's witnesses; depending on what the State's witnesses testified to, the proffered defense witnesses may or may not have relevant testimony. The trial court stated it would take under advisement whether it

¹ Additionally, defendant advised the court that she had difficulty getting in touch with Mixon and Woods.

would grant the defense a continuance to present its case in chief or if it would bar the defense witnesses outright.

¶ 7 The State's first witness was Brenda Stanley. Stanley, a licensed practical nurse (LPN), was the care plan coordinator at Galesburg Terrace nursing home. Defendant worked as an LPN during the third shift at Galesburg Terrace for approximately two years. Approximately seven employees at a time worked the third shift in March and April of 2012, including two nurses, a respiratory therapist or nurse, and four certified nursing assistants (CNAs).

¶ 8 On March 17, 2012, Stanley learned that there was a discrepancy with a Fentanyl patch on one of the patients. Fentanyl is a narcotic pain medication on a patch that is applied to a patient for three days. The nurses working on the medication cart on the third shift are responsible for administering new Fentanyl patches and removing old ones. The medication cart is locked and the Fentanyl is double-locked because it is a narcotic.

¶ 9 Jerry Bogg, the administrator of the nursing home, directed Stanley and Queen, the director of nursing, to investigate the Fentanyl patch discrepancy. The investigation lasted approximately a month and a half. Initially, Stanley and Queen checked the Fentanyl patches of every resident each day to ensure that the patches were on the patients. After finding irregularities with the patches, Queen and Stanley began checking the patches at the beginning and end of each shift. During the investigation, Stanley found several irregularities regarding the residents' Fentanyl patches, including: (1) the entire patch being gone; (2) the patch having pieces cut off; (3) the patch being upside down so that the medication was not going into the patient; and (4) an old patch with the wrong dosage being applied rather than a new patch.

¶ 10 The irregularities always occurred during the third shift. Stanley found no irregularities at the end of any other shift. Approximately five different nurses worked during third shift on

various days in March and April of 2012. The irregularities only occurred when defendant or another nurse, Vickie Norris, was working. There was never an irregularity on a date when defendant was not working. There was an irregularity on a date when Norris was not working.

¶ 11 Defendant and Norris did not always work together. No patches were found on defendant, and no one at the nursing home actually saw defendant with a patch. On one occasion, Stanley stated that Norris did not apply new patches to two residents. Norris told Stanley that she must have overlooked them. Norris was taking Vicodin and had a prescription for it.

¶ 12 Upon learning the results of the investigation, Bogg told Stanley and Queen to take defendant and Norris to the hospital for a drug screen. The drug screen would only test for Fentanyl. Stanley and Queen told Norris and defendant that there had been some discrepancies with the Fentanyl patches, and Norris and defendant were going to be tested for Fentanyl. Defendant said that she did not want to be tested because she had smoked cannabis. Stanley told her that she had nothing to worry about because the test was specifically looking for Fentanyl, not cannabis. Stanley testified that defendant could have been terminated just for smoking cannabis.

¶ 13 Stanley and Queen drove Norris and defendant to the hospital. When they arrived at the hospital, defendant told Stanley that she did not want to take the test because she had put a couple Fentanyl patches in her mouth. Defendant explained that she had been depressed about having a miscarriage and losing a friend. Defendant repeated the same thing to Queen. Neither defendant nor Norris took the drug test, and everyone went back to the nursing home. Queen and Stanley terminated defendant. Defendant signed a termination document stating that

defendant was being terminated for taking Fentanyl from the facility. The part of the document stating that defendant had taken Fentanyl was filled out before defendant signed it.

¶ 14 Norris still works at Galesburg Terrace. There have been no irregularities with the Fentanyl patches or any other narcotics since defendant was terminated. Stanley was not personally contacted by defendant after defendant was terminated. Stanley, Queen, Bogg, and defendant had an unemployment hearing over the telephone at the end of April or May 2012. At that time, defendant denied taking the patches.

¶ 15 Next, Queen testified that she was a registered nurse and had been the director of nursing at Galesburg Terrace since September 2011. On March 19, 2012, two nurses showed Queen that one of the resident's Fentanyl patches did not look right. Queen and Stanley commenced an internal investigation which lasted approximately three weeks. During the investigation, Stanley and Queen checked the Fentanyl patches of the residents at the beginning of each shift and discovered irregularities with the patches in the morning after the third shift. The irregularities included patches missing, parts of patches being gone, and patches being flipped over.

¶ 16 Like Stanley, Queen testified that the irregularities occurred when defendant and Norris were on duty. Queen arranged for a special drug test to be performed at the hospital to test defendant and Norris for Fentanyl. Queen did not know if the Fentanyl test detected other substances as well. Queen told defendant and Norris that they were going to the hospital for a drug test. Queen did not remember if she told them why they were being tested.

¶ 17 Queen, Stanley, Norris, and defendant drove to the hospital. When they arrived, Queen and Norris went inside, and Stanley and defendant stayed outside. Stanley motioned for Queen to come back out. Queen went back outside and defendant told Queen that she was not going to take the test because she had been tampering with the Fentanyl patches. Defendant was upset

and said she had taken the patches because she had a miscarriage and her best friend died all within one or two weeks.

¶ 18 Queen called the administrator, and he told her to return to the nursing home and terminate defendant. Queen filled out a termination paper that both she and defendant signed. Before defendant signed, Queen wrote on the form that defendant was being terminated for taking Fentanyl from the facility.

¶ 19 Norris continued to work at Galesburg Terrace after defendant's termination. The investigation continued for awhile after defendant was terminated. There were no irregularities with the patches after defendant was terminated. Queen could not recall any nurse telling her about any more irregular Fentanyl patches after defendant was terminated. Queen had no personal contact with defendant after she was terminated.

¶ 20 The State rested. Defense counsel stated that it wished to call defendant as well as Woods and Mixon, who were friends and former co-workers of defendant. The following exchange took place:

"THE COURT: *** I'm going to overrule the State's objection and I'm going to allow Ms. Woods and Ms. Mixon to testify as to [defendant's] character and reputation for truth telling. I'm not going to let them go into the goings on of the nursing home so if you want to have them called for the purposes of character witnesses, that would be fine, but otherwise it seems to me that the case has been pending for well over a year. The discovery order had been in place since December of '12 and really what else happens in the nursing home doesn't matter so much as what happened during this period of time.

MR. HARRELL [Defense Counsel]: Okay. Judge, just for clarification, I think Ms. Woods might testify that while she was working there that there were patches missing after Ms. Carson's termination. Do you not want me to go into that?

THE COURT: No because really what I'm looking at is whether or not *** she would be responsible for patches missing between January 1st of 2012 and April 7th of 2012."

¶ 21 While Mixon and Woods were barred from testifying as to matters at the nursing home, including any irregularities with Fentanyl patches after defendant's termination, they both offered character testimony that defendant was a truthful person. Both added that they were nurses who had worked with defendant at Galesburg Terrace for brief periods of time and who had personally known defendant for over 30 years.

¶ 22 Defendant testified that she was an LPN and began working at Galesburg Terrace on August 31, 2010, and was employed there until April 2012. From January 2012 through April 2012, defendant worked the third shift. She sometimes worked with patients on ventilators and sometimes worked the medication cart as a floor nurse. There were usually two other nurses working at the same time as defendant. When defendant and Norris worked the same nights, they did not both work the medication carts as floor nurses; one worked the medication cart and the other worked with the ventilator patients.

¶ 23 At the beginning of each shift, defendant would get a report about the previous shift from a second-shift nurse and they would count the narcotics, including the Fentanyl patches, to make sure everything was accounted for. When defendant worked with Fentanyl patches, she would get the patch out, sign her name, initial it, date it, put the patch on, and use a piece of tape to

secure it. The patches were usually put on a resident's arm, back, or chest. Defendant only applied patches to patients when the patches were due; she did not have to check patches on dates that the patch was not due to be changed.

¶ 24 Defendant did not know how a patch could have gotten flipped because if the patch did not stick to the patient, then it was on the wrong side. Defendant never flipped a patch nor did she ever trim or cut off a portion of a patch. Sometimes defendant found that patches were missing when she went to change them. She did not think it was strange if a patch was missing because sometimes the patches could get caught on residents' clothing when they were rolled or transferred. Defendant did not see a pattern of missing patches because she was not always the one to change them.

¶ 25 On the morning of April 7, 2012, Stanley called defendant into her office. Stanley and Queen told defendant that there was a problem with the Fentanyl patches. Queen told defendant that she was required to take a drug test, and defendant said that she had smoked cannabis. Queen said the test was for Fentanyl. No one told defendant that only Fentanyl would show up on the test.

¶ 26 They went to the hospital, and defendant told Stanley that she was not going to take the drug test. Defendant did not want to take the drug test because there was cannabis in her system. Defendant did not say that she had been tampering with the Fentanyl patches. At that time, defendant did not say anything about her miscarriage or the death of her friend, but everyone in the facility knew about it.

¶ 27 They returned to the nursing home and defendant signed a termination form. At the time defendant signed the form, there was nothing written on the form saying that defendant was

being terminated because she took Fentanyl from the facility. Defendant believed she was being terminated for refusing to take the drug test.

¶ 28 Defendant did not see Norris or anyone else tampering with the patches. Defendant denied ever taking Fentanyl patches without authority or ingesting Fentanyl. In April or May of 2012, subsequent to her termination, defendant was on the telephone with Stanley and denied that she had taken the Fentanyl patches.

¶ 29 The trial court found defendant guilty of unlawful possession of a controlled substance. In delivering its ruling, the court initially found that the patches were tampered with rather than just falling off the patients' clothing:

"[I]t seems to me that it happened *** regularly. It didn't happen on every shift. In fact, it didn't happen on any shift after [defendant's] termination so I would guess that if [the Fentanyl patches] were just falling off because of [the residents'] clothes, they'd continue to fall off but that's not been reported. And *** it just seems that someone was tampering with the patches."

¶ 30 The court reasoned the irregularities only occurred during the third shift when defendant was on duty. The court noted that others were on duty at the same time as defendant, including Norris, CNAs, and laundry personnel. The court stated that cutting and flipping the patches is something that would happen when the patch was being placed on the patient rather than after the fact, which reduced the possible persons who were tampering with the patches to defendant and Norris. The court further reasoned:

"So we narrowed it down kind of to two people and do I think that [Norris] is 100 percent not guilty? I mean, she's not on trial today but, you know, I've got no reason to think that [defendant] is the only person who was fiddling

around with these. I mean, maybe there's more people. It may be that there were several other people and once one person got arrested *** they stopped doing it."

¶ 31 The trial court noted that after defendant was told she was going to be tested for Fentanyl, she refused, stating she had smoked marijuana. Then, when she was told that the test was for Fentanyl specifically, she refused and confessed to both Stanley and Queen to tampering with the patches and putting them in her mouth on two separate occasions. The court concluded:

"I do think that the investigation having narrowed it down to just two people on that third shift and then [defendant's] subsequent admission to two separate persons on two different occasions consistent with the investigation up to that point is enough for the State to meet its burden of proof beyond a reasonable doubt, so that's what my finding will be."

¶ 32 The trial court sentenced defendant to 24 days' incarceration in the county jail and 2 years' probation.

¶ 33 ANALYSIS

¶ 34 On appeal, defendant argues that the trial court violated her constitutional right to present a defense when it precluded Woods from testifying that there were missing Fentanyl patches after defendant was terminated. Because we find that neither prong of plain error review applies in this case, we affirm the judgment of the trial court.

¶ 35 Defendant admits that she failed to preserve the foregoing issue for appeal and asks that we review the issue under the plain error doctrine. Forfeited errors are reviewable under the plain error doctrine where: (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. Belknap*, 2014 IL 117094, ¶ 48.

¶ 36 "The first step of plain-error review is determining whether any error occurred." *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). Here, we find that the trial court erred in excluding Woods's testimony that Fentanyl patches were missing after defendant was terminated. Said testimony was relevant to the issue of who tampered with the patches. The testimony potentially could have been used to impeach the testimony of Stanley and Queen that there were never any patches missing after defendant was terminated. We note, however, that the offer of proof regarding Woods's testimony was vague. Thus, it is difficult to determine with any certainty whether Woods's testimony could have *actually* impeached a State witness.

¶ 37 Due to the relevant nature of Woods's testimony, it should not have been excluded as a discovery sanction. While the trial court has broad discretion in imposing discovery sanctions, "the sanction of preclusion is limited to only the most extreme cases of discovery violations." *People v. Damico*, 309 Ill. App. 3d 203, 212 (1999). "[W]illful and blatant violations merit the most severe sanctions." *Id.* at 213. Here, defendant stated that she did not disclose the witnesses earlier because she had difficulty contacting them. The extreme sanction of preclusion was not warranted in this case where a lesser sanction, such as a brief continuance, would have prevented the State from being prejudiced by the late disclosure.

¶ 38 Although we find that an error occurred, defendant is unable to establish that she is entitled to relief under either prong of plain error analysis.

¶ 39 I. First Prong

¶ 40 First, the evidence was not closely balanced. Queen and Stanley testified that they investigated the Fentanyl patch irregularities for several weeks, and all the irregularities occurred during the third shift when defendant was on duty. Queen and Stanley narrowed down the employees who were potentially tampering with the patches to defendant and Norris. Defendant refused to take a drug test and confessed to both Stanley and Queen that she had tampered with a couple Fentanyl patches and put them in her mouth. While defendant testified that she did not tamper with the Fentanyl patches and did not tell Stanley and Queen that she had tampered with the patches, the trial court found Stanley and Queen more credible than defendant and believed their version of the facts. "This court will defer to the trial court's determination of the credibility of the witnesses and its resolution of the conflicts in the testimony." *People v. Kelper*, 258 Ill. App. 3d 153, 155 (1994).

¶ 41 Woods's proposed testimony does not refute the reasonable conclusion that defendant unlawfully possessed a substance containing Fentanyl. While Woods's testimony would have suggested that possibly someone other than defendant was tampering with the patches, such an inference does not rule out that defendant was also tampering with the patches. The trial court expressly recognized this fact. Consequently, the trial court found that the State met its burden based on testimony that: (1) the investigation pointed to defendant and Norris; and (2) defendant told Stanley and Queen that she had tampered with some Fentanyl patches.

¶ 42 We recognize that, in delivering its ruling, the trial court stated that the testimony of the State's witnesses that there were no missing patches after defendant was terminated tended to establish that someone tampered with the patches and that the patches were not just falling off onto patients' clothing. However, the trial court's statement that Norris could have also been tampering with the patches shows that the court did not find that Stanley's and Queen's

testimony, indicating there were no problems with the patches after defendant's termination, established that defendant was the only one tampering with the patches.

¶ 43

II. Second Prong

¶ 44

Additionally, the exclusion of Woods's testimony regarding missing Fentanyl patches after defendant was terminated does not constitute plain error under the second prong of plain error review. Our supreme court has equated the second prong of plain-error review with structural error. *Thompson*, 238 Ill. 2d 598, 613-14. A 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." ' " *Thompson*, 238 Ill. 2d at 614 (quoting *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009), quoting *People v. Herron*, 215 Ill. 2d 167, 186 (2005)). The supreme court has recognized structural error only in a very limited class of cases, including "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." *Thompson*, 238 Ill. 2d at 609, citing *Washington v. Recuenco*, 548 U.S. 212, 218 n. 2 (2006). The exclusion of witness testimony is an evidentiary issue within the discretion of the trial court and does not rise to the level of structural error.

¶ 45

We reject defendant's argument that the exclusion of Woods's testimony was plain error under the second prong because it impaired defendant's constitutional right to present a complete defense and her version of the facts to the trier of fact. In support of her position, defendant cites cases for the general principles that a defendant has a right to present a defense and to present witnesses on her own behalf, see, e.g., *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973); *Holmes v. South Carolina*, 547 U.S. 319 (2006), and argues that the trial court violated those principles by erroneously excluding Woods's testimony. However, on defendant's reasoning, any

erroneous evidentiary ruling against a criminal defendant would constitute second-prong plain error on the basis that it infringes on the constitutional right to present a defense. Defendant's broad view of second-prong plain error is contrary to the supreme court's holding in *Thompson* (*Thompson*, 238 Ill. 2d at 614).

¶ 46 Thus, because we find that neither prong of plain error review applies in this case, we affirm the judgment of the trial court.

¶ 47 CONCLUSION

¶ 48 The judgment of the circuit court of Knox County is affirmed.

¶ 49 Affirmed.