2015 IL App (4th) 130357-U

NOS. 4-13-0357, 4-14-0179 cons.

FILED
March 2, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
DELARGO L. GULLENS,	)	No. 12CF237
Defendant-Appellant.	)	
	)	Honorable
	)	Jennifer H. Bauknecht,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Pope and Justice Turner concur in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed defendant's convictions for drug-related offenses, rejecting defendant's argument that comments the trial court made to defense counsel outside of the jury's presence denied him a fair trial.

¶ 2 In November 2012, a jury convicted defendant, Delargo L. Gullens, of (1) possession with intent to deliver a controlled substance (15 grams or more but less than 100 grams of a substance containing heroin) (720 ILCS 570/401(a)(1)(A) (West 2010)) and (2) possession of a controlled substance (15 grams or more but less than 100 grams of a substance containing heroin) (720 ILCS 570/402(a)(1)(A) (West 2010)). In March 2013, the trial court merged defendant's convictions and sentenced him to 30 years in prison for possession with intent to deliver a controlled substance.

¶ 3 Defendant appeals, arguing that comments the trial court made to his counsel denied him a fair trial. We disagree and affirm.

¶ 4 I. BACKGROUND

¶ 5 A. The State's Charges

¶ 6 In August 2012, the State charged defendant with (1) possession with intent to deliver a controlled substance (15 grams or more but less than 100 grams of a substance containing heroin) and (2) possession of a controlled substance (15 grams or more but less than 100 grams of a substance containing heroin).

¶ 7 B. The Evidence Presented and Other Proceedings During Defendant's Trial

¶ 8 We note that in his brief to this court, defendant states that his "appeal is centered primarily around remarks that the [trial court] made to [his counsel]." Accordingly, in summarizing the testimony presented at defendant's November 2012 trial, we review the circumstances preceding the remarks of which defendant complains to place them in their proper context.

¶ 9 1. *The State's Evidence*

¶ 10 Testimony from several law-enforcement officials revealed that on the night of August 30, 2012, various city and county law-enforcement agents executed a search warrant on a residential trailer home owned by Olivia Hester. When police knocked on the front door and announced their presence, an officer—located at the rear of the home—observed defendant run from the front kitchen area into a rear bedroom. Upon entering by force, police arrested three adults later identified as Kayla Freeman, Jeffrey Harris, and defendant. Police seized 212 plastic bags from the kitchen countertop, each of which held a fine white powder. The parties later stipulated that the fine white powder was 15.7 grams of heroin.

¶ 11 Hester, who was facing trial on the same charged offenses as defendant, testified that although she hoped that "something good" might result, she had not received any promises from the police, the State, or her counsel in exchange for her testimony.

¶ 12 Hester, who first met defendant in May 2012, owned the trailer home, which she lived in with Harris and his girlfriend, Freeman. In early August 2012, Hester began selling defendant's heroin with Harris in exchange for defendant's promise to pay her monthly residential lot payment. Hester explained that she would keep the heroin in her home but did not sell heroin from that location. Hester admitted that in addition to possessing the heroin, packaging of the heroin sometimes occurred at her home. At various times during August 2012, Hester heard defendant and Harris talking about heroin and observed them handling small plastic bags of heroin while in her home.

¶ 13 Approximately 2 1/2 hours before police performed their August 30, 2012, search, Hester received a visit at her home from Keith Gullens, defendant's brother. Keith told Hester that Harris and Freeman were on their way to see her. Hester decided to go out and get something to eat before they arrived. At that time, she was not storing heroin in her home. While she was away, Hester received information that police were at her home. Hester returned, identified herself, and thereafter, the police arrested her.

¶ 14 Hester acknowledged that she did not (1) see defendant bring drugs into her home; (2) receive heroin directly from defendant or deliver money to him; or (3) provide defendant an accounting of any heroin sales.

¶ 15 Harris—who was also facing trial on the same charged offenses as defendant and Hester—testified that although he was "hoping to get something out of it," he had not received any promises from the police, the State, or his counsel in exchange for his testimony.

¶ 16 In June 2012, Keith introduced defendant to Harris. Keith told Harris that he sold drugs to make money. Keith later asked Harris—who was living in Chicago but homeless—to come to Livingston County. Defendant introduced Hester to Harris, and in July 2012, Harris

moved into Hester's home. Hester later introduced Freeman to Harris.

¶ 17 Initially, Harris sold cocaine that Keith provided, but he later sold heroin that defendant supplied. Harris stored the heroin in Hester's home. Harris explained that defendant agreed to pay Hester's monthly rent in exchange for her allowing Harris to reside in her home. Harris kept one third of the heroin-sale proceeds and gave defendant the remainder. Harris confirmed that (1) he never sold heroin from Hester's home and (2) on three occasions during August 2012, Hester accompanied him as he sold heroin.

¶ 18 According to Harris, on the evening of August 30, 2012, he, Freeman, and defendant arrived at Hester's home. At that time, Harris noticed about 20 bags of heroin on the kitchen countertop. Harris and Freeman then went into a bedroom located at the front of Hester's residence. Thereafter, Harris heard a bang at the front door. As he exited the bedroom, Harris saw defendant sitting at the kitchen countertop with many more bags of heroin than the 20 bags he had earlier observed. Defendant immediately ran into "the back room" of the trailer. As Harris reached to open the front door, police forced entry in the home, trapping Harris between the front door and an adjacent wall. Police then placed Harris under arrest. Harris summarized that (1) his involvement was selling drugs and (2) Keith and defendant "were calling the shots."

¶ 19 During re-cross-examination of Harris by defendant's counsel, Stuart Goldberg, the following exchange took place:

> "[GOLDBERG]: Did you see the police when they came in the house?
>
> [HARRIS]: Yeah.
>
> [GOLDBERG]: And did you ever see them find a bag that you say my client mysteriously took out of a car?

[HARRIS]: First of all, I never said [defendant] had a bag.

[THE STATE]: Objection.

THE COURT: Hold on. Watch your questions. You are asking questions assuming facts not in evidence, and even the witness figured it out.

[GOLDBERG]: I was just getting dizzy. [Harris] keeps moving around.

THE COURT: Now that remark is stricken; and that is completely improper, counsel.

[HARRIS]: Come on, man.

[GOLDBERG]: *** Did you have occasion on August 31st, 2012, at 5:35 hours to have an audio-videotaped interview on that day?

* * *

[HARRIS]: Yeah.

[GOLDBERG]: Did you have occasion to tell the officer that my client took a bag from that house, out of the car into the house?

[HARRIS]: They asked me was there anything—yeah.

[GOLDBERG]: You told an officer that my client brought something into that house?

* * *

[HARRIS]: They asked me what *** happened that day,

and I told them.

[GOLDBERG]: And you say my client brought a bag in the house?

[HARRIS]: No, I never said bag. *** [Defendant] told me to pop the trunk; and [defendant] got something out of the trunk. I don't know what it was. How could I say it was a bag?

[GOLDBERG]: How could you say it was a bag to the 12 ladies and gentlemen now if you can't say it then?

THE COURT: Counsel approach.

[HARRIS]: I didn't say it was a bag.

* * *

(The following proceedings were had outside the hearing of the jury.)

THE COURT: [The court does not] know what the problem is, but you are saying stuff that was not testified to. There was never any testimony that [Harris] saw a bag being taken out of the trunk. That's about the fourth time you've asked [Harris], and he keeps correcting you. *** [Harris] was asked and said I don't know what it was, but you keep asking him.

[GOLDBERG]: I thought I heard him say bag. I'll ask him.

THE COURT: Hold on. [The court does not] want one more improper question from you or [the court] will hold you in

contempt. You are doing nothing but throwing garbage into this trial.

(The following proceedings were had in the presence and the hearing of the jury.)

THE COURT: The objection is sustained. You may ask another question."

Following Harris' testimony, the State rested. Thereafter, the trial court released the jury for the remainder of the day.

¶ 20 2. *Proceedings Following the State's Presentation of Evidence*

¶ 21 (We identify in italics the specific portion of the trial court's commentary with which defendant takes issue. However, as previously noted, we also provide the circumstances preceding the comments of which defendant complains to place them in their proper context.)

¶ 22 After the jury left the courtroom, defendant moved for a directed finding, which the court denied, and the following discussion took place:

"GOLDBERG: Further, your honor, in my entire career, I've never been threatened with contempt during a trial. I find that this has a very oppressive feeling on the defense for me trying to advocate for my client. I heard the word bag. ***

THE COURT: *** [Y]ou *** are a much better lawyer than the questions that are coming out of your mouth today; and you were talking about evidence, or you are asking questions assuming facts that are not in evidence; and you did it a lot today; and [the court knows] darn well that you know better than that. So

when you start asking questions assuming facts not in evidence, twisting evidence, twisting facts, twisting testimony, [the court is] going to get upset; and [the court is] going to make sure that you understand what the rules are.

You crossed the line when you made that little comment about his testimony going back and forth. You know you crossed the line then about *** Harris's testimony going back and forth. It's rolling all around. I can't keep track of his testimony.

[GOLDBERG]: Oh, I meant his moving. That's what I meant.

THE COURT: Well, the implication at that point was that [Harris'] testimony was going back and forth. At least that's how [the court] took it; and if [the court] took it that way, it's very possible that the jury took it that way as well.

[The court's] point is simply this. Okay. You are obviously a fine trial lawyer. [The court] think[s] everybody in the county is aware of the vehicle that you drive, when you're in town and what your website looks like. All right? So we also know that you know what the rules of evidence are and how to try a case. So when you are asking questions assuming facts that are not in evidence, [the court] know[s] full well that you know better than to ask a question that assumes facts not in evidence. And [the court] let it go and [the court] let it go, but [the court is] not going to continue to let it

go.

***

So [the court has] no preconceived notions. [The court is] not even the trier of fact here; *** This is a very serious matter. These are lines being crossed. Your entire opening statement was more argument; but since the State didn't object to it[, the court] let it go; and [the court] know[s] darn well you know better than that."

¶ 23 Upon resumption of defendant's trial the next morning, the trial court addressed the parties, as follows:

"There are a couple of matters [the court] would like to take up before we bring in the jury[.] ***

So to begin with just to clarify for the record the court's comments concerning Mr. Goldberg, [the court] thinks you indicated during your opening statement that you were the only attorney in town that wears a blue square in your pocket—[the court] believe[s] those were your exact words—and that you were going to make this trial exciting for [the jury].

So I think it's no surprise to you that this is a small community; and when somebody drives up, and this is [the court's] purpose in clarifying this, that you are driving a Bentley with a license plate [']rainmaker['] you sort of stand out in Livingston County. *Okay? And [the court's] reason for saying that is that that causes people to be curious; and it appears to [the court] based upon*

what [the court has] learned that you are a high-profile attorney; and that you came into town, which is fine.

***

[The court's] point was simply that you are a high-profile attorney, and you ought to know how to ask a question in proper form."

(The record reveals that during *voir dire*, Goldberg (1) made comments about his "blue square" and (2) told a veniremember that, "this is going to be a more exciting trial," in response to the veniremember's earlier comment that he disliked his previous experience as a juror.)

¶ 24 3. *Defendant's Evidence*

¶ 25 Harris admitted that following his arrest, police conducted a videotaped interview in which Harris lied about (1) not knowing defendant, (2) never handling drugs, and (3) not knowing defendant was a drug dealer.

¶ 26 Harris explained that he initially lied because he was hesitant to admit another person's involvement, but he was now cooperating by providing his truthful testimony. Harris recounted that on September 1, 2012, he had a telephone conversation with defendant through a third party even though they were both in jail. During that conversation, defendant told Harris, "You might as well take the bullet for this." With regard to Hester, defendant told Harris to "throw that little bitch under the bus." Defendant directed Harris to tell the police that defendant did not have any involvement with the heroin, and that defendant was in the bathroom at the time police entered Hester's home to conduct their search.

¶ 27 Defendant chose not to testify.

¶ 28 4. *The State's Rebuttal Evidence*

¶ 29 The State, having authenticated a recording made of the September 1, 2012, phone conversation between defendant and Harris, played the entire conversation for the jury.

¶ 30 B. The Jury's Verdict

¶ 31 The jury convicted defendant of (1) possession with intent to deliver a controlled substance (15 grams or more but less than 100 grams of a substance containing heroin) and (2) possession of a controlled substance (15 grams or more but less than 100 grams of a substance containing heroin).

¶ 32 C. Defendant's Motion for a New Trial and the Trial Court's Judgment

¶ 33 On January 22, 2013, defendant filed a motion for a new trial. At a hearing held that same day, Goldberg argued, in pertinent part, as follows:

> "I feel that my client never was afforded the ability to get a fair trial because of the Court's remarks toward me. I feel that the Court's enmity and rancor towards me was vetted on my client; and for those reasons, I have to make an appellate record to protect his appellate rights; and I ask [the court] to grant him a new trial."

¶ 34 In March 2013, the trial court entered a written order, noting that because defendant's motion for a new trial was not timely in that it was filed 57 days after the jury's verdict in violation of the 30-day limit mandated by section 116-1(b) of the Code of Criminal Procedure of 1963 (725 ILCS 5/116-1(b) (West 2012)) it was procedurally barred.

¶ 35 Notwithstanding defendant's forfeiture, the trial court addressed defendant's post-trial claims. As to defendant's contention that the court was "hostile" toward his counsel, the court stated the following:

> "On the whole, the record is clear that defendant received a fair tri-

> al and further that this court did not harbor a hostile attitude toward either *** defendant or his attorney. The court treated both the [State] and defense counsel with the same professional courtesies and impartiality that it always does while at the same time ensuring that both parties followed the proper rules of evidence and procedure in regard to the admission of evidence."

¶ 36 D. The Trial Court's Sentence

¶ 37 In March 2013, the trial court merged defendant's convictions and sentenced him to 30 years in prison for possession with intent to deliver a controlled substance.

¶ 38 E. Defendant's Petition for Relief from Judgment

¶ 39 In September 2013, defendant *pro se* filed a motion for relief from judgment under section 2-1401(f) of the Code of Civil Procedure (735 ILCS 5/2-1401(f) (West 2012)), essentially arguing that because the trail court lacked subject-matter jurisdiction, his 30-year sentence was void. In January 2014, the court denied defendant's motion. (At oral arguments in this case, defendant abandoned his appeal of this issue.)

¶ 40 This appeal followed.

¶ 41 II. ANALYSIS

¶ 42 A. The Plain-Error Doctrine

¶ 43 We note that in his brief to this court, defendant—who acknowledges the forfeiture of his argument to this court because his posttrial motion was not timely filed—nonetheless urges us to consider his claim under the plain-error doctrine.

¶ 44 "To preserve a claim for review, a defendant must both object at trial and include the alleged error in a written posttrial motion." *People v. Thompson*, 238 Ill. 2d 598, 611, 939

N.E.2d 403, 412 (2010). Failure to do so results in the forfeiture of that claim on appeal. *Thompson*, 238 Ill. 2d at 613, 939 N.E.2d at 412. A defendant can avoid the harsh consequences of forfeiture under the plain-error doctrine. *Thompson*, 238 Ill. 2d at 613, 939 N.E.2d at 413.

¶ 45 The plain-error doctrine permits a reviewing court to reach a forfeited error affecting substantial right in the following two circumstances: "(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. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007). The overarching intent of the plain-error doctrine is to ensure that a defendant has received a fair trial. *People v. Herron*, 215 Ill. 2d 167, 179, 830 N.E.2d 467, 475 (2005).

¶ 46 As a matter of convention, reviewing courts *typically* undertake plain-error analysis by first determining whether error occurred at all. *People v. Sargent*, 239 Ill. 2d 166, 189, 940 N.E.2d 1045, 1059 (2010). See also *People v. Bowens*, 407 Ill. App. 3d 1094, 1108, 943 N.E.2d 1249, 1264 (2011) (where this court held that "the usual first step in plain-error analysis is to determine whether any error occurred"). "If error is found, the court then proceeds to consider whether either of the [aforementioned] two prongs of the plain-error doctrine have been satisfied." *Sargent*, 239 Ill. 2d at 189-90, 940 N.E.2d at 1059. In this case, we choose to dispense with our typical preliminary review and consider defendant's claim under the plain-error doctrine because doing so makes resolving the case easier.

¶ 47 B. Plain-Error Analysis

¶ 48 Defendant argues that comments the trial court made to his counsel denied him a

fair trial. Because we conclude that defendant manifestly fails to satisfy either prong of the plain-error doctrine, we disagree.

¶ 49 Under the first prong of the plain-error review, we reject any notion that the evidence presented in this case was closely balanced. Based on testimony provided by Harris and Hester—both of whom testified without being promised any favorable consideration—the jury could have found beyond a reasonable doubt that on August 30, 2012, defendant (1) possessed 15.7 grams of heroin and (2) was in charge of a distribution scheme in which he solicited the services of (a) Harris to sell the heroin and (b) Hester to provide a base of operations from which he could package and store the heroin. Indeed, the jury could have also reasonably inferred defendant's culpability based on his own words during his September 2012 conversation with Harris, in which defendant pressured Harris to (1) accept sole responsibility for the heroin seized, (2) confirm Hester's guilt, and (3) falsify defendant's location within the home in a failed attempt to avoid the State's charges.

¶ 50 We note that under the second prong of the plain-error analysis, automatic reversal is required only when an error is deemed structural—that is, a "systemic error" that erodes the integrity of the judicial process and serves to undermine the fairness of a defendant's trial. *People v. Glasper*, 234 Ill. 2d 173, 197-98, 917 N.E.2d 401, 416 (2009).

¶ 51 We conclude that the record in this case confirms the trial court's assessment in its March 2013 order that "[o]n the whole, the record is clear that defendant received a fair trial and further that [the] court did not harbor a hostile attitude toward either *** defendant or his attorney." The court's comments of which defendant complains occurred either outside of the jury's presence or, in the case of the court's contempt warning, outside of the jury's hearing. Clearly, no plain error occurred.

¶ 52 III. CONCLUSION

¶ 53 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2012).

¶ 54 Affirmed.