2016 IL App (1st) 133893-U

SIXTH DIVISION
Order filed: February 5, 2016

No. 1-13-3893

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 08 CR 9780
	)	
	)	Honorable
DAHVON WILSON,	)	Paula M. Daleo and
	)	Thomas M. Tucker,
Defendant-Appellant.	)	Judges, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Rochford and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's conviction is affirmed where the circuit court complied with Illinois Supreme Court Rule 402(d) by obtaining the defendant's consent prior to a plea conference and the court's alleged misrecollection of the evidence at trial and did not rise to the level of plain error.

¶ 2 Following a bench trial, the defendant, Dahvon Wilson, was convicted of attempt (first degree murder) (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2008)), aggravated battery (720 ILCS 5/12-4(a) (West 2008)), aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2008)), and

aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2008)), and sentenced to 40 years' imprisonment with 3 years' mandatory supervised release (MSR). On appeal, the defendant argues that his conviction should be reversed and the matter remanded for a new trial because the circuit court: (1) failed to ensure that the defendant understood its admonitions before proceeding to a plea conference pursuant to Illinois Supreme Court Rule 402(d) (eff. July 1, 1997); and (2) improperly recalled or failed to recall crucial evidence in reaching its verdict. For the reasons that follow, we affirm.

¶ 3 In May 2008, the defendant was charged by indictment with attempt (first degree murder), aggravated battery, aggravated battery with a firearm, and aggravated discharge of a firearm in connection with a February 3, 2008, shooting incident which resulted in the injury of Maurice Williams (Williams).

¶ 4 Prior to trial, the defendant moved for, and the State agreed to, an Illinois Supreme Court Rule 402(d) (eff. July 1, 1997) plea conference to determine what sentence the circuit court would impose if the defendant pled guilty. The conference was held on December 19, 2011. Before it commenced, the following colloquy occurred between the court and the defendant regarding what the conference would entail:

> "THE COURT: Sir, your lawyer and the State are seeking a conference regarding your case. At the conference, we'll hear the facts, circumstances surrounding your arrest. I'll hear about any traffic or criminal background you may have. Normally I would not hear this unless there was a trial or plea. We may reach agreements acceptable to you and your attorney. We may not. In the event we do not, you would not have a right to have another judge preside at your trial be it bench or jury trial for the reason I participate.

You understand and you want me to participate?

THE DEFENDANT: I don't understand. What did you say?

THE COURT: You want that done?

THE DEFENDANT: Yeah.

THE COURT: We'll get it done."

The conference was held off the record and the parties ultimately did not reach an agreement.

¶ 5 On August 29, 2013, the defendant's case proceeded to a bench trial. At trial, Joenglish Lewis testified that, on the night of February 2, 2008, and into the morning of February 3, 2008, she and her roommates threw a party at their residence in the village of Bellwood. Also at the party were the defendant, Arian Williams (Arian), and "Cary." During the party, Lewis called Williams twice to invite him. Lewis stated that she was in the basement with the defendant and Arian when the defendant took out a gun and waved it around as he danced. Lewis described the gun as a handgun and, when asked what color it was, she said: "I don't know. It was dark. Black or something." According to Lewis, she told the defendant to put the gun away or leave the party; he complied, placing the gun somewhere on his body. Subsequently, the defendant, Arian, and Cary left the party. Lewis stated that, sometime after they left, she received a call from Williams in which he told her to call 9-1-1.

¶ 6 Williams testified that he was previously a member of the Four Corner Hustlers gang with Arian. According to Williams, he stopped associating with the gang when he was 17 years old and never rejoined. He did, however, remain friendly with Arian. Williams was not friends with the defendant. He stated that he knew the defendant for approximately eight months and saw him about five times prior to February 3, 2008. Williams was familiar with the defendant because the defendant had "several altercations" with Williams' family members.

¶ 7 Williams stated that, at approximately 12:30 a.m. on February 3, 2008, he received a phone call from Lewis informing him about the party at her home. His call with Lewis was interrupted when he heard male guests in the background calling his name and making negative comments. Those interruptions ceased when Arian took the phone from Lewis and the two of them began talking. During their conversation, Williams agreed to help Arian find a job by giving him bus passes and money. Although they never discussed when Arian would pick up those items, Williams believed that he would see Arian "very soon," but not that night.

¶ 8 After his discussion with Arian, Williams called Victoria Lloyd. While he was talking to Lloyd, Williams received a call from Arian. Arian informed Williams that he was outside of his house, which was located on the 1700 block of West Washington Boulevard in Maywood, to pick up the bus passes and money. Williams went outside and talked with Arian for approximately five minutes; then, the defendant and Cary approached them.

¶ 9 Williams stated that the defendant attempted "to do a gang hand shake" with him, but he refused. In response, the defendant, who was standing about two to three feet away, shot him twice—once in the lower right side of his abdomen and once in his "groin area." The defendant also pointed the gun at Williams' face, and attempted to shoot him again; however, the gun jammed. Williams heard the men run and a car drive away.

¶ 10 Williams testified that he went into his house to call for help. He called Lewis using the re-dial function on his phone. When asked why he did not call 9-1-1 instead, Williams explained: "I couldn't really focus as far as using the phone. I just pressed one button. The first number that was in my favorites was the last number that I called." Williams called Lewis several times, requesting that she call 9-1-1, but she did not. He therefore called Lloyd and she

called 9-1-1 for him. Williams stated that he remembered the police arriving at his house—he was conscious and able to speak—however, he did not tell them who shot him.

¶ 11 Williams stated that, on February 5, 2008, the police visited him in the hospital and he gave them a description of the defendant. According to Williams, this is the first time that he "remembers police officers coming to talk to" him. During this visit, the police also asked Williams to view a photo array and he identified the defendant as the person who shot him. We note that Williams provided conflicting testimony as to whether the police visited him on February 3, 2008, and whether he identified the defendant in a photo array on that date.

¶ 12 Officer Donna Lewis, an evidence technician at Maywood police department, testified that, at approximately 3 a.m. on February 3, 2008, she was on patrol when she responded to a call at Williams' home. Upon arriving, Officer Lewis observed a pool of blood on the walkway leading up to Williams' residence. "[O]n the perimeter of the pool of blood," she recovered one shell casing, one live round, two $5 bills, and a Bluetooth ear piece. Officer Lewis determined that the live round and shell casing were from a .40 caliber gun.

¶ 13 The State rested and the defendant moved for a directed finding, arguing that there was no evidence directly linking him to this case other than the incredible testimony of Williams. He also asserted that Arian was the shooter. The circuit court denied this motion and the defendant rested.

¶ 14 The circuit court found the defendant guilty of attempted first degree murder, aggravated battery, aggravated battery with a firearm, and aggravated discharge of a firearm. It rejected defense counsel's arguments that Williams was not credible and instead found that Williams "credibly testified." In rejecting defense counsel's argument that Williams could not identify the shooter to first responding officers, the court explained as follows:

> "[Williams], I believe, said during his testimony that while he remembers police officers there, he does not remember being able to tell them who shot him, but certainly two days later, he was able to pick the defendant out of a photo array."

The court also recounted that, after being shot, Williams called Lewis and Lloyd instead of 9-1-1 "because he could only press one button. He was injured and the phone would re-dial."

¶ 15 In finding Williams credible, the circuit court noted that he knew the defendant prior to the incident or "certainly recognized him as a former associate or acquaintance," and that "there are gang over tones to this case." It explained, "I believe it's reasonable inference to draw from the evidence that I heard that th[e] meeting that took place at [Williams'] house was to convince him to once again join the Four Corner Hustlers." The court also found that Lewis' testimony corroborated Williams' testimony, summarizing that Lewis saw the defendant at her party waving around "a black gun" and then leaving with Arian and Cary. Additionally, the court held that Williams' testimony was also corroborated by the "bullets and the casing" recovered at the scene.

¶ 16 In September 2013, the defendant filed a motion for a new trial or, alternatively, a judgment of acquittal, arguing that the evidence, which "really boiled down to the [incredible] testimony of one witness," was insufficient to convict him. The circuit court denied the motion.

¶ 17 At the sentencing hearing in November 2013, the parties presented evidence in aggravation and mitigation. The circuit court then sentenced the defendant to 40 years' imprisonment with an MSR term of 3 years. The defendant filed a motion to reconsider sentence, which the court denied.

¶ 18 This appeal followed.

¶ 19 On appeal, the defendant's first assignment of error is that he should be granted a new trial because the circuit court violated Illinois Supreme Court Rule 402(d)(1) (eff. July 1, 2012) when it "failed to assure [his] understanding" of the admonitions regarding plea negotiation conferences. The defendant concedes that he did not raise this issue below; however, he argues that forfeiture does not apply where a court fails to give proper Rule 402(d) admonitions, citing *People v. Whitfield*, 217 Ill. 2d 177 (2005). Forfeiture aside, the defendant's argument fails on the merits.

¶ 20 We first note that defendant mistakenly relies on the most recent version of Rule 402, which became effective on July 1, 2012.[1] In this case, however, the plea conference took place on December 19, 2011; therefore, the version of Rule 402 that became effective on July 1, 1997, is applicable.

¶ 21 At the time of the defendant's 2011 plea conference, Illinois Supreme Court Rule 402(d) (eff. July 1, 1997), which governed plea conferences and agreements, provided that, at the request of the parties, prosecution and defense counsel could meet with the trial judge to advise him or her of a proposed plea agreement and learn, in advance of the plea, whether he or she would accept the plea and what sentence he or she would impose should the defendant plead guilty. Rule 402(d)(2) permitted the judge to be apprised of the tentative agreement and, at the same time, "with the consent of the defendant," receive evidence in aggravation and mitigation. Unlike the 2012 version, the 1997 version of Rule 402 did not require the court to admonish the defendant prior to the conference or "inquire as to the defendant's understanding of" those admonishments. Therefore, in this case, we need to determine whether the circuit court obtained

[1] Illinois Supreme Court Rule 402(d)(1) (eff. July 1, 2012)—the most recent version—provides, in pertinent part, that, before participating in a plea conference, "the trial judge shall admonish the defendant and inquire as to the defendant's understanding of" certain information.

the defendant's consent before hearing evidence in aggravation or mitigation at the conference as required by Rule 402(d)(2).

¶ 22 In our view, the circuit court did not violate Rule 402(d) because the record establishes that the defendant consented to the submission of evidence in aggravation and mitigation. After the court explained the procedure and consequences of the conference, it asked, "[y]ou want that done," and the defendant answered affirmatively. Although the defendant initially indicated uncertainty or confusion, he ultimately consented to the court's participation in the parties' plea negotiations.

¶ 23 We cannot say that real justice was denied or that the defendant was prejudiced. The defendant suggests that the circuit court was prejudiced by considering evidence in aggravation and mitigation at the conference; however, we do not know whether the court even received evidence in aggravation or mitigation because the defendant did not file a bystander's report of the proceedings. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984) (the defendant, as the appellant, has the burden of presenting a sufficient record on appeal). Additionally, two different judges presided over the conference and the bench trial and nothing in the record indicates that the judge who heard the trial was influenced by the plea conference. Therefore, the defendant's assertion that the court violated Rule 402(d) is unmeritorious.

¶ 24 We next address the defendant's claim that his conviction should be reversed and remanded for a new trial where the record demonstrates that the circuit court misrecalled "crucial" evidence in reaching its verdict. The defendant concedes that he did not raise this issue below, but asserts that we should review the merits under the plain-error doctrine because the evidence was closely balanced. In the alternative, he argues that his trial counsel was ineffective for failing to preserve this alleged error. We disagree.

¶ 25 Under the plain-error doctrine, a reviewing court may consider a forfeited issue when:

> "(1) a clear or obvious error occur[r]ed 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 occur[r]ed 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 (2007).

Under either of these prongs, the first step in considering whether this doctrine applies is to determine if any error occurred. *Id.* Where there is no error, there can be no plain error. *People v. Cosby*, 231 Ill. 2d 262, 273 (2008). "The ultimate question of whether a forfeited claim is reviewable as plain error is a question of law that is reviewed *de novo*." *People v. Johnson*, 238 Ill. 2d 478, 485 (2010).

¶ 26 During a bench trial, a circuit court's failure to recall and consider testimony crucial to the defense may result in a denial of the defendant's due process rights. *People v. Mitchell*, 152 Ill. 2d 274, 323 (1992). However, if a circuit court properly recalls the crux of the defense, then an "incorrect reference" or mere "misstatement" by the court, when considered in context, does not amount to a denial of the defendant's due process rights or plain error. *People v. Roman*, 2013 IL App (1st) 102853, ¶¶ 21-24. Additionally, a court does not improperly recall a witness' testimony where it summarizes the testimony and draws a reasonable inference therefrom. *People v. Simon*, 2011 IL App (1st) 091197, ¶¶ 95-96. Where the record does not indicate that the court was mistaken, there is a presumption that the court considered only competent evidence in reaching a verdict. *People v. Gilbert*, 68 Ill. 2d 252, 258-59 (1977). The court, as the fact-finder in a bench trial, is responsible for weighing the evidence—including determining "the

credibility and weight of witness testimony" and resolving "conflicts and inconsistencies present therein"—and making reasonable inferences from it. *Simon*, 2011 IL App (1st) 091197, ¶ 52.

¶ 27 Here, the defendant claims that the court "falsely corroborated" Williams' testimony because it misrecalled certain facts. Specifically, the court: (1) referred to the one live round recovered at the scene as "bullets;" and (2) misstated Lewis' testimony when it summarized that Lewis said she saw the defendant with "a black gun," although her testimony was that the gun was "[b]lack or something." He also claims that the court "falsely rehabilitated" Williams by failing to recognize impeachment evidence when it "misrecalled and failed to recall crucial testimony." In particular, the defendant contends that the court: (1) misstated that Williams did "not remember being able to tell [first responders] who shot him" because he actually testified that he was conscious and able to speak when they arrived; (2) "illogical[ly]" extended Williams' explanation regarding why he called Lewis and Lloyd instead of 9-1-1 after he was shot; and (3) "overlooked [Williams'] motive to lie by mischaracterizing his relationship with the defendant" when it found that Williams recognized the defendant as a "former associate or acquaintance" because Williams actually testified that he knew the defendant from "several altercations with family members." We disagree.

¶ 28 The record does not affirmatively indicate that the circuit court violated the defendant's due process rights by failing to recall and consider testimony crucial to his defense. Rather, we find that the court's statements here were either incorrect references or mere misstatements; or that the court drew reasonable inferences from the witnesses' testimony.

¶ 29 We first reject the defendant's argument that the court misrecalled Officer Lewis' testimony by incorrectly referring to the one live round recovered at the scene as "bullets." This was merely an incorrect reference or misstatement. *Roman*, 2013 IL App (1st) 102853, ¶¶ 21-24.

The court in this case found that Officer Lewis' testimony corroborated Williams' testimony, in relevant part, because the pool of blood that was surrounded by the one live round and one shell casing was physical evidence that a gun was fired and hit Williams. The court's reference to "bullets," when considered in context, did not amount to a denial of the defendant's due process rights as the court properly recalled the overall substance of Officer Lewis' testimony and its incorrect reference did not affect the crux of the defense.

¶ 30 We also do not find that the circuit court misrecalled Lewis' testimony or deprived the defendant of a fair trial when it summarized that Lewis saw the defendant with "a black gun," although Lewis' testimony was that the gun was "[b]lack or something." No evidence was presented showing that the gun was any other color, and the court properly concluded, based upon Lewis' testimony, that the gun was black. The court here merely made a reasonable inference based upon the evidence. *Simon*, 2011 IL App (1st) 091197, ¶¶ 95-96.

¶ 31 The circuit court also made a reasonable inference when it stated that Williams recognized the defendant as a "former associate or acquaintance." The defendant contends that the evidence actually showed that his relationship with Williams was adversarial and that, because of this, Williams had an incentive to wrongfully implicate him. We disagree. According to Williams' testimony, he had known the defendant for eight months and saw him five times prior to the shooting, but Williams did not consider him a friend. "Acquaintance" is an appropriate characterization of what the defendant was to Williams because they knew each other. Additionally, the court reasonably inferred that the defendant was Williams' "former associate" and this inference did not constitute a denial of the defendant's due process rights. Williams was previously a member of the Four Corner Hustlers with Arian. Arian and the defendant were together on February 3, 2008, when Williams refused to give the defendant a

gang handshake and the defendant shot him. Based upon this evidence, it is reasonable to infer that the defendant was trying to convince Williams to rejoin the gang.

¶ 32 The defendant also argues that the circuit court misrecalled the evidence and ignored impeachment evidence when it stated that "while [Williams] remembers police officers [arriving at his house], he does not remember being able to tell them who shot him" because Williams actually testified that he remembered being conscious and able to speak at that time. We find that the court merely made an incorrect reference regarding what Williams remembered after he was shot and that does not reflect a misrecollection of the crux of the defense. The record is silent as to why Williams did not identify the defendant to responding officers immediately after being shot. Moreover, before the court found that Williams' identification was reliable, it recognized that the defendant was attempting to impeach Williams based upon his inconsistent testimony regarding when he spoke to the police and when he identified the defendant. The court emphasized that February 5, 2008, was the first time that Williams "remembers police officers coming to talk to" him—just "two days [after the shooting], he was able to pick the defendant out of a photo array." Accordingly, the court's minor misstatement or incorrect reference with regard to the evidence does not affect its finding that Williams was credible.

¶ 33 Lastly, the defendant argues that the circuit court misrecalled evidence regarding why Williams called Lewis and Lloyd instead of 9-1-1 after he was shot. By doing so, the defendant contends, the court rehabilitated Williams after he was impeached. According to the defendant, a one button re-dial function could not be used to call both Lewis *and* Lloyd. He also asserts that Williams' could not have called Lewis using re-dial because his last outgoing call was to Lloyd and his last incoming call was from Arian. This impeached Williams, the defendant claims, and thus the court "based [its] findings on logically inconsistent evidence." We reject this contention

because we find that the court did not misrecall or fail to recall evidence. Williams dialed Lewis instead of 9-1-1 because he "couldn't really focus as far as using the phone," but knew that he could reach her by pressing one button under the re-dial function ("[t]he first number that was in my favorites was the last number that I called."). Williams did not state that he also called Lloyd using re-dial. The court found that Williams called Lewis and Lloyd because "he could only press one button" and "the phone would re-dial." The court's statement is supported by the evidence presented at trial. Thus, the court did not misrecall Williams' testimony.

¶ 34 In support of his argument, the defendant cites *Mitchell*, 152 Ill. 2d at 321, 326, and *People v. Williams*, 2013 IL App (1st) 111116, ¶¶ 85-86, where the reviewing courts found that violations of due process occurred because of the circuit courts' misrecollection of crucial evidence. In both *Mitchell* and *Williams*, however, the circuit courts recalled the opposite of what the defendants' testimony actually was and this testimony was crucial to their defenses. *Mitchell*, 152 Ill. 2d at 321, 326; *Williams*, 2013 IL App (1st) 111116, ¶¶ 85-86. For the reasons already explained, we find that the alleged errors in the instant case are either misstatements and incorrect references or reasonable inferences by the court that do not reflect a misrecollection of the crux of the defense. *Roman*, 2013 IL App (1st) 102853, ¶¶ 21-24; *Simon*, 2011 IL App (1st) 091197, ¶¶ 95-96.

¶ 35 Because the record does not affirmatively indicate a substantial misrecollection or misapprehension of the evidence by the circuit court or its failure to recall the crux of the defense (*i.e.*, misidentification and Williams' incredibility), the defendant has failed to show that he was denied due process and deprived of a fair trial. Accordingly, we find that there is no error to excuse the defendant's forfeiture of this issue. Consequently, the defendant has not met his burden of showing that he is entitled to review under the plain-error doctrine.

¶ 36 Because we find that no error exists, we need not address the defendant's alternative argument that his trial counsel was ineffective for failing to raise that the court misrecalled or failed to recall "crucial" evidence. *People v. Mahaffey*, 194 Ill. 2d 154, 173 (2000) (the prejudice prong of the ineffective-assistance-of-counsel test cannot be established when no error has occurred), overruled on other grounds by *People v. Wrice*, 2012 IL 111860.

¶ 37 In sum, the circuit court properly obtained the defendant's consent prior to a plea conference in accordance with Rule 402(d)(2). Additionally, the court did not commit error by misstating or incorrectly referencing certain portions of the testimony or by making reasonable inferences where it did not misrecall the crux of the defense. Therefore, the defendant's conviction should not be reversed and his case should not be remanded for a new trial.

¶ 38 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 39 Affirmed.