2016 IL App (1st) 140912-U

No. 1-14-0912

Fourth Division
August 4, 2016

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	No. 13 CR 15697
v.	)	Honorable Vincent M. Gaughan, Judge Presiding.
ANDRE NESBITT,	)	
Defendant-Appellant.	)	

JUSTICE COBBS delivered the judgment of the court.
Justices Howse and Ellis concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant was proved guilty beyond a reasonable doubt of possession of a controlled substance with intent to deliver within 1,000 feet of school, where testimony of officers with personal knowledge of the area established that the building near the offense was operating as a school. The trial court did not err in denying defendant's motion for a new trial where the alleged newly discovered evidence was not exculpatory. Trial court's comments regarding jury polling did not deprive defendant of a fair poll. The trial court improperly assessed a $500 reimbursement fee without a hearing; and mittimus amended to reflect the proper conviction.

¶ 2 Following a jury trial, defendant Andre Nesbitt was convicted of possession of between 1 and 15 grams of heroin with intent to deliver within 1,000 feet of "Ryerson Elementary School." 720 ILCS 570/407(b)(1) (West 2012). On appeal, defendant contends the State failed to prove him guilty beyond a reasonable doubt because it failed to present evidence that the building at issue was operating as a school on the date of the offense. Defendant further asserts that the circuit court: (1) should have considered codefendant Antoine Hardman's statement in allocution that defendant "wasn't in the same area" as Hardman in ruling on his motion for a new trial, (2) deprived him of his substantial right to a fair jury poll by "downplaying the importance of jury polling and precluding any dissent," and (3) improperly assessed a $500 reimbursement fee for the services of the public defender without a hearing to determine his ability to pay. In addition, defendant requests that the mittimus be corrected to reflect the name of the offense for which he was actually convicted. We affirm in part, reverse in part, and direct the clerk of the circuit court to amend the mittimus.

¶ 3 BACKGROUND

¶ 4 Defendant was tried by a jury. His codefendant Hardman was tried in a separate, but simultaneous, bench trial. At trial, Chicago police officer Joseph Harmon testified that on July 22, 2013, he was part of a surveillance team along with Officers Ruggiero and Von Kondrat. On that day, Ruggiero observed several hand-to-hand narcotics transactions near the alley of the 600 block of North Ridgeway in Chicago, Illinois. Harmon and Von Kondrat were several blocks away waiting for a signal from Ruggiero. Ruggiero reported via radio that he witnessed the transactions, provided a description of the two people involved, and told Harmon and Von Kondrat to come to that location.

¶ 5 Harmon testified that when he arrived at the alley behind 634 North Ridgeway, he saw two people that fit Ruggiero's descriptions. The officers detained the men. Soon after, Ruggiero appeared and "gave a thumbs-up" indentifying defendant and Hardman as the men he saw making hand-to-hand transactions. The officers then walked with the men to a vacant lot nearby. Harmon lifted a rock and saw several small Ziploc baggies with a white powder inside, which he believed to be heroin. The officers took the men to the 11th District police station, where they were processed and the baggies were inventoried.

¶ 6 Harmon stated that the borders of the 11th police district are Roosevelt Road on the south, Division Street on the north, Western Avenue on the East, and Cicero Avenue on the West. On the date of the offense, he had worked in the 11th district for nine years and was familiar with the area, including the schools located within the district. Harmon stated that the building near the offense was Laura Wood School, but was named "Ryerson" on July 22, 2013.

¶ 7 Officer Salvatore Ruggiero testified that he was assigned to the 11th district in July of 2013. At that time, he had been assigned there for seven years. Ruggiero further testified that he was familiar with the area and had conducted numerous arrests there. He stated that the block of 600 North Ridgeway is residential and is adjacent to a school that was called "Ryerson Elementary" on the date of the incident.

¶ 8 On the date of the offense, Ruggiero was working as a surveillance officer in the vicinity of 634 Ridgeway, which is within the 11th district. He observed defendant and Hardman talking to pedestrians walking through the alley. He watched the two men for approximately 20 minutes from at least 100 feet away using binoculars. Ruggiero testified that he observed defendant engage in three hand-to-hand transactions with unknown individuals. Each time,

Ruggiero saw defendant accept U.S. currency in exchange for a small item that was kept underneath a rock. After Ruggiero observed defendant and Hardman each conduct three hand-to-hand transactions, he radioed enforcement officers, provided their descriptions, and told the officers to come to the area. When they arrived, Ruggiero saw the enforcement officers approach the two men and he positively identified the defendants. The officers then recovered 12 small Ziploc baggies containing a white substance from under a rock located at 632 North Ridgeway.

¶ 9 Christopher Lappe testified that he is an investigator for the Cook County State's Attorney's Office. He received a request in September 2013 to measure the distance between 634 North Ridgeway, the scene of the offense, and the building at 646 North Lawndale, where Ryerson Elementary School was allegedly located. Using a calibrated measuring wheel, Lappe measured the distance between the two closest points at each location as 88 feet.

¶ 10 Penny Weinstein testified that she is a forensic scientist employed by the Illinois State Police. As part of her duties, Weinstein analyses substances that are suspected to be a controlled substance. She was qualified as an expert in forensic chemistry. Weinstein analyzed the contents of 7 of the 12 baggies that were retrieved during the investigation in this case. Based upon her expert opinion, she concluded the substances tested positive for 1.2 grams of heroin.

¶ 11 The jury found defendant guilty and defendant requested that the court poll the jury. In response to the request, the court stated:

"Ladies and gentleman of the jury, anybody convicted in a criminal case has a right to poll the jury. What that means is we ask each and every one that was then [*sic*], meaning in the jury room, and is this now your verdict.

This is, it's never happened in my lifetime, but there are stories that go back maybe decades and decades and decades ago where jurors were forced to sign jury verdict forms.

So, again, this is an absolute right of anybody who has been convicted. It's just another safety precaution that our Supreme Court has instituted. It's normal. It's done all the time. There is nothing unusual about that."

The court then asked each juror "was that then and is this now your verdict?" and each juror unequivocally answered "Yes." Defendant moved for a judgment notwithstanding the verdict or a new trial, which was denied. The matter then proceeded to sentencing.

¶ 12 Defendant and Hardman were sentenced at a joint sentencing hearing. Hardman was sentenced first. In allocution, Hardman stated "I would like to speak on behalf of my co-defendant that he should possibly get a new trial because he wasn't in the same area I was in, so if the Court could help him too, if that could be done." Both Hardman and defendant were sentenced to eight years in prison. After sentencing, the court asked defense counsel the number of times he appeared on the case. Counsel responded that he had appeared nine times. The court then noted that the case went to trial and imposed a $500 fee on defendant to reimburse the cost of the public defender's services. The court did not inquire as to defendant's ability to pay a fine.

¶ 13 Based on Hardman's statement, defendant renewed his motion for a new trial. The court again denied the motion. In doing so, the court stated, "Mr. Hardman never said any of this

prior to him being convicted, and it was only at that time, afterwards, that he made these statements." Defendant appealed.

¶ 14 ANALYSIS

¶ 15 Defendant first contends that he was not proved guilty beyond a reasonable doubt because the State failed to prove that the offense occurred within 1000 feet of a school. Specifically, defendant argues that the State did not present evidence that the building at issue was in fact operating as a school on the date of the incident. The State responds that the officers' testimony sufficiently established that the building near the offense was operating as a school. Notably, defendant does not challenge the sufficiency of the evidence establishing the conviction for the narcotics possession.

¶ 16 When reviewing the sufficiency of the evidence, it is not the function of this court to retry the defendant. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). Rather, the relevant inquiry is " 'whether, after viewing evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *People v. Clinton*, 397 Ill. App. 3d 215, 220 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Thus, we allow all reasonable inferences in the prosecution's favor. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). It is the trier of fact's role to resolve conflicts in testimony, determine the weight given to evidence, and draw reasonable inferences from the facts; we will not substitute our judgment. *People v. Bradford*, 2016 IL 118674, ¶ 12. The State bears the burden of proving every essential element of a crime. *People v. Larry*, 2015 IL App (1st) 133664, ¶ 14.

¶ 17 Section 401(d) of the Illinois Controlled Substances Act (Act) makes it a crime to knowingly deliver 1 gram or more but less than 15 grams of a controlled substance. 720

ILCS 570/401(d) (West 2012). When the offense occurs within 1,000 feet of a school, it is enhanced to a Class X felony. 720 ILCS 570/407(b)(1) (West 2012). Our supreme court has previously explained that a school refers to "any public or private elementary school, college, or university." *People v. Boykin*, 2013 IL App (1st) 112696, ¶ 10 (quoting *People v. Young*, 2011 IL 11886, ¶¶ 13-16)). To sustain a conviction under the enhancement, the State must prove that the building at issue was operating in its enhancing capacity on the date of the offense. See *People v. Ortiz*, IL App 2012 (2d) 101261, ¶ 11. An enhancing location can be proven through testimony by a layperson with personal knowledge of the operation of the building. *People v. Morgan*, 301 Ill. App. 3d 1026, 1032 (1998) (finding officer's testimony that enhancing location was a public park sufficient where he testified that he was familiar with the area and had made over 100 arrests there). "It is generally understood that persons living and working in the community are familiar with various public places in the neighborhood." *Id.*

¶ 18 Defendant primarily relies on *People v. Boykin*, 2013 IL App (1st) 112696, to support his contention that the officers' testimony was insufficient evidence to prove the building near the offense was a school. In *Boykin*, the defendant argued that the evidence was not sufficient to convict him of possession of a controlled substance with intent to deliver within 1000 feet of a school because the State did not establish that the enhancing location, "Our Lady of Peace," was operating as a school on the date of the offense. The court agreed and explained that although the officers testified that the building was a "school," the State did not present evidence demonstrating that the officers had personal knowledge of the operation of the building. *Id.* ¶ 15. It reasoned that the only evidence presented to establish that "Our Lady of Peace" was a school was an affirmative response from the officers to a leading question.

¶ 19 Unlike in *Boykin*, here, the officers established that they were familiar with the area and the elementary school at issue. Harmon testified that in July 2013 he had worked in the 11th district for nine years. Significantly, he specifically stated that he had knowledge of the schools there and that the building near the offense operated as Ryerson Elementary School in July 2013. He explained that it had subsequently changed its name to Laura Wood School. Similarly, Ruggiero testified that he had worked in the 11th district for seven years on the date of the incident. He stated that he had knowledge of the schools in the district, including that the building located at 646 North Lawndale was operating as Ryerson Elementary School on July 22, 2013. In addition, officer Ruggiero testified that he had conducted many arrests in that location. Thus, a rational trier of fact could find that both officers had personal knowledge that the building located near the offense was a school on July 22, 2013. Accordingly, the evidence was sufficient to establish that defendant possessed 1 to 5 grams of a controlled substance with intent to deliver within 1000 feet of a school.

¶ 20 Codefendant's Statement

¶ 21 Defendant next contends that the trial court erred in denying his motion for a new trial because newly discovered exculpatory evidence existed. Specifically, he asserts that the trial court should have considered codefendant Antoine Hardman's statement in allocution that defendant "wasn't in the same area" as Hardman. The State responds that the trial court did not abuse its discretion in denying the motion because the alleged newly discovered evidence would not have changed the result of trial.

¶ 22 A motion for a new trial based upon newly discovered evidence is not favored and is given close scrutiny. *People v. Moleterno*, 254 Ill. App. 3d 615, 624 (1993). To warrant a new trial, the evidence must be: (1) of such a conclusive character that the result on retrial

would likely be different, (2) material and not merely cumulative, and (3) discovered after trial and of such a character that the defendant could not have discovered it earlier. *People v. Gabriel*, 398 Ill. App. 3d 332, 350 (2010). A motion for a new trial based upon newly discovered evidence will not be reversed absent an abuse of discretion. *Id.* A reviewing court can affirm the trial court on any grounds supported by the record, regardless of whether the trial court's reasoning was correct. *People v. Young*, 2013 IL App (1st) 111733, ¶ 36.

¶ 23 Defendant contends that the trial court improperly discounted Hardman's statement because it was made subsequent to trial. As defendant points out, our supreme court has held that codefendants' statements subsequent to trial exonerating a codefendant could be considered newly discovered evidence. *People v. Molstad*, 101 Ill. App. 3d 878, 882 (1980) (explaining that defendants' post-trial but pre-sentencing statements that a codefendant was not involved in a crime were newly discovered evidence). Thus, we agree with defendant that the timing of Hardman's statement alone does not preclude its consideration as newly discovered exculpatory evidence. A review of the record suggests that the trial court rejected Hardman's statement because it was made after trial. Even if the court's reasoning was flawed, however, the alleged newly discovered evidence does not warrant a new trial because Hardman's statement was not so conclusive that it demonstrated defendant's innocence. We reiterate that "newly discovered evidence must be of such a conclusive nature that it would probably change the result on retrial." *People v. Jones*, 399 Ill. App. 3d 341, 366 (2010). Hardman merely stated that defendant was not in the same area as him. Notably, he did not state that defendant was not involved in the drug transactions nor provide information as to defendant's location at the time of the offense. Thus, the statement does not indicate that defendant was not within 1000 feet of Ryerson Elementary School and is not exculpatory. In

contrast, the State presented overwhelming evidence at trial that defendant was in the relevant area. Ruggiero testified that he observed defendant conducting hand-to-hand transactions near 634 North Ridgeway, which was measured by an investigator to be 88 feet from the school. In addition, Harmon testified that he detained defendant in the alley behind 634 North Ridgeway. The officers also conclusively established that the building near the offense was operating as a school at that time. Considering the evidence presented at trial and the fact that Hardman's statement was not exculpatory, we cannot say that the trial court abused its discretion in denying the motion for a new trial.

¶ 24 Jury Poll

¶ 25 Defendant additionally contends that he was denied his right to a fair jury poll because the trial court made statements that "downplayed" its importance. Specifically, defendant argues that the trial court's comments did not give the jurors an opportunity to dissent. The State first contends that this claim was forfeited because defendant did not raise it at the time of the jury poll or in a posttrial motion. Defendant asserts that despite not raising this claim below, it should not be subject to forfeiture because the alleged error was caused by the court's interaction with the jury. Alternatively, defendant argues that even if this claim was forfeited, it is reviewable as plain error. The State maintains that this claim does not amount to plain error because there was no error where the court's comments did not improperly influence the jury.

¶ 26 It is well settled that a claim is forfeited on review if the defendant failed to object at trial and in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Nevertheless, as defendant points out, application of the forfeiture rule can be relaxed where the alleged error relates to the trial judge's conduct in front of the jury. *People v. Williams*, 173 Ill. 2d 48,

85 (1996). In addition, plain error allows a reviewing court to review otherwise forfeited errors when: "(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. Thompson*, 238 Ill. 2d 598, 613 (2010). Regardless of whether the claim has been preserved or forfeited and thus reviewable as plain error, the first step in either analysis is to determine whether an error has occurred. See *id.* (explaining that the first step of plain-error review is determining whether error occurred). Where we find no error, there can also be no plain error.

¶ 27 A criminal defendant has an absolute right to poll the jury. *People v. McGhee*, 2012 IL App (1st) 093404, ¶ 15. The purpose of a jury poll is to confirm that the verdict is unanimous by giving each juror the opportunity to express his or her vote in public, free of any possible coercion that could have occurred in the jury room. *People v. Kellogg*, 77 Ill. 2d 524, 528 (1979); *People v. Wheat*, 383 Ill. App. 3d 234, 237 (2008). The trial court has discretion regarding the manner in which the jury is polled. *Wheat*, 383 Ill. App. 3d at 238. "A verdict cannot stand if the interrogation precludes the opportunity to dissent or if the record reflects that the juror in the poll has not in fact assented to the verdict." *Kellogg*, 77 Ill. 2d at 530.

¶ 28 Defendant contends that the court's comments prevented jurors from dissenting with the verdict because the court stated that coercion was an issue "decades and decades and decades ago" and "had never happened in [his] lifetime," implying that disagreement with the verdict was rare. Defendant further asserts that explaining that a jury poll was a "safety precaution" was "practically telling the jurors to simply play along in a pre-recorded charade rather than

express doubts." We disagree. We recognize that the "influence of the trial judge on the jury is necessarily and properly of great weight" and consequently the court "must carefully avoid the possibility of influencing" jurors. (Internal quotations marks omitted.) *Kellogg*, 77 Ill. 2d at 529. Thus, the trial judge's comments regarding his past experience, though perhaps well intentioned, were best left unsaid. That said, however, there is no evidence that the jurors were improperly influenced. Any of the alleged offending statements were mitigated by the court's explanation that a poll is "an absolute right of anybody convicted *** It's normal. It's done all the time. There's nothing unusual about that." Thus, in context, it is apparent that the comments were made to explain why juries are polled and to make the jury feel comfortable in expressing their vote in public. Defendant points to nothing in the record to suggest that a juror understood these comments to mean that he or she could not dissent from the verdict.

¶ 29 Additionally, we find defendant's reliance on *People v. Smith*, 271 Ill. App. 3d 763 (1995), and *People v. Kellogg*, 77 Ill. 2d 524 (1979), misplaced. Both of these cases involved situations where a juror's answer to the poll was equivocal and ambiguous. In *Smith*, the jury returned a guilty verdict and when polled, one juror stated that it was not her verdict and that she "voted guilty but it's not what [she] wanted." *Id.* at 764. Another juror then stated that "It's my verdict, but I'm not happy with it at all." *Id.* Defense counsel moved for a mistrial but before the court ruled on the motion, the jury was sent back into the jury room to deliberate. *Id.* During those deliberations, a juror asked the bailiff "What happens if we arrive at a hung jury?" *Id.* When the jury returned to the courtroom, defense counsel asked the court to rule on the motion and it refused. *Id.* at 765. Instead, over defense counsel's objection, the court re-polled only the two jurors who had indicated that they did not vote "guilty." *Id.* They affirmed the guilty verdict but one stated: "I just didn't like the presentation of evidence." *Id.*

Nevertheless, the court accepted the guilty verdict and reasoned that the evidence against the defendant was "strong." *Id.* Our supreme court reversed explaining that "the court erred in failing to instruct the jury to continue deliberating or to discharge the jury. There is no authority to support the trial court's decision that, because the evidence of guilt was strong, the court could accept the verdict when it was not clear that the verdict was unanimous." *Id.* at 767.

¶ 30 Similarly, in *Kellogg*, during the jury poll a juror asked "Can I change my vote?" *Kellogg*, 77 Ill. 2d at 527. The court responded, "The question is, was this then and is this now your verdict?" *Id.* The juror did not respond. *Id.* The court then repeated, "Was this then and is this now your verdict?" *Id.* The juror answered, "Yes, Sir." *Id.* Our supreme court found that the trial court erred because it did not allow dissent from the verdict and failed to ascertain whether the juror desired to change her vote at that time after she asked if she could. *Id.* at 530. In contrast, here, none of the jurors hesitated when they were asked "was that then and is this now your verdict" and answered "Yes." Thus, contrary to defendant's assertion that the court's comments "rendered the process meaningless" the record reveals that each juror had the opportunity to dissent and the poll served its purpose of confirming that the jury verdict was unanimous. Accordingly, defendant received a fair jury poll.

¶ 31 Fine

¶ 32 Defendant additionally argues that the trial court improperly assessed a $500 reimbursement fee for the public defender's services without conducting a hearing to determine his ability to pay. The State concedes this claim and agrees that this cause must be remanded for a hearing to determine whether defendant has the ability to pay the fee. We accept the State's concession. Section 5/113-3.1(a) of the Illinois Code of Criminal Procedure

provides that the circuit court may order a defendant to pay a reasonable sum, determined at a hearing at which the court shall consider the defendant's financial circumstances. 725 ILCS 5/113-3.1(a) (West 2012). Our supreme court has instructed that the trial court, "must give the defendant notice that it is considering imposing the fee, and the defendant must be given the opportunity to present evidence regarding his or her ability to pay and any other relevant circumstances." *People v. Somers*, 2013 IL 114054, ¶ 14. Here, the court merely asked the public defender the number of times he appeared in court. It did not inquire into defendant's financial status or give defendant an opportunity to present evidence regarding his ability to pay. Accordingly, we remand for a hearing on defendant's ability to pay the $500 fee imposed by the court.

¶ 33 Mittimus

¶ 34 Finally, defendant requests that the mittimus be corrected to reflect that he was convicted of possession of heroin with intent to deliver within 1000 feet of a school, and the State agrees. 720 ILCS 570/407(b)(1). The mittimus shows defendant was convicted of "MFG/DEL HEROIN/SCH/PUB HS/PK" referring to manufacture or delivery of heroin within 1,000 feet of a school. Accordingly, we direct the circuit court to amend the mittimus to reflect the proper offense.

¶ 35 CONCLUSION

¶ 36 For the foregoing reasons we affirm defendant's conviction and remand the cause for a hearing to determine defendant's ability to pay the fee for the public defender's services. The Clerk of the Circuit Court is directed to amend the mittimus to reflect the proper offense.

¶ 37 Affirmed and reversed in part; mittimus amended. Cause remanded with directions.