2016 IL App (3d) 130817-U

Order filed February 1, 2016
Modified upon denial of rehearing filed March 7, 2016

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JAMIE LOMELI, Defendant-Appellant.	)))))))))))	Appeal from the Circuit Court of the 13th Judicial Circuit, LaSalle County, Illinois. Appeal No. 3-13-0817 Circuit No. 11-CF-239 Honorable Cynthia M. Raccuglia, Judge, Presiding.

PRESIDING JUSTICE O'BRIEN delivered the judgment of the court.
Justices Holdridge and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: A defendant's felony murder conviction was affirmed on appeal where the mostly consistent testimony of two accomplices, corroborated in part by text messages and physical evidence, was sufficient to prove beyond a reasonable doubt that the defendant participated in the planning of the underlying felony, robbery. Any error in giving the jury Rule 431(b) admonishments was forfeited, and not reviewable for plain error, where the evidence was not closely balanced.

¶ 2 The defendant, Jamie Lomeli, was convicted of first degree murder (720 ILCS 5/9-1(a)(3) (West 2010)) and sentenced to 24 years in prison. She appealed.

¶ 3 FACTS

¶ 4 The defendant was charged with obstructing justice (720 ILCS 5/31-4(a) (West 2010)) and two counts of first degree murder (720 ILCS 5/9-1(a)(2), (3) (West 2010)) in the beating death of Darrio Hunter. Prior to trial, the state dismissed two of the counts and proceeded only on the felony-murder count (720 ILCS 5/9-1(a)(3) (West 2010)). The State's main witnesses were co-defendants Joshua Ward and Sylvia Enriquez.

¶ 5 During jury selection, the trial court informed the entire venire of the four principles contained in Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). At that point, the court did not ask the venire if they understood or accepted the principles. When the initial panel was seated, the trial court repeated the 431(b) principles and asked the first potential juror if he or she had "any problems with that presumption of innocence and the law?" and asked the remaining two jurors if they had any problem with that. The principles were repeated for the next four prospective jurors, and they were asked if they had any problem with those principles.

¶ 6 At trial, Jannelle Debernardi testified that she was friends with Hunter. During the early morning hours of May 2, 2011, she and Hunter were driving around Ottawa, Illinois. Debernardi was driving Hunter's car because Hunter did not have a license. Around 1 a.m., they drove to a house on Pierce Street after Hunter received a telephone call from the defendant. After arriving at the house, which Debernardi testified was the defendant's house, Hunter got out of the car and went in the house. Hunter brought cocaine with him into the house. He was in the house for about 15-20 minutes and then came back out and got in the car. He no longer had the cocaine, but he had money. After that, Debernardi dropped Hunter off at an apartment building and she went home to sleep. At around 4 a.m., Debernardi was contacted by Hunter and she went back to get him. Hunter wanted a ride back to Pierce Street, so Debernardi did so. Hunter again entered the defendant's house with cocaine. Debernardi waited in the car in the driveway.

About 20 to 30 minutes later, five people came out of the house. One of them was the defendant. There were three males and another female that Debernardi did not know. One of the males said something that Debernardi perceived as a threat. The defendant came around to the driver's side and told Debernardi that she needed to go in and get Hunter and that he needed to go to the hospital. Debernardi and the defendant went into the house and found Hunter lying on a bed in one of the bedrooms. His forehead was cut open and he was covered in blood. They tried helping him get to the car, but they could not get him in the car. The defendant did not want to call 911 because she was living in the house and she had kids there, but Debernardi called 911. The defendant told Debernardi to tell the ambulance people that the defendant did not know Hunter and he just came to her house for help. Debernardi testified that she was not truthful with the police when they arrived because she did not want to get herself or Hunter in trouble for the drug deal. Debernardi was questioned regarding her past convictions for misdemeanor retail theft and felony possession of cannabis with the intent to deliver. She was recently charged with possession of a stolen motor vehicle and she had an agreement with the State to testify regarding the events involving Hunter and in exchange she would plead guilty and be placed on conditional discharge.

¶ 7 Joshua Ward, a co-defendant, testified that he, his co-defendant brother Jason Ward, and co-defendants Luis Lomeli (the defendant's brother) and Sylvia Enriquez were at the defendant's home earlier in the day on May 1 and arrived back there around 1 a.m. on May 2nd. They were drinking with the defendant in her bedroom and decided that they needed some cocaine. The defendant texted her source and about 15 or 20 minutes later, a guy showed up with cocaine. Joshua and the defendant left the bedroom and went into the kitchen to meet Hunter, who Joshua did not know but described as a black man with braids, wearing a red hoodie. They purchased

the cocaine and Hunter left. They started doing the cocaine, but Luis became angry because he said it was bad cocaine. Joshua testified that his brother, Jason, then suggested that they rob Hunter, saying it in front of all of the co-defendants. Joshua testified that the defendant's response was that Hunter "always has stacks," which meant a lot of money. Luis told the defendant to text Hunter again, and the defendant started texting. All of the co-defendants were still in the back bedroom, and the defendant was telling the group what Hunter's responses were. Hunter did not have a ride and wanted them to come to him, but the co-defendants wanted him to come back to the defendant's house. The defendant walked out of the bedroom texting, but returned saying that Hunter was coming over. When Hunter returned to the house about 20 minutes later, he walked into the house. Joshua was in the living room, but everyone else was still in the bedroom. Joshua, the defendant, and Hunter went into the kitchen and started weighing the cocaine. Jason and Luis came into the kitchen and Jason punched Hunter and said "Give me your shit." Hunter pulled out a knife and swung it at Jason, and Luis, Jason and Hunter start fighting. Luis started punching Hunter. Joshua testified that he took the cocaine off the scale and gave it to the defendant, and she walked it to the back bedroom. Luis and Jason were punching and kicking Hunter as they went down a hallway toward the bedroom. Luis told Sylvia to shut the bedroom door on Hunter's hand to get him to drop the knife, which Sylvia did. The fight proceeded to the bedroom, and Luis and Jason continued to punch and kick Hunter. Then Jason hit Hunter in the head with a beer bottle. The defendant told Joshua to move the television, so he took it to the spare bedroom and placed it on the bed. Luis then used the knife to cut Hunter's face and then jumped on his head. At that point, the defendant said to "Get these two fucks out of my house." Joshua testified that he never touched Hunter. They left the house, and Jason went up the lady in the car in the driveway and said something, but Joshua did not

know what. Joshua testified that Sylvia took the cocaine. Luis took the knife and went on the side of the defendant's house, but Joshua did not know what Luis did with the knife. Joshua was questioned regarding his prior felony convictions, including burglary and residential burglary. He was originally charged with first degree murder in Hunter's death, but had an agreement with the State to plead guilty to armed robbery, with a 30-year prison sentence, in exchange for his testimony against his co-defendants. In addition, the State had agreed to run his 30-year sentence concurrently with any sentence imposed in Kane County.

¶ 8 Sylvia testified that she was Luis' girlfriend. Her testimony regarding the activities of May 1 and 2 was consistent with Joshua's testimony, except for a few differences. Sylvia initially testified that when Luis said he wanted to get more cocaine but not pay for it, they were all together in the bedroom. She then clarified that Luis did not personally ask the defendant to get ahold of Hunter, but asked Joshua to talk to the defendant about it because the defendant had gone to the living room sometime after they finished the first batch of cocaine. According to Sylvia, the defendant was not initially in the bedroom when they began talking about robbing Hunter, but Joshua went out to talk to the defendant and then the defendant came back into the bedroom and agreed to contact Hunter. Luis then told the defendant to get ahold of Hunter and bring him back so that they could rob him. Sylvia testified that the defendant then started texting on her telephone, and she read the incoming and outgoing texts out loud. Also, after Luis and Jason started beating up Hunter, Sylvia testified that she and the defendant went to the bedroom and tried to close the door. They entered the bedroom, and at some point Luis asked Sylvia to pick up the knife that had fallen to the floor. Sylvia testified that when she told police that she took the knife out of Hunter's hand but that was a lie. Sylvia testified that she left the bedroom at this point, but the defendant told her to go back and get Luis and leave. However, she did not

remember the defendant screaming at Luis and Jason to stop or telling them to get out of her house. After they left the house, Sylvia saw Jason go up to the girl in the car and tell her that he knew where she lived and to not say anything. Sylvia testified that she did not take the cocaine and did not see it again. Sylvia was given a 3-year prison sentence for her involvement in this case; she was already released from custody when she testified. Part of her agreement with the State was that she testify against her co-defendants.

¶ 9 The State then presented testimony and stipulations from numerous police officers and expert witnesses. That evidence established that police were dispatched to the defendant's home at 4:44 a.m. on May 2, 2011. Hunter was lying in the driveway, with the defendant and Debernardi, and medical personnel began to treat Hunter. Police officer Andrew McLaughlin testified that he spoke to the defendant at the scene, and she told him that Hunter was bleeding when he arrived at her house. McLaughlin noticed a large pool of blood in the defendant's bedroom, blood in the living room and the hallway, a knocked over bookshelf, a broken closet door in the hallway, and pictures on the floor. Detective Marc Hoster walked through the house, and noticed three small children were sleeping in one of the bedrooms. There was a large amount of blood and furniture knocked around in another bedroom, and there was a television sitting on a bed in a third bedroom. According to Hoster, the defendant told him that Hunter was bleeding when he arrived at her house. Dave Gualandri, a captain with the Ottawa Police Department, testified that he interviewed the defendant at the police station on the morning of May 2. The defendant again stated that Hunter was already injured when he arrived at her house and he did not get hurt inside her house.

¶ 10 The State also presented some physical evidence, including a white garbage bag containing bloody clothes and shoes found in Sheridan, Illinois. Hunter's state identification

card and credit cards were found nearby. A knife was recovered from the roof of the defendant's house. Joshua's fingerprints were found on the television on the bed in the third bedroom. Joshua's blood was on some of the clothes found in the garbage bag. Fingerprints from all of the defendants were found on beer bottles in the defendant's home. Hunter's blood was found in the defendant's kitchen, bathroom, hallway, on the television found in the third bedroom, and on some of the clothes in the garbage bad. His DNA was also found on the inside door of Luis' car and on the blade of the knife found on the roof.

¶ 11 The People's exhibit # 93, a PowerPoint presentation, was shown to the jury. It was a text conversation between the defendant and Hunter, taken from Hunter's phone, which was recovered from his girlfriend's house later on the day of the murder. Since the texts contained some street vernacular, Gualandri, who testified that he was familiar with the terminology, testified to the meaning of the conversation. He testified that the first text was at 3:15 a.m., from Hunter to the defendant and it said, "you like". The defendant responded at 3:16 a.m., saying "Yes, my brother said how much for the ball 3.5." Gualandri interpreted this to mean that the defendant was asking how much for an 8-ball of cocaine, which is 3.5 grams, and he thought the 3.5 referred to a price of $350. The defendant sent the next message, too, at 3:17 a.m., which said he said "not to tax." Gualandri testified that "taxing" meant paying more in a smaller community because the supply was less. The defendant's brother was asking that Hunter only charge the price they were accustomed to paying in a larger market like Chicago. According to Gualandri, Hunter's reply to the defendant at 3:21 a.m., "I don't got it like that. I'm just jump off the porch but like I said price is different," meant that Hunter had smaller amounts, and drugs are more expensive in Ottawa. Hunter told the defendant that he had an 8-ball, and in response to the defendant's text asking how much, Hunter replied that it was $100 per gram. Hunter's

next text, "Its very good and not beat up," referred to the quality of the cocaine. The defendant replied asking if Hunter would take $300 for the 8-ball. They agreed on the purchase, but at 3:39 a.m., Hunter's text asked if the defendant could come to his place to make the drug deal. The defendant asked if it was ok to send her friend, but then said no one could come. She then asked him in multiple texts if he was coming, but he did not answer. The last text from the defendant to Hunter, saying "Hello. So what's up" was sent at 4:16 a.m. Gualandri testified that these text messages had been deleted from the defendant's cell phone.

¶ 12 During deliberations, the jury sent a note to the judge asking to see the PowerPoint of the text messages again. The jury was allowed to come back into the courtroom and do so. The jury found the defendant guilty of first degree murder, and she was sentenced to 24 years in prison. The defendant appealed.

¶ 13 ANALYSIS

¶ 14 The defendant argues that, because the State's case hinged on the uncorroborated testimony of two accomplices, the State failed to prove her guilty beyond a reasonable doubt. There is no dispute that the defendant was not part of the beating of Hunter; the State's theory was that she was accountable for the actions of Luis and Jason because they beat and killed Hunter during a robbery attempt. The defendant argues that the State's evidence established that the defendant arranged for Hunter to come over but did not prove beyond a reasonable doubt that the defendant was aware of the plan to rob Hunter or that the defendant was involved in the robbery. She also argues that her involvement was uncorroborated by independent evidence and the text messages were exculpatory. The State argues that the defendant was proven guilty beyond a reasonable doubt.

¶ 15 In a criminal prosecution, the State must prove every element of the offense beyond a reasonable doubt. *People v. Cameron*, 2012 IL App (3d) 110020, ¶ 27 (citing *People v. Howery*, 178 Ill.2d 1, 32 (1997)). When addressing a defendant's challenge to the sufficiency of the evidence, a reviewing court determines whether, after viewing the 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. *People v. Collins*, 106 Ill. 2d 237, 261 (1985).

¶ 16 In this case, the defendant was convicted of first degree murder under the felony murder doctrine, on an accountability theory. One commits felony murder if he or she kills an individual without lawful justification and, in performing the acts which cause the death, "…is attempting or committing a forcible felony other than second degree murder." 720 ILCS 5/9-1(a)(3) (West 2010). The felony that the defendant was charged with committing was robbery, which is a forcible felony. 720 ILCS 5/2-8 (West 2010). The offense of felony murder is unique in that the defendant does not need to have the intent to kill, only the intent to commit the predicate forcible felony. *People v. Colbert*, 2013 IL App (1st) 112935, ¶ 12 (citing *People v. Davison*, 236 Ill. 2d 232, 239-40 (2010)). Thus, in this case, the State did not need to prove that the defendant intended to kill Hunter, only that she intended to commit the robbery.

¶ 17 A person is legally accountable for the criminal conduct of another when "either before or during the commission of an offense, and with the intent to promote or facilitate that commission, he or she solicits, aids, abets, agrees, or attempts to aid that other person in the planning or commission of the offense." 720 ILCS 5/5-29(c) (West 2012). To sustain a conviction based upon an accountability theory, the State must prove that the defendant: (1) solicited, ordered, abetted, or agreed or attempted to aid another in the planning or commission of the offense; (2) participated before or during the commission of the offense; and (3) had the

concurrent, specific intent to promote or facilitate the commission of the offense. *People v. Jaimes*, 2014 IL App (2d) 121368, ¶ 37, *as modified on denial of reh'g* (Feb. 10, 2015). The defendant acknowledges that the State presented evidence that the defendant agreed with the others to rob Hunter and participated in the robbery plan by luring Hunter to her house and also taking Hunter's cocaine during the scuffle. However, the defendant argues that the testimony that established these facts was untrustworthy and unreliable because it came from the testimony of two accomplices, Joshua Ward and Sylvia Enriquez.

¶ 18 Joshua testified that the defendant was present in the room when the plan to rob Hunter was made, that the defendant participated by offering that Hunter always had a lot of money, and the defendant was the one to text Hunter to get him to the house. Sylvia testified that the defendant was not initially in the room, but the defendant agreed to the plan and the defendant was the one to text Hunter to get him to the house. The defendant contends that this testimony was inherently suspect because both accomplices had been offered generous plea deals in exchange for their testimony against the defendant.

¶ 19 It is true that accomplice testimony is inherently suspect and should be accepted with utmost caution and suspicion. *People v. Newell*, 103 Ill. 2d 465, 470 (1984). However, it is also true that uncorroborated testimony of an accomplice is sufficient to sustain a conviction if the testimony convinces the jury of the defendant's guilt beyond a reasonable doubt. *Id.* The inherent weakness of the testimony goes to the weight of the evidence and the credibility of the witness, matters peculiarly within the province of the trier of fact. *People v. Holmes*, 141 Ill. 2d 204, 242 (1990). Both accomplices were impeached in front of the jury by with their prior offenses, prior statements, and their deals in the current case. Considering their testimony, in conjunction with the physical evidence and the text messages, the jury found the defendant guilty

beyond a reasonable doubt. Viewing the evidence in the light most favorable to the prosecution, we find that the evidence was sufficient to prove beyond a reasonable doubt that the defendant participated in the planning and the commission of the robbery of Hunter. Thus, we affirm the defendant's conviction.

¶ 20 The defendant also argues that the trial court failed to comply with the requirements of Rule 431(b) in that it asked the prospective jurors if they had any problem with the 431(b) principles, rather than asking whether the jurors accepted and understood the principles. The defendant acknowledges that this issue was forfeited, but argues that this error is reversible under the plain error doctrine because the evidence was closely balanced. The State argues that there was no error, much less plain error.

¶ 21 Rule 431(b) provides:

> "The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects. The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." Ill. S.Ct. R. 431(b) (eff. May 1, 2007).

¶ 22 Rule 431(b) is a codification of *People v. Zehr*, 103 Ill. 2d 472 (1984), which requires a trial court to determine whether potential jurors understand and accept key principles of criminal

law. *Zehr*, 103 Ill. 2d at 477-78. The rule requires that a trial court ask potential jurors whether they understand and accept the enumerated principles. *People v. Wilmington*, 2013 IL 112938, ¶ 32. Under our recent decision in *People v. Sebby*, 2015 IL App (3d) 130214, ¶ 39, asking the jurors if they had any problems with the 431(b) principles, and not asking them whether they understood and accepted them, was error. See also *People v. Gashi*, 2015 IL App (3d) 130064, ¶ 35 (asking potential jurors if they have "difficulty with" the principles encompasses understanding and acceptance, but asking them if they "disagree" with a principle is error because it does not ask whether they understood the principle).

¶ 23 The defendant did not object during *voir dire* and did not include the issue in her motion for a new trial, so any claimed error must be the subject of plain-error analysis. *People v. Wilmington*, 2013 IL 112938, ¶ 31. Plain error review allows an appellate court to correct unpreserved errors when the evidence is closely balanced or when the error is so serious that it denies a substantial right. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). The defendant argues that this case falls under the first prong, and that due to the closely balanced evidence, the error threatened to tip the scales of justice. The defendant again relies on the argument that the accomplice testimony was suspect, arguing that it made the evidence of the defendant's guilt closely balanced.

¶ 24 In determining whether evidence is closely balanced, we make a "'commonsense assessment' of the evidence within the context of the circumstances of the individual case." *People v. Adams*, 2012 IL 111168, ¶ 22 (citing *People v. White*, 2011 IL 109689, ¶ 139). Whether evidence is closely balanced is a separate question from whether the evidence is sufficient to sustain a conviction on review against a reasonable doubt challenge. *People v. Piatkowski*, 225 Ill. 2d 551, 566 (2007). As stated above, accomplice testimony is inherently

suspect. However, in this case, both accomplices testified that the defendant knew of and participated in the plan to rob Hunter. There was no testimony directly contradicting that testimony. See *People v. Newell*, 103 Ill. 2d 465, 470 (1984) (accomplice testimony was not sufficient to sustain a conviction when the testimony of the accomplice implicating the defendant was directly contradicted by both a second accomplice and the defendant, with no corroboration of either view). While the defendant argues to the contrary, the text messages between the defendant and Hunter corroborate the accomplices' testimony regarding the timing and the defendant's participation in getting Hunter to return to the defendant's house for the robbery. In light of the accomplice testimony, the physical evidence, and the text messages, we find that the evidence was not closely balanced. Thus, any error in admonishing the jurors regarding Rule 431(b) principles is not reversible under the plain error doctrine.

¶ 25 CONCLUSION

¶ 26 The judgment of the circuit court of LaSalle County is affirmed.

¶ 27 Affirmed.