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2016 IL App (3d) 140136-U

Order filed February 19, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2016

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-14-0136
JERRY HUGHES,)	Circuit No. 13-CF-649
Defendant-Appellant.)	Honorable Kevin Lyons, Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Holdridge and Wright specially concurring.

ORDER

- ¶ 1 *Held:* Although the trial court erred when it failed to comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012), defendant failed to establish plain error. Cause is remanded for proper entry of an order of enumerated assessments.
- ¶ 2 Defendant, Jerry Hughes, appeals from his convictions and sentences imposed for attempted first degree murder, aggravated battery, and unlawful possession of a weapon by a felon. Defendant argues that he is entitled to a new trial because during *voir dire* the trial court failed to properly question and admonish all potential jurors in accordance with Illinois Supreme

Court Rule 431(b) (eff. July 1, 2012). Alternatively, defendant requests this court vacate the assessments charged and remand the cause for the trial court to enter an order enumerating the fines and fees assessed against him. We affirm defendant's convictions and sentences. We vacate the assessments and remand with directions.

¶ 3

FACTS

¶ 4

The State charged defendant by indictment with two counts of attempted first degree murder (720 ILCS 5/8-4(a), 9-1 (West 2012)), aggravated battery (720 ILCS 5/12-3.05(e)(1) (West 2012)), and unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2010)). The charges are based on the allegation that on or about July 14, 2013, defendant shot and injured the victim, Anthony Thomas.

¶ 5

During *voir dire*, the trial court asked all but one of the potential jury members whether they understood and accepted the principles codified in Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). The one venire member the trial court failed to question was ultimately selected as a juror.

¶ 6

At trial, Thomas testified on direct examination that around 12:45 a.m. on July 14, 2013, he was smoking a cigarette in the back of his apartment at 2512 North Lavalley Court. He had just returned home from Anita Forrest's apartment in the Lexington Hills apartment complex. Lexington Hills apartment complex is next to 2512 North Lavalley Court but a field divides the two buildings.

¶ 7

As Thomas smoked his cigarette, three men approached him. Thomas estimated that two of the men were about 10 feet away. The third individual approached the neighbors' door to the left of Thomas's apartment. Thomas identified the third individual as defendant. Initially, Thomas did not observe defendant as he approached because several air-conditioner units

blocked his view. However, as defendant got closer to Thomas, he saw him in his peripheral vision. As soon as Thomas observed defendant, he stood up and went to the back door. Thomas then heard gunshots and was struck by three bullets. Thomas identified defendant as the shooter.

¶ 8 Thomas entered his apartment and went upstairs into his bedroom. Thomas went back downstairs to make sure "everything was okay." Thomas subsequently returned to his upstairs bedroom. Thomas did not call the police but believed his neighbor had. Thomas recognized the three individuals who had approached him because he had seen them before, but he did not know their names. Further, Thomas knew defendant because defendant previously dated Thomas's girlfriend, Silka Forrest. Although Thomas never spoke to defendant and did not know his name, he knew his face and that defendant's nickname was "Pooh Bear." The police then arrived and questioned Thomas. An ambulance took Thomas to the hospital.

¶ 9 On cross-examination, Thomas testified that he saw defendant holding a gun as he approached Thomas, but did not see the gun being fired. Thomas stated that he knew defendant was the only person close enough to shoot him, as the two other men were at least 20 to 30 feet away. Thomas also testified that he was on the lease at the 2512 North Lavalley Court apartment. He explained that when he left Anita's apartment, he saw defendant who was walking shirtless. According to Thomas, he identified defendant as the shooter because the person who shot him was also not wearing a shirt. Thomas stated that defendant and the two other men came from Lexington Hills apartment complex and that Thomas saw all three men walk out of the wooded area behind his apartment. Thomas's girlfriend, Silka Forrest, told him that one of the other men was "Jacorey." When the three men first approached him, Thomas believed Jacorey asked him if he knew where he could get drugs and Thomas told him no. Thomas said that there was a lot of blood and that blood was "all along the wall."

¶ 10 Officer Phillip Mahan testified that he responded to a dispatch call to 2512 North Lavalley Court at 12:45 a.m. on July 14, 2013. He walked into the apartment and went to an upstairs bedroom. Mahan did not recall seeing any blood as he went up the stairs. Mahan found Thomas inside the upstairs bedroom. Thomas had multiple gunshot wounds. Silka Forrest was also present. When Mahan asked Thomas what happened, Thomas told Mahan he was on the back porch of the apartment smoking a cigarette when three men approached him. Thomas told Mahan that defendant shot him.

¶ 11 According to Mahan, an investigating officer informed him that they had located another woman, "Shalitha" Foster, at a different apartment building nearby. Mahan believed Foster may have information regarding defendant's location. Based on this information, Mahan left Thomas's apartment and went to Foster's residence at 3614 Oakcrest in the Lexington Hills apartment complex. Foster answered the door and Mahan asked if defendant was inside. She responded yes, Mahan accessed the apartment, and located defendant inside. Foster later consented to a search of the apartment. Mahan asked Foster where defendant had been. Based on Foster's answer, Mahan searched a specific bedroom in the apartment. Mahan searched the bedroom and recovered a handgun hidden inside a box spring mattress. Police then arrested defendant.

¶ 12 On cross-examination, Mahan stated that he did not know if the gun had ever been tested for fingerprints. Mahan did not believe defendant's hands had been tested for gunshot residue.

¶ 13 Officer Donald Buhl responded to the same dispatch call as Mahan. He took photographs inside and outside the residence where Thomas had been shot. He did not see or photograph any blood.

¶ 14 Linda Yborra, an expert in firearm and tool mark identification with the Illinois State Police, testified that she examined three bullets removed from Thomas's body, five shell casings, and an ammunition round collected from the scene of the shooting. Yborra determined that they were fired from the handgun recovered from the apartment where police arrested defendant.

¶ 15 Silka Forrest testified that she lived at 2512 North Lavalle Court. Unlike Thomas's testimony, Silka stated that Thomas was not on the lease with her at 2512 North Lavalle Court. Silka was dating Thomas at the time of the shooting, but she previously dated defendant. On the day of the incident, Thomas came into the apartment and went into their bedroom around 12:45 a.m. Thomas had been shot. Unlike Thomas's testimony, Silka testified that Thomas came upstairs after being shot, got into bed, and did not move. Silka did not witness the shooting but Thomas told Silka that "Pooh Bear" shot him. Silka called the police.

¶ 16 Detective Shawn Curry testified for the defense. He spoke with Thomas at the hospital. Thomas told Curry that as he was walking back from Anita's apartment; defendant, Jacorey Shettlesworth, and another man defendant did not know began talking to him. Thomas said that as the men approached 2512 North Lavalle Court defendant asked him for drugs. Thomas said that he stopped in the building's door frame, turned around and told defendant he had the wrong person and he did not sell drugs. At this point, defendant shot Thomas. Thomas told Curry he knew defendant's nickname because "there had been an ongoing controversy over an infant girl and a DNA test."

¶ 17 The parties stipulated that defendant had previously been convicted of a forcible felony.

¶ 18 Ultimately, the jury found defendant guilty of all charges (attempted first degree murder, aggravated battery, and unlawful possession of a weapon by a felon). The trial court sentenced

defendant to 37 years' imprisonment for attempted first degree murder. At the hearing, the trial court did not mention fines, fees, or costs.

¶ 19 The written judgment order provided for a sentence of 37 years' imprisonment and 3 years' mandatory supervised release. It also provided sentencing credit from July 14, 2013, to January 30, 2014. A separate written order provided for the same terms and additionally provided "[t]hat a judgment be entered against the defendant for costs." The trial court denied defendant's motion to reconsider his sentence.

¶ 20 Included in the appellate record is a case transactions summary signed by the clerk of the circuit court which is not signed by the trial judge. It lists monetary assessments charged against defendant totaling \$1,734.50. The transactions summary makes no mention of the statutory \$5-*per-diem* credit. Each assessment is labeled by name, but citation to legal authority for the assessments is not provided.

¶ 21 ANALYSIS

¶ 22 On appeal, defendant argues he is entitled to a new trial because the trial court failed to comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). Defendant acknowledges he failed to preserve his Rule 431(b) claim, but requests this court to review it under the plain error doctrine because the evidence at trial was closely balanced. Although we find the trial court failed to comply with Rule 431(b), we hold defendant failed to satisfy the plain error doctrine.

¶ 23 The plain error doctrine bypasses forfeiture principles and allows a reviewing court to consider unpreserved error when: (1) the evidence is closely balanced, regardless of the seriousness of the error; or (2) the error is serious, regardless of the closeness of the evidence. *People v. Adams*, 2012 IL 111168, ¶ 21. While generally a reviewing court will first consider whether error occurred before analyzing either prong (*People v. Piatkowski*, 225 Ill. 2d 551, 565-

66 (2007)), we need not do so here because the State concedes the trial court failed to strictly comply with Rule 431(b). We therefore proceed directly to our review of whether the evidence is closely balanced. *People v. Thompson*, 238 Ill. 2d 598, 614-15 (2010) (a "violation of Rule 431(b) does not implicate a fundamental right or constitutional protection" and does not constitute structural error under the second prong of plain error).

¶ 24 Here, we find the evidence against defendant is not closely balanced. Thomas recognized defendant, but did not know his name. He testified that he saw defendant, who Thomas identified at trial, approach from his peripheral holding a gun. As soon as Thomas saw defendant, he turned to enter the back door of the building. As he did so, he was shot. Thomas's testimony is consistent with the identification he provided Officer Mahan, Officer Curry, and Silka Forrest. Thomas's identification testimony is not only corroborated by the fact that the police recovered the weapon used to shoot Thomas in the same apartment they found defendant. It is further corroborated by the fact that police recovered the weapon in the same bedroom they believed defendant occupied prior to their arrival.

¶ 25 In reaching our conclusion, we reject defendant's argument that the evidence is closely balanced because Thomas had a motive to testify falsely against defendant. Specifically, defendant notes that he previously dated Thomas's girlfriend and that there is some evidence that "there had been an ongoing controversy over an infant girl and a DNA test." This argument is entirely conclusory. Stated another way, defendant has not cited any affirmative evidence that would support a conclusion that Thomas was operating under some apparent bias. Moreover, it does not refute the evidence against defendant.

¶ 26 Additionally, we reject defendant's argument that the evidence is closely balanced because Thomas's credibility was impeached in three ways at trial. First, defendant argues

Thomas's prior inconsistent statements impeached his credibility. Defendant calls to our attention the following facts that Thomas told Officer Curry: (1) he walked home from the Lexington Hills apartment complex but at trial he said he drove; (2) he encountered and spoke to defendant while he walked home but at trial said the three men approached him while he was smoking at his apartment; and (3) defendant had a negative conversation with Thomas prior to the shooting but at trial Thomas testified that defendant did not say anything to him.

¶ 27 Second, defendant argues that Thomas's testimony was contradicted by other witness testimony regarding the following: (1) that he ran upstairs after the shooting, then came back downstairs was contradicted by Silka's testimony that Thomas stayed upstairs; (2) that there was blood along the wall was contradicted by Officer Mahan's and Officer Buhl's testimony that they did not observe blood in the building; and (3) that he was on the lease of the apartment was contradicted by Silka's testimony to the contrary.

¶ 28 Finally, defendant argues Thomas's credibility was impeached because his testimony changed from direct to cross-examination regarding the distance the three individuals were from Thomas when he was shot.

¶ 29 According to defendant, the above facts, along with the absence of physical evidence tying defendant to the weapon used to shoot Thomas render the evidence closely balanced. However, none of the above points question Thomas's consistent identification of defendant as the shooter. Although Thomas did not directly observe defendant shoot him, he testified that he saw defendant approach him holding a gun immediately before the shooting. The gun used to shoot Thomas was recovered in the same bedroom police believed defendant occupied immediately after the shooting. Perhaps most significantly, defendant's cited facts do not present two distinct versions of the events but are details ancillary to the issues at trial. In other words,

Thomas's identification of defendant as the shooter was not subject to a credibility contest because no opposing witnesses testified to facts directly contradicting Thomas's identification. See *People v. Naylor*, 229 Ill. 2d 584 (2008) (evidence closely balanced when two credible witnesses testified to two different versions of the events). While Officer Curry testified that Thomas told Curry that defendant approached him as he was walking back from Anita's apartment, his identification of defendant as the shooter was consistent with his identification at trial and to Forrest, Officer Mahan, and Officer Curry.

¶ 30 Defendant also argues that a number of the assessments found on the case transactions summary certified by the circuit court are without citation to statutory authorization and several of those assessments the circuit clerk is unauthorized to impose. Defendant also contends that he is entitled to a credit of \$1,000 against his fines—\$5 for each day spent in presentence custody. The State concedes that the circuit clerk imposed fines without authorization and that defendant is entitled to \$1,000 in credit for time spent in presentence custody. However, the State argues that we need not vacate the assessments imposed as costs, because the clerk of the circuit court is authorized to impose costs.

¶ 31 It has been the position of this court that where monetary assessments have been improperly imposed, the preferred remedy is to vacate the assessments in full and remand the matter so the trial court may enter an order of enumerated costs. See, e.g., *People v. Hunter*, 2014 IL App (3d) 120552, ¶¶ 16-17. This remedy allows the trial court to delineate "the specific amounts the court intended to order this defendant to pay." (Emphasis omitted.) *Id.* ¶ 17.

¶ 32 Accordingly, we vacate all of the fines and fees, and remand the cause with the following directions: the trial court should impose each proper fine, fee, assessment, and court cost setting forth in a written order the statutory authority for each one. The trial court should also calculate

the appropriate \$5-per-day presentence incarceration credit and offset defendant's fines by that amount.

¶ 33

CONCLUSION

¶ 34

The judgment of the circuit court of Peoria County is affirmed in part, vacated in part, and remanded with directions.

¶ 35

Affirmed in part, vacated in part, and remanded with directions.

¶ 36

JUSTICE HOLDRIDGE, specially concurring.

¶ 37

I agree with the majority's conclusion that the trial court's failure to comply with Supreme Court Rule 431(b) was not reversible error under the plain error doctrine because the evidence in this case was not closely balanced. I write separately to clarify the analysis we should apply when reviewing claims under the plain error doctrine. The first step in a plain error analysis is to determine whether a "plain error" occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 564-65 (2007). The word "plain" here "is synonymous with 'clear' and is the equivalent of 'obvious.'" *Id.* at 565 n.2 (2007). ¶ 38 If the reviewing court determines that the trial court committed a clear or obvious (or "plain") error, it proceeds to the second step in the analysis, which is to determine whether the error is reversible. Our supreme court has made clear that plain errors are reversible only when (1) "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) the 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." *Piatkowski*, 225 Ill. 2d at 565; *People v. Herron*, 215 Ill. 2d 167, 179 (2005).

¶ 38

In this case, the majority suggests that we "do not need to consider" whether a plain error occurred in this case because the State concedes that the trial court failed to strictly comply with

Rule 431(b). *Supra* ¶ 23. I disagree with that formulation. I would conclude, rather, that a plain error occurred in this case (as the State concedes) because the trial court failed to strictly comply with Rule 431(b). Having found the existence of a plain or obvious error, we then proceed to the second step of the inquiry; *i.e.*, we must determine whether the error is of sufficient magnitude to justify reversal. As the majority notes, our supreme court has held that a trial court's violation of Rule 431(b) does not constitute structural error. See *People v. Thompson*, 238 Ill. 2d 598, 614-15 (2010). Thus, the only remaining question is whether the evidence is closely balanced enough to warrant reversal. Because I find that the evidence is not closely balanced, I join the majority's judgment affirming the defendant's conviction. I also agree that the defendant's fines and fees should be vacated, and I join Justice Lytton's analysis on that issue.

¶ 39 JUSTICE WRIGHT, specially concurring.

¶ 40 I agree the Rule 431(b) claim has been forfeited for purposes of this appeal. I also agree the plain error doctrine does not apply in this case to excuse defendant's forfeiture of this issue.

¶ 41 Similarly, defendant did not raise an objection to the propriety of fines and costs in the trial court. Forfeited sentencing errors have previously been considered for the first time on review where defendant claims the sentence, or a portion of sentence, is void and subject to review at any time. Recently, our supreme court wisely abolished the void sentence rule. *People v. Castleberry*, 2015 IL 116916, ¶ 1.

¶ 42 I welcome the holding recently announced in *Castleberry*, but write separately to note that it appears to me that this defendant did not receive a timely notification of the total of fines, fees, and costs at the time of sentencing or shortly thereafter. Specifically, defendant was sentenced on January 30, 2014 and the clerk's tally is dated April 11, 2014. For this reason, I

recognize forfeiture should not be applied under these circumstances. Therefore, I specially concur and agree remand is in order in this case.