2016 IL App (3d) 140283-U

Order filed May 16, 2016

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IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court |
| | ) | of the 14th Judicial Circuit, |
| | ) | Rock Island County, Illinois, |
| Plaintiff-Appellee, | ) | |
| | ) | Appeal Nos. 3-14-0283 and 3-14-0284 |
| v. | ) | Circuit Nos. 11-CF-303 and 13-CF-758 |
| | ) | |
| KESWAN T. SIMMONS, | ) | Honorable |
| | ) | John L. Bell, |
| Defendant-Appellant. | ) | Judge, Presiding. |

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JUSTICE LYTTON delivered the judgment of the court.
Justice Schmidt concurred in the judgment.
Justice McDade dissented.

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**ORDER**

¶ 1 *Held*: (1) The State's line of questioning during *voir dire* did not constitute plain error; and (2) the matter is remanded for the proper judicial entry of a written order enumerating defendant's costs and fines.

¶ 2 Defendant, Keswan T. Simmons, appeals his conviction for robbery (No. 3-14-0284). Defendant argues that the State's questioning during *voir dire* regarding the perceived credibility of an accomplice served to indoctrinate the potential jurors and deprived him of his right to be tried before an impartial jury. Defendant also contends that remand is warranted in both that

case and an earlier case in which the court revoked his probation (No. 3-14-0283) in order to cure a number of defects relating to fines and fees imposed in each of those cases.

¶ 3 Upon review, we find that the State's line of questioning in *voir dire* did not constitute plain error. We remand the matter for the proper judicial entry of a written order enumerating the fines and fees to be imposed against defendant.

¶ 4 FACTS

¶ 5 The State charged defendant by information with robbery (720 ILCS 5/18-1(a) (West 2012)) and aggravated battery (720 ILCS 5/12-3.05(c) (West 2012)). The robbery information alleged that defendant, "while acting in concert with another for whose conduct he is legally responsible for," knowingly took a bicycle and $10 from J.B.L. Similarly, the aggravated battery information alleged that defendant, "while acting in concert with another for whose conduct he is legally responsible for," struck J.B.L. in the head with his fists.

¶ 6 Based on those charges, the State subsequently filed a petition to revoke defendant's probation in circuit court case No. 11-CF-303 (No. 3-14-0283). Defendant had been sentenced to probation based on the offense of burglary. The parties agreed that petition would be heard contemporaneously with defendant's jury trial on the robbery and aggravated battery charges.

¶ 7 The matter proceeded to jury impanelment on December 17, 2013. During *voir dire*, the State asked the first panel of prospective jurors: "Does anyone feel that if someone's admitted that they committed a—a crime with the defendant, that they should be any less believed or more believed?" The State asked a similar question to the second panel:

> "If the State has a witness that's going to testify that says they committed the crime that [defendant] is charged with, with [defendant], and that that person took

a—a plea deal to testify, does anyone have any issues or problems with that? Is anyone going to hold that against the State or hold that against [defendant]?"

Finally, the State asked the third panel of prospective jurors: "[I]f I had a witness that would testify that he participated in the crime with the defendant and took a plea deal, would any of you hold that against [the] State?" The matter then proceeded to trial.

¶ 8 J.B.L., 15 years old on the date of trial, testified that on August 21, 2013, he was riding his bicycle home from his father's shop when two males approached him. One was white, while the other was black. J.B.L. testified that he recognized the white male, but did not know his name. He had never seen the black male before. J.B.L. recalled that the black male was wearing a white shirt with plaid shorts. J.B.L. identified State's exhibit No. 2 as plaid shorts similar to those worn by the black male. J.B.L. testified that the men asked him for his money, but he declined. The white male then punched J.B.L. in the left ear. The black male then took $10 from J.B.L.'s pocket, and the white male struck him again. J.B.L. ran, leaving his bicycle behind. He observed that the white male began to run as well, while the black male took J.B.L.'s bicycle.

¶ 9 Approximately two minutes later, a police officer stopped J.B.L. J.B.L. explained to the officer that he had been "jumped" and robbed of $10. The two males were approximately half of a block away at that time, so J.B.L. pointed them out to the officer. The black male was riding J.B.L.'s bicycle.

¶ 10 Sergeant Todd Winters of the Silvis police department testified that he was on patrol on the night of August 21, 2013, when J.B.L. approached him on foot. J.B.L. explained that he had been robbed of $10 by two males. J.B.L. pointed to the alleged robbers, who were approximately 50 feet from him and Winters. Winters observed the white male walking

southbound and the black male riding a bicycle westbound, within 20 feet of each other. Winters advised Officer Jose Vargas, who had arrived on the scene, to stop the white male; Winters informed dispatch of the black male on a bicycle.

¶ 11 Winters testified that the white male fled from Vargas, and Vargas reported a foot pursuit. Vargas subsequently reported that the white male had run into the back door of the residence located at 134 Seventh Street. Winters could see the front entrance to that residence from his location at the time, so he maintained his position to make sure no one exited the front door. When officers from East Moline arrived at the scene, Winters approached the residence.

¶ 12 Winters testified that three people, defendant, Francois Chambers, and Lexis Sims, were in the yard of the house at 134 Seventh Street. Winters recalled that when he first saw defendant at the residence, defendant was wearing plaid shorts and no shirt. Winters identified State's exhibit No. 2 as the plaid shorts defendant was wearing at the time. When the homeowner, Rachel Tunnell, arrived, Winters asked for consent to search the home for the white male. Tunnell declined, but offered to go inside and "try to get him to come out." After going inside, Tunnell returned and reported that she could not find the white male in the house.

¶ 13 Winters testified that he next went to the alley behind the residence in an attempt to find the bicycle that J.B.L. had reported stolen. He found the bicycle between the garages of 124 and 128 Seventh Street. Winters reported that 128 Seventh Street is directly adjacent to 134 Seventh Street, the residence into which the white male fled. Winters eventually assisted in the search of the residence, at which time Zachary Tunnell was found hiding in the attic. The $10 reportedly stolen from J.B.L. was never recovered.

¶ 14 Winters testified that J.B.L. had failed to identify defendant. Specifically, Winters testified that he showed J.B.L. two photo lineups, with each lineup containing six photographs.

The first lineup included a photograph of defendant. J.B.L. asked to see two of the six photographs for a second time. Of those two, one photograph was of defendant. J.B.L. ultimately picked the photograph that was not of defendant. In the second lineup, J.B.L. identified Zachary Tunnell as the white male who had accosted him.

¶ 15 Officer Jose Vargas of the Silvis police department testified that he was on patrol on the night in question. After Vargas responded to Winters' call, Winters advised him to stop a white male walking down the street. Vargas pulled his vehicle next to the white male, Zachary Tunnell, lowered his window, and yelled at Tunnell to stop. When Tunnell continued walking, Vargas alighted from his vehicle and told Tunnell to stop again. Tunnell then fled on foot, eventually entering the residence of 134 Seventh Street through the back door. Vargas was familiar with that residence, and knew Rachel Tunnell lived there.

¶ 16 Vargas knocked on the back door of the residence, and a black male came out. Vargas knew the black male to be Francois Chambers. Chambers denied that a male matching Tunnell's description was in the house. A female then exited the house. Vargas knew the female to be Lexis Sims. Sims also denied that a male matching Tunnell's description was in the house.

¶ 17 Later, defendant exited the same house. Defendant also denied that a male matching Tunnell's description was in the house. Defendant told Vargas he had been in the basement playing video games. Vargas testified that defendant exited the house approximately 15 minutes after Vargas had arrived. No evidence was presented at trial that would account for defendant's whereabouts between the time Winters saw him on the bicycle and when he exited the house to speak to Vargas.

¶ 18 Rachel Tunnell testified that her son, Zachary Tunnell, lived with her at the time in question. She was also familiar with defendant, who was a friend of her daughter's boyfriend.

She testified that defendant was at her house when she left for work on the morning of August 21, 2013, as he had slept there the previous night.

¶ 19 Zachary Tunnell testified he left his house with defendant at approximately 8:45 p.m. on the night in question. Tunnell had known defendant for "[a] couple years." Tunnell identified State's exhibit No. 2 as the shorts defendant was wearing at the time. Tunnell testified that J.B.L. approached him and defendant, asking them to purchase cigarettes for him. Tunnell declined, but suggested the defendant might be willing to. Defendant took $10 from J.B.L., and proceeded to a gas station with Tunnell. At the gas station, Tunnell purchased cigarettes, but defendant did not. Tunnell testified that after leaving the gas station, defendant said he was going to take J.B.L.'s money.

¶ 20 Tunnell described what happened when he and defendant approached J.B.L.:

> "[J.B.L.] asked [defendant] for [J.B.L.'s] money, he kind of got a little rambunctious with him, so I hit him, and then that's when [defendant] had started going through his pockets. I'm not for sure if anything got tooken [*sic*] then at the time at the moment, but, you know, he did have ten dollars in his possession at that time—but I didn't see nothing happen at that point[.]"

Tunnell testified that defendant attempted to strike J.B.L., but that the attempt did not result in "full-blown contact with anything." Tunnell testified that after he struck J.B.L., defendant "hopped on [the bicycle] and rode off." He also testified that he and defendant left together, and only separated upon seeing the police. Tunnell testified that he ran to his mother's house and entered through the back door. When he entered the house, his sister Lexis Sims, Francois Chambers, and defendant were inside.

¶ 21 Tunnell admitted that he had a criminal background. He had previously been placed on probation stemming from a 2012 conviction for criminal trespass to a residence. He was also charged with robbery and aggravated battery in relation to the present matter. It was Tunnell's understanding that he had pled guilty to both charges, and that his plea did not include an agreement that the State would drop the robbery charge if he testified at defendant's trial.

¶ 22 On cross-examination, defense counsel asked Tunnell if he hated defendant. Tunnell replied that he did not. However, Tunnell testified that he did recall stating in a police interview: "I hate [defendant], I've always hated him, I've never liked him." At trial, Tunnell explained that those statements were made out of anger, and that he "would never necessarily mean that." During the same police interview, Tunnell claimed that defendant had entered Tunnell's mother's house two minutes after Tunnell himself had entered on the night in question. At trial Tunnell explained that he did not know at what point defendant entered the house, because defendant apparently entered while Tunnell was upstairs.

¶ 23 Tunnell also testified on cross-examination that J.B.L. did not approach him and defendant until *after* they had purchased cigarettes from the gas station. When defense counsel pointed out that he had previously testified otherwise, Tunnell declared: "It's hard to remember, it was a while ago." Tunnell also admitted that he had previously denied striking J.B.L. and had instead told police that defendant had struck J.B.L. Tunnell had also lied to the police about various details of the incident, such as in which alley the altercation took place and in which direction he ran after the altercation.

¶ 24 On redirect examination, the State elicited the consistencies between Tunnell's testimony and his statements to the police. Tunnell told police that defendant was wearing a white shirt and plaid shorts, and that it was defendant who went through J.B.L.'s pockets. As to the

inconsistencies between his testimony and his interview with the police, Tunnell testified: "I did go in there speaking the truth. I lied about a few things but I didn't lie thoroughly. It ain't like I lied about every single thing."

¶ 25 Following closing arguments, the trial court provided instructions to the jury. Specifically, the court instructed the jury: "When a witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case." The jury was also instructed on the theory of accountability.

¶ 26 The jury found defendant guilty of robbery and not guilty of aggravated battery. On March 11, 2014, defendant filed a motion for new trial, which was denied. The court subsequently entered a written order ruling on the petition to revoke probation in case No. 3-14-0283. The court granted the petition, finding defendant had violated his probation by committing the offense of robbery. On March 28, 2014, the court sentenced defendant to a term of six years' imprisonment for the offense of robbery, to be served concurrently with a term of five years' imprisonment for the probation revocation.

¶ 27 The trial court's written order for the offense of burglary—the offense underlying defendant's probation—stated that defendant was "ordered to pay the costs of prosecution herein." It further stated that those "fees, costs, and restitution (if applicable)" were reduced to a judgment against defendant. The written judgment order for the offense of robbery was identical, indicating that defendant pay costs, and that those costs were reduced to a judgment. Criminal costs sheets for the burglary and robbery offenses were generated on May 22 and May 23, 2014, respectively.

¶ 28 ANALYSIS

¶ 29 I. Indoctrination of the Jury

¶ 30 Defendant argues that the State's improper indoctrination of the venire deprived him of the opportunity of a fair trial before an impartial jury. Since he failed to object to the State's line of questioning at the time and to raise this issue in his posttrial motion, he urges us to analyze the issue as plain error.

¶ 31 A. Error

¶ 32 The first step in plain-error analysis is to determine whether any error has been committed. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). First, we must determine whether the trial court erred in allowing the State to question the venire regarding their opinion of accomplice testimony.

¶ 33 Illinois Supreme Court Rule 431(a) (eff. July 1, 2012) governs *voir dire* examination. The rule provides that the court shall ask potential jurors questions regarding their qualifications to serve on a jury, and may allow the parties to submit questions as well. *Id*. Importantly, the rule states that "[q]uestions shall not directly or indirectly concern matters of law or instructions." *Id*. Illinois Pattern Jury Instructions, Criminal, No. 3.17 (4th ed. 2000) (hereinafter IPI Criminal 4th No. 3.17) reads: "When a witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case." IPI Criminal 4th No. 3.17.

¶ 34 The State asked questions to each venire panel regarding the amount of credibility jurors would afford to a person who admitted to committing an offense with the defendant. These questions cover the precise issue covered by IPI Criminal 4th No. 3.17. Accordingly, the trial

court erred in allowing the State to violate Illinois Supreme Court Rule 431(a) by asking questions that concerned matters of jury instruction.

¶ 35 B. Closely Balanced Prong

¶ 36 Having found that an error was committed by the trial court, the next step in plain-error analysis is to determine whether that error prejudiced defendant. Under the plain-error doctrine, prejudice may be found in two ways. First, where the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence. *People v. Herron*, 215 Ill. 2d 167, 178 (2005). Alternatively, relief may be warranted "where the error is so serious that the defendant was denied a substantial right, and thus a fair trial." *Id* at 179. We begin our analysis here with the closely balanced prong.

¶ 37 Evidence in this case was not so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence. Tunnell testified that he and defendant accosted J.B.L. and that defendant took $10 and the bicycle from J.B.L. Tunnell also testified that defendant was later in Tunnell's mother's house with him. While the jury was instructed that Tunnell's testimony was to be viewed with suspicion, it apparently found the testimony credible. Of course, questions of a witness's credibility are the province of the jury. *People v. Belknap*, 2014 IL 117094, ¶ 55.

¶ 38 While Tunnell's testimony was inconsistent at points with his prior statements to police, the most relevant portions of his testimony were largely corroborated by J.B.L., Vargas, and Winters. J.B.L. testified that he was accosted by Tunnell and a black male, and that the black male fled on J.B.L.'s bicycle. Although J.B.L. was unable to identify defendant, he did recognize a pair of plaid shorts as similar to those the black male wore during the robbery. Vargas and Winters reported that defendant was wearing those plaid shorts. Moreover, Winters testified

J.B.L.'s bicycle was found one house away from the residence in which defendant and Tunnell were found.

¶ 39 Still, defendant argues that the case boils down to a question of Tunnell's credibility. He cites cases in which the defendant presented directly contradictory testimony. See *People v. Naylor*, 229 Ill. 2d 584, 605 (2008); *People v. Boston*, 383 Ill. App. 3d 352, 356 (2008). Here, the only witness who offered a full accounting of the events in question was Tunnell. His testimony was substantially corroborated by a number of other witnesses. While defendant suggests that much of the evidence presented could have applied equally to Francois Chambers, another black male in the Tunnell house, he points to no evidence which might lead the jury to reject Tunnell's testimony and instead infer that Chamber's was J.B.L.'s assailant.

¶ 40 C. Structural Error Prong

¶ 41 Under the second prong of plain-error review, relief may be warranted "where the error is so serious that the defendant was denied a substantial right, and thus a fair trial." *Herron*, 215 Ill. 2d at 179. Prejudice under the second prong derives from the notion that errors of a certain magnitude are presumptively prejudicial. *Thompson*, 238 Ill. 2d at 613. We find that the error committed in the present case was not structural.

¶ 42 The trial court erred in allowing the State to violate Illinois Supreme Court Rule 431(a). We reiterate this point because defendant argues that the court's error lies not only in the technical violation of a supreme court rule, but in a denial of defendant's constitutional right to a fair trial by a panel of impartial jurors. Defendant maintains that the State allowed prospective jurors to preview the facts of the case and prepared the jurors to accept its theory of the case, thus indoctrinating the jury in its favor, citing *Boston*, 383 Ill. App. 3d 352, and *People v. Bell*, 152 Ill. App. 3d 1007 (1987).

¶ 43 However, *Boston* and *Bell* belie defendant's position. The State's single question to each panel in the present case compared to the implication- and subtext-laden questions at issue in *Boston* and *Bell*. Here the question indicated that an accomplice would testify against defendant, but did not give prospective jurors a loaded preview of the facts. The State's question did not implicitly urge the prospective jurors to adopt the State's theory of the case, nor was the State's single question internally suggestive as to what its answer should be. The questions in *Boston* and *Bell* were factually specific—so much so that they "went beyond a probe for bias." *Bell*, 152 Ill. App. 3d at 1017. The same cannot be said in the case at hand. The State's question did not render defendant's trial fundamentally unfair or unreliable. See *Thompson*, 238 Ill. 2d at 609.

¶ 44 II. Fines and Fees

¶ 45 Defendant further argues that the criminal cost sheets filed subsequent to each of his convictions suffer from numerous defects. Among the errors, defendant contends that he was improperly charged with two DNA fees and that the circuit clerk improperly imposed fines, when the trial court only ordered payment of costs and fees. Moreover, defendant points out that if fines were to be assessed, he should receive monetary credit for the days he spent in presentence custody.

¶ 46 The State concedes that the cost sheets in this case contain errors and that the matter should be remanded under *People v. Hunter*, 2014 IL App (3d) 120552, ¶ 17. After a thorough review of the record, we accept the State's concession. We agree that the cost sheets contain a number of errors on their faces, including the assessment of fines by the circuit clerk. See, *e.g.*, *People v. Rogers*, 2014 IL App (4th) 121088, ¶ 28 (circuit clerk does not have authority to impose fines).

¶ 47 It has been the consistent practice of this court to remand such errors in the assessment in fines and fees so that the issues may be addressed fully with both parties present. *Hunter*, 2014 IL App (3d) 120552, ¶ 17. Accordingly, we vacate all of the fines and fees, and remand the cause with the court costs 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, if any, by that amount.

¶ 48 CONCLUSION

¶ 49 The judgment of the circuit court of Rock Island County is affirmed in part, vacated in part and remanded with instructions.

¶ 50 Affirmed in part and vacated in part.

¶ 51 Cause remanded.

¶ 52 JUSTICE McDADE, dissenting.

¶ 53 The majority has affirmed the conviction of defendant, Keswan Simmons, for robbery and the resultant revocation of his probation for a prior crime. In arriving at its decision, the majority has found that Simmons' allegation that the State's improper indoctrination of the jury deprived him of an impartial fact-finder and thus of a fair trial—an unpreserved error—was not plain error.

¶ 54 For the reasons that follow, I disagree with that finding and, therefore, respectfully dissent from the majority decision.

¶ 55 Initially, the majority has found that the trial court erred by allowing the State to question the jurors on a matter of jury instruction, citing IPI Criminal 4th No. 3.17. *Supra* ¶ 33. This is, in my opinion, a far more benign error than the one that was argued by defendant and which I would find also actually occurred.

¶ 56 In the three challenged *voir dire* questions posed to the jurors, the State effectively advised them that it had identified a person who admitted to acting in concert with the defendant to commit the charged crime and that the State had granted him a plea concession to testify against the defendant, thereby affirming its belief in the truthfulness of the witness and the truth of his account. The State vouched for the credibility of Zachary Tunnell, the primary witness against the defendant, not just before the jury, but directly to the jurors in small groups and with the same information presented in three different ways. Not only was the jurors' impartiality compromised by the State's intentional misconduct, the defendant's cloak—presumption—of innocence was torn to shreds before the trial even started.

¶ 57 Nor, for two reasons, was the error harmless. First, the trial court's instruction pursuant to IPI Criminal 3.17 after the jury had heard all of the evidence and the parties' closing arguments was too little, too late. The instruction advises the jury that the testimony of a co-offender witness "should be considered by you with caution." In this case, however, the jury had been assured, not subtly, that the State had already assessed Tunnell's credibility and had rewarded his truthfulness with a plea deal. They had been relieved by the prosecutor of any duty to proceed with caution.

¶ 58 Second, an impartial jury, evaluating the evidence without the State's thumb on the scale could, quite reasonably, have found defendant not guilty. Without Tunnell's self-serving testimony implicating Simmons, the State's evidence was very weak. The police officers had no direct evidence against Simmons, unless one considers the plaid shorts, which may very well have been one of at least hundreds of identical pairs in the Quad Cities. The testimony of Mrs. Tunnell, Zachary's mother, was neutral at best—she knew nothing about the robbery. And, most telling of all, the victim thought the shorts looked like those worn by one of his assailants, but,

presented with two photo lineups, he positively identified Tunnell from the white array, but rejected defendant to positively identify a different black male from the second array.

¶ 59 For these reasons, I would find that Simmons has shown that he was tried before a biased fact-finder; that this constitutes a structural error, reversible in law and in fact; that the error was not harmless; and that the conviction of robbery and the resultant revocation of his probation should be reversed.

¶ 60 Moreover, I believe the reversal should be outright, without remand. It is impossible to reasonably conclude that the State's violation of a supreme court rule and its undermining of an IPI instruction, committed three times in three different iterations, was anything but intentional. There appears to be no tenable argument that it was inadvertent. In such a circumstance, I would be very reluctant to put this defendant in jeopardy a second time, particularly since he has already served a significant portion of his sentence.

¶ 61 I do not, of course, reach the issue of fines, fees, and sentencing credit.