2017 IL App (4th) 150095-U

NO. 4-15-0095

FILED
April 19, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Vermilion County
ROBERT C. WASSON,	)	No. 14CM106
Defendant-Appellant.	)	
	)	Honorable
	)	Mark S. Goodwin,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Harris and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: (1) We find defendant forfeited his claims the trial court erred in not *sua sponte* disallowing certain evidence and not independently providing a limiting instruction for such evidence where he failed to meet his burden of proving a clear and obvious error occurred.

(2) Defendant failed to show ineffective assistance of trial counsel in connection with (1) above.

(3) We vacate outright various improperly imposed fines and fees.

¶ 2 In December 2014, a jury convicted defendant, Robert C. Wasson, of violating an order of protection (720 ILCS 5/12-3.4(a)(1) (West 2012)). In January 2015, the trial court sentenced defendant to 12 months' supervision and ordered him to pay a $300 fine and a $100 public-defender-reimbursement fee. Thereafter, a number of assessments were imposed by the circuit clerk.

¶ 3 Defendant appeals, arguing he should receive a new trial where (1) the trial court erred in not (a) *sua sponte* disallowing certain evidence defendant characterizes as irrelevant and prejudicial and (b) independently providing the jury with a limiting instruction on such evidence; and (2) his trial counsel was ineffective for (a) failing to object to the challenged evidence, and (b) not requesting a limiting instruction for it. Defendant also contends the court improperly imposed the $100 public-defender-reimbursement fee without first holding a hearing on his ability to pay, and the circuit clerk improperly imposed a number of fines. We affirm in part, vacate in part, and remand the cause with directions.

¶ 4 I. BACKGROUND

¶ 5 On February 11, 2014, the State charged defendant with one count of violating a July 2012 order of protection (720 ILCS 5/12-3.4(a)(1) (West 2012)) on or about Janury 25, 2014. The order was effective from July 11, 2012, through July 11, 2014.

¶ 6 Prior to trial, the trial court granted defendant's motion *in limine*, which sought, *inter alia*, to bar the State from referencing the underlying reason for the July 2012 order of protection and from referring to Heather Delp as a victim. For its part, the State filed a pretrial motion to use defendant's two prior misdemeanor theft convictions for impeachment purposes in the event defendant testified. The trial court granted the State's motion over defendant's objection.

¶ 7 During defendant's December 2, 2014, trial, Delp testified defendant was her ex-boyfriend and they had three children together. In July 2012, Delp obtained an order of protection against defendant. The order included a "stay away" provision, requiring defendant "to refrain from both physical presence and nonphysical contact with [Delp] whether direct or

indirect (including by not limited to, telephone calls ***), or through third parties who may or may not know about the order of protection."

¶ 8 The order also set up a visitation schedule for defendant with the children and designated Pauline Guiliani, Delp's mother, as the individual defendant had to contact to set up visits. Delp testified visits took place in 2012, but no visits occurred in 2013 or 2014. Delp also testified defendant had not made any child support payments in 2013 or 2014.

¶ 9 Guiliani testified defendant called her on January 25, 2014, and asked to speak with Delp. After Guiliani told defendant Delp was not there, defendant told Guiliani to let Delp know he needed the children's social security numbers if she wanted her back child support payments. Guiliani told defendant he should contact his attorney for that information. According to Guiliani, defendant then told her to give Delp the message or "it would be very unpleasant."

¶ 10 After the phone call, Guiliani called Delp, as well as the police. Guiliani testified she did not regularly talk with defendant regarding visitations or anything else. When asked whether defendant was exercising his visitation with the children, Guiliani responded, "No." In response to the State's question regarding whether defendant had been paying any child support, Guiliani replied, "[N]ot to my knowledge." Guiliani explained, "I haven't heard from [defendant] in so long that I didn't expect him to call."

¶ 11 Westville police officer Justin Varvel testified he spoke with Delp and Guiliani about defendant's call. Based on those conversations, Varvel compiled a report, which was forwarded to the State's Attorney's office. Varvel also testified he confirmed the order of protection was in place when defendant called Guiliani.

¶ 12 Vermilion County deputy sheriff Rick Barnes testified he served defendant with the order of protection on July 11, 2012.

¶ 13 Following the close of the State's case, defendant moved for a directed verdict, which the trial court denied.

¶ 14 Defendant testified he knew there was an order of protection in place and he was to stay away from Delp as a result. Defendant admitted calling Guiliani. According to defendant, the reason for calling Guiliani was "[t]o get social security numbers for [his] children so [he could] file taxes and pay off back child support." Defendant acknowledged his attorney already had the numbers, but he explained the attorney had passed away, and defendant could not afford to hire a new attorney. It was defendant's understanding, from what his attorney and the trial court had told him, Guiliani was the contact and mediator for issues involving the children. Defendant denied asking Guiliani to speak with Delp. He also denied threatening Guiliani or Delp. Defendant explained he had not been visiting his children because of the order of protection. Defendant testified the last time he visited his children was December 24, 2012.

¶ 15 Thereafter, the jury found defendant guilty of violating the order of protection.

¶ 16 On December 15, 2014, defendant filed a motion to set aside the verdict and grant an acquittal or a new trial, which the trial court denied.

¶ 17 On January 26, 2015, the trial court sentenced defendant to 12 months' supervision. The trial court ordered defendant to pay a $300 fine, a $100 public-defender-reimbursement fee, and court costs. The circuit clerk thereafter entered additional assessments against defendant.

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 On appeal, defendant argues he should receive a new trial where (1) the trial court erred in not (a) *sua sponte* disallowing irrelevant and prejudicial evidence he had not paid child support or visited his children in two years and (b) independently providing the jury with a limiting instruction on such evidence and (2) his trial counsel was ineffective for (a) failing to object to the challenged evidence and (b) not requesting a limiting instruction. Defendant also contends the court improperly imposed a $100 public-defender-reimbursement fee without first holding a hearing on his ability to pay, and the circuit clerk improperly imposed a number of fines.

¶ 21 A. Evidentiary Claim

¶ 22 Defendant primarily argues he should receive a new trial where the trial court erred in not (1) *sua sponte* disallowing irrelevant and prejudicial evidence he had not paid child support or visited his children in two years and (2) independently providing the jury with a limiting instruction on that evidence.

¶ 23 Defendant acknowledges these claims were not properly preserved for appellate review. Indeed, neither a timely objection was made when the testimony was offered nor was the issue raised in his posttrial motion. Nevertheless, defendant urges our review under the plain-error doctrine.

¶ 24 The plain-error doctrine provides a narrow exception to the general rule of forfeiture. *People v. Walker*, 232 Ill. 2d 113, 124, 902 N.E.2d 691, 697 (2009). We will review forfeited challenges under the plain-error doctrine when (1) a clear or obvious error occurred and the evidence is so closely balanced the error alone threatened to tip the scales of justice against the defendant; or (2) a clear or obvious error occurred, and the error is so serious it affected the

fairness of the defendant's trial and the integrity of the judicial process, without regard to the closeness of the evidence. *People v. Taylor*, 2011 IL 110067, ¶ 30, 956 N.E.2d 431. The defendant has the burden of persuasion under either prong of the plain-error analysis. *People v. Lewis*, 234 Ill. 2d 32, 43, 912 N.E.2d 1220, 1227 (2009). Prior to determining whether plain error occurred, however, we first determine whether error occurred at all. *Lewis*, 234 Ill. 2d at 43, 912 N.E.2d at 1227. If error did occur, we then consider whether either prong of the plain-error doctrine has been satisfied. *People v. Sargent*, 239 Ill. 2d 166, 189-90, 940 N.E.2d 1045, 1059 (2010).

¶ 25 1. *Nature of the Challenged Evidence*

¶ 26 A defendant's guilt may be proved only by "legal and competent" facts, and a jury must remain "uninfluenced by bias or prejudice raised by irrelevant evidence." *People v. Blue*, 189 Ill. 2d 99, 129, 724 N.E.2d 920, 936 (2000). Evidence is relevant if it tends to make the existence of any fact of consequence more or less probable than without the evidence. *People v. Boand*, 362 Ill. App. 3d 106, 125, 838 N.E.2d 367, 387 (2005); see also Ill. R. Evid. 401 (eff. Jan. 1, 2011).

¶ 27 Defendant is essentially arguing the trial court had an independent duty to disallow the challenged testimony. On its face, however, this contention would appear unsustainable without an objection first being raised at the time the evidence was offered. That observation notwithstanding, the challenged evidence is relevant, and the risk of prejudice is reasonably low under the circumstances of this case. The testimony defendant had not paid child support in some time was relevant to explain why defendant called Guiliani, *i.e.*, to take steps to pay that back child support. Further, the testimony defendant had not visited his children in years was

relevant to show why it was less probable he was calling Guiliani to set up a visit with the children, a permitted contact under the order of protection. With regard to the potentially prejudicial nature of the testimony, the evidence is more in the nature of prior bad acts and not strictly other-crimes evidence. As such, it is generally viewed as less prejudicial than ordinary other-crimes evidence because it would not be viewed as propensity evidence. See *People v. Pelo*, 404 Ill. App. 3d 839, 869, 942 N.E.2d 463, 489 (2010). Moreover, defendant himself testified he owed back child support and had not visited his children since December 24, 2012. See *People v. Simpson*, 129 Ill. App. 3d 822, 837, 473 N.E.2d 350, 361 (1984) (finding no error in admitting allegedly prejudicial evidence where the defendant himself testified to it). Thus, we cannot say a clear and obvious error occurred. Because we find no error occurred, we do not reach the issue of plain error. Accordingly, defendant has forfeited the issue.

¶ 28 2. *Limiting Instruction*

¶ 29 Defendant also contends it was plain error for the trial court not to *sua sponte* provide the jury with a limiting instruction on the evidence he had not paid child support or visited his children in two years. We disagree.

¶ 30 The Illinois pattern jury instructions provide a limiting instruction which may be given when such evidence is used. See Illinois Pattern Jury Instructions, Criminal, No. 3.14 (4th ed. 2000) ("Proof Of Other Offenses Or Conduct"). However, the trial court is under no independent duty to tender such an instruction. See *People v. Mullen*, 80 Ill. App. 3d 369, 376, 399 N.E.2d 639, 644 (1980) ("With few exceptions, [relating primarily to the elements of the crime, the presumption of innocence, and the burden of proof,] Illinois courts have consistently taken the position that the trial court is under no obligation to give *sua sponte* jury instructions

not requested by counsel."); *People v. Peoples*, 377 Ill. App. 3d 978, 987-88, 880 N.E.2d 598, 605-06 (2007) (trial court was not required to, *sua sponte*, instruct the jury alleged hearsay testimony was admissible only for impeachment purposes and not as substantive evidence).

¶ 31 Here, defendant had the primary responsibility to request any limiting instruction. He did not. Therefore, no clear and obvious error occurred on the part of the trial court. As a result, defendant cannot establish plain error. See *People v. Nicholas*, 218 Ill. 2d 104, 121, 842 N.E.2d 674, 684-85 (2005) (quoting *People v. Keene*, 169 Ill. 2d 1, 17, 660 N.E.2d 901, 910 (1995)) (" 'short of a conclusion that an asserted error is a "plain" one, the so-called plain[-] error doctrine offers no basis to excuse a procedural default' "). Accordingly, defendant's argument fails.

¶ 32 B. Ineffective-Assistance Claims

¶ 33 In the alternative, defendant argues he should receive a new trial where his trial counsel was ineffective for failing to (1) object to evidence defendant had not paid child support or visited his children in two years and (2) request a limiting instruction regarding that evidence.

¶ 34 Ineffective-assistance-of-counsel claims are reviewed under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Evans*, 186 Ill. 2d 83, 93, 708 N.E.2d 1158, 1163 (1999). "To obtain reversal under *Strickland*, a defendant must prove (1) his counsel's performance failed to meet an objective standard of competence and (2) counsel's deficient performance resulted in prejudice to the defendant." *People v. Thompson*, 359 Ill. App. 3d 947, 952, 835 N.E.2d 933, 937 (2005). To satisfy the deficient-performance prong, the defendant must show that counsel made errors so serious that he was not functioning as the "counsel" guaranteed by the sixth amendment (U.S. Const., amend. VI). To satisfy the prejudice

prong, the defendant must show that, but for counsel's errors, a reasonable probability exists that the outcome of the proceedings would have been different. *Thompson*, 359 Ill. App. 3d at 952, 835 N.E.2d at 937. The failure to satisfy either *Strickland* prong will preclude a finding of ineffective assistance of counsel. *People v. Young*, 347 Ill. App. 3d 909, 927, 807 N.E.2d 1125, 1140 (2004).

¶ 35 This trial court has recently articulated three different categories of cases in which a defendant raises an ineffective-assistance-of-counsel claim on direct appeal. *People v. Veach*, 2016 IL App (4th) 130888, ¶ 72, 50 N.E.3d 87. Category A cases involve direct appeals raising ineffective-assistance claims which the appellate court should decline to address because the claims require consideration of matters outside of the record. *Veach*, 2016 IL App (4th) 130888, ¶¶ 74-75, 50 N.E.3d 87. Category B cases involve direct appeals raising ineffective-assistance claims which the appellate court may address because the claims are clearly groundless. *Veach*, 2016 IL App (4th) 130888, ¶ 82, 50 N.E.3d 87. Finally, Category C cases involve cases where the record contains sufficient evidence for the appellate court to resolve the defendant's ineffective-assistance claim because the alleged error was so egregious or obvious any answers to questions regarding what led counsel to make those errors simply would not matter. *Veach*, 2016 IL App (4th) 130888, ¶ 85, 50 N.E.3d 87.

¶ 36 Based on the record before us, defendant's ineffective-assistance-of-counsel claims in this case fall within Category B. For the reasons set forth in paragraph 27, *supra*, we find those claims meritless where, under the circumstances of this case, the challenged evidence was relevant and any prejudicial effect was reasonably low. Thus, we conclude counsel clearly did not err by failing to object to or request a limiting instruction for that evidence. Accordingly,

defendant's ineffective-assistance claims fail.

¶ 37 C. Fines-and-Fees Argument

¶ 38 Defendant also maintains (1) the trial court improperly imposed a $100 public-defender-reimbursement fee without holding a hearing on his ability to pay and (2) the circuit clerk improperly imposed a number of assessments that are fines.

¶ 39 1. *Public-Defender-Reimbursement Fee*

¶ 40 Defendant argues the trial court erred by ordering him to pay a $100 public-defender-reimbursement fee without holding a hearing to assess his ability to pay, as required by section 113-3.1(a) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/113-3.1(a) (West 2012)). Defendant contends we should vacate the fee outright and not remand the matter for its reimposition.

¶ 41 Section 113-3.1(a) of the Code provides the following:

> "Whenever under either Section 113-3 of this Code or Rule 607 of the Illinois Supreme Court the court appoints counsel to represent a defendant, the court may order the defendant to pay to the Clerk of the Circuit Court a reasonable sum to reimburse either the county or the State for such representation. In a hearing to determine the amount of the payment, the court shall consider the affidavit prepared by the defendant under Section 113-3 of this Code and any other information pertaining to the defendant's financial circumstances which may be submitted by the parties. Such hearing shall be conducted on the court's own motion or on motion of the

> State's Attorney at any time after the appointment of counsel but no later than 90 days after the entry of a final order disposing of the case at the trial level." 725 ILCS 5/113-3.1(a) (West 2012).

¶ 42 The State concedes the issue and we agree. No hearing was held on defendant's ability to pay the fee in this case. Accordingly, we vacate the fee outright. See *People v. Aguirre-Alarcon*, 2016 IL App (4th) 140455, ¶ 17, 59 N.E.3d 229 (vacating the public-defender-reimbursement fee outright where the trial court did not hold a hearing on the defendant's ability to pay and the statutorily required 90-day time period within which to hold such a hearing had passed).

¶ 43 2. *Circuit Clerk Imposed Fines*

¶ 44 Defendant argues the circuit clerk improperly imposed certain fines. Specifically, defendant contends the following circuit clerk imposed fines are void and should be vacated: (1) a $25 court finance fee; (2) a $15 state police operations fee; (3) a $4 youth diversion assessment; (4) a $2 State's Attorney automation assessment; and (5) a $1 anti-crime fund assessment.

¶ 45 This court has repeatedly addressed the impropriety of the circuit clerk imposing judicial fines. See *People v. Warren*, 2014 IL App (4th) 120721-B, ¶¶ 75-171, 55 N.E.3d 117; *People v. Larue*, 2014 IL App (4th) 120595, ¶¶ 54-73, 10 N.E.3d 959. "Although circuit clerks can have the statutory authority to impose a fee, they lack authority to impose a fine, because the imposition of a fine is exclusively a judicial act." (Emphases omitted.) *People v. Smith*, 2014 IL App (4th) 121118, ¶ 18, 18 N.E.3d 912. Thus, "any fines imposed by the circuit clerk are void from their inception." *Larue*, 2014 IL App (4th) 120595, ¶ 56, 10 N.E.3d 959.

¶ 46 While the State concedes those fines were improperly imposed and should be vacated, the State requests the cause be remanded to the trial court to reimpose the vacated fines. We accept the State's concession and agree these fines were improperly imposed by the circuit clerk. As such, we vacate them. However, we disagree with the State regarding remandment for reimposition of the fines. A clerk-imposed fine is void from its inception. If we remand and direct the trial court to impose the vacated circuit clerk-imposed fines, we will increase defendant's sentence by requiring him to pay fines he was never legally obligated to pay. Such an action runs afoul of *People v. Castleberry*, 2015 IL 116916, ¶¶ 26-27, 43 N.E.3d 932 (supreme court case holding, absent filing of a writ of *mandamus,* the State may not seek to increase a defendant's sentence). Accordingly, we decline to remand the cause to allow the trial court to impose the vacated fines. See *People v. Wade*, 2016 IL App (3d) 150417, ¶ 16, 64 N.E.3d 703; see also *People v. Daily*, 2016 IL App (4th) 150588, ¶ 29, ___ N.E.3d ___ (agreeing with *Wade* and declining the State's request to remand the case for the trial court to impose the mandatory fines).

¶ 47 As to the State's Attorney automation fee, this court has held, because the legislature intended the assessment to reimburse the State's Attorneys for their expenses related to automated record-keeping systems, the assessment was not punitive in nature and thus constituted a fee. *Warren*, 2016 IL App (4th) 120721-B, ¶ 115, 55 N.E.3d 117. Thus, we found the circuit clerk could properly impose the assessment. *Warren*, 2016 IL App (4th) 120721-B, ¶ 115, 55 N.E.3d 117. We decline to depart from our decision in *Warren*. Thus, we do not vacate the $2 State's Attorney automation fee. See *People v. Daily*, 2016 IL App (4th) 150588, ¶ 31, ___ N.E.3d ___.

¶ 48 III. CONCLUSION

¶ 49 For the reasons stated, we vacate outright the following assessments: $100 public-defender-reimbursement fee; $25 court finance fee; $15 state police operations fee; $4 youth diversion assessment; and $1 anti-crime fund assessment. We remand the cause for issuance of an amended sentencing judgment so reflecting. We otherwise affirm trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2014).

¶ 50 Affirmed in part and vacated in part; cause remanded with directions.