2018 IL App (1st) 152863-U

No. 1-15-2863

Order filed July 27, 2018

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County,
	)	
v.	)	No. 09 C6 61553
	)	
MARK A. WILLIAMS,	)	Honorable
	)	Luciano Panici,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Reyes and Justice Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court's remark in finding defendant guilty in bench trial, that codefendant who pled guilty had admitted to the offense, was harmless beyond a reasonable doubt. Mittimus corrected to properly reflect presentencing detention credit.

¶ 2 Following a 2015 bench trial, defendant Mark Williams was convicted of armed robbery with a firearm and sentenced to 21 years' imprisonment. On appeal, he contends that the trial court erred in considering that "codefendant already admitted to that crime" while finding defendant guilty because codefendant Calvin Kelly did not testify at defendant's trial. Defendant

also contends, and the State agrees, that his mittimus must be corrected to duly reflect his presentencing detention credit. We agree with the latter and so order, and we otherwise affirm.[1]

¶ 3 Defendant and codefendant were charged with armed robbery for, on or about August 30, 2009, allegedly taking currency from Gregory Burks by force or threat of force while armed with a firearm. Defendant and codefendant were also each charged with aggravated unlawful use of a weapon (AUUW) for possessing a revolver and shotgun, respectively, on that same day.

¶ 4 Just before trial, the State spread of record that "codefendant already pled."

¶ 5 At trial, Gregory Burks testified that, on August 30, 2009, he was working in a gasoline station and convenience store. The store had only one entrance and exit, as the rear door had been sealed. At about 2:20 a.m., Burks noticed two men enter the store. One was taller, wearing a baseball cap and blue shirt, and carrying a "long rifle." The other was dressed in all-black clothing including a hood and a mask covering half his face, and "had some kind of revolver or pistol." Both men showed their weapons to Burks, and the man in blue walked to a point on the shop floor where he could see outside the store. The man in black said that "this is not a joke, this is a robbery," pointed the revolver at Burks, and directed him to the cash register. There, the man in black told Burks to "get the money out" and place it in a bag. Burks opened the register, and the man in black handed him a bag from the store's supply. As he did so, the man in black held his pistol in his right hand. When Burks had placed all the money from the register in the bag, the man in black took the bag and walked to the sealed rear door. Burks told him that the door was sealed, but the man in black tried the door himself. He then returned to the shop floor

[1] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.

and told the man in blue that there was no rear exit. The man in blue said "let's go, we need to leave," and both men left the store, still carrying their weapons.

¶ 6 The police arrived at the store a short time later, and Burks told them what happened. About a half-hour later, officers asked Burks to identify someone they brought to the gasoline station. Burks recognized that person as the man in blue who had been carrying a rifle, and later learned that he was codefendant Kelly. Burks identified store security video as accurately depicting the incident, and the video was shown at trial. He pointed out where in the video "the defendant," who was at that point directing him to take the money out of the cash register, was visibly holding a pistol. Burks also identified photographs of the guns held by the man in black and the man in blue. On cross-examination, Burks testified that he was not shown the pistol shortly after the robbery, nor was he shown the photograph of the pistol alongside photographs of other guns. He also made no identification of any person as the man in black. On redirect examination, Burks again identified on the video where the man in black was visibly holding a pistol and testified that the photograph of the pistol was the same gun visible in the video. On recross-examination, Burks admitted that the video did not depict the man in black pointing the pistol at him.

¶ 7 David Yarbrough testified that he was driving past the gasoline station when he saw two men in front of the station. One was wearing black, and the other was in blue including a blue hat and holding a shotgun. He did not see anything in the man in black's hand. He called 911 and drove into the gasoline station. When he looked into the store, he saw the man in black lead the store clerk behind the cash register while the man in blue stood nearby. Yarbrough told the operator that there was a robbery in progress and described the two men. When the two men

exited the store, Yarbrough drove away. He saw the men walk into a forest preserve west of the gasoline station and told the operator so. While he was still on the telephone, he saw the police arrive. On cross-examination, Yarbrough clarified that he never saw a gun in the hand of the man in black. While he identified the man in blue, he did not identify the man in black and was not shown a lineup that the police said may contain the man in black.

¶ 8 Police officer Thomas Dermody testified that he brought a dog to the scene to find the two armed robbery suspects. The grass or weeds were trampled behind the gasoline station, and the dog followed a scent from there. Dermody then received a report that two suspects were seen fleeing nearby, so he brought the dog to that location. He saw a shotgun on the ground, and the dog followed a scent until Officer Dermody heard another officer report detaining a suspect, codefendant, about 10 yards away. Neither Officer Dermody nor the dog found defendant.

¶ 9 Police detective Mark Akiyama testified that he examined the car found near the scene. The car contained two wallets, and the shredded remains of black clothing were found a few feet from the car. One wallet contained various documents, including an Illinois identification card, a military identification card, and two bank cards, bearing defendant's name. The other wallet contained various documents, including an Illinois identification card, an Illinois driver's license, a Social Security card, and a bank card, bearing codefendant's name. Having already arrested codefendant, Detective Akiyama believed that defendant was the other armed robbery suspect still at large. He went to the address on defendant's identification but did not find him there at the time. After the sun rose, officers reported finding a pistol in the woods near the scene. Detective Akiyama recovered, photographed, and inventoried the pistol.

¶ 10 Defendant went to the police station on the afternoon following the incident. Detective Akiyama informed defendant of his *Miranda* rights, and defendant acknowledged understanding his rights and agreed to speak with him. Defendant admitted to participating in the armed robbery of the gasoline station with codefendant. He identified photographs of the gasoline station he robbed, the car they used, and the black shirt he shredded. He also identified a still-picture taken from the security video as depicting codefendant and himself. In making each identification, defendant signed, initialed, or marked each photograph or picture.

¶ 11 Defendant also gave a written statement to an assistant State's Attorney (ASA). In it, defendant admitted that he and codefendant were discussing "money problems" and the possibility of robbery when Calvin Kelly produced two guns including a shotgun. They then planned the robbery of the gasoline station, drove to an abandoned house near the station, walked to the station, and committed the robbery. Defendant described discarding the gun and his black clothing as he fled.

¶ 12 On cross-examination, Officer Akiyama testified that neither interview of defendant was video- or audio-recorded, nor were any notes taken during the interviews by police or the ASA. Defendant was shown only two still-pictures from the security video, neither of which depicted the man in black holding a gun. The pistol was not tested for fingerprints or DNA, nor was the shredded black clothing tested for DNA.

¶ 13 The parties stipulated that a forensic scientist would testify that the revolver recovered by police contained two unfired cartridges and was found to be "designed to be used as a gun."

¶ 14 Following closing arguments, the court noted that defendant was not identified by Burks but "other indicia" in the evidence showed that defendant was the man in black: his statement

admitting to the robbery, and his wallet found with codefendant's wallet when "codefendant already admitted to that crime." The court thus found that it had no reasonable doubt that defendant participated in the armed robbery. As to whether defendant was armed with a firearm, the court noted that, assuming *arguendo* that the security video did not depict him holding a gun, Burks testified to the gun being pointed at him during the robbery. The court found defendant guilty of armed robbery and AUUW.

¶ 15 In his posttrial motion, defendant claimed in relevant part that the "court erred by stating in its finding of guilt that *** codefendant had admitted guilt by pleading guilty." Following argument, the court denied the motion. The court then held a sentencing hearing where it merged the AUUW count into armed robbery and sentenced defendant to 21 years' imprisonment including the 15-year firearm enhancement. The mittimus reflected 758 days' credit.

¶ 16 On appeal, defendant primarily contends that the trial court erred in considering that "codefendant already admitted to that crime" while finding defendant guilty, because codefendant did not testify at defendant's trial.

¶ 17 Before we may address this claim, we must consider the State's argument that defendant forfeited it by not objecting at trial to the court's remark. We agree with defendant that counsel is not required to interrupt the trial court as it pronounces or explains its ruling in order to preserve a claim of error regarding the court's remarks. *People v. Mitchell*, 152 Ill. 2d 274, 325 (1992), citing *People v. Saldivar*, 113 Ill. 2d 256, 266 (1986). Our supreme court stated in *Saldivar* that counsel need not interrupt the trial court in pronouncing sentence – "[t]o preserve any error of the court made at that time, it was not necessary for counsel to interrupt the judge and point out that he was considering wrong factors in aggravation" – and held in *Mitchell* that "we find the

same rule to apply to a trial court's explaining its reasons for not suppressing evidence." *Saldivar* at 266; *Mitchell* at 325. We see no reason why this rationale should not also apply to counsel not being required to interrupt the trial court pronouncing and explaining its ruling at the end of a trial. Crucially, defendant raised this claim in his posttrial motion, which gave the trial court the opportunity to correct any error from its remark before appeal. See *People v. Minter*, 2015 IL App (1st) 120958, ¶ 137 (recognizing that it would be unreasonable to expect counsel to interrupt the court but finding forfeiture because the claim was also not raised in the posttrial motion).

¶ 18 In reviewing a bench trial, we presume that the court considered only properly admitted evidence unless the record affirmatively rebuts the presumption. *People v. Oglesby*, 2016 IL App (1st) 141477, ¶ 261, citing *People v. Naylor*, 229 Ill. 2d 584, 603-04 (2008). Even where the court considered improper evidence, there is no reversible error if the error was harmless; that is, when there is no reasonable probability that the defendant would have otherwise been acquitted. *Oglesby*, ¶ 262; *People v. McCullough*, 2015 IL App (2d) 121364, ¶ 138.

¶ 19 At trial, the trier of fact need not be satisfied beyond a reasonable doubt as to each link in the chain of circumstances; instead, it is sufficient if all the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 60. The trier of fact is not required to disregard inferences that flow normally from the evidence, nor to seek all possible explanations consistent with innocence and elevate them to reasonable doubt, nor to find a witness not credible merely because a defendant says so. *Id.*

¶ 20 Here, we need not examine whether the court's reference to codefendant's admission of guilt was improper because we find any error to be harmless beyond a reasonable doubt. As the court correctly noted, defendant gave a detailed statement describing the armed robbery and the

occurrences preceding and following it, and his wallet was found with codefendant's wallet in the car near the scene. We note that the car also had shredded black clothing nearby linking it to the robbery. Especially in light of the fact that codefendant was found near the scene and the car, the court was not required to elevate to reasonable doubt the possibility that the Mark Williams and Calvin Kelly identified in the wallets – with not just names but addresses and other particulars – were not defendant and codefendant. Despite the court's remark that codefendant was linked to the crime by his admission of guilt, the trial evidence firmly and properly linked codefendant to the armed robbery by his presence near the scene immediately afterwards and by the pretrial identifications of codefendant by Burks and Yarbrough to which each testified. We find that defendant's wallet linked him to the armed robbery independently of his statement, so that his inculpatory statement was corroborated. In sum, we find no reasonable probability that defendant would have been acquitted absent the court's remark about codefendant.

¶ 21 Defendant also contends, and the State agrees, that his mittimus must be corrected to properly reflect credit for his presentencing detention. We agree with the parties. The record shows that defendant was arrested on August 30, 2009, released on bond on April 17, 2010, rearrested on March 13, 2014, and sentenced on September 22, 2015. He was therefore in custody a total of 788 days. However, the mittimus reflects a credit of only 758 days.

¶ 22 Accordingly, we direct the clerk of the circuit court to correct the mittimus to reflect 788 days of presentencing detention credit. The judgment of the circuit court is otherwise affirmed.

¶ 23 Affirmed, mittimus corrected