2018 IL App (1st) 152964-U

FIRST DIVISION
June 29, 2018

No. 1-15-2964

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	
	)	No. 14 CR 1291
AUKIN HARRIS,	)	
	)	Honorable
Defendant-Appellant.	)	Maura Slattery Boyle,
	)	Judge Presiding.
	)	

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Harris and Mikva concurred in the judgment.

ORDER

¶ 1 *Held*: Plain error did not result from the trial court's failure to properly inform the jury. Defendant was not denied due process based on the trial court's exclusion of certain evidence and certain arguments during closing arguments.

¶ 2 Following a jury trial, defendant Aukin Harris was convicted of armed habitual criminal and sentenced to 7.5 years' imprisonment. On appeal, defendant contends: (1) the trial court violated Illinois Supreme Court Rule 431(b) (eff. May 1, 2007) in questioning the venire; and (2)

he was denied his right to present a complete defense when the trial court refused to allow defendant's counsel to elicit relevant evidence and prevented him from making a proper closing argument. For the following reasons, we affirm the judgment of the trial court.

¶ 3 BACKGROUND

¶ 4 Defendant was charged with armed habitual criminal for possessing a gun after having two prior qualifying felonies. He was convicted and sentenced to seven years and six months in prison.

¶ 5 On December 18, 2013, Chicago police officers Kevin Deeren and Eric Jehl observed a drug transaction take place at 1244 S. Kedvale in Chicago between occupants of a vehicle and a pedestrian. Once the officers approached, the pedestrian fled on foot and Officer Deeren chased the man, later identified as Sidney Jordan, into a nearby apartment building. When Jordan partially opened the door to a first-floor apartment, Officer Deeren caught him, performed a pat down search and then detained Jordan.

¶ 6 Through the open door of the first-floor apartment, Officer Deeren observed a man, whom he knew as defendant from a prior "interaction," sitting on the couch. Defendant was wearing a black hoodie or jacket and jeans. Once defendant noticed Officer Deeren detaining Jordan in the doorway, defendant stood up, took a silver revolver out of his waistband and placed it in between the cushions of the couch. Defendant then fled out of the back door of the apartment. After Jordan was handcuffed, Officer Deeren retrieved the gun, loaded with six live rounds, from the couch and ran to the back of the first-floor apartment.

¶ 7 At the back door, he saw defendant running up the stairway to the third-floor apartment. Office Deeren went back around to the front of the building and met his partner. Additional

officers arrived on the scene. Officer Deeren was explaining to Officer Jehl what happened with defendant when Deangelo Murray and Stephanie Cobbs approached them.

¶ 8 About five minutes later, Officers Deeren and Jehl, along with Officer Rick Caballero, who had arrived as back up, proceeded to the third-floor apartment. As the officers cleared the apartment, they observed that the first bedroom on the left was in "disarray" with no beds, trash everywhere, and no heat. In the second bedroom on the left, they discovered defendant who was lying on a mattress on the floor with a woman later identified as Najeea Hemphill. Defendant was wearing a tank top and boxers. Officer Deeren identified defendant as the person he saw earlier with the gun and defendant was placed in custody.

¶ 9 On cross-examination, Officer Deeren stated that his partner stayed with the vehicle that was part of the drug transaction while he chased Jordan into the building. When he was chasing Jordan, he did not yell "police" or "stop." Officer Deeren did not know if Jordan lived in the building when he followed Jordan in. He patted Jordan down for safety reasons because he did not know if he was armed.

¶ 10 Officer Jehl testified that after he and Officer Deeren observed the drug transaction, he remained with the occupants of the vehicle involved in the transaction while Officer Deeren chased Jordan into the building. Officer Deeren returned a short time later with a silver revolver.

¶ 11 After additional units arrived, Officers Jehl, Deeren and Caballero went up the back stairs to the third floor apartment. They located defendant in the second bedroom from the rear. Officer Deeren identified defendant as the person he had seen in the first-floor apartment with the gun. Defendant was placed in custody. Officer Jehl stated that he was familiar with the building that Jordan ran into and knew it was foreclosed. The first and third floors were

abandoned but there was an older lady still living on the second floor.

¶ 12 After Officer Jehl's testimony, the parties stipulated that defendant had two prior qualifying felony offenses under case numbers 04 CR 18216 and 02 CR 14769. The State then rested.

¶ 13 The defense called Najeea Hemphill. She testified that on December 18, 2013, she was in an intimate relationship with defendant. She picked defendant up at about 7 or 8 p.m. that evening and they went to a friend's third-floor apartment at 13th and Kedvale. When they arrived, the friend let them inside. It was a "normal" apartment with two or three furnished bedrooms, TV's, beds and furniture.

¶ 14 She and defendant went to the bedroom closest to the front room and stayed in there for "like 30 minutes to a couple of hours." Hemphill stated that there was no one in the bedroom except the two of them. She and defendant were lying down, asleep, when three or four police officers kicked in the bedroom door. She stated that she and defendant were together the entire time and she never saw defendant with a gun that day.

¶ 15 Deangelo Murray testified that he knew defendant for about ten years. On December 18, 2013, he and his girlfriend arrived at the third floor apartment in the building at 1242 South Kedvale at about 7 or 8 p.m. Defendant arrived with his girlfriend and they went to the bedroom closest to the back door and stayed there. He did not hear anyone enter or leave the apartment after he let defendant in. Murray stated that he was never on the first floor of the building on that night and further denied that he saw defendant on the first floor.

¶ 16 When he left the building and was walking down the stairs, the police grabbed him and did not tell him why. They searched him and placed him and his girlfriend in the back of a squad

car. The police took keys out of his pocket for the third-floor apartment. Murray stated that the keys for the third floor apartment had been given to him by the people who used to live there. Murray stated that the building was abandoned but that people partied and sold drugs there. Murray admitted that he had been convicted of three drug offenses.

¶ 17 After hearing all of the evidence, the jury found defendant guilty of armed habitual criminal. Defendant's motion for a new trial was denied. Defendant was sentenced to 7.5 years' imprisonment. This appeal followed.

¶ 18 ANALYSIS

¶ 19 Defendant argues that the trial court violated Illinois Supreme Court Rule 431(b) (eff. May 1, 2007) in questioning the venire where it failed to inform the venire about the principle that the defendant is not required to testify and failed to ask the venire if it understood that if a defendant chooses not to testify, that cannot be held against him.

¶ 20 Rule 431(b) requires:

> " 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 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." Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

¶ 21 The State correctly asserts that defendant has forfeited review of this error because he failed to object during *voir dire* and has failed to include this issue in his posttrial motion. *People v. Sebby*, 2017 IL 119445, ¶ 48. Rule 615(a) permits an appellate court to excuse a defendant's forfeiture and reach the merits of a claim that amounts to plain error. Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967); *Sebby*, 2017 IL 119445, ¶ 48. Defendant acknowledges this forfeiture and asks this court to review this issue for plain error.

¶ 22 The plain error doctrine allows a court of review to consider a forfeited error when "(1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005).

> "In the first instance, the defendant must prove 'prejudicial error.' That is, the defendant must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him. The State, of course, can respond by arguing that the evidence was not closely balanced, but rather strongly weighted against the defendant. In the second instance, the defendant must prove there was plain error and that the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Id.* at 187.

However, before considering plain error, we must first consider whether error occurred at all. *People v. Harris*, 225 Ill. 2d 1, 31 (2007).

¶ 23 Defendant argues that the circuit court's error constitutes first-prong plain error. His argument is consistent with our supreme court's holdings that Rule 431(b) errors are usually only subject to first-prong plain error analysis. *Id.* ¶ 33 (citing *People v. Thompson*, 238 Ill. 2d 598, 615 (2010)); *Sebby*, 2017 IL 119445, ¶ 52. We must therefore determine whether the evidence

here was closely balanced such that the circuit court's error threatened to tip the scales of justice against defendant. This requires us to "evaluate the totality of the evidence and conduct a qualitative, commonsense assessment of it within the context of the case." *Sebby*, 2017 IL 119445, ¶ 53. We are required however, to first determine whether error occurred. *Id*.

¶ 24 Rule 431(b) "mandates a specific question and response process." *Thompson*, 238 Ill. 2d at 607. "The rule requires questioning on whether the potential jurors both understand and accept each of the enumerated principles." *Id*. Accordingly, failure to ascertain whether the jurors both understand and accept the principles constitutes a violation of Rule 431(b) and therefore, error. *Id*; See also *People v. Wilmington*, 2013 IL 112938, ¶ 28.

¶ 25 There is no doubt that error occurred here. Our review of the record shows that the fourth instruction given by the trial court did not fully comply with Rule 431(b) in so far as the court failed to inform the jury that defendant's failure to testify could not be held against him. The State acknowledges as such.

¶ 26 Defendant argues that plain error occurred because the evidence in this case was closely balanced. Defendant argues that this case came down to the testimony of the State's witnesses versus the defense witnesses. The sole evidence of his guilt was Officer Deeren's testimony that he observed defendant with a gun, which was not corroborated by any witnesses or physical evidence as the gun was not submitted for independent testing. Defendant further claims that there were discrepancies in the State's evidence concerning crucial facts regarding the drug transaction that led to Officer Deeren's alleged observation of defendant with the gun. Defendant cites *People v. Naylor*, 229 Ill. 2d 584 (2008), to support his claim that where the evidence comes down to a credibility contest, we should find that the evidence was closely

balanced.

¶ 27 In *Naylor*, our supreme court concluded that error occurred when the trial court admitted the defendant's prior aggravated battery conviction into evidence to impeach his testimony because the conviction was more than 10 years old at the time of trial. Because the evidence was closely balanced where the trial court had heard the credible testimony of two police officers that defendant sold drugs, and the credible testimony of defendant that he was swept up in a drug raid, and the case was a "contest of credibility," plain error occurred. *Id*. at 606-07. The court further explained that at the close of the testimony in the bench trial, the trial court "was faced with two different versions of events, both of which were credible." *Id*. at 608. Based on that record, the court in *Naylor* opted to "err on the side of fairness" and reversed the defendant's convictions. (Internal quotation marks omitted.) *Id*. As the court explained:

> "The evidence boiled down to the testimony of the two police officers against that of defendant. Further, no additional evidence was introduced to contradict or corroborate either version of events. Thus, credibility was the only basis upon which defendant's innocence or guilt could be decided." *Id*. at 608.

¶ 28 In so holding, the *Naylor* majority rejected the dissent's suggestion that it was creating "a rule holding that if the evidence at trial involves a contest of credibility, and the defendant testifies contrary to the prosecution's witnesses, the evidence will always be closely balanced." *Id*. at 615-16 (Thomas, C.J., dissenting, joined by Garman and Karmeier, JJ.) The majority explained that: "It is axiomatic that whether the evidence in a criminal trial is closely balanced depends solely on the evidence adduced in that particular case." *Id*. at 609. Contrary to defendant's argument here, *Naylor* does not demand that we enter a finding of plain error based

on closely balanced evidence merely because the case came down to a credibility assessment.

¶ 29 Recent supreme court cases have established a common sense approach that should be used when analyzing evidence to determine if it is closely balanced. "A reviewing court must undertake a commonsense analysis of all the evidence in context when reviewing a claim under the first prong of the plain error doctrine." *People v. Belknap*, 2014 IL 117094, ¶ 50; see also *People v. Adams*, 2012 IL 111168, ¶ 22 (in deciding whether closely-balanced prong has been met, court's "commonsense assessment" of the evidence must be made "within the context of the circumstances of the individual case"); *People v. White*, 2011 IL 109689, ¶ 139 ("A qualitative-as opposed to strictly quantitative-commonsense assessment of the evidence demonstrates that the evidence was not closely balanced."); *Sebby*, 2017 IL 119445, ¶ 61 ("A commonsense assessment of the evidence reveals that it was closely balanced").

¶ 30 A commonsense assessment of the evidence in this case leads us to conclude that the evidence was not closely balanced. Officer Deeren testified that he pursued Jordan inside an apartment building. As Jordan was entering the first floor apartment, Officer Deeren detained him. While he was standing there, he was able to see inside the first-floor apartment where defendant sat on the couch. Officer Deeren knew defendant from a prior interaction. Once defendant noticed Officer Deeren detaining Jordan in the doorway, defendant stood up, took a silver revolver out of his waistband and placed it in between the cushions of the couch. Defendant then fled the apartment out of the back door.

¶ 31 After Officer Deeren finished handcuffing Jordan, he retrieved the gun from the couch and went out the back door. Officer Deeren observed defendant on the stairway outside of the third floor apartment. After explaining what he found to Officer Jehl, the officers, along with

backup, entered the third floor apartment where they found defendant in a bedroom.

¶ 32 Defendant's case consisted of two witnesses who attempted to establish an alibi for defendant. Hemphill testified that she and defendant arrived at the third floor apartment between 7 and 8 p.m. and immediately went to a bedroom. They spent some "quality time" and then went to sleep. Although Hemphill claimed that she and defendant were never apart until interrupted by the police, she could not account for defendant's whereabouts while she was sleeping.

¶ 33 Similarly, Murray testified that he let defendant and his girlfriend into the third floor apartment sometime between 7 and 8 p.m. Defendant and Hemphill went directly into the bedroom by the back door. Murray admitted that he never saw defendant after defendant went into the bedroom, but did not "hear anyone enter or leave the apartment" after he let defendant in. Murray's testimony was hardly conclusive of defendant's whereabouts on the evening in question.

¶ 34 Furthermore, the minor inconsistencies defendant complains of with respect to the officer's testimony relate to the officers' observations of the narcotics transaction and not with Officer Deeren's observation of defendant with a weapon. On the one hand, the jury heard the testimony of a police officer regarding his opportunity to see the defendant with a weapon, his attempt to hide the weapon, his flight and his subsequent arrest. On the other hand, the jury heard the testimony of two friends of the defendant who did not place defendant on the first floor or see him possessing a weapon. The jury observed the demeanor of the witnesses and made credibility determinations that were not unreasonable. Viewing the entire record, we cannot say the evidence was "so closely balanced that the guilty verdict may have resulted from the error." *Thompson*, 238 Ill. 2d at 613. As such, the trial court's failure to comply with Rule 431(b) cannot

be considered plain error because the evidence is not closely balanced.

¶ 35 Defendant also argues that the trial court erred when it precluded defendant from cross-examining Officer Deeren about whether the criminal case stemming from his prior arrest of defendant was dismissed. Defendant argues that his sixth amendement right was also violated by this ruling. This claim must be viewed in context.

¶ 36 On direct examination, Officer Dereen was asked whether "this was the first time [he] had ever come into contact with this defendant before?" Officer Dereen responded, "No," and was then asked to elaborate. Officer Dereen explained that he recognized defendant from a prior encounter sometime in October 2012, and when he saw defendant he recognized him immediately. On cross-examination, defense counsel questioned Officer Dereen about how and why he was familiar with defendant. Defense counsel asked Officer Dereen if he "recognized [defendant] as somebody that you had contact with on October 22nd of 2012" and if he arrested defendant on October 22, 2012. Officer Dereen responded "yes" to both questions. Defense counsel then asked whether defendant was charged with possession of a controlled substance and Officer Dereen answered "yes." Defense counsel's next question was whether that case was dismissed in court. The State then objected on the basis of relevance and the trial court sustained the objection. Defense counsel stated it "goes to bias" but made no offer of proof, and continued her cross-examination.

¶ 37 The sixth amendment right to cross-examination is not without limit. "A judge may limit the scope of cross-examination and unless the defendant can show his or her inquiry is not based on a remote or uncertain theory, a court's ruling limiting the scope of examination will be affirmed." *People v. Tabb*, 374 Ill. App. 3d 680, 689 (2007). "The admissibility of evidence rests

within the discretion of the trial court, and its decision will not be disturbed absent the abuse of that discretion." *People v. Pikes*, 2013 IL 115171 ¶ 12.

¶ 38 "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and [in] case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." Ill. R. Evid. 103(a)(2) (eff. Jan. 1, 2011). "[W]hen a trial court bars evidence, no appealable issue exists unless the denied party makes an offer of proof." *People v. Boston*, 2016 IL App (1st) 133497, ¶ 64, citing *People v. Peeples*, 155 Ill. 2d 422, 457 (1993). "If a criminal defendant claims on appeal that he was not able to prove his case because the trial court improperly barred him from presenting evidence but he failed to make an adequate offer of proof, he forfeits review of the issue on appeal." *Id*.

¶ 39 To be clear: it was the defendant who first raised the issue of a drug arrest. Defense counsel then tried to elicit the disposition of the prior case. Clearly, had the nature of the "prior interaction" not been described further as a "drug arrest" there would have been no reason to know of the disposition. The record also indicates the reason for defense counsel eliciting testimony about the prior interaction was to attack the officer's ability to make an identification based on the short observation of defendant in the first floor apartment. In either event, defendant made no offer of proof in the trial court as to how the dismissal of defendant's prior case had any relevance to the charges in the instant case. Defense counsel's general statement that it "goes to bias" was not sufficient to put the court on notice that defense counsel was attempting to establish a theory of defense that he now argues on appeal: that Officer Deeren was somehow biased against defendant based on the prior dismissed case which would have made

Officer Deeren's testimony even more suspect, "given that he had already arrested [defendant] before and then seen those charges dismissed." Defense counsel did not make any mention of Officer Deeren's prior encounter with defendant or his alleged bias in opening statement or alert the court through a motion *in limine* that this was a part of his defense. Defendant has therefore forfeited this argument.

¶ 40 Forfeiture aside, the State argues that any alleged error related to the exclusion of this evidence is harmless beyond a reasonable doubt. An error is harmless if the jury would have reached the same verdict even without the error. *Herron*, 215 Ill. 3d 181-82. To determine whether error is harmless beyond a reasonable doubt we must consider: (1) whether the error contributed to the defendant's conviction; (2) whether the other evidence in this case overwhelmingly supported the defendant's conviction; and (3) whether the excluded evidence would have been duplicative or cumulative. *People v. Blue*, 205 Ill. 2d 1, 26 (2001).

¶ 41 The alleged improper exclusion of evidence did not contribute to defendant's conviction. Defense counsel had more than adequate opportunity on cross-examination to probe Officer Deeren's credibility including his ability to see the initial narcotics transaction, whether he announced his office to Jordan, how he was able to see defendant in the first-floor apartment if his focus was on Jordan, why a vacant apartment would be well-lit and have furniture, and why he did not call an evidence technician to preserve fingerprints on the gun. Defense counsel also cross-examined Officer Deeren's partner, Officer Jehl. These lines of questioning allowed defense counsel to argue in closing that Officer Deeren lacked credibility. We fail to see how the exclusion of testimony regarding defendant's dismissal in an unrelated case would contribute to his conviction.

¶ 42 As we have already discussed, the evidence in this case was not closely balanced. Officer Deeren saw defendant remove a silver revolver from his waistband, place it in the cushions of the couch and flee through the back door. Office Deeren then saw defendant climbing the stairs to the third floor. Defendant was subsequently found in a third-floor apartment. Although defendant attempted to establish an alibi defense, his whereabouts on the night in question could not be fully accounted for. An error is harmless if the jury would have reached the same verdict even without the error. We have no doubt that any error that occurred here is harmless. Defendant also argues that he was prejudiced because the jury only heard that Officer Deeren had previously arrested defendant on drug-related charges and that the jury was therefore allowed to hear proof of other crimes evidence that would have been inadmissible otherwise is without merit. It was the defendant who elicited this testimony regarding his prior arrest and the drug charges from Officer Deeren and he cannot now complain that he was prejudiced by it. See *People v. Anderson*, 2017 IL App (1st) 122640.

¶ 43 Defendant further claims that the trial court compounded its error by preventing defense counsel from arguing reasonable inferences from the facts in evidence, constantly interrupting counsel and improperly admonishing counsel in the presence of the jury. In this regard, defense counsel made two comments during closing argument that related to Officer Deeren's prior arrest of defendant. The trial court *sua sponte* sustained an objection to the first comment. After the second comment, the court sustained the State's objection and then reminded defense counsel that she had been "repeatedly told that is not relevant. It's disregarded." Defense counsel also attempted twice to define reasonable doubt for the jury. In the first instance, defense counsel told the jury, "Don't put the burden on proving reasonable doubt on the defense. It's not our job. It's

their job." In the second instance, defense counsel stated, "Now, it's not my job. It's not your job to solve this mystery, to figure out what really happened. * * * It's simply enough if you have any questions that that is reasonable doubt." The circuit court sustained both of the State's objections.

¶ 44 The circuit court retains broad discretion to limit the scope of closing argument. *People v. Burnett*, 237 Ill. 2d 381, 389 (2010). Furthermore, the trial court has discretion to regulate its substance and style of closing arguments. *People v. Blue*, 189 Ill. 2d 99, 128 (2000). There is nothing in the record before us to suggest that the trial court abused its discretion in precluding argument regarding the disposition of Officer Deeren's prior arrest of defendant, given that the court previously found the evidence to be irrelevant. Similarly, the record shows that the trial court properly sustained the State's objections to defense counsel attempting to define reasonable doubt for the jury. It is well-established that the concept of reasonable doubt needs no definition and that it is improper for the court or counsel to attempt to define reasonable doubt to the jury. *People v. Thomas*, 191 Ill. App. 3d 187, 197 (1989). There was no error here where the circuit court had previously ruled this evidence was irrelevant and it was clear that the defense counsel was attempting to avoid these rulings and argue some aspects of the prior arrest to the jury notwithstanding the clear rulings of the circuit court. There is nothing indicating that defense counsel sought clarification or guidance from the court as to the parameters she would be allowed to argue and counsel made no offer of proof to inform the court of the relevancy of the prior arrest. Under these circumstances, the circuit court was within its discretion in prohibiting defense counsel from commenting on these matters.

¶ 45 CONCLUSION

¶ 46 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 47 Affirmed.