2018 IL App (1st) 153554-U

No. 1-15-3554

Order filed on December 4, 2018.

Second 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. 13 CR 6002 (03)
	)	
ANTOINE HOTCHKISS,	)	The Honorable
	)	Maura Slattery Boyle,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Pucinski and Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for armed robbery with a firearm is affirmed where: the trial court's failure to advise potential jurors regarding defendant's decision not to testify did not constitute plain error under the closely-balanced evidence test; and the State's use of the memorialized statement from an accomplice in order to rebut the defense's claim of recent fabrication, amounted to harmless error because it did not affect the outcome of the case. The mittimus is corrected to accurately reflect the offense of which defendant was convicted.

¶ 2 Following a jury trial, defendant Antoine Hotchkiss was convicted of armed robbery with a firearm (720 ILCS 5/18-2(a)(2) (West 2012)) and sentenced to 22 years in prison. On appeal, defendant contends: (1) the trial court's failure to ask the jury venire whether they understood and accepted the principle that his decision not to testify could not be held against him constituted plain error under the "closely balanced" prong of that doctrine; (2) the State presented inadmissible hearsay evidence during the testimony of an accomplice, who testified for the State, and its admission constituted error that was not harmless; and (3) the mittimus should be corrected to reflect the offense of which defendant was convicted. We affirm and correct the mittimus.

¶ 3 Defendant was charged with armed robbery with a firearm and aggravated unlawful restraint. Defendant and his co-defendant, Jeffrey Loving, were tried simultaneously by separate juries. Both men were convicted of the armed robbery of Timothy Armstead with a firearm.[1] At the time of the offense, defendant and Loving were being driven in a car by Joannie Rivera, who was charged with armed robbery and aggravated unlawful restraint, and testified for the prosecution pursuant to a plea deal.

¶ 4 At the outset of his testimony, Armstead acknowledged pleading guilty in 2007 to possession of a controlled substance. Armstead testified he was raised in Chicago and was in the city visiting family on March 1, 2013. About 9:30 p.m., he was walking alone on St. Louis Avenue to the Blue Line train station at Homan Avenue and Congress Parkway. Armstead had $220 cash in his hand and was retrieving the correct amount to buy a train ticket. As he did so, a four-door Chrysler sport-utility vehicle drove alongside him and stopped at a stop sign. Armstead

[1]Loving's appeal is being addressed by this court in case No. 1-16-0276.

testified Loving "jumped out of the back seat" with a gun, pointed the gun at Armstead's stomach and told him not to move. Loving patted Armstead down, took the $220 from his hand and got back in the car.

¶ 5 Defendant got out of the Chrysler and patted Armstead down, taking a "flip"-style cell phone from Armstead's coat pocket. Armstead said defendant was "real close" and "in my face." Defendant dropped the phone on the ground, and Loving told defendant to hurry up. Defendant got in the car, and the car drove away.

¶ 6 A van containing two men Armstead knew from the neighborhood then pulled up next to him. Armstead told them he had just been robbed and got in their van to pursue the robbers. The van pulled up to the passenger side of the Chrysler at a red light at Jackson Boulevard and Central Park Avenue. Armstead opened the van's sliding door and shouted to Loving, who sat in the passenger seat of the Chrysler, that he would remember his face.

¶ 7 A police vehicle pulled in front of the Chrysler and the van, and an officer asked what was happening. Armstead pointed at the Chrysler and said he had been robbed. The Chrysler drove away when the light turned green, and police pursued the vehicle. The officers eventually apprehended defendant, Loving and Rivera.

¶ 8 Several Chicago police officers testified at trial regarding these events. Chicago police officer Pedro Barrera testified he and his partner were parked in a marked police vehicle near the edge of Garfield Park, at the intersection of Jackson and Central Park. Barrera saw Armstead standing next to a van, trying to get his attention. Barrera pulled into the intersection and Armstead pointed to the Chrysler and said he was robbed and they had a gun. Barrera, who was between 10 and 15 feet away from the Chrysler, saw Loving was the passenger and a woman was the driver.

¶ 9 The Chrysler drove around Barrera's vehicle and proceeded west toward Garfield Park. Barrera pursued the vehicle. Shortly thereafter, police detained the Chrysler and its occupants at a red light at Jackson and Independence, on the west side of Garfield Park. Barrera learned via police radio that a weapon had been recovered. On cross-examination, Barrera stated he did not see a gun being thrown from the car. Chicago police officer Luis Centeno testified he recovered $220 from Loving during a patdown search.

¶ 10 Chicago police sergeant Jeff Truhlar testified that at about 9:36 p.m., he received a radio report of an armed robbery suspect near Jackson and Central Park. A handgun with black tape wrapped around the handle was recovered from the north side of Jackson, approximately one or two blocks west of the corner of Jackson and Central Park. No fingerprints were recovered from the weapon, which was loaded.

¶ 11 Chicago police sergeant Adam Zelitzky testified he interviewed Armstead and the other men in the van. In separate show-up identifications, Armstead identified Loving as the man who robbed him, defendant as the second man in the Chrysler and Rivera as the driver.

¶ 12 Rivera was charged with armed robbery and testified against defendant and Loving pursuant to an agreement with the State in which she pled guilty to robbery and received a four-year prison sentence. In March 2013, Rivera and Loving had been dating for several months. On the morning of March 1, Rivera purchased a Chrysler vehicle and met Loving at about noon. Rivera drove Loving to his sister's house on the west side. Loving called defendant, who came to the house. At 5 or 6 p.m., Loving asked Rivera to drive him and defendant somewhere but did not tell her exactly where they would be going. Rivera testified that no one mentioned a robbery and she did not know Loving had a handgun.

¶ 13 Loving got in the passenger seat of her car, and defendant got in the back seat. Rivera drove them around for about an hour, with Loving giving her directions. Loving told Rivera to pull over and stop the car near Congress Parkway and St. Louis Avenue where Armstead and another man were walking down the street. Loving got out of the car, and the man who was with Armstead ran away. Defendant and Rivera remained in the car. Although Loving was on the sidewalk behind the vehicle, Rivera could see him in her side mirror.

¶ 14 Loving approached Armstead, held a gun to Armstead's stomach and asked for money. Loving searched Armstead's pockets and removed money. Defendant then approached Armstead and searched the pockets of his jacket, removing a cell phone and throwing it to the ground. Rivera said she did not drive away because she was "in shock." Loving and defendant ran back to the car, and Loving told Rivera, "Go, go, go." Rivera drove away as Loving counted money in the car.

¶ 15 Rivera stopped at a red light at Jackson and Central Park, with Loving again in the passenger seat and defendant in the back. Armstead was shouting at Loving from a blue van. When Armstead pointed the Chrysler out to police nearby, Rivera made a left turn and a police vehicle began following her car. Loving passed the gun to defendant, who threw it out of the window. Rivera's car was detained by police at the next stoplight and all three were arrested. Rivera made a statement to police and identified the weapon recovered by police as the gun that Loving used to rob Armstead and that defendant threw from the car window.

¶ 16 On cross-examination, Rivera acknowledged her relationship with Loving at the time of the offense and said she met defendant through Loving. Before the robbery, Rivera consumed beer they had purchased from a liquor store. Rivera said when they stopped near Armstead, Loving got out of the vehicle and had a weapon.

¶ 17 Defense counsel attempted to impeach Rivera with portions of her statement made to an assistant state's attorney and a detective that was memorialized at 4 a.m. on March 2, 2013, at the 11th District police station. Rivera acknowledged that in her statement she did not tell police at that time that Loving had a weapon. Rivera also acknowledged she did not say in her statement that defendant had taken Armstead's cell phone. The State stipulated that Rivera's statement did not indicate she told interviewers that Loving had a weapon.

¶ 18 On redirect examination, the State asked Rivera about portions of her statement in which she said, *inter alia*, that: she saw defendant search Armstead's clothing; after the robbery, Loving sat in the front seat counting the money he had taken from Armstead; and while she was stopped at a red light after the robbery, a police car was nearby with its lights flashing. The trial court overruled the defense's objections to those inquiries. The redirect examination of Rivera will be set out *infra* in greater detail when discussing defendant's related contentions.

¶ 19 At the close of the State's case-in-chief, the State asked to admit "all of our remaining exhibits into evidence for the jury." The court asked defense counsel if it had any objection to those exhibits, which included Rivera's statement, being admitted into evidence. Defense counsel responded, "No, your Honor."

¶ 20 The defense moved for a directed verdict, which was denied. The defense stipulated that, if called, Detective Bor[2] would testify that, he interviewed Armstead at 10:50 p.m. on the night of the robbery. During the interview, Armstead told Bor that, immediately after he was robbed, two black men he did not know pulled up in a car at Congress and St. Louis and agreed to give him a ride. The defense also entered a stipulation to Armstead's prior conviction. Defendant did not testify.

[2]Detective Bor's first name was not given.

¶ 21 Following deliberations, the jury found defendant guilty of armed robbery with a firearm. Defendant's motion for a new trial was denied.

¶ 22 Defendant was sentenced to 22 years in prison. He filed a motion for reconsideration of his sentence, which the trial court denied.

¶ 23 On appeal, defendant first contends the trial court failed to comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) by not asking the jury venire if they understood and accepted that defendant's decision not to testify could not be held against him.

¶ 24 Rule 431(b), which codifies the principles set out in *People v. Zehr*, 103 Ill. 2d 472, 477-78 (1984), requires the trial court to ask each juror if he or she understands and accepts each of the following four tenets: (1) the defendant is presumed innocent of the charge(s) against him; (2) before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) the defendant is not required to offer any evidence on his or her own behalf; and (4) if a defendant does not testify, it cannot be held against him. Ill. S. Ct. R. 431(b) (eff. July 1, 2012); *People v. Thompson*, 238 Ill. 2d 598, 607 (2010). Even though Rule 431(b) does not contain a "precise formula for trial judges to use in ascertaining jurors' prejudices or attitudes," the rule requires trial courts to address each enumerated principle and "mandates a specific question and response process." *Thompson*, 238 Ill. 2d at 607; *People v. Emerson*, 122 Ill. 2d 411, 427 (1987). The court is required to ask each juror if he or she understands and accepts each of the principles set out in the rule. *Thompson*, 238 Ill. 2d at 607.

¶ 25 Here, the State concedes, and, after reviewing the record, we agree, that the trial court did not explain the fourth *Zehr* principle, namely that defendant's decision not to testify could not be held against him. The trial court's failure to advise the venire on this principle has been found to

be error. *People v. Blanton*, 2011 IL App (4th) 080120, ¶ 19; *People v. Chester*, 409 Ill. App. 3d 442, 447 (2011).

¶ 26 Defendant acknowledges he did not preserve his objection to this alleged error by raising it during *voir dire* or including the issue in his posttrial motion, thus requiring its consideration under the plain-error rule. Under the doctrine of plain error, a reviewing court may exercise its discretion and excuse the party's procedural default if a clear or obvious error has occurred and either: (1) the evidence is "so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error" or (2) the error is "so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Staake*, 2017 IL 121755, ¶ 31 (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)).

¶ 27 Invoking the first alternative, defendant argues the evidence in this case was closely balanced such that his decision not to testify could have affected the jury's consideration of his guilt. Our supreme court recently reaffirmed in *People v. Sebby*, 2017 IL 119445, ¶ 72, that a "clear Rule 431(b) violation is cognizable under the first prong of the plain error doctrine."

¶ 28 Thus, it is necessary to consider whether the evidence in this case was closely balanced. A "closely balanced" case is "one where the outcome of the case would have to be different had the impropriety not occurred." *People v. Pierce*, 262 Ill. App. 3d 859, 865 (1992). "In determining whether the evidence adduced at trial was close, a reviewing court must 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. This inquiry "involves an assessment of the evidence on the elements of the charged offense or offenses, along with any evidence regarding the witnesses' credibility." *Id*.

¶ 29 The consideration of whether evidence is closely balanced differs from a reasonable doubt argument based on the sufficiency of the evidence. *Id*. ¶ 60 (framing the issue as "the closeness of sufficient evidence" rather than "the sufficiency of close evidence"); *Piatkowski*, 225 Ill. 2d at 566. The closely balanced standard errs on the side of fairness and grants a defendant a new trial even if the evidence was otherwise sufficient to sustain a conviction. *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 75. However, the burden of persuasion that the closely balanced nature of the evidence contributed to the outcome is on the defendant. *Piatkowski*, 225 Ill. 2d at 565.

¶ 30 Defendant contends the evidence in his case was closely balanced because the testimony of Armstead and Rivera was inconsistent and uncorroborated. He also asserts no physical evidence connected him to the recovered weapon. Defendant further contends that Rivera had a motivation to implicate him and Loving because she received a plea deal.

¶ 31 Evidence has been found to be closely balanced where each side has presented credible witnesses or where the credible testimony of a witness is countered by evidence that casts doubt on his or her account. See *Sebby*, 2017 IL 119445, ¶ 63 (evidence is closely balanced where the outcome of the case turns on the resolution of a "contest of credibility" where both sides offer believable versions of events and neither version was supported by corroborating evidence); *People v. Evans*, 369 Ill. App. 3d 366, 376 (2006) (verdict was based on credibility determination of two expert witnesses who testified regarding competing theories); *People v. Wilson*, 199 Ill. App. 3d 792, 795 (2011) (victim's testimony, which was principal evidence against defendant was challenged by witness's testimony that victim had motive to lie). In contrast, evidence has been deemed to be not closely balanced when one witness's version of

events was either implausible or corroborated by other witnesses. *People v. Daniel*, 2018 IL App (2d) 160018, ¶ 30 (and cases cited therein).

¶ 32 Applying those standards here, we do not find the evidence against defendant was closely balanced. The defense did not present any witnesses to cast doubt on the accounts presented by Armstead, the police officers and Rivera. The need to determine the credibility of a witness where no competing witness or other evidence was presented does not render the evidence closely balanced. *People v. Hammonds*, 409 Ill. App. 3d 838, 861-62 (2011). Although defendant contends the inconsistencies between the testimony of Armstead and Rivera renders their accounts unbelievable, their overall descriptions of the events were consistent with each other and were corroborated by other evidence, such as the amount of money recovered from defendant and the recovery of the weapon from the vicinity where Rivera said it had been discarded by defendant. The absence of physical evidence against a defendant does not preclude a finding that the other evidence presented was not closely balanced. See *Cosmano*, 2011 IL App (1st) 101196, ¶ 76. Although defendant deems "improbable" Armstead's account that he flagged down a passing car to pursue the robbers, Armstead testified that he knew the occupants and it is not at all outside the realm of normalcy that he would attempt to immediately catch up to his assailants. As such, because the evidence against defendant was not closely balanced, he cannot obtain relief under the plain-error doctrine.

¶ 33 Defendant next contends that although it was permissible for the State to use portions of Rivera's memorialized statement on redirect examination to counter any claim that she was motivated to testify falsely by her plea deal, the State's use of that material exceeded the bounds of that rule and constituted inadmissible hearsay. He argues that after his counsel attempted to impeach Rivera, the State introduced facts from her statement that were not part of her direct

examination and were unnecessary for impeachment. Furthermore, defendant challenges the admission of Rivera's statement in its entirety, asserting the State failed to redact portions of the statement that were unnecessary for impeachment and that "mug shot" photos of both defendants were attached to the statement.

¶ 34 In response, the State points out, and our review of the record confirms, that at the close of the State's case, defense counsel expressly agreed to the admission of Rivera's written statement into evidence. It is well-settled that when a defendant acquiesces in the admission of evidence, he forfeits any issue as to its impropriety. *People v. Bradi*, 107 Ill. App. 3d 594, 601 (1982); see also *People v. Stewart*, 2018 IL App (3rd) 160205, ¶ 19 (" 'a party cannot complain of error which that party induced the court to make or to which that party consented. The rationale behind this well-established rule is that it would be manifestly unfair to allow a party a second trial upon the basis of error which that party injected into the proceedings.' " (quoting *In re Detention of Swope*, 213 Ill. 2d 210, 217 (2004)). Thus, defendant has affirmatively waived his contentions as to the admission of the statement as a whole.

¶ 35 Accordingly, our consideration of this issue is limited to defendant's more specific complaints regarding the State's redirect examination of Rivera. Defendant concedes that the State could introduce portions of Rivera's memorialized statement as prior consistent statements. However, he argues the State's redirect examination referred to additional facts in Rivera's statement that were not needed to confirm her trial testimony and that only served to bolster Rivera's credibility before the jury. Thus, defendant contends the State exceeded the permissible use of Rivera's statement.

¶ 36 Evidence that a witness made a prior consistent statement is generally inadmissible for the purpose of corroborating the witness's trial testimony. *People v. Maldonado*, 398 Ill. App. 3d

401, 422 (2010). Such evidence unfairly enhances the credibility of the witness because a jury is more apt to believe something that is repeated. *Id*.

¶ 37 However, a prior consistent statement may be admissible when it is suggested that the witness recently fabricated the testimony and the prior statement was made before the existence of a motive to fabricate, or it is suggested that the witness is motivated to testify falsely with a hope or expectation of leniency. *Id*.; see also *People v. Randolph*, 2014 IL App (1st) 113624, ¶ 15. A prior consistent statement that is admitted on this basis may be used to rehabilitate the witness by showing that the witness told the same story before the motive came into existence or before the time of the alleged fabrication. *People v. Williams*, 147 Ill. 2d 173, 227 (1991); *People v. Stull*, 2014 IL App (4th) 120704, ¶ 99. Such prior consistent statements are admissible only to rehabilitate the witness and not as substantive evidence. *Id.* The admission of evidence is a matter left to the trial court's discretion, and this court will reverse only if the trial court's decision was arbitrary, fanciful or if no reasonable person would agree with the court's ruling. *Randolph*, 2014 IL App (1st) 113624, ¶ 16.

¶ 38 The State's redirect examination of Rivera began as follows:

> "[Assistant State's Attorney]: Counsel asked you some questions about what she called the deal. It's an agreement, is that right?
>
> A. Yes.
>
> Q. You only -- and you haven't been sentenced yet, is that right?
>
> A. Yes.
>
> Q. And your understanding -- and correct me if I am wrong -- you only get four[] years if you tell the truth in court, is that right?
>
> A. Yes.

Q. Now, counsel asked you some questions about how you are able to see what was happening behind you. Was it your rear-view mirror, kind of on the ceiling of your car; or was it your side mirror that you were looking at?

A. My side mirror."

¶ 39 The prosecutor showed Rivera her memorialized statement, which was made within seven hours of the crime, and asked about several parts of that statement. The prosecutor first asked Rivera about the part of her statement in which she said Loving had told her to drive to Congress and St. Louis Avenue and park her car. Rivera also acknowledged saying the following: defendant and Loving got out of the car and approached a "chubby man" who said he only had two rocks on him; she was looking out her side mirror; the man said defendant and Loving could search him; and defendant searched the man's coat and pants pockets.

¶ 40 At that point, defense counsel objected, stating that was "improper rehabilitation." The court overruled the objection.

¶ 41 The redirect examination continued with the prosecutor asking Rivera about portions of her statement in which she said she saw Loving take money from the man, and she then drove away, making two right turns. Loving was sitting in the front seat, counting the money he had just taken from the "chubby man." Defense counsel again objected without stating grounds, and the court overruled the objection.

¶ 42 The prosecutor also asked Rivera about the portion of her statement in which she said Loving gave some of the money to defendant and the two men were arguing about the money, and Rivera stopped at a red light where a fire truck, ambulance and police car also were stopped. Defense counsel objected, arguing that the questioning was beyond the scope of cross-examination. The court overruled the objection.

¶ 43 The prosecutor then asked Rivera about the portion of her statement in which she said defendant had a gun in hand and she drove on when the red light turned green. Rivera said in her statement that she told defendant the police were "right behind us" and Loving told her not to worry because she did not do anything; defendant threw the gun from the back window of the car, and police stopped her and placed her in their car.

¶ 44 The parties disagree as to whether defendant preserved this claim on appeal, which affects whether our review is under the plain-error doctrine or as harmless error. See *People v. Thompson*, 238 Ill. 2d 598, 611 (2010) (where a defendant has not preserved review of an issue, this court considers whether it is plain error, and when a defendant has preserved the issue, a harmless-error analysis is conducted). Defendant asserts his objections during the State's attempted impeachment of Rivera and his inclusion of the matter in his motion for a new trial sufficiently preserved the issue and requires the State to show the error was harmless.

¶ 45 The State responds that plain-error review is warranted because defendant did not specifically object to each portion of Rivera's testimony on redirect examination and only stated a general objection that the State's questioning on redirect examination exceeded the scope of defense counsel's cross-examination.

¶ 46 The above colloquy illustrates that defendant objected during Rivera's testimony on redirect examination that the use of one portion of her statement was "improper rehabilitation." Defendant also included that claim in his posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (to preserve a claim for review, a defendant must both object at trial and include the alleged error in a written posttrial motion). Therefore, defendant preserved his challenge to the State's use of portions of Rivera's statement during her redirect examination.

¶ 47 That said, even under a harmless-error standard, we conclude that defendant is not entitled to relief on this issue. In a harmless-error analysis, the burden is on the State to prove beyond a reasonable doubt that the jury verdict would have been the same absent the error. *People v. Magallenes*, 409 Ill. App. 3d 720, 727 (2011) (and cases cited therein). Three tests have been applied to determine whether an error is harmless: (1) whether the error contributed to the defendant's conviction; (2) whether the other properly admitted evidence overwhelmingly supported the defendant's conviction; and (3) whether the excluded evidence was merely cumulative or duplicated evidence that was properly admitted. *People v. Lerma*, 2016 IL 118496, ¶ 33; *In re Brandon P.*, 2014 IL 116653, ¶ 50.

¶ 48 Defendant's complaint regarding Rivera's redirect examination is that it included details that were not testified to on direct examination. Those facts included that defendant and Loving got out of the car and approached a "chubby man" who said he only had two rocks and that the defendants could search him: that the defendants were arguing about money in the car, that a fire truck, police car and ambulance were at the red light, that the police car's lights were activated; that Rivera said the police were behind them and that Loving told her not to worry because she did not do anything.

¶ 49 However, a review of the evidence establishes that any error in admitting these additional portions of Rivera's statement during redirect examination did not contribute to the conviction. Stated differently, even if these facts had not been introduced, the properly admitted evidence would have overwhelmingly supported defendant's conviction for armed robbery with a firearm. At trial, Armstead testified credibly regarding the offense and the key portions of his account were corroborated by Rivera's properly admitted testimony, namely that Loving got out of a car and approached him while holding a weapon, defendant approached him and took a cell phone

and Rivera then drove them away. Thus, the admission of additional details in Rivera's direct examination constituted harmless error.

¶ 50 Defendant's remaining assertion on appeal is that the mittimus must be corrected to accurately state the offense for which he was convicted. A review of the mittimus confirms that it reflects a conviction for aggravated unlawful restraint (720 ILCS 5/10-3.1(a) (West 2012)). Defendant was charged with, but not convicted of, that offense. The State concedes, and we agree, that the mittimus should be corrected to reflect only defendant's conviction for armed robbery with a firearm. Accordingly, pursuant to Illinois Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we order the mittimus corrected to reflect that defendant was convicted of armed robbery with a firearm and only that offense.

¶ 51 In conclusion, we affirm the judgment of the trial court and order the mittimus to be corrected as set out above.

¶ 52 Affirmed; mittimus corrected.