2020 IL App (1st) 162990-U

No. 1-16-2990

Order filed February 28, 2020

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. 15 CR 685
	)	
MICHAEL MCGUIRE,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for aggravated unlawful use of a weapon is affirmed where the trial court's improper admonition under Illinois Supreme Court Rule 431(b) was not plain error because the evidence was not closely balanced. Additionally, the State's closing argument did not contain a clear or obvious error. Pursuant to Illinois Supreme Court Rule 472, we decline to reach defendant's challenge to the fines and fees order.

¶ 2 Following a jury trial, defendant Michael McGuire was found guilty of aggravated unlawful use of a weapon (AUUW) and sentenced to one year's imprisonment. Defendant

appeals, arguing that the trial court improperly admonished the jury pursuant to Illinois Supreme Court Rule 431(b) (eff. July 1, 2012), and that the State engaged in prosecutorial misconduct during closing argument. Finally, defendant argues the trial court miscalculated his fines and fees and erred in applying his presentence custody credit. We affirm defendant's conviction, and remand to the trial court to allow defendant to file a motion raising the alleged fines and fees errors.

¶ 3 Defendant was charged by information with nine counts of AUUW. The State dismissed eight counts and proceeded on count VI (720 ILCS 5/24-1.6(a)(1), (a)(3)(A-5), (a)(3)(C) (West 2014)).

¶ 4 During jury selection, the trial court asked the venire if anyone had "any problems understanding" that all defendants are presumed innocent, the burden of proof in a criminal matter is beyond a reasonable doubt, the State has the burden of proof, all defendants have the constitutional right not to testify, and not testifying cannot be held against them. The trial court further inquired whether any potential juror had "problems or qualms" about applying those principles. No venirepersons responded. The court did not ask the potential jurors whether they understood and accepted that defendants are not required to offer any evidence on their own behalf.

¶ 5 Chicago police officer Andrew Gorlewski testified that on December 28, 2014, he was on patrol in a marked vehicle with his partner, Officer Jason Lenski, near 6700 South Martin Luther King Drive when he saw a pickup truck fail to signal for a right turn. The officers activated their emergency equipment and initiated a traffic stop. As Gorlewski exited his vehicle to approach

the truck, he saw the driver and only occupant, whom he identified as defendant, lean towards the passenger's side.

¶ 6 Gorlewski walked to the passenger's side window. Lenski asked defendant for his driver's license, and when he could not produce one, the officers removed defendant from the vehicle and arrested him. Lenski searched the truck and recovered a firearm. The officers took defendant to the Third District police station, where he was Mirandized. He told the officers that he kept the firearm for protection because he was recently robbed. No DNA testing was done on the firearm. Gorlewski identified the firearm in court, a .25-caliber semiautomatic handgun that was loaded with six live rounds at the time of recovery.

¶ 7 On cross-examination, Gorlewski stated that the police vehicle did not have a dashcam. He had never seen the truck prior to December 28, 2014. He did not see the firearm when he looked into the window, and did not see Lenski locate the firearm in the truck. On redirect, he confirmed that officers do not choose their vehicles.

¶ 8 Lenski testified that he also witnessed the truck fail to signal for a turn and saw defendant lean towards the passenger's side as the officers approached. While searching the truck, Lenski found a blanket on the passenger's side of the front bench seat. When he lifted the blanket, he saw the firearm on the seat and recovered it. After Lenski Mirandized defendant, he admitted he had no Firearm Owner's Identification (FOID) card or Concealed Carry License (CCL).

¶ 9 On cross-examination, Lenski stated that he did not see the blanket or the firearm until he began the search. He did not see defendant's hands when defendant leaned towards the passenger's side. Lenski found the firearm 30 to 40 seconds into his search. The vehicle was not registered to defendant, and Lenski did not know how long defendant was driving prior to the

stop. Defendant's statements were not recorded or memorialized, and Lenski did not know if the Third District police station had interrogation rooms equipped with cameras.

¶ 10 Tracey Bushue testified that she reviews applications for FOID cards and CCLs for the Illinois State Police Firearms Services Bureau. She searched the database of FOID card and CCL carriers and found no record of defendant.

¶ 11 During closing argument, the prosecutor characterized the case as "simple." He reminded the jurors that they took an oath to "uphold the law and follow the law," and argued that the evidence demonstrated defendant possessed a loaded firearm without a FOID card or CCL. He then listed the elements of AUUW and described the evidence supporting each element. According to the prosecutor, there were not "a lot of facts to absorb or think about," and the case was a "matter of following the law." He finished by saying, "[A]t the conclusion of the arguments, I'm going to ask you, ladies and gentlemen, to do what you took an oath to do, and that is to follow the law, which is not what Mr. McGuire did, and find him guilty." Defense counsel did not object to this comment, but argued in closing that the State had not met its burden of proof because the officers' testimony was uncorroborated and untrustworthy.

¶ 12 The jury found defendant guilty of AUUW. Defendant filed a motion for a new trial, which the trial court denied. Following a hearing, the trial court sentenced defendant to one year's imprisonment and imposed fines and fees. Defendant did not file a motion to reconsider sentence.

¶ 13 On appeal, defendant first argues, and the State concedes, that the trial court improperly admonished the jury pursuant to Rule 431(b) by not asking whether the potential jurors understood and accepted that defendant was not required to offer any evidence on his behalf.

Defendant acknowledges that he waived this issue for review by neither objecting at trial nor addressing the alleged error in a written posttrial motion. See *People v. Smith*, 2016 IL 119659, ¶ 38. However, defendant argues that we can reach the issue on plain error review.

¶ 14 Under the plain error doctrine, a reviewing court may consider arguments not properly preserved at trial when a clear or obvious error occurred and (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) "that 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." (Internal quotation marks omitted.) *People v. Harvey*, 2018 IL 122325, ¶ 15. Defendant argues that, under the first prong, the trial court committed clear error during the Rule 431(b) instructions and the evidence was closely balanced.

¶ 15 Rule 431(b) requires the trial court to inquire whether prospective jurors "understand and accept" that (1) the defendant is presumed innocent, (2) the State must prove the defendant guilty beyond a reasonable doubt, (3) the defendant is not required to offer any evidence, and (4) the defendant's decision not to testify cannot be held against him. Ill. S. Ct. R. 431(b) (eff. July 1, 2012); see also *People v. Zehr*, 103 Ill. 2d 472, 477 (1984). The trial court must specifically ask each potential juror, individually or as a group, whether he or she understands and accepts each principle. *People v. Sebby*, 2017 IL 119445, ¶ 49. Compliance with Rule 431(b) is reviewed *de novo*. *People v. Belknap*, 2014 IL 117094, ¶ 41.

¶ 16 Here, the trial court failed to inquire as to whether the potential jurors understood and accepted that defendant was not required to present evidence on his behalf. This was clear error. See *People v. Wilmington*, 2013 IL 112938, ¶ 32 (clear error where "trial court did not even

inquire regarding the jury's understanding and acceptance of the principle that defendant's failure to testify could not be held against him").

¶ 17 Because clear error occurred, we must determine if the evidence was closely balanced. This requires the reviewing court to make a "qualitative, commonsense assessment" of the entire record. *Sebby*, 2017 IL 119445, ¶ 53. The determination does not involve the "sufficiency of close evidence but the closeness of sufficient evidence." *Id.* at ¶ 60. "Although [a] defendant has the burden *** to show that the evidence is closely balanced, he ha[s] no burden to present any evidence or testify himself at trial." *People v. Piatkowski*, 225 Ill. 2d 551, 567 (2007). The inquiry "involves an assessment of the evidence on the elements of the charged offense or offenses, along with any evidence regarding the witnesses' credibility." *Sebby*, 2017 IL 119445, ¶ 53.

¶ 18 Defendant argues that the evidence is closely balanced primarily because no evidence corroborated the officers' testimony, the traffic stop was not filmed, and defendant's statements were not memorialized or videotaped. The State responds that the officers' testimony was unchallenged and credible.

¶ 19 Evidence can be closely balanced when a case turns on a credibility determination between conflicting testimony. See *People v. Naylor*, 229 Ill. 2d 584, 606-08 (2008) (evidence was closely balanced where the defendant's version of events conflicted with that of the testifying officers, and both accounts were credible). Courts have ruled that there is no "credibility contest," however, when one party's account is "unrefuted." See *People v. Montgomery*, 2018 IL App (2d) 160541, ¶ 31. Where the only evidence is witness testimony, the

factfinder's responsibility to assess credibility does not automatically make evidence closely balanced. See *People v. Hammonds*, 409 Ill. App. 3d 838, 861-62 (2011).

¶ 20 Relevant here, to establish the elements of AUUW the State was required to prove that defendant, while not on his property, possessed an uncased, loaded, and immediately accessible firearm in a vehicle without having a valid CCL or FOID card. 720 ILCS 5/24-1.6(a)(1), (a)(3)(A-5), (a)(3)(C) (West 2014).

¶ 21 We find that the evidence was not closely balanced. Officers Gorlewski and Lenski testified that they made a routine traffic stop and arrested defendant, the sole occupant of the truck, when he could not produce a driver's license. Lenski searched the truck and recovered a loaded firearm within easy reach of defendant's position in the vehicle. After being arrested and Mirandized, defendant admitted the firearm was his and that he did not have a FOID card or CCL. The State produced the firearm at trial. The officers testified consistently with each other, and defendant did not impeach them or present any evidence. Thus, there is no credibility contest, and the unrefuted evidence strongly favors the State. See *Montgomery*, 2018 IL App (2d) 160541, ¶¶ 31-32; *Hammonds*, 409 Ill. App. 3d at 861-62. This conclusion is not defeated by the absence of other corroborating evidence. Corroborating evidence, or the lack thereof, can affect the closely balanced determination when there is conflicting testimony, but here defendant did not present his own version of events. See *Naylor*, 229 Ill. 2d at 606-07. Because the evidence was not closely balanced, plain error review is inappropriate and defendant's waiver of the trial court's Rule 431(b) errors will be honored.

¶ 22 Defendant next argues that prosecutorial misconduct during the State's closing argument denied him a fair trial. Specifically, defendant challenges the prosecutor's statement that "at the

conclusion of the arguments, I'm going to ask you, ladies and gentlemen, to do what you took an oath to do, and that is to follow the law, which is not what Mr. McGuire did, and find him guilty." Defendant claims that this statement impermissibly suggested the jury's oath required a guilty verdict. The State responds that it permissibly requested that the jury honor its oath to follow the law.

¶ 23 Defendant acknowledges that he failed to preserve this issue by not objecting at trial or arguing the point in a posttrial motion, but contends we may reach it under either prong of the plain error doctrine. Because the evidence was not closely balanced, we need only address the second prong argument. In assessing whether second prong plain error occurred, we must first determine if there was a clear or obvious error. *Harvey*, 2018 IL 122325, ¶ 15. If there was such an error, we must then determine whether it was so serious that it affected the fairness of the trial and integrity of the judicial process. *Id.*

¶ 24 The defendant has a "substantial burden" in trying to overturn a conviction based on improper remarks made during closing arguments because the State is granted a "great deal of latitude." *People v. Moore*, 358 Ill. App. 3d 683, 693 (2005). "In reviewing comments made at closing arguments, [the reviewing] court asks whether or not the comments engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from them." *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007). It is improper to suggest that the jurors' oath requires them to find a defendant guilty, and such comments can rise to the level of second prong plain error. For example, in *People v. Nelson*, 193 Ill. 2d 216 (2000), our supreme court found second prong plain error where the prosecutor told the jury that "I would suggest your oaths require you to find [defendant] guilty on this evidence." *Nelson*, 193 Ill. 2d at

226-27; see also *People v. Castaneda*, 299 Ill. App. 3d 779, 783, 785 (1998) (in reviewing for harmless error, finding error where the prosecutor stated, "I would suggest your oath requires you to find the Defendant guilty on all of the charges").

¶ 25 The parties agree that there is a conflict regarding the appropriate standard of review. Defendant argues we should apply *de novo* review because the trial court did not rule on the State's closing argument. See *Wheeler*, 226 Ill. 2d at 121. The State contends that abuse of discretion review is appropriate. See *People v. Phagan*, 2019 Il App (1st) 153031, ¶ 54; but see *People v. Davis*, 2018 IL App (1st) 152413, ¶ 68, and *People v. Cook*, 2018 IL App (1st) 142134, ¶ 64 (applying a bifurcated approach where a comment's propriety is reviewed for abuse of discretion, but whether an error necessitates a new trial is considered *de novo*).

¶ 26 Here, we find that no error occurred under any standard. Unlike *Nelson* and *Castaneda*, this case does not involve statements by prosecutors that the jury's oath requires a guilty verdict. Rather, the prosecutor appropriately referenced the jury's oath on multiple occasions in the closing argument, reminding the jury of its oath to "uphold the law and follow the law," and later suggesting the case was a "matter of following the law." In the statement at issue, the prosecutor repeated this "follow the law" theme and made two requests: (1) that the jury obey their oath to "follow the law," and (2) that the jury find defendant guilty. There is nothing inherently objectionable about these requests. That both were made in the same sentence does not change their plain meaning and does not implicate the concerns expressed by the *Nelson* court. See *Nelson*, 193 Ill. 2d at 227-28. Consequently, there was no clear or obvious error in the prosecutor's closing argument, and defendant's waiver will not be excused.

¶ 27 Finally, defendant argues that the court miscalculated his fines and fees and erred in applying his presentence custody credit. The State argues, and defendant concedes in his reply brief, that this issue must be remanded to the circuit court.

¶ 28 On February 26, 2019, while this appeal was pending, our supreme court adopted new Illinois Supreme Court Rule 472, which sets forth the procedure in criminal cases for correcting sentencing errors in, as relevant here, the "imposition or calculation of fines, fees, and assessments or costs" and "application of *per diem* credit against fines." Ill. S. Ct. R. 472(a)(1), (2) (eff. Mar. 1, 2019). On May 17, 2019, Rule 472 was amended to provide that "[i]n all criminal cases pending on appeal as of March 1, 2019, or appeals filed thereafter in which a party has attempted to raise sentencing errors covered by this rule for the time on appeal, the reviewing court shall remand to the circuit court to allow the party to file a motion pursuant to this rule." Ill. S. Ct. R. 472(e) (eff. May 17, 2019). "No appeal may be taken" on the ground of any of the sentencing errors enumerated in the rule unless that alleged error "has first been raised in the circuit court." Ill. S. Ct. R. 472(c) (eff. May 17, 2019). Therefore, pursuant to Rule 472, we "remand to the circuit court to allow [defendant] to file a motion pursuant to this rule," raising the alleged errors regarding the calculation of fines and fees and the application of *per diem* presentence custody credit. Ill. S. Ct. R. 472(e) (eff. May 17, 2019).

¶ 29 Affirmed; remanded as to fines and fees.