2011 IL App (1st) 091023-U

FIRST DIVISION
DATE 9/12/11

No. 1-09-1023

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the
	) Circuit Court of
Plaintiff-Appellee,	) Cook County.
	)
v.	) No. 08 CR 5225
	)
JAMES HILL,	) Honorable
	) Mary Margaret Brosnahan,
Defendant-Appellant.	) Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Justices KARNEZIS and ROCHFORD concurred in the judgment.

O R D E R

HELD: Where the evidence was not closely balanced the plain error doctrine would not be invoked to overlook the forfeiture created by defendant's failure to object to allegedly improper jury *voir dire* or allegedly improper cross-examination of defendant.

¶ 1 Following a jury trial, defendant James Hill was found guilty of the delivery of a controlled substance and sentenced to five years and six months' incarceration. On appeal, defendant contends that 1) he was deprived of a fair trial because the trial court failed to question the jury venire as required by Supreme Court Rule 431(b) (eff. May 1, 2007); and 2) the State

improperly implied during cross-examination and closing arguments that the jury could only acquit if it found that the police witnesses were lying. We affirm.

¶ 2 Defendant was arrested and charged with delivery of a controlled substance, where a police officer alleged that defendant sold him a small package containing heroin on February 18, 2008. Defendant elected to be tried by a jury.

¶ 3 During *voir dire*, the trial court began by addressing the jury regarding general principles of law. The court noted that defendant was presumed innocent, did not have to offer evidence on his own behalf, and had to be proven guilty beyond a reasonable doubt. The court inquired whether any juror had "any problem" with that general concept. The court also noted that defendant was not required to testify and asked whether any juror would "hold it against the defendant" if he exercised his right not to testify. The court continued to address other general legal principles, such as the need to not pre-judge the case or pre-judge any witness in a similar fashion. Defendant did not object to the method of questioning used by the trial court.

¶ 4 At trial, Moises Flores, a retired Chicago police officer, testified that on February 18, 2008, he was working as a police officer and assigned to a narcotics enforcement team. On that day, he was assigned to be a "buy officer." He was dressed in civilian clothes and driving a covert vehicle. He approached defendant, who was standing on the sidewalk on the 5400 block of North Avenue in Chicago. Defendant was wearing dark jeans and a black jacket with red, yellow, and orange stripes.

¶ 5 Flores further testified that he rolled down his window and asked defendant if he had any "blows." Defendant asked how many Flores wanted, and he replied one. Defendant asked to get into the car, and Flores unlocked the door. Inside the car, Flores handed defendant "1505 funds," a $10 bill the serial number of which had been previously recorded. Defendant reached into his

waistband recovered a foil packet and handed it to Flores. Defendant exited the vehicle, and Flores departed.

¶ 6 Flores testified that he returned to the scene of the transaction after receiving a radio call from the "enforcement team." The enforcement team had a suspect in custody, whom Flores identified as the man who sold him the foil packet. Flores returned to the police station and inventoried the foil packet.

¶ 7 On cross-examination, Flores testified that he had completed more than 400 "buy bust" missions as a police officer. He admitted that neither he nor any other member of his team made audio or video recordings or took photographs during the buy.

¶ 8 Chicago police officer Miroslaw Dobek testified that on February 18, 2008, he was assigned as a "surveillance officer" on the same enforcement team as Officer Flores. Dobek was dressed in civilian clothes and driving a covert vehicle. Dobek observed defendant standing on the sidewalk on North Avenue. Defendant was wearing a black jacket with red, yellow and orange stripes; no one else in the area was wearing similar clothing. Dobek observed defendant approach Flores' vehicle, engage in a short conversation and enter the vehicle. A short time later, defendant exited the vehicle and walked toward a building. Defendant entered a "vestibule area," where Dobek lost sight of him, and emerged approximately one minute later. Dobek radioed enforcement officers who arrived at the scene and arrested defendant. He used his radio to direct one of the officers to search the vestibule.

¶ 9 On cross-examination, Dobek admitted that he had not included the fact that defendant entered a vestibule in his police report.

¶ 10 Chicago police officer William Smith testified that he was assigned as the "enforcement officer" on the team with Flores and Dobek. He was working with another officer, dressed in civilian clothes but wearing a visible gun and had his "star" visible on a vest. After receiving a

radio call, he went to the location on North Avenue and placed defendant under arrest. After arresting defendant, Officer Dobek directed him to a vestibule in a nearby building. Smith spent approximately one minute looking around the vestibule, where he discovered the door was locked and where he noticed some debris on the floor. However, he did not notice anything he believed relevant to the narcotics investigation.

¶ 11 Smith further testified that he performed a custodial search of defendant at the police station. He recovered several items including $3, but did not recover any suspected narcotics or the 1505 funds.

¶ 12 On cross-examination, Smith admitted that defendant did not run from the police when they approached him. Smith also admitted that he did not write in the arrest report or a supplementary report that he was asked to search the vestibule.

¶ 13 Hasnain Hamayat, a forensic chemist, testified that he examined the foil packet and performed chemical testing on its contents. He opined that the packet contained 0.2 gram of heroin.

¶ 14 The State rested, and defendant testified on his own behalf. Defendant testified that he was a heroin addict and that on the date in question he was planning on buying $5 worth of heroin, "a nickle blow." He met an individual he could not identify, and inquired about buying heroin. He told the individual that he was "short," but that he would return with the rest of the money later. The individual refused to sell him the heroin until he had sufficient cash. Defendant then began walking toward his sister's house which was approximately two blocks away. As he was walking, he was arrested by Officer Smith.

¶ 15 Defendant testified that in 2004 he pled guilty in a "manufacture and delivery" case, and that in 2002 he pled guilty in a theft case. Defendant further testified that he had sold drugs in

the past, but that he no longer sold drugs because he had a reputation of not being trusted because, due to his addiction, he would run off with the drugs.

¶ 16 On cross-examination, defendant testified that Officer Smith told him to place all of his things on the hood of the police car. Defendant placed the contents of his pockets on the car, including cigarettes, a lighter, a spoon, $3 cash, and some syringes. Smith told defendant to get his stuff off the car, and defendant placed all of the items back in his pockets except the syringes, which he threw down a sewer at Smith's direction. Defendant further testified that although he had seen similar packets, he had never seen the foil packet Officer Flores bought. The prosecutor further inquired:

> "Q. So, that officer or an officer must be lying is that right?
>
> A. I couldn't say he is lying. It wasn't me that served nobody nothing.
>
> * * *
>
> Q. Now were those officers [who identified defendant] lying?
>
> A. I don't know if they was lying, but I know they was terribly mistaken."

¶ 17 In rebuttal, the state introduced certified copies of convictions for defendant for retail theft and possession of a controlled substance with intent to deliver.

¶ 18 During closing arguments defense counsel commented that there was no video, no audio and the police officers expected the jury to "take their word for it." Defense counsel further commented that defendant did not know whether the police officers were lying or whether it was some sort of vast conspiracy.

¶ 19 The State argued in rebuttal, "Do you believe the Defendant, or do you believe the police officers?" Defendant's objection to this comment was overruled. The prosecutor continued:

> "Let's look at this for a second. To what end are the police officers lying about this heroin? Is it to let the real pusher go free? Is that what they did? *** Ladies and Gentleman, why would the police officers lie? Why would they come in here and tell you something that wasn't exactly true. If it was a frame-up, don't you think they could have done a better job than they did?"

The State continued arguing that the police officers were credible because they did not try to "fudge" about losing track of the 1505 funds, and that there was no need to report about searching the vestibule because nothing was recovered. Defendant made no further objections to the State's arguments.

¶ 20 Following arguments, the trial court instructed the jury and it retired to deliberate. The jury ultimately found defendant guilty, and the trial court subsequently sentenced defendant to five years and six months' imprisonment. Defendant timely appeals.

¶ 21 Defendant first contends that the trial court committed plain error when it failed to properly question the jury venire in compliance with Supreme Court Rule 431(b) (eff. May 1, 2007). The State responds that defendant forfeited review by failing to object at trial, and that plain error review is not appropriate.

¶ 22 Rule 431(b) requires a trial court to question a jury venire regarding the "*Zehr* principles" (see *People v. Zehr*, 103 Ill. 2d 472 (1984)) and determine individually whether each juror "understands and accepts" each principle. Defendant argues that the trial court failed to comply because it conflated three of the principles into a single question, and asked potential jurors whether they "had a problem" with the principles rather than whether they understood and accepted them. Our supreme court recently provided guidance on this issue in *People v.*

Thompson, 238 Ill. 2d 598 (2010). *Thompson* clearly holds that it is inappropriate to make a broad statement of the law followed by a general question about the jurors willingness to follow it. *Thompson*, 238 Ill. 2d at 607. In *People v. Lampley*, 405 Ill. App. 3d 1, 10-11 (2010) this court applied *Thompson* to hold that asking juror if they "had problems" with the *Zehr* principles was insufficient to comply with Rule 431(b)'s mandate.

¶ 23 Applying these precedents to the case at bar, it at least appears that the questioning by the trial court fell short of the requirements of Rule 431(b). However, at this juncture, we need not make a definitive ruling on this issue. Defendant raised no objection to the questioning at the trial level, and therefore, he forfeited review of the alleged error. The question before us, then, is whether we should apply the plain error doctrine and overlook the forfeiture.

¶ 24 The plain error doctrine operates to allow an appellate court to reach the merits of a procedurally defaulted claim in two instances. First, a reviewing court may consider a procedurally defaulted error when the evidence is so closely balanced that the error may have affected the outcome of the trial. *People v. Herron*, 215 Ill. 2d 167, 178 (2005). Second, a reviewing court may consider a procedurally defaulted error when the error is so serious that it affects the fairness of the trial regardless of the closeness of the evidence. *Herron*, 215 Ill. 2d at 179. In *Thompson*, our supreme court held that, unless the jury is actually biased, the failure of a trial court to fully comply with Rule 431(b) does not constitute plain error under the second prong. *Thompson*, 238 Ill. 2d at 615. Here, defendant has not alleged actual bias was created by the trial court's method of questioning the jury. Accordingly, we are presented with the question of whether the evidence was so closely balanced that our confidence in the outcome is undermined by the trial court's error.

¶ 25 Here, the evidence is not closely balanced simply because defendant took the stand and denied being the offender. Defendant was identified by the police officer to whom he sold the

heroin and the surveillance officer. The buy officer had ample opportunity to view defendant when he sat in the officer's car. The surveillance officer likewise had ample opportunity to view defendant from his position only a few car lengths away. Defendant argues that the identifications were impeached by the fact that the officers momentarily lost sight of defendant and the fact that the 1505 funds were never recovered. Contrary to defendant's argument, these two facts do not build upon one another to create doubt. Rather, the fact that the police lost sight of defendant explains their failure to recover the 1505 funds. We cannot know whether defendant secreted the funds in the vestibule or passed them along to an accomplice, but the minute or two he was out of sight was ample time to do either.

¶ 26 Moreover, although the failure of Officer Dobek to include defendant's momentary disappearance into the vestibule in his police report is certainly impeaching, the impeachment was not so significant that it persuades us that his testimony as a whole was incredible. Further, although defendant clearly had no obligation to present evidence, we need not ignore the fact that the story he did present was inherently incredible. It is unlikely that a police officer, when making an arrest, would order a suspect to throw drug paraphernalia down a sewer. We can fathom no reason why, even if intent on arresting a defendant for a different offense, a police officer would actively participate in the destruction of evidence of a crime. Unlike the police officers' testimony, defendant's account was filled with discrepancies and inconsistencies, and we need not accept his explanation that he was present in that high narcotics trafficking area merely as a buyer. Therefore, we conclude that the evidence was not so closely balanced that the trial court's apparent failure to comply with Rule 431(b) undermines our confidence in the verdict. Accordingly, we will not apply the plain error doctrine to overcome defendant's forfeiture of this issue.

¶ 27 Defendant also contends that the State committed prosecutorial misconduct when it asked him to opine on whether the police witnesses were lying during cross-examination and compounded this error by asserting improperly during closing arguments that the jury could not acquit the defendant unless the jury found that the police were lying. We find no merit to these contentions.

¶ 28 Defendant argues that asking him to opine on whether the police officers were lying when they identified him as the narcotics dealer was improper and quotes *People v. Young*, 347 Ill. App. 3d 909 (2004), which held

> "The prosecution's practice of asking a criminal defendant to comment on the veracity of other witnesses who have testified against him has consistently and repeatedly been condemned by this court because such questions intrude on the jury's function of determining the credibility of witnesses and serve to demean and ridicule the defendant." *Young*, 347 Ill. App. 3d at 926.

However, defendant's quotation conveniently overlooks the next sentence from that case which notes: "This practice has generally been deemed harmless error where evidence of defendant's guilt was overwhelming." *Young*, 347 Ill. App. 3d at 926. Defendant failed to object to the improper questioning. Therefore, rather than the State bearing the burden of establishing harmless error, it is he who must establish plain error. See *People v. McLaurin*, 235 Ill. 2d 478, 495 (2009). We find that he cannot.

¶ 29 Initially, we hold that although widely condemned, questioning of the type employed by the State is not so serious as to support reversal under the second prong of the plain error analysis. Although this sort of questioning may interfere with the jury's function of weighing

credibility and may demean or ridicule a defendant, those outcomes are not so certain that this type of error automatically affects the fundamental fairness of a trial. The questioning in this case was brief and isolated and we cannot conclude that the second prong of the plain error analysis is satisfied. Furthermore, as we observed above the evidence was not closely balanced, and therefore, this is not the type of error for which we can ignore defendant's forfeiture under the first prong of the plain error analysis. Accordingly, we do not find that this error rises to the level of plain error and we will not invoke that doctrine to avoid defendant's forfeiture.

¶ 30 In reaching this conclusion, we have considered the effect of the allegedly improper arguments made by the State. There is a subtle but important distinction between two types of arguments about witnesses lying. The State may not argue that the jury must find that the police or other prosecution witnesses are lying in order to acquit the defendant. See *People v. Banks*, 237 Ill. 2d 154, 185 (2010). Such an argument distorts the proper burden of proof and ignores the possibilities that the jury could find that the State's witnesses were mistaken or that even if accepted as true, their testimony is insufficient to meet the beyond-a-reasonable-doubt standard. The State may properly argue, however, that the jury must find that the prosecution witnesses were lying if it is to accept the testimony of defendant or other defense witnesses. See *Banks*, 237 Ill. 2d at 185. Such argument constitutes nothing more than permissible commentary on the evidence, the inferences which may be drawn from it, and witness credibility.

¶ 31 Here, the State's argument does not cross the line of impermissible argument. Defense counsel argued that the State failed to meet its burden of proof because no video or audio recordings were made of the transaction, the crime lab did not test the evidence for fingerprints, and the 1505 funds were not recovered. Defendant testified that he was merely a victim of mistaken identification. Neither theory can be rejected on the basis that it requires a finding that the police were lying. They could have been mistaken or the jury could find that their testimony

did not satisfy the State's burden in light of the lack of physical evidence. Accordingly, an argument that the jury could not acquit without finding the police officer's testimony untruthful would be improper. However, defendant and Officer Smith provided contradictory accounts of defendant's arrest. Defendant testified that Smith searched him on the street and then told him to throw some syringes down a sewer. Smith, on the other hand, testified that he searched defendant at the police station and did not testify that he recovered syringes. This directly contradictory testimony cannot be reconciled without a finding that one of the witnesses was untruthful. Therefore, the State's argument that the jury must find that the police officers were lying to accept defendant's account of the encounter was not improper. Accordingly, there was no error to compound the admittedly improper questioning and we need not find that plain error allows us to disregard defendant's forfeiture.

¶ 32 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 33 Affirmed.