No. 1-09-1328

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FIRST DIVISION
FILED: JANUARY 3, 2011

IN THE APPELLATE COURT OF THE STATE OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY
Plaintiff-Appellee,	)	
v.	)	No. 07 CR 2881
DARRELL WIMBERLY,	)	HONORABLE WILLIAM G. LACY,
Defendant-Appellant.	)	JUDGE PRESIDING.

JUSTICE HOFFMAN delivered the judgment of the court.
PRESIDING JUSTICE HALL and JUSTICE LAMPKIN concurred in the judgment.

O R D E R

Held: The defendant forfeited objections to the trial judge's *voir dire* questioning and the trial judge's responses to jury questions, and the evidence against him was so overwhelming that he could not satisfy the *Strickland* test for ineffective assistance of counsel.

The defendant, Darrell Wimberly, was convicted after a jury trial of two counts of armed robbery and one count of attempted first degree murder. In this appeal, he argues that his convictions must be reversed because (1) the trial judge gave an inadequate answer to a jury question during deliberations; (2) the

trial judge violated Supreme Court Rule 431(b) (eff. May 1, 2007) during jury *voir dire*; and (3) his attorneys were ineffective for failing to object to purported hearsay and other-crimes evidence. For the reasons that follow, we affirm the circuit court's judgment.

During his prefatory comments to begin jury *voir dire*, the trial judge informed the venire that the defendant was not required to present evidence on his own behalf. However, during the part of *voir dire* in which the judge asked the first panel of potential jurors if they accepted and understood the principles listed in Rule 431(b), the judge asked only if the venire understood and would follow the law stating that the defendant was not required to testify. The trial judge asked the correct questions of a second panel comprised of potential alternate jurors. The defense raised no objections to the trial court's jury inculcation.

Before the start of trial, defense counsel made a motion "to bar circumstances of the evidence of [the defendant's] arrest *** as he was in custody on a misdemeanor charge" when police arrested him in the current case. The State did not object to the motion, and the prosecution agreed when the trial court stated that it had been indicated "that the detective" who arrested the defendant "is going to be led through that part of the testimony so that he doesn't testify that he was in custody on another charge."

At the defendant's trial, Brandon Lofton testified that, in the early morning of July 31, 2006, he and a friend, Fabienne

Marthol, were walking down the street when he turned around to see a gun in his face. Lofton said that he complied immediately with the gunman's order to lay on the ground and that he then felt someone taking his cellular telephone and other items from his pockets. Shortly thereafter, Lofton said, he felt a gunshot in his back. Lofton testified that he was not able to look at the shooter, and he said that the gunshot left him paralyzed from the waist down. On cross-examination, Lofton agreed that he had been unable to identify anyone as the shooter out of a police-organized lineup in which the participants spoke as directed by police.

The State's next witness, a police detective, testified that, as he was conducting an investigation for an unrelated vehicular hijacking case, he recovered a cellular telephone later identified as having been taken from Lofton. The detective also testified that pictures on the telephone eventually led him to connect the phone, and the hijacking, to Imir Wimberly.

Imir, the defendant's foster brother, testified that he had pled guilty to armed robbery in connection with this case and agreed that he had given a statement to police regarding the case. However, he testified that he could not recall the events of July 31, 2006, and that his statement reflected what police had told him to say, not his true recollection. Imir affirmed that he had confessed to driving the defendant, who had a gun, near two pedestrians, parking in a nearby alley, waiting as the defendant left the car to rob the pedestrians, hearing a gunshot, and then

seeing the defendant running back towards the car. According to the statement, the defendant then sold Imir a cellular telephone he apparently obtained during the robbery. During his testimony, Imir identified the cellular telephone that had belonged to Lofton as a telephone he possessed at one time; he said that he purchased the telephone from a stranger.

After testimony from the assistant state's attorney who took Imir's statement, the State presented the testimony of Fabienne Marthol, the second victim in the case. She, like Lofton, recalled a gunman's confronting them and ordering them to the ground. She saw the gunman take items from Lofton before coming to her to demand money, and, she said, the gunman hit her when she did not produce any money. Marthol recalled that the gunman started to leave before returning to shoot Lofton in the back. Marthol said that she was able to get a good look at the gunman's face during the incident.

Marthol testified that she gave police a description of the shooter. Twenty days later, police showed her a photographic lineup. She was unable to identify the shooter among the pictures in this first lineup, which did not include the defendant's picture. Approximately two weeks later, Marthol viewed a second photographic lineup and identified the defendant but added that she was "not sure." She asked for an in-person lineup, from which she again identified the defendant. By the time of her testimony, Marthol testified that she had "no doubt" that the photograph of

the defendant depicted the gunman.

Detective Luke Connolly testified that, as he investigated this incident, cellular phone data led him to identify Imir as a suspect, and he included Imir, but not the defendant, in the first photographic lineup he showed to Marthol. Connolly stated that Marthol told him the gunman was not depicted in this first lineup. After speaking with Imir and obtaining his confession, Connolly assembled a second photographic lineup, and later an in-person lineup, both of which included the defendant. Connolly said that he later obtained confessions from both the defendant and Imir.

During the State's direct examination of Connolly, the following exchange took place as he described the course of his investigation:

"Q Were you looking for anyone after [Marthol] was shown that [second photo lineup]?

A [The defendant].

Q After looking for [the defendant], did you learn that he was, in fact, in custody in Dolton on September 28th of 2006?

A On that day, yes, I learned that.

Q And what did you do when you learned he was in custody in Dolton?

A I went to Dolton and placed him in custody."

In defense counsel's cross-examination of Connolly, the following exchange occurred:

"Q Now, at some point you issued what we call an investigative alert for [the defendant]?

A Yes.

* * *

Q *** That is the reason that [the defendant] was released to your custody?

A Well, yes. He was under arrest.

Q On this case?

A From Dolton, yes, he was under arrest.

Q Well --

A On [the defendant].

Q The Dolton Police Department released [the defendant] to your custody because of an investigative alert for this case?

A No, [the defendant] was going to be released and Dolton told me he was going to be released, so I went there *** to take him into custody."

During the State's case-in-chief, the trial court admitted into evidence, without objection, advisory forms that Marthol signed before viewing each of the police lineups.

The State's final witness, the prosecutor who took the defendant's confession, verified the authenticity of a written record of that confession. In the statement, which was written by the prosecutor but signed by the defendant, the defendant described, in some detail, his robbing the two victims at gunpoint and shooting Lofton.

The defendant presented no evidence in his case-in-chief. After hearing closing argument and receiving instructions, including instructions that its verdict must be unanimous, the jury deliberated for approximately two hours and 20 minutes before sending the court the following note:

> "What happens if we can't unanimously agree on guilty? Does it automatically become not guilty *** or do we have to agree on not guilty?"

In a conference with counsel for both parties, the trial judge suggested that he would "tell them again the jury's verdicts must be unanimous" and ask them to "[p]lease continue to deliberate." Neither party objected to the trial judge's answer, which was sent to the jury approximately 20 minutes after the question was submitted. Approximately 45 minutes later, and approximately three hours and 25 minutes after deliberations had begun, the jury returned its verdict finding the defendant guilty of two counts of armed robbery and one count of attempted first degree murder. The trial court sentenced the defendant to consecutive terms of 15, 15, and 50 years' imprisonment for each of the respective counts. The defendant timely appealed.

The defendant's first argument on appeal is that the trial court committed reversible error by failing to provide an adequate answer to the jury's question regarding the necessity of a unanimous verdict. As a threshold matter, the defendant acknowledges that he did not raise a timely objection to the manner

in which the trial court answered the jury's inquiry. Although his failure to raise a timely objection would normally result in his forfeiting the issue for appeal, the defendant argues that we may excuse the forfeiture under the plain error rule. The plain-error rule "allows a reviewing court to reach a forfeited error affecting substantial rights in two circumstances." *People v. Herron*, 215 Ill. 2d 167, 178, 830 N.E.2d 467 (2005). "First, where the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence, a reviewing court may consider a forfeited error in order to preclude an argument that an innocent person was wrongly convicted." *Herron*, 215 Ill. 2d at 178. "Second, where the error is so serious that the defendant was denied a substantial right, and thus a fair trial, a reviewing court may consider a forfeited error in order to preserve the integrity of the judicial process." *Herron*, 215 Ill. 2d at 179. In either event, if there is no error, there can be no plain error. See *People v. Walker*, 232 Ill. 2d 113, 124-25, 902 N.E.2d 691 (2009). We therefore begin by determining whether the defendant has identified an error in the first place.

In his initial brief, the defendant based his argument largely on the idea that the trial court answered the jury's question by stating only "Please continue to deliberate." However, after the State pointed out in its brief that the trial court actually gave a longer answer that included a repetition of the instruction that the jury's verdict must be unanimous, the defendant changed

emphasis in his reply brief. He now argues that the trial court's response to the jury inquiry failed to alleviate the jury's confusion about the legal requirement for unanimity. According to the defendant, the trial court's answer "foreclosed the possibility of dissent" among them by giving the jury only the options of a unanimous guilty or not-guilty verdict. We summarily reject this argument. A trial court does not err, nor does it inhibit jury deliberation, by informing the jury that its verdict must be unanimous.

The defendant also argues briefly that the trial court erred in failing to tender a so-called *Prim* instruction in response to the jury's question. The *Prim* instruction, a specific set of admonitions named for the supreme court decision that announced it (see *People v. Prim*, 53 Ill. 2d 62, 289 N.E.2d 601 (1972)), is designed "to guide a jury that is unable to reach a unanimous verdict." *People v. Chapman*, 194 Ill. 2d 186, 222, 743 N.E.2d 48 (2000). In determining whether a *Prim* instruction is appropriate, a trial court will consider "such factors as the length of time already spent in deliberation and the complexity of the issues before the jury." *Chapman*, 194 Ill. 2d at 222.

Of course, in this case, both of those factors very strongly indicated that a *Prim* instruction was not warranted. The issues before the jury were very straightforward, and the jury had deliberated less than three hours before it sent its communication to the trial judge. The defendant nonetheless argues that a *Prim*

instruction should have been administered because the jury's note indicated that it was deadlocked. We disagree. The jury's note indicated a question about the necessity for a unanimous verdict. We cannot say that such a question, after a very short period of deliberation, evinces deadlock.

Because we conclude that the defendant has not demonstrated that the trial court's response to the jury's inquiry constituted error, we necessarily conclude that that same response did not rise to the level of plain error. Since the defendant has not demonstrated plain error in the trial court's answer to the jury inquiry, we must deem his argument forfeited.

The defendant's second argument on appeal is that his conviction must be reversed due to the trial court's deviation from the *voir dire* questioning required by Rule 431(b). Again, the defendant acknowledges that he failed to raise any timely objection on this issue and therefore must establish plain error in order to avoid his forfeiture. He argues that the trial court's error meets the second prong of the plain-error test, because it was an error "so serious that [he] was denied a substantial right, and thus a fair trial," and thus that our review is necessary "to preserve the integrity of the judicial process." *Herron*, 215 Ill. 2d at 179. However, in his reply brief, the defendant correctly acknowledges that our supreme court recently rejected the notion that this type of Rule 431(b) error meets the second prong of the plain-error test. See *People v. Thompson*, No. 109033 (Ill. Oct. 21, 2010).

Because the defendant cannot establish plain error, we must consider his second argument forfeited.

The defendant's final argument is that his attorneys were ineffective for failing to object on hearsay grounds to the admission of the lineup advisory forms shown to Marthol and for failing to object to Connolly's testimony indicating that he was already in custody when Connolly arrested him. An accused is entitled to capable legal representation at trial. *People v. Wiley*, 165 Ill.2d 259, 284, 651 N.E. 2d 189 (1995). Under the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant alleging ineffective assistance of counsel will prevail only where he is able to show that (1) counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Albanese*, 104 Ill.2d 504, 525, 473 N.E. 2d 1246 (1984) (adopting *Strickland*).

Here, even if we were to assume that the defendant is correct when he argues that competent counsel would have raised the above objections, we cannot conclude, in light of the overwhelming evidence marshaled against him, that the omissions prejudiced the defendant as required under the second prong of the *Strickland* test. Regarding the admission of the advisory forms, which the defendant argues were allowed to bolster Marthol's eyewitness identification improperly, we note that, even without

that identification evidence, the State presented detailed, consistent confessions from both the defendant and an accomplice. We see no reasonable probability that the exclusion of the advisory forms, or, frankly, even the exclusion of Marthol's testimony altogether, would have changed the result of this case.

As for the defendant's argument that purported other-crimes evidence, in the form of Connolly's testimony that the defendant was being released from custody when Connolly arrested him, caused him unfair prejudice, we observe that, "[w]hile the erroneous admission of other-crimes evidence carries a high risk of prejudice and ordinarily calls for reversal [citation], the evidence must be so prejudicial as to deny the defendant a fair trial, *i.e.*, it must have been a material factor in his conviction such that without the evidence the verdict likely would have been different." *People v. Cortes*, 181 Ill. 2d 249, 285, 692 N.E.2d 1129 (1998). Again, the State's evidence was so strong that we see no reasonable probability that Connolly's purported other-crimes testimony changed the result of the defendant's trial.

For the foregoing reasons, we affirm the judgment of the circuit court.

Affirmed.