2012 IL App (1st) 101925

SIXTH DIVISION
March 16, 2012

No. 1-10-1925



IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 09 CR 17710 |
| | ) | |
| JOHNNY McCRAY, | ) | The Honorable |
| | ) | Lawrence P. Fox, |
| Defendant-Appellant. | ) | Judge Presiding. |

JUSTICE PALMER delivered the judgment of the court.
Justices Garcia and Lampkin concurred in the judgment.

**O R D E R**

¶ *1* *Held:* Defendant forfeited claim that the jury was improperly instructed on the definition of dwelling place; trial counsel's decision on which instructions to give the jury did not amount to ineffective assistance of counsel; judgment affirmed on residential burglary conviction.

¶ 2 Following a jury trial, defendant Johnny McCray was convicted of residential burglary and sentenced to 10 years' imprisonment. On appeal, he contends that he was denied a fair trial when the jury was improperly instructed regarding the definition of dwelling place, an element of

the residential burglary offense. He also contends that he was denied effective assistance of trial counsel because counsel failed to request a jury instruction on the lesser included offense of criminal trespass to residence.

¶ 3 The record shows that defendant was arrested and charged with the residential burglary of 5330 South Morgan Street in Chicago. The indictment specifically alleged that on September 16, 2009, defendant, knowingly and without authority, entered the dwelling place of Arthemio Martinez with the intent to commit a theft therein. At trial, Martinez testified that he owns the two-flat residential building at 5330 South Morgan Street, which last housed tenants in February 2009. Martinez explained that after his tenants moved out that month, there was a fire in the building in March or April 2009, and that the resulting damage required him to "gut" the building. The renovations were finished at the beginning of August 2009.

¶ 4 Martinez further testified that after the building was renovated, he intended to sell it, and that he had a realtor helping him do so in September 2009. When asked what he would do with the building if he were unable to sell it, he responded that he "was going to get new renters in there." Martinez testified that after the renovations, the building was in move-in condition and habitable.

¶ 5 Martinez further testified that he visited the property monthly and was there on September 5, 2009, before the break-in. At that time, the property was "intact." There were brand new cabinets, counter tops, light fixtures, walls, flooring, sinks, tubs and toilets. There was also new plumbing with copper piping. There were no appliances or furniture in the unit, and the outside of the property was boarded up for safety and security concerns.

¶ 6 Martinez further testified that on September 16, 2009, he noticed that the doorknob to the back door had been damaged and that there was a hole in the door. Inside, he observed that sinks had been moved, that some of the copper piping was on the floor and some was missing, and that the water heater, furnace and the main water shutoff valve were missing. Martinez stated that he did not know defendant or give him permission to enter his building or remove anything from it.

¶ 7 Martinez also testified that between September 16, 2009, and April 2010, the apartments had not been rented or the building sold, and the property was still boarded up. Martinez explained that he has not been able to fix the damage done to his property from the break-in, and that it was currently uninhabitable. He further stated that he was unable to get new tenants or sell the property.

¶ 8 Chicago police officer Chris Hackett testified that at 12:15 a.m. on September 16, 2009, he received a call of a burglary in progress at 5330 South Morgan Street. When he arrived there, he heard pounding coming from the residence and called for assistance. When Officers Berg and Corwin arrived, they went to the back of the building where they observed that the basement door was ajar and the lock had been damaged. They entered the residence and walked up to the first floor kitchen where they observed copper piping laid out. At that time, they heard noises coming from the second floor, which Officer Hackett described as someone dragging something. After checking out the second floor, he shined his flashlight on the stairwell and observed defendant and another person, Cory Graham, crouched down together. He also discovered a black bag between defendant and Graham, which contained wire cutters, wrenches and a tire iron.

¶ 9 Defendant and Graham were placed in custody. When Officer Hackett spoke to

defendant at the police station, he asked him why he was in the building, and defendant said that he had the bag of tools and was there to remove the copper piping and some appliances.

¶ 10 At the close of evidence, defense counsel requested jury instructions on attempted burglary, theft and criminal trespass to land. The court denied the request but allowed an instruction on burglary per the State's request. The jury was also provided with the following jury instruction: the term "dwelling place" means a building or portion of a building which is used or intended for use as a human habitation, home or residence. Counsel indicated that he had no objection to the jury being provided with this definition of "dwelling place."

¶ 11 The jury found defendant guilty of residential burglary. On appeal, defendant first contends that he was denied a fair trial where the jury was improperly instructed as to the definition of dwelling place. He maintains that the jury was erroneously provided with Illinois Pattern Jury Instruction, Criminal, (IPI) No. 4.03(1) (3d ed. 1992), which defines dwelling place as a building or portion of a building which is used or intended for use as a human habitation, home, or residence, where the Committee Note to this section states IPI No. 4.03(2) should be given in conjunction with residential burglary. IPI No. 4.03, Committee Note, at 92. IPI No. 4.03(2) defines dwelling place as a house or apartment in which at the time of the alleged offense the owners or occupants actually reside or in their absence intend within a reasonable period of time to reside. Defendant thus maintains that the jury should have been instructed with IPI No. 4.03(2), rather than with IPI No. 4.03(1), and that he is entitled to a new trial.

¶ 12 To preserve an issue for review, a defendant must object at trial and raise the matter in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Here, defendant did not

do so, and so failed to properly preserve the issue now presented in this court. *Enoch*, 122 Ill. 2d at 186. Defendant acknowledges this omission but contends that this court may review the issue under Supreme Court Rule 451(c) (eff. July 1, 2006).

¶ 13 Rule 451(c) provides that substantial defects in criminal jury instructions are not waived by failure to make timely objections thereto if the interests of justice require. This rule crafts a limited exception to the general rule of forfeiture to correct grave errors and errors in cases so factually close that fundamental fairness requires that the jury be properly instructed. *People v. Snowden*, 2011 IL App (1st) 092117, ¶ 79. Rule 451(c) is coextensive with the plain error clause of Supreme Court Rule 615(a) (eff. Aug. 27, 1999), and the two rules are construed identically. *Snowden*, ¶ 79.

¶ 14 As a consequence, we may review this claim of error only if the defendant has established plain error. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). To do so, the defendant must first show that a clear or obvious error occurred (*Hillier*, 237 Ill. 2d at 545), and then, that the evidence is closely balanced or that the error is of such magnitude that the defendant was denied a fair trial and remedying the error is necessary to preserve the integrity of the judicial process (*People v. Nieves*, 192 Ill. 2d 487, 502-03 (2000)). When a defendant fails to meet his burden, the procedural default will be honored. *Hillier*, 237 Ill. 2d at 545.

¶ 15 The supreme court has held that the two most important functions of the appellate court when beginning the review of a case are to ascertain if it has jurisdiction and determine which issues have been forfeited. *People v. Smith*, 228 Ill. 2d 95, 106 (2008). The supreme court has urged judicial restraint (*People v. White*, 2011 IL 109689, ¶ 153), and held that a defendant

forfeits plain error review where he fails to present argument on how either of the two prongs of the plain error doctrine is satisfied *(Hillier*, 237 Ill. 2d at 545-46).

¶ 16 In his reply brief, defendant maintains that this court can review this issue as plain error. He claims that the error is so serious that it denied him a substantial right and undermined the integrity of the judicial process. However, this mere assertion is insufficient to warrant plain error review. *People v. McDade*, 345 Ill. App. 3d 912, 914 (2004); *People v. Rathbone*, 345 Ill. App. 3d 305, 311 (2003). Defendant must argue that the evidence is closely balanced or explain why the error is so severe that it must be remedied to preserve the integrity of the judicial process. *Nieves*, 192 Ill. 2d at 503. Thus, the mere assertion that the alleged error affected defendant's substantial rights and undermined the integrity of the judicial process is insufficient to warrant review. *McDade*, 345 Ill. App. 3d at 914; *Rathbone*, 345 Ill. App. 3d at 311. By presenting this argument in his reply brief, rather than in his initial brief on appeal, defendant has prevented the State from responding to it and thus violated Supreme Court Rule 341(h)(7) (eff. July 1, 2008), prohibiting new arguments from being raised in reply.

¶ 17 Even if we were to examine the error, we find that it does not amount to plain error. A jury instruction error rises to the level of plain error only when it creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law so as to severely threaten the fairness of the trial. *Snowden*, ¶ 80. Here, the jury was erroneously given IPI 4.03(1) which defines dwelling place as a building or portion of a building which is used or intended for use as a human habitation, home or residence, instead of IPI 4.03(2) which defines dwelling place as a house or apartment in which at the time of the alleged offense the

owners or occupants actually reside or in their absence intend within a reasonable period of time to reside.

¶ 18 That said, there was no serious risk that the jurors incorrectly convicted defendant because the definition of dwelling place in IPI 4.03(2) was clearly met where Martinez testified that he intended to have renters in his building in September 2009 if he was unable to sell the residential building, which was in move-in condition. *People v. McGee*, 398 Ill. App. 3d 789, 794 (2010); *People v. Silva*, 256 Ill. App. 3d 414, 420 (1993). Further, the evidence was not closely balanced but overwhelming where defendant admitted that he was in the residence to take the copper piping and appliances which he did not have permission to do from Martinez, and he was found crouching next to a bag containing wire cutters, wrenches and a tire iron. Accordingly, as the evidence was not closely balanced and the integrity of the judicial process was not undermined, there was no plain error. *Nieve*s, 192 Ill. 2d at 502-03.

¶ 19 Defendant next contends that trial counsel was ineffective for requesting a jury instruction on criminal trespass to land when that is not a lesser included offense of residential burglary and failing to ask for an instruction on criminal trespass to a residence which is a lesser included offense of residential burglary. He claims that trial counsel erroneously believed that criminal trespass to land was a lesser included offense of residential burglary, and thus, his decision to ask for an instruction on criminal trespass to land instead of criminal trespass to a residence was not a matter of trial strategy.

¶ 20 Under the two-prong test for examining a claim of ineffective assistance of counsel, defendant must establish that his attorney's performance fell below an objective standard of

reasonableness and but for that deficient performance, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). The scrutiny of defense counsel's performance is highly deferential due to the inherent difficulties of making the evaluation, and the reviewing court must indulge a strong presumption that counsel's conduct fell within the range of reasonable professional assistance. *People v. Robinson*, 299 Ill. App. 3d 426, 433 (1998).

¶ 21 Here, counsel requested jury instructions on attempted burglary, theft and criminal trespass to land, which were denied by the court. Defendant maintains that counsel should have requested a lesser included offense instruction on criminal trespass to a residence, which was supported by the facts presented at trial. He claims that if the jury had been so instructed, it may have found him guilty of this lesser offense, and that he was prejudiced by counsel's failure to do so. We disagree.

¶ 22 A defendant is only entitled to a lesser included offense instruction if the evidence at trial is such that a jury could rationally find him guilty of the lesser offense yet acquit him of the greater offense. *People v. Medina*, 221 Ill. 2d 394, 405 (2006). That evidentiary prerequisite must be met before a right to have the jury instructed on a lesser included offense arises. *Medina*, 221 Ill. 2d at 405.

¶ 23 The totality of the facts presented at trial do not lend themselves to the conclusion that defendant was merely trespassing in the residence. Rather, the evidence shows that defendant was found in the stairwell with a bag containing wire cutters and wrenches between him and Graham, he admitted to having that bag of tools and that he was in the residence to remove

copper piping and appliances, and appliances and copper piping had been removed or moved. In light of this overwhelming evidence (*People v. Johnson*, 128 Ill. 2d 253, 271-72 (1989)), a rational jury would not have acquitted defendant of the greater offense and found him guilty of the lesser offense. Counsel's failure to request this instruction did not prejudice defendant. We therefore conclude that defendant has failed to show that he was denied effective assistance of trial counsel.

¶ 24 In light of the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 25 Affirmed.