2014 IL App (1st) 102886-U

No. 1-10-2886

March 28, 2014

SIXTH DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DARRYL SUTTON, Defendant-Appellant.	Appeal from the Circuit Court of Cook County. No. 98 CR 15711 The Honorable Thomas M. Tucker, Judge presiding.

JUSTICE HALL delivered the judgment of the court.
Justice Lampkin and Justice Reyes concurred in the judgment.

O R D E R

¶ 1 *HELD*: The trial court did not deprive defendant of his constitutional right to a unanimous jury verdict. Defense trial counsel was not ineffective for failing to challenge expert testimony concerning calculation of probability that recovered DNA samples matched defendant's DNA profile. The prosecutor did not act improperly by emphasizing the DNA probability statistics during closing argument. Defense trial counsel did not act deficiently in failing to object to the State's closing argument relating to the DNA probability statistics. The trial court did not violate defendant's constitutional right to present a defense.

¶ 2 Defendant Darryl Sutton appeals his second jury conviction for first-degree murder and

felony murder relating to the rape and shooting death of Ms. Monica Rinaldi. We reversed defendant's first conviction and remanded for a new trial after we determined the trial court erroneously admitted an eyewitness's hypnotically-enhanced testimony. *People v. Sutton,* 349 Ill. App. 3d 608, 621-22 (2004). We also found the trial court denied defendant his constitutional rights to a fair trial and to present a defense when, as a discovery sanction, it denied his counsel's pretrial discovery request to independently retest DNA (Deoxyribonucleic Acid) evidence recovered in the case. *Id.* In this second direct appeal we find no reversible error and therefore affirm.

¶ 3 The parties are familiar with the facts and procedural history of the case. Moreover, the underlying facts are set out at length in our decision on the first direct appeal. Therefore, we will repeat only those facts necessary for the disposition of each issue as it is discussed and analyzed.

¶ 4 ANALYSIS

¶ 5 Defendant first contends the trial court deprived him of his constitutional right to a unanimous jury verdict (Ill. Const. 1970, art. I, § 13) when it failed to poll juror Mr. Manuel Londres, as to whether he agreed with the announced guilty verdicts. The record shows the jury returned separate verdict forms signed by all twelve jurors finding defendant guilty of: first-degree murder, felony murder predicated on attempt murder, felony murder predicated on vehicular invasion, felony murder predicated on aggravated kidnaping, and felony murder predicated on aggravated criminal sexual assault.

¶ 6 After the jury verdicts were announced, the trial court asked defense counsel if he wished to have the jury polled. Defense counsel responded "[y]es, of course." The trial court then asked the clerk to poll the jury. The clerk polled the jury, during which each juror was asked

individually, "was this then and is this now your verdict?" Each juror answered in the affirmative. However, the clerk failed to poll juror Mr. Londres. This appears to have been inadvertent. Defense counsel did not object to the incomplete polling and he failed to raise the issue in his motion for a new trial.

¶ 7 Defendant concedes he failed to preserve this issue for review, but maintains it should be addressed as plain error. The plain-error doctrine permits a reviewing court to consider unpreserved or forfeited claims of error if either: (1) the evidence is closely balanced and the jury's guilty verdict may have resulted from the error; or (2) the error was so fundamental and of such magnitude that the defendant was denied a fair trial and the error must be remedied to preserve the integrity of the judicial process. *People v. Hudson*, 228 Ill.2d 181, 191 (2008). A defendant has the burden of persuasion under both prongs of the plain-error analysis. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009).

¶ 8 Defendant argues we should review this issue under the second prong of the plain-error doctrine because the failure to poll Mr. Londres was so serious it affected the fairness of the trial and challenged the integrity of the judicial process. We must disagree.

¶ 9 Because the facts of this case are not in dispute, our review is *de novo. People v. McLaurin*, 235 Ill. 2d 478, 485 (2009). Under the second prong of the plain error analysis, prejudice is presumed because of the importance of the right involved, regardless of the strength of the evidence against the defendant. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). Our supreme court has equated the second prong of the plain error analysis with structural error. *Id*. at 613-14 (citing *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009)).

¶ 10 Structural errors are constitutional deprivations "affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v.*

Fulminante, 499 U.S. 279, 310 (1991). "An error is typically designated as 'structural' and requiring automatic reversal only if it necessarily renders a criminal trial fundamentally unfair or unreliable in determining guilt or innocence." *People v. Averett*, 237 Ill. 2d 1, 12-13 (2010).

¶ 11 Structural errors are recognized in only a limited class of cases. *Johnson v. United States*, 520 U.S. 461, 468-69 (1997). The United States Supreme Court has identified a small number of errors deemed so serious that they defy harmless-error analysis and, thus, must be considered structural errors requiring automatic reversal. These errors include: complete denial of counsel; biased trial judge; racial discrimination in the selection of the grand jury; denial of self-representation at trial; denial of a public trial; and an erroneous reasonable doubt instruction to the jury. See *Thompson*, 238 Ill. 2d at 609 (citing *Washington v. Recueno*, 548 U.S. 212, 218 n.2 (2006) (listing examples of structural errors)). The United States Supreme Court has determined that without "these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Fulminante*, 499 U.S. at 310 (quoting *Rose v. Clark*, 478 U.S. 570, 577-78 (1986)).

¶ 12 Under the circumstances in this case, we do not believe the trial court's failure to poll Mr. Londres rose to the level of a structural error, under which prejudice is presumed, entitling defendant to an automatic reversal of his convictions. A criminal defendant has a constitutional right to an impartial jury. U.S. Const., amend. VI; Ill. Const. 1970, art. I, § 8. Polling jurors is one method of safeguarding a defendant's right to be tried by an impartial jury. *People v. Bennett*, 154 Ill. App. 3d 469, 475-76 (1987).

¶ 13 A defendant's right to poll the jury has been described as a "substantial" right. *People v. Townsend*, 5 Ill. App. 3d 924, 925 (1972); see also *People v. McGhee*, 2012 IL App (1st) 093404, ¶ 15 (a criminal defendant's right to poll the jury has long been recognized in Illinois and is rooted in Illinois common law). The purpose of polling a jury is to determine whether the verdict was freely and voluntarily reached, and to ensure unanimity. *People v. Wheat*, 383 Ill. App. 3d 234, 237 (2008).

¶ 14 In Illinois, it is well-established that criminal jury verdicts must be unanimous and cannot be reached by majority vote. *People v. Lobb*, 17 Ill. 2d 287, 298 (1959); *People v. Strain*, 194 Ill. 2d 467, 475 (2000). Polling the jury is a procedural device that helps ensure the jury's verdict is unanimous. *McGhee*, 2012 IL App (1st) 093404, ¶ 25. However, it is not the only method for helping to ensure a unanimous verdict. See, *e.g.*, *State v. Yang*, 201 Wis. 2d 752, 745 (Ct. App. 1996) (polling the jury is not the only method for assuring a unanimous verdict).

¶ 15 A trial court's jury instruction regarding the jury's duty to reach a unanimous verdict is an additional method that helps to ensure the jury's verdict is unanimous. *Id.* Here, the jury was given People's Instruction No. 22, Illinois Pattern Jury Instruction (IPI), Criminal No. 26.01, which advised them in relevant part that "[y]our agreement on a verdict must be unanimous. Your verdict must be in writing and signed by all of you, including your foreperson." As a reviewing court, we must presume, absent a showing to the contrary, that the jury followed the trial judge's instructions in reaching a verdict. *People v. Simms*, 192 Ill. 2d 348, 373 (2000).

¶ 16 In this case, we find no evidence suggesting the jury's verdict was not unanimous or that it failed to follow the unanimity instruction. The foreperson returned separate verdict forms,

signed by all twelve jurors, including Mr. Londres, finding defendant guilty of the aforementioned offenses. Although a juror's signature on a verdict form may not be conclusive evidence of the juror's assent to the verdict (*People ex rel. Paul v. Harvey*, 9 Ill. App. 3d 209, 211 (1972)), no juror objected when the verdicts were announced. Mr. Londres was present during the jury polling in which the eleven other jurors voiced their agreement with the verdicts. Mr. Londres had the opportunity to voice a dissent, but did not do so. The jurors' responses indicate there was no dissent from the announced verdicts, even though the question posed gave them the opportunity to do so. The defendant has pointed to no evidence on the record indicating a lack of unanimity.

¶ 17 Under these circumstances, we cannot say that the trial court's failure to poll Mr. Londres, in and of itself, rendered defendant's trial fundamentally unfair or unreliable. The failure to poll Mr. Londres did not affect the framework within which the trial proceeded and therefore such failure did not rise to the level of structural error warranting automatic reversal of defendant's convictions. The circumstances of this case do not warrant application of presumed prejudice. Consequently, defendant has failed to meet his burden of persuasion under the second prong of the plain-error doctrine. Since defendant has not met his burden, the second prong of the plain-error doctrine cannot excuse his forfeiture of this issue. See *McGhee*, 2012 IL App (1st) 093404, ¶ 26.

¶ 18 Contrary to defendant's contentions, the decisions in *People v. DeStefano*, 64 Ill. App. 2d 389 (1965), *People v. Kellogg*, 77 Ill. 2d 524 (1979), and *People v. Wheat*, 383 Ill. App. 3d 234 (2008), are factually distinguishable from the instant case and therefore do not compel a different result.

¶ 19 In *DeStefano*, the trial court declared a mistrial and discharged the jury after the jury foreman informed the court that the jury was unable to reach a unanimous verdict; the State objected to the mistrial suggesting it would like further deliberations. *DeStefano*, 64 Ill. App. 2d at 402. After the jury was discharged and returned to the jury room, the court discovered the jury had actually found the defendant guilty of one of two counts, and was hung only as to the second count. *Id*. at 403-04.

¶ 20 The jury made a request to return to open court and the trial court recalled the jury. The jury foreman told the trial court he had not understood that the court's question as to whether the jury had reached a unanimous verdict, pertained to both counts. *Id*. at 403-04. The trial court asked the bailiff to retrieve the signed verdict form from the jury room, where it had been left unattended. After the guilty verdict was read, the trial court accepted the verdict. Defense counsel asked the trial court to poll the jury, which the court failed to do. *Id*. at 405.

¶ 21 On appeal, defendant contended, among other things, that the jury could not render a valid verdict after the mistrial was declared and the jury discharged. He also argued the trial court erred in failing to poll the jury upon his request. *Id*. at 405-07. The reviewing court reversed the conviction, stating, "[e]ven if the verdict had been properly returned, we consider the failure to poll the jury, after an affirmative request to do so, to be reversible error." *Id*. at 408-09.

¶ 22 *DeStefano* is factually distinguishable from the present case in a number of significant respects. In *DeStefano*, there was: the lack of unanimity on one count, the jury foreman's misunderstanding of the unanimity instruction, and an unsecured jury room when the jury conducted further deliberations following the mistrial.

¶ 23 By contrast, in the instant case, there was no evidence the jury misunderstood the unanimity instruction or that the confidentiality of the jury's deliberations was possibly breached. Moreover, there was not a complete failure to honor the defendant's polling request. In fact, the trial court asked defense counsel if he wished to have the jury polled. The jury was polled, and eleven out of twelve jurors verbally informed the court their verdict was unanimous and the record does not show a lack of unanimity in the verdict.

¶ 24 In addition, the situations in *People v. Kellogg*, 77 Ill. 2d 524 (1979), and *People v. Wheat*, 383 Ill. App. 3d 234 (2008), are factually distinguishable from the instant case. In *Kellogg*, during the polling of the jury, the trial court failed to answer a juror's inquiry as to whether she could change her vote. *Kellogg*, 77 Ill. 2d at 527. In *Wheat*, the trial court refused defense counsel's request to poll the jury, claiming the jury already had been discharged and that the request was untimely, even though the jurors remained seated in the jury box and the court continued to address them for approximately another minute. *Wheat*, 383 Ill. App. 3d at 236-37. The reviewing court determined that a defendant should be given an adequate opportunity to request a jury polling. *Id*. at 242. The reviewing court concluded that the trial court's denial of the defendant's timely request to poll the jury required reversal of his conviction and remand for a new trial. *Id*.

¶ 25 In sum, the cases defendant relies upon are factually distinguishable and do not involve a situation, as here, where the trial court honored defendant's request to poll the jury, but inexplicably failed to poll one juror. Under the factual circumstances in this case, where there was no evidence the jury verdict was not unanimous, the arguably unintentional failure to individually poll one of the jurors did not undermine defendant's constitutional right to an impartial jury.

¶ 26 Defendant next contends his trial counsel was ineffective for failing to challenge expert testimony concerning calculation of probability that DNA samples recovered from the victim's vaginal swabs came from defendant. Nicholas Richert, a forensic scientist employed by the Illinois State police, testified on behalf of the State as an expert in the field of forensic DNA analysis. Richert compared defendant's DNA profile with a male DNA profile recovered from the victim's vaginal swabs and determined that the profiles matched at each of the 13 loci tested.[1] He opined that particular profile would be expected to occur in 1 in 9.7 quintillion blacks, 1 in 250 quintillion whites, and 1 in 260 quadrillion Hispanic unrelated individuals. This is the expert opinion testimony about which defendant complains.

¶ 27 Under the circumstances in this case, we do not believe trial counsel's alleged failure to present an expert witness to challenge such statistics constituted ineffective assistance of counsel. On the contrary, we believe trial counsel's attack on the reliability of the scientific methods employed in testing and analyzing the DNA samples at issue was a reasonable trial strategy.

¶ 28 Both the United States and Illinois Constitutions guarantee a criminal defendant the assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. This

[1] "When a law enforcement agency attempts to connect a DNA sample to a particular person, it does not compare entire DNA sequences, but rather the DNA at thirteen specific places, or 'loci.' A person's DNA characteristics at those thirteen loci make up their DNA 'profile.' A 'match' between an unknown sample and the profile of a particular person can occur at all thirteen or fewer loci. As more loci match, the probability increases that the DNA in the unknown sample comes from that person." *State v. Dwyer*, 2009 ME 127, ¶ 11, 985 A.2d 469.

requires not only that a person accused of a crime have the assistance of counsel for his or her defense, but also that such assistance be "effective." *United States v. Cronic*, 466 U.S. 648, 655-56 (1984). The test for determining an ineffective assistance of counsel claim was established in *Strickland v. Washington*, 466 U.S. 668, 691-98 (1984), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984). The test is composed of two prongs: deficiency and prejudice.

¶ 29 In order for a defendant to obtain reversal of a conviction based on an ineffective assistance of counsel claim, he or she must show that: (1) counsel's performance was so deficient as to fall below an objective standard of reasonableness under prevailing professional norms, and (2) the deficient performance so prejudiced defendant that there is a reasonable probability that, absent the errors, the outcome would have been different. *People v. White*, 322 Ill. App. 3d 982, 985 (2001). "The fundamental concern underlying this test is 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " *People v. Powell*, 355 Ill. App. 3d 124, 14 (2004) (quoting *Strickland*, 466 U.S. at 686).

¶ 30 A defendant must satisfy both prongs of the *Strickland* test to prevail on a claim of ineffective assistance of counsel. However, it is well established that if the claim can be disposed of on the ground that defendant did not suffer prejudice from the alleged ineffective performance, then the court need not decide whether counsel's performance was constitutionally deficient. *Strickland*, 466 U.S. at 697; *People v. Griffin*, 178 Ill. 2d 65, 74 (1997); *People v. Flores*, 153 Ill. 2d 264, 283-84 (1992).

¶ 31 "Matters of trial strategy are generally immune from claims of ineffective assistance of counsel." *People v. Smith*, 195 Ill. 2d 179, 188 (2000). Decisions concerning which

witnesses to call and what evidence to present on a defendant's behalf are generally viewed as matters of trial strategy that are generally immune from claims of ineffective assistance of counsel. *People v. Munson*, 206 Ill. 2d 104, 139-40 (2002). Such decisions will generally not be second-guessed by a reviewing court. *People v. Simms*, 168 Ill. 2d 176, 200 (1995). To establish deficient performance, the defendant must overcome the strong presumption that counsel's actions or inactions were sound trial strategy. *People v. Perry*, 224 Ill.2d 312, 341-42 (2007). Here, we find defendant has failed to overcome the presumption his counsel may have made a tactical decision not to present an expert witness to challenge the DNA probability statistics presented by the State in order to avoid calling attention to the statistics.

¶ 32 In the first appeal, we reversed defendant's conviction and remanded for a new trial, in part, because we found the trial court violated his rights to a fair trial and to present a defense when it denied his counsel's pretrial discovery request to independently retest the DNA evidence using a more advanced method of testing than was previously used. *Sutton*, 349 Ill. App. 3d at 621-22. Upon remand, the DNA evidence was retested using the Short Tandem Repeat (STR) method. Test results established that the DNA recovered from the victim's vaginal swabs and fabric from the car's backseat matched defendant's DNA profile at 13 loci. A report published by the National Institute of Justice has noted that the likelihood any two individuals (except identical twins) will share the same thirteen-locus DNA profile can be as high as one in one billion or greater. See National Institute of Justice, U.S. Dep't of Justice, Special Report: Using DNA to Solve Cold Cases, July 2002, at 6 (available at http://www.ncjrs.gov/pdffiles1/nij/194197.pdf).

¶ 33 The statistical probability that any two persons will share identical DNA profiles at 13 loci, excluding identical twins, is astronomically rare. Consequently, it is unlikely that expert

testimony challenging Richert's probability statistics in this area would have changed the outcome of the trial. Defendant cites no authority that directly places into question the statistical calculations conducted by Richert in the context of a 13 loci match. Therefore, we find defendant has failed to show his trial counsel's performance was constitutionally deficient or that he was prejudiced by counsel's representation. The cases and authorities cited by defendant do not warrant a different conclusion, as none of them call into question the prevailing statistical probability that the likelihood any two individuals (except identical twins) will share identical DNA profiles at 13 loci is one in one billion or greater.

¶ 34 We also reject defendant's contention that the prosecutor acted improperly by emphasizing these probability statistics during closing argument. It is well settled that the State is given wide latitude in closing argument and has the right to comment upon the evidence presented and upon reasonable inferences arising therefrom, even if such inferences are unfavorable to the defendant. *People v. Hudson*, 157 Ill. 2d 401, 441 (1993). For the same reasons, we reject defendant's claim that his counsel acted deficiently in failing to object to the State's closing argument relating to these probability statistics.

¶ 35 Defendant next contends the trial court violated his constitutional right to present a defense when the court, during defense counsel's cross-examination of forensic biologist Michael Podlecki, barred counsel from eliciting evidence of the potential contamination of DNA evidence during the testing process. We reject defendant's argument because the record belies his contention. A review of the record shows defense counsel was given extensive leeway in presenting a defense of potential contamination of DNA evidence. The contamination defense was discredited by facts attested to by the experts who handled the DNA evidence in question.

¶ 36 Finally, defendant contends, and the State agrees, that the mittimus should be corrected to reflect a single conviction for first degree murder because there was only one murder victim. We agree, and therefore order, pursuant to Supreme Court Rule 615(b)(1), that the mittimus be corrected to reflect a single conviction for knowing and intentional murder (count I), the most serious charge.

¶ 37 For the reasons stated, we affirm defendant's conviction for first degree murder and correct the mittimus.

¶ 38 Affirmed, mittimus corrected.