2013 IL App (1st) 111773-U

FIRST DIVISION
November 4, 2013

No. 1-11-1773

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
	)	the Circuit Court
Plaintiff-Appellee,	)	of Cook County
	)	
v.	)	10 C4 40985
	)	
MARTIN CANONICO,	)	Honorable
	)	Noreen Valeria-Love,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Hoffman and Cunningham concurred in the judgment.

O R D E R

***Held*:** Defendant's conviction for residential burglary must be reversed and remanded where the jury was not given a jury instruction that could acquit him of both residential burglary and the lesser-included offense of criminal trespass to a residence.

¶ 1 Following a jury trial, defendant Martin Canonico was convicted of residential burglary and sentenced as a Class X offender to 20 years in prison. Defendant now appeals, arguing that

(1) he was denied a fair trial because the trial court failed to determine whether he agreed with defense counsel's decision to tender a jury instruction of the lesser-included offense of criminal trespass, (2) he was denied a fair trial when the trial court submitted a "guilty of criminal trespass to residence" verdict form to the jury, but did not submit a "not guilty of criminal trespass to a residence" verdict form, (3) the trial court erred in failing to conduct a *Krankel* inquiry after defendant made an ineffective assistance of counsel claim in his presentence investigation report, (4) defendant's sentence was excessive, and (5) the proper term of mandatory supervised release should be two years. For the following reasons, we reverse and remand for a new trial.

¶ 2 I. BACKGROUND

¶ 3 At trial, 46-year-old Kajsa Johnson testified that she lived at 212 Addison Road in Riverside, Illinois with her elderly parents. On September 9, 2011, at about 3 p.m., Johnson was home alone while her father, Donald, was outside mowing the lawn. Donald was wearing ear muffs and a dust mask.

¶ 4 Johnson testified that she heard the doorbell ring, but when she went to the front door she did not see anyone, although she did see a bike. She then proceeded to the back door of her house, but on her way to the back door, she saw an unknown man standing in her kitchen, whom she later identified as defendant. Johnson asked defendant why he was in her house, and defendant responded that his name was John Martin, and that he was the painter. He told Johnson he had come inside to use the bathroom. Defendant told Johnson that he had been talking to the man outside mowing the lawn about doing some painting. Johnson told defendant he did not belong in her house, and defendant left through the back door. Johnson ran towards

her father and told him to call the police. She then went to the front of the house and saw defendant standing there with a bicycle. She grabbed the handlebars of the bicycle and yelled for someone to call the police. Johnson asked defendant what he was doing there and defendant said he wanted to "get some money" from them. Defendant pushed the bicycle back, pinning Johnson under the bike. Defendant then tried to get the bike away from Johnson, but Johnson was still holding on to it and was dragged across the asphalt. Defendant eventually released the bike and ran away. Johnson pursued him until a police officer appeared, arresting defendant.

¶ 5 Donald Johnson then testified that he was outside wearing earmuffs cutting the grass at the time of the incident. Donald never saw anyone go inside his house, and did not give anyone permission to go inside his house. He testified that he never saw defendant prior to the day in question, and that defendant did not approach him while he was mowing his lawn.

¶ 6 Officer Lazanksy testified that after defendant's arrest, he noticed flyers in defendant's back pocket regarding a painting company.

¶ 7 The State introduced other-crimes evidence for the purposes of intent and identification. Officer Szubert testified that on January 7, 2002, he was dispatched to a residence in Cicero, Illinois, to investigate a residential burglary. Officer Szubert spoke to the suspect in that case, who was identified as defendant. Defendant told Officer Szubert that he was a painter and that he was at the residence looking for work, but that he had opened the basement window thinking that the apartment was empty.

¶ 8 Officer Montoro testified that on May 10, 1989, while investigating a residential burglary in Berwyn, Illinois, he spoke to defendant at the police station and defendant admitted that he had

committed the crime and other crimes in a multi-unit apartment building using a screwdriver.

¶ 9 Defendant offered the testimony of 88-year-old Joseph Kublick, who testified that he lived in a two-flat building in Berwyn, Illinois. Kublick testified that defendant was a painter who had been living with him for the past four or five years. Defendant originally came to him for a place to live but did not have the money to pay rent. Kublick allowed defendant to move in with him, and shortly after that defendant started his own painting business and began paying rent. Defendant had flyers printed for his business, and one of the telephone numbers listed on the flyer belonged to Kublick.

¶ 10 During the jury instructions conference, defense counsel requested that the jury be instructed on the lesser-included offense of criminal trespass to residence. The court allowed the instruction. The parties agreed that the following verdict forms should be submitted to the jury: not guilty of residential burglary; not guilty of criminal trespass to residence; guilty of residential burglary; guilty of criminal trespass to residence. During the reading of the jury instructions, the court instructed the jury, in accordance with IPI Criminal 2.01Q and 26.01Q, that there were three possible verdicts: (1) not guilty of residential burglary and not guilty of criminal trespass to residence; (2) guilty of residential burglary; or (3) guilty of criminal trespass to residence. After reading those instructions to the jury, the court noted that a "not guilty for criminal trespass to residence" verdict form was unnecessary since defendant had not been charged with criminal trespass. Accordingly, the following jury instructions were given to the jury: (1) not guilty of residential burglary; (2) guilty of residential burglary; or (3) guilty of criminal trespass to residence. The jury found defendant guilty of residential burglary.

¶ 11 At the sentencing hearing, the State presented testimony of Officer James Joseph, who testified that in 1991 he questioned defendant in connection with a residential burglary at a multi-unit condominium complex. Officer Joseph found stolen property in defendant's possession after defendant admitted to committing the crime. Officer Giordana Manfedini testified that in 1996, he investigated three burglaries that defendant was involved in. Defendant had multiple prior convictions for residential burglary and burglary. Defendant's longest sentence that he had served in prison was 10 years. Defense counsel conceded that defendant was subject to a mandatory Class X sentence. The trial court sentenced defendant to 20 years in prison, followed by 3 years of mandatory supervised release. Defendant now appeals.

¶ 12 II. ANALYSIS

¶ 13 On appeal, defendant contends that (1) he was denied a fair trial because the trial court failed to determine whether he agreed with defense counsel's decision to tender a jury instruction on the lesser-included offense of criminal trespass, (2) he was denied a fair trial when the trial court submitted a "guilty of criminal trespass to residence" verdict form to the jury, but did not submit a "not guilty of criminal trespass to a residence" verdict form, (3) the trial court erred in failing to conduct a *Krankel* inquiry after defendant made an ineffective assistance of counsel claim in his presentence investigation report, (4) defendant's sentence was excessive, and (5) the proper term of mandatory supervised release should be two years.

¶ 14 We first address defendant's argument that he was denied the right to a fair trail when the trial court submitted a "guilty of criminal trespass to residence" verdict form to the jury, but did not submit a corollary "not guilty of criminal trespass to residence" verdict form, thereby

depriving the jury of a mechanism to acquit him of criminal trespass to residence.

¶ 15 The State first notes, and defendant admits, that he failed to preserve this issue on appeal by failing to object to the given instructions at trial, and by failing to include the objection in a posttrial motion. See *People v. Thompson*, 238 Ill. 2d 598, 612 (2010) (citing *People v. Enoch*, 122 Ill. 2d 176, 186 (1988)). Nonetheless, defendant urges us to review his claim under the plain-error doctrine. The plain-error doctrine allows for review where the error is clear and obvious and (1) the evidence was so closely balanced that the error alone threatened to tip the scales of justice against defendant, or (2) the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). However, before we can determine if plain error occurred, we must first consider whether any error occurred at all. See *People v. Sims*, 192 Ill. 2d 592, 621 (2000) (before invoking the plain error exception, it is appropriate to determine whether error occurred at all).

¶ 16 Here, the trial court indicated that it would give a concluding instruction pursuant to IPI 26.01Q, which states, in relevant part, that when a defendant is charged with the greater offense, he may be found (1) not guilty of the greater offense and not guilty of the lesser offense; or (2) guilty of the greater offense; or (3) guilty of the lesser offense. The instruction states "you will be provided with three verdict forms pertaining to the charge of the greater offense. From these three verdict forms, you should select the one verdict form that reflects your verdict." IPI 26.01Q. The parties agreed that the following verdict forms should be submitted to the jury: "Not Guilty of Residential Burglary," "Not Guilty of Criminal Trespass to Residence," "Guilty of

Residential Burglary," and "Guilty of Criminal Trespass to Residence."

¶ 17 Prior to jury instructions being given, the parties gave closing arguments. Defense counsel argued that while defendant entered the Johnson residence without authority, he did not intend to commit a theft. Thus, defense counsel's theory of the case was that defendant was guilty of criminal trespass to a residence, but not residential burglary. Defense counsel specifically stated:

> "For residential burglary, the State needs to prove beyond a reasonable doubt that [defendant] entered the house, that he entered without authority, and that he entered with the intent to commit a theft.
>
> Three things they have to prove. For criminal trespass to residence, they have to prove the first two. That he entered. That he entered without authority. And if they do, that's criminal trespass to residence.
>
> And, quite honestly, that is what he did. He entered without authority. We're not saying he didn't enter. This isn't a who done it *** They got the right guy."

¶ 18 Following closing arguments, the court instructed the jury, consistent with IPI Criminal No. 2.01Q and 26.01Q:

> "defendant is charged with residential burglary. The defendant has pleaded not guilty. Under the law, a person charged with residential burglary may be found not guilty of residential burglary and not guilty of

criminal trespass to residence or guilty of residential burglary or guilty of criminal trespass to residence."

Accordingly, you will be provided with three verdicts [*sic*] forms as to the defendant pertaining to the charge of residential burglary. Not guilty of residential burglary and not guilty of criminal trespass.

We need to make a correction on this.

From these three verdicts [*sic*] forms, you should select one verdict form which reflects your verdict, and sign it as I have indicated. Excuse me, as I have stated. Do not write on the other two verdict forms. Sign only one verdict form.

***

If you find the State has proved the defendant guilty of both residential burglary and criminal trespass to residence, you should select the verdict form finding the defendant guilty of residential burglary. Sign it as I have stated.

Under these circumstances, do not sign a verdict form finding the defendant guilty of criminal trespass to residence.

***

[T]he first verdict form is, we, the jury, find the defendant, [], not guilty of residential burglary.

***

> We, the jury, find the defendant, [], guilty of residential burglary ***.
>
> ***
>
> We, the jury, find the defendant [], guilty of criminal trespass to a residence ***.

¶ 19 The court did not provide People's Instruction No. 18, which stated "We, the jury, find the defendant, [], Not Guilty of Criminal Trespass to Residence," and defendant did not object. The court then clarified that:

> "There was not a form that was sent back which referred to the defendant being found not guilty of the criminal trespass. There is no charge of criminal trespass, and if [the jury] should find the defendant guilty of residential burglary, they don't have to find him not guilty of criminal trespass. He is not charged."

¶ 20 Following jury deliberations, the jury returned a verdict of guilty of residential burglary. Defendant argues, relying on *People v. Durr*, 215 Ill. 2d 283 (2005), that because there was no instruction or verdict form of "not guilty of criminal trespass to residence," the jury was deprived of a method with which to acquit defendant of that charge. We agree.

¶ 21 In *Durr*, the defendant was charged with criminal sexual assault of a child. The trial court found that the defendant was entitled to lesser-included offense instructions on attempted predatory criminal sexual assault of a child and aggravated criminal sexual abuse. Defense counsel tendered a jury instruction which read that under the law, a person charged with predatory sexual assault of a child could be found: not guilty of predatory sexual assault of a

child, and not guilty of attempt predatory sexual assault of a child, and not guilty of aggravated criminal sexual abuse; or, guilty of predatory criminal sexual assault of a child; or guilty of attempt predatory sexual assault of a child; or guilty of aggravated criminal sexual assault. The state objected to the tendered instruction, arguing it was unduly confusing. The trial court agreed.

¶ 22 Instead, the trial court informed the jury that under the law, a person charged with predatory criminal sexual assault of a child may be found: not guilty; or guilty of predatory criminal sexual assault of a child; or guilty of attempt predatory criminal sexual assault of a child; or guilty of aggravated criminal sexual abuse. The trial court stated that there would be four verdict forms, and that the jurors should select the one verdict form that reflects their verdict and sign it. The verdict form for finding the defendant not guilty of any of the offenses simply read: "not guilty."

¶ 23 Our supreme court noted that in the original instructions tendered by defense counsel, there was an instruction that would have informed the jury that it could find defendant "not guilty of predatory sexual assault of a child, and not guilty of attempt predatory sexual assault of a child, and not guilty of aggravated criminal sexual abuse," which would have informed the jury that it could acquit the defendant of all offenses after giving independent consideration to the elements of each offense. *Durr*, 215 Ill. 2d at 300. Our supreme court found that the trial court erred when it refused defendant's tendered instruction, which conformed to the pertinent provision of the applicable IPI Criminal instruction and which encouraged the jury to examine the elements of each offense separately, and instead gave a general "not guilty" instruction.

Durr, 215 Ill. 2d at 300 (defendant's tendered instructions properly adopted the structure and tracked the IPI Criminal instruction which stated that a person charged with the greater offense may be found (1) not guilty of the greater offense and not guilty of the lesser offense; or (2) guilty of the greater offense; or (3) guilty of the lesser offense).

¶ 24 Our supreme court in *Durr* reiterated that Supreme Court Rule 451(a) requires that in a criminal case, if the court determines the jury should be instructed on a subject, and the Illinois Pattern Jury Instruction, Criminal, contains an applicable instruction, then the IPI Criminal instruction "shall" be given unless the court determines it does not accurately state the law. *Durr*, 215 Ill. 2d at 300-01. The *Durr* court found that the originally tendered instruction applied in that case because it would have accurately stated the law, since the corresponding IPI Criminal instruction states in relevant part that under the law, a person charged with the greater offense may be found (1) not guilty of the greater offense and not guilty of the lesser offense; or (2) guilty of the greater offense; or (3) guilty of the lesser offense. Instead of giving the instructions tendered by defense counsel that tracked the language of "not guilty of the greater offense and not guilty of the lesser offense," from the corresponding IPI Criminal instruction, the trial court submitted an instruction which read simply: "Not Guilty." Accordingly, our supreme court found that the trial court erred when it gave non-IPI instructions on this point. *Durr*, 215 Ill. 2d at 301.

¶ 25 The same scenario is present in the case at bar. The applicable IPI Criminal instruction in our case, which was agreed to by all parties, was IPI 26.01Q, which stated that when a defendant is charged with the greater offense, he may found (1) not guilty of the greater offense and not guilty of the lesser offense; or (2) guilty of the greater offense; or (3) guilty of the lesser offense.

The parties agreed that the following verdict forms would be submitted to the jury: Not guilty of residential burglary, not guilty of criminal trespass to residence, guilty of residential burglary, and guilty of criminal trespass to residence. However, only three verdict forms were given to the jury: not guilty of residential burglary, guilty of residential burglary, and guilty of criminal trespass to residence. The court did not provide the "not guilty of criminal trespass to residence" verdict form. Just like in *Durr*, we find that the trial court erred when it gave non-IPI instructions on this point. *Durr*, 215 Ill. 2d at 301.

¶ 26 Now that we have determined there was an instructional error, we must, as our supreme court did in *Durr*, go on to decide whether such instructional error rose to the level of plain error. Here, defendant contends that we should review this issue under the second prong of the plain error rule because depriving the jury of the ability to return a not guilty verdict "not only is a significant structural error [], but also a violation of substantial rights and a compromise of the fairness and integrity of the trial process." See Ill. S. Ct. R. 451 (c) (eff. Apr. 8, 2013) (substantial defects in jury instructions in criminal cases are not waived by failure to make timely objections thereto if the interests of justice require).

¶ 27 Rule 451(c)'s exception to the waiver rule for substantial defects applies when there is a grave error or when the case is so factually close that fundamental fairness requires that the jury be properly instruction. *People v. Hopp*, 209 Ill. 2d 1, 7 (2004). The tests for application of Rule 451(c)'s exception to the waiver rule are strict tests that demonstrate that the exception to the waiver rule is limited and is applicable only to serious errors which severely threaten fundamental fairness of the defendant's trial. *Hopp*, 209 Ill. 2d at 8.

¶ 28 Our supreme court has reviewed alleged instructional errors under the plain-error doctrine as affecting substantial rights, even though it has ultimately concluded that any instructional error was not so substantial that it reflected on the fairness of the trial. *People v. Durr*, 215 Ill. 2d 283, 298 (2005) (citing *People v. Williams*, 181 Ill. 2d 297, 317-20 (1998)). To determine whether a purported error is "plain" requires a substantive look at it, but in the end, if the error is found not to rise to the level of plain error, the procedural default must be honored. *Durr*, 215 Ill. 2d at 298 (citing *People v. Keene*, 169 Ill. 2d 1, 17 (1995)). Rule 451(a) places the burden of persuasion on the defendant who raises a procedurally defaulted instructional error. Ill. S. Ct. R. 451(a) (eff. Apr. 8, 2013).

¶ 29 The function of jury instructions is to convey to the jurors the law that applies to the facts so they can reach a correct conclusion. *Hopp*, 209 Ill. 2d at 8. As our supreme court explained in *Hopp*, Rule 451(c) "does not require that defendant prove beyond doubt that her trial was unfair because [an instructional error] misled the jury to convict her. It does require that she show that the error caused a *severe* threat to the fairness of her trial." (Emphasis in original.) *Hopp*, 209 Ill. 2d at 12.

¶ 30 Our supreme court recently held in *People v. Sargent*, 239 Ill. 2d 166, 191 (2010), that the "erroneous omission of a jury instruction rises to the level of plain error only when the omissions 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." See also *Hopp,* 209 Ill. 2d at 12 (citing *People v. Ogunsola*, 87 Ill. 2d 216, 223 (1981)).

¶ 31 Accordingly, in this context, defendant must show that the omission of a "not guilty of

criminal trespass" instruction "create[d] 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." *Hopp*, 209 Ill. 2d at 8. In other words, defendant must show there was a serious risk that the jurors convicted him of residential burglary because they did not understand that they had the option of signing a verdict form finding defendant not guilty of both the greater and lesser included offenses. See *Durr*, 215 Ill. 2d at 299 (defendant must show there was a serious risk that jurors convicted him because they did not understand they had the option of signing a general "not guilty" verdict pertaining to both greater and lesser-included offenses).

¶ 32 In *Durr*, the court found that the general "not guilty" instructions were read to the jury, and the general "not guilty" verdict forms were given to the jury. The court found that because the jury was unequivocally instructed that it could find the defendant not guilty of all offenses under consideration, there was no plain error. *Durr*, 215 Ill. 2d at 306. However, the defendant argued that there were jury instructions in the common law record, marked "given," which stated "not guilty of predatory criminal sexual assault," instead of "not guilty." The court in *Durr* found that those instructions were not actually submitted to the jury, even though they were marked "given," because the proceedings revealed otherwise. *Durr*, 215 Ill. 2d at 306. The court went on to say that because the jury did not receive the verdict forms mistakenly marked "given," and was unequivocally instructed that it could find the defendant "not guilty" of all offenses under consideration, there was no plain error. *Id*.

¶ 33 In the case at bar, the jury received instructions akin to those marked "given" in the *Durr* case, but which were not actually submitted to the jury, that did not provide for a general "not

guilty" verdict form. Our supreme court specifically held in *Durr* that "[i]f the instructions given the jury had denied the jury the option of returning a general 'not guilty' verdict *** a significant structural error would have occurred for purposes of our rules, substantial rights would in fact have been violated, and the fairness and integrity of the trial process would have been compromised." *Durr*, 215 Ill. 2d at 302.

¶ 34 Here, the jury in our case did not receive a general "not guilty" verdict form. Instead, it received a "not guilty of residential burglary" verdict form. Accordingly, we must find, based on our supreme court's holding in *Durr*, that the error in this case rose to the level of plain error. *Durr*, 215 Ill. 2d at 306; see also *People v. James*, 255 Ill. App. 3d 516 (1993) (finding plain error where trial court gave instructions for "not guilty of aggravated arson," "guilty of aggravated arson," and "guilty of arson," but failed to give a "not guilty of any arson related offense" verdict form).

¶ 35 To the extent that the State contends that this type of instructional error does not amount to second-prong plain error review because it is not a "structural error," as contemplated by our supreme court in *People v. Thompson*, 238 Ill. 2d 598, 613-14 (2010), we remain unpersuaded. In *Thompson*, a voir dire case, our supreme court noted that in *People v. Glasper*, 234 Ill. 2d 173 (2009), another voir dire case, our supreme court had "equated the second prong of plain-error review with structural error." *Thompson*, 238 Ill. 2d at 613-14. The court in *Thompson* stated that the United States Supreme Court has recognized errors as structural in only a "very limited" class of cases, which "include a complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a

public trial, and a defective reasonable doubt instruction." *Id*. at 609. The State seems to be arguing that this list United States Supreme Court cases represent the only types of cases that can be considered second-prong plain error, and because defendant's claim of an erroneous jury instruction does not fall into that list, his claim does not rise to plain error. We disagree.

¶ 36 Our supreme court has specifically held, a month after issuing its opinion in *Thompson*, that the erroneous omission of a jury instruction rises to the level of second-prong plain error "when the omission 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." *Sargent*, 239 Ill. 2d at 191 (citing *Hopp*, 209 Ill. 2d at 8). This is the same language that was present in *Durr*, and which we relied on above in finding that the failure to submit an instruction to the jury which could acquit defendant of all offenses constituted plain error in this case. Because we find that the instructional error constituted plain error in this case, we must reverse the trial court's ruling and remand this case for a new trial.

¶ 37 III. CONCLUSION

¶ 38 For the foregoing reasons, we reverse the judgment of the circuit court of Cook County, and remand for a new trial.

¶ 39 Reversed and remanded.