

No. 1-11-3459

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 09 CR 15411
)	
JOHN BUTTS,)	Honorable
)	William G. Lacy,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin and Justice Epstein concurred in the judgment.

ORDER

- ¶ 1 **Held:** Defendant's claim that trial court committed reversible error by misstating the evidence and shifting the burden of proof to defendant forfeited and without merit; judgment entered on armed habitual criminal conviction affirmed.
- ¶ 2 Following a bench trial, defendant John Butts was convicted of armed habitual criminal and sentenced to eight years' imprisonment. On appeal, he contends that the trial court committed reversible error by misstating the evidence and shifting the burden of proof to him when it announced its credibility determination.
- ¶ 3 At trial, Chicago police officer Wesselhoff testified that at 10:30 p.m. on August 8, 2009, he and his partners, Officers Vogt and Verdon, received a call regarding someone in need of help

at Jackson Boulevard and Western Avenue in Chicago. No one was at that intersection so they drove around the area trying to find the person who was looking for help, and at Jackson and Oakley noticed defendant and another individual yelling obscenities at a group of individuals on a basketball court on the other side of a fence. Defendant had his arm raised and was waving it in a fist while screaming. When he and the other individual noticed the uniformed officers in an unmarked car, the two men began to leave in different directions.

¶ 4 The officers stopped their car about five feet away from defendant, who had one hand in his pocket, and the other down by his side. Officer Wesselhoff exited the police vehicle, and said, "police, let me see your hands." The officer made the same request twice more, then approached defendant, who kept stepping back. As the officer grabbed his shirt, defendant pulled away, and the officer observed a gun in defendant's waistband. The officer yelled, "gun, gun, he's got a gun." Defendant ran off causing his shirt, which was in the officer's grasp, to rip. Officers Wesselhoff and Verdon pursued defendant. Defendant ran into an alley, Officer Verdon followed him, while Officer Wesselhoff ran parallel to the alley along Jackson Boulevard. When Officer Wesselhoff reached the mouth of the alley, he saw defendant, 20 feet away from him, crouching down behind a garbage can along a fence.

¶ 5 After defendant made eye contact with Officer Wesselhoff, he threw the gun over the fence into the yard at 214 South Oakley Boulevard and ran off. Officer Wesselhoff observed Officer Verdon pursue defendant and he followed behind them. When a squad car arrived, defendant placed his hands in the air, and Officer Verdon took him into custody. Officer Wesselhoff headed to the location where he had observed defendant toss the gun, and when he was a few feet away from it, he tripped, and broke his ankle. He called for assistance, and Officer Morales arrived on the scene and retrieved the gun where defendant had tossed it. Officer Wesselhoff stated that this gun was the same one he saw in defendant's waistband, noting

that it was a very unusual gun with "goofy lines through the butt of the gun, " and a "little orange dot" on it.

¶ 6 Officer Verdon testified that he observed defendant and the other individual yelling at people on the other side of a fence, and approached the other individual. He also observed Officer Wesselhoff approaching defendant, who jumped back as Officer Wesselhoff tried to grab him, ripping his shirt. Officer Verdon noted that the area was very well lit. After he heard Officer Wesselhoff yell that defendant had a gun, he pursued him. Officer Verdon lost sight of defendant for five seconds, but then saw him in the alley. Defendant was 20 feet away from Officer Verdon when he observed defendant crouched down by a fence, then stand up and throw an object into the yard behind him. The officer noted that the lighting in the alley was good, and that defendant continued to run, but that he apprehended him five seconds later in the alley.

¶ 7 The parties stipulated to defendant's two certified convictions for manufacture and delivery of a controlled substance. They also stipulated that defendant had a prior conviction for possession of a controlled substance.

¶ 8 Defendant testified that at the time in question he, his cousin and friend were waiting at a bus stop at Jackson Boulevard and Western Avenue when three officers in an unmarked police car made a U-turn, then exited their vehicle. Officer Wesselhoff ran towards Oakley Boulevard, and Officers Verdon and Vogt came up to him and asked what was going on. Defendant testified that the officers then searched him, placed him in handcuffs, and told him he was not being arrested, and that "[i]t was for their safety." Defendant, however, then testified, in contrast, that he observed Officer Wesselhoff trip while he was running, laughed because he was being harassed, and that the police responded by grabbing and handcuffing him.

¶ 9 Defendant further testified that his shirt was not ripped that evening, and that after he was handcuffed, he was placed in a police car, and driven to the nearby alley. Defendant stated that

he did not leave the car and was not crouching down near a fence. He also stated that he did not flee from police, did not have a gun on him, and did not toss anything over the fence in the alley.

¶ 10 At the close of evidence, the court found defendant guilty of armed habitual criminal. In doing so, the court stated that it assessed the credibility of each of the testifying witnesses, that it found the officers' testimony clear, detailed and credible with Officer Wesselhoff noting the unusual and distinct markings on the gun. The court further noted that any discrepancies in the details of the chase by the two officers involved did not affect their credibility in any significant fashion. The court further stated that:

"[a]s to [defendant's] testimony, he's asking the Court to believe not only did the officer falsify an injury and where it took place, but then he planted a gun on him, that Officers Wesselhoff, Vernon and Vogt, and Officer Morrales all took -- not Vogt, but testified that the gun was recovered in a separate location, and therefore apparently these officers all committed a couple of felonies themselves."

The court then stated that based on the testimony, the demeanor of defendant, and his prior conviction which affects his credibility, it found his testimony incredible. The court concluded that "defendant was proved guilty beyond a reasonable doubt as charged." Defendant's motion for a new trial was denied, and defendant appealed.

¶ 11 In this court, defendant seeks reversal of his conviction claiming that he was denied a fair trial based on the remarks made by the trial court in weighing the different accounts of the incident by him and the police officers. Defendant maintains that the court affirmatively misstated that the officers would have had to intentionally falsify the case, committing felonies themselves, to believe defendant, and thereby improperly shifted the burden of proof to him.

¶ 12 As an initial matter, the State maintains that defendant has forfeited this issue due to his failure to raise it at trial and in his post-trial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defendant acknowledges his failure to properly preserve the issue, but claims that forfeiture is less rigidly applied where the conduct of the court is at issue.

¶ 13 Although judicial misconduct can provide a basis for relaxing the forfeiture rule (*People v. Sprinkle*, 27 Ill. 2d 398 (1963)), the supreme court has clarified that this exception applies only in extraordinary situations such as when the trial judge makes inappropriate comments to the jury or relies on social commentary in sentencing defendant to death (*People v. McLaurin*, 235 Ill. 2d 478, 488 (2010)). The fact that forfeiture is rarely relaxed in noncapital cases underscores the importance of the uniform application of the forfeiture rule except in the most compelling situations. *McLaurin*, 235 Ill. 2d at 488. Here, defendant has not presented any extraordinary or compelling reason to relax the rule under *McLaurin*, and we decline to do so.

¶ 14 Alternatively, defendant claims that the trial court's conduct amounted to plain error, and should be considered as such. He maintains that the court's conduct concerned his "substantial rights" and deprived him of the presumption of innocence.

¶ 15 The plain error doctrine is a narrow and limited exception to the general waiver rule allowing a reviewing court to consider a forfeited error where the evidence was closely balanced or where the error was so egregious that defendant was deprived of a substantial right and thus a fair trial. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). To obtain relief, defendant must first show that there was a clear or obvious error. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). The burden of persuasion remains with defendant, and the first step in plain error review is to determine whether any error occurred. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009).

¶ 16 In this case, defendant claims that the trial court committed reversible error when, in weighing the credibility of the witnesses who testified at trial, it shifted the burden of proof to him. We disagree.

¶ 17 The presumption that the court knows the law and properly applies it is rebutted only where the record affirmatively shows strong evidence to the contrary. *People v. Howery*, 178 Ill. 2d 1, 32 (1997). Here, the record affirmatively shows that the trial court assessed the evidence presented and found that defendant was proved guilty beyond a reasonable doubt, as charged. Prior to reaching that conclusion, the court reviewed the testimony of the witnesses and commented on its plausibility and credibility. The court found the officers' testimony clear, detailed and credible, and that Officer Wesselhoff had specifically recalled the distinct markings of the gun observed and recovered in this case. The court also noted the discrepancies in the officers' testimony regarding the chase, but found that those discrepancies did not affect their credibility in any significant way.

¶ 18 On the other hand, the court found defendant's testimony incredible noting his demeanor and the effect of his prior convictions on his credibility. In doing so, the court commented that if it was to believe defendant's story, it would have to find that the police falsified the incident and committed felonies themselves. This observation was made in relation to the defense theory that the incident reported by police did not occur and that defendant was innocently standing by waiting for a bus when police came up to him, handcuffed him for merely laughing at an officer, and drove him into the alley and effectively planted a gun on him. We observe that the trial court is free to comment on the implausibility of the defense theories, as long as it is clear from the record that it applied the proper burden of proof in finding defendant guilty. *People v. Cameron*, 2012 IL App (3d) 110020, ¶28. Here, the record does not contain any strong affirmative evidence that the court erroneously shifted the burden of proof to defendant. *Cameron*, ¶29.

Rather, it reflects the court's deliberation on the theories and testimony presented and the correlative credibility of the witnesses in deciding the case. It does not show any improper shift of the burden of proof to defendant, and we reject this argument. *Cameron*, ¶29.

¶ 19 In reaching this conclusion, we find defendant's reliance on *People v. Virella*, 256 Ill. App. 3d 635 (1993), *People v. Miller*, 302 Ill. App. 3d 487 (1998), and *People v. Wilson*, 199 Ill. App. 3d 792 (1990), misplaced. In *Virella*, 256 Ill. App. 3d at 638, the trial court stated that the standard of proof was clear and convincing, instead of beyond a reasonable doubt, four times. Here, unlike *Virella*, the trial court clearly applied the correct standard of proof, "beyond a reasonable doubt."

¶ 20 In *Miller*, 302 Ill. App. 3d at 496-98, a jury trial, defendant did not testify and the prosecutor commented during closing argument that to believe defendant did not commit the murder, it would have to believe that the State's witnesses were making things up and lying and trying to let the real murderer go free. This court concluded that the State's comments misstated the burden of proof and shifted it to defendant. *Miller*, 302 Ill. App. 3d at 497. Here, unlike *Miller*, defendant was tried before the bench, and testified that the incident did not occur. The trial court's comment was thus based on defendant's trial testimony, which, in essence, accused the police of making up the entire incident. Accordingly, we find no misstatement of the evidence or improper shifting of the burden of proof to defendant.

¶ 21 In *Wilson*, defendant did not testify and the State informed the jury during closing arguments that it would have to believe that everyone in the case was guilty except defendant and that the State's witnesses committed perjury. *Wilson*, 199 Ill. App. 3d at 796. The reviewing court held that the State thereby distorted the burden of proof to the jury, and improperly conveyed that defendant carried the burden of proof to establish his innocence. *Wilson*, 199 Ill. App. 3d at 796-97. Here, unlike *Wilson*, there was no jury, and the comments made by the trial

court on the implausibility of defendant's testimony were based on the evidence presented (*Cameron*, ¶¶28-29), and its findings was based on proof beyond a reasonable doubt. Thus the record affirmatively shows that the court was aware of the proper standard of proof and applied it, and that there was no error to excuse defendant's forfeiture of this issue. *Cameron*, ¶29.

¶ 22 Defendant also suggests that there are other scenarios in which the court could have found that the officers were incredible. He specifically claims that the police could have been initially chasing a different individual, were unable to see adequately in the dark, and thus were confused about the suspect that they placed in custody. In essence, this argument is a further challenge to the credibility of the witnesses. *People v. Berland*, 74 Ill. 2d 286, 305-06 (1978). However, it is based on conjecture without support in the record, and does not alter the determination of the trial court that the officers were more credible than defendant (*People v. Hernandez*, 278 Ill. App. 3d 545, 551, 553 (1996)), and that defendant's explanation for his presence at the scene, and the actions of the officers, was unpersuasive (*People v. Morehead*, 45 Ill. 2d 326, 330 (1970)).

¶ 23 In sum, defendant has forfeited his claim that the trial court committed reversible error by misstating the evidence and shifting the burden of proof to defendant in making its credibility determination, and there was no plain error. The record shows that the trial court properly made a credibility determination based on the implausibility of defendant's testimony and found that he was proved guilty beyond a reasonable doubt.

¶ 24 For these reasons, we affirm the judgment of the trial court of Cook County.

¶ 25 Affirmed.