

THIRD DIVISION
November 18, 2015

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 12 CR 13779
)	
DEON WILSON,)	The Honorable
)	Thomas M. Davy,
Defendant-Appellant.)	Judge Presiding.

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

ORDER

¶ 1 *Held:* Defendant's armed habitual criminal conviction affirmed where the record did not affirmatively show that the circuit court employed the wrong standard of proof when determining his guilt.

¶ 2 Following a bench trial, defendant Deon Wilson was convicted of being an armed habitual criminal and was sentenced to 8 years' imprisonment. On appeal, defendant seeks reversal of his conviction and the sentence imposed thereon, arguing that the circuit court employed an incorrect legal standard to assess his trial testimony and thereby deprived him of his

due process right to a fair trial.¹ For the reasons set forth herein, we affirm the judgment of the circuit court.

¶ 3

BACKGROUND

¶ 4

Following an encounter with police on June 29, 2012, defendant was arrested and charged with two counts of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1), (a)(3)(A); 720 ILCS 5/24-1.6 (a)(1), (a)(3)(E) (West 2012)), one count of unlawful use of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2012)), and one count of armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2012)). Defendant elected to proceed by way of a bench trial.

¶ 5

At trial, Chicago Police Officer Patrick Soraghan testified that on June 29, 2012, at approximately 11:45 a.m., he and his partner, Officer Dejuan Turner, had a conversation with one of their colleagues, Officer Malone, near the intersection of 112th and Michigan Avenue. Following that conversation, which lasted "just a couple of minutes," he and his partner drove their vehicle, an unmarked Crown Victoria, over to the 4 Aces Tire Shop, located at 10952 South Michigan Avenue. He explained that they were looking for a "male black around six feet, wearing a white T-shirt, blue jeans, light complexion, and [wearing] big earrings."

¶ 6

As they approached the tire shop from an alley located in the rear of the store, they noticed that the garage door was open and observed defendant, who matched the description of the individual they were looking for, sitting inside of the garage. There were three other men sitting by defendant. As Officer Soraghan and his partner exited their vehicle and walked toward the garage, defendant looked in their direction, stood up, and dropped a handgun to the ground.

¹ In defendant's appellate brief, he also argued that the circuit court erred in allowing the State to present improper uncharged other crimes evidence during his trial. Alternatively, he argued that defense counsel was ineffective for failing to object to the introduction of that evidence. Defendant, however, withdrew both arguments in his reply brief. Accordingly, the only issue that remains in dispute is whether or not the circuit court applied the correct standard of proof during his trial.

Officer Soraghan immediately ordered defendant out of the garage, patted him down and then secured him. After doing so, he retrieved the weapon, which was a Kel Tec .9-millimeter semi-automatic handgun that was "fully loaded" with eight rounds. Seven of the bullets were in the magazine and one was in the chamber. He and his partner also recovered a large plastic bag containing 33 smaller plastic bags filled with suspect cannabis. That bag was located on a shelf "right next" to where defendant had been sitting. They recovered a second bag from the same shelf. The second bag contained three .9-millimeter rounds as well as a hand-rolled cigar that contained suspect cannabis. Officer Soraghan testified that the three rounds in the plastic bag matched the rounds that were loaded in the handgun they recovered. The gun and both bags were inventoried in accordance with police protocol and defendant was subsequently transported to the 5th District Police Station. Prior to transporting defendant to the station, Officer Soraghan testified that he spoke to the manager of the tire shop and was informed that defendant was not employed there.

¶ 7 On cross-examination, Officer Soraghan testified that the other three individuals who had been sitting in the garage with defendant did "nothing" when he and his partner approached the garage. Defendant was the only person who reacted when they arrived at the scene. Although he was carrying his own firearm, Officer Soraghan confirmed that he did not pull out his weapon when he saw the gun in defendant's hand; rather he ordered defendant to walk out of the garage. He further confirmed that the shelf on which the two bags were recovered also contained tools and other items that one would expect to find at a tire shop. Officer Soraghan acknowledged that he never saw defendant have any physical contact with either of the bags recovered from the shelf. He also acknowledged that the gun was not tested for fingerprints.

¶ 8 Lieutenant Sean Loughran testified that he had a "conversation" with defendant at approximately 12:45 p.m. on June 29, 2012, in the "bull pen" at the 5th District Police Station. After advising defendant of his *Miranda* rights, defendant agreed to cooperate and converse with him. During that conversation, defendant discussed his history of selling marijuana, his previous convictions, and the events that led to his recent arrest. Specifically, defendant informed Lieutenant Loughran that he "purchased weed in large amounts," smoked some of the weed himself, and divided the rest of it into nickel bags and dime bags, which he then sold to "get by." Regarding the earlier events of that day, defendant stated that he woke up at approximately 9:45 a.m., smoked some marijuana, drove his vehicle over to the tire shop, smoked some more marijuana in his car, and then began selling the rest of his supply, which was "at least 15 nick[le] bags." Defendant further informed Lieutenant Loughran that he carried a firearm "to ward against him being robbed because he had been robbed on three prior occasions" and was shot once. Because he had seen two men in a truck drive past the tire shop several times that morning, defendant was worried he was going to be robbed again, and as a result, he kept his gun readily accessible. Defendant also acknowledged that he knew he was prohibited from owning a firearm due to his prior criminal convictions.

¶ 9 On cross-examination, Lieutenant Loughran testified that the conversation he had with defendant lasted approximately 25 minutes and that the statement was not memorialized on video or on paper. Instead, he testified that he summarized the statement that defendant provided in a written report. Lieutenant Loughran further testified that defendant did not sign a written *Miranda* rights waiver form; rather, he simply orally waived his rights.

¶ 10 Following the aforementioned testimony, the State introduced certified copies of defendant's prior felony convictions, which were necessary to satisfy the elements of the armed

habitual criminal and unlawful use of a weapon by a felon offenses. Thereafter, the State rested its case-in-chief and defense counsel moved for a directed verdict. In doing so, defense counsel challenged the credibility of Officer Soraghan, arguing that it was not believable that defendant dropped a weapon in front of the officer. Defense counsel also challenged the credibility of Lieutenant Loughran, noting that although the lieutenant "testifie[d] to the statement that the defendant gave, he offer[ed] nothing to corroborate the statement other than his own memory and his own self-interest in investigating the case." The circuit court, however, denied the motion, explaining that it found the testimony provided by the officers to be convincing.

¶ 11 Thereafter, defendant elected to exercise his right to testify. He acknowledged that prior to June 29, 2012, he was a convicted felon. Specifically, he had been convicted of narcotics offenses in 2002 and 2010 and was convicted of armed robbery back in 2004. Turning to the date in question, defendant recalled that he left his residence at approximately 9:30 a.m. and "proceeded to the tire shop *** to get some service on [his] tire." He arrived at the shop at approximately 10:10 a.m., spoke to the owner, and then went to the garage to wait for his tire to be fixed. There were three other customers who were also waiting in the garage area. Defendant estimated that he sat in the garage for approximately 35 minutes before he saw a Crown Victoria pull up to the rear of the tire shop. Then, an "officer jumped out of the car and came to the threshold of the shop and *** asked could he search all four of us." All four of the tire shop patrons were then subsequently searched, cuffed, and placed in the back of the officer's vehicle. Each of their names was then run through the police database. During that time, "a long line of officers" arrived on scene. Defendant testified that he and the three other men remained handcuffed in the backseat of the car for about 45 minutes while approximately six officers searched the garage. After the search was concluded, the three other men were "un-cuffed" and

released from the car. Defendant, however, was transported to the police station. He denied that he was in possession of a handgun that day or that he dropped a gun to the ground when he saw the officer approaching the garage. Defendant further denied that he had been in possession of cannabis. Although he recalled meeting Lieutenant Loughran at the 5th District Police Station, defendant denied that he ever told him that he smoked or sold marijuana. He also denied telling Lieutenant Loughran that he had been previously shot at and robbed before or that he had been in possession of a handgun.

¶ 12 On cross-examination, defendant denied having any real conversation with Lieutenant Loughran, explaining that the lieutenant merely "tried to talk to [him]" and tried to "coerce" him into saying something incriminating. Defendant also denied that he had discussed his criminal history with the lieutenant. Although he was still at the scene while the police officers searched the garage, defendant testified that he never saw any of the officers recover a gun.

¶ 13 Following defendant's testimony, the defense rested and the parties delivered closing arguments. After considering the evidence as well as the arguments made by the parties, the court found defendant guilty. In doing so, the court went through the testimony it had heard and concluded: "Having considered the totality of the testimony and having previously expressed my frustration that the Chicago Police Department does not have signed *Miranda* forms for individuals, I still at the conclusion of all of the evidence, find the testimony of Lieutenant Loughran and Officer Soraghan to be much more credible."

¶ 14 Defendant filed a post-trial motion, which the circuit court ultimately denied and the cause proceeded to a sentencing hearing where the parties presented evidence in aggravation and mitigation. After considering that evidence, defendant was sentenced to 8 years' imprisonment. This appeal followed.

¶ 15

ANALYSIS

¶ 16

On appeal, defendant argues that the circuit court improperly shifted the burden of proof to him during his bench trial in violation of his due process rights. In support of that argument, defendant points to a statement made by the circuit court when it denied his motion for a new trial. He argues that this statement reveals that the circuit court erroneously believed that defendant was required to prove his innocence beyond a reasonable doubt.

¶ 17

As a threshold matter, defendant acknowledges that he failed to object to the court's statement and properly preserve this issue for appellate review and invokes the plain error doctrine to avoid forfeiture.² The plain error doctrine provides a limited exception to the forfeiture rule and allows for review of forfeited issues on appeal if the evidence is closely balanced or the error is of such a serious magnitude that it affected the integrity of the judicial process and deprived the defendant of his right to a fair trial. Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967); *People v. Belknap*, 2014 IL 117094, ¶ 48; *People v. Sargent*, 239 Ill. 2d 166, 189 (2010); *People v. Piatkowski*, 225 Ill. 2d 551, 564-65 (2007). The first step in any plain error analysis is to determine whether any error actually occurred. *Piatkowski*, 225 Ill. 2d at 565.

¶ 18

The constitutional principles of due process mandate that a defendant charged with a criminal offense be presumed innocent and that the State bear the burden of proving a defendant's guilt of a charged offense beyond a reasonable doubt. U.S. Const., amend. XIV; Ill. Const. 1970, art. 1, §2. That burden never shifts to the accused; rather, it remains at all times with the State. *People v. Howery*, 178 Ill. 2d 1, 32 (1997); *People v. Cameron*, 2012 IL App (3d) 110020, ¶ 27. Accordingly, if the circuit court shifts the burden of proof to the defendant or

² We observe that defendant did not raise his plain error argument with respect to this issue in his initial appellate brief; rather, he raised it for the first time in his reply brief. Courts, however, have held that raising a plain error argument for the first time in a reply brief is "sufficient" to permit review of an issue for plain error. See, e.g., *People v. Ramsey*, 239 Ill. 2d 342, 412 (2010); *People v. Johnson*, 2015 IL App (1st) 133663, ¶ 11.

applies the wrong standard of proof, the principles of due process mandate that the defendant receive a new trial. See, e.g., *People v. DeVine*, 296 Ill. App. 3d 537, 544 (1998); *People v. Virella* 256 Ill. App. 3d 635 (1993). However, because the circuit court is presumed to know and properly apply the law, including the allocation of the burden of proof, this presumption will only rebutted if there is "strong affirmative evidence" to the contrary. *Howery*, 178 Ill. 2d at 32; *Cameron*, 2012 IL App (3d) 110020, ¶ 28. Whether the circuit court applied an incorrect legal standard is an issue of law subject to *de novo* review. *Cameron*, 2012 IL App (3d) 110020, ¶ 26.

¶ 19 In the instant case, the circuit court and both parties made multiple references to the State's burden of proof throughout the lower court proceedings. For example, in denying defendant's motion for a directed verdict once the State concluded its case-in-chief, the court, after reviewing the testimony that had been provided by Officer Soraghan and Lieutenant Loughran, stated: "So at this time, based on the testimony that's been presented, understanding the State consistently has the burden of proof beyond a reasonable doubt, respectfully, the motion in favor of the defendant will be denied." Thereafter, defendant testified, the defense rested, and the parties delivered closing arguments. During defendant's closing argument, defense counsel emphasized that the State's burden was to prove defendant guilty beyond a reasonable doubt and argued that the State failed to meet that burden because the account that defendant provided as to what happened at the tire shop was "just as believable" as the accounts provided by the State's witnesses.

¶ 20 After hearing the arguments made by the parties, the circuit court, after reviewing all of the testimony that it had heard, including defendant's, convicted defendant because it found that the testimony provided by Officer Soraghan and Lieutenant Loughran was more credible. Following defendant's conviction, he filed a motion for a new trial in which he again challenged

the credibility of the State's witnesses and argued that he was not proven guilty beyond a reasonable doubt given the lack of credible testimony provided by the State's witnesses. During a hearing on the motion, defense counsel again argued that defendant's testimony was "just as believable" as the testimony provided by the State's witnesses and that "all of the evidence *** [fell] far short in proving the defendant guilty beyond a reasonable doubt." The circuit court, after hearing arguments from the parties, denied the motion. In doing so, the court reiterated that the case turned on witness credibility and reaffirmed its conclusion that it found the testimony of the police officers to be more credible and that the State satisfied its burden of proving defendant guilty beyond a reasonable doubt. Specifically, the court stated:

"I had at the conclusion of the State's case when the defense moved for a finding in its favor, I commented, Judge Wasilewski's commented, the opinions of Justice Scariano used to offer every year about the trial judges being asked to direct themselves to enter a finding, and basically I suppose the burden would be if it was a jury would I feel that there was evidence to go to the jury, and it having met that standard and the evidence consistently proved beyond a reasonable doubt at the conclusion of the State's case for that reason I denied it. ***

I suppose I should limit it to what is in my notes and what would therefore be in the record in terms of the testimony, not as to what was introduced. So I will limit it to that, and basically as I say at the conclusion of the State's case, I found that they had met their burden of proof beyond a reasonable doubt. *The testimony of the defendant I obviously considered that, but did not feel that disproved the State's case beyond a reasonable doubt.*

The testimony of Lieutenant Loughran in terms of what the defendant told him about what he was doing in the garage and being robbed before and seeing a car would be consistent the observations made by Officer Soraghan.

At this time respectfully the motion for a new trial is denied."

¶ 21 Defendant relies entirely on the above-italicized statement to support his contention that the circuit court improperly applied an incorrect standard of proof. We, however, disagree that the statement constitutes strong affirmative evidence that the circuit court shifted the burden of proof to defendant and applied an incorrect legal standard to determine his guilt. The record reflects that the circuit court made multiple references to the State's burden of proving defendant guilty beyond a reasonable doubt both during and after defendant's trial. Indeed, the court correctly referenced the State's burden in the sentence immediately preceding the complained-of statement. When read in context, the complained-of statement merely shows that the circuit court carefully considered the testimony that defendant provided during the trial and considered defendant's credibility and theory of the case when making its determination. We therefore reject defendant's argument that the record affirmatively shows that the circuit court employed an incorrect legal standard to determine his guilt. As this court has stated before: "The decision of the circuit court will not be reversed based on an isolated statement. The burden of proof, beyond a reasonable doubt, is one of the most basic tenets in criminal law, known to laymen, lawyers, and judges alike. The presumption that the circuit court knows the law is not so easily rebutted in this case by one isolated statement, especially where the court demonstrated excellent knowledge of the law and facts throughout trial." *People v. Weston*, 271 Ill. App. 3d 604, 616 (1995).

¶ 22 In so finding, we are unpersuaded by defendant's reliance on *People v. Virella* 256 Ill. App. 3d 635 (1993) and *People v. Devine*, 295 Ill. App. 3d 537 (1998), as those cases are readily distinguishable. In *Virella*, the circuit court did not reference the State's burden to prove the defendant guilty beyond a reasonable doubt, but instead referred to the clear and convincing standard on four separate occasions throughout the lower court proceedings. *Virella*, 256 Ill. App. 3d at 638. Based on those statements, the reviewing court reversed the defendant's conviction, finding that the circuit court's "repeated reference to the totality of the State's evidence as clear and convincing constitutes an affirmative showing that the court misapplied the law." *Id.* at 639.

¶ 23 Similarly, in *Devine*, the defendant's conviction was also reversed where the circuit court made multiple "incorrect statements of law [that were] inconsistent with the well-established principles that [a] defendant is constitutionally entitled to the presumption of innocence and proof beyond a reasonable doubt when charged with a violation of criminal law." *Devine*, 295 Ill. App. 3d at 544. Specifically, the circuit court, following defense counsel's closing argument, stated: "[a]ll the defendant has to do is establish that there's reasonable doubt, reasonable doubt that in fact the person is not guilty of an offense. And any type—any kind of tie is broken by the law, and that tie is broken in favor of the defendant." *Id.* Thereafter, in finding the defendant guilty, the court again demonstrated its erroneous belief that the defendant was required to prove his innocence, stating: "the People's *prima facie* case that was established by the State had not been rebutted. It hadn't been rebutted. All I heard were unsupported theories without anything other than that." *Id.*

¶ 24 Unlike the courts in *Virella* and *Devine*, the circuit court in the instant case did not make multiple misstatements of law or reference incorrect legal standards; rather, the court repeatedly

and correctly referenced the State's burden of proof both during and after trial. Having found that no error occurred, we need not consider defendant's remaining plain error arguments. *People v. Johnson*, 218 Ill. 2d 125, 139 (2005) ("Clearly, there can be no plain error if there is no error").

¶ 25

CONCLUSION

¶ 26

The judgment of the circuit court is affirmed.

¶ 27

Affirmed.