2015 IL App (1st) 140373-U

FOURTH DIVISION
November 25, 2015

No. 1-14-0373

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. 10 CR 19718
	)	
LONNIE ELLINGTON,	)	Honorable
	)	Diane Gordon Cannon,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Ellis concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Plain-error review was not warranted where defendant could not demonstrate that the evidence in his burglary trial was so closely balanced that the circuit court's error concerning its questioning of prospective jurors on basic principles of the law threatened to tip the scales of justice against him.

¶ 2 Following a jury trial, defendant Lonnie Ellington was found guilty of burglary and sentenced to eight years in prison as a Class X offender. On appeal, he contends that the circuit court committed plain error when questioning prospective jurors on basic principles of law, and we should reverse and remand his case for a new trial. For the reasons that follow, we affirm.

¶ 3 The State charged defendant with burglary and proceeded to a jury trial. Prior to the trial and during jury selection, the parties selected 10 jurors from the first venire. The court then brought in a second venire and informed the prospective jurors as follows:

> "All right. Ladies and gentlemen, I'm going to go over some principles of law. As I indicated earlier the defendant is presumed innocent of the charges against him. The State has the burden of proving him guilty beyond a reasonable doubt. He is not required to prove his innocence. Is there anybody who has any disagreement or qualms with that proposition of law? No response.
>
> Defendant has a right to testify. He has a right not to testify. If he exercises his right not to testify, is there anybody who would hold that against him? No response. Should the State meet their burden of proof beyond a reasonable doubt, is there anybody seated in the jury box who could not or would not go into the jury room with your fellow jurors and follow the law that governs this case as I give it to you and sign a verdict form of guilty? Anybody who could not or would not do that for any reason?
>
> Should the State fail to meet their burden of proof beyond a reasonable doubt, is there anybody seated in the jury box who could not or would not again go into the jury room with your fellow jurors and the law that governs this case and sign a verdict form of not guilty? No response."

The remaining jurors were selected, and the case proceeded to trial.

¶ 4 At trial, Officer Jarosz of the Chicago police department testified that at approximately 4:30 a.m. on October 14, 2010, he received a radio dispatch alerting him of a burglary in

progress at Star Trek convenience store located at 420 West 79th Street. When Jarosz arrived at the convenience store, he saw two garbage cans lined up in front of a broken window in the store. From approximately 20 feet away and with an unobstructed view, he observed defendant "stepping out of the window." As Jarosz and his partner exited their car, defendant put a backpack on, made eye contact with the officers and began to walk away from them. Another police car arrived at the store immediately after Jarosz, and the officers detained defendant.

¶ 5 Defendant was wearing a black hoodie, which contained some shards of glass, gray and black gloves, and had a black ski mask in his pocket. When the officers looked in defendant's backpack, they observed "a lot" of tobacco products, including "cigarillos." The officers put defendant into a police car, and they returned to the store. Jarosz observed a broken window with metal security bars crisscrossing the inside of the window. He noted that the store was "messed up inside" and looked like "somebody was in there messing around." Jarosz also saw a screwdriver just inside the broken window, and a bag of t-shirts and a bag of DVDs just outside the store by the broken window.

¶ 6 On cross-examination, Jarosz testified that when he received the call about a burglary in progress, he did not receive a description of the suspect. He admitted that the officers did not take a photograph of defendant's black hoodie or inventory any of the shards of glass found on the hoodie. He also admitted that he did not climb through the broken window because he could not "get through" the metal bars crisscrossing the window. However, Jarosz stated that he was approximately 100 pounds heavier and five inches taller than defendant, and reiterated that he

witnessed defendant come out of the broken window. Jarosz did not remember if defendant had any cuts or if he was bleeding when the officers detained him.

¶ 7 Fadi Rafati, owner of Star Trek convenience store, testified that on October 13, 2010, he closed the store at 8 p.m. and left no later than 8:15 p.m. Before leaving, he swept and mopped the store's floors, secured the windows, and then took the garbage out. Although the front of the store was on 79th Street, the garbage containers were not located on 79th Street, but rather on another street.

¶ 8 At approximately 5 a.m. the next day, Rafati received a phone call from the police, alerting him that his store had been broken into and requesting that he come to the store. When he arrived at his store, he observed garbage cans in front of his store, but noted at trial that they did not belong to him. He said the garbage cans looked like ones used by houses, explaining that businesses are required to use metal garbage cans.

¶ 9 Rafati entered his store and observed that his cigars were missing, boxes were empty on the floor and generally, the scene was a "mess," which was not the way he left the store the night before. Rafati noted that a bag of t-shirts outside the broken window contained a specific brand of t-shirts and his store, to his knowledge, was the only one in the area to sell that brand. Additionally, a bag of DVDs outside the store contained DVDs that he watched while working at his store, which were ordinarily placed in a basket underneath the cash register.

¶ 10 Later, Rafati went to the police station and met with a detective. The detective showed him some cigars, which he identified as his store's because the cigars had his tags and one of the cigars had his handwriting for the price. He stated that all of the tobacco products he saw at the

police station "fit exactly" the empty boxes from his store. Finally, Rafati denied that he gave anyone, including defendant, permission to enter or take anything from his store.

¶ 11 On cross-examination, Rafati admitted his store sold screwdrivers and that a loose screwdriver found at the scene was his. He also stated that he was missing all the change from the cash register, which was approximately $18 to $28, but the register did not appear to be missing any bills.

¶ 12 The State rested. Defendant moved for a directed verdict, but the court denied the motion. Defendant then orally moved to exclude the name of his prior burglary conviction if he were to testify and the State chose to impeach him with the conviction because his instant trial was also for burglary. The court denied the motion. Defendant chose not to testify or present any evidence on his behalf.

¶ 13 After argument, and during deliberations, the jury submitted a note to the court, asking if it could "get a copy of the police reports or report signed by another officer." Defense counsel objected to giving the jury any further documentation. The court and the parties agreed that the court should inform the jury to continue deliberating based on the exhibits they received and the evidence they heard. Shortly thereafter, the jury indicated that it was "hung" and asked the court "[w]hat is the next step or procedure to be followed?" The court noted that the jury had deliberated for barely "an hour" and instructed it to continue deliberating. Soon after, the jury returned with a verdict, finding defendant guilty of burglary.

¶ 14 Defendant filed a motion for a new trial, which did not include any argument concerning the alleged error during jury selection. The court denied the motion, and it subsequently

sentenced defendant as a Class X offender, based on his criminal background, to eight years in prison with a term of three years' mandatory supervised release. This appeal followed.

¶ 15 On appeal, defendant contends the circuit court committed plain error when it violated Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) during its questioning of prospective jurors on basic principles of law, which necessitates a reversal and remand for a new trial.

¶ 16 Initially, we note, and the parties agree, that defendant forfeited review of his claim on appeal because he did not object to the court's questioning of prospective jurors during jury selection or include the issue in his posttrial motion. See *People v. Colyar*, 2013 IL 111835, ¶ 27 ("Generally, to preserve an issue for appellate review, a party must raise the issue before the trial court and in a posttrial motion."). Nevertheless, defendant argues we may review his claim for plain error.

¶ 17 Under the plain-error doctrine, a reviewing court may consider a forfeited argument on appeal when a "clear and obvious error" occurred and either: (1) "the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error" or (2) "that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Belknap*, 2014 IL 117094, ¶ 48. Defendant concedes, and the State agrees, that alleged errors of Illinois Supreme Court Rule 431(b) are not so serious to affect the fairness of a defendant's trial or the integrity of the judicial process under the second prong of the plain-error doctrine. See *People v. Wilmington*, 2013 IL 112938, ¶ 33 citing *People v. Thompson*, 238 Ill. 2d 598, 615 (2010). Accordingly, the parties agree that plain error could

only occur under the first prong of the doctrine. However, before deciding whether the evidence was closely balanced, the first step in any plain-error analysis is to determine if any error occurred. *Wilmington*, 2013 IL 112938, ¶ 31. Our review proceeds *de novo*. *Id.* ¶ 26.

¶ 18 Illinois Supreme Court Rule 431(b) requires the circuit court to ask each prospective juror, either individually or in a group, whether the juror:

> "understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that if a defendant does not testify it cannot be held against him or her." Ill. S. Ct. R. 431(b) (eff. July 1, 2012); see also *Wilmington*, 2013 IL 112938, ¶¶ 25-32.

¶ 19 In the present case, defendant argues that the circuit court violated Rule 431(b) when it failed to ask prospective jurors whether they "understood" and "accepted" the first two principles enunciated in Rule 431(b). Additionally, defendant observes the court failed to acknowledge the third and fourth principle enunciated in Rule 431(b). The State concedes the court failed to follow Rule 431(b), and therefore, the court committed error when questioning prospective jurors. Accordingly, the court committed a clear and obvious error, and we must determine whether the evidence was "so closely balanced that the error alone threatened to tip the scales of justice against" defendant. *Belknap*, 2014 IL 117094, ¶ 48.

¶ 20 Defendant was convicted of burglary, which occurs when an individual "without authority *** knowingly enters or without authority remains within a building *** with intent to

commit therein a felony or theft." 720 ILCS 5/19-1(a) (West 2010); see *People v. Smith*, 2014 IL App (1st) 123094, ¶ 13. Defendant does not dispute any single element of the crime, rather he argues as a whole, the evidence of his guilt was so closely balanced as to require review for plain error. When a reviewing court examines whether the evidence at trial was closely balanced, it must undertake "a commonsense assessment of the evidence within the context of the circumstances of the individual case." *Belknap*, 2014 IL 117094, ¶ 52. The evidence will only be deemed closely balanced if the defendant can demonstrate that "but for the error, the outcome of the trial would likely be different." *People v. Sebby*, 2015 IL App (3d) 130214, ¶ 51. The defendant bears the burden of persuasion to demonstrate the evidence was closely balanced. *Wilmington*, 2013 IL 112938, ¶ 43.

¶ 21 In the present case, we do not find that defendant has met his burden of persuasion to demonstrate the evidence was closely balanced. Officer Jarosz testified that he and a partner responded to a burglary-in-progress call at a convenience store early in the morning. Upon arriving at the scene, Jarosz observed defendant coming out of a broken window. Jarosz was only 20 feet away from defendant and his view was unobstructed. Jarosz described defendant as wearing a black hoodie, black and gray gloves, and having a black ski mask in his pocket. Additionally, shards of glass were found on defendant's hoodie. A search of defendant's backpack by the officers revealed multiple tobacco products. Fadi Rafati, the store's owner, testified that the tobacco products shown to him at the police station matched products missing from his store. Finally, the testimony of Jarosz and Rafati was unimpeached and uncontradicted.

¶ 22 Nevertheless, defendant argues multiple facts demonstrate the evidence at trial was closely balanced. First, he notes that Jarosz admitted that he would not have been able to fit through the broken window. However, Jarosz acknowledged that he was approximately 100 pounds heavier and five inches taller than defendant. Moreover, Jarosz unequivocally testified he saw defendant "stepping out of the window." Next, defendant argues that the State did not corroborate Jarosz's assertion that defendant's black hoodie had shards of glass on it. The State already had a strong case against defendant, and it presented the uncontradicted and unimpeached testimony of Jarosz who affirmatively stated defendant's hoodie had shards of glass on it. More evidence to this point would have merely been cumulative, especially considering the other evidence presented against defendant at trial.

¶ 23 Additionally, defendant argues that the jury's notes during deliberation demonstrate the "closely balanced nature of the evidence" in his case. Specifically, he notes the jury requested a copy of the police reports from the case and after deliberating for approximately an hour, the jury noted it was hung. While we cannot know the exact reason for the jury's request for the police records, this request does not necessarily indicate the evidence was closely balanced. See *People v. Minniweather*, 301 Ill. App. 3d 574, 580 (1998) (stating a jury's "request to review evidence and [its] questions posed to the court during deliberations *** merely indicates that the jury took its job seriously and conscientiously worked to come to a just decision"). Furthermore, although the jury indicated it was hung, the jury had deliberated for barely an hour. See *People v. Cotton*, 393 Ill. App. 3d 237, 260 (2009) (stating "the mere fact that the jury indicated in one note that it

could not reach a decision does not render the evidence closely balanced"). Soon after being instructed by the court to continue deliberating, the jury returned with a guilty verdict.

¶ 24 Finally, defendant points out that Rafati stated the cash register was missing a significant amount of change, yet no change was found on defendant. Defendant is correct that there is an inconsistency between these two facts, but we do not find that this single inconsistency counterbalances the strong, clear evidence of his guilt. Defendant has not convinced us that if the jury had been properly instructed pursuant to Illinois Supreme Court Rule 431(b) (eff. July 1, 2012), the outcome of his trial would have been different. See *Sebby*, 2015 IL App (3d) 130214, ¶ 51. Therefore, we cannot say that defendant has met his burden of persuasion to demonstrate the evidence was "so closely balanced that the error alone threatened to tip the scales of justice against" him. *Belknap*, 2014 IL 117094, ¶ 48; see *Wilmington*, 2013 IL 112938, ¶ 43. Accordingly, because we have found the evidence was not closely balanced, defendant is not entitled to review under the plain-error doctrine. See *Belknap*, 2014 IL 117094, ¶ 70.

¶ 25 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 26 Affirmed.