2016 IL App (1st) 140697-U

THIRD DIVISION
June 1, 2016

No. 1-14-0697

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. 11 CR 18764
	)	
DERRICK MACKLIN,	)	Honorable
	)	Luciano Panici,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE MASON delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: Judgment of the circuit court affirmed where defendant forfeited review of the trial court's error in providing Illinois Pattern Jury Instructions, Criminal, No. 3.13X (4th ed. 2000) over his objection, and he could not establish plain error.

¶ 2 Following a jury trial, defendant Derrick Macklin was convicted of being an armed habitual criminal and sentenced to 12 years' imprisonment. On appeal, Macklin contends the trial court erred in providing Illinois Pattern Jury Instructions, Criminal, No. 3.13X (4th ed. 2000)

(IPI Criminal 3.13X) as the instruction should only be given when the defendant testifies, and here Macklin did not testify. We affirm.

¶ 3 Macklin was charged with two counts of being an armed habitual criminal (Counts 1 and 2) resulting from his alleged possession on October 10, 2011, of two firearms—a .38 caliber revolver and a .45 caliber semiautomatic handgun. An individual commits this offense by possessing a firearm after previously being convicted of two prior qualifying felonies. 720 ILCS 5/24-1.7(a) (West 2010).

¶ 4 Prior to trial, the court held a jury instruction conference. During the conference, the State requested that the court give the jury IPI Criminal 3.13X, which reads:

> "Ordinarily, evidence of a defendant's prior conviction of an offense may [be considered by you only as it may affect his believability as a witness and must] not be considered by you as evidence of his guilt of the offense with which he is charged.
>
> However, in this case, because the State must prove beyond a reasonable doubt the proposition that the defendant has previously been convicted of ____, you may [also] consider evidence of defendant's prior conviction of the offense of ____, [only] for the purpose of determining whether the State has proved that proposition." IPI Criminal 3.13X.

Defense counsel objected to the instruction, stating "[b]asic objection, your Honor." The court stated that IPI Criminal 3.13X would be provided over the objection. Defense counsel made no representation as to whether Macklin would testify at trial.

¶ 5 At trial, Officer Daniel Walz testified that at about 5:30 p.m. on October 10, 2011, he was dispatched to the area of 159th Street and Carse Avenue in Harvey, IL for a shots fired call involving two black male suspects, one with braided hair and wearing a backpack. On route to

that location, near 159th Street and Lathrop Avenue, Walz saw two black men fitting the description. He identified Macklin in court as the man with braided hair and a backpack.

¶ 6 Walz made a u-turn into a vacant lot, and then drove his squad car in the men's direction. He parked his car on 159th Street, exited, and said to the two men walking together, "Police. Come here." The unknown suspect fled on foot and Macklin followed him. Walz pursued them and lost sight of Macklin for a "split second" when he turned into a nearby alley.

¶ 7 As Walz entered the alley, he saw Macklin crouched behind a bush inside the fenced-in backyard of the house at 15830 Fisk Street shoving something into the backpack he had been wearing. Walz also noticed Macklin was no longer wearing a dark shirt, but, instead, a white tee shirt. Macklin and Walz made eye contact and Walz again announced his office and told Macklin to "freeze." Macklin dropped the backpack and fled again, but eventually surrendered to Walz.

¶ 8 After Macklin was arrested, Walz returned to where Macklin left the backpack. Inside, among other items, was a black hooded sweatshirt and a .38 caliber revolver, loaded with four live rounds and two spent casings. Walz found a fully-loaded .45 caliber handgun next to the backpack.

¶ 9 Walz acknowledged that Macklin and the unknown suspect did not run away from him when he initially passed them in his squad car before making a u-turn, or after he parked near them. The two men were not doing anything illegal that Walz could see when he initially approached them. After Walz announced his presence, both men ran away. Walz acknowledged that it is a common practice for individuals to run when they see police officers, and that people flee for any number of reasons. Walz further testified that Harvey is a high-crime area and he did not know what happened to the backpack Macklin left near the bush while Walz continued to chase him. Walz never searched the bushes located at 15830 Fisk Street prior to October 10, did

not know if the .45 caliber handgun had been there prior to that date, and did not see Macklin with a gun. The recovered backpack did not contain anything that would indicate Macklin owned it, Macklin's fingerprints were not found on the handguns, and no gunshot residue was found on him or his clothing.

¶ 10 The parties stipulated that Macklin was previously convicted of two qualifying felony offenses in 2007 and 2009.

¶ 11 Macklin elected not to testify and rested without presenting any evidence. The matter proceeded to closing arguments, during which the prosecutor referred to Macklin as a convicted felon multiple times. Following closing arguments, the trial court instructed the jury as to the law, including IPI Criminal 3.13X.

¶ 12 The jury found Macklin guilty of both counts of being an armed habitual criminal. Macklin filed a motion for a new trial, arguing that the evidence was insufficient to convict him. The court denied the motion, merged Count 2 into Count 1, and sentenced Macklin to 12 years' imprisonment.

¶ 13 On appeal, Macklin contends the trial court erred in providing IPI Criminal 3.13X where the committee comments for the instruction provide that if the defendant does not testify, IPI Criminal 3.13X should be given only at the defendant's request. Here, Macklin did not testify or request IPI Criminal 3.13X. On this basis alone, Macklin requests reversal and remand for a new trial.

¶ 14 As an initial matter, the State contends that Macklin forfeited this error because he acquiesced in the giving of this instruction. See *People v. Mescall*, 379 Ill. App. 3d 670, 677 (2008) (quoting *People v. Rachel*, 123 Ill. App. 3d 600, 606 (1984)) (" '[i]t is axiomatic that a defendant cannot complain of error in instructions to which he has acquiesced, induced or invited

or which were given at his request' "). As support, the State points to the jury instruction conference held prior to trial. At the time, Macklin had not decided whether to testify, and when IPI Criminal 3.13X was raised, defense counsel merely stated "[b]asic objection, your Honor." No explanation was provided for the basis of this objection.

¶ 15 According to the State, even more importantly, when it rested and Macklin chose not to testify, the trial court re-opened the jury instruction conference, and after defense counsel noted that certain corrections to the instruction were required, the court afforded the parties time to review them. Despite expressing a need to correct the jury instructions, no objection was raised to the inclusion of IPI Criminal 3.13X, nor was the instruction changed. The State thus maintains that given the fact that Macklin raised an unexplained "basic objection" to this instruction prior to trial before he had decided whether to testify, the objection could not have been directed to the issue now raised on appeal, namely, the alleged inappropriateness of the instruction in a case where a defendant does not testify. Moreover, the State maintains that, given the fact that Macklin neither raised an objection to the instruction nor requested to change it after he decided he would not testify and the instruction conference was reopened, he acquiesced to the trial court giving IPI Criminal 3.13X to the jury. We disagree.

¶ 16 Nothing in the record indicates that Macklin acquiesced to IPI Criminal 3.13X, or affirmatively requested the instruction. The record clearly shows that Macklin objected to IPI Criminal 3.13X, albeit on unspecified grounds, and that the trial court noted that the instruction would be given over his objection. Furthermore, Macklin never affirmatively requested that the court give IPI Criminal 3.13X. This case is unlike those where, having requested the trial court to proceed in a specific manner, the defendant was deemed to have invited the error. See *e.g.*, *People v. Villareal*, 198 Ill. 2d 209, 227-28 (2011) (invited error precluded defendant from

arguing on appeal that a verdict form was improper where it was submitted by defense counsel). Here, the record unequivocally shows that IPI Criminal 3.13X was proffered by the State and Macklin objected to the instruction.

¶ 17 Nevertheless, both parties agree that Macklin failed to preserve the issue by not including it in his motion for a new trial. See *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007). Macklin thus requests that we review the issue as plain error. A limited exception to the forfeiture rule is contained in Supreme Court Rule 451(c) (eff. July 1, 2006), which provides that "substantial defects" in criminal jury instructions are not forfeited by the failure to make timely objections if the interests of justice require. This rule is coextensive with the plain error doctrine (*People v. Keene*, 169 Ill. 2d 1, 32 (1995)), and is limited either to the correction of "grave errors," or may apply where the case is factually close and fundamental fairness requires that the jury be properly instructed (*People v. Sargent*, 239 Ill. 2d 166, 189 (2010)).

¶ 18 Even if relief under Rule 451(c) was improper, plain error remains an avenue for relief. *Keene*, 169 Ill. 2d at 32. Plain error permits a reviewing court to consider unpreserved error when a clear or obvious error occurred and (1) the evidence is closely balanced, regardless of the seriousness of the error, or (2) the error is so serious that it affected the fairness of the defendant's trial, regardless of whether the evidence close. *Sargent*, 239 Ill. 2d at 189-91.

¶ 19 Macklin limits his request for plain error review to the closely balanced prong, which requires him to prove "prejudicial error," *i.e.*, Macklin must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him. *People v. Herron*, 215 Ill. 2d 167, 187 (2005). We note that the first step in plain error analysis is to determine whether an error occurred at all. *Sargent*, 239 Ill. 2d at 189.

¶ 20 The purpose of jury instructions is to provide the jury with the law to apply to the evidence in order to reach a correct result. *People v. Pierce*, 226 Ill. 2d 470, 475 (2007). Fundamental fairness requires that the trial court in a criminal case fully and properly instruct the jury on the elements of the offense, burden of proof, and presumption of innocence. *Id.* A trial court errs in providing jury instructions if they are "unclear, mislead the jury, or are not justified by the evidence and the law." *People v. Lovejoy*, 235 Ill. 2d 97, 150 (2009).

¶ 21 Here, use of IPI Criminal 3.13X was error. The committee note to IPI Criminal 3.13X states, in pertinent part, that "[i]f the defendant does not testify at trial, this instruction should be given *only* at the defendant's request; otherwise, this instruction should *not* be given." (Emphasis in original.) IPI Criminal 3.13X, Committee Note. Because Macklin did not testify and did not request the instruction and, in fact, objected to the instruction when it was tendered by the State, it should not have been given. In failing to follow the committee note, the court erred in giving IPI Criminal 3.13X. See *People v. Herron*, 215 Ill. 2d 167, 191 (2005) (relying on committee note in finding plain error in failing to excise the word "or" in identification instruction); *People v. Cacini*, 2015 IL App (1st) 130135, ¶¶ 51-52 (relying on committee note to find court erred in omitting instruction on burden of proof for self-defense).

¶ 22 As Macklin acknowledges, there is no case law that directly addresses the effect of this error. But the few Illinois cases to address IPI Criminal 3.13X in other contexts shed light on why the use of the instruction here was error. For example, in *People v. Lewis*, 2014 IL App (1st) 122126, a case in which the defendant testified, he asserted that the trial court erred in providing IPI Criminal 3.13X as he stipulated to his status as a felon for purposes of his charged offense and that the instruction inappropriately suggested to the jury that it may consider the prior conviction as propensity evidence of his guilt. *Id.* ¶ 43. We noted that the instruction served two

purposes: to inform the jury that the prior convictions were admissible as substantive evidence and to instruct the jury that the prior convictions were admissible as impeachment against the defendant. *Id*., ¶ 49. See also *People v. Hester*, 271 Ill. App. 3d 954, 960 (1995).

¶ 23 Unlike the defendants in *Lewis* and *Hester*, Macklin did not testify and his credibility was not at issue. Accordingly, IPI Criminal 3.13X, which instructed the jury to consider Macklin's prior convictions as they affected his believability, should not have been given as it improperly suggested that Macklin's credibility was at issue.

¶ 24 Notwithstanding the foregoing, this error does not rise to the level of plain error where the evidence at trial was not so closely balanced that the error alone threatened to tip the scales of justice against Macklin.

¶ 25 First, the evidence here was not closely balanced. An individual commits the offense of armed habitual criminal when he possesses a firearm after having been convicted of two or more predicate offenses. 720 ILCS 5/24-1.7(a) (West 2010). At trial, Macklin stipulated that he had been convicted of two predicate felony offenses and, therefore, the only contested issue was whether he possessed a firearm.

¶ 26 Possession may be actual or constructive. *People v. Givens*, 237 Ill. 2d 311, 335 (2010). Constructive possession exists where the defendant had knowledge of the presence of the weapon, and immediate and exclusive control over the area where it was found. *People v. McCarter*, 339 Ill. App. 3d 876, 879 (2003). Knowledge may be, and ordinarily is, proven through circumstantial evidence. *People v. Ortiz*, 196 Ill. 2d 236, 260 (2001).

¶ 27 It is uncontested that Macklin was not in actual possession of the firearms. The evidence does, however, show he was in constructive possession of both firearms. While responding to a shots-fired call, Walz saw two black men, including Macklin, fitting the description provided to

him by "dispatch." Walz exited his squad car, identified himself as a police officer and ordered the men to "come here." Both men fled and Walz pursued them, losing sight of Macklin for a "split second" as he turned into a nearby alley. As Walz entered the same alley, he saw Macklin crouched behind a bush inside the backyard of the house at 15830 Fisk Street shoving something into the backpack he had been wearing. After Macklin and Walz made eye contact, and Walz again announced his office and told Macklin to "freeze," he dropped the backpack and fled again. Walz apprehended Macklin shortly thereafter and returned to where Macklin left the backpack. Walz searched the backpack and found a loaded .38 caliber revolver with spent casings. A loaded .45 caliber handgun was also found next to the backpack. This evidence provided by Walz, which was not impeached or contradicted by any other evidence, overwhelmingly established Macklin's constructive possession of both the backpack and guns found inside and beside it. Therefore, the evidence regarding defendant's possession of the firearms was not closely balanced.

¶ 28 Second, the error did not, standing alone, threaten to tip the scales of justice against Macklin. Although the court improperly instructed the jury on IPI Criminal 3.13X, it properly instructed the jury on Illinois Pattern Jury Instructions, Criminal, No. 2.04 (4th ed. 2000) (IPI Criminal 2.04). IPI Criminal 2.04 stated that "[t]he fact that the defendant did not testify must not be considered by you in any way in arriving at your verdict." *Id*. This instruction clearly told the jury not to use Macklin's silence against him. We are thus not persuaded that the jury drew an impermissible inference from Macklin's failure to testify as a result of IPI Criminal 3.13X. Nor is there any reason to suppose the jury was "confused" where Macklin did not testify at trial and the instruction referred to his "believability as a witness." Macklin was not a "witness" whose believability was in question. Taking IPI Criminal 2.04 together with IPI Criminal 3.13X, we do

not see how the jury could have believed it was required to assess Macklin's credibility in this case. See *People v. Walker*, 392 Ill. App. 3d 277, 293 (2009) (examining whether the instructions, taken as a whole, fairly, fully and comprehensively apprised the jury of the relevant law or whether they misled the jury and prejudiced the defendant).

¶ 29 Macklin maintains that the error unfairly highlighted his criminal record for the jury. As there is little authority on the use of IPI Criminal 3.13X, Macklin relies on cases involving the erroneous use of Illinois Pattern Jury Instructions, Criminal, No. 3.13 (4th ed. 2000) (IPI Criminal 3.13), which states, "[e]vidence of a defendant's previous conviction of an offense may be considered by you only as it may affect his believability as a witness and must not be considered by you as evidence of his guilt of the offense with which he is charged." The committee note for IPI Criminal 3.13 states that the instruction should only be given at the request of the defendant when he has been impeached by proof of a prior conviction. IPI Criminal 3.13, Committee Note.

¶ 30 In support of his contention that the error emphasized his record, Macklin relies on *People v. Fultz*, 2012 IL App (2d) 101101, *People v. Cook*, 262 Ill. App. 3d 1005 (1994), and *People v. Gibson*, 133 Ill. App. 2d 722 (1971). Yet in each of these cases, the court cited additional errors, the cumulative effect of which denied the defendant a fair trial. *Fultz*, 2012 IL App (2d) 101101, ¶ 76 (trial was a "credibility contest" and erroneous instruction coupled with limitation on cross-examination of State's key witness required reversal); *Cook*, 262 Ill. App. 3d at 1019 (cumulative effect of defense counsel's errors warranted a new trial); *Gibson*, 133 Ill. App. 2d at 726 (erroneous instruction plus "highly prejudicial" cross-examination of defense witnesses). In none of these cases did the error in giving IPI Criminal 3.13, standing alone, prompt reversal.

¶ 31 Here the sole error identified by Macklin is that IPI Criminal 3.13X was given over his objection. While Macklin also complains that the State emphasized his criminal record during closing argument, there was nothing improper in this given that Macklin's prior convictions were an element of the offenses charged. Thus, regardless of the fact that Macklin stipulated to those offenses, the State was allowed to comment on Macklin's criminal record in closing.

¶ 32 The circuit court's conduct in giving IPI Criminal 3.13X over Macklin's objection was error, but under the circumstances presented here, it does not constitute plain error. Therefore, we honor Macklin's procedural default and affirm the judgment of the circuit court.

¶ 33 Affirmed.