2017 IL App (1st) 143431-U

No. 1-14-3431

Order filed November 17, 2017

Fifth Division



IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 12 MC6 007072 |
| | ) | |
| DEANDRE BARRON, | ) | Honorable |
| | ) | Laurence J. Dunford, |
| Defendant-Appellant. | ) | Judge, presiding. |

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Reyes and Justice Lampkin concurred in the judgment.

**ORDER**

¶ 1 *Held*: Defendant's conviction for violation of owner's duties is reversed because the trial court committed plain error in failing to comply with Illinois Supreme Court Rule 431(b) by not ensuring that jurors understood the principles stated therein.

¶ 2 Following a jury trial, defendant Deandre Barron was convicted of violation of owner's duties of the Humane Care for Animals Act (the Act) (510 ILCS 70/3(c) (West 2012)), and sentenced to 79 days in the Cook County Department of Corrections, time considered served. On appeal, defendant contends that: (1) the State failed to prove beyond a doubt that he fell under

the Act's definition of owner; (2) the trial court committed plain error by failing to comply with Illinois Supreme Court Rule 431(b) during jury selection; and (3) his conviction should be reversed because the State engaged in prosecutorial misconduct during closing argument. For the reasons set forth herein, we reverse the judgment of the trial court and remand for a new trial.

¶ 3 Defendant was charged by misdemeanor complaint with one count of cruel treatment of an animal (510 ILCS 70/3.01 (West 2012)). On August 24, 2012, the State charged defendant with violation of owner's duties (510 ILCS 70/3(c) (West 2012)) and subsequently nol-prossed the cruel treatment to animal count. The case proceeded to a jury trial.

¶ 4 During jury selection, the trial court admonished the first group of 14 prospective jurors as follows:

> THE COURT: Under the law, the defendant is presumed to be innocent of the charge pending against him. This presumption remains at all through all stages of the trial, [up] to and including any deliberations on the verdict, and is not overcome unless, from all the evidence in the case, you are convinced beyond a reasonable doubt that the defendant is guilty.
>
> The State has the burden of proving that guilt beyond a reasonable doubt, and this burden remains with the State throughout the case. The defendant is not required to prove his innocence nor is he required to present any evidence on his behalf. He may rely on this presumption of innocence.

¶ 5 After the court individually questioned each juror, the parties convened outside the presence of the jury in order to select jurors. The State reminded the trial court that it must ask

the potential jurors the *Zehr* questions. See *People v. Zehr*, 103 Ill. 2d. 472, 476 (1984). The court then again addressed the first group of prospective jurors:

> THE COURT: We came back early because I forgot to ask some very, very important questions. I'm going to ask you as a whole, and if you have a problem with these questions, raise your hand.
>
> A defendant is presumed innocent until the jury during deliberations determines from all of the evidence that the defendant is guilty beyond a reasonable doubt. That's a presumption which means that that's what's here until you've heard the evidence and decide the case differently.
>
> Does anybody have a problem or any preconceived idea about that presumption? No response.
>
> Now, the State has the burden of proving the defendant guilty beyond a reasonable doubt. Does anyone disagree with the rule requiring the State to prove the defendant guilty beyond a reasonable doubt? The defendant does not have to present any evidence at all or testify in the case. It mainly relies on his presumption of innocence.
>
> Does anyone have difficulty with extending that courtesy or that rule to the defendant throughout the course of the trial?
>
> Wait until all of the evidence, the arguments of Court and the Court's instructions on the law before making up your mind one way or the other.
>
> Everybody's answering, nodding in the affirmative.
>
> Anything else? Did I miss anything?
>
> Let the record reflect that there were no responses to any of my questions.

¶ 6 Thereafter, outside the presence of the jury pool, the parties selected seven jurors from the first group. The court called a second group of 14 prospective jurors. The court then immediately addressed the juror regarding the *Zehr* principles:

THE COURT: All right. Those of you in the jury box, if you have a - - I'm going to ask you to raise your hand if you mean yes to these questions. Okay?

The defendant is presumed to be innocent until the jury determines after deliberation that the defendant is guilty beyond a reasonable doubt. Does everyone agree with this rule of law?

All said yes

* * *

THE COURT: The State has the burden of proving the defendant guilty beyond a reasonable doubt. Does everyone agree with this rule of law?

All hands were raised.

The defendant does not have to present any evidence at all and may rely upon the presumption of innocence. Does everyone agree with this rule of law? Raise your hand if you do.

All hands were raised.

The defendant does not have to testify. Would you hold that fact against the defendant if he did not testify? If you would, raise your hand.

That was a trick question just to see if everybody was listening.

Let the record show no one raised their hand, and everyone indicated that they would not hold the fact that the defendant did not testify against the defendant.

¶ 7 After selecting five more jurors and two alternate jurors from this group, the trial commenced.

¶ 8 Daniel Junker, a parole agent for the Illinois Department of Corrections, testified that, on July 25, 2012, he went to 17022 Shea Avenue in Hazel Crest, Illinois to conduct a parole compliance check. After other agents were positioned around the house, Junker knocked on the front door and announced his office. After 5 to 10 minutes of knocking on the door, Junker saw an individual through a window on the second floor. After "someone" answered the door, the agents conducted a compliance check of the residence. Junker testified that there were "at least" two adults and three children in the house. He identified defendant, in-court, as one of those adults. Defendant told Junker that he lived at that address.

¶ 9 Junker testified that, after searching the inside of the residence, the agents searched a detached garage that was located in the "back corner of the lot." There, agents found a tan and white colored dog tethered to a wall. Junker testified that the dog's face was "kind of mauled up" and had "several long cuts" and dried blood in its fur. The dog was sitting and "cowering on the floor." Concerned with the dog's condition, Junker instructed Cook County sheriffs to contact Animal Control. Thereafter, Hazel Crest police officers took possession of the dog, and the animal crimes unit of the Cook County Sheriff's Police arrived at the residence.

¶ 10 Officer Michael Kizaric of the Cook County Sheriff's Police animal crimes unit testified that, on July 25, 2012, he arrived at the house on Shea Street and inspected the detached garage. Inside the garage, there was a bowl of dog food and a bucket of water. After learning that the dog had been taken to an animal shelter, Kizaric relocated to the Animal Welfare League in Chicago Ridge, Illinois. There, Kizaric learned that a tan and white pit-bull, which had been brought to

the shelter by Hazel Crest police, had received veterinary treatment. He identified photographs of the dog that he saw at the shelter. After speaking with veterinarians at the shelter, Kizaric relocated to the Markham courthouse and filed a criminal complaint against defendant.

¶ 11 Doctor Mark Kahn testified that he was employed as a licensed veterinarian at the Animal Welfare League and that, on July 25, 2012, Hazel Crest police brought a tan and white dog to the shelter for a veterinary examination. Kahn described that "the dog was in general poor condition," underweight for his frame, dirty, and unkempt. The dog had "multiple wounds of not recent origin over his head, face, and legs." He described the wounds as bite or puncture wounds. Kahn testified that the condition of the wounds suggested that they were "more than twenty-four hours old" and had not been treated before the dog was taken to the shelter. Kahn flushed-out and washed the wounds, and prescribed the dog oral antibiotics because the wounds were infected. Kahn testified that infection generally occurs "within twelve to twenty-four hours" after the infliction of a wound and that the dog's infection could have been avoided if it had received prompt veterinary care.

¶ 12 The State then proceeded by way of stipulation. The parties stipulated that defendant was one of the residents of 17022 Shea Street in Hazel Crest, Illinois on July 25, 2012, and "for a period of seven months before that date." The State then rested, and the trial court denied defendant's motion for a directed verdict.

¶ 13 For the defense, Latronica Davis testified that she lived in a house located at 2020 West 170th Street in Hazel Crest and that, from her house, she could see the front, side, back, and the detached garage of 17022 Shea Avenue. She testified that the door of the detached garage does not close. On July 25, 2012, Davis observed police "bring out" a brown dog from the detached

garage. She knew the dog to be a stray that she had seen around the neighborhood. She had never seen defendant with the dog. A week before the incident, Davis had seen the dog with kids from the neighborhood.

¶ 14 On cross-examination, Davis clarified that the large door meant for vehicles of the garage was closed on July 25, 2012, and that the door, on the side of the garage, that was always open was the size of a "normal door." She acknowledged that she had never seen the children that reside at 17022 Shea Avenue playing with the dog. She described how the house at 17022 Shea had a fence around its backyard and that the fence had three gates, which were open on the morning in question. On redirect she testified that the gates are usually open.

¶ 15 During closing argument, the State essentially argued that the fact that the dog was found tethered in the detached garage of defendant's residence led to a reasonable inference that defendant knew that the dog was in the garage and was therefore "harboring" the dog. The prosecutor told the jury:

> [STATE'S ATTORNEY]: And keep in mind the definition of owner. It doesn't say that the defendant had to be the one who actually purchased the dog. It doesn't say that the defendant had to be the primary caregiver of the dog. It doesn't say that the defendant has to be the one who walks the dog or feeds the dog or cares for the dog. That's not what the Instruction says. Instruction says when it defines owner that it is any person who has a right of property in the animal, keeps or harbors an animal, or has an animal in his care, or acts as a custodian of the animal.

¶ 16 Defense counsel argued that the State did not prove that defendant was the owner of the dog. It argued that the evidence suggested that the door to the garage was always open, that

multiple people resided in the home, and that multiple people had access to the detached garage. Counsel argued that Latronica Davis, who had known defendant for three years, had never seen defendant with the dog and testified that the dog was a stray from the neighborhood.

¶ 17 In rebuttal argument, the State told the jury:

> [STATE'S ATTORNEY]: Don't be confused, ladies and gentlemen, a lot of things that Counsel just said are not what you will be instructed in the law. Contact that he had with the dog, not part of the instructions. How long he lived in the house, irrelevant. Whether he walked to dog, like my partner said, irrelevant. Fed the dog, irrelevant. That's not what the law says about who an owner is.
>
> The law is very specific about who an owner is. If you keep or harbor an animal you're an owner under the law. And, that's what the defendant is.
>
> * * *
>
> [STATE'S ATTORNEY]: Ladies and gentlemen, the law is written that way because these are living creatures. To say that I live in the same house with a dog but if it is suffering I'm just going to walk passed it and ignore it is inhumane. To say no that's my wi[f]e's cat so I'm not going to feed it and not be held accountable is inhumane. That's why the law is written the way that it is. Because if you live in the same residence as an animal you're keeping that animal, harboring that animal, responsible for feeding it, giving it water, protecting it, giving it adequate shelter, and providing proper veterinary care for that animal.
>
> Those are the responsibilities that you have. He violated those duties. He is guilty of violating owner's duties, ladies and gentlemen.

¶ 18 After deliberation, the jury found defendant guilty of violating owner's duties. The trial court denied defendant's oral motion for judgment notwithstanding the verdict, noting that there was sufficient circumstantial evidence for a jury to infer that defendant harbored the dog. Following a sentencing hearing, the trial court sentenced defendant to 79 days' custody in the Cook County department of corrections, time considered served. On October 7, 2014, the court denied defendant's supplemental motion for a new trial, which focused the use of non-IPI jury instructions and the use of preemptory strikes during jury selection, and defendant filed a timely notice of appeal.

¶ 19 On appeal, defendant first contends that the State failed to prove beyond a reasonable doubt that he owned or harbored the dog in question because there was no evidence that defendant knew that the dog was tied up in the garage.

¶ 20 The due process clause of the fourteenth amendment protects defendants against conviction in state courts except upon proof beyond a reasonable doubt of every fact necessary to constitute the charged crime. *People v. Brown*, 2013 IL 114196, ¶ 48; *Jackson v. Virginia*, 443 U.S. 307, 315-16 (1979). When determining the sufficiency of the evidence, the standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Wilkerson*, 2016 IL App (1st) 151913, ¶ 64. This means that we must draw all reasonable inferences from the record in favor of the prosecution, and that " '[w]e will not reverse a conviction unless the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt.' " *People v. Lloyd*, 2013 IL 113510, ¶ 42 (quoting *People v. Collins*, 214 Ill. 2d 206, 217 (2005)). " 'Under this standard, the reviewing

court does not retry the defendant, and the trier of fact remains responsible for making determinations regarding the credibility of witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn from the evidence.' " *People v. Daheya*, 2013 IL App (1st) 122333, ¶ 61 (quoting *People v. Ross*, 229 Ill. 2d 255, 272 (2008)).

¶ 21 Section 3 of the Act requires that an "owner" of an animal must provide it with: "(a) sufficient quantity of good quality, wholesome food and water; (b) adequate shelter and protection from the weather; (c) veterinary care when needed to prevent suffering; and (d) humane care and treatment." 510 ILCS 70/3 (West 2012). As relevant here, to sustain a conviction for violation of owner's duties, the State was required to prove that defendant owned the dog, that the dog required veterinary care to prevent suffering, and that defendant failed to provide veterinary care to the dog. 510 ILCS 70/3 (West 2012).

¶ 22 Here, defendant does not dispute the facts presented at trial, or that the dog in question required veterinary care. Rather, he argues that the State did not prove beyond a reasonable doubt that he owned the dog.

¶ 23 The Act defines an "owner" as "any person who (a) has a right of property in an animal, (b) keeps or harbors an animal, (c) has an animal in his care, or (d) acts as custodian of an animal." 510 ILCS 70/2.06 (West 2012). In *Steinberg v. Petta*, 114 Ill. 2d. 496, 500-502 (1986), our supreme court found that, under a similar provision of the Animal Control Act (510 ILCS 5/1, *et seq.* (West 2012), "harbor" means to "afford lodging to, to shelter, or to give a refuge to," and that "to harbor" an animal requires "some measure of care, custody, or control" of the animal.

¶ 24 After viewing the record evidence in the light most favorable to the State, we find that a rational trier of fact could have concluded that defendant "harbored" the dog and, thus, owned the dog beyond a reasonable doubt. Junker testified that defendant told him that he lived at the residence. The parties stipulated that defendant was a resident in the house located at 17022 Shea Avenue on July 25, 2012, and, had been, for seven months prior to that date. In addition, Kizaric testified to finding the dog tethered in a garage in the house's backyard, with a bowl of dog food and a bucket of water. Based on this evidence, it was reasonable for the jury to infer that defendant was harboring or had control over the dog, and was thus guilty of violation of owner's duties beyond a reasonable doubt.

¶ 25 Defendant nevertheless argues that the State failed to prove that he harbored the dog because Latronica Davis testified that the dog was a neighborhood stray and that she had never seen defendant with the dog, and because there were other people living in the house. Regarding the testimony of his neighbor, it was the jury's role to make determinations regarding the credibility of witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn from the evidence. See *Daheya*, 2013 IL App (1st) 122333, ¶ 61. Regarding the possibility that another person living in the house was secretly keeping the dog, the jury heard similar claims during closing arguments, but was not obligated " 'to accept any possible explanation compatible with the defendant's innocence and elevate it to the status of reasonable doubt.' " *People v. Jone*s, 2017 IL App (1st) 143403, ¶ 26 (quoting *People v. Harrett*, 137 Ill. 2d 195, 206 (1990)). As none of the State's evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt, we will not substitute our judgment for that of the trier of fact on these matters and will not overturn the jury's

determination that defendant was an "owner" of the dog in question. See *Lloyd*, 2013 IL 113510, ¶ 42.

¶ 26 Defendant next contends that he was prejudiced by the trial court's failure to ask potential jurors whether they understood or accepted the enumerated principles of Illinois Supreme Court Rule 431(b).

¶ 27 Initially, defendant concedes that he did not raise this claim in a posttrial motion. See *People v. Thompson*, 238 Ill. 2d 598, 611 (2010) ("To preserve a claim for review, a defendant must both object at trial and include the alleged error in a written posttrial motion."). He argues, however, that we may review his claim under the first prong of the plain error doctrine, which allows a reviewing court to consider unpreserved error when a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant. *Nowells*, 2013 IL App (1st) 113209, ¶ 18. Under either prong of the plain error doctrine, the burden of persuasion remains on the defendant. *Nowells*, 2013 IL App (1st) 113209, ¶ 19. A reviewing court conducting plain error analysis must first determine whether an error occurred, as "[w]ithout reversible error, there can be no plain error." *People v. McGee*, 398 Ill. App. 3d 789, 794 (2010).

¶ 28 Illinois Supreme Court Rule 431(b), (eff. July 1, 2012), requires that a trial court ask potential jurors whether they understand and accept 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."

¶ 29 Our supreme court has held that each of these principles goes to the heart of a particular bias or prejudice which would deprive defendant of his right to a fair and impartial jury. *People v. Zehr*, 103 Ill. 2d. 472, 477 (1984). Rule 431(b) requires that the trial court ask potential jurors whether they understand and accept the enumerated principles in a " 'specific question and response process,' " and that simply asking whether the jurors agree or disagree with the principles is insufficient. *People v. Wilmington*, 2013 IL 112938, ¶ 32 (quoting *People v. Thompson*, 238 Ill. 2d 598, 607 (2010)). See *People v. Sebby*, 2017 IL 119445, ¶ 49 (finding "clear error" where the trial court asked the jurors whether they "had any problems with" or "believed in" the 431(b) principles). We review a trial court's compliance with Rule 431(b) *de novo*. *People v. Belknap*, 2014 IL 117094, ¶ 41.

¶ 30 Here, the record reflects that the trial court failed to admonish the first panel of prospective jurors, from which seven jurors were chosen, regarding the principle that defendant's silence could not be held against him. This was an error, as the court did not ask each juror about all four 431(b) principles. See *People v. McNeal*, 405 Ill. App. 3d 647, 662 (trial court erred by failing to admonish jurors regarding each 431(b) principle, where it omitted admonishments that defendant's failure to testify could not be held against him).

¶ 31 Moreover, defendant contends, the State concedes, and we agree that the trial court also erred by not asking the prospective jurors on either panel whether they understood each of the 431(b) principles. Although the record shows that the court interchangeably asked the jurors whether they agreed with, had a problem with, or had a "difficulty with extending" the 431(b)

principles to defendant, the court did not ask the jurors whether they understood the principles. See *Belknap*, 2014 IL 117094, ¶ 44 ("While we noted that it is arguable that the trial court's asking for disagreement, and getting none, is equivalent to the jurors' acceptance of the Rule 431(b) principles, the court's failure to ask the jurors whether they understood the principles is error in and of itself.").

¶ 32 However, under the first prong of the plain error doctrine, even where defendant shows that a clear and obvious error occurred, the burden remains on defendant to show that the "evidence is so closely balanced that the error alone threatened to tip the scales of justice against" him. See *Nowells*, 2013 IL App (1st) 113209, ¶ 18. "If the defendant carries that burden, prejudice is not presumed; rather, '[t]he error is actually prejudicial.' " *Sebby*, 2017 IL 119445, ¶ 51 (quoting *Herron*, 215 Ill.2d at 187). In determining whether the evidence adduced at trial was closely balanced, "a reviewing court must evaluate the totality of the evidence and conduct a qualitative, commonsense assessment of it within the context of the case." *Sebby*, 2017 IL 119445, ¶ 53. This inquiry "involves an assessment of the evidence on the elements of the charged offense or offenses, along with any evidence regarding the witnesses' credibility." *Id.*

¶ 33 Although we have found the evidence sufficient to sustain his conviction, we believe that the evidence presented was closely balanced. There is no question that the defendant lived in the house and that the dog found in the house's detached garage was in need of veterinary care. However, the main issue of this case is whether defendant owned the dog. Aside from the fact that defendant resided in the house, there was no other evidence presented to establish that defendant was the owner of the dog, or that he knew that the dog was tethered in the garage. The record shows that four other individuals resided in the house with defendant: one adult and three

children. It is conceivable that any one of the four individuals living in the house could have owned the dog and kept the dog in the garage without defendant's knowledge. Moreover, Latronica Davis testified that she never saw defendant with the dog and that the dog was a stray. She also testified that she had seen the dog with kids from the neighborhood.

¶ 34 Because the evidence was closely balanced and defendant exercised his right not to testify, the trial court's error in questioning prospective jurors about the 431(b) principles "left open the possibility that a juror who did not understand" these principles, especially the principle that defendant's silence cannot be used against him, might have resolved the close question on an improper basis. *People v. Richardson*, 2013 IL App (1st) 111788, ¶ 33. Accordingly, we reverse the judgment and remand the case for a new trial.

¶ 35 In reaching this conclusion, we are not persuaded by the State's argument that, because the jury was given instructions regarding the 431(b) principles before entering deliberation, defendant's claim that the jury may have may have considered his silence against him is merely speculative. Our supreme court recently reaffirmed the principle established in *Zehr* that " 'an instruction given at the end of the trial will have little curative effect' " after a failure to ask jurors about the 431(b) principles during *voir dire*. *Sebby*, 2017 IL 119445, ¶ 77 (quoting *Zehr*, 103 Ill. 2d at 477). Furthermore, when a defendant makes a showing of a clear and obvious error and that the evidence at trial was closely balanced, "prejudice is not presumed; rather '[the] error is actually prejudicial.' " *Sebby*, 2017 IL 119445, ¶ 51 (quoting *Herron*, 215 Ill.2d at 187).

¶ 36 As we have found that the trial court's error in questioning the jurors about the 431(b) principles amounted to plain error, we need not address defendant's claim that he was prejudiced by the prosecutors' alleged improper remarks during closing argument. Further, as we have

found that the evidence was sufficient to sustain his conviction, no double jeopardy violation will occur upon retrial. *People v. Hunt*, 2016 IL App (1st) 132979, ¶ 28.

¶ 37 For the foregoing reasons, we reverse the judgment of the trial court and remand the case for a new trial.

¶ 38 Reversed and remanded.