2018 IL App (1st) 150855-U

No. 1-15-0855

Order filed January 19, 2018

Sixth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County,
	)	
v.	)	No. 14 CR 18791
	)	
SHAWN DAVIS,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant forfeited his claims of improper prosecutorial remarks and an incomplete Rule 431(b) inquiry of potential jurors, and those claims did not constitute plain error because the evidence was not closely balanced. The circuit court erred by not holding a proper inquiry into defendant's ability to pay before ordering reimbursement of defense costs, and we remand for a proper hearing on that issue. The fines and fees order is corrected.

¶ 2 Following a jury trial, defendant Shawn Davis was convicted of residential burglary and sentenced to seven years' imprisonment. On appeal, he contends that the State made

inflammatory remarks in its opening statement and closing argument at trial. He also contends that the court erred by not asking potential jurors all the *voir dire* inquiries required by Supreme Court Rule 431(b) (eff. July 1, 2012). Lastly, he challenges certain fines and fees, including reimbursement of the cost of his representation by the Public Defender. We vacate the public defender fee and remand for a proper hearing thereon, correct the order assessing fines and fees, but otherwise affirm.

¶ 3 The defendant was charged with residential burglary for entering the apartment of Keaton Derocher on or about September 23, 2014, with the intent to commit a theft therein. The Cook County Public Defender represented the defendant in the circuit court. Before trial, the State filed a motion for reimbursement of county funds for court-appointed counsel. 725 ILCS 5/113-3.1 (West 2014).

¶ 4 At trial, the State argued in its opening statement that most people work for a living but "when [defendant] wants money, he takes something that doesn't belong to him and he sells it. That's how he gets his money. That's exactly what he did on September 23, 2014." Defense counsel did not object.

¶ 5 Keaton Derocher testified that he lived in a sixth-floor apartment. No one except Derocher and building manager Thomas Bruce had keys to Derocher's apartment. When Derocher left for work on the day in question at about 6 a.m., his PlayStation gaming system, iPad tablet, and tool bag were in his apartment. He closed the apartment door but was not certain that he locked it. When he returned home at about 6 p.m., the apartment door was open. The tools had been dumped from the tool bag onto a mattress, and the tool bag itself was missing, as were the PlayStation, iPad, and an alarm clock. After calling Bruce to report the incident, Derocher called the police. When the police were meeting with Derocher in the apartment

building lobby, Bruce pointed out a tool bag in the laundry room that Derocher recognized as his. The bag was empty. The police obtained serial numbers for the missing PlayStation and iPad from their original boxes. Two weeks later, the police recovered Derocher's PlayStation and returned it to him. The iPad was never recovered. Derocher testified that he did not give defendant permission to enter his apartment.

¶ 6 Thereafter, the State played a video that was taken on September 23, 2014, depicting the lobby of Derocher's apartment building from 7:30 a.m. to 8 a.m. The video shows that at 7:38 a.m., a man entered the lobby with a bicycle. At 7:48 a.m., the man entered a laundry room with the bicycle and a tool bag. Less than a minute later, the man left the laundry room empty-handed. He returned to the laundry room at 7:53 a.m. carrying another bag. At 7:56 a.m., the man left with the bicycle and second bag. Derocher testified that the tool bag the man was carrying at 7:48 a.m. belonged to him.

¶ 7 Aileen White, a tenant in Derocher's apartment building, testified that she left home between 7 a.m. and 8 a.m. on the day in question and held the building's door open for a man with a bicycle. On cross-examination, she testified that the building's elevators took approximately two minutes to travel from the lobby to the sixth floor. On redirect examination, White testified that she did not time the elevators and that it may take less than two minutes to reach the sixth floor from the lobby.

¶ 8 Thomas Bruce, the apartment's building manager, testified that he discovered Derocher's tool bag in the laundry room. Bruce viewed the lobby video and testified that the man in question was not a tenant in that building. Bruce confirmed that he had a key to each apartment in the building.

¶ 9 Officer Eric Marcus was assigned to investigate the burglary. He testified that he came to Derocher's apartment and did not see signs of forced entry.

¶ 10 Officer Abdalla Abdabuzanat testified that he was an evidence technician with the Chicago Police Department. He processed Derocher's apartment but was unable to locate any usable finger prints.

¶ 11 William Hernandez, a manager at Just Pawn, a pawn shop in Chicago, testified that when his store buys an item, it creates a pawn ticket containing a description and serial number for the item, as well as the seller's name, address, signature, and a description of the seller's likeness. He explained that the shop confirms the seller's name by checking his or her "state identification." At about 9:30 a.m. on September 23, 2014, a man who identified himself as Shawn Davis and showed identification bearing that name sold the pawn shop a PlayStation for $100. When the police came to the shop in early October, Hernandez provided them the pawn ticket for the PlayStation. On cross-examination, Hernandez testified that Shawn Davis did not pawn an iPad. The pawn ticket was admitted into evidence. It states that seller Shawn Davis resided at a particular address and showed identification with a particular state identification card number on it. It states a date of birth for Davis of March 31, 1980, and that he is a black man with brown eyes and black hair, weighing 185 pounds and being six feet tall.

¶ 12 Detective Robert Rose testified that he collected a PlayStation from Hernandez's pawn shop with a serial number that matched the serial number obtained from Derocher's PlayStation box. Eventually, he returned the PlayStation to Derocher. After defendant was arrested, Rose interviewed him. Defendant told Rose that he was in the apartment building that morning to buy marijuana. He denied taking anything. Defendant rested without presenting any evidence.

¶ 13 During its rebuttal closing argument, the State reiterated its argument that defendant "doesn't work for his money. He goes and he steals other people's property and sells it, and that's how he makes his money." Defense counsel again did not object to this characterization.

¶ 14 Following instructions, which included repeated admonishments that arguments were not evidence, the jury deliberated and found defendant guilty of residential burglary.

¶ 15 Defendant's posttrial motion did not include a claim that the court violated Rule 431(b) in conducting the *voir dire,* nor did it claim that the State made improper arguments. Following a hearing where defendant again did not raise either claim, the court denied the posttrial motion.

¶ 16 Following a sentencing hearing, the court found defendant to be a mandatory Class X offender and sentenced him to seven years' imprisonment and imposed certain fines and fees. Defendant filed a motion to reconsider his prison sentence, raising no challenge to his fines or fees, and the court denied the motion. The State then reminded the court of its motion for reimbursement, and the court asked defense counsel how many times he appeared in this case. Counsel replied "seven times." Without argument or further questions, the court assessed a $150 public defender fee.

¶ 17 On appeal, defendant first contends that the State made inflammatory remarks in its opening statement and closing argument. Defendant concedes that he forfeited this claim by not raising it in the circuit court. However, he argues that we may consider it as plain error. A plain error is a clear and obvious error that (1) occurred when the evidence was so closely balanced that the error alone threatened to change the result or (2) was so serious that it affected the fairness of the trial and challenged the integrity of the judicial process. *People v. Sebby*, 2017 IL 119445, ¶ 48. The first step in plain error analysis is determining whether there was a clear or obvious error. *Id.* ¶ 49. In determining whether the evidence was closely balanced, we perform a

commonsense and qualitative, rather than strictly quantitative, assessment of the entirety of the trial evidence in context against the elements of the charged offense. *Id.* ¶ 53; *People v. Belknap*, 2014 IL 117094, ¶¶ 50-53. Evidence is not closely balanced merely because it was circumstantial rather than direct. *Belknap*, 2014 IL 117094, ¶ 56 ("While there were no eyewitnesses to the crime, other evidence pointed to defendant as the perpetrator and excluded any reasonable possibility that anyone else inflicted [the victim's] injuries").

¶ 18 The State has wide latitude in closing arguments and may comment on the evidence and any fair, reasonable inferences it yields. *People v. Austin*, 2017 IL App (1st) 142737, ¶ 54. However, argument that serves no purpose but to inflame the jury constitutes error. *People v. Anderson*, 2017 IL App (1st) 122640, ¶ 108. In reviewing a challenge to remarks made in opening statements or closing arguments, we view the remarks in context and consider the statements or arguments in their entirety. *Id*. Improper remarks in argument warrant reversal if they constituted a material factor in the defendant's conviction. *People v. Henderson*, 2016 IL App (1st) 142259, ¶ 238. Where no objection was made to the remarks at issue, they constitute plain error only if they were so inflammatory as to deny the defendant a fair trial or so flagrant as to threaten deterioration of the judicial process. *People v. Trice*, 2017 IL App (4th) 150429, ¶ 60.

¶ 19 Here, in its opening statement and closing argument, the State argued that, when defendant wants money, he steals someone else's property and sells it. Defendant challenges the State's present-tense characterization—that stealing goods to sell is something defendant *does* rather than merely *did*—and its contrast of defendant's actions to the average person who works for a living. However, the State's theory of the case, supported by the evidence at trial, was that defendant entered Derocher's apartment, removed his property therefrom, and soon afterwards sold his PlayStation for $100. When we view the challenged argument in light of the evidence,

we cannot conclude that the remarks at issue served no conceivable purpose but to inflame the jury. Rather, these remarks, at least in part, served to summarize what the State believed the evidence would show or had shown.

¶ 20 Moreover, we find that any error here was not plain error because the evidence was not closely balanced. The video shows a man in Derocher's apartment building. While the video does not show the man in Derocher's apartment, the fact that the man is seen on the video carrying a tool bag that Derocher identified as his establishes that the man was in Derocher's apartment and removed his property from it. That fact also belies defendant's argument that the man's 10-minute absence from the video was insufficient time to go to Derocher's apartment, burglarize it, and return to the lobby. It speaks for itself that the man is carrying Derocher's tool bag after the 10-minute absence. The jury was able to compare the man in the video to the defendant before it and conclude whether the two were the same. Derocher established that a PlayStation with a unique serial number was taken from his apartment along with the tool bag and other items. The pawn shop manager established that a man who gave defendant's name and who showed State identification with defendant's name sold Derocher's PlayStation with the same serial number. Again, the jury was free to compare the description on the pawn ticket to defendant himself. Lastly, while defendant gave a self-serving explanation for his presence at the apartment building, he admitted to Detective Rose that he was in Derocher's building on the morning in question. That admission, and the above-described evidence, excluded any reasonable possibility that the man in the video who burglarized Derocher's apartment was someone other than defendant. There was such powerful circumstantial evidence that defendant burglarized Derocher's apartment, we cannot find that the State's remarks would have affected the ultimate result or deprived defendant of a fair trial.

¶ 21 Defendant next contends that the circuit court erred by not asking potential jurors whether they understood and accepted the principle that defendant need not present any evidence as required by Supreme Court Rule 431(b). Defendant forfeited this claim by not raising it below, but he argues that we may consider it as plain error. Failure to comply with Rule 431(b) is not second-prong plain error unless the defendant shows that the Rule 431(b) violation actually produced a biased jury. *Sebby*, 2017 IL 119445, ¶ 52. Thus, any plain error here would have to arise from closely-balanced evidence.

¶ 22 Supreme Court Rule 431 governs *voir dire* examination of potential jurors. It provides:

> "The court shall ask each potential juror, individually or in a group, whether that 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; however, no inquiry of a prospective juror shall be made into the defendant's decision not to testify when the defendant objects. The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." Ill. S. Ct. R. 431(b) (eff. July 1, 2012).

¶ 23 Under Rule 431(b), a court may not merely give "a broad statement of the applicable law followed by a general question concerning the juror's willingness to follow the law." Ill. S. Ct.

R. 431, Committee Comments. As our supreme court has stated, "the language of Rule 431(b) is clear and unambiguous; the rule states that the trial court 'shall ask' whether jurors understand and accept the four principles set forth in the rule. The failure to do so constitutes error." *Belknap*, 2014 IL 117094, ¶ 45. A court errs when it (1) fails to ask prospective jurors whether they *both* understand and accept the principles set forth in Rule 431(b), (*id.* ¶ 46); (2) fails to ask the jurors whether they understood the principles, (*id.*, ¶ 44); or (3) only asks jurors "whether they 'had any problems with' or 'believed in' those principles." *Sebby*, 2017 IL 119445, ¶ 49.

¶ 24 Here, before *voir dire*, the court told the venire that defendant is presumed innocent of the charge against him, the State bears the burden of proving him guilty beyond a reasonable doubt, and defendant is not required to testify or present any witnesses. As is relevant to the issue raised in this appeal, the court later stated to the jury:

> "Now if you look at this as a constitutional coin and turn it over, anybody placed on trial in a criminal case has a constitutional right not to testify. And if Mr. Davis decides not to testify, no inference can be drawn from his silence. Does anybody have any problems understanding that constitutional principle? And does anybody have any problems applying that constitutional principle to this case?"

The court spread of record that nobody raised a hand for either question.

¶ 25 We agree with the defendant that the circuit court erred by not asking all the prospective jurors (except one in an individual colloquy) if they either understood or accepted the third Rule 431(b) principle: that defendant need not *present evidence*. However, we find that this error does

not rise to the level of plain error because the evidence was not closely balanced. See *Sebby*, 2017 IL 119445, ¶ 52.

¶ 26 Last, defendant challenges the assessment of certain fines and fees. The State agrees that the public defender fee must be vacated and argues that the case should be remanded for a proper hearing. Imposition of the public defender fee without a proper hearing is not a claim subject to forfeiture. *People v. Hardman*, 2017 IL 121453, ¶ 49.

¶ 27 We agree with the parties that defendant's $150 public defender fee must be vacated. The court did not comply with the statutory requirement to hold a hearing where "the court shall consider" defendant's financial affidavit and assess his financial resources and ability to pay. 725 ILCS 5/113-3.1 (West 2014). The entire proceeding on the fee consisted of the State reiterating its motion, the court asking defense counsel how many times he appeared in this case, counsel answering seven times, and the court imposing a $150 fee. Neither party presented evidence, *sua sponte* or on the court's questions, regarding defendant's ability to pay, and there was no mention of any financial affidavit executed by the defendant.

¶ 28 Although the parties agree that the fee should be vacated, they dispute the appropriate remedy. Defendant argues that there was no hearing pursuant to section 113-3.1(a) and that we cannot remand because more than 90 days have passed since the sentencing order. The State argues that we should remand for a new hearing as there was a timely, but inadequate, hearing. Our supreme court recently clarified in *Hardman*, 2017 IL 121453, ¶¶ 64-66, 68, that any hearing under the ordinary definition of a hearing – a judicial session held for the purpose of deciding issues of fact or of law – on the public defender fee with the parties present and within the 90-day time limit qualifies as some sort of hearing under *Somers* so that remand is proper. Like here, the hearing in *Hardman* consisted of the court asking defense counsel how many

times she had appeared before imposing the fee. The *Hardman* court expressly rejected the proposition that remand is appropriate only when the hearing addressed the defendant's ability to pay the fee. *Id.*, ¶¶ 65-67. This case falls squarely under *Hardman*, so we remand for a proper hearing on the fee.

¶ 29 We now review the defendant's challenges to the other fines and fees. Defendant forfeited these claims by not raising them below. However, the State does not argue that defendant's forfeiture bars his claims and so has forfeited any forfeiture challenge. *People v. Murphy*, 2017 IL App (1st) 142092, ¶ 16.

¶ 30 We agree with the parties that the $5 court system fee (55 ILCS 5/5-1101(a) (West 2014)) and $5 electronic citation fee (705 ILCS 105/27.3e (West 2014)) must be vacated in this felony case. The court system fee applies only in traffic cases, and the electronic citation fee applies only in traffic, misdemeanor, ordinance and conservation cases. Defendant's 142 days of presentencing custody entitle him to up to $710 credit against his fines at the statutory $5 per day rate. 725 ILCS 5/110-14(a) (West 2014). The parties correctly agree that defendant is due credit for $65 in fines: $50 for the court system and $15 for State Police operations fees. 55 ILCS 5/5-1101(c); 705 ILCS 105/27.3a(1.5) (West 2014).

¶ 31 However, the parties dispute whether three charges—$10 for probation and court services operations (705 ILCS 105/27.3a(1.1) (West 2014)) and $2 each for records automation for the Public Defender (55 ILCS 5/3-4012 (West 2014)) and the State's Attorney (55 ILCS 5/4-2002.1(c) (West 2014))—are fines or fees. There is conflicting authority from this court regarding whether these charges are fees. See *People v. Brown*, 2017 IL App (1st) 150146, ¶ 38; *People v. Heller*, 2017 IL App (4th) 140658, ¶ 74; *People v. Reed*, 2016 IL App (1st) 140498, ¶¶ 16-17; *People v. Rogers*, 2014 IL App (4th) 121088, ¶¶ 33-39 (fees); but see *People v. Camacho*,

2016 IL App (1st) 140604, ¶¶ 47-56; *People v. Carter*, 2016 IL App (3d) 140196, ¶¶ 56-57 (fines). This division has followed the weight of authority and held that these charges are fees. See *People v. Jones*, 2017 IL App (1st) 143766, ¶ 53. We decline to depart from that practice in this case.

¶ 32 In sum, we vacate the $150 public defender fee and remand for the court to hold a hearing complying with section 113-3.1(a). Pursuant to Illinois Supreme Court Rule 366(a)(1) (eff. Feb. 1, 1994), we modify the fines and fees order to reflect both a $65 credit and the removal of the $5 court system fee and $5 electronic citation fee. The judgment of the circuit court is otherwise affirmed.

¶ 33 Affirmed as modified in part, vacated in part, and remanded with directions.