2019 IL App (1st) 162180-U

No. 1-16-2180

Third Division
February 27, 2019

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	No. 16 DV 71208
v.	)	Honorable Michael R. Clancy,
ROBERT BOVAN,	)	Judge, presiding.
Defendant-Appellant.	)	

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's conviction for violation of an order of protection is affirmed where he forfeited his claim that the State's evidence was hearsay and therefore, a violation of the confrontation clause. Additionally, because no error occurred, further review of the claim under the plain-error doctrine is unwarranted.

¶ 2 Following a jury trial, Robert Bovan was convicted of violation of an order of protection ("VOOP") and sentenced to 120 days in the Cook County Department of Corrections. On appeal, defendant requests this Court reverse his conviction and remand the matter for a new trial. He contends that the admission of the order of protection ("OP"), specifically a

statement in the order providing that it was "Served in Open Court" violated his sixth amendment right to confrontation. For the reasons discussed below, we affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 Defendant previously lived in the same neighborhood and was in a romantic relationship with Rebecca Spelz. Their relationship only lasted two months but they continued to communicate with one another afterwards. On September 28, 2015, Spelz obtained a plenary order of protection (OP) against defendant which was issued and served on defendant the same day, and effective until March 27, 2017.[1] Defendant was later charged with one count of domestic battery and one count of violation of the OP for knowingly or intentionally making contact with Spelz on February 7, 2016 in violation of the order.

¶ 5 On March 16, 2016, the case proceeded to jury trial. Spelz testified that on February 7, 2016, she met defendant in his neighborhood which was around North Avenue and Austin Avenue in Chicago. At the time, Spelz was on pain medication prescribed after a recent surgery. As such, she was not in the right state of mind when she met defendant. Spelz drove her Toyota Camry to pick up defendant and, upon meeting him, she allowed defendant to drive the car. Spelz testified that while driving towards the lake, defendant slapped her. They then stopped in the area of 1304 West Birchwood Avenue, Chicago. After stopping the car, defendant put Spelz in a headlock and would not let her go. Defendant took out two pair of scissors and slashed at her, cutting her left wrist, right shoulder, chest, and inner part of her arms, among other injuries. To garner attention, Spelz began beeping the car's horn. Spelz testified that she also tried to get defendant off of her but he took the scissors, put them to her

[1] The order of protection was in effect at the time of trial.

throat, and threatened to kill her. Defendant also used the scissors to pull out two dermal piercings from her face causing additional bleeding.

¶ 6 Laila Mehana, testified that she was in her third-floor apartment when she heard a girl screaming "he's going to kill me." She went to her window to see where the screams were coming from and saw a girl sitting in a car in the middle of the street. Mehana's view of the girl was through the window on the driver's side of the car and she could not see anyone else. The girl opened the car door, raised her hand up toward Mehana, and again said "he's going to kill me." Mehana called 9-1-1.

¶ 7 At the same time, Katarzyna Polanowska was in her ground floor apartment at the end of the block. She also heard screams. Polanowska testified that she did not make much of the screams until she heard a car honking. She then went to her living room and peeked out the window. She saw a car parked in the middle of the street and only saw one person inside. She then made two calls to the police.

¶ 8 The police responded shortly after receiving the calls. Both Mehana and Polanowska testified consistently that they witnessed the police arrive and remove a man from the car. Mehana further testified that she saw the police handcuffing this man.

¶ 9 Officer John Reeder testified that he and his partner, Officer John O'Leary, responded to a call on February 7, 2016, requesting a well-being check of a woman heard screaming at 1304 West Birchwood Avenue. Upon arrival, they spotted a Toyota sedan parked in the middle of the street that matched the description they had received. They also saw two occupants inside the vehicle, one in the driver seat and the other in the front passenger seat. After parking behind the vehicle, Officer Reeder approached the driver's side where Spelz was sitting and asked her what had happened. He observed that Spelz "had several

lacerations to her face and she also had one that was in her chest or shoulder area." The lacerations were still actively bleeding. Officer Reeder further testified that Spelz "had injuries that were consistent with piercings being ripped out." The officers recovered two pairs of scissors covered in blood underneath the passenger's seat of the car. They called the paramedics, arrested defendant, and inventoried the scissors pursuant to department policy. The paramedics arrived and transferred Spelz to St. Francis Hospital for treatment.

¶ 10 At the close of the State's case in chief, with proceedings held in open court out of the presence and hearing of the jury, the State sought to admit Exhibit No. 11, the certified copy of the order of protection. The copy of the OP is a type-written, two page document that contains a no contact provision, the issuance and effective date of the order, and identifies Spelz as the person to be protected by the order. With respect to Spelz, the order states that defendant is "prohibited from committing the following: Physical Abuse; Harassment; Interference with personal liberty; Intimidation of a dependent; Stalking." The OP also includes a certification stamp which states that it is a true copy and bears the signature of Dorothy Brown. The second page of the order includes another certification stamp by the clerk of the circuit court stating that the OP is "a true and accurate copy of the Court's order." Additionally, the statement "Served in Open Court" appears at the top of each page.

¶ 11 Defense counsel objected to Exhibit No. 11 being admitted into evidence, arguing that the "Served in Open Court" statement in the order was prejudicial because it "can be construed as him being served with this order of protection when there actually isn't any evidence that he was served with it." The court found the argument unpersuasive and admitted the OP, noting that "[i]t is a certified document. It does have the certification this is, in fact, a true copy with the signature of Dorothy Brown. It also has the stamp of Dorothy

Brown so I believe it is a self-authenticating document. I'm going based on that, not based on the testimony of Ms. Spelz. So People's 11 is going in."

¶ 12 On its motion for directed finding, defense counsel again argued that "[t]he State clearly hasn't established one of the essential elements which is that he was served with that order." As such, defense counsel requested the court "to consider that and direct at least that count out at this point." The court denied the motion, ruling that: "[i]n the light most favorable to the State the certified document self-authenticating which is being admitted into evidence is sufficient to establish that so your motion for directed finding is denied on that count." After reconvening, the jury found defendant guilty of violating the order of protection but acquitted him on the charge of domestic battery. Subsequently, the trial court sentenced defendant to 120 days in Cook County Department of Corrections.

¶ 13 Defendant then filed a motion for judgment notwithstanding the finding or, in the alternative, a new trial. During the hearing on the motion, defendant argued that the "certified stamp says that the order is an order, but there is hearsay when it says it is served in open court." The defendant further argued that a sixth amendment issue was involved because he could not "confront the most fundamental issue of the case whether or not that he was served." The trial court denied the motion. The court ruled that "any rational fact finder could have found beyond a reasonable doubt the essential elements of the crime had been met." Specifically, that Defendant had notice of the order and that he committed an act that the order prohibited. The court further found that there was authority to admit the OP under Illinois Rule of Evidence 902 and 735 ILCS 5/8-1201. Defendant now challenges his conviction on appeal.

¶ 14 II. ANALYSIS

¶ 15 Defendant contends that his sixth amendment right to confrontation was violated when the trial court allowed the State to present a certified copy of the OP which contained a written statement that it was "Served in Open Court." Defendant argues that this statement was testimonial in nature and improperly used to prove that he had notice of the OP's contents and subsequently violated the OP despite having such notice. Thus, defendant contends that the statement contained in the OP was impermissible hearsay which violated his sixth amendment right to confrontation.

¶ 16 The State contends that the defendant has forfeited his claim of error on appeal by raising it for the first time during oral argument of his post-trial motion rather than raising the issue at trial and in his written post-trial motion. Defendant acknowledges that he did not raise the issue at trial; nevertheless, he asserts that this Court may review his claim under the plain-error doctrine.

¶ 17 The State maintains that even under the plain-error doctrine, there was no error. The State contends that the OP was a self-authenticating court document which was non-testimonial and not prepared for the purpose of this later prosecution. Therefore, the admission of this evidence did not violate defendant's sixth amendment right to confrontation.

¶ 18 A. Standard of Review

¶ 19 As a reviewing court, we will not disturb a trial's court ruling on the admissibility of evidence or testimony absent an abuse of discretion. *In re Brandon P.,* 2014 IL 116653, ¶ 45. However, sixth amendment claims often present questions of law which are reviewed *de novo. In re Rolandis G*¸ 232 Ill. 2d 13, 23 (2008). Questions regarding whether statements are testimonial in nature or qualify as hearsay are questions of law, which we review *de novo*.

Id. at 23 ("whether a statement is 'testimonial' is a question of law and our review, therefore, is *de novo*").

¶ 20 B. Forfeiture

¶ 21 Generally, a defendant must both object at trial and raise the specific issue again in a post-trial motion to preserve it for appeal. See *People v. Thompson*, 238 Ill. 2d 598, 611-12 (2012). At trial, defendant only objected to the sufficiency of the OP statement for proof of service. He did not challenge the OP statement as hearsay or argue that it violated the confrontation clause until oral argument on a motion for new trial. This objection was insufficient to preserve the separate issue of hearsay for appeal. See *People v. Casillas*, 195 Ill. 2d 461, 491 (2000) (holding that a defendant's hearsay objections at trial to the testimony of two witnesses did not preserve the issue of unreliability for appeal). Given that the defendant did not raise the issue of hearsay either at trial or in a written post-trial motion, we find that the defendant did not properly preserve this issue on appeal and has forfeited his argument.

¶ 22 C. Plain Error Doctrine

¶ 23 Defendant contends that even if he forfeited his argument by failing to raise it during trial, this Court should still review it under the plain-error doctrine. Generally, errors not objected to at trial are waived for purposes of appellate review. *In re T.L.B.*, 184 Ill. App. 3d 213, 219 (1989). However, Rule 615(a) of the Illinois Supreme Court Rules provides, in part, that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Ill. S. Ct. R. 615(a). As such, the plain error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error. *People v. Fort*, 2017 IL 118966, ¶ 18. Accordingly, we will review the

merits of defendant's argument under the plain-error doctrine despite his failure to preserve the objection at trial.

¶ 24 In our plain-error analysis, we must first "determine whether a clear or obvious error has occurred." *People v. Darr*, 2018 IL App (3d) 150562, ¶ 47 (citing *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)). This requires us to give a "substantive look" at the issues raised. *People v. Johnson*, 208 Ill. 2d 53, 64 (2003). Absent an error, there can be no plain error and we must honor the procedural bar. *People v. Eppinger*, 2013 IL 114121, ¶ 19. However, if we determine that a clear or obvious error has occurred at the trial level, the defendant bears the burden of demonstrating that the error was prejudicial. *Darr*, 2018 IL App (3d) 150562, ¶ 48. The defendant may demonstrate prejudice either by showing that: (1) the evidence at trial was so closely balanced that the guilty verdict may have resulted from the error; or (2) the error was so serious that it deprived the defendant of a fair trial. *People v. McLaurin*, 234 Ill. 2d 478, 489 (2009).

¶ 25 1. Confrontation Clause

¶ 26 Here, the defendant asserts that the OP statement was testimonial hearsay and barred by the confrontation clause. Accordingly, we will begin our plain-error analysis by determining whether a clear or obvious error occurred when the trial court admitted into evidence the OP which included a "Served in Open Court" statement.

¶ 27 The sixth amendment of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right *** to be confronted with the witnesses against him." U.S. Const., amend. VI. This is known as the confrontation clause and applies to the states through the fourteenth amendment. *People v. Stechly*, 225 Ill. 2d 246 (2007); Ill. Const. 1970, art. I, § 8. The right to confrontation protects the defendant from testimonial

hearsay. *Davis v. Washington*¸ 547 U.S. 813, 823-24 (2006). Hearsay is a statement, other than one made by the declarant while testifying at trial, offered into evidence to prove the truth of the matter asserted. S*ee People v. Leach*, 2012 IL 111534, ¶ 66. Hearsay is inadmissible at trial unless the statement falls within an exception. *People v. Tenney*, 205 Ill. 2d 411, 432-33 (2002).

¶ 28 In *Crawford v. Washington*, 541 U.S. 36, 56 (2004), the United States Supreme Court developed the analysis for an alleged violation of a defendant's right to confrontation. In so doing, the Court noted that the central issue is not whether the evidence falls within an exception, but, rather, whether the evidence is testimonial. *Id*. at 42. The Court further noted that the sixth amendment's confrontation clause bars "testimonial" statement of witnesses who did not testify at trial, unless the witnesses are unavailable and the defendant has a prior opportunity to cross-examine them. *Id.* at 67-68. Where the statement is not "testimonial," the confrontation clause is not implicated. *Id*. at 68.

¶ 29 Although the *Crawford* Court declined to provide a comprehensive definition of what constitutes "testimonial" evidence, it provided guidance as to what types of statements are considered "testimonial." *Crawford*, 541 U.S. at 68. The Court recognized that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.*

¶ 30 Thereafter, in *Williams v. Illinois*¸ 567 U.S. 50 (2012), the Court provided further clarification as to what constitutes testimonial evidence. In *Williams*, the issue was whether a DNA expert's testimony violated the confrontation clause. *Williams v. Illinois*¸ 567 U.S. at 50. There, no report was admitted into evidence but an expert witness testified as to a DNA profile obtained by a private laboratory. *Id*. at 56. The expert witness did not have any

firsthand knowledge of how the sample was handled, what tests were run on the sample, or how the tests were conducted by the lab. *Id*. Nevertheless, the expert witness was allowed to testify on how the DNA taken from the sample matched that of the defendant's. *Id*. The Court held that the expert's testimony did not violate the confrontation clause because the defendant had the opportunity to cross examine the expert and the out-of-court statements were relayed by the expert for the sole purpose of explaining the assumptions on which the expert's testimony was based on and not offered for the truth. *Id*. at 57-58. Therefore, the Court found the testimony was not barred by the confrontation clause. *Id*. at 58. The Court further noted that even if the report was admitted, there would be no violation of the confrontation clause because the "report was very different from the sort of extrajudicial statements, such as affidavits, depositions, prior testimony and confessions, that the Confrontation Clause was originally understood to reach." *Id*. Additionally, the Court noted that the "report was produced before any suspect was identified. The report was sought not for the purpose of obtaining evidence to be used against petitioner, who was not even under suspicion at the time, but for the purpose of finding a rapist who was on the loose." *Id*.

¶ 31 In light of *Williams*, our supreme court in *People v. Leach*, 2012 IL 111534 was asked to consider whether the admission of expert testimony of a pathologist describing the autopsy findings of another pathologist, and the admission of the autopsy report violated the confrontation clause. *People v. Leach*, 2012 IL 111534, ¶ 1. The court concluded that the autopsy report was not testimonial. *Id*. ¶ 122. In so holding, the court determined that (1) the autopsy report was not prepared for the primary purpose of accusing a targeted individual or (2) for the primary purpose of proving evidence in a criminal case. *Id*.

¶ 32 Here, the defendant claims that the certified order of protection, specifically the "Served in Open Court" statement in the order was testimonial hearsay because it was created for the purpose of proving defendant's guilt and signed by a judge who did not testify at trial or was subject to cross-examination. We disagree.

¶ 33 We find that the certified OP was non-testimonial and therefore, not barred by the confrontation clause. No error occurred when it was admitted into evidence absent testimony and cross-examination of a witness. Defendant's claim that the OP's statement regarding service was created for the purpose of proving the defendant's guilt at trial is unpersuasive. The OP and the statement that it was "Served in Open Court" was included prior to defendant's arrest, entered in relation to a separate cause of action, and not created in anticipation of his prosecution in this case. *Cf. People v. Diggins*, 2016 IL App (1st) 142088, ¶ 16 (reversing defendant's conviction by finding that the police's certified letter was testimonial because it constituted an affidavit "presumably" created for defendant's prosecution).

¶ 34 Nothing in the copy of the OP or the record suggests that future prosecution would occur against the defendant by default upon issuance of the OP on March 27, 2017. Rather absent any altercation or contact between the defendant and the victim, prosecution is not triggered pursuant to such order. Although violation of an order of protection can incur criminal penalties as defendant points out, the mere fact that it could eventually be used against the defendant in litigation does not render it testimonial. See *People v. Leach*, 2012 IL 11534, ¶ ¶ 130, 137 (finding that the admission of an autopsy report, which "might eventually be used in litigation" did not violate defendant's right to confrontation because these reports are

generally "prepared in the normal course of operation of the medical examiner's office" and therefore non-testimonial).

¶ 35 We further note that the main objective of an OP is not for prosecution but rather to protect victims of domestic violence from ongoing abuse. In *Sanchez v. Torres*, the court provided that the purpose the Illinois Domestic Violence Act under which the OP falls, *inter alia*¸ is to prevent "further abuse of domestic violence victims by promptly entering and diligently enforcing court orders," minimize "the perpetrator's access to the victim," clarify "the role of law enforcement officers to quickly and effectively assist and protect victims often at their personal peril," and "enlarging the civil and criminal remedies available for victims of domestic violence." *Sanchez v. Torres*, 2016 IL App (1st) 151189, ¶15; 750 ILCS 60/102 (West 2014). Therefore, we find that the OP and the statement "Served in Open Court" are non-testimonial because it was not created for the purpose of establishing a fact at this trial. To the extent that defendant argues that the admission of the certified OP was improper as it contained the statement "Served in Open Court," we are not persuaded. At most, this information indicates when the defendant was provided a copy of the OP in court with regards to a domestic violence proceeding but not that the statement itself, "service" was created for the defendant's later prosecution for violating the OP. Therefore, we find that the OP and its statement "Served in Open Court" are non-testimonial as it would not reasonably lead a person to believe that the statement would be available for use at a later trial.

¶ 36 Next, we briefly address defendant's argument that the State did not offer any other evidence aside from the OP to establish service. Defendant argues that the OP's statement was the sole evidence the State presented to show that he was served with the OP. This

argument falls outside the scope of our review. On appeal, defendant claims a violation of his sixth amendment right to confrontation. Defendant's claim that no other evidence was offered by the State to prove he was served or otherwise learned of the contents of the OP, goes to the sufficiency of the evidence rather than a sixth amendment violation. Accordingly, we need not address defendant's assertion concerning the sufficiency of the evidence as it is irrelevant to the Confrontation Clause issue.

¶ 37 2. Self-Authenticating Document

¶ 38 Furthermore, we find that the admission of the OP's statement at trial was appropriate because the OP was properly authenticated and admissible under the public records exception to the hearsay rule. *People v. Schlott*, 2015 IL App (3d) 130725, ¶ 33 (finding that admissible nonhearsay does not implicate the confrontation clause). The OP is admissible under 735 ILCS 5/8-1202 (West 2014), which provides:

> The papers, entries and records of courts may be proved by a copy thereof certified under the signature of the clerk having the custody thereof, and the seal of the court, or by the judge of the court if there is no clerk. 735 ILCS 5/8-1202 (West 2014).

¶ 39 Here, the copy of the OP includes a certification stamp which states that it is a true copy with the signature of Dorothy Brown. Therefore, the copy of the OP was admissible as a court record. Furthermore, we find that there was no clear or obvious error because the certified OP is a self-authenticating document pursuant to the Illinois Rule of Evidence 902. Rule 902 provides, in pertinent part, as follows:

> Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
> ***
> **(4) Certified Copies of Public Records.** A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any

> form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any statute or rule prescribed by the Supreme Court. Ill. R. Evid. 902 (West 2014).

¶ 40 Accordingly, copies of a public record or a certified OP in this case are admissible because they are self-authenticating documents and extrinsic evidence of its authenticity is not a prerequisite to its admission. Therefore, the trial court did not err in admitting the certified OP and all its content into evidence.

¶ 41 We conclude that the admission of the OP statement did not violate defendant's constitutional rights under the confrontation clause. Because no error occurred, defendant's forfeiture must be honored. Thus, we need not address defendant's claim of prejudice pursuant to the second part of the plain-error doctrine.

¶ 42 III. CONCLUSION

¶ 43 For the reasons stated, we affirm the judgment of the Circuit Court of Cook County.

¶ 44 Affirmed.