2011 IL App (3d) 091053–UB

Order filed October 27, 2011
Modified upon denial of Petition for Rehearing November 28, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
Plaintiff-Appellee,	)	Peoria County, Illinois,
	)	
v.	)	Appeal No. 3–09–1053
	)	Circuit No. 08–CF–1380
KYRON MURDOCK	)	
	)	Honorable
Defendant-Appellant.	)	James E. Shadid,
	)	Judge Presiding

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Holdridge and Lytton concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court complied with the requirements of Supreme Court Rule 431(b) and did not err in denying defendant's motion for a new trial based on newly discovered evidence where the evidence was not new, was cumulative, and would not have likely changed the results on retrial.

¶ 2 Defendant Kyron Murdock was convicted of first degree murder following a jury trial and sentenced to a 52-year term of imprisonment. He appealed, arguing that the trial court failed to comply with Supreme Court Rule 431(b) and erred in denying his motion for a new trial based on

newly discovered evidence. We affirm.

¶ 3 **FACTS**

¶ 4 Defendant Kyron Murdock was arrested in November 2008 for the May 12, 2005, shooting death of Mark Walker. Walker was killed while sitting on a car parked in front of the house of his friend, Anthony King. Murdock's arrest resulted from information provided by Micah Formon, who identified Murdock as Walker's killer. In preparation for a jury trial, the trial court addressed the venire as follows:

> "The Defendant is presumed to be innocent of the charges against him. That presumption remains with him throughout every stage of the trial and during your 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 the guilt of the Defendant beyond a reasonable doubt and this burden remains on the State throughout the case. The Defendant is not required to prove his innocence, nor is he required to present any evidence on his own behalf. He may rely on the presumption of innocence. He is not required to testify, and if he does not do so, it cannot be used against him."

The trial court reiterated the *Zehr* principles to each group of prospective jurors as stated above and asked each juror individually if he or she "agree[d] with those principles of law."

¶ 5 At trial, Formon testified for the State that he was with Murdock on May 12, 2005. He and

Murdock and three other friends went to a club together. On their way to the club, they saw Anthony King's car. Murdock stated, "I want to rob him" and "I'm gonna smoke that [ ]," which according to Formon, indicated Murdock planned to kill King. They followed King to his mother's house. The attempted robbery was not planned but occurred on the spur of the moment. Formon stood watch in the alley while Murdock ran to King's car with a .45 caliber gun. Formon heard seven or eight shots and saw Murdock run back to the their vehicle. Formon did not tell the police what he knew about the Walker murder until 2008 when he was arrested on other charges. His class 1 drug felony charge was dismissed in exchange for a guilty plea to a Class 4 felony and testimony against Murdock. At the time of Murdock's trial, Formon was in custody in Peoria County on an escape charge on which he was going to also receive consideration for his cooperation in the Walker murder. Formon had a 2006 conviction for aggravated unlawful use of a weapon and a 2004 conviction for unlawful possession of a controlled substance.

¶ 6 Anthony King testified that in spring 2005, he was the leader of the "Wiswall Boys" and earned his living by selling drugs. Walker, with whom he had been lifelong friends, worked with him. On May 12, 2005, they went clubbing together but were denied entry into a club because they were not properly dressed. Walker and King went to King's mother's home so he could change his shirt. Walker waited outside, and while King was in the house, he heard gunshots. He ran outside and found Walker on the ground. The police arrived and King told an officer that he did not have any information regarding the shooting. A few years after the shooting, he and Murdock were both in custody at the Tazewell County jail, although they were in different pods. From his pod, King could see Murdock in the exercise room. A couple of times, Murdock gestured as if he were shooting a gun at King. At the time of trial, King was serving an 84-month term in federal prison

on a drug conviction. In return for his testimony against Murdock, he anticipated a reduction in his federal sentence.

¶ 7 Michael Sullivan testified he had been in custody in the Tazewell County jail from April 2007 to April 2009, where he met Murdock. They were housed in the same pod and regularly worked out together. King was also in the jail at the same time, although in a different pod. While in the exercise room, Murdock used to point his fingers at King like he was pointing a gun. Murdock would also rap, "somebody's gonna die tonight." Murdock told him he once tried to "off Mr. King"; one of "his guys" had shot at a car in front of King's house but King was not in the car. Sullivan read about Murdock's arrest for Walker's murder and notified law enforcement in December 2008 that he had information about the case. At the time of trial, he was serving a federal term of 108 months for conspiracy and manufacture of cocaine. He expected a reduced sentence in exchange for his testimony against Murdock.

¶ 8 Antquint Cox testified that he was Murdock's cousin and had known Formon for 10 years. Murdock called him on May 13, 2005, and said, "we got them guys." Cox met Murdock and Murdock explained that he and a few of his "guys" "had came across a conflicting group of people and took care of their business." Murdock did not admit to shooting anyone but asked Cox what he should do with the gun. Cox told Murdock to dispose of the gun, but he did not know any other details regarding it. He was serving a 20-year federal prison sentence for selling drugs at the time of Murdock's trial. Cox anticipated consideration for his cooperation.

¶ 9 Murdock did not present any evidence in his behalf. The jury found Murdock guilty on July 22, 2009. On August 20, 2009, Murdock filed a motion for a new trial based on new evidence. Attached to his motion were two reports from an investigator's interviews with Kensey Ross and

Denarius Barnett. An evidentiary hearing on Murdock's motion ensued and Ross and Barnett testified.

¶ 10 Barnett testified that he was in custody in the Peoria County jail on drug charges in July 2008. While at the courthouse for a pretrial court date, he met and spoke to Formon in a courthouse holding cell. He learned Formon was facing more serious drug charges but was to receive a lesser sentence of probation while Barnett was being sentenced to prison. Formon told Barnett that he "had to plant a murder on somebody" to receive his sentence. Formon did not identify the murder or who he implicated. In July 2009, Barnett was again in custody in Peoria County on an armed robbery charge. He was in the same pod as Murdock two days before Murdock's trial started. He did not previously know Murdock. Murdock did not discuss his case or tell Barnett that Formon was a witness against him. After Murdock's trial ended, Barnett told Murdock about his conversation with Formon. Although Murdock did not discuss his case, Barnett knew Formon "had something to do with the murder." He and Formon were both in serving terms at Pontiac Correction Center at the time of the evidentiary hearing. They had talked about Murdock's case and Formon said he was sorry about testifying against Murdock. Formon never said Murdock did not kill Walker. Barnett had a 2005 conviction for delivery of a controlled substance, 2006 and 2007 convictions for possession of a controlled substance, and a 2009 conviction for armed robbery.

¶ 11 Ross testified that he was in custody in the Tazewell County jail from December 2008 until January 2009, and shared a cell with King. He had known King from living in Peoria. Sullivan was also in custody. He spent time with Sullivan and King. Ross heard King tell Sullivan the details of something that had happened in Peoria. King told Sullivan "the things that went on in the crime" and "what streets that he was on and what kind of car and, you know, how to – how [the shooter]

looked and things of that nature." King and Sullivan discussed "some details that they needed to know, they collaborated on, so they can agree upon the same things, and you know, say the same stuff." Ross believed that Sullivan did not have personal knowledge of the Walker murder because King told Sullivan what to do and say. Sullivan, who was facing a 15-year federal sentence, told him that he would do whatever he had to do to get out of prison. King and Sullivan would discuss their interviews with the detectives, including what they said and were going to say. Sullivan and King never mentioned names when they were discussing the crime.

¶ 12 When Ross was released from Tazewell County jail in January 2009, he did not know what murder Sullivan and King had been discussing. King told Sullivan to tell prosecutors about Murdock's gun gestures, although King did not mention Murdock's name. After his release from federal prison in July 2009, he stopped by the home of Murdock's father with whom he was friends. Murdock's father told Ross that Murdock was going to trial for Walker's murder. He attended the trial and after hearing the testimony against Murdock, he told Murdock's mother that he had been in jail with the State's witnesses, that he knew their testimony was fabricated, and that King provided the information to Sullivan for his testimony. Ross told Murdock's mother to inform defense counsel that he had information to discredit the State's witnesses. Ross said King never mentioned Murdock or Formon's names in discussing the Walker murder. In response to the trial court's inquiry, Ross said he heard King testify that "he didn't think Kyron did it" and that someone named Micah did it. He also heard King say "a few things" but he left the courtroom. At the time of the evidentiary hearing, Ross was in custody for armed robbery, and had convictions for second degree murder, mob action, and a federal drug offense. He did not anticipate any consideration for his testimony.

¶ 13 Murdock signed and submitted an affidavit attesting that he did not know any of the information Barnett or Ross provided until after the trial and that he only discovered it because the witnesses volunteered the information. Following the close of testimony, the trial court rejected Murdock's claim of newly discovered evidence, stating:

> "Mr. Ross didn't say anything that Mr. King didn't say. In fact, when Ross was asked about the details of what King told Sullivan, he said that King said he saw – he never saw anyone who killed his friend because he was inside his house when the shots were fired. That's consistent with what King said at trial and was subject to cross-examination at that time. Furthermore, about Murdock, he didn't say he knew who killed Walker and – or as to - well, he said that King didn't testify that it was Murdock that killed Walker. I just said that. He didn't know.
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> ***
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> And the testimony of Mr. Barnett as well, had to plant – he said – Formon said he had to plant a murder on someone. That means nothing. He didn't say it wasn't made up or that it wasn't true. He just said that he had to plant a murder on someone. Actually he told the investigator he had to plant a body on someone.
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> So I believe that the newly discovered evidence argument must fail as well, and the Motion For New Trial would – is respectfully denied."

The trial court sentenced Murdock to a term of imprisonment of 52 years. He appealed.

¶ 14 **ANALYSIS**

¶ 15 There are two issues on appeal: whether the trial court failed to comply with the requirements of Supreme Court Rule 431(b) and whether it erred in denying Murdock's motion for a new trial based on newly discovered evidence.

¶ 16 The first issue concerns the trial court's compliance with the requirements of Supreme Court Rule 431(b). Murdock complains that the trial court did not comply with the requirements of Supreme Court Rule 431(b) when it failed to ascertain the jury's understanding and acceptance of the fundamental principles of a fair trial as required by the rule.

¶ 17 As an initial matter, the State asserts and Murdock acknowledges, that because he failed to object during *voir dire* or raise the issue of non-compliance with Rule 431(b) in a posttrial motion, the issue is forfeited. Murdock urges this court to address the issue under plain error review.

¶ 18 The plain error doctrine allows a reviewing court to consider a forfeited issue when (1) the evidence in the case is closely balanced, regardless of the severity of the error; or (2) the error was so serious that the fairness of the defendant's trial and the integrity of the judicial process is affected. *People v. Herron*, 215 Ill. 2d 167, 187 (2005). Before this court may apply plain error review, we must determine whether there was error. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 19 Illinois Supreme Court Rule 431(b) requires that:

> "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 the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure 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. May 1, 2007). See also *People v. Zehr*, 103 Ill. 2d 472, 477 (1984).

¶ 20 In *People v. Blakenship*, 406 Ill. App. 3d 578, 581 (2010), the second district considered whether the court's failure to expressly ask whether the jurors "understood and accepted" the *Zehr* principles constituted error. The *Blakenship* court relied on an earlier second district opinion, *People v. Calabrese*, 398 Ill. App. 3d 98 (2010)), and its consideration of a trial court's administration of Rule 341(b). *Blakenship*, 406 Ill. App. 3d at 582. It noted that in *Calabrese*, while the trial court asked the venire only whether it "accept[ed]" the *Zehr* principles, the reviewing court interpreted the venire's assent to mean the jurors understood and accepted the *Zehr* principles, finding that "acceptance implies understanding, as least so far as Rule 431(b) is concerned." *Blakenship*, 406 Ill. App. 3d at 582 (quoting *Calabrese*, 398 Ill. App. 3d at 121). The *Blankenship* court concluded that "to accept" a *Zehr* proposition is "both to comprehend it and to assent to it." *Blakenship*, 406 Ill. App. 3d at 583.

¶ 21 The trial court here properly presented the *Zehr* principles and reiterated them to each group

of prospective jurors before asking each juror individually if he or she "agree[d] with those principles of law." As held in *Blakenship*, asking the jurors whether they "agree[d] with" the principles is "sufficient to confirm whether the jurors (in the language of Rule 431(b)) 'accept[ed]' the Zehr principles." *Blakenship*, 406 Ill. App. 3d at 583. We find there was no error and that plain error review is not warranted.

¶ 22 The next issue concerns the trial court's denial of Murdock's motion for a new trial based on newly discovered evidence. Murdock asserts that he presented newly discovered evidence entitling him to a new trial. He maintains that the two new witnesses, Ross and Barnett, offered testimony that contradicted the testimony of the State's witnesses, and that the information they would offer could not have been discovered prior to trial and would likely change the results on retrial.

¶ 23 Newly discovered evidence warrants a new trial when the evidence: (1) has been discovered since the trial; (2) is of such character that it could not have been discovered prior to trial by exercise of due diligence; (3) is material to the issue but not merely cumulative; and (4) will likely change the result on retrial. *People v. Molstad*, 101 Ill. 2d 128, 134 (1984) (quoting *People v. Baker*, 16 Ill. 2d 364, 374 (1959)). This court reviews a trial court's denial of a defendant's motion for a new trial based on newly discovered evidence for an abuse of discretion. *People v. Williams*, 295 Ill. App. 3d 456, 462 (1998).

¶ 24 In denying Murdock's motion for a new trial, the trial court found that none of the evidence presented was newly discovered, but if it was newly discovered, it was not so conclusive as to likely change the result on retrial. The trial court was correct. Ross's and Barnett's testimonies did not offer any new information pertinent to Murdock's guilt. While it at best presented circumstantial details about the credibility of the State's witnesses, Murdock was not identified as the murderer by

either witness. It would not have likely changed the result on retrial. The evidence was also cumulative and would serve only as impeachment of the State's witnesses. Lastly, the evidence was not newly discovered. Barnett had been in communication with Murdock before his trial and Ross told Murdock's mother his information during the trial. Because a new trial was not warranted, we find that the trial court did not err in denying Murdock's motion.

¶ 25 For the foregoing reasons, the judgment of the circuit court of Peoria County is affirmed.

¶ 26 Affirmed.