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2014 IL App (3d) 120378-U

Order filed February 14, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

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|--------------------------------------|---------------------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) Appeal from the Circuit Court |
| |) of the 14th Judicial Circuit, |
| Plaintiff-Appellee, |) Henry County, Illinois, |
| |) |
| v. |) Appeal No. 3-12-0378 |
| |) Circuit No. 11-CF-420 |
| |) |
| ANTONIO BONILLA, |) Honorable |
| |) Charles H. Stengel, |
| Defendant-Appellant. |) Judge, Presiding. |

JUSTICE McDADE delivered the judgment of the court.
Justice Carter concurred in the judgment.
Justice Schmidt concurred in part and dissented in part.

ORDER

¶ 1 *Held:* (1) The trial court committed reversible error when it failed to give a jury instruction defining a fictitious identification card because it was a necessary element of the offense. (2) Defendant was entitled to a \$500 credit against his \$500 felony fine for the days he spent in presentence custody.

¶ 2 Following a jury trial, defendant, Antonio Bonilla, was found guilty of obstructing justice (720 ILCS 5/31-4(a) (West 2010)) and possession of a fictitious identification card (15 ILCS 335/14A(b)(1) (West 2010)). Defendant was sentenced to two concurrent terms of two years'

conditional discharge. On appeal, defendant argues: (1) the trial court committed reversible error when it failed to instruct the jury as to the definition of a fictitious identification card; and (2) he is entitled to presentence custody credit against his felony fine. We reverse and remand for a new trial and to modify defendant's mittimus as directed herein.

¶ 3

FACTS

¶ 4 On December 5, 2011, defendant was charged by information with obstructing justice (count I) (720 ILCS 5/31-4(a) (West 2010)) and possession of a fictitious identification card (count II) (15 ILCS 335/14A(b)(1) (West 2010)). Count II alleged that defendant knowingly possessed a fictitious identification card in that said card contained a false name and false date of birth of defendant.

¶ 5 On February 27, 2012, after a hearing on defendant's motion to suppress, the trial court granted defendant's motion with respect to his allegedly fake identification card because it was improperly obtained by the police.

¶ 6 On March 8, 2012, the cause proceeded to a trial jury trial. The State's evidence indicated that on December 3, 2011, police officers Tim Bryner and Michael Minx were dispatched to defendant's residence in response to a noise complaint. The officers observed a vehicle parked in front of the residence playing loud music. The officers also observed defendant walk from the vehicle into the residence.

¶ 7 Bryner knocked at the door of the residence and asked Kimberly Bonilla, defendant's niece, to speak with the registered owner of the vehicle. Kimberly retrieved defendant and acted as an interpreter for him because he did not speak English. Defendant confirmed that the vehicle was his, and Bryner told defendant to keep the music down and left.

¶ 8 After leaving the residence, dispatch informed Bryner that defendant was the registered owner of the vehicle and that he had a warrant for his arrest in Fulton County. Bryner and Minx returned to defendant's residence and asked to speak with Antonio Bonilla. Kimberly retrieved defendant, and Minx informed him that he had a warrant for his arrest. Defendant said that he was Jesus Martinez and had Kimberly retrieve his wallet. Defendant handed the officers his wallet, which contained an Illinois identification card with a photograph that matched defendant's appearance and the name Jesus Martinez. Bryner believed that Minx checked the identification card with dispatch. The card appeared to be valid, so the officers left.

¶ 9 Minx returned to the police department and obtained defendant's booking photograph from Fulton County. Minx compared defendant's booking photo to the photo on defendant's identification card from the State Police database and determined that they were the same person. The officers returned to defendant's residence, and he was arrested.

¶ 10 The State rested, and defendant's motion for a directed verdict was denied. Defendant rested without presenting any evidence. During the jury instructions conference, the State tendered two jury instructions relating to possession of a fictitious identification card. The instructions stated:

"A person commits the offense of possession of fictitious identification when he knowingly possesses, displays or causes to be displayed any fictitious or unlawfully altered identification card.

To sustain the charge of possession of fictitious identification, the State must prove the following proposition:

That the defendant knowingly possessed a fictitious or

unlawfully altered identification card."

¶ 11 Defendant argued that "fictitious" was unclear and requested a definitional instruction, noting that the instant offense could be confused with a misdemeanor crime for showing someone else's identification. The trial court allowed the instruction without providing a definition for fictitious.

¶ 12 In closing arguments, the State told the jury that with regard to count II, if defendant had an identification card with his photograph and any name other than his own, it was a fictitious identification. The State argued that defendant displayed an Illinois identification card with his photograph and the name Jesus Martinez, and thus was guilty of the offense.

¶ 13 Defense counsel argued that without the allegedly fictitious identification card in evidence, there was no way to know if the photograph on the card was of defendant or someone that looked like defendant. Counsel informed the jury that there was a difference between a fictitious identification card and using someone else's identification, noting that the former required proof that defendant altered the card in some way before displaying it. Counsel argued that the State failed to meet its burden of proof for this offense.

¶ 14 The jury found defendant guilty of both charges. Defendant filed a motion for new trial, which the trial court denied. Defendant was sentenced to two concurrent terms of two years' conditional discharge and ordered to pay a \$500 felony fine for his obstructing justice conviction. Defendant appeals.

¶ 15 ANALYSIS

¶ 16 I. Jury Instructions

¶ 17 Defendant first argues that the trial court erred when it failed to instruct the jury on a

necessary element of the charge for possession of a fictitious identification card. Defendant asserts that the trial court should have instructed the jury as to the definition of a fictitious identification card.

¶ 18 Defendant admits that he failed to preserve this issue for appeal, but argues that we may review it under the plain error doctrine. Generally, no party may raise on appeal the failure to give an instruction unless he shall have tendered it. Ill. S. Ct. R. 366(b)(2)(i) (eff. Feb. 1, 1994). However, Illinois Supreme Court Rule 451(c) (eff. July 1, 2006) provides that substantial defects in jury instructions are not waived by a defendant's failure to make timely objections if the interests of justice require. *People v. Fonder*, 2013 IL App (3d) 120178. "The purpose of Rule 451(c) is to permit correction of grave errors and errors in cases so factually close that fundamental fairness requires that the jury be properly instructed." *Id.* ¶ 17 (citing *People v. Sargent*, 239 Ill. 2d 166, 189 (2010)). Rule 451(c) is coextensive with the plain error rule. See Ill. S. Ct. R. 615(a); *Sargent*, 239 Ill. 2d 166. Therefore, before addressing whether defendant's claim satisfies the plain error doctrine, we must first determine whether a clear or obvious error occurred. *People v. Thompson*, 238 Ill. 2d 598 (2010).

¶ 19 The purpose of jury instructions is to provide the jury with the correct legal principles applicable to the evidence, so that the jury may reach a correct conclusion according to the law and the evidence. *Fonder*, 2013 IL App (3d) 120178. It is the trial court's burden to insure the jury is fully instructed on the elements of the offense, the burden of proof, and the presumption of innocence. *People v. Williams*, 181 Ill. 2d 297 (1998). When reviewing whether the applicable law was correctly conveyed by the instructions to the jury, our review is *de novo*. *Fonder*, 2013 IL App (3d) 120178.

¶ 20 In this case, defendant was convicted under section 14A(b)(1) of the Illinois Identification Card Act, which states that it is unlawful to "knowingly possess, display, or cause to be displayed any fictitious or unlawfully altered identification card." 15 ILCS 335/14A(b)(1) (West 2010).

The statute defines a fictitious identification card as:

"any issued identification card for which a computerized number and file have been created by the Secretary of State, the United States Government, any other state or political subdivision thereof, or any government or quasi-governmental organization that contains false information concerning the identity of the individual issued the identification card." 15 ILCS 335/14A(a)(1) (West 2010).

¶ 21 Thus, in order to convict defendant under this section, the State was required to prove beyond a reasonable doubt that the identification card was created and issued by the appropriate agency and that it contained false information of the individual that was issued the card. In the instant case, there was no pattern jury instruction available for this offense, so the trial court instructed the jury using the language of section 14A(b)(1). The court, however, failed to give a definitional instruction for a fictitious identification card, which left the jury without any guidance on the meaning of an essential element of the offense.

¶ 22 As defendant points out, in addition to not having a definitional instruction before the jury, the State also misled the jury on this essential element during its closing argument. The State informed the jury that in order to find defendant guilty, it was only required to find that defendant possessed an identification card that contained his photograph and a name other than

his own. The State's argument disclaimed any burden of proof regarding the creation and issuance of the card. Additionally, the State failed to present sufficient evidence to prove that the appropriate agency had created and issued the identification card. Although the evidence indicated that Minx believed defendant's identification card appeared to be valid and had viewed it in the State Police database, this evidence did not address how the card was created or issued. Moreover, the card itself was not submitted into evidence in order to determine how it was created. In light of the misleading burden of proof presented to the jury and the lack of evidence supporting this necessary element, we find the trial court's omission of the definitional instruction was error.

¶ 23 Since we have determined that the omission of the definitional instruction was error, we must next determine whether this omission was reversible error. The erroneous omission of a jury instruction rises to the level of reversible error only when the omission creates a serious risk that the jurors incorrectly convicted defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial. *Sargent*, 239 Ill. 2d 166. Fundamental fairness requires trial courts to see to it that certain basic instructions, essential to a fair determination of the case by the jury, are given. *Fonder*, 2013 IL App (3d) 120178.

¶ 24 Here, the jury found defendant guilty, but was never instructed that the State had to prove the identification card was created and issued by the appropriate agency. Since these elements are not commonly understood from the term fictitious, the jury was likely misled when the tendered jury instructions failed to define it. *Cf. People v. Hopp*, 209 Ill. 2d 1 (2004) (holding that where a term is commonly understood, the court's failure to define the term is not reversible error). The jury found defendant guilty without having an accurate definition of an essential

element of the offense, and this omission severely threatened the fairness of defendant's trial. Thus, we find such error reversible. See *Fonder*, 2013 IL App (3d) 120178 (finding reversible error where the trial court's omission of a jury instruction did not allow the jury to consider an element essential to the determination of defendant's guilt or innocence). Therefore, we reverse defendant's conviction for possession of a fictitious identification card, and remand the cause for a new trial on that charge.

¶ 25

II. Presentence Credit

¶ 26 Defendant next argues that he is entitled to a \$5-per-day credit against his felony fine for the time he spent in custody before sentencing. See 725 ILCS 5/110-14(a) (West 2010). The State concedes that defendant is entitled to a credit against his fine, and we agree. A defendant who is assessed a fine is allowed a credit of \$5 for each day spent in custody on a bailable offense for which he did not post bail. 725 ILCS 5/110-14(a) (West 2010). A defendant may apply for the credit at any stage of court proceedings. *People v. Caballero*, 228 Ill. 2d 79 (2008).

¶ 27 The record reveals that defendant was incarcerated for 156 days prior to sentencing. Thus, defendant is entitled to up to \$780 in credit against his fine. Accordingly, we direct the trial court to modify defendant's mittimus to reflect a credit of \$500 against his \$500 felony fine.

¶ 28

CONCLUSION

¶ 29 For the foregoing reasons, the judgment of the circuit court of Henry County is reversed, and the cause is remanded for further proceedings.

¶ 30 Reversed and remanded.

¶ 31 JUSTICE SCHMIDT, concurring in part and dissenting in part.

¶ 32 I find the jury instruction issue forfeited and, therefore, dissent from that portion of the

majority's order which reverses the defendant's fictitious identification card conviction.

¶ 33 As the majority points out, the purpose of Illinois Supreme Court Rule 451(c) is to permit correction of grave errors and errors in cases so factually close that fundamental fairness requires the jury be properly instructed. In the case before us, the jury heard the following testimony from police officers:

"Q. And you said he showed you identification. What sort of identification did he show?

A. It was a driver's license, I believe, or an ID card.

I -- can't remember exactly. It was an Illinois identification card.

Q. OK. From the State of Illinois?

A. Correct."

The officer later went on to say that it was a driver's license.

¶ 34 A second officer was asked:

"Q. OK. And when you opened that wallet, you saw a driver's license?

A. An Illinois ID card."

Yet, a third officer testified that he had stopped the defendant previously and defendant handed him an Illinois identification card identifying himself as Jesus Martinez.

¶ 35 Whether it was a driver's license or an Illinois identification card is irrelevant. Testimony from the officers was clear that defendant handed them an Illinois identification card with his picture and someone else's name.

¶ 36 There was no grave error. Unlike danger, there is another kind of error! This is not a close case. On remand, the officers will undoubtedly testify that this was a State of Illinois identification card and that it had been altered to include the defendant's picture and someone else's name and other identifying information. Defendant will be convicted. We will have accomplished nothing other than a waste of time and money. This is not the kind of case envisioned by the supreme court when authoring Rule 451(c) or the plain error rule.

¶ 37 We are living in a time of limited resources. There are not enough public defenders. There are not enough appellate defenders. There are defendants in serious need of the assistance of these lawyers. At least in this case, Mr. Bonilla is not one of them. By requiring a retrial in this case, we are not just wasting time and money, but also depriving some deserving defendant of the attention his case deserves. There are only so many public defenders and only so many hours in the day. I respectfully submit that overlooking forfeiture in this case serves not to promote justice but, rather, to defeat it.