2014 IL App (4th) 121140-U

NO. 4-12-1140

FILED
July 3, 2014
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
CLYDE H. WALLACE,	)	No. 10CF725
Defendant-Appellant.	)	
	)	Honorable
	)	Patrick W. Kelley,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Pope and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court did not commit plain error by admitting a photo array of defendant which revealed he was previously arrested.

(2) Defendant was not denied his right to a speedy trial.

¶ 2 Following an August 2012 jury trial, defendant, Clyde H. Wallace, was found guilty of robbery (720 ILCS 5/18-1(a) (West 2010)) and aggravated robbery (720 ILCS 5/18-5(a) (West 2010)) and was acquitted of armed robbery (720 ILCS 5/18-2(a) (West 2010)). In October 2012, the trial court found the robbery conviction merged with the aggravated robbery conviction and sentenced defendant to 16 years' imprisonment. Defendant appeals, arguing (1) the trial court erred when it admitted a photo array showing he was previously arrested for an unrelated crime; and (2) his right to a speedy trial was violated because the State elected to proceed on another charge as subterfuge to avoid trying him within the speedy-trial term. We affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Pretrial Proceedings

¶ 5 On September 24, 2010, defendant was arrested and charged with five counts of aggravated robbery (720 ILCS 5/18-5(a) (West 2010)) and five counts of armed robbery (720 ILCS 5/18-2(a) (West 2010)). On September 29, 2010, a probable-cause hearing was held and bond was set at $250,000. Defendant was never able to post bond and remained in jail throughout these proceedings.

¶ 6 On October 14, 2010, a preliminary hearing was held and defendant requested a continuance. On October 28, 2010, the State charged defendant by information with six counts of aggravated robbery (720 ILCS 5/18-5(a) (West 2010)) and six counts of armed robbery (720 ILCS 5/18-2(a) (West 2010)) for the same offenses and superseded the initial charges. Counts I through XII generally alleged defendant committed six robberies from August 13, 2010, to September 16, 2010. The court set the case for jury trial for December 6, 2010.

¶ 7 From December 6, 2010, through July 11, 2011, defendant requested continuances and filed a series of motions, including *inter alia* motions to proceed *pro se*, a motion to dismiss, motions for substitution of judge, a motion for a private investigator, motions for transcripts and the common-law record, and a motion for standby counsel.

¶ 8 On July 11, 2011, defendant, proceeding *pro se*, withdrew his pending motions and announced ready for trial. The State indicated it would not be ready to proceed and requested a continuance. The trial court set a pretrial conference for August 17, 2011, and scheduled the trial for August 22, 2011.

¶ 9 At the August 17, 2011, pretrial hearing, the State stated it was having problems with witnesses and was not sure if it would be prepared for trial by August 22, 2011. The next

day, on August 18, 2011, the State charged defendant with one count of aggravated battery (720 ILCS 5/12-4(b)(8) (West 2010)) for an unrelated fight that occurred in jail.

¶ 10 On August 22, 2011, the State elected to try defendant for aggravated battery pursuant to section 103-5(a) of the Code of Criminal Procedure of 1963 (speedy-trial statute) (725 ILCS 5/103-5(a) (West 2010)). Defendant objected to the State's election. On September 6, 2011, defendant moved to dismiss due to the violation of his speedy-trial rights. The trial court denied the motion and found 67 days had elapsed in the speedy-trial term since defendant's arrest.

¶ 11 On May 15, 2012, defendant's aggravated battery case proceeded to jury trial and on May 16, 2012, he was found guilty. On July 13, 2012, the trial court sentenced defendant to 42 months' imprisonment in that case.

¶ 12 On August 13, 2012, one month after sentencing in No. 11-CF-0726, the robbery case herein proceeded to jury trial. Prior to trial, the State dismissed counts I to X for lack of evidence. Defendant proceeded to trial *pro se*.

¶ 13 B. The Trial

¶ 14 At trial, Lucinda White testified she was working as head service clerk at the Walgreens at 1155 North 9th Street in Springfield on September 16, 2010. Shortly before closing at 10 p.m., she was in the photography section talking with Kervin Jones (a coworker) when she noticed defendant approach the front register. She left the photo area to assist defendant. Defendant was wearing a wig with curly hair and brown streaks, glasses, and a cap. He asked for two cartons of cigarettes and White replied she did not have two cartons available—because she believed defendant would write a bad check—but she then looked under the counter and decided to produce two cartons of cigarettes. As she was going to ring up the

purchase, defendant said, "put 'em on the counter, b***. I got a gun. Give me the money." White put her hands up, stepped back, and looked at Jones. Defendant said, "B***, don't look at him." White saw a silver gun tucked under defendant's left arm with two holes pointing at her. She opened the register, took the money out of the drawer, and put it on the counter. White asked if he wanted the change and defendant replied, "don't be funny." Defendant took the money, cigarettes, and hair clippers and left the store. White immediately told Jones about the robbery and paged the manager. Following the robbery, White met with detectives at the Sangamon County Building to view a physical lineup, but the lineup was cancelled. On September 30, 2010, she met with two detectives at Walgreens to view a photo array. White circled defendant's photograph and stated she was 100% sure the individual was the offender because of his facial features.

¶ 15 Kervin Jones testified he was working as a photo specialist at the Walgreens at 1155 North 9th Street on September 16, 2010. Around 9:45 p.m., he observed defendant enter the store wearing glasses, a white cap, and a wig. Jones asked if he needed assistance, and defendant said he did not. Jones returned to the photo department and saw defendant walk down the middle aisle but did not notice anything suspicious. Jones first became aware of the robbery when White ran toward him and told him there had been a robbery. Jones further testified Detective Sara Jett asked him to view a physical lineup but the lineup was cancelled because one of the individuals refused to participate. On September 30, 2010, Detective Jett and Detective Steve Dahlkamp showed Jones a photo array and Jones circled the third photograph (defendant) as the person who committed the robbery.

¶ 16 Both White and Jones testified Walgreens had a security-surveillance system. White and Jones stated, prior to testifying, they viewed the footage depicted on the surveillance

video and it truly and accurately depicted the images of what happened during the robbery. The trial court viewed the video, a copy of which has been included in the record on appeal. The first video clip shows a man entering the Walgreens through the front door at 9:21 p.m. Jones testified the man seen entering the front door was defendant. The video clip shows defendant with dark, curly hair, clear glasses, a white hat, black shirt, blue jeans, and black shoes with white trim.

¶ 17 The second and third video clips show defendant approach the cash register at 9:24 p.m. Moments later, White walked behind the register to assist defendant. Defendant leaned on the counter and pointed to cigarettes. After a brief conversation, White placed two cartons of cigarettes on the counter and rang up defendant's purchase. As the register opened, White stepped back with her hands up and looked to her left. The video then shows White taking cash out of the register and placing it on the counter next to defendant. Defendant pointed to the register and White removed the empty tray. Defendant took the money from the counter and put it in his left pants pocket. He grabbed the cigarettes and hair clippers and exited the store at 9:26 p.m. The video does not show defendant holding a gun under his arm.

¶ 18 The State called Tara Burkhart to the stand. Burkhart testified she was working as head photo specialist at the Walgreens at 1155 North 9th Street on September 16, 2010. Burkhart was walking toward the back of the store when she noticed defendant wearing a black wig with brown highlights, a ball cap, and jeans. Her attention was drawn to defendant because he was "wearing a woman's wig that was not taken very good care of." Burkhart was shown a still photograph from the first video that was identified in court and included in the record on appeal. She identified People's exhibit No. 1 as defendant entering the store. Burkhart testified she asked defendant if he needed assistance, and he replied he was looking for hair clippers.

Burkhart was apprehensive because she thought a man wearing a wig would have no need for hair clippers. She told defendant where the hair clippers were located but did not accompany him because she did not feel safe. Burkhart observed defendant pick up hair clippers and walk toward the front register. Burkhart walked to the back office and told her manager about defendant and that something was not right. By the time they went to the front of the store, the robbery had already occurred. Burkhart was asked to view an in-person lineup at the Sangamon County jail but it was cancelled because the suspect refused to cooperate. Burkhart met with two detectives to view a photo lineup and she was 80% certain that one of the photographs depicted the offender.

¶ 19 Detective Sara Jett testified she was assigned to investigate the armed robbery at the Walgreens. As part of the investigation, she reviewed the surveillance video depicting the robbery and interviewed White, Jones, and Burkhart, and based on this information she believed defendant to be the primary suspect. Defendant was arrested on September 24, 2010. On September 29, 2010, Detective Jett obtained a court order to compel defendant to appear in a lineup but defendant refused to participate. Detective Jett assembled a photo lineup of six photos, including a photo of defendant. She obtained the photos by searching the police records system for arrestees with similar physical characteristics as defendant (*e.g.*, same race, age, height, and weight). The query resulted in a population of arrestees and Detective Jett chose five that looked like defendant. She prepared a photo array for each of the three witnesses. She used the same photographs in each, but changed the order in which they appeared. (Defendant's photo displays a placard labeled "Sangamon County Sheriff." A digital display labeled "DATE" shows "07.24.10."

¶ 20 On September 30, 2010, Detective Jett showed the photo arrays to Jones, White,

and Burkhart. Jones and White both identified defendant. Burkhart also identified defendant but declined to circle his picture because she was only 80% certain.

¶ 21 Britney Lunsford (defendant's ex-girlfriend) testified she and defendant stayed at her aunt Lashay Lovved's house in September 2010. Her aunt had "a lot of wigs" of different sizes and colors. Around the time of the robbery, Lunsford saw defendant with a pair of hair clippers she had not seen before. When shown a still photograph from the surveillance video, Lunsford testified the man's shoes were similar to the shoes defendant wore but the person depicted in the photo is not defendant.

¶ 22 Lashay Lovved testified that Lunsford and defendant occasionally stayed at her home. Sometime around August 30, 2010, Lovved ordered them to leave because she found a silver revolver in their room. Lovved owned approximately 25 wigs and some were missing, including a curly black wig with brown highlights, when defendant and Lunsford moved out. The State rested.

¶ 23 Defendant first called Robert Wallace to impeach the testimony of White. Defendant then called Ebony Wallace (defendant's sister) to the stand. She testified that defendant made money by babysitting her child on weeknights from 4 p.m. to 4 a.m. Rimy Sims (engaged to defendant's cousin) corroborated Ebony Wallace's testimony. Defendant called himself as a witness and testified he did not rob the Walgreens and he could not remember September 16, 2010, because nothing significant happened to him that day.

¶ 24 Following deliberations, the jury acquitted defendant of armed robbery, but it found him guilty of aggravated robbery and robbery. The trial court determined the robbery conviction merged with the aggravated robbery conviction. On October 17, 2012, the trial court sentenced defendant to 16 years' imprisonment, with two years' mandatory supervised release.

The sentence is to run consecutively with the aggravated battery sentence in No. 11-CF-0726. The trial court denied defendant's motion to reconsider his sentence on December 7, 2012.

¶ 25 This appeal followed.

¶ 26 II. ANALYSIS

¶ 27 A. Admissibility of Photo Array

¶ 28 Defendant first argues the trial court erred when it allowed evidence of a photo array showing he was arrested prior to the robbery. We note defendant, who represented himself at trial, did not object to the introduction of the photo array at trial, nor did he raise the issue in a posttrial motion.

¶ 29 "The failure to object to allegedly improper evidence when it is introduced at trial results in forfeiture of the issue for purposes of appeal." *People v. Hudson*, 228 Ill. 2d 181, 190, 886 N.E.2d 964, 970 (2008). This principle encourages defendants to raise issues before the trial court so the court may correct its errors before instructions are given " 'and consequently preclud[es] a defendant from obtaining a reversal through inaction.' " *Id*. (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 564, 870 N.E.2d 403, 409-10 (2007)).

¶ 30 Defendant acknowledges the procedural default but argues the error should be reviewed under the plain-error rule. Illinois Supreme Court Rule 615(a) (eff. Jan. 1, 1967) states: "Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court."

¶ 31 In addressing a defendant's plain-error argument, we first consider whether an error occurred at all. *People v. Urdiales*, 225 Ill. 2d 354, 415, 871 N.E.2d 669, 705 (2007). Here, the trial court erred when it admitted a photo array with defendant's booking photo bearing

an arrest date prior to that of the offense at issue. *People v. Arman*, 131 Ill. 2d 115, 124, 545 N.E.2d 658, 662 (1989); see also *People v. Warmack*, 83 Ill. 2d 112, 128, 413 N.E.2d 1254, 1262 (1980) ("[t]he error in revealing a prior arrest is obvious" and the evidence should not be made available to the jury where it is not relevant to any matter in issue). Although photo arrays are otherwise admissible to show how defendant was identified (*People v. Sims*, 285 Ill. App. 3d 598, 608, 673 N.E.2d 1119, 1125 (1996)), the date of arrest should have been redacted from the photo array in this case. See *People v. Taylor*, 244 Ill. App. 3d 806, 815-16, 612 N.E.2d 943, 950 (1993) (testimony related to the use of mug shots should not be permitted "if it tends to inform the jury the defendant committed an unrelated[] criminal act"). Since the jury could infer defendant was previously arrested for another offense, an error occurred when the court admitted the photo array.

¶ 32 We next address whether the evidence is so closely balanced the error threatened to tip the scales of justice against defendant or is so serious it affected the fairness of defendant's trial and challenged the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007).

¶ 33 In *Warmack*, 83 Ill. 2d at 128, 413 N.E.2d at 1262, the defendant argued the trial judge erred in admitting his mug shot bearing an arrest date prior to that of the offenses at issue. The supreme court acknowledged the error in admitting evidence of the prior arrest. However, the court reasoned, "[t]o hold that this error is reversible would require us to presume that the jury recognized the arrest date for what it was, realized that the arrest date preceded the date of the offenses with which defendant was charged, and then adjudicated defendant's guilt on the basis of this prior arrest rather than the evidence produced at trial." *Id.* at 129, 413 N.E.2d at 1262. The court rejected this presumption and concluded that a trial without this error would

produce no different result. *Id.* at 128-29, 413 N.E.2d at 1262. Accordingly, the court held the admission of the photo was not plain error. *Id.* at 129, 413 N.E.2d at 1262.

¶ 34 Like the court in *Warmack*, we decline to presume defendant's booking photo, rather than the evidence presented at trial, provided the basis upon which the jury adjudicated defendant's guilt. Even if defendant was granted a new trial and the date of the prior arrest was excluded, the evidence would not be likely to produce a different result in light of the surveillance video and eyewitness testimony from White, Jones, and Burkhart, as well as the corroborating testimony from Lunsford and Lovved. We find the evidence supporting the jury's verdict overwhelming, and the photo array did not contaminate the jury or affect the outcome of defendant's trial. Retrial without the erroneous admission of the evidence would not produce a different result. Admission of the photo array was not plain error.

¶ 35 B. Speedy Trial

¶ 36 Defendant next contends his right to a speedy trial was violated. Specifically, he argues the State's election to proceed on the aggravated battery charge was subterfuge because the State was experiencing problems with its witnesses and its election enabled the State to avoid violating defendant's right to a speedy trial. The State acknowledges it was having problems locating witnesses but argues it has a right to elect on a different charge and there is no subterfuge in this case. We agree with the State.

¶ 37 A defendant possesses both constitutional and statutory rights to a speedy trial. *People v. Phipps*, 238 Ill. 2d 54, 65, 933 N.E.2d 1186, 1193 (2010). In this case, defendant asserts only his statutory right to a speedy trial was violated. Illinois's speedy-trial statute provides, in part, a defendant in custody must be brought to trial within 120 days of the day he was brought into custody. 725 ILCS 5/103-5(a) (West 2010). The speedy-trial statute tolls

during any period of delay occasioned by the defendant. *People v. Kliner*, 185 Ill. 2d 81, 115, 705 N.E.2d 850, 869 (1998). A defendant not tried within the statutory period must be released from custody and have the charges against him dismissed. 725 ILCS 5/103-5(d) (West 2010); *People v. Hunter*, 2013 IL 114100, ¶ 10, 986 N.E.2d 1185.

¶ 38 When a defendant is simultaneously in custody for more than one charge, the State is required to bring the defendant to trial on one of those charges within 120 days of arrest and must try the defendant on the remaining charge within 160 days from the rendering of judgment on the first charge. 725 ILCS 5/103-5(e) (West 2010). "Section 103-5(e) thereby preserves a defendant's right to a speedy trial and also mitigates the State's burden of preparing more than one charge for trial against a single incarcerated defendant. Under section 103-5(e), the speedy-trial period on the second charge is tolled until a judgment is rendered in the first charge." *Kliner*, 185 Ill. 2d at 123, 705 N.E.2d at 873.

¶ 39 Whether the State acted to evade the speedy-trial term or otherwise gain a tactical advantage over defendant is a factual issue. In general, a reviewing court may upset a trial court's factual determination only if it is against the manifest weight of the evidence. *People v. Richardson*, 234 Ill. 2d 233, 251, 917 N.E.2d 501, 512 (2009). However, a trial court's determination of how many days have accrued against the State following a defendant's speedy-trial demand is typically reviewed against an abuse-of-discretion standard. *Kliner*, 185 Ill. 2d at 115, 705 N.E.2d at 869.

¶ 40 Although not raised in the parties' briefs, the trial court incorrectly found 67 days elapsed in the speedy-trial period from the date of defendant's arrest on September 26, 2010, to the time the State elected to proceed on the aggravated battery case on August 22, 2011. First, defendant was arrested on September 24, 2010, not September 26, 2010. Second, the trial court

incorrectly counted the date of the hearing as one day, which resulted in some days being counted twice—for example, there are seven days, and not eight, from July 11, 2011, to July 18, 2011. In any case, as of August 22, 2011 (the date the State elected to proceed on the aggravated battery case), a detailed review of the proceedings shows 62 days in the speedy-trial term had passed. The running of the speedy-trial statute was tolled in the robbery case until judgment in the aggravated battery case was rendered.

¶ 41 On May 15, 2012, the aggravated battery case proceeded to jury trial and on May 16, 2012, defendant was found guilty. On July 13, 2012, judgment was rendered and defendant was sentenced to 42 months' imprisonment. (A detailed review of the 263 days between August 18, 2011 (date of the aggravated battery indictment), and May 15, 2012 (date of trial), shows defendant filed numerous motions and only four days in the speedy-trial term are attributable to the State.)

¶ 42 The speedy-trial period with respect to the robbery case was therefore tolled from August 22, 2011, until July 13, 2012, when judgment was rendered on the aggravated battery charge. Once judgment was rendered, the State was required to bring defendant to trial for robbery within 160 days. The State brought defendant to trial in the robbery case 31 days later, on August 13, 2012. Defendant was tried well within the 160 days provided for in section 103-5(e).

¶ 43 We reject defendant's contention that the State's election was subterfuge. In *Kliner*, the supreme court found no subterfuge where the State changed its election in order to interview a witness. *Id.* at 124, 705 N.E.2d at 873. The supreme court in *Kliner* stated section 103-5(e) "preserves a defendant's right to a speedy trial and also mitigates the State's burden of preparing more than one charge for trial against a single incarcerated defendant." *Id.* at 123, 705

N.E.2d at 873 (citing 725 ILCS 5/103-5(e) (West 1994)). The court noted the State has a right to change its election, and once the State did so the speedy-trial clock in the underlying case tolled. *Id.* at 123-24, 705 N.E.2d at 873.

¶ 44 Here, the State changed its election on one occasion because it was having problems locating witnesses. See *People v. Beard*, 271 Ill. App. 3d 320, 327-28, 648 N.E.2d 111, 116 (1995) (no speedy-trial violation where the State changed its election three times). The State in this case was not precluded from changing its election to proceed on the aggravated battery charge; otherwise, defendant could decide which charge should be tried first by challenging a prosecutor's legitimate reason for changing his election. *Kliner*, 185 Ill. 2d at 124, 705 N.E.2d at 873. The delays in this case are attributable to both the State and defendant as each party requested and received continuances at various times, and the record fails to show defendant was prejudiced by the delay in his ability to prepare for trial. As noted above, 62 days in the speedy-trial term had passed when the State elected to try defendant on the aggravated battery charge, and the State had sufficient time remaining in the speedy-trial term. Since defendant failed to show he was brought to trial after the initial time period passed, the State did not violate defendant's speedy-trial rights by changing its election.

¶ 45 Finally, defendant contends the $250,000 bond set in the aggravated battery case is evidence of subterfuge. The State argues defendant fails to cite anything in the record to support his argument. The State also asserts it does not determine the amount of bail, the court does (725 ILCS 5/110-5 (West 2010)), and thus, the State did not use subterfuge to deny defendant's speedy-trial rights. We agree with the State. The record shows defendant remained in custody from the time of his arrest to the time of sentencing because he was not able to pay the

$250,000 bond set in the armed robbery case. We fail to understand how the additional $250,000 bond set in the aggravated battery case is subterfuge.

¶ 46 III. CONCLUSION

¶ 47 We affirm defendant's conviction for aggravated robbery.

¶ 48 Affirmed.