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Carla Bender
4th District Appellate
Court, IL

2017 IL App (4th) 141070-U

NO. 4-14-1070

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
CORDELL M. SANDERS,	)	No. 13CF22
Defendant-Appellant.	)	
	)	Honorable
	)	Jennifer H. Bauknecht,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justice Holder White concurred in the judgment.
Justice Pope dissented.

ORDER

¶ 1 *Held*: The trial court's failure to conduct a proper *Boose* hearing before restraining defendant constituted plain error.

¶ 2 The State charged defendant with two counts of aggravated battery, and the cause proceeded to a jury trial, where defendant represented himself. Prior to *voir dire*, the court ordered defendant's handcuffs removed, but not his leg restraints, which defendant wore throughout his trial. The jury found defendant guilty of aggravated battery, and the trial court sentenced him to six years in prison.

¶ 3 On appeal, defendant argues that the trial court failed to comply with Illinois Supreme Court Rule 430 (eff. July 1, 2010) and *People v. Boose*, 66 Ill. 2d 261, 362 N.E.2d 303 (1977), by failing to conduct an appropriate hearing before ordering defendant to remain restrained during trial. We agree and vacate defendant's convictions.

¶ 4 I. BACKGROUND

¶ 5 In February 2013, while defendant was an inmate at Pontiac Correctional Center, the State charged him with two counts of aggravated battery (720 ILCS 5/12-3.05(d)(4) (West 2012)), alleging that he pulled a correctional officer into the bars of a cell door. The trial court appointed counsel to represent defendant.

¶ 6 In September 2013, defendant *pro se* filed a motion asking the trial court to appoint different counsel. At a hearing conducted later that month, defendant explained that he was trying to hire private counsel but wanted a new public defender appointed in the meantime. The court denied defendant's motion for new appointed counsel but explained to defendant that he could hire private counsel if he was unsatisfied with appointed counsel.

¶ 7 In December 2013, defendant, through appointed counsel, filed a motion to allow defendant to proceed *pro se*. The trial court granted that motion and refused to appoint standby counsel.

¶ 8 In June 2014, the cause proceeded to a jury trial. Prior to *voir dire*, outside the presence of the jury, the following exchange occurred concerning defendant's restraints:

> "THE COURT: Then we need to address restraints. Let me ask the officers there: How has he been today?
>
> CORRECTIONAL OFFICER: Fine.
>
> THE COURT: All right. And if I have his restraints, as far as his hand restraints are concerned, if I have those removed for trial, if he's a problem, do you think you can bring him under control?
>
> CORRECTIONAL OFFICER: Yes.

THE COURT: [Mr. State's Attorney], it's my understanding, at least from [defendant's] earlier comments, that you have a conviction for murder. Is that correct?

DEFENDANT: Yeah.

THE COURT: All right. What other criminal history does he have?

STATE'S ATTORNEY: Your Honor, I think he just has some juvenile arrests; I don't have dispositions for those offenses.

THE COURT: All right. And, [defendant], what restraints are you asking to have removed?

DEFENDANT: My handcuffs.

THE COURT: All right. Then I'll direct that those be removed. I would tell you, I don't know if you've been through this before, but, when the jurors come in, they're going to come in this back door; so, they're not going to see, they won't be able to see any restraints on your legs. So, should appear relatively normal when they come in."

(The record on appeal does not disclose what prompted the trial court to address the issue of defendant's restraints. Nor does the record reveal whether defendant stood and attempted to move about the courtroom during opening statement or cross-examination of the State's witnesses.)

¶ 9 After the close of the State's evidence, outside the presence of the jury, the following exchange occurred between the trial court and defendant:

"THE COURT: And if you do wish to testify, then what we'll do is, we'll get you up to the stand and get you secured; jurors will not be able to see the leg restraints. And then we'll bring the jury in after you're in the box. And then, when

> you have completed your testimony and examination by the State, then I'll have the jury go out and we'll put you back at the table so they won't see you in a restrained fashion.
>
> DEFENDANT: All right."

Prior to the jury returning to the courtroom, defendant confirmed that he wished to testify. The court stated, "All right. Then what we'll do is, we'll have them secure you here, at least your legs, release the hands." Defendant testified and presented no further evidence.

¶ 10 The jury found defendant guilty on both counts of aggravated battery. After an October 2014 sentencing hearing, the trial court merged the counts and sentenced defendant to six years in prison, to run consecutively to the sentence defendant was already serving.

¶ 11 This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 Defendant raises multiple arguments on appeal, but we need only address one, because it is dispositive. In that argument, defendant claims that his convictions must be vacated because the trial court forced him to wear leg restraints during his jury trial without first holding a proper hearing to determine whether restraints were necessary, as required by Illinois Supreme Court Rule 430 (eff. July 1, 2010) and *Boose*. We agree with defendant.

¶ 14 A. Rule 430

¶ 15 Illinois Supreme Court Rule 430 (eff. July 1, 2010) provides the following:

> "An accused shall not be placed in restraint of any form unless there is a manifest need for restraint to protect the security of the court, the proceedings, or to prevent escape. *** Once the trial judge becomes aware of restraints, prior to allowing the defendant to appear before the jury, *he or she shall conduct a sepa-*

rate hearing on the record to investigate the need for such restraints. At such hearing, the trial court shall consider and shall make specific findings as to:

(1) the seriousness of the present charge against the defendant;

(2) defendant's temperament and character known to the trial court either by observation or by the testimony of witnesses;

(3) defendant's age and physical attributes;

(4) defendant's past criminal record and, more particularly, whether such record contains crimes of violence;

(5) defendant's past escapes, attempted escapes, or evidence of any present plan to escape;

(6) evidence of any threats made by defendant to harm others, cause a disturbance, or to be self-destructive;

(7) evidence of any risk of mob violence or of attempted revenge by others;

(8) evidence of any possibility of any attempt to rescue the defendant by others;

(9) size and mood of the audience;

(10) physical security of the courtroom, including the number of entrances and exits, the number of guards necessary to provide security, and the adequacy and availability of alternative security arrangements.

After allowing the defendant to be heard and after making specific findings, the trial judge shall balance these findings and impose the use of a restraint only where the need for restraint outweighs the defendant's right to be free from

restraint." (Emphasis added.)

The committee comments to Rule 430 state that the rule codifies the holdings in *Boose* and *People v. Allen*, 222 Ill. 2d 340, 856 N.E.2d 349 (2006).

¶ 16 B. *People v. Boose*

¶ 17 In *Boose*, the defendant appeared at a hearing on his competency to stand trial "wearing handcuffs, which were threaded through shackles attached to a restraining belt wrapped around his waist." *Boose*, 66 Ill. 2d at 264, 362 N.E.2d at 304. The defendant objected, requesting that he be unshackled while in the presence of the jury. The trial court denied that request, stating that the shackles were necessary because the defendant was charged with murder. The jury found defendant competent to stand trial. *Id.* at 264-65, 362 N.E.2d at 304-05.

¶ 18 On appeal, the supreme court held that the trial court had abused its discretion by ordering the defendant to remain shackled. *Id.* at 267, 362 N.E.2d at 306. The court explained that shackling is an option "when there is reason to believe that [the defendant] may try to escape or that he may pose a threat to the safety of people in the courtroom or if it is necessary to maintain order during the trial." *Id.* at 266, 362 N.E.2d at 305. But the court warned that shackling a defendant should be avoided unless absolutely necessary because shackling (1) tends to prejudice the jury against the defendant by negating the presumption of innocence; (2) restricts the defendant's ability to assist counsel during trial; and (3) offends the dignity of the judicial process. *Id.* at 265, 362 N.E.2d at 305.

¶ 19 The court explained further that before allowing a defendant to appear shackled before a jury, a trial court should (1) state on the record the court's reasons for allowing the defendant to remain shackled and (2) allow the defendant's attorney to present argument why the defendant should not be shackled. *Id.* at 266, 362 N.E.2d at 305. The *Boose* court also listed a

number of factors—most of which are now incorporated into Rule 430—that a trial court should consider when reaching a decision on shackling. *Id.* at 266-67, 362 N.E.2d at 305-06. The court emphasized that "the record should clearly disclose the reason underlying the trial court's decision for shackling and show that the accused's attorney was given an opportunity to oppose this decision." *Id.* at 267, 362 N.E.2d at 306.

¶ 20 C. *People v. Allen* and Plain Error

¶ 21 The issue in *Allen* was whether a restraint, such as a stun belt, that is not easily noticeable by a jury nevertheless is governed by the requirements of *Boose*. The supreme court held that even concealable restraints are subject to *Boose*, explaining:

> " 'The possibility of prejudicing a jury, however, is not the only reason why courts should not allow the shackling of an accused in the absence of a strong necessity for doing so. The presumption of innocence is central to our administration of criminal justice. In the absence of exceptional circumstances, an accused has the right to stand trial "with the appearance, dignity, and self-respect of a free and innocent man." [Citation.] It jeopardizes the presumption's value and protection and demeans our justice for an accused without clear cause to be required to stand in a courtroom in manacles or other restraints while he is being judged.' " *Allen*, 222 Ill. 2d at 346, 856 N.E.2d at 352 (quoting *In re Staley*, 67 Ill. 2d 33, 37, 364 N.E.2d 72, 73 (1977)).

¶ 22 The *Allen* court also confirmed that a trial court's shackling of a defendant without first conducting a proper *Boose* hearing constitutes a violation of due process. *Id.* at 349, 856 N.E.2d at 354. The court explained that "any unnecessary restraint is impermissible because it hinders the defendant's ability to assist his counsel, runs afoul of the presumption of innocence,

and demeans both the defendant and the proceedings." *Id.* at 346, 856 N.E.2d at 353. Therefore, any restraint of a defendant is permissible only when there has been a showing of a "manifest need for the restraint." *Id.* at 347, 856 N.E.2d at 353.

¶ 23 The *Allen* court emphasized that trial courts must make the decision to use restraints on a case-by-case basis and should not abdicate their responsibility on that front by merely deferring to the policy or judgment of the sheriff. *Id.* at 348-49, 856 N.E.2d at 354. The court reiterated, however, that a trial court's decision whether and how to restrain a defendant is reviewed for an abuse of discretion. *Id.* at 348, 856 N.E.2d at 353.

¶ 24 The *Allen* court also addressed whether the failure to conduct a proper *Boose* hearing constitutes plain error. *Id.* at 349-60, 856 N.E.2d at 354-60. After determining that the defendant had not adequately preserved his objection to wearing the stun belt, the court held further that the defendant had not established that either prong of the plain-error test applied. *Id.* The defendant did not argue that the evidence was closely balanced such that the first-prong of plain error applied. *Id.* at 352, 856 N.E.2d at 356. Instead, he claimed second-prong plain error, arguing that restraining a defendant without a proper *Boose* hearing automatically constituted plain error because such an error affects the fairness of the defendant's trial and challenges the integrity of the judicial process. *Id.*

¶ 25 The *Allen* court disagreed that restraining a defendant without a *Boose* hearing always constitutes second-prong plain error. *Id.* at 353, 856 N.E.2d at 356. Instead, the issue of second-prong plain error must be considered on a case-by-case basis. *Id.* In *Allen*, the defendant failed to establish second-prong plain error because he did not establish that "his presumption of innocence, ability to assist his counsel, or the dignity of the proceedings was compromised." *Id.* at 353, 856 N.E.2d at 357. In support of that conclusion, the court noted that "defendant wore the

electronic device into the third day of his jury trial with no objection, complaint, or any apparent difficulty consulting with his counsel." *Id.*

¶ 26 D. Restraining a Defendant Appearing *Pro Se*

¶ 27 In *People v. Rippatoe*, 408 Ill. App. 3d 1061, 1068, 945 N.E.2d 132, 138 (2011), the Third District explained that the concerns underlying restraints apply with greater force when a defendant appears *pro se*:

> "Where a defendant is forced to appear *pro se*, take an oath, testify, question witnesses, and present his arguments to the court all while shackled, without any consideration by the trial judge of the necessity for the shackles, the integrity of the judicial process is greatly demeaned. There can be no doubt that the defendant's ability to act on his own behalf is severely diminished."

¶ 28 E. This Case

¶ 29 In this case, the trial court failed to conduct the hearing mandated by Rule 430 and *Boose*. Although the court inquired about defendant's criminal history, his temperament that day, and the ability of court personnel to control defendant, that inquiry was not sufficient to comply with Rule 430 and *Boose*. The court was required to conduct a hearing, during which defendant should have been given an opportunity to argue against the restraints. The court then should have made specific findings relating to the 10 factors provided by Rule 430. Finally, the court should have balanced the need for restraints against defendant's right to be free from restraint before reaching a decision whether to restrain defendant.

¶ 30 The State does not contest defendant's claim that the trial court failed to conduct a proper *Boose* hearing. Instead, the State responds only to defendant's argument that his failure to object to the leg restraints may be excused under the plain-error doctrine. In response to defend-

ant's plain-error argument, the State argues that the plain-error doctrine is inapplicable because defendant not only forfeited his claim about the leg restraints, but went so far as to invite that error in the trial court. As a result, the State argues, defendant may not now raise that claim of error on appeal.

¶ 31 "[P]lain-error review is forfeited when the defendant invites the error." *People v. Harding*, 2012 IL App (2d) 101011, ¶ 17, 966 N.E.2d 437. "[U]nder the doctrine of invited error, a defendant may not request to proceed in one manner and later contend on appeal that the course of action was in error." *Id.* "To allow a defendant to use the exact ruling or action procured in the trial court as a vehicle for reversal on appeal would offend notions of fair play and encourage defendants to become duplicitous." *Id.* Invited error also deprives the State of the opportunity to cure the error in the trial court. *Id.*

¶ 32 Defendant's actions in this case did not rise to the level of invited error. In *Harding*, defense counsel affirmatively stated that " '[h]e can keep his feet shackles on.' " *Id.* ¶ 4. In this case, defendant, appearing *pro se*, made no such affirmative statement. Instead, defendant merely neglected to request that his leg restraints be removed. Such a failure to raise an issue constitutes forfeiture, not invited error. As a result, we conclude that the trial court's failure to conduct a proper *Boose* hearing constituted plain error because it compromised defendant's presumption of innocence, his ability to conduct his own defense, and the dignity of the proceedings. As a result, we vacate defendant's convictions and remand for further proceedings.

¶ 33 III. CONCLUSION

¶ 34 For the foregoing reasons, we vacate defendant's convictions and remand for further proceedings not inconsistent with this order.

¶ 35 Convictions vacated; cause remanded.

¶ 36 JUSTICE POPE, dissenting:

¶ 37 Because defendant requested removal of only his arm shackles, any error was invited error. Additionally, because the trial court substantially complied with Illinois Supreme Court Rule 430 (eff. July 1, 2010), I would find no error occurred. Accordingly, I dissent.

¶ 38 The trial court conducted a hearing on the issue of the restraints prior to the jury venire being questioned. The hearing was conducted outside the presence of the venire and is reflected in ¶ 8, *supra*.

¶ 39 Defendant was charged with aggravated battery to a correctional officer. The trial court inquired about defendant's behavior that day and confirmed defendant had a prior conviction for murder. The court then asked defendant what restraints he was asking to have removed. Defendant replied, "My handcuffs." The court then allowed the arm restraints, the only restraints defendant asked to have removed, to be removed. The record also reflects the jurors would be unable to see defendant's leg restraints while at the counsel table or while testifying.

¶ 40 The majority states the record on appeal does not disclose what prompted the trial court to address the issue of defendant's restraints. See *supra* ¶ 8. Here, defendant appeared in court in restraints for his jury trial. Defendant was proceeding *pro se*. Rule 430 made it incumbent upon the court to hold a *Boose* hearing, which it did.

¶ 41 The majority finds the trial court should have made specific findings relating to the 10 factors provided by Rule 430. *Supra* ¶ 29. While that would be the best practice, our supreme court has regularly accepted substantial compliance with its rules. See, *e.g.*, *People v. Johnson*, 119 Ill. 2d 119, 132, 518 N.E.2d 100, 106 (1987) (substantial compliance with Rule 401(a) is sufficient to effectuate a valid waiver of counsel). Here, I would find the trial court substantially complied with Rule 430. I would further note, once defendant asked for his hand re-

straints to be removed and the court allowed his request, there was no reason to further consider any other relevant *Boose* factors.

¶ 42 Even if the trial court erred by failing to substantially comply with Rule 430, I would find defendant invited the error. When the court asked defendant which shackles he was asking to have removed, he stated, "My handcuffs." He did not ask for his leg shackles to be removed. Defendants who choose to represent themselves are held to the same standards attorneys must meet. See *People v. Richardson*, 2011 IL App (4th) 100358, ¶ 12, 961 NE.2d 923 ("where a defendant elects to proceed *pro se*, he is responsible for his representation and is held to the same standards as any attorney"). In *Harding*, the defendant's attorney sought only to have defendant's hands unshackled. On appeal, the Second District Appellate Court found error where the trial court failed to place on the record its reasons for the shackling, also finding the trial court failed to consider the *Boose* factors *at all*. *Harding*, 2012 IL App (2d) 101011, ¶ 15, 966 N.E.2d 437. While the defendant in *Harding* sought plain-error review, the appellate court found plain-error review was forfeited when the defendant invited the error. The *Harding* court stated as follows: "[T]he invited-error rule contemplates that a defendant may not request to proceed in one manner and later contend on appeal that the course of action was in error." *Id.* ¶ 19. I would find defendant invited the error when he was specifically asked by the court what shackles he wanted removed and replied, "My handcuffs." He did not object to the leg shackles, nor did he request they be removed. The record reflects the jury would not be able to see defendant was shackled while sitting at the counsel table or on the witness stand.

¶ 43 The majority finds, without explanation, second-prong plain error. *Supra* ¶ 32. As it correctly notes, our supreme court in *Allen* found failure to hold a *Boose* hearing does not always require reversal under second-prong plain error. *Supra* ¶ 25. Here, the trial court held a

Boose hearing, albeit the majority has determined it was an inadequate hearing. The record demonstrates defendant vigorously defended himself. Further, by draping the table and having defendant assume the witness stand prior to the jury entering the courtroom, the court took steps to protect both the presumption of innocence and the dignity of the courtroom. Even if reviewed for plain error, where the burden of persuasion is on defendant, I would find no plain error occurred.

¶ 44 For these reasons, I would affirm defendant's conviction.