2017 IL App (4th) 150211-U

NO. 4-15-0211

FILED
April 19, 2017
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. | ) | Champaign County |
| CHARMAR C. THOMPSON, | ) | No. 14CF926 |
| Defendant-Appellant. | ) | |
| | ) | Honorable |
| | ) | Harry E. Clem, |
| | ) | Judge Presiding. |

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Turner and Justice Harris concurred in the judgment.

**ORDER**

¶ 1 *Held*: Defendant's claim the trial court's failure to instruct a juror pursuant to Rule 431(b) is forfeited where the evidence against defendant was not closely balanced.

¶ 2 In February 2015, a jury convicted defendant, Charmar C. Thompson, of one count of theft in excess of $500 (720 ILCS 5/16-1(a)(1)(A) (West 2012)). In March 2015, the trial court sentenced defendant to 12 months' conditional discharge.

¶ 3 Defendant appeals, arguing he is entitled to a new trial where the trial court violated Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) when questioning the jury venire by failing to instruct a prospective juror on all four *Zehr* principles. See *People v. Zehr*, 103 Ill. 2d 475, 469 N.E.2d 1062 (1984). We affirm.

¶ 4 I. BACKGROUND

¶ 5 On July 9, 2014, the State charged defendant, by information, with felony theft (720 ILCS 5/16-1(a)(1)(A) (West 2012)). The information alleged defendant "knowingly exerted unauthorized control over property of Common Ground Co-Op [(Common Ground)], namely: currency, having a value in excess of $500.00, intending to permanently deprive [Common Ground] of the use or benefit of [the currency]."

¶ 6 During *voir dire*, the trial court individually asked prospective jurors whether they understood and agreed to be bound by the four Rule 431(b) principles. However, it did not ask prospective juror number 17 whether he or she understood and accepted those principles. Juror number 17 was then seated as a juror.

¶ 7 During defendant's February 2015 trial, Michael Pennington, the Internet technology manager for Common Ground, testified his job involved ensuring the computerized cash registers were "ringing up" properly. After Pennington learned of a discrepancy at defendant's register, Pennington ran a query on the database for transactions performed by defendant and found one involving a coupon which was voided out and immediately followed up with a "no-sale" being recorded. Pennington explained "voiding out" meant the transaction was cleared from the system as if it never took place. When a "no-sale" takes place, it means the cashier opened the cash drawer by pressing a button.

¶ 8 During Pennington's testimony, the State presented store surveillance video from July 2, 2014, taken while defendant was working. The video showed defendant presiding over a transaction where the customer paid in cash and left the store with the purchased item. Pennington testified the transaction log corresponding to that transaction showed the transaction was voided and the "no-sale" button pressed. That transaction log was part of a larger group of records from April to July 2014, which were introduced into evidence. Those records showed

defendant had been repeatedly ringing items up, and then voiding the transactions, which was immediately followed up with a "no-sale." This process allowed the cash for the transactions to be taken without having to record the sales. Pennington testified he found 100 such transactions attributable to defendant. No similar transactions were found for any of the other Common Ground employees. The deficient amounts reflected in those records as a result of defendant's no-sale/void transactions totaled $2,237. Pennington testified none of that money went to Common Ground. According to Pennington, "[t]hat money went somewhere else."

¶ 9 Nathan Epton, the front-of-house manager for Common Ground, testified the bookkeeper was reconciling coupons on July 2, 2014, when he noticed a coupon had been turned in but had not been displayed in the general ledger. That inquiry led to a voided transaction performed by defendant. Epton approached defendant, who told Epton he could not remember the transaction in question. Epton testified there was "no way" all of the transactions uncovered by Pennington over the period of time in question were performed by someone other than defendant. Epton explained the cashiers were not allowed to use each other's drawers.

¶ 10 Kevin Bowersox-Johnson, the human resources manager for Common Ground, testified after they uncovered the thefts, defendant was fired and the police were called. Bowersox-Johnson testified he accompanied defendant to the City of Urbana police station but was not present for defendant's interview with police.

¶ 11 City of Urbana police sergeant Shaun Cook testified he responded on July 4, 2014, to a report of theft at Common Ground. According to the report, one of the employees had been stealing money from the cash register over the course of several months. Cook's investigation into the matter led him to defendant. Cook testified he interviewed defendant, who made general

admissions to him about taking money from Common Ground and apologized for doing so. A videotape of Cook's interview of defendant was played for the jury without objection. Cook testified he did not threaten defendant or make any promises to him to obtain the confession.

¶ 12 The video of the interview showed, before Cook asked defendant any questions, defendant gave a general statement in which he apologized to Common Ground and stated it "was very selfish of [him] to do the things that he did." Defendant explained he had been experiencing a lot of stress from getting a demotion and pay cut at work, his mother being sick, and his sister having a drug problem. Defendant stated he "saw an opportunity" and "was truly sorry." When Cook asked defendant if the money he took was used to help his mother and sister, defendant agreed, stating they were on fixed incomes. Defendant stated it was hard to see his family struggle, but he acknowledged it still was not fair to Common Ground. When Cook asked him if he had used the void or "no-sale" button on the cash register when customers were paying with cash and then took the excess money at the end of the day, defendant responded, "Yes." Defendant estimated he took between $50 and $100 per day. Defendant did not take money every day. Instead, he stated he would do it "occasionally." Defendant also stated he was willing to pay the money back to Common Ground. At the end of the interview, defendant reiterated he was "sorry it happened."

¶ 13 After the State rested, defendant moved for a directed verdict, which the trial court denied.

¶ 14 As part of his case, defendant called Karen Medina, an employee of Common Ground, who testified she had worked with defendant and never observed him taking cash out of his register and putting it in his pocket.

¶ 15 Lindsey Belahi, another Common Ground employee, testified for defendant. Belahi testified she had frequently worked with defendant. Belahi testified she never saw defendant take cash from his drawer and pocket it.

¶ 16 Defendant then recalled Michael Pennington, who testified defendant had called him to fix his cashier's computer a few times over a three-month period. Pennington explained, depending on how the computer is frozen, it could sometimes clear out all the transactions for that day.

¶ 17 During defendant's testimony, he acknowledged the statements he made to Cook during the interview. However, defendant maintained he only said what he did and agreed with Cook's follow-up questions because he thought it would help him get out of jail without having to post a cash bond. Defendant denied stealing any money from Common Ground over the four-month period in question. Defendant maintained he had a lot of computer issues with his cash register. The computer would freeze and he would have to hit the "all void" button and void out transactions to back out of the frozen screen. Defendant testified he had a problem with a customer's torn coupon on July 2, 2014. Defendant testified, "[n]ormally[,] maybe a few weeks prior to that [he] would *** just manually give them a discount." However, on this occasion, defendant testified he asked both Pennington and Epton for help and the coupon was eventually scanned in and credited.

¶ 18 Thereafter, the jury convicted defendant of theft.

¶ 19 On March 6, 2015, defendant filed a motion for acquittal or, in the alterative, a motion for a new trial.

¶ 20 On March 16, 2015, trial court denied defendant's posttrial motion and sentenced him to 12 months' conditional discharge.

¶ 21 This appeal followed.

¶ 22 II. ANALYSIS

¶ 23 On appeal, defendant argues his conviction should be reversed and this cause remanded for a new trial where the trial court failed to comply with Rule 431(b) as to juror number 17.

¶ 24 The State argues defendant has forfeited review of the issue because he did not object at trial or otherwise include the issue in his posttrial motion. Defendant acknowledges he forfeited the issue but urges our review under the plain-error doctrine.

¶ 25 The plain-error doctrine provides a narrow exception to the general rule of forfeiture. *People v. Walker*, 232 Ill. 2d 113, 124, 902 N.E.2d 691, 697 (2009). It allows a reviewing court to reach an unpreserved error in two circumstances: (1) where the evidence is closely balanced, regardless of the nature of the error; or (2) where the error is so serious that the defendant was denied a substantial right and a fair trial, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 178-79, 830 N.E.2d 467, 475 (2005). Prior to determining whether plain error occurred, however, we first determine whether error occurred at all. *People v. Lewis*, 234 Ill. 2d 32, 43, 912 N.E.2d 1220, 1227 (2009).

¶ 26 In *Zehr*, 103 Ill. 2d at 477, 469 N.E.2d at 1064, our supreme court held essential to the qualification of a jury in a criminal case is each juror's knowledge of the following four principles: (1) "a defendant is presumed innocent," (2) "he is not required to present evidence on his own behalf," (3) the State must prove him guilty beyond a reasonable doubt, and (4) his

decision not to testify may not be held against him. The subject matter of these principles should be addressed in the course of *voir dire*, as a juror's prejudice as to any of them would not be automatically cured with closing remarks by counsel or jury instructions from the trial court. *Id.*

¶ 27 In 1997, the Illinois Supreme Court adopted Rule 431(b) to embrace the *voir dire* principles established in *Zehr*. Ill. S. Ct. R. 431(b) (eff. May 1, 1997). *People v. Glasper*, 234 Ill. 2d 173, 187, 917 N.E.2d 401, 410 (2009). The original rule provided, "[i]f requested by the defendant, the court shall ask each potential juror, individually or in a group, whether that juror understands and accepts" the four *Zehr* principles. Ill. S. Ct. R. 431(b) (eff. May 1, 1997). At that time, the trial court had no obligation to *sua sponte* question jurors as to the *Zehr* principles. *People v. Graham*, 393 Ill. App. 3d 268, 272, 913 N.E.2d 99, 103 (2009), *appeal denied and judgment vacated*, *People v. Graham*, 239 Ill. 2d 565, 940 N.E.2d 1146 (2011) (directing the First District to vacate its order and reconsider in light of *People v. Thompson*, 238 Ill. 2d 598, 939 N.E.2d 403 (2010)).

¶ 28 However, effective May 1, 2007, the supreme court amended the language to require trial courts to question jurors on the Rule 431(b) principles without a defendant's prompting, providing:

> "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." Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

¶ 29 In this case, it is undisputed the trial court failed to question juror number 17 on whether he or she understood and accepted the Rule 431(b) principles. The supreme court has made it clear such a failure is error. See *People v. Belknap*, 2014 IL 117094, ¶ 46, 23 N.E.3d 325 (trial court must ask prospective jurors both whether they understand and accept the principles set forth in Rule 431(b), and the court's failure to ask whether the jurors understood the principles constitutes error); *Thompson*, 238 Ill. 2d at 607, 939 N.E.2d at 410 ("trial court must ask each potential juror whether he or she understands and accepts each of the principles in the rule."); *People v. Wilmington*, 2013 IL 112938, ¶ 32, 983 N.E.2d 1015 (trial court's failure to ask jurors if they both understood and accepted the enumerated principles of Rule 431(b) is "error in and of itself").

¶ 30 Having found an error, we next examine whether that error rises to the level of plain error. Because defendant only argues plain error under the closely-balanced-evidence prong of the plain-error doctrine, we limit our analysis to that prong of the test. See *Herron*, 215 Ill. 2d at 178, 830 N.E.2d at 475. We note Rule 431(b) errors are no longer recognized under the second prong of plain-error analysis. See *Belknap*, 2014 IL 117094, ¶ 47, 23 N.E.3d 325; *Thompson*, 238 Ill. 2d at 610-11, 939 N.E.2d at 412.

¶ 31 The State maintains the error does not rise to the level of plain error as the evidence at trial was not closely balanced. We agree. The evidence established defendant repeatedly

voided out transactions and opened the drawer when customers paid cash between April and July 2014. Over that period of time, those transactions totaled $2,237. The State played a video showing such a transaction involving defendant where the customer paid with cash and left with their purchase. The log for that day showed the transaction was voided and defendant had hit the "no sale" button. Epton testified the cashiers were not allowed to use each other's drawers and there was "no way" the questionable transactions were performed by someone other than defendant. Notably, defendant himself confessed to taking the money during his videotaped interview. The video was admitted into evidence and played for the jury. We have reviewed the video, and defendant appears very candid and credible throughout. At the beginning of the interview, prior to being asked any questions, defendant volunteered an apology and explained he took the money to help his mother and sister, who were on fixed incomes. At the end of the interview, defendant again stated he was sorry. While defendant recanted during trial, the reason he gave for confessing, *i.e.*, he was hoping to get out of jail without having to post a cash bond, strains credulity given the other evidence in this case.

¶ 32 In sum, because the evidence was not closely balanced, defendant has failed to establish plain error occurred. Accordingly, defendant's argument is forfeited.

¶ 33 III. CONCLUSION

¶ 34 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2014).

¶ 35 Affirmed.