2012 IL App (5th) 110246-U

NO. 5-11-0246

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Madison County.
	)	
v.	)	No. 09-CF-1059
	)	
DIAMOND L. BARNES,	)	Honorable
	)	James Hackett,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE SPOMER delivered the judgment of the court.
Justices Welch and Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction and sentence affirmed where: (1) it is not clear from the record that defendant was shackled during his bench trial, and where he would not prevail even if it was clear; (2) evidence was sufficient to find beyond a reasonable doubt that murder was not committed in self-defense; (3) evidence did not support reduction of charge to second-degree murder; and (4) sentence was constitutional.

¶ 2 The defendant, Diamond L. Barnes, appeals his conviction and sentence for the offense of first-degree murder. For the following reasons, we affirm.

¶ 3 FACTS

¶ 4 The facts necessary to our disposition of this appeal are summarized from the partially complete record on appeal provided by the defendant, including testimony adduced from several witnesses at the defendant's bench trial, and are as follows. On May 2, 2009, the defendant shot and killed Marcus Shannon following an altercation at Shannon's home. The defendant admitted to killing Shannon, but he claimed the killing was justified. Prior to trial,

the defendant filed a written waiver of his right to prove a mitigating factor that might have reduced his crime to second-degree murder, and specifically asked the court not to consider a lesser charge. According to the defendant's filing, his desire was to be found "guilty of any/all charged crimes" or to be acquitted by virtue of his proposed affirmative defenses. At the close of evidence, but before closing argument, the trial judge asked the defendant, who was, against the advice of the trial judge, proceeding *pro se*, if he still did not want the court to consider the lesser charge of second-degree murder, and the defendant stated, multiple times and in response to multiple questions about the issue, that he did not want the court to consider second-degree murder.

¶ 5 During the course of the trial, several witnesses, including the defendant, testified about the events leading up to the killing. Four witnesses, including the defendant, his brother, and his mother, testified that Shannon had displayed two firearms and pointed them at a number of people. Multiple other witnesses, including Shannon's wife and his sister-in-law, claimed Shannon did not ever brandish a weapon, and that Shannon tried to calm the defendant down once the defendant displayed his weapon. The defendant conceded that at the time Shannon was killed, Shannon had retreated into his home and was crouched on the floor behind a chair. Although the other direct witness to the killing, Shannon's sister, testified that Shannon was on his hands and knees, face down, as if in a "tornado drill," the defendant claimed that he believed Shannon might be attempting to load a weapon behind the chair, and that therefore the killing was a legitimate act of self-defense or the defense of the defendant's grandmother, who was also in the house. The defendant conceded that despite the presence in the house of his grandmother, after shooting Shannon, the defendant, while fleeing the scene, fired several shots toward the house. Physical evidence demonstrated that Shannon died of gunshot wounds, and that he had been shot in the back, with the trajectory of the bullets being downward.

¶ 6 Following trial, the defendant was convicted of first-degree murder. The trial judge noted that it was his finding of fact that the State had proven beyond a reasonable doubt all the elements of first-degree murder. With regard to the defendant's proposed affirmative defenses, the trial judge stated that the killing was not justified because at the time of the killing, the defendant "had the ability to retreat," was on the property of the victim rather than his own property, and had, following Shannon's retreat into the home, advanced into the home and killed Shannon while Shannon was "in essentially a defenseless position." Although he acknowledged that the defendant did not wish the trial judge to consider second-degree murder, the trial judge nonetheless stated that, based upon the trial judge's findings of fact as to how the murder occurred, "I don't find that second degree murder applies." The defendant, who was subsequently represented in the trial court by the same counsel who now represents him on appeal, filed a motion for a new trial, which was denied. Ultimately, the defendant was sentenced to 20 years in the Department of Corrections for first-degree murder, with a 25-year enhancement, to be served consecutively, for killing with a firearm, for a total term of imprisonment of 45 years. This timely appeal followed. Additional facts related to the issues raised by the defendant will be provided as necessary throughout the remainder of this order.

¶ 7 ANALYSIS

¶ 8 On appeal, the defendant first contends the trial judge committed reversible error "by keeping the defendant shackled for the duration of his trial without making the required findings which would justify such a restraint." The defendant concedes that this issue was not raised before the trial court, despite the fact that counsel now representing the defendant also represented the defendant when he filed, in the trial court, his motion for a new trial. Accordingly, the defendant acknowledges that the issue is waived, but he nevertheless asks this court to consider it under the plain error exception to the waiver rule. Before a reviewing

court may consider an issue as plain error, however, that court first must determine if there was an error at all. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 70. In the case at bar, we do not agree with the defendant's assertion that "the record clearly shows that the defendant was shackled during the course of the entire trial." In fact, because this issue was not preserved by the defendant in the trial court, and because the partially complete record on appeal provided by the defendant contains no transcripts of pretrial hearings at which shackling might have been discussed, there is scant evidence as to whether the defendant was shackled at all, let alone throughout his trial. The only evidence of shackling to which the defendant can point is the defendant's request, as he testified on the second day of his trial, that the State place an exhibit on an overhead projector for him, followed by the trial judge's statement, after the exhibit was so placed: "Your left hand is free there. There's a laser pointer in front of you." There is no explicit mention of shackling, nor any other reference over the course of the defendant's two-day bench trial that remotely could be construed as implying that the defendant was shackled during part or all of the trial.

¶ 9 Nevertheless, counsel for the defendant boldly posits that the exchange that took place as the defendant testified "clearly shows" that the defendant's "right hand was shackled, either at his waist or to the chair in which he was sitting," and that "[t]he fact that [the defendant's] legs were shackled is evidenced by the fact that he could not freely access the projector and had to ask the State to put an exhibit on the projector." We do not agree. At the risk of stating the obvious, we conclude that it is far from clear that the sequence of events cited by the defendant "proves" that the defendant's right hand and legs were shackled. Asking for the State to assist him by placing an exhibit that had been admitted into evidence by the State on an overhead projector with which the State was presumably much more familiar than he was does not prove that the defendant was shackled and thus physically unable to manipulate the exhibit onto the projector, nor does the trial judge's observation that

the defendant's left hand was free necessarily prove that the defendant's right hand was physically restrained by shackles.

¶ 10 Indeed, a thorough review of the record on appeal discloses substantial evidence that contradicts the defendant's bold assertion that he was shackled throughout his trial, or even when on the witness stand. On the first day of the defendant's trial, as he cross-examined Shannon's wife, the defendant stated, "[Y]ou said Marcus was backing up making a hand gesture like, whoa, whoa, whoa, is this a proper hand gesture that he was making?" It would appear from the record that the defendant's question was accompanied by gesturing in imitation of Shannon–gesturing that would be nearly impossible if the defendant was shackled as his counsel now claims–because Shannon's wife answered his question by stating, "He had his hands thrown up like this," and her answer was followed by the defendant stating, "Court reporter, can you note that on the record?" Moments later, it is apparent from the record that the defendant gestures again, using both hands, because he states to Shannon's wife, "[Y]ou just said you seen [*sic*] Marcus with his hands up like this." Again, we find it unlikely that the defendant could have so gestured had he been shackled in the manner claimed on appeal.

¶ 11 On the second day of his trial, after the defendant indicated that he wished to testify in his own defense, the trial judge stated, "I need you to raise your right hand to be sworn in," and the notes of the court reporter indicate that the defendant was then "duly sworn." They do not reflect a pause in the proceedings so that the defendant could be unshackled, a necessity had the defendant's right hand been shackled at his waist or to his chair as counsel now claims, nor do they reflect a pause for a reshackling of the defendant, which would have been necessary if he had been shackled, moments later, when asking for the State's assistance with the projector. Moreover, within minutes after the sequence of events involving the projector, the defendant testified, in narrative fashion, stating to the judge: "[I]t happened he

approached my friend, Brad Warren, like this and he–he's like this with these–supposedly he had something in his hand, but I can't see at the time what's actually in his hand. But he approached Brad Warren like this." Again, it would appear that the defendant's testimony was accompanied by gesturing, and there is no indication that he was prevented from gesturing or otherwise impaired by shackles or other restraints. Indeed, several minutes later, still testifying in narrative fashion, but now describing the actual killing of Shannon, the defendant asked, "[C]an I demonstrate it, Judge, on the record?" He apparently did so, for his next statement, "As like over the top of the couch where my grandmother's sitting," is accompanied by the court reporter's note "(indicating)," and again nothing in the record reflects the presence of shackles or restraints. Finally, later on the second day of the trial, as the defendant examines his mother, he assists her quite a bit with her testimony, on multiple occasions pointing to exhibits to clarify them for her.

¶ 12 Thus, to conclude, as the defendant would have us do, that the record "clearly shows" that for the entirety of his trial, his "right hand was shackled, either at his waist or to the chair in which he was sitting," and that his legs were shackled, requires a suspension of disbelief, and an engagement in speculation, that we decline to indulge. The Illinois Supreme Court has held that when the facts surrounding the alleged shackling of a defendant are not clear, a reviewing court should "decline to *** speculate, and instead follow well-settled case law and presume that the trial court knew and followed the law with regard to shackling." *In re Jonathon C.B.*, 2011 IL 107750, ¶ 73. In this case, there is no clear evidence that the defendant was shackled at any time during his trial, let alone during the entire trial. Accordingly, we cannot conclude an error occurred, and therefore cannot review the issue raised by the defendant under the plain error exception to the waiver rule.

¶ 13 These problems with the defendant's contentions notwithstanding, even if we were to assume, *arguendo*, that the defendant was in fact shackled throughout his trial, he would not

prevail on appeal. Although the defendant has cited cases in which reviewing courts have found plain error where a defendant was observed in shackles by a jury, we reiterate our holding in *People v. Tedrick*, 377 Ill. App. 3d 926, 928-29 (2007), that in a case such as this one, where the evidence is not closely balanced, plain error will be found with regard to shackling during a bench trial only where a defendant can point to something in the record that shows that "his presumption of innocence, his ability to assist his counsel, or the dignity of the proceedings was compromised" by the shackling. The record in this case is devoid of any such showings, and the defendant has not even attempted to make them on appeal. Moreover, nowhere in his brief does the defendant contend the evidence was closely balanced in this case, and even if he did so argue, we would not find that to be true. There was no error.

¶ 14 The defendant next contends the State failed to prove beyond a reasonable doubt that the killing of Shannon was not done in self-defense or in the defense of others. When a defendant challenges the sufficiency of the evidence against him, the question this court must answer is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt." *People v. Foltz*, 403 Ill. App. 3d 419, 423 (2010) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). With regard to the affirmative defense of self-defense, we specifically ask whether, when all the evidence is viewed in the light most favorable to the State, "any rational trier of fact could have found beyond a reasonable doubt defendant did not act in self-defense." *People v. Brown*, 406 Ill. App. 3d 1068, 1081 (2011). Although it is true, as the defendant contends, that some evidence presented at trial supported the defendant's story that Shannon was armed at some point during the confrontation, it is also true that multiple witnesses testified that Shannon was never armed; moreover, although it is true that the defendant testified at trial that he believed Shannon may have been loading

a weapon while crouched behind the chair, and that therefore Shannon posed an imminent threat to the defendant or the defendant's grandmother, that version of events is contradicted by the defendant's statement, made in a videotaped interview with police shortly after the killing and highlighted by the State in its closing argument at trial, that there was no good reason for the defendant to follow Shannon into Shannon's home and shoot him after Shannon retreated from the confrontation. Additionally, the other direct witness to the killing, Shannon's sister, testified that her brother was on his hands and knees, face down, as if in a "tornado drill" when he was killed, a fact that further renders unbelievable the defendant's self-defense claim. The trial judge was aware of the conflicting testimony about the events surrounding the killing and had every right to believe the killing was cold-blooded murder, not self-defense. As the State aptly notes, there was sufficient credible evidence that the defendant "shot an unarmed man in the back" while that man attempted to hide behind a chair. We find no error.

¶ 15 The defendant also contends that his conviction should be reduced to second-degree murder because, according to the defendant, the evidence established that he "acted under an actual, though unreasonable, belief in self-defense and the defense of others." We begin by noting that at and before trial, the defendant repeatedly told the court that he did not wish for the charge of second-degree murder to be considered, preferring either a conviction for first-degree murder or an acquittal. As the State points out, a defendant who requests to proceed in a certain manner can hardly be heard to complain on appeal when his request is honored. See, *e.g.*, *People v. Harvey*, 211 Ill. 2d 368, 385-86 (2004). The foregoing notwithstanding, even if we, like the trial court, were to consider *arguendo* the question of whether second-degree murder applies to this case, the defendant would not prevail. Although the defendant contends that he labored under "an actual, though unreasonable, belief in self-defense and the defense of others," we reiterate that in a statement given to

police shortly after the killing, the defendant made no such claim; to the contrary, he admitted that there was no good reason for the defendant to follow Shannon into Shannon's home and shoot him after Shannon retreated from the confrontation. Moreover, the concern the defendant professed at trial for the welfare of his grandmother is belied by the fact that as he fled the scene of the murder, the defendant fired additional shots into the Shannon home, aware as he did so that his grandmother remained in that home. Accordingly, the trial judge was free to conclude, as a factual matter, that the defendant did not actually believe, at the time he murdered Shannon, that doing so was necessary to protect himself or his grandmother, and therefore appropriately could conclude, as he did, that the defendant was not entitled to the reduction of the charge against him to second-degree murder. Again, we find no error.

¶ 16 The final contention raised on appeal by the defendant is that his sentence is unconstitutional because it contains a double enhancement. According to the defendant, "the only distinguishing feature" between the 25-year enhancement the defendant received and the 20-year enhancement he claims he should have received "is the death of the victim." The reasoning put forward by the defendant in support of this claim has been roundly rejected by Illinois courts, and we reject it as well. See, *e.g.*, *People v. Sharpe*, 216 Ill. 2d 481, 524-27 (2005).

¶ 17 CONCLUSION

¶ 18 For the foregoing reasons, we affirm the defendant's conviction and sentence.

¶ 19 Affirmed.