2012 IL App (1st) 111190-U

FIFTH DIVISION
December 7, 2012

No. 1-11-1190

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 7447
	)	
MELTON BLACK,	)	Honorable
	)	Thomas M. Tucker,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Taylor concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant was proven guilty beyond a reasonable doubt of robbery when he took the victim purse's after choking her boyfriend. Defendant's procedural default must be honored when, although the trial court erred when it permitted testimony that defendant was identified in a lineup by a person who did not testify at trial, defendant failed to establish that the verdict in this case resulted from that error rather than the evidence properly adduced at trial.

¶ 2 After a bench trial, defendant Melton Black was convicted of robbery and sentenced to six years in prison. On appeal, defendant first contends that he was not proven guilty of robbery beyond a reasonable doubt because the State failed to establish that he took the victim's purse by

force or the threat of force. He further contends that his constitutional right to confront the witnesses against him was violated when a police officer testified regarding an identification by a person who did not testify at trial. We affirm.

¶ 3 Defendant's arrest and prosecution arose out of a March 2010 incident during which he took the purse of the victim Derease Walker after choking her boyfriend Glen Rieves.

¶ 4 At trial, the victim testified that at the time of this incident, she and Rieves were expecting a child. On the day in question, she accompanied Rieves to pick up defendant and give him a ride to a train station. Rieves drove the victim's car. The victim had first seen defendant five days earlier outside a restaurant when defendant approached Rieves. An unidentified person was also with defendant.

¶ 5 When they arrived to pick up defendant, he was accompanied by the same person that had been with him at the restaurant. Defendant and his companion then entered the car. Defendant sat behind Rieves, and the other person sat behind the victim. Defendant asked to be taken to a store for "change and cigarettes." Once there, defendant's companion exited the car, went into the store, and returned. Defendant then asked to be taken back to where he had been picked up. Although Rieves began to drive, he soon pulled over and told defendant and his friend to get out of the car. Defendant responded by calling Rieves by his nickname of "dough boy" and putting a black cord around his neck. After defendant leaned over and put the cord around Rieves's neck, Rieves reached up and tried to put his fingers between his neck and the cord. At this time, the car was still running and Rieves had his foot on the brake. The victim began screaming, opened the passenger door, put one foot outside, and pepper sprayed defendant.

¶ 6 Once the victim pepper sprayed defendant, he let go of Rieves. Rieves jumped out of the car and ran off down the street. The car then began to move so the victim also jumped out. She fell to the ground. Defendant remained in the car until it hit a curb. At that point, defendant got

out of the car, took the keys from the ignition and walked to the trunk. After taking the victim's purse out of the trunk, defendant walked off down an alley with it. He also took the victim's keys. Defendant's companion followed. During this time, the victim, who was standing four or five feet away, tried to flag down help. Eventually, she was successful and the police were contacted. The next day, the victim went to a police station and identified defendant in a lineup.

¶ 7 During cross-examination, the victim clarified that she was standing a "little bit" outside the car when she pepper sprayed defendant and that she fell after she got out of the car. She was two to three feet away from defendant when she sprayed him. While she stood in the street screaming for help, Rieves ran away with defendant's companion following him.

¶ 8 Detective Dan Zimmerman testified that after speaking with the victim and Rieves he had a description of the offender and learned that the victim's purse and keys were taken. Rieves was not wearing a shirt and Zimmerman saw scratches on his neck. There was also a faint smell of pepper spray in the victim's car. Zimmerman gave the victim a ride home so that she could get keys to her car. The victim and Rieves later identified defendant in a lineup.

¶ 9 In finding defendant guilty of robbery, the court stated that the victim was a credible witness who told the truth of what happened or "[p]art of what happened there, at least." Defendant was subsequently sentenced to six years in prison.

¶ 10 On appeal, defendant first contends that his conviction for robbery should be reversed because the State failed to establish that he took the victim's purse by force or threat of force.

¶ 11 In assessing the sufficiency of the evidence, the relevant inquiry is whether, considering the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). This court does not retry the defendant or substitute its judgment for that of the trier of fact with regard to the credibility of witnesses, the weight to be given to each witness's

testimony, and the reasonable inferences to be drawn from the evidence. *Ross*, 229 Ill. 2d at 272; see also *People v. Sutherland,* 223 Ill. 2d 187, 242 (2006) (it is the trier of fact's responsibility to determine the appropriate weight to afford each witness's testimony, resolve any inconsistencies in the evidence, and draw reasonable inferences from the testimony). A defendant's conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to his guilt. *People v. Siguenza-Brito,* 235 Ill. 2d 213, 225 (2009).

¶ 12 To sustain a conviction for robbery, the State must show that a defendant took property from the person or presence of another by the use of force or by threatening the imminent use of force. See 720 ILCS 5/18-1(a) (West 2010). The force sufficient to sustain a conviction for robbery is that force administered at any time during the criminal act, however, there must be some concurrence between the use or threat of force and the taking of the victim's property. *People v. Collins*, 366 Ill. App. 3d 885, 894-95 (2006). The offense is complete when force or the threat of force causes the victim to part with a possession or custody of property against her will. *People v. Klebanowski*, 221 Ill. 2d 538, 551 (2006); see also *People v. Bowel*, 111 Ill. 2d 58, 63 (1986) (the degree of force necessary is such that the power of the victim to retain her property is overcome, either by actual violence or by putting her in such fear as to overpower her will).

¶ 13 Here, the evidence at trial established that after Rieves told defendant and his friend to get out of the car, defendant leaned over and wrapped a cord around Rieves's neck. At that point, the victim screamed, began to exit the car, and pepper sprayed defendant. After exiting the car, the victim stood in the street and tried to get help. At the same time, defendant took the keys from the ignition of the victim's car, went to the trunk, and took her purse. He then walked away. In the instant case, defendant removed the victim's purse from the trunk without her permission

immediately after having choked Rieves. Therefore, both force and a taking were established by the evidence.

¶ 14 Defendant argues the evidence is insufficient because he did not commit any acts of violence or make any threats toward the victim. In other words, defendant argues that no force was used to take the victim's purse because he never touched the victim. We disagree.

¶ 15 The record indicates that the victim watched from the passenger seat as defendant choked Rieves. She then pepper sprayed defendant and ran into the street to seek help. While there was no testimony that defendant actually touched the victim, viewing the evidence in the light most favorable to the State, this court cannot say that no trier of fact could have found that a threat of violence was directed at the victim. See *Sutherland,* 223 Ill. 2d at 242 (it is the trier of fact's responsibility to draw reasonable inferences from the testimony at trial).

¶ 16 *People v. Hay*, 362 Ill. App. 3d 459 (2005), is instructive. There, the evidence at trial established that the defendant entered a jewelry store and asked to see an engagement ring. After the victim pulled out two rings, the defendant grabbed them from the victim's hand. Although the record did not indicate that the defendant used force to take the rings from the victim's hand, the defendant did push the victim's coworker and threaten to hurt her if she did not let him go. On appeal, the defendant argued that he was not proven guilty of robbery beyond a reasonable doubt because he did not use or threaten to use force against the victim.

¶ 17 In that case, the court determined that although force was not actually applied to the victim, force was used in her presence when the defendant struggled with the victim's coworker in order to leave the store. Therefore, the force directed toward the victim's coworker "implicitly threatened" the use of force against the victim and suspended the victim's will to prevent the rings being taken. *Hay*, 362 Ill. App. 3d at 466. Because a robbery occurs when the degree of force is such that the power of the owner to retain her property is overcome either by physical

violence directly applied to her or when she is put in fear of such violence, the force directed against the victim's coworker put the victim in fear that violence would be directed at her and was sufficient to establish that the defendant had robbed the victim. *Hay*, 362 Ill. App. 3d at 466.

¶ 18 Similarly, here, although the victim did not have violence applied to her person, violence was used in her presence. Implicit in defendant's actions of choking Rieves was the threat that such force could be used against the victim should she try to stop defendant from taking her purse. See *People v. Ware*, 168 Ill. App. 3d 845, 846 (1988) (rejecting the defendant's "technical" claim that he did not touch the victim or take her purse from her person when the evidence established that he broke the victim's car window with a metal object and leaned inside because there was "an implicit threat, inherent in the defendant's conduct, of the imminent use of more force" should the victim try to stop him).

¶ 19 Ultimately, viewing the evidence in the light most favorable to the State, as we must, this court cannot say that no rational trier of fact could have found defendant guilty of robbery when, after choking the victim's boyfriend in front of the victim, defendant took the victim's purse from the trunk of her car. *Ross*, 229 Ill. 2d at 272. This court reverses a defendant's conviction only when the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to his guilt (*Siguenza-Brito,* 235 Ill. 2d at 225); this is not one of those cases. Accordingly, we affirm defendant's conviction for robbery.

¶ 20 Defendant next contends that he was denied the right to confront one of the witnesses against him when Zimmerman was permitted to testify as to an out-of-court lineup identification by Rieves. Defendant acknowledges that this issue was not raised before the trial court, and, consequently is forfeited for purposes of this appeal. See, *e.g., People v. Enoch,* 122 Ill. 2d 176, 186 (1988)). However, he asks this court to review his contention for plain error. *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005) (the plain error doctrine allows a reviewing court to

address forfeited errors "when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence").

¶ 21 The sixth amendment of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right *** to be confronted with the witnesses against him." U.S. Const., amend. VI. Consequently, testimonial statements made by a witness who is not at trial may only be admitted where the declarant is unavailable and the defendant has had a prior opportunity to cross-examine him. *People v. Williams,* 238 Ill. 2d 125, 142 (2010), *aff'd,* 132 S. Ct. 2221 (2012). Although "the confrontation clause does not bar the admission of testimonial statements that are admitted for purposes other than proving the truth of the matter asserted" (*Williams,* 238 Ill. 2d at 142), the right to confront the accusing witnesses is so fundamental that its alleged violation would fall within the embrace of the plain error doctrine (*People v. Silva*, 231 Ill. App. 3d 127, 134 (1992)). See also *People v. Hughes*, 259 Ill. App. 3d 172, 178-79 (1994) (determining that the admission of hearsay identification testimony constitutes plain error only when it serves as a substitute for courtroom identification or is used to strengthen and corroborate a weak identification).

¶ 22 Here, although Rieves was absent from trial, Zimmerman testified that both the victim and Rieves identified defendant in lineups. However, defendant's claim must fail because, even agreeing that this was an error, the complained of error does not rise to the level of plain error.

¶ 23 First, this court rejects defendant's argument that the testimony regarding the out-of-court identification constituted plain error under the first prong of the plain error doctrine because the evidence at trial was close. In considering whether the first prong of the plain error doctrine has been satisfied, this court must consider whether the outcome of defendant's trial may have been affected by Zimmerman's testimony that Rieves identified defendant in a lineup. In order to prevail on this claim, defendant must establish that this error alone could have led to his

conviction, that is, the verdict "may have resulted from the error and not the evidence" properly adduced at trial. *Herron*, 215 Ill. 2d at 178; see also *People v. Naylor*, 229 Ill. 2d 584, 593 (2008) (defendant bears the burden of persuasion under both prongs of the plain error doctrine).

¶ 24 Defendant has not met this burden, as it is clear after reviewing the record that defendant cannot show prejudice. Here, the victim identified defendant in a lineup and at trial as the person who choked Rieves and subsequently took her purse and keys. Even accepting that Zimmerman's testimony that Rieves also identified defendant in a lineup was admitted in error, defendant has failed to establish that the verdict resulted from that error and not the evidence "properly adduced at trial." *People v. White*, 2011 IL 109689, ¶ 133.

¶ 25 Defendant has also failed to establish that the complained of error affected the fairness of his trial or challenged the integrity of the judicial system. Our supreme court has equated the second prong of plain error review to "structural error" and held that automatic reversal is only required in those cases where the complained of error is a systematic error which erodes the integrity of the judicial process and undermines the fairness of a defendant's trial. *People v. Thompson,* 238 Ill. 2d 598, 613-14 (2010). This limited category of structural errors includes "the complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of the right of self-representation at trial, denial of a public trial, and defective reasonable doubt instructions." *People v. Washington,* 2012 IL 110283, ¶ 59, citing *Neder v. United States,* 527 U.S. 1, 8-9 (1999)); see also *Thompson,* 238 Ill. 2d at 614 (a defendant tried by a biased jury would certainly satisfy the second prong of plain error).

¶ 26 In the case at bar, the complained of error is not one of the specific examples listed in *Thompson* and *Washington*. Rather, it is a simple evidentiary error which presumably would have been corrected had defense counsel objected at the time. This court cannot say that the fairness of defendant's trial was affected by Zimmerman's testimony regarding Rieves's

identification of defendant when the victim identified defendant in court. Consequently, the complained of error does not rise to the level of plain error under the second prong of plain error review. *Thompson,* 238 Ill. 2d at 613-14; *Washington,* 2012 IL 110283, ¶ 59.

¶ 27 Accordingly, even if the court erred when it permitted Zimmerman to testify regarding Rieves's out-of-court identification of defendant, the plain error doctrine is not applicable because this error did not tip the scales of justice against defendant or affect the fairness of his trial. See *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Therefore, this court must honor defendant's procedural default.

¶ 28 For these reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 29 Affirmed.