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20112 IL App (3d) 100256-U

Order filed November 26, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit
	)	Will County, Illinois
Plaintiff-Appellee,	)	
	)	Appeal No. 3-10-0256
v.	)	Circuit No. 09-CF-1717
	)	
SHERMAN R. HEARNS, SR.,	)	Honorable
	)	Richard C. Schoenstedt
Defendant-Appellant.	)	Judge Presiding

JUSTICE LYTTON delivered the judgment of the court.
Justices Holdridge and McDade concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant was not denied effective assistance of counsel where one of his attorneys previously represented a prosecution witness. Defendant was not denied a fair trial by the trial court's failure to strictly comply with Illinois Supreme Court Rule 431(b) where the evidence was not closely balanced.

¶ 2 A jury found defendant, Sherman R. Hearns, Sr., guilty of burglary (720 ILCS 5/19-1(a) (West 2008)). The trial court sentenced him to 15 years in prison. On appeal, defendant argues that (1) he was denied effective assistance of counsel because his attorney was operating under a *per se*

conflict of interest, and (2) he was denied a fair trial where the court failed to strictly comply with the mandates of Illinois Supreme Court Rule 431(b) (Ill. S. Ct. R. 431(b) (eff. May 1, 2007)). We affirm.

¶ 3 In August 2009, defendant was charged with one count of burglary for knowingly entering a 1994 Ford van owned by Diane Holley without authority and with the intent to commit a theft therein. The case proceeded to a jury trial.

¶ 4 On January 19, 2010, jurors were selected. During *voir dire*, the trial court asked each of the potential jurors, the following questions:

> "Do you understand and accept that a person accused of a crime is presumed to be innocent of the charge against him, that that presumption of innocence stays with the defendant throughout the trial and is not overcome unless from all the evidence that you believe the State has proved the defendant's guilt beyond a reasonable doubt?
>
> ***
>
> Do you understand that that means the State has the burden of proving that the defendant is guilty beyond a reasonable doubt, that the defendant does not have to prove his innocence, and that the defendant does not have to present any evidence on his own behalf if he does not wish to?
>
> ***
>
> Do you understand that means that the defendant does not have to testify if he does not wish to, and *** if he does not testify, do you understand that fact must not be considered by you in any way in arriving at your verdict?"

Each of the prospective jurors answered the above questions affirmatively.

¶ 5 The next day before defendant's trial began, one of the prosecutors notified the court that one of the State's witnesses recognized one of defendant's attorneys, Julie Primozic. Primozic explained that she had previously represented Marlin Johnson, a witness for the State, in an unrelated case. Defendant's other attorney, Gabriel Guzman, told the court that he had explained the situation to defendant and that defendant indicated that he "has no problems continuing." Guzman further stated, "There's no conflict. [Defendant] wants to go forward." Thereafter, the testimony began.

¶ 6 Diane Holley testified that she lives at 13 South Prairie in Joliet with her husband and two sons. In the early morning hours of August 1, 2009, she was at home watching television. Her son, Marlin Johnson, was in the backyard smoking a cigarette. Her vehicle, a 1994 Ford Econoline van, was parked on the street in front of the house. At approximately 1:15 a.m., she heard some noise outside. Ten to fifteen seconds later, Johnson poked his head in the door and said, "[S]omeone's in the van, get dad." Diane called for her husband, who came downstairs and ran outside.

¶ 7 Fred Holley, Diane's husband, testified that he was awakened by his wife at approximately 1:15 a.m. on August 1, 2009. He went outside and saw Johnson running down the street chasing a man. When the man ran under a street light, Fred could see that he was wearing an "orangish-red shirt and long shorts down past his knees." The man turned left on Jefferson Street, and Fred could no longer see him. Fred called the police. The police arrived four to five minutes later. After the police spoke to Fred and Johnson, they left. The police returned 15 to 20 minutes later and said they stopped someone matching the description Johnson gave. The police took Johnson with them to see the man. When Johnson returned home, he told Fred, "They got him."

¶ 8 Marlin Johnson testified that he was smoking a cigarette on the back patio of the house where

he lived with his mother and stepfather on August 1, 2009, at 1:15 a.m. He heard a noise, so he walked to the front of the house. He saw some movement inside his mother's van, but he did not know what it was. He then walked to the front door of the house, stuck his head in, and told his mother, "It looks like somebody's in the van, get dad."

¶ 9 After that, Johnson walked toward the van and saw that someone was sitting in the driver's seat. Johnson opened the front passenger side door to the van, and the man in the driver's seat turned and looked directly at Johnson for "a couple of seconds." The man then opened the driver's side door, jumped out of the van and started running. Johnson pursued him. At one point, the man turned and looked over his shoulder, and Johnson was able to see the man's face again. Johnson saw that the man was wearing "a red or orange colored shirt" and dark blue pants or long shorts.

¶ 10 Johnson and the man continued running toward Jefferson Street. The man turned left on Jefferson, and Johnson lost sight of him. Johnson then returned home. When he got home, Fred asked him what happened. When Johnson told Fred that someone was in the van, Fred called 9-1-1. Police arrived within a few minutes. He gave a description of the man he saw to police: an African-American, approximately six-feet tall, 200 pounds, somewhat thin, wearing a red or orange shirt and jeans or dark-colored pants or shorts.

¶ 11 About 20 to 25 minutes later, a police officer, Michael Pauly, picked up Johnson and took him to another location. When he arrived, Johnson saw several police officers and a man wearing jeans or dark pants, an orange or red colored top and a baseball cap. Pauly asked Johnson if the man was who he saw in his mother's van. Johnson said he couldn't be sure because the man was not wearing a baseball cap when he saw him. Police then instructed the man to remove his baseball cap. When the man removed his cap, Johnson saw that he was the man in his mother's van. In court,

Johnson identified defendant as the man he saw in his mother's van and later saw with police. Defense attorney Primozic cross-examined Johnson.

¶ 12 Officer Michael Pauly of the City of Joliet Police Department testified that he responded to a call from 13 South Prairie. He spoke to Fred and Johnson. They told him they were outside their residence smoking when they heard a noise. When they went to see what it was, they saw a man in their vehicle. Johnson chased the man down the street. Johnson described the man as "a thin male black taller with jean shorts and a red shirt." Pauly's fellow officer, Delaney, put the description out on the radio. About 10 minutes later, Officer Emph notified Pauly that she stopped a man matching the description. Pauly asked Johnson if he would go with him to look at the man. Johnson agreed, and Pauly took Johnson to see the suspect. When the suspect removed his hat, Johnson identified him as the man he chased. After Johnson identified defendant, he was charged with burglary.

¶ 13 Officer Lisa Emph, a police officer with the City of Joliet, testified that on August 1, 2009, at approximately 1:19 a.m., she heard a description of a suspect over the radio. The suspect was described as a tall, thin, black male, wearing a red or orange t-shirt. Within five to ten minutes, she saw defendant walking less than a mile from 13 South Prairie. He matched the description she heard on the radio. When she approached defendant, he was out of breath and sweaty. He told her he was on his way home, but he was walking in the opposite direction as his home.

¶ 14 The jury found defendant guilty of burglary. The trial court sentenced defendant to 15 years imprisonment. Defendant filed a motion for a new trial, arguing that (1) the court should have stricken the pre-trial identification of him, and (2) the jury erred in finding him guilty of burglary beyond a reasonable doubt. The trial court denied the motion.

¶ 15 I

¶ 16 Defendant first argues that attorney Primozic was operating under a *per se* conflict of interest when she represented him because she had previously represented Johnson in an unrelated case.

¶ 17 A criminal defendant's sixth amendment right to effective assistance of counsel includes the right to conflict-free representation. *People v. Fields*, 2012 IL 112438, ¶ 17. There are two categories of conflict of interest: *per se* and actual. *Id*. A *per se* conflict of interest exists where certain facts about a defense attorney's status engender a disabling conflict. *Id*. If the record reveals a *per se* conflict of interest, reversal is required unless the defendant waived his right to conflict-free counsel. *Id*. at ¶ 18.

¶ 18 The supreme court has identified three situations where a *per se* conflict exists: "(1) where defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution, (2) where defense counsel contemporaneously represents a prosecution witness, and (3) where defense counsel was a former prosecutor who had been personally involved in the prosecution of the defendant." *Fields,* 2012 IL 112438, at ¶ 18. When the record shows that the facts are undisputed, the issue of whether a *per se* conflict exists is a question that this court reviews *de novo*. *Id*.

¶ 19 "[I]n cases where defense counsel has represented a State's witness, a *per se* conflict of interest will not be held to exist unless the professional relationship between the attorney and the witness is contemporaneous with defense counsel's representation of the defendant." *Fields*, 2012 IL 112438, at ¶ 20. There is no *per se* conflict of interest when defense counsel's representation of the witness is prior to counsel's representation of defendant. *Id*. at ¶ 29.

¶ 20 Here, the undisputed facts establish that Primozic had represented Johnson, a prosecution witness, in an unrelated case prior before she began representing defendant. Primozic was no longer

representing Johnson when Johnson testified against defendant. Since the relationship between Primozic and Johnson was over when Johnson testified against defendant at defendant's trial, no *per se* conflict of interest existed. See *Fields*, 2012 IL 112438, at ¶¶ 20, 29.

¶ 21 II

¶ 22 Defendant next argues that he was denied his right to a fair trial because the trial court did not strictly comply with Illinois Supreme Court Rule 431(b) (Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

¶ 23 Rule 431(b) provides:

> "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).

"The language of Rule 431(b) is clear and unambiguous." *People v. Thompson*, 238 Ill. 2d 598, 607 (2010). The trial court is required to ask potential jurors whether they understand and accept the enumerated principles. *Id*.

¶ 24 A defendant's failure to object to an error at trial and raise the issue in a posttrial motion ordinarily results in forfeiture of the issue. See *People v. Vesey*, 2011 IL App (3d) 090570, ¶ 14. A defendant may avoid forfeiture only by showing that the court committed plain error. *Id.* An error is reversible under the plain-error doctrine only where "(1) a clear or obvious error occurred and the

evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). A defendant has the burden of persuasion under both prongs of the plain-error analysis. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009).

¶ 25 The first step of plain-error analysis is determining whether any error occurred. *People v. Stuckey*, 2011 IL App (1st) 092535, at ¶ 28. The question in this case is whether the trial court strictly complied with Rule 431(b) when questioning the jurors. *Id*.

¶ 26 Here, the trial court announced the four principles set forth in Rule 431(b). The trial court asked the potential jurors if they understood and accepted the first principle. However, with respect to the remaining three principles, the trial court only asked the prospective jurors if they understood them. Rule 431(b) requires questioning on whether the potential jurors both understand and accept each of the enumerated principles. *Thompson*, 238 Ill. 2d at 607. Because the prospective jurors were not asked if they accepted three of the principles, the trial court violated Rule 431(b). See *id*.

¶ 27 Having found that the court erred, we must now determine if the error amounts to plain error since defendant did not object at trial or raise the issue in his posttrial motion. Defendant seeks reversal only under the first prong of the plain-error doctrine, arguing that the evidence was closely balanced.

¶ 28 We find that the evidence in this case was not closely balanced. Johnson heard a noise coming from his mother's van and saw defendant inside. Officer Emph found defendant, sweaty and out of breath, less than a mile from the van. Johnson positively identified defendant as the man

inside his mother's van. Because the evidence against defendant was overwhelming, defendant cannot establish that the court's Rule 431(b) violation constituted plain error under the first prong of the plain-error doctrine.

¶ 29 Moreover, even if we were to assume that the evidence was closely balanced, defendant has not demonstrated how the trial court's Rule 431(b) error could have tipped the scales against him and resulted in a conviction. See *People v. White*, 2011 IL 109689, ¶ 133. Defendant offers no evidence from the record showing how the trial court's failure to strictly comply with Rule 431(b) prejudiced him. Because defendant has not met his burden of showing that the error tipped the scales of justice against him, the first prong of the plain-error doctrine does not excuse his forfeiture of this issue.

¶ 30 CONCLUSION

¶ 31 The judgment of the circuit court of Will County is affirmed.

¶ 32 Affirmed.