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2012 IL App (3d) 100404-U

Order filed May 14, 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 10th Judicial Circuit,
Plaintiff-Appellee,)	Peoria County, Illinois,
)	
v.)	Appeal No. 3-10-0404
)	Circuit No. 05-CF-351
)	
SHONE L. JONES,)	Honorable
)	James E. Shadid,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Presiding Justice Schmidt and Justice Holdridge concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court erred when it instructed the jury at defendant's fitness hearing that defendant was presumed fit.
- ¶ 2 After being found fit to stand trial a second time, defendant, Shone L. Jones, was found guilty of 11 charges against him and was sentenced to 25 years in prison. On appeal, defendant argues that the trial court erred when it instructed the jury at his second fitness hearing that he was presumed fit to stand trial. We reverse and remand.

FACTS

¶ 3

¶ 4 In April 2005, defendant was charged with multiple criminal offenses. In December 2005, defense counsel notified the court that he believed there was a *bona fide* doubt as to defendant's fitness to stand trial. The trial court found that there was a *bona fide* doubt as to defendant's fitness and set the case for a fitness hearing.

¶ 5 On June 20, 2006, a jury considered the issue of defendant's fitness to stand trial. Dr. Sohee Lee testified for the State that defendant was not fit to stand trial. Defendant testified on his own behalf that he was fit. The jury concluded that defendant was fit to stand trial.

Thereafter, defendant was convicted of four counts of armed violence (720 ILCS 5/33A-2(a) (West 2004)); two counts of aggravated discharge of a firearm (720 LCS 5/24-1.2(a)(2) (West 2004)); two counts of aggravated unlawful restraint (720 ILCS 5/10-3.1(a) (West 2004)); and one count each of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2004)), criminal damage to property (720 ILCS 5/21-1(1)(a) (West 2004)), and unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2004)). The court sentenced defendant to 25 years' imprisonment.

¶ 6 Defendant appealed his conviction, arguing that the trial court erred in finding him fit to stand trial. We reversed and remanded the case with instructions for the trial court to conduct a fitness hearing to determine if defendant was fit to stand trial. *People v. Jones*, 386 Ill. App. 3d 665 (2008).

¶ 7 On July 13, 2009, defendant's case proceeded to a second fitness hearing. Two experts testified for the State. Dr. Ryan Finkenbine testified that defendant was fit to stand trial, but it was a "close call" and defendant barely met the fitness standard. Dr. William Hillman opined

that he also felt that defendant was competent to stand trial. Lee testified for the defense that his opinion had not changed from the first fitness hearing, *i.e.*, that defendant remained unfit. At the jury instruction conference, the State requested that the court instruct the jury that defendant was presumed fit to stand trial. The trial court gave the instruction over defendant's objection. The jury found defendant fit to stand trial.

¶ 8 Following the fitness hearing, defendant filed a motion for a judgment notwithstanding the verdict or for a new trial. The motion alleged that there was no evidence to support the State's experts' conclusion that defendant was fit. The trial court denied defendant's motion. After a jury trial, defendant was found guilty of four counts of armed violence, two counts of aggravated discharge of a firearm, two counts of aggravated unlawful restraint, and one count each of unlawful possession of a weapon by a felon, criminal damage to property, and unlawful possession of a controlled substance. Defendant was sentenced to 25 years in prison. Defendant appeals.

¶ 9 ANALYSIS

¶ 10 Defendant argues that the trial court erred when it instructed the jury at his second fitness hearing that he was presumed fit to stand trial. Although defendant did not raise this issue in his posthearing motion, he asks that we review it for plain error under Illinois Supreme Court Rule 615(a) (eff. Aug. 27, 1999), or 451(c) (eff. July 1, 2006).

¶ 11 When a defendant fails to preserve an alleged instructional error for appellate review, courts have applied the principles of Illinois Supreme Court Rules 451(c) and 615(a). Rule 451(c) is applicable when a defendant fails to object to the instructional error at trial. Rule 615(a) is applicable when a defendant objected to the instruction but failed to preserve the issue

by including it in his posttrial motion. *People v. Magallanes*, 409 Ill. App. 3d 720 (2011). Here, defendant objected to the instruction at trial, but failed to raise the issue in his postfitness hearing motion. Therefore, we conduct plain error review under Rule 615(a).

¶ 12 We may address the merits of defendant's forfeited issue only if he proves that: (1) the evidence was so closely balanced that the error alone threatened to tip the scales of justice against defendant; or (2) the error was so serious that it affected the fairness of defendant's trial and challenged the integrity of the judicial process. *People v. Herron*, 215 Ill. 2d 167 (2005). The first step of plain error review is to determine whether the trial court erred. *People v. Walker*, 232 Ill. 2d 113 (2009).

¶ 13 The due process clause of the fourteenth amendment bars prosecuting a defendant who is unfit to stand trial. U.S. Const., amend XIV; *People v. Shum*, 207 Ill. 2d 47 (2003). A defendant is unfit if, based on a mental or physical condition, he is unable to understand the nature and purpose of the proceedings against him or to assist in his defense. 725 ILCS 5/104-10 (West 2008); *People v. Burton*, 184 Ill. 2d 1 (1998). A defendant is presumed fit to stand trial. 725 ILCS 5/104-10 (West 2008). However, when a trial court finds there is a *bona fide* doubt as to defendant's fitness, it shall order a hearing to determine if defendant is fit to stand trial. 725 ILCS 5/104-11(a) (West 2008). When a *bona fide* doubt of defendant's fitness has been raised, the State bears the burden of proving that defendant is fit to stand trial by a preponderance of the evidence. 725 ILCS 5/104-11(c) (West 2008).

¶ 14 In the present case, defendant was presumed to be fit to stand trial until defense counsel requested a fitness hearing and the court found that there was a *bona fide* doubt as to defendant's fitness. See *People v. Murphy*, 160 Ill. App. 3d 781, 793 (1987) (once a *bona fide* doubt as to

defendant's fitness is raised, the presumption "bubble" bursts, and a hearing must be held where the State is required to prove defendant's fitness by a preponderance of the evidence). Therefore, we find that the trial court erred when it instructed the jury that defendant was presumed to be fit to stand trial.

¶ 15 We next review defendant's case under the first prong of plain error analysis. Under the first prong, defendant must prove that the evidence was so closely balanced that the jury's fitness finding may have resulted from the error and not the evidence. *Herron*, 215 Ill. 2d 167.

Defendant must further prove that prejudice resulted from the trial court's error. *Id.*

¶ 16 We find that defendant has proven that the evidence was closely balanced and prejudice resulted from the trial court's error. At defendant's fitness hearing, three witnesses testified. Although the State's experts concluded that defendant was fit, Finkenbine opined that it was a "close call" and that defendant barely met the standard for being fit. Lee remained steadfast in his testimony for the defense that defendant was not fit to stand trial. Thus, the jury heard three different opinions as to defendant's fitness that did not conclusively demonstrate that defendant was fit or unfit to stand trial. Under such circumstances, defendant's case may well have been affected by the trial court's instruction on the presumption of fitness. This instruction effectively shifted the burden of proof from the State to the defendant on the question of fitness. Thus, we find that the instructional error prejudiced defendant and constituted plain error.

¶ 17 As we find plain error under the first prong, we do not address the second prong. We reverse the defendant's convictions and remand the case to the trial court to conduct a new hearing to determine if defendant is fit to stand trial.

¶ 18

CONCLUSION

¶ 19 For the foregoing reasons, the judgment of the circuit court of Peoria County is reversed and remanded with instruction.

¶ 20 Reversed and remanded.