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2012 IL App (3d) 100577-U

Order filed March 1, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of the 10th Judicial Circuit,
)	Peoria County, Illinois,
Plaintiff-Appellee,)	
)	Appeal No. 3-10-0577
v.)	Circuit No. 08-CF-1506
)	
DOMINICK EPPINGER,)	Honorable
)	James E. Shadid,
Defendant-Appellant.)	Judge, Presiding.

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

ORDER

- ¶ 1 *Held:* Where a *pro se* defendant voluntarily absents himself from trial, section 115-4.1(a) of the Code of Criminal Procedure requires the trial court to appoint counsel before conducting *voir dire*. In this case, the trial court committed plain error by proceeding to *voir dire* without defendant being present or represented by counsel.
- ¶ 2 Defendant Dominick Eppinger was found guilty of attempt first degree murder (720 ILCS 5/8-4(a) (West 2008)), two counts of armed robbery (720 ILCS 5/18-2(a)(2) (West

2008)), aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2008)) and unlawful use of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2008)). He was sentenced to an aggregate term of 95 years in prison. On appeal, he argues that the trial court committed plain error by proceeding to *voir dire* without his presence or the presence of defense counsel. We reverse and remand for further proceedings.

¶ 3 On December 9, 2009, the State indicted defendant on several criminal charges. All of the charges were related to an incident that occurred on December 2, 2008, in which defendant, while armed with a handgun, took money from four individuals and shot one.

¶ 4 Defendant was initially represented by counsel. On August 18, 2009, defendant requested that the court discharge the public defender and allow him to proceed *pro se*. The trial court admonished defendant regarding the possible penalties he faced and the difficulties he may experience as a *pro se* litigant. Defendant stated that he understood the admonishment, and that he still wished to represent himself. The court then discharged counsel and allowed defendant to proceed *pro se*.

¶ 5 On December 15, 2009, defendant sent a letter to the trial court requesting the appointment of standby counsel. The trial court held a hearing on the issue. At the hearing, defendant stated that he still wanted to represent himself but that he was afraid he would not know the proper procedure in some circumstances. The trial court denied defendant's request.

¶ 6 The day trial was scheduled to begin, defendant informed the court that he had decided he was not capable of presenting his own defense. The trial court stated that defendant was attempting to delay trial. The following exchange occurred:

"Defendant: No attempt to delay.

Court: Yes, an attempt to delay.

Defendant: "But I'm just not— I never been to school on this. And, I mean, from that I— the hearings I done been through, and I can clearly see that I don't got enough experience. I mean, I'm not—I don't want to go to trial by myself. I need a — I need counsel, and, I mean, I'm not— I'm not going to trial by myself."

The trial court then informed defendant that the trial would commence with or without his participation.

¶ 7 Following a brief recess, defendant did not return to the courtroom. The bailiff reported to the trial court that he went to defendant's holding cell, that he told defendant they were ready to select a jury and asked him if he wanted to participate, and that defendant refused.

¶ 8 The trial court called in potential jurors and conducted *voir dire* with the State but with no representative from the defense. The potential jurors were informed that defendant had chosen to represent himself and to absent himself from the *voir dire* proceedings. The jury was selected that afternoon, and the case was recessed until the following day.

¶ 9 The next morning, defendant appeared in court and voluntarily participated in the rest of trial. The jury ultimately found him guilty of all charges.

¶ 10 For his posttrial motion, defendant requested and received appointed counsel. Both defendant and defense counsel filed motions for a new trial. At the hearing held on the motions, counsel adopted defendant's *pro se* motion and argued that the State failed to prove defendant guilty beyond a reasonable doubt. Defendant argued his remaining *pro se* claims,

and the trial court denied both motions.

¶ 11 The trial court sentenced defendant to 55 years in prison for attempt first degree murder. It then sentenced defendant to 40 years' imprisonment for the counts of armed robbery and 12 years' imprisonment for unlawful use of a weapon by felon, to run concurrent with each other but consecutive to the attempt murder sentence.

¶ 12 ANALYSIS

¶ 13 Defendant argues that the trial court erred by conducting *voir dire in absentia* without the presence of any counsel representing defendant in violation of section 115-4.1(a) of the Code of Civil Procedure of 1963 (Code) (725 ILCS 5/115-4.1(a) (West 2008)). Defendant acknowledges that he forfeited this issue by failing to raise it below but urges us to review it under the plain error doctrine, arguing that his absence from the jury selection process affected his substantial rights.

¶ 14 I. Trial *In Absentia*

¶ 15 Section 115-4.1 of the Codes states:

"(a) When a defendant after arrest and an initial court appearance for a non-capital felony or a misdemeanor, fails to appear for trial, at the request of the State, and after the State has affirmatively proven through substantial evidence that the defendant is willfully avoiding trial, the court may commence trial in the absence of the defendant. *** Trial in the defendant's absence shall be by jury unless the defendant had previously waived trial by jury. The absent defendant must be represented by retained or appointed counsel." 725 ILCS 5/115-4.1(a) (West 2008).

¶ 16 The primary rule of statutory construction is to ascertain and give effect to the intent

of the legislature. *People v. McClure*, 218 Ill. 2d 375 (2006). The best evidence of legislative intent is the language of the statute. *McClure*, 218 Ill. 2d at 381. When possible, the court should interpret the language of a statute according to its plain and ordinary meaning. *People v. McCombs*, 372 Ill. App. 3d 967 (2007).

¶ 17 Section 115-4.1(a) applies when a defendant "fails to appear for trial." Failing to appear for trial necessarily includes failing to appear for *voir dire*. See *People v. Vest*, 397 Ill. App. 3d 289 (2009) (trial begins when *voir dire* begins). The statute provides that if the defendant fails to appear for *voir dire*, the trial court may commence the trial in the defendant's absence. It further states that the absent defendant "must be represented by retained or appointed counsel." 725 ILCS 5/115-4.1(a) (West 2008). The statute contains no exception for a prior waiver of counsel.

¶ 18 In this case, the trial court conducted *voir dire* in defendant's absence without appointing counsel. Section 115-4.1(a) of the Code permitted the court to begin the trial without defendant present, but the trial court was required to appoint an attorney to represent the defendant during the proceedings. The court's failure to comply with section 115-4.1(a) was error. See *McCombs*, 372 Ill. App. 3d at 972.

¶ 19 The State argues that section 115-4.1(a) does not apply to this case because defendant was in custody and voluntarily chose to stay in his holding cell, citing *People v. Reisinger*, 106 Ill. App. 3d 148 (1982). In *Reisinger*, the defendant remained in his cell and refused to participate in his trial. On appeal, he argued that his trial *in absentia* was reversible error. The appellate court affirmed, finding that the defendant's voluntary decision to absent himself from trial could be construed as an effective waiver of his right to be present. The

court also held that the requirement of counsel under section 115-4.1(a) was inapplicable because the defendant did not fail to appear by intentionally and unequivocally choosing to remain in his cell. *Reisinger*, 106 Ill. App. 3d at 153.

¶ 20 We disagree with *Reisinger*. The statute does not qualify the term "fails to appear." If the defendant is in custody and chooses to stay in his cell rather than participate in his trial, he fails to appear for trial. To the extent that *Reisinger* concludes that section 115-4.1(a) does not apply when a defendant voluntarily remains in his holding cell, we decline to follow it.

¶ 21 II. Plain Error

¶ 22 Next, we must determine whether the unpreserved error warrants a new trial. Under the plain error doctrine, we will remand for a new trial only if (1) an error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice, regardless of the seriousness, or (2) an error occurred and that 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. Averett*, 237 Ill. 2d 1 (2010). The burden of persuasion in plain error review rests with the defendant. *People v. McLaurin*, 235 Ill. 2d 478 (2009).

¶ 23 Defendant argues plain error review under the second prong, claiming that the violation of section 115-4.1(a) affected his substantial rights and resulted in an unfair trial. To satisfy the second prong, defendant must demonstrate that a structural error occurred. *People v. Glasper*, 234 Ill. 2d 173 (2009). In other words, defendant must show that the error that occurred eroded the integrity of the judicial process and undermine the fairness of the

trial. *Glasper*, 234 Ill. 2d at 197-98, citing *People v. Herron*, 215 Ill. 2d 167, 186 (2005). Cases such as denial of counsel, trial before a biased judge, denial of self-representation at trial, and trial by a biased jury fall into the category of a "structural error." *People v. Thompson*, 238 Ill. 2d 598 (2010) (listing cases of structural error).

¶ 24 Jury selection is a critical stage of trial. *People v. Bean*, 137 Ill. 2d 65 (1990). In determining whether a defendant's failure to participate in jury selection resulted in an impartial jury, our focus involves the impartiality of the jury that actually sits in judgment. *People v. Bennett*, 282 Ill. App. 3d 975 (1996). The right to use peremptory challenges during the selection process is not denied or impaired "if the procedure affords both parties fair opportunity to detect bias or hostility on the part of prospective jurors, and if the procedure allows both parties a fair chance to peremptorily excuse any venireman." *People v. Daniels*, 172 Ill. 2d 154 (1996). The hindrance of a defendant's right to determine juror challenges is an impairment of that right and is presumed prejudicial. *Bennett*, 282 Ill. App. 3d at 980.

¶ 25 Here, defendant was absent from the entire jury selection proceedings. Had defendant been present through counsel, the proceedings may have been different. Defense counsel's presence would have given both parties a fair opportunity to observe facial expressions, listen to the tone of the voices, and assess the verbal responses given. Counsel would have then been allowed to peremptorily excuse one or more of the jurors, or to excuse them for cause. The possibility that one of the jurors who sat in judgment could have been excluded had defense counsel been present contributes to the unfairness of the *voir dire* process. See *Bennett*, 282 Ill. App. 3d at 980. Thus, the court's failure to comply with

section 115-4.1(a) resulted in the denial of defendant's fundamental right to a fair trial by an impartial jury and constitutes plain error.

¶ 26 The State maintains that under *Thompson* any error that occurs during *voir dire* can only be plain error if the defendant can prove that the jury was biased. See *Thompson*, 238 Ill. 2d 598. In *Thompson*, the supreme court held that it was error for the trial court to fail to ask potential jurors questions set forth in Supreme Court Rule 431(b) (Ill. S. Ct. R. 413(b) (eff. May 1, 2007)). However, the court found that the failure to comply with the rule did not constitute plain error because it did not directly affect the defendant's constitutional rights and the rule was not the only way to ensure that a jury was not biased. The court concluded that Rule 413(b) was not "indispensable to the selection of an impartial jury." *Thompson*, 238 Ill. 2d at 615.

¶ 27 The State's attempt to apply *Thompson* is misplaced. The error in this case did not involve the failure to ask the venire questions under Rule 413(b). Here, the failure to appoint counsel under section 115-4.1(a) of the Code caused the jury selection process to occur without any participation from one side of the adversarial system. Unlike the error in *Thompson*, defendant's participation in *voir dire* is an indispensable part of the selection of an impartial jury. The error in this case constituted plain error; the cause is therefore remanded for a new trial.

¶ 28 CONCLUSION

¶ 29 The judgment of the circuit court of Peoria County is reversed, and the cause is remanded for further proceedings.

¶ 30 Reversed and remanded.