2016 IL App (1st) 142149-U

SIXTH DIVISION
Order filed: August 5, 2016

No. 1-14-2149

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 13 CR 20992
	)	
SHELTON PAGE,	)	Honorable
	)	Nicholas Ford,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Rochford and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held*: Although the circuit court erred in sustaining the State's objection to a statement made by defense counsel during closing arguments, the defendant's forfeiture of the issue was not excused where he failed to satisfy either prong of the plain-error doctrine. Accordingly, his conviction for burglary was affirmed.

¶ 2 Following a jury trial, the defendant, Shelton Page, was convicted of burglary and sentenced to 22 years' imprisonment with a 2-year mandatory supervised release (MSR) term.[1]

[1] We note that there is a discrepancy between what the court stated at the sentencing hearing and what is written in the sentencing order. At the hearing, the court stated that the defendant was sentenced to a three-year MSR term; conversely, in the written order, the defendant was sentenced to two years of MSR. Neither party raised this discrepancy on appeal.

On appeal, the defendant argues that his constitutional rights to present a defense and to a fair trial were violated where, during closing arguments, the circuit court sustained the State's objection regarding a statement made by defense counsel because it was not supported by the evidence presented at trial. For the following reasons, we affirm the judgment of the circuit court.

¶ 3 In October 2013, the defendant was charged by information with one count of burglary under section 19-1(a) of the Criminal Code of 1961 (720 ILCS 5/19-1(a) (West 2012)), based upon his entry into John Montgomery's garage with the intent to commit a theft. On May 20, 2014, the case proceeded to a jury trial and the following evidence was adduced.

¶ 4 Montgomery testified that he resided at 7812 South Rhodes Avenue in Chicago, a two-story house with a porch, deck, and detached garage located in the backyard. The garage had a locked service door and a window that faced the kitchen window of the house. According to Montgomery, "[f]rom the kitchen window you can see straight out to [the back of] the garage," which was approximately 15 to 20 feet away. As a safety precaution, Montgomery placed a baby monitor on a shelf in the garage and placed the monitor's receivers in "the bedrooms" of his house. A six-foot tall fence surrounded Montgomery's yard; the fence had a locked gate, located on the left side of the garage, that opened into an alley.

¶ 5 Montgomery further testified that, at approximately 1 a.m. on October 22, 2013, he was sleeping when his wife woke him up because she heard noises coming from the garage through the baby monitor in her bedroom. Once awake, Montgomery also heard movement in the garage, so he went downstairs to the kitchen and looked out the window. Montgomery stated that he saw a lit flashlight moving around through the garage's window. His wife called 9-1-1 while he continued to observe the garage from the kitchen window. According to Montgomery,

he saw the defendant leave the garage through the service door, carrying his "weed eater." The defendant then proceeded to walk out of the gate, deposit the weed eater into the alley, and walk back into the garage. Montgomery acknowledged that there was not any light in his backyard at that time; however, he was wearing glasses and his view of the defendant was "clear."

¶ 6 Montgomery stated that, while the defendant was in the garage, he walked from the kitchen to the porch and turned on an outdoor light affixed to the porch, which illuminated the entire backyard. Montgomery continued to observe the defendant from a window in the porch that was approximately 10 feet away from the garage. The defendant exited the garage, carrying a plastic bag full of items over his shoulder. According to Montgomery, he could see the defendant's face "clearly," and he observed that the defendant was wearing a white t-shirt and dark pants. The defendant then jumped over the fence on the right side of the garage as lights from a police car arrived in the alley.

¶ 7 Montgomery also testified that, after the police apprehended the defendant, he walked into the alley and saw several items from his garage—the weed eater, a leaf blower, lights, cords, and drills—on the ground. He told the police that those items belonged to him. Additionally, Montgomery identified the defendant as the man that he observed in his backyard and garage. Lastly, Montgomery stated that the locks on the garage's service door had been broken and that the defendant did not have permission to enter the garage or take his property.

¶ 8 On cross-examination, Montgomery acknowledged that, on the night of the incident, there were blinds on the kitchen window and bars on the porch window. He also testified that the porch window was one-and-a-half feet wide.

¶ 9 Chicago police officer Ayokunle Akinbusuyi testified that, at approximately 1 a.m. on October 22, 2013, he and his partner were patrolling in a marked squad car near the area where

Montgomery lived. They were "[p]robably less than a minute" away from Montgomery's house when they received a radio call informing them that a burglary was in progress in Montgomery's garage. Officer Akinbusuyi stated that he and his partner turned into the alley behind Montgomery's garage. The alley was illuminated by alley lights as well as the squad car's headlights. After driving past three or four houses, Officer Akinbusuyi observed the defendant standing in the alley and facing Montgomery's fence. The defendant was standing about three to five feet away from Montgomery's garage, in between Montgomery's garage and a neighbor's garage, and was holding a black, plastic bag full of items. The defendant looked in the direction of the squad car and Officer Akinbusuyi could see his face. According to Officer Akinbusuyi, the defendant then dropped the plastic bag, ran directly in front of the police car, and attempted to climb a nearby fence on the opposite side of the alley. Officer Akinbusuyi apprehended the defendant while he was on the fence, handcuffed him, and placed him in the squad car. Officer Akinbusuyi stated that, when Montgomery came outside and looked into the squad car, he identified the defendant as "the man that broke into [his] garage." Montgomery also confirmed that he owned the items in the alley.

¶ 10 On cross-examination, Officer Akinbusuyi acknowledged that he did not see the defendant taking any items out of Montgomery's garage or climbing over Montgomery's fence. He also stated that, when he arrived at the scene, Montgomery's gate was closed. Officer Akinbusuyi did not recall whether any lights were on in Montgomery's backyard, but "[i]t wasn't too dark." He did not believe that he found "any type of instrument that would be able to break open a garage door."

¶ 11 A recess was called and the defendant filed a motion for a directed verdict, which the circuit court denied. The defendant also informed the court that he did not wish to testify on his

own behalf. Back in the presence of the jury, the State rested its case in chief. The defendant did not present any evidence before he rested.

¶ 12 At the beginning of defense counsel's closing arguments, the following colloquy occurred:

> "BY MR. THOMAS [assistant public defender]:
>
> [The defendant] was not in Mr. Montgomery's garage on October 22, 2013, and because he was not in that garage, he's not guilty of burglary.
>
> Now, he's in the alley, comes across a garbage bag. So be it. Garbage bag is in his hands. He sees the police. Wrong place, wrong time.
>
> It's not illegal to be walking down an alley at 1 o'clock in the morning. It just so happens that while [the defendant] was walking down that alley, he came across a garbage bag.
>
> MS. LOITERSTEIN [assistant State's Attorney]: Objection. That's not in the evidence, Judge.
>
> THE COURT: The objection is sustained.
>
> MR. THOMAS: Now, he has a garbage bag in his hands when the police arrive, and that's all we've got."

Defense counsel went on to argue that the defendant was not the person who was in Montgomery's garage, pointing out that no fingerprints or DNA were recovered from Montgomery's garage or from the items found in the alley. He further emphasized that the police did not find any tools on the defendant's person that could be used to break into Montgomery's gate or the service door of his garage. Defense counsel also suggested that Montgomery's identification of the defendant was unreliable because there were no lights on when Montgomery

first glanced into his backyard and Montgomery's view was obstructed because there were bars on the porch window. According to defense counsel, Montgomery first saw the defendant when he was in the back of the squad car. Thus, counsel argued, the State did not prove the defendant guilty of burglary beyond a reasonable doubt.

¶ 13 After deliberations, the jury found the defendant guilty of burglary.

¶ 14 At the sentencing hearing, held in June 2014, the defendant filed a motion for a new trial, which contained several broad allegations, including that he did not receive a fair and impartial trial as guaranteed by the Illinois and United States Constitutions. In the motion for a new trial, however, the defendant did not allege how he was deprived of a fair trial, nor did he argue that the circuit court erred in sustaining the State's objection to defense counsel's statement during closing arguments—that the defendant was merely walking down the alley and found the plastic bag full of Montgomery's items. The court denied the post-trial motion. After considering the pre-sentence investigative report, evidence in aggravation and mitigation, and a statement in allocution, the court sentenced the defendant to 22 years' imprisonment with a 2-year MSR term. The defendant filed a motion to reconsider sentence, which the court denied. This appeal followed.

¶ 15 On appeal, the defendant contends that his conviction should be reversed and that the matter should be remanded for a new trial because, when the circuit court sustained the State's objection during his closing argument, he was denied his right to present a defense and was thus deprived of his right to a fair trial. Specifically, he argues that the circuit court's ruling on this objection was improper because the jury was prevented from making a reasonable inference from the evidence—that the defendant did not burglarize Montgomery's garage; rather, he merely found the plastic bag full of stolen items while he was walking down the alley.

According to the defendant, this statement was a reasonable inference from the evidence because no fingerprints, DNA, or tools to assist with the burglary were found, and because the State's only direct evidence placing him inside of Montgomery's garage was Montgomery's allegedly unreliable testimony. By sustaining the State's objection, the defendant asserts, the defense's theory of the case was left "flat on its back" because:

> "[t]he court *** likely left the impression on jurors that, while they should consider the evidence presented, they should not consider the *absence* of any evidence that weakened the State's case, as such as [*sic*] the fact that no burglary tools or flashlight were recovered from [the defendant] and no fingerprints were recovered." (Emphasis in original.)

¶ 16 Initially, we note that the defendant forfeited this issue by failing to raise it in his post-trial motion for a new trial. *People v. Abrams*, 2015 IL App (1st) 133746, ¶ 49 (citing *People v. Enoch*, 122 Ill. 2d 176, 190 (1988)) (to preserve an issue for review, the defendant must both object at trial and file a written post-trial motion raising the issue). Despite the forfeiture, the defendant argues that review under the plain-error doctrine is appropriate. "The ultimate question of whether a forfeited claim is reviewable as plain error is a question of law that is reviewed *de novo*." *People v. Johnson*, 238 Ill. 2d 478, 485 (2010).

¶ 17 Under the plain-error doctrine, a reviewing court may consider a forfeited issue when:

> "(1) a clear or obvious error occur[r]ed 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 occur[r]ed 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. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

The defendant in this case argues that plain-error review is appropriate under both prongs. The first step in considering whether this doctrine applies, however, is to determine whether any error occurred. *People v. Hudson*, 228 Ill. 2d 181, 191 (2008).

¶ 18 Pursuant to the sixth amendment guarantee of assistance of counsel (U.S. Const., amend. VI), made applicable to the states by the fourteenth amendment (U.S. Const., amend. XIV), a defendant's right to make a closing argument before a fact-finder is a fundamental right. *People v. Stevens*, 338 Ill. App. 3d 806, 810 (2003). Although counsel is afforded wide latitude in closing arguments (*People v. Burgess*, 2015 IL App (1st) 130657, ¶ 158), the arguments and statements made must be "based upon the facts in evidence, or upon reasonable inferences drawn therefrom." *People v. Crawford*, 343 Ill. App. 3d 1050, 1058-59 (2003); see also *People v. Gant*, 202 Ill. App. 3d 218, 226 (1990) (counsel may "present his theory of the case to the jury so long as the theory is based upon the evidence and reasonable inferences therefrom."). If an argument or statement is not based upon the evidence or a reasonable inference therefrom, it lacks proper foundation. *People v. Terry*, 312 Ill. App. 3d 984, 993 (2000). "The regulation of the substance and style of closing argument lies within the [circuit] court's discretion; the court's determination of the propriety of the remarks will not be disturbed absent a clear abuse of discretion." *People v. Caffey*, 205 Ill. 2d 52, 128 (2001).

¶ 19 Here, we believe that the circuit court committed error when it sustained the State's objection to defense counsel's statement during closing arguments; specifically, that the defendant was merely walking down the alley when he found the bag containing Montgomery's items. Although Montgomery testified that he saw the defendant jump over the fence as police

lights arrived in the alley, Officer Akinbusuyi did not testify that he saw the defendant jumping over or climbing down Montgomery's fence; rather, he only found the defendant standing in the alley, holding the plastic bag. Accordingly, the testimonial evidence contains a gap in events—even if the events took place just a matter of seconds apart. Because of this gap, as well as the lack of DNA and fingerprint evidence, and the fact that the defendant was not carrying burglary tools at the time he was apprehended, the defendant's argument that he merely found the bag was a reasonable inference from the evidence or lack thereof. Therefore, the court should have overruled the State's objection.

¶ 20 Because we find that the circuit court's ruling on the objection constituted error, we must next consider whether either of the two prongs of the plain-error doctrine is satisfied: whether the evidence was closely balanced or whether the error "affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Piatkowski*, 225 Ill. 2d at 565. Under both prongs, "the burden of persuasion remains with the defendant." *People v. Herron*, 215 Ill. 2d 167, 187 (2005).

¶ 21 As to the first prong, the defendant argues that the evidence was closely balanced because there was no physical evidence linking him to the burglary, so the State's case relied almost exclusively on the identification testimony of Montgomery—which he asserts was incredible—and Officer Akinbusuyi. We disagree; rather, the evidence overwhelmingly favored the State where Montgomery provided detailed testimony of his observations and Officer Akinbusuyi testified about where and how the defendant was taken into custody. See *People v. Piatkowski*, 225 Ill. 2d 551, 566 (2007) ("[a] positive identification by a single eyewitness who had ample opportunity to observe is sufficient to support a conviction."). Montgomery observed the defendant jump over the fence *as lights from the police car arrived in the alley*. Officer

Akinbusuyi then saw the defendant standing in the alley and holding the bag full of items, just a few feet from Montgomery's garage and facing the fence. After the defendant ran in front of the squad car and attempted to climb a nearby fence, Officer Akinbusuyi apprehended him. Once the defendant was in police custody, Montgomery came into the alley to identify him.

¶ 22 We now go on to decide whether Montgomery's testimony was reliable. To determine whether the evidence was closely balanced based upon the reliability of a witness's identification testimony, an assessment of the five factors set forth in *Neil v. Biggers*, 409 U.S. 188 (1972), is appropriate. See *Piatkowski*, 225 Ill. 2d at 567. The five factors are as follows: (1) the witness's opportunity to view the defendant during the offense; (2) the witness's degree of attention at the time of the crime; (3) the accuracy of the witness's prior description of the defendant; (4) the witness's level of certainty at the identification; and (5) the length of time between the crime and the identification. *Piatkowski*, 225 Ill. 2d at 567 (citing *Neil*, 409 U.S. at 199-200). After reviewing the record in this case, we find that the factors weigh in favor of finding that Montgomery's identification testimony was reliable.

¶ 23 With respect to the first *Neil* factor, Montgomery had a good opportunity to view the defendant while the burglary was taking place. He testified that he "clearly" saw the defendant in his garage and backyard from a distance of 10 to 20 feet, carrying the "weed eater" and the bag full of items into the alley. Although the offense occurred early in the morning, Montgomery was wearing glasses and turned on the porch light, which illuminated the entire backyard.

¶ 24 The second factor also weighs in favor of the State. Montgomery's wife woke him up early in the morning after hearing sounds coming from one of the baby monitor's receivers. Because he was concerned that someone was in the garage, Montgomery got out of bed, went to

the kitchen, and started observing the garage. There was no evidence presented to suggest that Montgomery was distracted or that his attention was directed elsewhere. In fact, his degree of attention was high as demonstrated by his recollection of the specific items that the defendant carried out of his garage—the "weed eater" and the plastic bag—and what the defendant was wearing at the time of the incident.

¶ 25 The third factor, the accuracy of the witness's prior description of the defendant, is inapplicable because Montgomery did not have the opportunity to describe the defendant to the police before the defendant was arrested. Rather, shortly after the defendant's arrest, Montgomery identified the defendant in-person as "the man that broke into [his] garage."

¶ 26 As to the fourth *Neil* factor, Montgomery identified the defendant with a high level of certainty; there was no evidence that he hesitated or seemed unsure when he told the police that the defendant was the man who burglarized his garage. Additionally, he identified the defendant in open court during the trial and nothing in the record suggests that the in-court identification was anything less than certain.

¶ 27 With respect to the fifth and final factor, Montgomery's identification was made very shortly after the defendant's arrest.

¶ 28 Our analysis of the five *Neil* factors leads us to conclude that Montgomery's identification of the defendant was reliable and thus the evidence was not closely balanced. Although the State did not present any DNA or fingerprint evidence connecting the defendant to the burglary, its eyewitness testimony was uncontradicted and the circuit court's error—sustaining the objection during closing arguments—did not relate to how the jury would consider the reliability of that testimony. Accordingly, the defendant has not satisfied the first prong of the plain-error doctrine.

¶ 29 In further support of his argument that the evidence was closely balanced, the defendant contends that many eyewitness identifications are unreliable and lead to wrongful convictions, citing, *inter alia*, law review articles and a treatise. We find that these materials are *de hors* the record because the defendant did not present any evidence or argument about the general unreliability of identification testimony at trial; rather, he is attempting to introduce new theories and evidence on appeal. See *People v. Magee*, 374 Ill. App. 3d 1024, 1030 (2007) (where this court struck the portions of a defendant's brief discussing the articles, explaining that he was using them "for their substance and ultimate findings. Therefore, there [wa]s an existing concern regarding hearsay, in that the author [could not] be observed or cross-examined"); *People v. Mehlberg*, 249 Ill. App. 3d 499, 531-32 (1993). Therefore, we will not consider these secondary sources on appeal or the defendant's arguments that rely on them.

¶ 30 We now move on to determine whether the defendant has met his burden of showing that the second prong of the plain-error doctrine—whether the error "affected the fairness of the defendant's trial and challenged the integrity of the judicial process" (*Piatkowski*, 225 Ill. 2d at 565)—has been satisfied. The defendant argues that, by sustaining the State's objection to defense counsel's statement during closing arguments (that he was merely walking down the alley and found the plastic bag), the circuit court was denying him of his ability to present his theory of the case and he was thus deprived of a fair trial. We find *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 78, instructive. In *Cosmano*, this court explained the following regarding structural errors and closing arguments:

> "Error under the second prong of plain error analysis has been equated with structural error, meaning that automatic reversal is only required where an error is deemed to be a systemic error that serves to 'erode the integrity of the

> judicial process and undermine the fairness of the defendant's trial.' (Internal quotation marks omitted.) [Citation.] In other words, '[a]n error is typically designated as structural only if it necessarily renders a criminal trial fundamentally unfair or an unreliable means of determining guilt or innocence.' [Citation.] Structural errors have been recognized in only a limited class of cases including: a complete denial of counsel; trial before a biased judge; racial discrimination in the selection of a grand jury; denial of self-representation at trial; denial of a public trial; and a defective reasonable doubt instruction. [Citation.]" *Cosmano*, 2011 IL App (1st) 101196, ¶ 78.

¶ 31 Here, we do not believe that the circuit court's ruling on the objection during closing arguments was so substantial that it deprived the defendant of a fair trial. Aside from the objection at issue, defense counsel's argument was not interrupted or constrained. He continued to draw the jury's attention to the lack of DNA and fingerprint evidence as well as burglary tools, and the alleged unreliability of Montgomery's testimony, which counsel argued created a reasonable doubt as to the defendant's guilt. Accordingly, the error in this case does not qualify as a structural error that satisfies the second prong of the plain-error doctrine.

¶ 32 Because the defendant has not met his burden of establishing that either prong of the plain-error doctrine applies to this case, his failure to raise the circuit court's ruling on the objection in a post-trial motion is not excused.

¶ 33 For the foregoing reasons, we affirm the defendant's conviction of burglary.

¶ 34 Affirmed.