2016 IL App (2d) 140774-U
No. 2-14-0774
Order filed November 22, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 10-CF-3414
TIRINO CORINTHIUS JACKSON, a/k/a Tirniocorinthi U. Jackson,	)	Honorable John S. Lowry,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Zenoff and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The record did not support defendant's claim that the trial court's failed to include a limiting instruction among the written instructions tendered to the jury, and, assuming the instruction was not tendered in a written format, any error was harmless, as the jury had heard the instruction orally several times.

¶ 2 Defendant, Tirino Corinthius Jackson (called Tirniocorinthi U. Jackson in some court documents, in what we take to be a typographical error), appeals from his convictions of multiple offenses connected to an incident in which defendant fled the police in a friend's car and the police found two handguns in the car after defendant crashed it. Defendant's claim on appeal

turns on an apparent oversight in the written instructions the trial court gave his jury: those instructions, as they appear in the record on appeal, lack the instruction the court orally gave the jury to limit the use of evidence of defendant's convictions of two felonies. Defendant here argues that that failure made his trial unfair. The State responds, *inter alia*, that defendant forfeited his argument by failing to bring the instruction flaw to the trial court's attention and that the omission does not rise to the level of plain error. We address defendant's claim; we hold that, on the particular facts here, application of forfeiture principles would be over-technical. However, we conclude that the instruction error was harmless, and thus we affirm the convictions.

¶ 3 I. BACKGROUND

¶ 4 A grand jury indicted defendant on 12 counts stemming from a November 4, 2010, incident that involved a car chase and then the discovery of two guns in the car in which defendant had fled. Those counts were as follows:

• Count I charged that defendant was an armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2010)); this was based on his possession of a semiautomatic handgun and was predicated on a conviction of a Class 1 drug felony and a conviction of unlawful possession of a weapon by a felon.

• Count II was identical to count I except for the firearm at issue, which in count II was a revolver.

• Counts III through X charged unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2010)).

• The first four of these counts were based on the allegation of defendant's possession of either the semiautomatic handgun or the revolver and on his

wearing of a bulletproof vest. These were predicated either on the drug conviction or on the conviction of unlawful possession of a weapon by a felon.

• The next four counts were the same except that they removed the allegation that defendant was wearing a bulletproof vest, a change that reduced the maximum available sentence.

• Count XI charged aggravated fleeing or attempting to elude a peace officer (625 ILCS 5/l1-204.1(a)(4) (West 2010)), with the aggravating circumstance that defendant disobeyed two or more traffic control devices.

• Count XII charged criminal damage to state-supported property (720 ILCS 5/21-4(a) (West 2010)) and alleged that defendant had kicked the windows in the back of a squad car such that windows were pushed out of their frames.

¶ 5 Defendant had a jury trial. During the jury selection process, the court asked panel members if they could adhere to the following instruction:

"Ordinarily evidence of the defendant's prior conviction of an offense may not be considered by you as evidence of his guilt of the offense with which he is charged. However, in this case, because the State must prove it [*sic*] beyond a reasonable doubt the proposition that the Defendant has previously been convicted of violation of the Illinois Controlled Substances Act and Unlawful Use of a Weapon by a Felon, you may consider evidence of the Defendant's prior conviction of the offenses of Violation of the Illinois Controlled Substances Act and Unlawful Use of a Weapon by a Felon only for the purpose of determining whether the State has proved the proposition."

The court repeated this statement, or a nearly identical one, to each panel. The jury selection required almost all of the 36 prospective jurors, so some jurors were exposed to this statement

multiple times.

¶ 6 The parties agreed as to most of the underlying facts. The primary disagreement concerned facts that went to defendant's possession of the two handguns. Because of the many points of agreement, we can summarize much of the evidence.

¶ 7 The police were seeking defendant on a felony arrest warrant. The police had information that placed him inside a house on Kilburn Avenue in Rockford and planned to arrest him in a traffic-type stop as he left that house. However, extra vehicles were on hand as backup in case he fled.

¶ 8 The police watched as defendant and Shawna Riley (called "Shaunna Riley" in the transcripts) exited the house. (Riley described her relationship with defendant as "friends with benefits.") Riley got into the driver's seat of her car, defendant got into the passenger's seat, and Riley drove them away. The police attempted to stop the car, but Riley did not comply and led the police on a chase. Eventually, she drove the car into an alley, slowed it, and jumped out.

¶ 9 Defendant moved to the driver's seat and drove away. (Riley rolled away from the car unharmed; the police arrested her soon after.) Defendant, with the police in pursuit, drove at high speed and ignored stoplights. Eventually, he lost control of the car, which then knocked over a fire hydrant and collided with a tree. He fled on foot, but was stopped by an officer with an AR-15. When the police searched defendant, they discovered that he was wearing a bulletproof vest under his clothing.

¶ 10 The police searched Riley's car, finding two firearms. An officer involved in examining the vehicle described the firearms and their location:

> "There were two handguns in plain view inside the vehicle. One of the handguns was a [Ruger] .44 Magnum [revolver]. That particular firearm was shoved in-between the

> center console of the car and of [sic] the passenger's side front seat, barrel down. There was a second firearm, an all black Beretta 9 millimeter [semiautomatic], that was lying on the driver's side seat."

The evidence photographs show the black Beretta semiautomatic lying on the driver's seat amid glass from the broken windshield. They further show the Ruger revolver pushed into the gap between the passenger seat and the console next to the passenger's seat, with the butt clearly visible next to the passenger's seat-belt receptacle where it protrudes from the gap. This gun was a light steel color and had a worn wooden handle.

¶ 11 The State had both guns examined for fingerprints and had swabs of one gun subjected to DNA testing. No evidence was found to tie the guns to defendant or anyone else. The fingerprint examiner explained that, for several reasons, firearms were not surfaces on which fingerprints were typically preserved. The witness who did the DNA testing explained that any DNA found on a gun would likely be what was left behind by a touch and that such DNA only occasionally yields useful profiles.

¶ 12 After officers arrested defendant and searched him, they placed him, with his hands handcuffed behind his back, in the back of a squad car. While he was alone in the car, he began kicking the back windows, ultimately damaging them. Defendant admitted that he had done this, but said he did it because the handcuffs were much too tight, so that he was trying to attract attention.

¶ 13 Defendant disputed some of the State's evidence, and, on the disputed matters, we provide more detail. One of the officers present at defendant's arrest testified that defendant admitted to having guns in the car:

> "Q. Did [defendant] specifically say anything related to guns or firearms?

A. Yes.

Q. What do you recall him saying?

A. He said he was—we were lucky that he couldn't get to his guns or else it would have been a good time.

Q. Did he state anything indicating where the guns were in the car?

A. And he said the guns—he couldn't get to his guns 'cause they were under the seat of the car.

Q. Did he say anything related to how many guns were in the car?

A. He—two guns. He said plural."

The officer characterized defendant as "babbling": "he would say a lot of different statements just out of the blue, just odd statements." During defendant's interrogation at the police station, he was photographed making a gun gesture with his hand. The parties disputed the context and meaning of that gesture. The exhibit photographs show defendant grimacing before the camera.

¶ 14 Riley testified that, on the evening of November 3, she had picked defendant up well before they went to the house on Kilburn Avenue in Rockford. They had driven around for several hours, including stopping for a while to have sex and then driving to a house where her friend Athena lived. She and defendant saw Athena and Riley's brother there. She then drove defendant to the house on Kilburn, where they watched movies and cuddled. She knew that defendant was wearing a bulletproof vest while they were watching movies. She had not then noticed the presence of any guns.

¶ 15 Riley and defendant left the house and got into her car. She then noticed a black gun on the passenger-side floor. She and defendant did not discuss the gun. Riley further testified that neither of the two guns the police recovered was hers; she had nothing to do with their presence

in the car that night. She did not see anybody put guns in her car. When the police first tried to stop the car, she was frightened for defendant because she knew that defendant had a warrant for his arrest. Defendant, however, had been the one who urged her to flee. He told her what turns to make. Riley had bought the car quite recently but her brother, some of her brother's friends, and her sister's boyfriend had already driven it.

¶ 16 The State charged Riley with two felonies based on her flight from the police, but the State eventually agreed to reduce the charges to misdemeanors based on Riley's agreement to testify at defendant's trial. Riley was unable to post bond until her bond was reduced as a result of her agreement with the State; she was in custody from November to March.

¶ 17 At the close of its case-in-chief, the State introduced certificates of defendant's convictions of a violation of the Illinois Controlled Substances Act (720 ILCS 570/401(c)(2) (West 1998)) and of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2004)). The jury did not receive a limiting instruction when those certificates were entered into evidence.

¶ 18 Defendant chose to testify. He conceded that the chase occurred much as the State's witnesses had described it. His testimony was inconsistent with Riley's concerning the guns. He stated that he had noticed the revolver when he first got into Riley's car on the night at issue. He asked Riley why there was a gun in the car, and she responded that her sister's boyfriend and the boyfriend's friend had left the guns there. Riley mentioned "guns" plural, but defendant did not initially register that that was what she had said. He saw the semiautomatic for the first time when Riley was preparing to exit the car during the chase. She pushed the seat back so that defendant would be able to drive, then opened the window, which she had to do to open the door because the inside handle was broken. He was not sure what happened exactly, but at some

point he realized that Riley had a gun in her hand. He did not see what happened to the gun as she jumped out of the car. He denied that he had brought the firearms into the car or had handled them.

¶ 19 Defendant denied telling the police that they were lucky that he had not been able to reach the guns. Asked what he actually said, he testified:

> "Well, *** the conversation was he asked me why didn't I shoot, and I told him I didn't have a gun, and he said well we *** thought you was *** or I wish you would have so then it would have been a great time. Then my hands is cuffed so I nudged my head at the rifle he got, and I said 'Well, give me one of those, Barney Fife, and we will have a good time.' "

¶ 20 Defendant rested after his testimony. After brief testimony from a single rebuttal witness, the court held the instruction conference. The court ruled that the certificates of conviction should go to the jury room. The parties agreed that the jury should receive a standard instruction as to the use of the evidence of his convictions. As the court read it during the conference, it said:

> " '[O]rdinarily evidence of Defendant's prior conviction of the offense may not be considered by you as evidence of guilt of the offense with which he is charged. *** [H]owever, [in] this case, because the State must prove beyond a reasonable doubt the proposition that the Defendant has previously been convicted of a Class I felony, violation of the Illinois Controlled Substances Act and Unlawful Use of Weapon by a Felon you may consider evidence of Defendant's prior conviction of the offenses of the violation of the Illinois Controlled Substances Act and Unlawful Use of Weapon by Felon only for the purpose of determining whether the State proved that proposition.' "

The parties discussed minor modifications, but both agreed to the instruction. During closing argument, defendant reminded the jury of the limitation on the use of the convictions.

¶ 21 The court read the instruction essentially as we have given it. However, the packet of instructions in the record does not contain the instruction.

¶ 22 The jury found defendant guilty of all charges. The court received no questions from the jury during its deliberations.

¶ 23 Defendant filed a posttrial motion; as amended, it raised multiple issues, the majority of them relating to the denial of certain of his motions *in limine*. The sole jury-instruction issue was one based on the court's accepting a State instruction; defendant did not raise the absence of the limiting instruction on prior convictions. The court denied defendant's motion.

¶ 24 At the sentencing hearing, the parties agreed that the two armed-habitual-criminal counts would merge. The State asked that convictions enter on the armed-habitual-criminal counts based on defendant's possession of the Beretta semiautomatic and the unlawful-possession-of-a weapon-by-a-felon count based on defendant's possession of the Ruger revolver and the body armor. The discussion suggests that the State deemed the multiple convictions to be on the firmest ground if the armed-habitual-criminal conviction and the unlawful-possession-of-a weapon-by-a-felon conviction were based on defendant's possession of different weapons. Ultimately, the court entered convictions on four counts: counts I (armed habitual criminal, possession of semiautomatic), V (unlawful possession of a weapon by a felon, revolver and body armor), XI (aggravated fleeing), and XII (criminal damage to state-supported property). It sentenced defendant to 30 years on count I and a concurrent 20 years on count V, with both sentences consecutive to a 6-year sentence on count XI, and a 2-year sentence on count XII concurrent to the sentence on count XI. Defendant moved for reconsideration of his sentence.

He filed a timely notice of appeal when the court denied that motion.

¶ 25 II. ANALYSIS

¶ 26 On appeal, defendant argues that the failure to tender the written limiting instruction for the use of the evidence of his convictions was prejudicial error. The State argues that, because defendant did not raise the error in the trial court, our review is only for plain error, and the mistake does not rise to that level.

¶ 27 The initial question here is whether defendant forfeited his claim of error through failure to raise it to the trial court. We conclude that to deem defendant to have forfeited the issue would be to take too technical an approach to forfeiture principles. As a rule, "*[b]oth* a trial objection *and* a written post-trial motion raising the issue are required for alleged errors that could have been raised during trial." (Emphases in original.) *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). "[A] defendant generally forfeits review of any purported jury instruction error if the defendant does not object to the instruction, or tender an alternative instruction at trial, and does not raise the instruction issue in a posttrial motion." *People v. Bannister*, 232 Ill. 2d 52, 76-77 (2008). Here, the requirement for submission of alternative instructions is inapplicable, as the court accepted the limiting instruction and read it to the jury with the other instructions.

¶ 28 Although a rigid reading of standard statements of forfeiture principles might permit the conclusion that defendant's failure to raise the matter in a posttrial motion resulted in the issue's forfeiture, we conclude that a proper understanding of the reason for the forfeiture rule weighs heavily against such a holding. "The well-recognized purpose of the waiver doctrine is to give the trial court an opportunity to consider the issue [citation] and to give the reviewing court the benefit of the trial court's judgment on it." *People v. Washington*, 154 Ill. App. 3d 648, 652 (1987). Here, we *know* the trial court's judgment on the limiting instruction: it ruled in favor of

giving it, read it to the jury, and thus it must have been included in the written instructions. It is unclear when, after being given to the jury, the limiting instruction got separated from the rest of the packet. Since it is not comparable to the standard forfeiture scenario of the court's not having made a judgment at all, we decline to apply the forfeiture doctrine.

¶ 29 In this case, the common law record and the report of proceedings are in conflict. It is true that the instruction at issue does not appear in the common law record of what was given to the jury. However, it is also the case that the trial court read to the jury the entire packet of instructions and immediately stated it was handing them to the jury bailiff to tender to the jury. Our supreme court has explained that "[w]here the common law record is contradicted by matters in the report of proceedings, a reviewing court must look at the record as a whole to resolve the inconsistencies." *People v. Cortes*, 181 ILCS 249, 278-79 (1998). Taking this record as a whole, the trial court's express statement that it was tendering the instructions to the jury and the fact that the packet clearly contained the instruction at issue (since the trial court just read it) are clearly more significant that the instruction's subsequent unexplained absence from the common law record. In other words, taking the record as a whole indicates that the jury was provided with a written copy of the instruction.

¶ 30 Moreover, assuming, *arguendo*, that the jury did not receive the instruction in writing, any error was harmless. Quite simply, the jury heard the limiting instruction: although it was missing from the written instructions, it was present in the oral instructions and echoed elsewhere. During *voir* dire, the court questioned each panel of jurors about their willingness to abide by the instruction. During closing argument, defense counsel reminded the jury of the instruction. Most importantly, the trial court read the instruction to the jury after the closing arguments. In *People v. King*, 248 Ill. App. 3d 253, 275-79 (1993), the reviewing court declined

to find reversible error where the trial court failed to instruct the jury regarding the presumption of innocence where there were collateral sources from which the jury obtained knowledge of the presumption. Like this case, the sources in *King* included *voir dire* and the arguments of counsel. *Id*. at 277-78. Admittedly, the *King* case also involved collateral written sources concerning the presumption; however, as we read that case, the salient point is that collateral sources existed and not whether they were written or oral. In this case, the fact that the jury was made aware of the proper use of the evidence at issue through other sources—including a direct oral charge—rendered any failure to provide a written instruction harmless.

¶ 31 In short, defendant's claim that the jury did not receive a written copy of the instruction at issue is not substantiated by the record. Furthermore, assuming that it did not, defendant suffered no prejudice from this alleged omission.

¶ 32 III. CONCLUSION

¶ 33 For the reasons stated, we affirm defendant's convictions. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 34 Affirmed.