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2016 IL App (3d) 140936-U

Order filed December 20, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 13th Judicial Circuit,
	)	La Salle County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-14-0936
v.	)	Circuit No. 14-CM-750
	)	
DEWAYNE E. HOLLOWAY,	)	Honorable
	)	Cynthia M. Raccuglia,
Defendant-Appellant.	)	Judge, Presiding.

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

ORDER

¶ 1 *Held*: (1) Trial court did not improperly shift the burden of proof to defendant. (2) Trial court did not erroneously rely upon facts not in evidence in reaching its verdict.

¶ 2 Defendant, Dewayne E. Holloway, appeals from his conviction for domestic battery, a Class A misdemeanor (720 ILCS 5/12-3.2(a)(1) (West 2014)). Defendant contends that the trial court's comments following his bench trial indicate that it improperly shifted the burden of proof

to him. Defendant also contends that the trial court erroneously relied upon facts not in evidence in reaching its verdict. We affirm.

¶ 3 FACTS

¶ 4 Defendant's bench trial commenced on September 5, 2014. The State's first witness was Genie Robinson, the alleged victim in the case. Robinson testified that defendant was her former boyfriend. Robinson and defendant were involved in an altercation on July 26, 2014, which gave rise to the present charge.

¶ 5 Robinson testified that on that evening, before defendant left for work, she and defendant argued with one another. Defendant had accused Robinson of cheating on him. Defendant eventually left for work, and Robinson "went out with some *** friends."

¶ 6 Robinson returned to the home later that night before defendant. Upon the advice of another individual, Robinson called the police "to let them know what was going on." While Robinson was on the telephone with the police, defendant arrived at the home. Robinson testified that defendant "was banging on the door screaming for me to let him in and was calling me a bitch." Defendant eventually entered the home through the unlocked back door. Upon entering the home, defendant took the telephone from Robinson's hand and hung it up.

¶ 7 Robinson went to the bedroom in an attempt to keep defendant away from her children. She described the events that transpired next:

> "My kids followed in behind me and he went at them and was screaming and hollering, threatening them that he was going to smack them. Threatened he was going to kill me and my kids that night. So I jumped in front of him. He punched me in the left side of my ribs and knocked me backwards into the wall where I then fell to the floor."

Robinson testified that while she was on the floor, she saw defendant reach down to pick up a crowbar. Robinson told her children to leave the room, then jumped on defendant's back, hitting him. Robinson testified that she was able to scratch his neck. She then left the bedroom.

¶ 8 Robinson testified that after she left the bedroom, defendant "picked up the crowbar and was like come on, bitch, I'm going to kill you." Robinson then locked herself in the bathroom. While she was in the bathroom, a 911 dispatcher called. Robinson testified: "So while I was in the bathroom on the phone, he proceeded to bust down the bathroom door with the crowbar and said bitch, you are going to die tonight. If I can't have you, no one else can. I'm going to beat you to death."

¶ 9 Police officers eventually arrived at the scene. Robinson testified that the police did not make any arrests, but took her and her children to another residence "[t]o let things cool down." The person who lived there did not answer the door. Because the police who dropped them off had already left, Robinson and her children walked back to their house at approximately 4:30 a.m. Feeling that she could not go back inside with her children, Robinson called the police again and waited outside the house for them to arrive. Robinson testified that as a result of defendant's attack she had scratches on her arm, blood blisters, and a bruise. She admitted that she had been drinking that night.

¶ 10 On cross-examination, Robinson testified that she was "[b]arely" intoxicated on the night in question, but admitted that she could not have safely driven. She testified that defendant had entered the back door by using the crowbar, then discarded it. Robinson also testified for the first time that her mother, Rita Robinson, was present at the time of the altercation. Rita had been at the home babysitting, and left after the police arrived.

¶ 11 Streator Police Officer Eric Gwaltney testified that he was acting shift commander on the night of the incident in question. Gwaltney was dispatched to Robinson's home. When he arrived, he saw that Robinson was crying. Gwaltney observed a small scratch on Robinson's left forearm, as well as "the start of maybe a bruise or red mark on her bicep." He observed a scratch on defendant's neck. Gwaltney testified that the injuries he observed were consistent with the version of events to which Robinson had testified. Gwaltney's attempt to take photographs of the injuries failed due to a camera malfunction.

¶ 12 Gwaltney testified that the night in question was a particularly busy one for the Streator police department. Accordingly, Gwaltney made sure there were no serious injuries, took Robinson to a different residence, and did not make any arrests. Robinson had informed Gwaltney that she could stay somewhere else that night, while defendant did not have anywhere else he could go. Robinson admitted to Gwaltney that she had been drinking that night, but Gwaltney did not find her incoherent or unable to communicate. Gwaltney arrested defendant after returning to the house later that night.

¶ 13 The State rested following Gwaltney's testimony, and the defense called Robinson in its case-in-chief. Robinson testified that Rita had seen most of the altercation, but did not see defendant strike her because Rita was in a different room at that time. She testified that Rita was not a witness in court because her health problems made coming to court inconvenient.

¶ 14 Defendant testified in his own defense. He explained that on the night in question he was living with Robinson, her two children, and Rita. That evening, before he left for work, he and Robinson argued. Defendant accused Robinson of cheating on him. Robinson denied the accusation, and defendant told her that he was going to move back to Iowa. Defendant then left for work.

¶ 15 Defendant testified that he returned from work at approximately 9:30 p.m. Robinson was not home. Defendant testified that he then received a telephone call from his cousin, informing him that his cousin's husband had seen Robinson "with guys at the bar." Defendant asked his cousin to take him to that bar so he could see for himself. When defendant arrived at the bar, no one was there. Defendant asked his cousin to call Robinson, but Robinson did not answer. Defendant eventually returned to the house.

¶ 16 When defendant arrived at the house, Robinson was home. Defendant testified that Robinson let him in through the back door, then immediately began arguing with him. Defendant testified: "I pushed the door open a little more and walked past her to prevent the argument and walked towards the [bed]room. She followed me into the [bed]room."

¶ 17 Once in the bedroom, Robinson continued to scream in defendant's face. Defendant told Robinson he just wanted to go to bed. Defendant attempted to call his cousin for a ride to her house, at which point Robinson slapped him. Defendant characterized the attack: "She smacked me across the face, and I balled up in the fetal position, and she hit me probably I would say about seven or eight times." Defendant testified that Rita then came into the room and grabbed Robinson. Robinson then took the telephone and went into the bathroom. The police eventually arrived at the house. An officer asked defendant if he wanted to press any charges, but defendant declined.

¶ 18 Defendant testified that he did not strike Robinson that night and never threatened her with the crowbar. He testified that the crowbar was on the floor in front of Rita when he came in through the back door. Defendant was curious as to why the crowbar was there. After Robinson started arguing with him, he picked the crowbar up for his own safety.

¶ 19 In closing arguments, the State posited that Robinson's version of events was more credible than defendant's. Argued the State:

> "As we see sometimes, the person who is willing to give a little bit seems to be a little bit more credible. [Robinson] is willing to give that she fought back. She put injuries on the defendant around his neck because she had two children in the house. And at that point after being told that she was going to be killed multiple times, after the defendant picking up a crowbar, she is fighting not only for her life but for her children's life [*sic*], and she is willing to give a little bit and say that yeah, I caused some injuries as well, and I did fight back.
>
> She also admitted that she was drinking a little bit."

¶ 20 Following closing arguments, the trial court delivered its ruling:

> "You know, sometimes my decisions are just common sense. Common sense tells me exactly what [the State] said, and I have no doubt. The victim doesn't make herself innocent. I can see her doing exactly what she said she did. And the only thing that makes sense is her version of events. And I have to go along with [the State]. I have a hard time when I look at the demeanor of the defendant to believe, number one, that a crowbar after all this time just appeared out of the air. He had never seen it before.
>
> His testimony is unbelievable. Absolutely unbelievable. He wants me to believe that after being pissed—and I use that word because it describes exactly what happened—about the information that you got that you came home and just wanted to go to bed? I'm sorry. If you would have given a little bit, I may have—yes—but no, sorry—may have found out.

But right now, it's unbelievable. The defendant's testimony is unbelievable since he is not willing to give. The more credible testimony for the reasons that I have said is the victim's.

So I find the defendant guilty."

¶ 21 At a subsequent sentencing hearing, the trial court sentenced defendant to a term of 240 days in the county jail.

¶ 22 ANALYSIS

¶ 23 On appeal, defendant argues that the trial court improperly shifted the burden of proof onto him. He also maintains that the trial court considered facts not in evidence in reaching its credibility determination. Defendant concedes that he failed to preserve both of these issues, but requests that this court review them under the rubric of plain error. Because the first step in plain-error analysis is to determine whether any error was committed (*People v. Wade*, 131 Ill. 2d 370, 376 (1989)), we address defendant's arguments in turn.

¶ 24 I. Burden of Proof

¶ 25 Defendant contends that the trial court's commentary upon announcing its verdict evinced a shifting of the burden of proof onto defendant. Specifically, defendant suggests that "the judge intimated that she would have acquitted defendant if he 'would have given a little bit,' " and that by doing so the court "requir[ed] defendant to testify, to present evidence, and to testify to events that may not have even happened."

¶ 26 It is axiomatic that the State carries the burden of proving each element of a charged offense beyond a reasonable doubt. *E.g.*, *People v. Brown*, 2013 IL 114196, ¶ 52. That burden rests on the State at all points throughout a trial, never shifting onto a defendant. *People v. Howery*, 178 Ill. 2d 1, 32 (1997). "The defendant is presumed innocent throughout the course of

the trial and does not have to prove his innocence, testify, or present any evidence." *People v. Cameron*, 2012 IL App (3d) 110020, ¶ 27. A conviction will be vacated only where the record "contains strong affirmative evidence that the trial court incorrectly allocated the burden of proof to the defendant[.]" *Id.* ¶ 28.

¶ 27 The record in the present case contains no indication that the trial court shifted the burden of proof to defendant. In delivering its verdict, the trial court explained why it found Robinson's version of events credible. Namely, the court found that Robinson's nuanced recollection of the night, in which she admitted that she had not behaved perfectly, was reasonable and likely. The court then provided a number of reasons for finding defendant's version of events incredible, citing his demeanor and his inability to explain the appearance of the crowbar. The court also noted that, in contrast to Robinson's testimony, defendant did not admit to acting in any improper or unpleasant manner. As a specific example, the court found it unlikely that after being told that his girlfriend was at a bar with men, and after leaving his house to search for her, defendant would return to the house and simply tell Robinson he wished to go to bed.

¶ 28 Defendant argues that the trial court's explanation of why it found his story incredible amounted to the court unconstitutionally requiring him to testify in order to obtain an acquittal. We reject this argument. The determination of the credibility of witnesses is a function reserved for the trier of fact—in this case, the trial court. *People v. Locascio*, 106 Ill. 2d 529, 537 (1985). In exercising this function, the trial court affirmatively found that Robinson's testimony was credible. Though defendant attempted to refute Robinson's testimony through his own, the trial court affirmatively found that testimony to be incredible. While defendant is entitled to the presumption of innocence, he is not entitled to a presumption that his testimony is credible.

¶ 29 Defendant's argument also relies upon a mischaracterization of the record. Defendant insists that "the judge intimated that she would have acquitted defendant if he 'would have given a little bit.' " Defendant makes this assertion based on the following passage from the trial court's comments: "If you would have given a little bit, I may have—yes—but no, sorry—may have found out. But right now, it's unbelievable. The defendant's testimony is unbelievable since he is not willing to give."

¶ 30 Clearly, the trial court made no such intimation. Though the court suggested defendant's testimony would have been more credible had he "given a little"—that is, admitted to some wrongdoing—the court had already listed other reasons why it had found his story incredible. It did not intimate that outright acquittal hung on that one factor.

¶ 31 II. Consideration of Facts Not in Evidence

¶ 32 Defendant next claims that the trial court considered facts not in evidence. Specifically, defendant takes issue with the trial court's apparent acceptance of the State's argument that witnesses who admit to some wrongdoing are more believable than those who claim to have acted perfectly. Defendant argues that no testimony or other evidence was presented that would support such an argument. Defendant explains:

> "There were no empirical studies presented about witness credibility. There was no expert testimony in this case. Simply put, there was absolutely no evidence presented from which Judge Raccuglia could appropriately find that a witness who is 'willing to give a little bit' is more credible than a witness who is not."

¶ 33 We reject defendant's argument outright. Defendant's contention—that when a trier of fact must make a credibility determination, empirical studies and expert witnesses must be presented to guide that determination and support any rationale employed—is untenable. Not

only would defendant's position be practically unworkable, it would fly in the face on the well-settled tenet that expert testimony may not be used to bolster or undermine witness credibility. See, *e.g.*, *People v. Howard*, 305 Ill. App. 3d 300, 307 (1999) ("A trial court should allow expert testimony only if *** the expert's testimony would help the jury understand an aspect of the evidence that it otherwise might not understand, without invading the province of the jury to determine the credibility and assess the facts of the case ***."). Credibility, like any number of other determinations a trier of fact must make, may be determined through everyday observations and common experiences. *E.g.*, *People v. Dixon*, 87 Ill. App. 3d 814, 818 (1980) ("[T]he trustworthiness of eyewitness observations is not generally beyond the common knowledge and experience of the average juror.").[1]

¶ 34 The cases defendant cites in ostensible support for his argument actually serve to illustrate its shortcomings. In *People v. Steidl*, 177 Ill. 2d 239, 244-45 (1997), the trial judge dismissed a postconviction claim of ineffective assistance of counsel without an evidentiary hearing. In doing so, the judge remarked that the attorney in question had appeared before him on numerous occasions, and had always performed skillfully and competently. *Id*. at 265-66. In *People v. Dameron*, 196 Ill. 2d 156, 178-79 (2001), the trial judge consulted a social science book, as well as the transcript of an earlier, unrelated case before imposing the death penalty. In each case, the supreme court reversed on the grounds that the trial courts had considered matters outside the record. *Steidl*, 177 Ill. 2d at 266; *Dameron*, 196 Ill. 2d at 179. In explaining

[1]Defendant frames the present argument solely in terms of the trial court considering facts not in evidence, taking exception with the methodology employed by the court in making its credibility determinations. To the extent that this argument could be construed as defendant arguing that the *results* of those credibility determinations were incorrect, we would reject that argument as well. See *People v. Williams*, 2013 IL App (1st) 111116, ¶ 76 ("[A] trial court's credibility determinations are entitled to great deference, and they will rarely be disturbed on appeal."); *Locascio*, 106 Ill. 2d at 537 ("Determining the credibility of witnesses and the weight to be given to their testimony is a function reserved primarily for the trier of fact, who in this case was the trial judge, and a court of review will not normally substitute its own judgment in that regard.").

its ruling in *Steidl*, the court wrote: "While all judges come to the courtroom influenced, either consciously or unconsciously, by the experiences, associations, and prejudices developed over a lifetime, they are expected to make an effort to put those predilections aside and make determinations based only upon the evidence presented." *Steidl*, 177 Ill. 2d at 266.

¶ 35 The judges in both *Steidl* and *Dameron* were ruling on substantive issues—whether to advance a postconviction petition and whether to impose the death penalty, respectively. Neither case involved a credibility determination. Further, those judges relied on *specific* experiences or sources in making their rulings, rather than general notions of common sense or experience. To illustrate: Had the trial court here found defendant incredible because the judge had previously met defendant, and known him to be a liar, *that* would have been an error. Instead, the trial court relied on common sense—stating so explicitly—and its general experience in separating truth from fiction. To stretch the *Steidl* court's comments to triers of fact making credibility determinations would completely undermine their ability to make such determinations.

¶ 36 Indeed, it is unclear what else a trier of fact—be it judge or jury—could use to make credibility determinations if not for logic, common sense, and human experience. In the present case, the trial court employed these tools in finding it unreasonable that defendant, having been told his girlfriend was "with guys at the bar" then going out to look for her, would simply wish to go to bed when he returned. The trial court needed no empirical evidence or expert testimony in reaching this conclusion, nor would any such evidence have even been appropriate. See *Howard*, 305 Ill. App. 3d at 307. Because we find that the trial court committed no errors, we need not proceed further in our plain-error analysis.

¶ 37 CONCLUSION

¶ 38 The judgment of the circuit court of La Salle County is affirmed.

¶ 39 Affirmed.