2017 IL App (1st) 142887-U

FIRST DIVISION
January 17, 2017

No. 1-14-2887

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 16702
	)	
JOSEPH ALI,	)	Honorable
	)	Frank G. Zelezinski,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Connors and Justice Simon concurred in the judgment.

O R D E R

¶ 1 *Held*: We affirm defendant's conviction where the trial court did not rely on improper evidence to find him guilty.

¶ 2 Following a bench trial, defendant Joseph Ali was convicted of armed robbery while armed with a firearm (720 ILCS 5/18-2(a)(2) (West 2012)) and sentenced to 21 years' imprisonment. On appeal, defendant argues his due process rights were violated when the trial

court used its own personal knowledge and beliefs to define a slang term, and this definition compelled a finding of guilt. We affirm.

¶ 3 Defendant was charged by indictment with one count of armed robbery and one count of aggravated unlawful restraint stemming from acts taking place on April 30, 2013, in Matteson, Illinois. The State proceeded at trial on the armed robbery count and the following evidence was presented.

¶ 4 Ron Oh testified that defendant contacted him by text message on April 28, 2013, seeking to purchase iPhones. Oh sold electronics and had sold defendant, who he identified in court, a Play Station 3 about a month prior. That transaction had been arranged via text messages and cell phone conversations.

¶ 5 Oh and defendant agreed to meet on April 30, 2013, at a Toys R Us store at 5001 West 211th Street in Matteson. Oh parked his vehicle in the parking lot and notified defendant by text message that he had arrived. About ten minutes later, defendant and another individual, subsequently identified as Maliek Heath, approached Oh. Oh was outside his vehicle but defendant asked to go inside the vehicle. Defendant got into the front passenger seat and Heath sat in the back seat, behind Oh. Defendant looked at the iPhones and began to complain that the phones were used, not new. Heath then said "hey" and, when Oh turned around, pointed a revolver in Oh's face.

¶ 6 Defendant took the phones and exited the vehicle. Heath grabbed an iPad that was in the back seat. Both men began running in the direction from which they had approached Oh's vehicle. Oh called 911 and began to follow them. Defendant and Heath entered a waiting blue Ford Explorer, which began driving southbound before making a U-turn going northbound on Cicero. Eventually the Explorer stopped and defendant started running. Oh exited his vehicle and

chased defendant, but lost sight of him. Oh then met a police officer, who took him to another location where he identified the blue Explorer. He saw the iPad that had been taken from him inside the car.

¶ 7 While being driven in the police vehicle, Oh saw defendant walking and alerted the police. Defendant was placed into custody. The police later returned to Oh the iPad and the iPhones taken by defendant and Heath. Oh identified several photographs including those of the scene, the iPhones, the Explorer, and the iPad in the Explorer. He further identified the gun that Heath pointed at him.

¶ 8 Oh testified that, a month before trial, defendant called him saying what he had done was wrong and apologizing for it. Oh stated this phone call made him feel "threatened" and "scared."

¶ 9 Matteson police officer Vanoskey testified that, on April 30, 2013, at 5:26 p.m., he received a call that an armed robbery had just occurred at Toys R Us. He learned that the offenders were fleeing in a blue Ford Explorer and that the victim was chasing them in his vehicle. Vanoskey then observed the two vehicles and began to follow them. Eventually the vehicles turned off Cicero Avenue and, when Vanoskey caught up with them, he witnessed Oh running towards the backyard of a home. Vanoskey continued driving, saw the Explorer, and pulled it over. The vehicle's license plate matched the information he was previously given. Vanoskey ordered the driver, who was the only individual inside the vehicle, to step out with his hands up. After the driver was detained, Oh was brought to the scene. Oh identified the Explorer that the offenders had fled in but could not identify the driver. He identified his iPad on the back seat of the Explorer.

¶ 10 Oh gave a description of the individuals he was chasing, and Vanoskey relayed it to dispatch. Dispatch then called him to advise of a 9-1-1 call from a nearby business. When

driving to the business, Oh spotted defendant and told Vanoskey "that's him." Following Oh's positive identification, Vanoskey arrested defendant, who matched the description previously provided by Oh. Defendant, who Vanoskey identified in court, had in his possession two cell phones that Oh positively identified as his property.

¶ 11 Matteson police officer Rockett testified that, on April 30, 2013, at 5:34 p.m., he received a call regarding a recent armed robbery at Toys R Us. As he was proceeding to the intersection of Morning Glory and Cicero, he scanned Morning Glory for a disposed firearm. On the south side sidewalk of Morning Glory, about 100 feet east of Cicero Avenue, Rockett discovered a black revolver with wooden grips. The loaded revolver, which he identified in court, was secured and placed in an evidence box.

¶ 12 Detective Shawn White testified that he was assigned to investigate an armed robbery that occurred on April 30, 2013, in Matteson. He met with defendant, who he identified in court, in an interview room in the Matteson Police Department. White was present with Sergeant Jeremy Simms and advised defendant of his *Miranda* rights. Defendant agreed to speak with White and told him that he had just gotten laid off from his job. Because it was the end of the month and rent was due, defendant contacted someone from whom he had previously purchased a Play Station 3 to see if there was anything he could buy. He did not know the seller's name. Defendant stated that he was going to "short" the seller on whatever the price was.

¶ 13 After contacting the seller, defendant asked a friend, "Robert," to drive him and another individual, Malik Heath, to the Toys R Us in Matteson. Defendant told Heath and Robert that he was going to purchase two iPhones for $750 and asked Heath how much money he had on him, which was about $450. The plan was to give the seller $425 and take the phones and leave. Once

they arrived at the Toys R Us, Robert parked at the opposite end of the parking lot and defendant and Heath walked to the victim's vehicle.

¶ 14 Defendant told White that he approached the vehicle and began talking to the occupant through the window while Heath got into the back seat. He then saw Heath pull out a handgun and point it at the seller. Defendant grabbed the two iPhones that were on the front passenger seat and fled back to Robert's vehicle, with Heath following him. Once back in the vehicle, he told Robert to drive away and noticed that the seller was following them in his vehicle. Eventually, defendant told Robert to stop, got out of the car, and fled to a nearby restaurant. As he was walking away, the police approached and searched him, finding the two phones in his possession. Defendant identified photographs of Heath as the individual who was involved. He identified a photograph of a gun as the gun Heath pointed at the victim.

¶ 15 White testified that defendant later gave a similar statement to Assistant State's Attorney Richard Stack, for which White was present, but added more details. Defendant stated that the seller was named Ron Oh and that he was going to pay Oh $500 and take the phones. Further, defendant stated that he told Heath and Robert that they were going to do a "lick." He indicated that he was going to give Oh some money, "short him" on what they were going to give him, and then take the phones and leave.

¶ 16 On cross-examination, White did not recall whether he asked defendant to explain what "short" meant. He further testified that defendant explained a "lick" meant "it was just to short him for the money, and not pay full price." Defendant told White that he was going to sell the phones to someone else for a better price to make money. White never asked defendant if he planned an armed robbery or if he knew one was going to happen beforehand.

¶ 17 The trial court found defendant guilty of one count of armed robbery. It extensively set forth the evidence presented at trial and found that defendant had brought in Heath and Robert for "criminal wrongdoing." It further noted White's testimony did not indicate what a "short" is but the trial court "could only think that by shorting it would only mean that he wished to negotiate with him, perhaps legally, to get a lesser price, but that wasn't explained." The court noted that the "detective" did not "explain what a lick is" but, from the court's experience on the bench, it knew "lick always has meant to be a robbery." The court ultimately concluded the incident "was not a random type of situation, because [defendant] stayed with the person who [defendant] brought there, and stayed with that person who pulled a gun, and helped him take the items that [defendant] wanted to get."

¶ 18 The trial court denied defendant's written motions to reconsider and for a new trial. It sentenced defendant to 21 years' imprisonment, noting that it was the minimum sentence because a firearm was used. Defendant did not file a motion to reconsider sentence but filed a timely notice of appeal.

¶ 19 On appeal, defendant argues his due process rights were violated when the trial court used its own personal knowledge to define the slang term "lick," and its definition of "lick" as "robbery" then compelled a finding of guilt. The State responds that defendant forfeited his argument because he failed to raise the issue in the trial court. Defendant concedes that he failed to bring this error to the trial court's attention but argues that we should nevertheless review it as the claimed error is the result of the trial court's conduct. Alternatively, defendant urges us to review the error under either prong of the plain-error doctrine or as an ineffective assistance of counsel claim.

¶ 20 Defendant concedes he failed to raise the error in the trial court but argues the review of claims of error is not forfeited when the conduct of the trial court is at issue. See *People v. Davis,* 185 Ill. 2d 317, 343 (1998); *People v. Rowjee,* 308 Ill. App. 3d 179, 185 (1999). The State concedes " 'application of the waiver rule is less rigid where the basis for the objection is the trial judge's conduct' " (*Rowjee,* 308 Ill. App. 3d at 185 (quoting *People v. Nevitt,* 135 Ill. 2d 423, 455 (1990))) but argues that *Rowjee,* relied upon by defendant, is distinguishable.

¶ 21 The parties are correct that, when the trial judge's conduct is at issue, the waiver rule is less rigid. This rule, which our supreme court has termed the "*Sprinkle* doctrine," allows the forfeiture rule to be relaxed when the trial judge oversteps his or her authority in the presence of the jury or when counsel has been effectively prevented from objecting because it would have " 'fallen on deaf ears.' " *People v. Thompson,* 238 Ill. 2d 598, 612 (2010) (quoting *People v. McLaurin,* 235 Ill. 2d 478, 488 (2009)). However, the doctrine is to be applied in only the most compelling of situations, "when a judge makes inappropriate remarks to a jury or relies on social commentary instead of evidence in imposing a death sentence." *Thompson,* 238 Ill. 2d at 612. Indeed, our supreme court's limited application of the *Sprinkle* doctrine to noncapital cases highlights the importance of maintaining the forfeiture rule except in the most compelling of situations. *McLaurin,* 235 Ill. 2d at 488.

¶ 22 We see no compelling reason to apply the *Sprinkle* doctrine to the facts here. There was no jury present as this was a bench trial, and defendant does not argue his trial counsel was effectively prevented from objecting to the trial court's findings. The record does not indicate any basis to suggest trial counsel's objection would have "fallen on deaf ears," and defendant does not indicate any compelling reason here to relax the forfeiture rule.

¶ 23 While we do not find reason to apply the *Sprinkle* doctrine, a defendant's claim that his due process rights were violated at trial can be reviewed under the plain-error doctrine. Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967); see *McLaurin,* 235 Ill. 2d at 489. The plain-error doctrine is a narrow and limited exception to the rules of forfeiture. *People v. Bannister,* 232 Ill. 2d 52, 65 (2008). A defendant must show:

> "(1) a clear or obvious error occurred 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 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. Piatkowski,* 225 Ill. 2d 551, 565 (2007).

When a defendant fails to establish plain error, that procedural default must be honored. *Bannister,* 232 Ill. 2d at 65. The first step on plain-error review is to determine whether a clear or obvious error occurred. *In re M.W.,* 232 Ill. 2d 408, 431 (2009). For the reasons that follow, we find no error here.

¶ 24 In a bench trial, the trial court is limited to the trial record developed before it. *People v. Jackson,* 409 Ill. App. 3d 631, 647 (2011). " 'A determination made by the trial judge based upon a private investigation by the court or based upon private knowledge of the court, untested by cross-examination, or any of the rules of evidence constitutes a denial of due process of law.' " *Id.* (quoting *People v. Wallenberg,* 24 Ill. 2d 350, 354 (1962)). The trial court will be accorded every presumption it considered only admissible evidence in its deliberations. *People v. Jenk,*

2016 IL App (1st) 143177, ¶ 53. "This assumption will be overcome only if the record affirmatively demonstrates the contrary, as where it is established the court's finding rests on a private investigation of the evidence, or on other private knowledge about the facts in the case." *People v. Tye,* 141 Ill. 2d 1, 26 (1990)). However, "[a] trial judge does not operate in a bubble; she may take into account her own life and experiences in ruling on the evidence." *People v. Thomas,* 377 Ill. App. 3d 950, 963 (2007). We review *de novo* whether a defendant's due process rights were violated as this is a question of law. *People v. Williams,* 2013 IL App (1st) 111116, ¶ 75. We find the trial court did not violate defendant's due process rights when it found him guilty of armed robbery with a firearm.

¶ 25 The record does not support defendant's claim that the court's guilty finding was compelled by its definition of "lick." The court found defendant guilty of armed robbery under an accountability theory. In order to sustain the charge, the State was required to prove defendant knowingly took property from Oh by the use of force or threatening the imminent use of force while carrying or being otherwise armed with a firearm. See 720 ILCS 5/18-1(a), 18-2(a)(2) (West 2012). Here, Heath threatened Oh with the firearm. Defendant may be held accountable if, either before or during the commission of the offense, with the intent to promote or facilitate that commission, he solicited, aided or abetted Heath in the planning or commission of the offense. See *People v. Dennis,* 181 Ill. 2d 87, 96 (1998); see 720 ILCS 5/5-2(c) (West 2012). In order to prove intent, the State must establish beyond a reasonable doubt that either (1) defendant shared the criminal intent of Heath, or (2) there was a common criminal design. *People v. Perez,* 189 Ill. 2d 254, 266 (2000). The standard of review when challenging the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of

fact could have found the essential elements of the offense proven beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48.

¶ 26 Viewing the record as a whole, there was sufficient evidence to convict defendant of armed robbery. Oh's testimony established that defendant had contacted him seeking to purchase iPhones and brought Heath with him to complete the transaction. Defendant and Heath got into Oh's car at defendant's request and, when Heath pointed a gun in Oh's face, defendant ran off with the two iPhones while Heath stole an iPad. The two then fled in Robert's waiting Explorer, and defendant subsequently tried to escape on foot. The phones were found in his possession and the loaded gun was recovered along the route in which defendant and Heath fled.

¶ 27 Defendant's statements to Detective White show he initiated the transaction, brought Heath to the scene, and stole the phones when Heath pulled the gun. Defendant further stayed with Heath after the robbery and attempted to escape with him. See *People v. Flynn*, 2012 IL App (1st) 103687, ¶ 23 (citing *People v. Taylor*, 164 Ill. 2d 131, 140-41 (1995)) (noting that a defendant's "flight from the scene may be considered in determining whether [a] defendant is accountable"). Defendant in no way attempted to distance himself from the actions of Heath but instead shared a "common criminal design" with him by stealing the phones while Heath pointed the gun. See *Taylor*, 164 Ill. 2d at 141 ("[t]he common design can be inferred from the circumstances surrounding the perpetration of the unlawful conduct"). The evidence therefore amply supports a finding that defendant was guilty of armed robbery with a firearm under an accountability theory.

¶ 28 The court's explanation of its decision shows it based its guilty finding on the ample evidence of defendant's guilt, not on its definition of "lick." In rendering its decision, after an extensive recitation of the evidence presented at trial, the court stated:

> "*** why was it that defendant had to bring Malik Heath into the picture? Why did he not go and go himself and make some innocent negotiations with Mr. Oh about getting these items for a lesser price? But instead, a planning was made by him ahead of time to have Mr. Heath, who absolutely had nothing to do with the sale itself accompany him at the time. Also, brought in was Robert, the driver of the vehicle. And a curious thing by the detective's testimony was that The Defendant indicated that he told Robert, I'm quoting, that they were going to do a lick, quote unquote. The detective didn't explain what a lick is, but I can tell you this, I've handled dozens and dozens of cases here, by street vernacular, a lick always has meant to be a robbery. Now take it for what it's worth, but I just can't be blind to the evidence that I have in front of me, and that's the words that were used here. Though the evidence does not explain it, but perchance it sheds some light as to the fact that, instead of saying a short to Robert, it was a lick that what Robert was told is going to happen."

It continued:

> "Looking at what happened in the case here, by the victim's testimony, and by what occurred, the placement of people involved here, Mr. Heath was brought here for a purpose and that's to assist in some criminal wrongdoing here. Perhaps it might have ended with just shorting the victim in some which way, but he was the

> one who brought the gun, and when one brings the gun into a picture that's planned, it does turn into an armed robbery. Even if those weren't the immediate plans at the time, the fact that this happened to be a crime of opportunity, with Malik Heath pulling the gun, The Defendant still partook in taking that property from the victim. If The Defendant were so surprised by the actions of Mr. Heath pulling the gun on the victim at that point, why did he take the two cell phones with him and run along with him and run into the vehicle with him thereafter. It only adds light to the fact that this was not a random type of situation, because he stayed with the person who he brought there, and stayed with that person who pulled a gun, and helped him take the items that he wanted to get. Based upon the evidence that I have, I do believe The State has proven their case in chief."

¶ 29 The court's discussion affirmatively rejects defendant's theory that he was an innocent purchaser, unaware of his companion's intentions. Instead, it finds that Heath and Robert were brought in as part of "planning" of "criminal wrongdoing." It also notes that defendant took the phones and ran with Heath to Robert's car after Heath pointed the gun at Oh. The court found defendant guilty based on the totality of the circumstances, on defendant's planning of the transaction, involvement of Heath, taking of the phones, and fleeing with Heath.

¶ 30 The trial court did not, as defendant argues, find defendant guilty based on its own definition of "lick." The court's comment that "lick" is a robbery was not dispositive in its finding defendant guilty. Rather, read in context of the trial court's lengthy discussion of the

facts, theories, and reasons for defendant's guilt, its remarks regarding "lick" were minor and, in fact, the court qualified its comment, stating "for what it's worth." The court did not base its ruling on this information.

¶ 31 Crucially, the court's comment does not reflect improper personal knowledge. It was not based on the court's private investigation or private knowledge but rather flowed from the evidence presented at trial and the court's extensive experience on hearing criminal cases. As previously noted, "[a] trial judge does not operate in a bubble; she may take into account her own life and experience in ruling on the evidence." *Thomas,* 377 Ill. App. 3d 950, 963 (2007). To hold otherwise would reject the presumption that the court considered only admissible evidence in reaching its decision. Given the significant amount of evidence presented at trial and the context in which the trial court made its remark regarding "lick," defendant has not rebutted the presumption that the court considered only admissible evidence in finding defendant guilty.

¶ 32 In further support of defendant's position that the trial court improperly relied on its own personal knowledge in finding him guilty, he cites *People v. Wallenberg,* 24 Ill. 2d 350 (1962). In *Wallenberg,* the defendant was charged with robbery. *Wallenberg,* 24 Ill. 2d at 351. He presented an alibi that, at the time of the robbery, he was waiting for a mechanic to fix a flat tire. *Id.* at 352. He maintained in relevant part, that there were no gas stations on a particular road in Chicago. *Id.* at 353. The State presented no evidence rebutting that assertion. *Id.* at 354. However, in finding the defendant guilty, the trial court announced " 'I happen to know different [that there are gas stations on that road]. I don't believe his story.' " *Id.* On appeal, our supreme court reversed the defendant's conviction and ordered a new trial. It held that the defendant's credibility and alibi were "entirely negated by the trial court's resort to personal beliefs." *Id.* When the trial court considered matters not in evidence based on its private knowledge untested

by cross-examination, a denial of due process resulted. *Id.* The trial court's remarks affirmatively rebutted the presumption that it had considered only admissible evidence. *Id.*

¶ 33 Unlike in *Wallenberg*, the trial court here did not rely on its own private knowledge to negate defendant's defense. Rather, its comments show it gave serious consideration to that defense and then found defendant guilty based on the totality of the evidence presented at trial, not on its definition of "lick." Accordingly, defendant's due process rights were not violated.

¶ 34 In sum, we find that the trial court did not err in finding defendant guilty of armed robbery. Having found no error, there can be no plain error and defendant's argument is forfeited. See *People v. Williams*, 193 Ill. 2d 306, 349 (2000).

¶ 35 Defendant alternatively contends that any forfeiture was the result of ineffective assistance of counsel, where counsel's failure to raise the issue in the trial court was "objectively unreasonable" as "competent counsel would have objected to the court's reliance of improper evidence in determining [defendant's] guilt." A defendant has a constitutional right to the effective assistance of counsel. See *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). In order to establish the ineffective assistance of counsel, a defendant must show both that (1) counsel's representation was deficient and (2) that deficiency prejudiced the defendant. *People v. Petrenko*, 237 Ill. 2d 490, 496 (2010) (citing *Strickland*, 466 U.S. at 694). Having already determined that the trial court committed no error, we find defendant cannot establish the requisite prejudice, and thus cannot succeed on his ineffective assistance of counsel claim. See *People v. Caffey*, 205 Ill. 2d 52, 106 (2001).

¶ 36 For the reasons set forth above, we affirm the judgment of the circuit court of Cook County.

¶ 37 Affirmed.