2017 IL App (1st) 143408-U

THIRD DIVISION
January 18, 2017

No. 1-14-3408

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 18726
	)	
ALONZO McFADDEN,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Lavin and Cobbs concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant's conviction for armed violence affirmed where there was no affirmative evidence that the trial court relied on improper evidence in finding him guilty.

¶ 2 Following a simultaneous, but severed, bench trial with his codefendant, defendant Alonzo McFadden was convicted of armed violence (720 ILCS 5/33A-2(a) (West 2012)) and sentenced to 17 years' imprisonment. On appeal, defendant contends that he was denied his rights to confront the witnesses against him and to a fair trial when the trial court, in finding him guilty, relied on his nontestifying codefendant's statement to the police inculpating him. We affirm.

¶ 3 The State charged defendant and his codefendant, Aretha Simmons, by joint information.[1] It proceeded to trial against defendant on one count each of armed violence, possession of a controlled substance with intent to deliver and unlawful use of a weapon by a felon. It proceeded to trial against Simmons on one count each of armed violence, defacing identification marks on a firearm and possession of a controlled substance.

¶ 4 Prior to trial, defendant filed a motion to sever his trial from Simmons', arguing that Simmons had made a statement inculpating him and their defenses would be antagonistic to one another. After the State did not object to the severance, the trial court granted the motion. The court also noted that it would hear a motion to suppress statements filed by Simmons contemporaneously with her trial. It stated that "[h]earsay will be admitted in only for the purposes of that motion" and not "admitted in for the purposes of trial." The court reiterated to the parties that "only competent evidence will be admitted in as far as the trial and no hearsay evidence will be." It then observed that there was "a severance so *** two trials [would be] going on at the same time."

[1] Simmons is not a party to this appeal.

¶ 5 At defendant and Simmons' simultaneous, but severed, bench trials, the State presented the testimony of three Chicago police officers: John Wrigley, John O'Keefe and Justin Homer. The evidence showed that, at around 6 p.m. on August 29, 2013, Officer Wrigley was conducting surveillance of a residence on the 900 block of North Keystone Avenue when he observed defendant standing on the sidewalk in front of the residence. While defendant was there, Wrigley observed a man approach defendant and engage him in a brief conversation. Following the conversation, defendant walked to the residence's front porch, retrieved an unknown item from inside a silver purse that was sitting on a chair and returned to the man. Defendant gave the man the unknown item in exchange for an unknown amount of money. The man walked away. Defendant continued to stand on the sidewalk for a few minutes, then took keys out of his pocket and entered the residence. A short time later, defendant came back outside and stood on the sidewalk.

¶ 6 Wrigley observed defendant engage in two more identical transactions with other individuals. During these transactions, Simmons was on the porch. After the third transaction, Wrigley left his surveillance location and met other police officers at an undisclosed location. They drove to the residence and detained defendant, who was standing on the sidewalk. Wrigley and other officers walked up to the porch and detained Simmons, who was sitting on a chair and had just grabbed the purse. Officer O'Keefe opened the purse and observed a loaded semi-automatic firearm with an "obliterated" serial number, 21 plastic bags containing suspect heroin and 3 plastic bags containing suspect cannabis. The police subsequently executed a pre-planned search warrant on the residence.

¶ 7 Wrigley went to the police station, where, in his presence, a sergeant read defendant his *Miranda* rights. Defendant told the officers that a man had asked him if he wanted to buy the firearm for $400. Defendant "handled" the firearm and gave it back to the man because the firearm was too expensive.

¶ 8 Officer Homer testified that, at the police station, he read Simmons her *Miranda* rights. Simmons told Homer "that's [defendant's] f*** gun. He has it for when he's — keeps it in the purse when he's working and that he has it for — in case he gets robbed 'cause he's into it with some people."

¶ 9 Simmons withdrew her motion to suppress. The parties stipulated that the contents of the 21 plastic bags tested positive for heroin and weighed 3.6 grams. No evidence was presented concerning the contents of the 3 plastic bags containing suspect cannabis. The State introduced a certified copy of conviction showing defendant had been convicted of possession of a controlled substance in case number 08 CR 0827202.

¶ 10 The trial court found defendant guilty of all three counts, observing that the State had proven "each and every element *** beyond a reasonable doubt." The court found Simmons not guilty on all three counts. Defendant unsuccessfully moved for a new trial. The court subsequently merged all of defendant's convictions into his armed violence conviction and sentenced him to 17 years' imprisonment. This appeal followed.

¶ 11 Defendant contends that his constitutional rights to confront the witnesses against him and to a fair trial were violated when the trial court, in finding him guilty, relied on Simmons' statement to the police that the firearm found in the purse was his.

¶ 12 Initially, defendant acknowledges failing to preserve his claim of error for review because he failed to both object at trial to the alleged error and did not include it in his posttrial motion. See *People v. McLaurin*, 235 Ill. 2d 478, 485 (2009). However, he asserts that we may review the claim of error under either prong of the plain-error doctrine. Pursuant to this doctrine, we may review an unpreserved claim of error when a clear or obvious error has occurred and either (1) "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) "the 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. McDonald*, 2016 IL 118882, ¶ 48. In any plain-error analysis, the first step is to determine whether an error occurred. *Id.*

¶ 13 Simmons' statement to the police inculpating defendant was an out-of-court statement offered to prove the truth of the matter asserted: that the firearm was defendant's, not hers. This statement was hearsay (see *People v. Leach*, 2012 IL 111534, ¶ 66), and the State does not dispute that it was inadmissible at defendant's trial. See *People v. Lucious*, 2016 IL App (1st) 141127, ¶¶ 28, 33-35 (nontestifying codefendant's statement to the police inculpating the defendant was inadmissible in the defendant's case during their joint bench trial). In *Bruton v. United States*, 391 U.S. 123, 136-37 (1968), the United States Supreme Court held that the admission of a nontestifying codefendant's statement inculpating the defendant during a joint jury trial violated the defendant's right to confront the witnesses against him. In *Lee v. Illinois*, 476 U.S. 530, 543, 546 (1986), the United States Supreme Court held that a trial court's express

reliance on a nontestifying codefendant's statement inculpating the defendant during a joint bench trial violated the defendant's right to confront the witnesses against him. Consistent with *Bruton* and *Lee*, "the Illinois Supreme Court has condemned the admission of extrajudicial statements of [nontestifying] codefendants against a defendant." *Lucious*, 2016 IL App (1st) 141127, ¶ 34 (citing *People v. Duncan*, 124 Ill. 2d 400, 411-15 (1988)). This is so because such statements, as hearsay and made in situations where there is a " 'strong motivation to implicate the defendant and to exonerate [oneself],' " are generally " 'viewed with special suspicion.' " *Lee*, 476 U.S. at 541 (quoting *Bruton*, 391 U.S. at 141 (White, J., dissenting)).

¶ 14 In a joint jury trial, the risk of these statements being used against another defendant is so serious that even a limiting instruction cannot cure the potential prejudice. *Bruton*, 391 U.S. at 126, 137. Unlike in a joint jury trial, however, the admission of these statements during a joint bench trial does not pose the same risk because a trial court is deemed "capable of compartmentalizing its consideration of evidence." *People v. Schmitt*, 131 Ill. 2d 128, 137 (1989). As such, in a bench trial, we must presume the court knew the law and evaluated the case against each defendant separately based on the evidence properly admitted against that defendant. *People v. Howery*, 178 Ill. 2d 1, 32 (1997); *Schmitt*, 131 Ill. 2d at 138-39. This presumption can only be rebutted if affirmative evidence to the contrary appears in the record. *Schmitt*, 131 Ill. 2d at 138-39.

¶ 15 In the present case, defendant had a joint bench trial, and therefore, we must presume that the trial court only allowed Simmons' statement into evidence and relied on it in her trial, unless affirmative evidence to the contrary appears in the record. See *id.* The record in this case fails to

show any affirmative evidence that the court relied on Simmons' statement in defendant's case. Critically, when the court found defendant guilty, it did not mention, either implicitly or explicitly, Simmons' statement. Furthermore, before the trial began, the court noted that it would hear Simmons' motion to suppress statements contemporaneously with her trial and stated "I can assure you only competent evidence will be admitted in as far as the trial and no hearsay evidence will be." The court then acknowledged that defendant and Simmons were having simultaneous, but severed, trials. The court is presumed to know the law. See *Howery*, 178 Ill. 2d at 32. Therefore, we can reasonably assume that its express pretrial statement that it would consider only competent nonhearsay evidence in Simmons' trial, as opposed to during its contemporaneous consideration of her motion to suppress, extended to defendant's simultaneous, but severed, trial.

¶ 16 In addition, during the trial, the trial court noted that evidence elicited during the State's direct examination of Officer O'Keefe concerning a search warrant would only pertain to defendant's case, and not Simmons' case, because the evidence regarding the warrant had only been brought up during defendant's cross-examination of Officer Wrigley. This comment demonstrates that the court was well aware it had to compartmentalize its consideration of the trial evidence and acted in furtherance of this objective. See *People v. Williams*, 246 Ill. App. 3d 1025, 1033 (1993) ("[W]here a trial court explicitly states in a joint trial that it will not consider inadmissible evidence, and the record supports the judge's admonition, a defendant cannot claim that he has been denied a fair trial."); compare with *Lucious*, 2016 IL App (1st) 141127, ¶¶ 35-41 (finding affirmative evidence in the record showed the trial court considered a nontestifying

codefendant's statement inculpating the defendant where the court expressly stated in finding defendant guilty that he "was 'accountable' for codefendant's statement"). Consequently, as the trial court knew it had to separately consider some of the evidence during the simultaneous, but severed, trials, and the record contains no affirmative evidence demonstrating that it failed to do so, defendant's rights to confront the witnesses against him and to a fair trial were not violated.

¶ 17 Defendant, however, argues that the record affirmatively demonstrates the trial court's reliance on Simmons' statement in his case. He highlights that, twice during the trial, the court noted it would only consider evidence of the pre-planned search warrant in defendant's case and not in Simmons' but, when Simmons' statement was introduced into evidence, the court did not make a similar comment limiting that evidence to only Simmons' case. Defendant's argument essentially reverses the presumption that the court only considered competent evidence unless the record affirmatively demonstrates the contrary. See *Schmitt*, 131 Ill. 2d at 138-39. We will not infer that the court considered Simmons' statement in defendant's case based on its failure to state that it would only consider her statement in her case.

¶ 18 Defendant further points out that the trial court asked his defense counsel if he had any cross-examination questions for Officer Homer, who defendant asserts was only called as a witness to testify to Simmons' statement exculpating her and inculpating him. Defendant additionally notes that, at the time Homer testified, Simmons' motion to suppress statements had been withdrawn, rendering Homer's testimony only admissible as substantive trial evidence. From this, defendant concludes that the court must have relied on Simmons' statement as evidence against him because there was no reason for the court to ask his counsel if he had any

cross-examination questions of Homer otherwise. We cannot say this is affirmative evidence that the court relied on Simmons' statement in finding defendant guilty. Affirmative evidence requires something more substantial and explicit. See *Lucious*, 2016 IL App (1st) 141127, ¶¶ 35-41 (affirmative evidence existed where the trial court expressly stated that the defendant "was 'accountable' for codefendant's statement" when finding the defendant guilty).

¶ 19 Defendant lastly argues that the trial court must have relied on Simmons' statement because it was the only evidence, albeit inadmissible in his case, showing he had knowledge of the firearm in the purse. We disagree. To sustain defendant's conviction for armed violence, the State had to prove that he committed a felony, here, possession of a controlled substance, "while armed with a dangerous weapon." 720 ILCS 5/33A-2(a) (West 2012). "A person is considered armed with a dangerous weapon *** when he or she carries on or about his or her person or is otherwise armed with" a weapon, such as a firearm. 720 ILCS 5/33A-1(c)(1), (2) (West 2012). The defendant must know he is armed to sustain the conviction. *People v. Adams*, 265 Ill. App. 3d 181, 186 (1994).

¶ 20 Defendant's knowledge that he was armed with a firearm could be inferred from his control of the purse, which, on three separate occasions, he opened to take out an unknown object. See *People v. Roberts*, 263 Ill. App. 3d 348, 352-53 (1994) (sufficient evidence existed for the trial court to conclude that the defendant knew of the presence of a firearm to support an armed violence conviction where the firearm was found in the defendant's purse, she was close to the purse at all times during an encounter with the police and the weapon would have been noticeable to someone handling the purse). As defendant notes, there was a brief period of time

in which the police did not observe him, from when Officer Wrigley left his surveillance post until defendant was detained. However, whether the firearm could have placed in the purse during that time without defendant's knowledge was for the trier of fact to determine, and the court here necessarily did not come to the conclusion that the firearm was placed in the purse during this time. There was therefore evidence beyond Simmons' statement on which the court could rely in finding defendant knew he was armed with a dangerous weapon to support his conviction for armed violence.

¶ 21 Having found no affirmative evidence in the record that the trial court, in finding defendant guilty, relied on Simmons' statement inculpating him, no error occurred in this case. Absent error, there can be no plain error. See *McDonald*, 2016 IL 118882, ¶ 48.

¶ 22 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 23 Affirmed.