2017 IL App (1st) 143482-U

No. 1-14-3482

Order filed May 16, 2017

Second Division

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. 14 CR 2659
	)	
JOHNNY HOWELL,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE MASON delivered the judgment of the court.
Presiding Justice Hyman and Justice Pierce concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction affirmed where the trial court did not abuse its discretion in responding to a jury request for police reports. Fines and fees order corrected.

¶ 2 Following a jury trial, defendant, Johnny Howell, was convicted of home invasion with a firearm (720 ILCS 5/19-6(a)(3) (West 2014)) and armed robbery with a firearm (720 ILCS 5/18-2(a)(2) (West 2014)). The trial court merged the convictions and sentenced Howell to 27 years' imprisonment for home invasion with a firearm. Howell argues on appeal that the court abused

its discretion by giving an incomplete response to a question from the jury. He also argues that the court improperly imposed a trauma fund fine against him and failed to give him $5 per day of presentence custody credit against certain fines. We affirm as modified.

¶ 3 In January 2014, Teressa Catron lived with her seven year-old twins in an apartment in the Altgeld Gardens apartment complex on South Evans in Chicago. On the night of January 2, 2014, around 9:00 p.m., Catron, who had been staying with her children at her mother's house for several days, returned alone to her apartment and parked in the illuminated parking lot near the back door of her home.

¶ 4 Two men stood between the parking lot and Catron's back door. Catron had seen the first man, later identified as Howell, in the neighborhood. The second man was wearing a ski mask. As she passed, Howell walked with her to her door, making romantic advances toward her. The lights at her back door and in the parking lot allowed Catron to see Howell's face. She waited for Howell to leave before entering her home.

¶ 5 Catron was home for a few minutes when there was a knock at the back door. She looked through back window and saw Howell; they spoke through the glass and Howell asked to borrow a plastic bag. Since Catron was leaving anyway, she grabbed her coat and a plastic bag. When she opened her door, Howell entered with a handgun and pulled a ski mask over his face. A second armed, masked man followed.

¶ 6 Howell asked Catron where she kept her money. She indicated there was money in her purse, which the second man took and emptied on the floor. The second man took $60 and searched the house. Catron could only see Howell's eyes but still recognized him. He took her upstairs, removed his mask in her bedroom, and told her to take off all of her clothing. He told

her not to move and count to 100. He also warned her not to tell anyone what happened or he would come back and kill her.

¶ 7 While Catron counted to 100, she heard her back door open and close. She waited another 5 to 10 minutes before she dressed and returned to her car. She called her sister and met her at a friend's house. She eventually called the police at approximately 10:30 p.m. and met them a few blocks away from her apartment because she was afraid the offenders would see her with the police. When Chicago police officer Matthew Cadman and his partner arrived, Catron was upset and crying.

¶ 8 Catron eventually went with the police to her apartment and described what had happened. She told the police that she recognized the first man. She described him as a black male between 35 and 45 years old, standing between five feet seven inches and six feet tall, weighing between 155 and 175 pounds. Catron recalled also telling the officers that he had braided salt and pepper hair, a goatee, and a caramel complexion. She also gave a more general description of the second man's height, weight and age. She admitted that she told the officers that it was the first man who emptied her purse and took $60.

¶ 9 Cadman's report related that Catron described the first offender as having a dark complexion. Cadman did not recall Catron mentioning a goatee or that she had ever seen the first offender before.

¶ 10 Catron moved out of the Altgeld Gardens complex at the end of January. After the robbery, she stayed with her children at her mother's and returned only to move out her belongings at the end of the month.

¶ 11 On January 5, 2014, Catron received a phone call from Chicago police detective Edmund Beazley and discussed the incident with him. Beazley had reviewed Cadman's report and noted the description of the first suspect as having a dark complexion. But Beazley recalled that Catron told him the first offender's complexion was caramel colored and that he had a goatee.

¶ 12 In the first half of January 2014, a security officer from the Chicago Housing Authority (CHA) showed Catron a photograph of a possible suspect, but Catron did not recognize that person. The officer texted her another photograph, this time of Howell, who Catron identified as being the first of the two men. Beazley also received the photograph from the CHA security officer, but was unaware it had been shown to Catron.

¶ 13 On January 17, 2014, Catron met with Beazley to view a photo array of possible suspects. Catron recalled telling Beazley that the CHA officer had sent her photos, but Beazley claimed not to have been aware of that fact prior to showing Catron the photo array. Catron identified Howell in the array. The photo of Howell used in the array was not the same photo of him that the CHA officer had provided to Catron and Beazley. During their conversation that day, Catron recalled telling Beazley that she had spoken to Howell through the window when he had asked for a plastic bag, but Beazley denied that Catron relayed those details.

¶ 14 After the case was submitted to the jury, the jury sent the trial court two notes. One note stated: "Request for police reports please transcript of 911 call." The second note asked:

> "When was the description with the goatee and caramel color [complexion] before or after seeing the text from the security guard?
>
> How did the security guard know to show that photo? (Exhibit #3)."

¶ 15 The trial court proposed the following response: "Police reports are not evidence. You have heard and received all the evidence in this case. Please continue to deliberate." Defense counsel requested that the court inform the jury that although the reports themselves were not evidence, the jury could consider testimony about those reports. Defense counsel expressed his concern "that the jury would think that any testimony about police reports is not evidence." The court responded, "that's included in 'you have heard and received all the evidence in this case.' That's an umbrella that covers all of that, because I don't want to emphasize one specific part of evidence over another." The response proposed by the court was sent to the jury.

¶ 16 Shortly after receiving the trial court's response, the jury found Howell guilty of both home invasion with a firearm (720 ILCS 5/19-6(a)(3) (West 2014)) and armed robbery with a firearm (720 ILCS 5/18-2(a)(2) (West 2014)). It also found the State proved that Howell used a firearm during the offenses. The trial court denied Howell's posttrial motions in which he argued, *inter alia*, that the court erred in its response to the jury's question. At sentencing, the court merged the armed robbery conviction into the home invasion conviction and sentenced Howell to 27 years' imprisonment, 12 years as the base sentence with a consecutive 15-year firearm enhancement. Howell timely appealed.

¶ 17 Howell raises two arguments on appeal: first, that the trial court abused its discretion in responding to the jury's question in the manner it did and second, that the court failed to provide him presentence credit and improperly assessed a trauma fund fine.

¶ 18 With respect to the first issue, Howell argues that the trial court abused its discretion in denying his counsel's request to advise the jury that testimony about the police reports was evidence even though the reports themselves were not. Howell argues that the court's response

was incomplete and misleading, as the jury could have interpreted it as prohibiting its consideration of vital impeachment testimony that had referenced the contents of the police reports.

¶ 19 The State contends that the trial court's response was an accurate statement of the law. The State argues, alternatively, that if the court erred, the error was harmless because its jury instruction on the use of prior inconsistent statements prevented the jury from inferring that it should not consider the testimony referencing police reports.

¶ 20 Jurors are typically entitled to have their questions answered, and the trial court has a duty to instruct the jury when clarification is requested, the original instructions are insufficient, or the jurors are manifestly confused. *People v. Averett*, 237 Ill. 2d 1, 24 (2010). A trial court may exercise its discretion to decline to answer a question from the jury in some circumstances, including when the jury instructions are readily understandable and sufficiently explain the relevant law, when additional instructions would serve no useful purpose or may potentially mislead the jury, when the jury's request involves a question of fact, or when giving an answer would cause the trial court to express an opinion likely directing a verdict one way or the other. *People v. Millsap*, 189 Ill. 2d 155, 161 (1994). "At the same time, failing to respond or responding in a way that fails to answer the question may be as prejudicial as a response which is inaccurate, misleading, or likely to direct a verdict one way or another." *People v. Wetzel*, 308 Ill. App. 3d 886, 894 (1999) (citing *People v. Childs*, 159 Ill. 2d 217, 229 (1994)). Once a judge decides to give additional instructions, they should be complete and accurate. *Id.*

¶ 21 Determining the propriety of the trial court's response to a jury question accordingly requires a two-step analysis. *People v. Leach*, 2011 IL App (1st) 090339, ¶ 16. We first

determine whether the trial court should have answered the jury question, conducting our review on an abuse-of-discretion basis, and then determine whether the court's response was legally correct, a matter of law reviewed *de novo*. *Id.*

¶ 22 The trial court did not abuse its discretion in its response to the jury. The jury asked for the police reports referred to by witnesses. The court, in response, told the jury that the reports are not evidence, essentially denying the jury's request and explaining why. Granted, the court could have accomplished the same purpose by telling the jury only that it "had heard and received all the evidence in this case," but adding the instruction that "police reports are not evidence" expressly addressed the jury's request and was not, in itself, improper. See *Wetzel*, 308 Ill. App. 3d at 894. ("[T]he trial judge in this case could have insisted the jury base its verdict on the instructions it already had, but we are not willing to say the giving of additional instructions was an abuse of discretion.").

¶ 23 Nevertheless, an additional instruction to the jury can be an abuse of discretion if it incomplete and misleading. *Id.* On this point, Howell argues that the trial court's response that police reports were not evidence was incomplete as it implied that the jury should disregard the trial testimony which referenced police reports. We disagree. As the trial court noted when it denied defense counsel's request for the additional language, the court's response included the admonishment that the jury had "heard and received all the evidence in this case," which evidence necessarily included all testimony, including that which referenced statements either included in or absent from police reports.

¶ 24 Further, both parties acknowledge that the trial court's response to the jury was a correct statement of the law. It is well established that police reports are not evidence. *People v.*

Herndon, 2015 IL App (1st) 123375, ¶ 40. Moreover, we adhere to longstanding precedent that a trial court is without discretion to provide the jury documents that have not been admitted into evidence. *People v. Williams*, 173 Ill. 2d 48, 87 (1996). Both parties in this case acknowledge that there were no police reports in evidence for the court to provide the jury. We therefore find the court responded to the jury's request with an accurate statement of the law. Accordingly, because there was no error, we reject this issue as a basis for a new trial.

¶ 25 Howell contends that the trial court improperly imposed a trauma fund fine against him and failed to give him $5 per day of presentence custody credit against other monetary assessments that qualified as fines. Howell did not preserve these issues for appeal given that he did not raise them in the trial court. Nor does his brief on appeal articulate any basis, such as plain error, that would enable us to review these issues.

¶ 26 Generally, a defendant forfeits a sentencing issue that he fails to raise in the trial court through both a contemporaneous objection and a written postsentencing motion. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). But the rules of forfeiture and waiver also apply to the State and where the State does not argue forfeiture of unpreserved errors, that issue is foreclosed. *People v. Reed*, 2016 IL App (1st) 140498, ¶ 13. Thus, as the State has not contested our ability to review the issues Howell raises with respect to fines and fees, we will address them. We review the propriety of a trial court's imposition of fines and fees *de novo*. *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 60.

¶ 27 Howell argues, and the State agrees, that the $100 trauma fund fine assessed against him should be vacated because this fine only applies to specified firearm offenses that do not include

home invasion. See 730 ILCS 5/5-9-1.10 (West 2014). As such, we vacate the $100 trauma fund fine. *People v. Bryant*, 2016 IL App (1st) 140421, ¶ 23.

¶ 28 Howell also argues, and the State agrees, that he is entitled to $95 in pre-sentence credit that is applicable to a $10 mental health court assessment (55 ILCS 5/5-1101(d-5) (West 2014)), a $5 youth diversion program assessment (55 ILCS 5/5-1101(e) (West 2014)), a $5 drug court assessment (55 ILCS 5/5-1101(f) (West 2014)), a $30 children's advocacy center assessment (55 ILCS 5/5-1101(f-5) (West 2014)), a $30 fine to fund juvenile expungement (730 ILCS 5/5-9-1.17(a) (West 2014)), and a $15 state police operations assessment (705 ILCS 105/27.3a(1.5) (West 2014)).

¶ 29 A defendant is entitled to a $5 credit toward the fines levied against him for each day he is incarcerated. 725 ILCS 5/110-14(a) (West 2014). Further, "a defendant may request presentence [custody] credit for the first time on appeal." *Bryant*, 2016 IL App (1st) 140421, ¶ 22; see also *People v. Lake*, 2015 IL App (3d) 140031, ¶ 31. Here, Howell accumulated 289 days of presentence custody credit, and, therefore, he is entitled to up to $1,445 of credit toward his eligible fines.

¶ 30 The mental health court assessment, youth diversion program assessment, drug court assessment, children's advocacy center assessment, juvenile expungement fund assessment, and state police operations assessment are all fines subject to presentence custody credit. See *People v. Graves*, 235 Ill. 2d 244, 251-55 (mental health court and youth diversion program assessments are fines); *People v. Warren*, 2016 IL App (4th) 120721-B, ¶ 138 (drug court assessment is a fine); *People v. Lattimore*, 2011 IL App (1st) 093238, ¶ 107 (children's advocacy center assessment is a fine); *People v. Smith*, 2014 IL App (4th) 121118, ¶ 61 (juvenile expungement

fund assessment is a fine); *People v. Moore*, 2014 IL App (1st) 112592-B, ¶ 46 (state police operations assessment is a fine). Therefore, Howell must receive $5 per day of presentence custody credit toward these fines, which amounts to a credit of $95 in this case.

¶ 31 In sum, we order the clerk of the circuit court to vacate Howell's $100 trauma fund fine and award Howell $5 per day of presentence custody credit toward his $10 mental health court assessment, $5 youth diversion program, $5 drug court assessment, $30 children's advocacy center assessment, $30 fine to fund juvenile expungement, and $15 state police operations assessment, resulting in a total credit in the amount of $195.

¶ 32 The judgment of the trial court is affirmed in all other respects.

¶ 33 Affirmed as modified.