

2017 IL App (1st) 1150249-U

No. 1-15-0249

Order Filed October 27, 2017

Fifth Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,) Appeal from the
) Circuit Court of
Plaintiff-Appellee,) Cook County.
)
v.) No. 13 CR 8299
)
JOSHUA GARNER,) Honorable
) James B. Linn,
Defendant-Appellant.) Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Justices Gordon and Lampkin concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant's conviction affirmed where he was not denied his due process right to a fair trial or a fair, open-minded, impartial trier of fact.
- ¶ 2 Following a bench trial, defendant Joshua Garner was convicted of aggravated unlawful use of a weapon and sentenced to four years' imprisonment.
- ¶ 3 The State presented the testimony of Chicago Police Officers Riley and Rialmo.

¶ 4 Officer Riley testified that on April 29, 2014, he was working with Officer Rialmo on routine patrol in a marked squad car at approximately 1:14 a.m. near 4728 West Arthington Street in Chicago. While heading eastbound on Arthington Street from Cicero Avenue, Officer Riley observed a car on the north side of the street near some vacant lots and found it to be suspicious looking. Initially, he only observed one male occupant in the vehicle, but upon exiting the squad car to conduct a field interview, he observed that there were two other female occupants of the vehicle. Defendant was identified as the male seated in the front passenger seat of the vehicle. Officer Riley approached the driver's side of the vehicle while Officer Rialmo approached the passenger's side and the occupants were asked for identification. The driver, Nikki Igbokidi, was the only person to produce any identification, and they returned to the squad car to run the history of her license, which came back suspended. At that point, all of the occupants were directed to exit the vehicle. A call was made for a female officer for search, who arrived shortly thereafter, and began the search of the female occupants. Officer Riley testified that they had told them that they had auto liability insurance, so Officer Rialmo checked the glove compartment to find the verification of insurance based on information from the driver.

¶ 5 When Officer Rialmo opened the glove compartment, he found a black revolver with a white handle inside in plain view. The weapon was recovered and all of the vehicle's occupants were detained. At that time, the officers did not know who the gun belonged to, so defendant and his companions were transported to the police station for further investigation. Officer Riley did not transport any of the occupants to the station, instead he took the car. Once he arrived at the station, he inspected the firearm and

found it to be a Smith and Wesson .38 caliber revolver, with a defaced serial number and five live rounds. The firearm was then inventoried under inventory number 13160767. Defendant was transported to the station by his partner, Officer Rialmo.

¶ 6 On cross-examination, Officer Riley testified that he never observed defendant handle the gun and that defendant never moved towards the glove compartment before it was opened.

¶ 7 Officer Rialmo testified that he has been employed as a Chicago police officer for approximately two years, and that on April 29, 2014, he was working with his partner, Officer Riley, on patrol near 4728 West Arthington Street. There they observed a red Ford Expedition idling, with at least two occupants inside. They approached the vehicle, where they observed that there were actually three people inside, one of whom he identified as defendant. The driver was asked for a driver's license, which she was unable to produce, and the officers subsequently learned that her license was suspended. All three occupants were asked to exit the vehicle, and the driver indicated that the vehicle did not belong to her and that proof of insurance should be in the glove box. Officer Rialmo opened the glove box to look for the proof of insurance, and he observed a loaded revolver in plain view. The glove box was directly in front of defendant, who was seated in the front passenger seat. The gun was fully loaded with five live rounds and it was subsequently inventoried under inventory number 13160767. All of the vehicle's occupants were transported to the police station, with defendant being transported by Officer Rialmo. They were alone in the vehicle, and according to Officer Rialmo, defendant spontaneously admitted that the gun belonged to him and that he had it on him all day. Once they arrived to the police station, Officer Rialmo

Mirandized defendant from a pre-printed form in the FOP book in Officer's Riley's presence. Officer Rialmo testified that defendant then waived his rights and repeated his statement that the gun was his and that he had it on him all day.

¶ 8 On cross examination, Officer Rialmo testified that he never observed defendant touch the gun or make any movement towards the glove box. He further testified that he never took a written statement from defendant, nor did he have defendant sign any form of a statement or a *Miranda* waiver form. Officer Rialmo also testified that to the best of his knowledge, the gun was never checked for fingerprints or DNA, and that the car was owned by someone other than the three occupants.

¶ 9 Defendant's motion for directed finding was denied and the defense rested without calling any witnesses. The trial court then asked defense counsel for his closing argument. After hearing defense counsel's closing argument, the trial court found that defendant "insisted on the scene" that it was his gun, not the girls. The court further found that "at the police station, [defendant] was *Mirandized* and processed and repeated again, it was his gun. He said it was his." The court stated that it believed the officers' rendition of the facts and found defendant guilty as charged beyond a reasonable doubt.

¶ 10 Defendant's posttrial motion to reconsider was denied and the matter proceeded to sentencing. He was sentenced to a four-year prison term, and after the denial of his motion to reconsider sentence, this timely appeal followed.

¶ 11 ANALYSIS

¶ 12 On appeal, defendant contends that he was denied his due process right to a fair trial when the trial court convicted him based on a misapprehension of the evidence,

and that the trial court denied him the right to a fair, impartial and open-minded trier of fact by not asking the State to present a closing argument, failing to recall a key fact, and taking actions indicating that it was rushing to judgment.

¶ 13 We note that defendant failed to preserve these claims of error by objecting at trial or including them in his posttrial motion. Defendant acknowledges this, but maintains that such claims are constitutional errors that cannot be forfeited, citing *People v. Williams*, 2013 IL App (1st) 111116, and *People v. Mitchell*, 152 Ill. 2d 274 (1992).

¶ 14 The failure to object to alleged error at trial and raise the issue in a posttrial motion ordinarily results in the forfeiture of the issue on appeal. *People v. Enoch*, 122 Ill. 2d 176, 186-87 (1988). However, Supreme Court Rule 615(a) provides: "any error, defect irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967).

¶ 15 To establish plain error, a defendant must first show that a clear or obvious error occurred (*People v. Thompson*, 238 Ill. 2d 598, 613 (2010)), 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 (*People v. Naylor*, 229 Ill. 2d 584, 593 (2008)) or that 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 (*Thompson*, 238 Ill. 2d at 613).

¶ 16 Here, defendant argues that the trial court's misapprehension of the evidence pertains to his right to a fair trial, and argues that this court should review it under the

second prong of the plain error analysis. See *People v. Jackson*, 409 Ill. App. 3d 631, 646 (2011).

¶ 17 Under the second prong of plain error, prejudice is presumed because of the importance of the right involved, regardless of the strength of the evidence. *People v. Herron*, 215 Ill. 2d 167, 187 (2005). A finding that the trial court misunderstood the evidence, denied defendant's right to a fair and impartial trial by not asking the State to present a closing argument, failed to recall a key fact of the evidence, and otherwise indicated a rush to judgment would satisfy the second prong of plain-error review.

¶ 18 "A criminal defendant, whether guilty or innocent, is entitled to a fair, orderly, and impartial trial" conducted according to law. *People v. Blue*, 189 Ill. 2d 99, 138 (2000) citing *People v. Bull*, 185 Ill. 2d 179, 214 (1998). This due process right is guaranteed by the federal and state constitutions. *Blue*, 189 Ill. 2d at 138; *Bull*, 185 Ill. 2d at 214; U.S. Const., amend XIV, §1; Ill. Const. 1970, art. I, §2.

¶ 19 When a defendant's right to a fair trial has been denied, reviewing courts must take corrective action to preserve the integrity of the judicial process. *Blue*, 189 Ill. 2d at 138; *People v. Carlson*, 79 Ill. 2d 564, 577 (1980).

¶ 20 A criminal defendant who elects to be tried in a bench trial "is entitled to the same fair, patient, and impartial consideration he would be entitled to by a jury composed of fair, impartial, careful and considerate jurors." *Jackson*, 409 Ill. App. 3d at 646, citing *People v. Trefonas*, 9 Ill. 2d 92, 100 (1956). A trial judge sitting as the trier of fact must consider all the matters in the record before deciding the case. *People v. Williams*, 2013 IL App (1st) 111116, ¶75; *People v. Bowen*, 241 Ill. App. 3d 608, 624 (1992). In a bench trial, the trial judge is limited to the record developed during the

course of the trial before him. *Jackson*, 409 Ill. App. 3d at 646; *Cf. People v. Wallenberg*, 24 Ill. 2d 350, 354 (1962). During a bench trial, a trial court's misapprehension of evidence crucial to the defense may violate the defendant's right to due process. *People v. Mitchell*, 152 Ill. 2d 274, 321 (1992); *People v. Bowie*, 36 Ill. App. 3d 177, 180 (1976); see also *People v. Simon*, 2011 IL App (1st) 091197, ¶91 (trial court's failure to recall and consider such evidence may result in a denial of due process). However, where the record does not affirmatively indicate that the fact-finder was mistaken, there is a presumption that the trial court considered only competent evidence in reaching its verdict. See *Simon*, 2011 IL App (1st) 091197, ¶91. Moreover, in a bench trial, the trial court has the responsibility to both weight the evidence and to make reasonable inferences from that evidence. Thus, it is the direct purview of the trial court to adjudge the credibility of witnesses, resolve any conflicts in their testimony, determine the weight to afford the evidence presented based on this, and draw reasonable inferences therefrom. See *People v. Deleion*, 227 Ill. 2d 322, 332 (2008); accord *People v. Steidl*, 142 Ill. 2d 204, 226 (1991); *Simon*, 2011 Ill App (1st) 091197, ¶94, citing *People v. Berland*, 74 Ill. 2d 286, 305-06 (1978). We, as a reviewing court, will not substitute our own judgment for that of the trial court in this regard. *Deleion*, 227 Ill. 2d at 322; *Steidl*, 142 Ill. 2d at 226.

¶ 21 Whether a defendant's due process rights have been denied is an issue of law, and our review is *de novo*. *Williams*, 2013 IL App (1st) 111116, ¶75. Under the *de novo* standard of review, this court owes no deference to the trial court. *Williams*, 2013 IL App (1st) 111116, ¶75.

¶ 22 We now to turn to a review of each of defendant's claimed errors by the trial court.

¶ 23 Defendant first claims that the trial court misapprehended the evidence presented at trial. Having reviewed defendant's claim, we do not find that the trial court's statement was necessarily inconsistent with the testimony presented. Defendant takes issue with the trial court's statement that the evidence indicated that he made an admission "at the scene" and at the police station, when Officer Rialmo's testimony was that defendant made an admission in the police car and then again at the station. Officer Rialmo's testimony was that defendant made two admissions; it is insignificant where the exact location of the first admission was actually made. It was sometime after defendant entered the squad car at the scene and they were on their way to the station. Defendant's trial defense challenged Officer Rialmo's credibility; it is the function of the trial court as the trier of fact to determine the credibility of the witnesses and the weight to be given their testimony (*People v. Snulligan*, 204 Ill. App. 3d 110, 118 (1990)). Apparently, the trial court resolved that credibility argument against defendant in this case. A fair trial is different from a perfect trial. *Herron*, 215 Ill. 2d at 177. We do not believe the judge was misstating the evidence, he was just summarizing it. The first step in a plain error review is to determine whether the trial court committed error and the burden is on defendant to establish that an error occurred. *Thompson*, 238 Ill. 2d at 613. As such, we conclude that the trial court's statement was not error; therefore there can be no plain error as defendant failed to establish that an error occurred.

¶ 24 Defendant next contends that the trial court denied him the right to a fair, impartial and open-minded trier of fact by not asking the State to present a closing argument, failing to recall a key fact, and taking actions indicating that it was rushing to judgment. Defendant also argues that at the close of the evidence, the trial court proceeded to closing argument despite defendant's indication that he wished to testify. Defendant avers that the actions and comments by the trial court indicate that the trial court prematurely adjudicated the defendant's guilt instead of remaining fair and impartial until the close of trial.

¶ 25 In response, the State contends that defendant failed to preserve these issues for review and that they are forfeited on appeal.

¶ 26 Defendant, however, contends that an objection to the court's actions would have been futile because the issue is in what the court's actions showed, namely, that it had prejudged defendant's guilt, and that there was no practical way to address or correct that problem via an objection. Defendant also maintains that a prejudged trier of fact is a constitutional error that can be reviewed under the plain error doctrine.

¶ 27 As stated previously, in order to preserve an error for review, a defendant must object at trial or raise the issue in a posttrial motion. *People v. Anderson*, 407 Ill. App. 3d 662, 676 (2011). As defendant did neither, we may review this forfeited claim of error only if defendant has established plain error. See Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967).

¶ 28 As previously stated, the plain error doctrine will be applied when a clear or obvious error occurred and the evidence is closely balanced or a clear and obvious error occurred that affected the fairness of the defendant's trial and challenged the

integrity of the judicial process, regardless of the closeness of the evidence.

Thompson, 238 Ill. 2d at 613. Again, the first step of plain error review is determining whether any error occurred. *Thompson*, 238 Ill. 2d at 613.

¶ 29 Here, defendant has failed to meet his burden of establishing that any error occurred. A trial judge is presumed to be impartial, and the burden of overcoming this presumption rests on the party making the charge of prejudice. *People v. Faria*, 402 Ill. App. 3d 475, 482 (2010). Allegations of judicial bias or prejudice must be viewed in context and should be evaluated in terms of the trial judge's specific reaction to the events taking place. *Faria*, 402 Ill. App. 3d at 482; *People v. Jackson*, 205 Ill. 2d 247, 277 (2001).

¶ 30 In its finding of guilt, the trial court specifically stated that it found the officers' testimony credible (as discussed above), and although defendant claims that the trial court neglected his indication that he wished to testify, the record does not indicate that the trial court failed to allow defendant to testify. When the court inquired as to whether defendant wanted to testify, defendant stated "no" which indicates that defendant did not want to testify. Moreover, defendant does not cite, nor have we found, any case that supports the proposition that he is entitled to have the State give closing arguments. In fact, defendant's admits in his brief that the State often reserves all of its argument for rebuttal in bench trials. In short, we find no error by the trial court, thus plain error does not apply. As such, we find that defendant has forfeited this claim for review.

¶ 31

CONCLUSION

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

¶ 33 Affirmed.