

2017 IL App (1st) 152635-U

No. 1-15-2635

Order filed October 4, 2017

Third 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 DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 14 CR 375
)	
TIMOTHY LEE,)	Honorable
)	Luciano Panici,
Defendant-Appellant.)	Judge, presiding.

PRESIDING JUSTICE COBBS delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's conviction for aggravated battery with a firearm affirmed over his challenges that the State failed to prove that he did not act in self-defense, and that the trial court's credibility determination was based on a misunderstanding of the testimony; fines and fees order amended.

¶ 2 Following a bench trial, defendant Timothy Lee was convicted of aggravated battery with a firearm and sentenced to 10 years' imprisonment. On appeal, defendant contends that the State failed to prove beyond a reasonable doubt that he did not act in self-defense when he shot the

victim. Defendant also contends that he was denied a fair trial because the trial court based its credibility determination on a misunderstanding of a witness's testimony. Finally, defendant contends, and the State agrees, that his fines and fees order should be amended. We amend the fines and fees order and affirm defendant's conviction.

¶ 3 Defendant was tried on two counts of attempted first degree murder and one count of aggravated battery with a firearm. At trial, Brian Hill testified that in July 2013, he had been dating and living with Jillian Johnson for about two years. Around July 27, Hill and Jillian were in a car when defendant drove past and gave Hill dirty looks. About that time, Hill learned that Jillian was married to defendant. Hill ended the relationship and moved out of Jillian's house.

¶ 4 On August 5, Hill spoke with Jillian on the phone and learned that his young son was being threatened. Hill reported the threat to the Dolton police, who advised him to obtain an order of protection. Hill's cousin, Andre Curry, gave him a ride to obtain the order. Hill sat in the front passenger seat of Curry's vehicle, and Andre and Austin Whirl sat in the back seat. While en route, Curry drove down Michigan Avenue intending to stop at a gas station. Hill acknowledged that he knew Jillian lived at 14843 Michigan Avenue. As they drove down the street, Hill saw defendant standing outside and told Curry to stop the vehicle. Hill wanted to speak with defendant "man to man" about stalking him. Curry stopped across the street from Jillian's house. Jillian was in the middle of the street entering the driver's seat of her car. Defendant was on the sidewalk walking towards Jillian's car. Hill opened the door to exit Curry's vehicle. He denied having a gun.

¶ 5 As Hill exited the vehicle, defendant raised a firearm and began shooting at him. A bullet came through the windshield and struck Hill on the left side of his face in his mouth. A second

bullet struck Hill in the left chest, and a third bullet grazed his right arm. Several bullets struck Curry's vehicle. Hill identified photographs depicting bullet holes in Curry's truck, including the hole in the windshield from the bullet that struck him in the face.

¶ 6 After being shot, Hill momentarily lost consciousness. As Curry backed up his vehicle, Hill was knocked to the ground. The Whirl brothers picked up Hill and placed him inside the vehicle. Curry then drove away to take Hill to a hospital. Police stopped Curry four blocks from the scene, and Hill was transported to Christ Hospital.

¶ 7 Hill testified that he did not know that police recovered a gun from Curry's vehicle, and that he never saw a gun in the vehicle. Hill denied that the gun was his. He further denied that he fired gunshots at defendant.

¶ 8 Hill acknowledged that he was serving 270 days in the Cook County Department of Corrections after being found guilty of domestic violence. He also acknowledged that he had a prior felony conviction for aggravated unlawful use of a weapon, and misdemeanor convictions for resisting arrest and domestic battery.

¶ 9 James Jones, an employee with Dolton's Public Works, was working at the corner of 149th Street and Michigan Avenue about 10:50 a.m. on August 6 when he observed defendant across the street, walking around the corner. Defendant flicked a cigarette to the ground and began shooting a gun at a red truck. Jones had not noticed the truck prior to that moment. Jones looked towards the truck and saw Hill standing near the passenger door with a gun in his hand. Defendant aimed at Hill as he continued shooting. Jones heard 8 to 10 gunshots. When Hill was shot, the gun fell from his hand. Jones did not see Hill fire his gun, nor did he hear any gunshots coming from the area where Hill was standing. At the time of the shooting, a woman was in the

street entering the driver's door of a car. Jones took cover, but continued watching the area where defendant was shooting. Jones reported the shooting to police over the radio in his truck. He observed Hill fall to the ground. Two men then exited the truck, carried Hill to the truck, retrieved the gun from the ground, and drove away.

¶ 10 Dolton police officer Jesse Williams pulled over the red truck, observed that Hill had been shot, and called paramedics. During a search of the truck, police recovered a small caliber semiautomatic pistol containing three live rounds from underneath the front passenger's seat.

¶ 11 Dolton police detective Darryl Hope recovered three shell casings that were on the street in front of a green car. He found another shell casing on the sidewalk near Jillian's house. No shell casings were found in the middle of the street, or in any other location at the scene. Hope acknowledged that a 25-caliber automatic handgun containing live ammunition was recovered from the truck.

¶ 12 Jillian Lee testified for the defense that she married defendant in January 2013. Hill was her former boyfriend. On August 6, Jillian left her house with defendant and her brother, Marcus Johnson. When Jillian reached the driver's door of her green vehicle, she noticed a red truck speeding down the street. The truck stopped, and she observed at least three people inside. Hill then exited the truck holding a gun in his hand. Defendant was standing on the front lawn by the passenger door of her car. Hill pointed the gun at defendant and began shooting. Hill fired the first shot, and she heard him fire at least six or seven shots. Jillian testified that she "did not see Timothy Lee do anything." She did not see defendant fire back at Hill. Jillian explained that when the shots were fired, she was ducking underneath the steering wheel of her vehicle. When the gunshots stopped, she exited her vehicle and no one was around. Both defendant and the red

truck had left the scene. Jillian acknowledged that no gunshots hit defendant or her car. Jillian denied that defendant knew Hill. Hill had called Jillian several times on the morning of the shooting before he came to her house. She told him not to call her and hung up the phone. She denied speaking to him about his son.

¶ 13 Defendant testified that prior to the date of the shooting, he knew Hill, and knew Hill was Jillian's former boyfriend. He denied that there was any bad blood between him and Hill. On August 6, defendant, Jillian and Marcus exited Jillian's house and walked to her car. Marcus entered a car parked behind Jillian's. Defendant was talking to Jillian over the top of her car while she stood on the driver's side and he stood on the passenger's side. Jillian never entered her car. A red truck came down the street and stopped about 15 to 20 feet from their house. A man whom defendant did not recognize exited the passenger's door of the truck and stood behind the door. The man, whom defendant later testified was Hill, fired three gunshots at defendant. Defendant testified that he was afraid for his life and returned fire at Hill, firing five or six gunshots. He was not trying to kill Hill, but was trying to scare him away. Defendant acknowledged that photographs depicting numerous bullet holes in the red truck were from bullets he fired towards Hill, including a bullet hole through the windshield. After shooting at Hill, defendant fled the scene. He was arrested several months later when stopped for speeding.

¶ 14 The trial court found that the only reliable witness was Jones, who saw defendant shooting at Hill. The court noted that Jones testified that when Hill was shot, a gun dropped from his hand, and that Jones never saw Hill shoot at defendant. The court emphasized that this testimony was "very important." The court further found that Jones' testimony was corroborated by the physical evidence which showed that no shell casings were recovered from the area where

Hill was standing, but casings were recovered from the area where defendant was standing. The evidence also showed that defendant fired multiple gunshots at Hill because Hill was struck three times, and at least five bullets struck the truck. The court found that there was no evidence that Hill shot at defendant. The court therefore concluded that, although Hill may have had a gun in his hand or in his possession, he was not the initial aggressor.

¶ 15 The trial court further noted that Jillian testified that Hill shot at defendant. The court stated:

“and then she says oh, no, Mr. Lee didn’t even shoot at Mr. Hill, but that is totally incorrect, because we know for a fact, at the very least, that Mr. Hill got shot and he had to go to the hospital for a week and he was shot by Mr. Lee. So for Jillian Lee to say to [sic] Mr. Lee did not shoot at Mr. Hill is totally incorrect. So I discount her testimony all together.”

¶ 16 The trial court found defendant not guilty of attempted first degree murder, but guilty of aggravated battery with a firearm. Defendant was sentenced to 10 years’ imprisonment and assessed \$384 in fines and fees.

¶ 17 When denying defendant’s motion to reconsider the sentence, the court again noted that Jones testified that defendant, not Hill, started shooting. The court stated “[s]o the issue of self-defense is definitely gone and out the window.”

¶ 18 On appeal, defendant first contends that the State failed to prove beyond a reasonable doubt that he did not act in self-defense when he shot Hill. Defendant argues that he had a reasonable belief that his life was in imminent danger when he was confronted by Hill with a gun in his hand, and he acted reasonably under the circumstances. The State responds that the

evidence established that defendant was the aggressor, and therefore, it proved that he did not act in self-defense.

¶ 19 A person is justified in using force that is intended or likely to cause death or great bodily harm only if he reasonably believes such force is necessary to prevent imminent death or great bodily harm to himself or another. 720 ILCS 5/7-1(a) (West 2012). Self-defense is an affirmative defense, and when raised by defendant, it is the State's burden to prove beyond a reasonable doubt that defendant did not act in self-defense, in addition to proving the elements of the offense. *People v. Lee*, 213 Ill. 2d 218, 224 (2004).

¶ 20 When defendant claims that he acted in self-defense, he must present some evidence of each of the following elements: (1) that unlawful force was threatened against a person; (2) that the person threatened was not the aggressor; (3) that there was an imminent danger of harm; (4) that his use of force was necessary; (5) that he actually and subjectively believed a danger existed that required the force applied; and (6) that his beliefs were objectively reasonable. *Id.* at 225; *People v. Jeffries*, 164 Ill. 2d 104, 127-28 (1995). If the State negates any one of these elements, defendant's claim of self-defense must fail. *Lee*, 213 Ill. 2d at 225.

¶ 21 On review, this court must determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found, beyond a reasonable doubt, that defendant did not act in self-defense. *Id.* Under this standard, all reasonable inferences from the evidence must be allowed in favor of the State. *People v. Lloyd*, 2013 IL 113510, ¶ 42. In a bench trial, the trial court is responsible for determining the credibility of the witnesses, weighing the evidence, resolving conflicts in the evidence, and drawing reasonable inferences from therein. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009).

¶ 22 Here, viewed in the light most favorable to the State, we find that the evidence was sufficient for the trial court to find that defendant was the aggressor, and therefore, did not act in self-defense. Jones testified that defendant flicked a cigarette to the ground and began shooting at a red truck which Jones had not even noticed prior to that moment. Jones then looked towards the truck and saw Hill standing near the passenger door with a gun in his hand. Jones observed defendant aim a gun at Hill and fire 8 to 10 shots. The trial court found it “very important” that Jones did not see Hill fire his gun, nor did he hear any gunshots coming from the area where Hill was standing. The trial court found Jones’ testimony credible. It also found that his testimony was corroborated by the physical evidence which showed that no shell casings were recovered from the area where Hill was standing, but four casings were recovered from the area where defendant was standing. The evidence also showed that Hill was shot three times, and the truck was struck by at least five bullets, all of which defendant acknowledged firing at Hill.

¶ 23 In addition, Hill testified that as he exited the truck, defendant raised a firearm and began shooting at him. A bullet came through the windshield and struck Hill in the left side of his mouth. Hill’s testimony was corroborated by a photograph of the bullet hole in the windshield, which defendant acknowledged was from a bullet he fired at Hill. The fact that a bullet passed through the windshield and struck Hill in the mouth shows that Hill was not yet outside of the truck, but instead, was in the process of exiting the truck, when defendant began shooting at him.

¶ 24 We note that defendant did not testify that he shot at Hill because Hill had a gun in his hand. Instead, defendant claimed that Hill had fired three gunshots at him first, and he then returned fire and shot Hill in self-defense. The trial court, however, found that there was no

evidence that Hill fired any gunshots at defendant. Accordingly, the court rejected defendant's claim of self-defense.

¶ 25 The record reveals that the evidence was sufficient for the trial court to conclude that defendant, not Hill, was the aggressor in this case. By negating that element, the State proved beyond a reasonable doubt that defendant did not act in self-defense.

¶ 26 Defendant next contends that he was denied a fair trial because the trial court based its credibility determination on a misunderstanding of Jillian's testimony. Defendant asserts that the trial court erred when it stated that Jillian testified that he did not shoot Hill. Defendant points out that Jillian's testimony was that she did not see him do anything because she was hiding underneath her steering wheel. Defendant argues that if the court had correctly understood Jillian's testimony, it may have found her credible, which could have changed the outcome of the trial because she testified that Hill was the aggressor and fired at defendant first.

¶ 27 Defendant acknowledges that he failed to preserve this issue for appeal because he did not object to the error at trial or raise the issue in his posttrial motion. He asserts, however, that his claim may be reviewed under both prongs of the plain error doctrine. Alternatively, he argues that trial counsel rendered ineffective assistance when he failed to object to the trial court's mischaracterization of Jillian's testimony.

¶ 28 The State responds that defendant forfeited the issue and that the plain error doctrine does not apply because no error occurred. The State asserts that the trial court did not misunderstand Jillian's testimony, but instead, recalled all of the evidence presented and drew reasonable inferences from therein while determining the credibility of all of the witnesses. The State also argues that the evidence of defendant's guilt was overwhelming.

¶ 29 Initially, the parties agree that defendant forfeited this issue for appeal because he failed to object to the alleged error during trial and did not raise the issue in his posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Consequently, we consider defendant's contention that his claim should be reviewed as plain error. Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999).

¶ 30 The plain error doctrine is a limited and narrow exception to the forfeiture rule that exists to protect defendant's rights and the reputation and integrity of the judicial process. *People v. Herron*, 215 Ill. 2d 167, 177 (2005). To obtain plain error relief, defendant must first demonstrate that a clear or obvious error occurred. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). Thereafter, defendant must show either that the evidence at trial was so closely balanced that the guilty verdict may have resulted from the error, or that the error was so substantial that it deprived him of a fair trial. *People v. McLaurin*, 235 Ill. 2d 478, 489 (2009). When invoking the plain error doctrine, it is appropriate to first determine whether any error occurred at all, "because 'without error, there can be no plain error.'" *People v. Hood*, 2016 IL 118581, ¶ 18 (quoting *People v. Smith*, 372 Ill. App. 3d 179, 181 (2007)). The burden of persuasion is on defendant, and if he fails to meet his burden, his procedural default will be honored. *Hillier*, 237 Ill. 2d at 545.

¶ 31 Where the trial court fails to recall and consider testimony that is crucial to defendant's defense, it may result in a denial of defendant's right to due process. *People v. Simon*, 2011 IL App (1st) 091197, ¶ 91. In a bench trial, it is presumed that the trial court considered only competent evidence in reaching its verdict, unless that presumption is affirmatively rebutted by the record. *Id.* Where the record affirmatively shows that the trial court did not recall or consider the crux of the defense when rendering its judgment, defendant did not receive a fair trial. *Id.*

¶ 32 Here, the record shows that the trial court's statements were not necessarily inconsistent with Jillian's testimony. Defendant specifically challenges the trial court's statement that Jillian testified that defendant did not shoot at Hill. We find that this statement, however, was a reasonable inference made by the trial court based on Jillian's testimony.

¶ 33 The record shows that Jillian testified that when she reached the driver's door of her car, she observed a red truck speeding down the street. The truck stopped, and she observed Hill exit the truck with a gun in his hand. Jillian testified that defendant was standing on the front lawn by the car door, referring to the passenger's door of her car. Jillian claimed that she then saw Hill point a gun at defendant and begin shooting, and she heard him fire at least six or seven shots. Defense counsel asked Jillian "what did you see Timothy Lee do?" Jillian replied "I did not see Timothy Lee do anything." Jillian testified that Hill fired the first shot, and denied that defendant shot first. Counsel then asked "[d]id you see Timothy Lee shoot back?" She replied "[n]o, sir." She then testified that when the shots were fired that she was underneath the steering wheel of her vehicle.

¶ 34 The record further shows that the trial court correctly recalled that Jillian testified that Hill shot at defendant. The court then stated:

"and then she says oh, no, Mr. Lee didn't even shoot at Mr. Hill, but that is totally incorrect, because we know for a fact, at the very least, that Mr. Hill got shot and he had to go to the hospital for a week and he was shot by Mr. Lee. So for Jillian Lee to say to [sic] Mr. Lee did not shoot at Mr. Hill is totally incorrect. So I discount her testimony all together."

¶ 35 Defendant claims that because the court allegedly misunderstood Jillian's testimony, it erroneously found her not credible. We disagree. We find that the trial court did not misunderstand Jillian's testimony, but instead, inferred from her testimony that she was claiming that defendant had not fired shots at Hill, which it found completely incredible. It is undisputed that defendant fired at least eight gunshots at Hill. Defendant himself admitted that he did so. Jillian and defendant both testified that defendant was standing at the passenger door of her vehicle during the shooting. Jillian, Jones and Hill all testified that Jillian was entering her car at the time of the shooting. Defendant testified that she never entered her car. All of the testimony would have placed Jillian within a few feet of defendant when he shot at Hill. Based on this testimony, we find that the court's statements show that it did not believe Jillian's testimony that she did not see defendant shoot at Hill. In light of all of the evidence that defendant fired numerous shots at Hill, including defendant's testimony, the court therefore found Jillian not credible.

¶ 36 We therefore find no error by the trial court in recalling Jillian's testimony. Moreover, the record affirmatively shows that the court reviewed and considered all of the evidence presented when reaching its verdict, including the crux of the defense that defendant shot Hill in self-defense after Hill fired at him first. As no error occurred, the plain error doctrine does not apply and we honor defendant's forfeiture of this issue. *Hillier*, 237 Ill. 2d at 545.

¶ 37 In addition, we find no merit in defendant's alternative argument that counsel rendered ineffective assistance when he failed to object and preserve this issue for appeal. As the challenge to the trial court's statements is without merit, defendant was not prejudiced by counsel's failure to preserve the issue, and thus, counsel did not render ineffective assistance. See

People v. Coleman, 158 Ill. 2d 319, 349 (1994) (defendant was not denied effective assistance of counsel where the issues counsel failed to preserve for appeal were without merit and did not prejudice defendant).

¶ 38 Defendant next contends that his fines and fees order must be amended. He argues that he is entitled to have \$15 in presentencing monetary credit applied against one of his fines, and that two fees must be vacated.

¶ 39 Defendant acknowledges that he did not preserve this issue for appeal because he did not challenge the assessments in the trial court. It is well settled that 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. *Hillier*, 237 Ill. 2d at 544. He argues, however, that this court may modify the fines and fees order pursuant to our authority under Illinois Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999). Defendant also asserts that he may request the *per diem* monetary credit at any time. In addition, he urges this court to review his request to vacate the two fees under the second prong of the plain error doctrine. The State does not argue against the forfeiture, but instead, addresses the merits of the issue and agrees that this court may correct the fines and fees order pursuant to Rule 615(b)(1).

¶ 40 We agree that defendant may request the *per diem* monetary credit at any time. *People v. Caballero*, 228 Ill. 2d 79, 82 (2008). We disagree, however, that defendant's challenge to vacate two fees is reviewable under the plain error doctrine. *People v. Grigorov*, 2017 IL App (1st) 143274, ¶ 15; *People v. Griffin*, 2017 IL App (1st) 143800, ¶ 9. We further disagree that we can reach the merits of defendant's claim under Rule 615(b). *Grigorov*, 2017 IL App (1st) 143274, ¶¶ 13-14. However, the rules of forfeiture and waiver also apply to the State, and where the State

fails to argue that defendant has forfeited the issue, it waives the forfeiture. *People v. Bridgeforth*, 2017 IL App (1st) 143637, ¶ 46. Here, the State has not argued that the issue is forfeited, and thus, we address the merits of defendant's claims.

¶ 41 First, the parties agree that defendant is due full credit for the \$15 State Police Operations Fee (705 ILCS 105/27.3a(1.5) (West 2012)). Both parties point out that, although this charge is labeled a fee, this court previously held that it is a fine because it does not compensate the State for expenses incurred in the prosecution of defendant, and thus, it is subject to offset by the monetary sentencing credit. *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 31. We direct the clerk of the circuit court to amend the fines, fees and costs order to reflect a \$15 credit for the State Police Operations Fee.

¶ 42 Next, the parties agree, and we concur, that the \$5 Electronic Citation Fee assessed pursuant to section 27.3e of the Clerks of Courts Act (705 ILCS 105/27.3e (West 2012)) must be vacated as that fee only applies to traffic, misdemeanor, municipal ordinance and conservation violations, and does not apply to defendant's felony offense. We vacate the \$5 Electronic Citation Fee and direct the clerk of the circuit court to amend the fines, fees and costs order accordingly.

¶ 43 Finally, the parties agree that the \$2 Public Defender Records Automation fee assessed pursuant to section 3-4012 of the Counties Code (Code) (55 ILCS 5/3-4012 (West 2012)) should be vacated because defendant was represented by private counsel, not the public defender, and thus, the fee is inapplicable here. *People v. Taylor*, 2016 IL App (1st) 141251, ¶ 30. We agree and vacate the \$2 Public Defender Records Automation fee. We direct the clerk of the circuit court to further amend the fines, fees and costs order to reflect this modification.

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¶ 44 For these reasons, we vacate the \$5 Electronic Citation Fee and the \$2 Public Defender Records Automation fee from the Fines, Fees and Costs order. We direct the clerk of the circuit court to further amend that order to reflect a credit of \$15 to offset the State Police Operations Fee. We affirm defendant's conviction and sentence in all other respects.

¶ 45 Affirmed as modified.