

2017 IL App (1st) 152832-U

No. 1-15-2832

Order filed November 3, 2017

Sixth Division

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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 MC1 188836
)	
ANGELA COLBERT,)	Honorable
)	Daniel J. Gallagher,
Defendant-Appellant.)	Judge, presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm defendant's conviction for battery because the trial court committed no error and, therefore, she forfeited her claim that the trial court, during its oral pronouncement of her guilt, improperly shifted the burden of proof.

¶ 2 Following a bench trial, Angela Colbert was convicted of battery (720 ILCS 5/12-3(a)(2) (West 2014)) and sentenced to 12 days' imprisonment, one day in the Sheriff's Work Alternative Program (SWAP), and a mental health evaluation. Defendant appeals, arguing that the trial court denied her a fair trial by failing to hold the State to its burden of proof. We affirm.

¶ 3 Defendant was charged with one count of battery. She waived her right to a jury trial, and on December 11, 2014, the case proceeded to a bench trial.

¶ 4 At trial, Kathleen Alexander, a Chicago Transit Authority (CTA) bus operator, testified that, on February 10, 2014, she was standing in line to report for work at the bus terminal located at 1815 West 74th Street. Defendant was standing behind Alexander and “ranting and raving” about filing a complaint because a bus did not stop for her. Alexander told defendant to let her check in for work and then defendant could file her complaint without Alexander standing in her way. Alexander checked in for work, and, as she turned around to leave the bus terminal, defendant pushed her. Alexander was facing defendant when she was pushed. Defendant used both hands to push Alexander and made contact with her shoulders. The push sent Alexander back a few steps and she felt a “pop” in her left shoulder. The two were immediately separated and the manager took defendant to another room. Alexander filled out an incident report and the police were called. Alexander went to the hospital and was diagnosed with a torn rotator cuff.

¶ 5 On cross-examination, Alexander acknowledged that the incident report she filled out on the day of the altercation stated that she was pushed from behind rather than while she was facing defendant as she had related during her testimony. Alexander also acknowledged that she did not tell the police officer that she was injured. Alexander admitted that she did not provide the State’s Attorney with evidence to corroborate her injury.

¶ 6 Chicago police officer Schwarzer testified that, on February 10, 2014, he responded to an incident at the CTA bus depot. Officer Schwarzer spoke with Alexander, who told him that she had been pushed by defendant. Alexander told Schwarzer that defendant had used only one hand

to push her in her front shoulder. Schwarzer asked Alexander if she was injured and needed medical help. Alexander replied that she was not injured.

¶ 7 Defendant testified that, on February 10, 2014, she was waiting at a bus stop at 74th Street and Ashland Avenue when a CTA bus drove passed without stopping to pick her up. Defendant went to the nearby CTA bus terminal, located at 1815 West 74th Street, to lodge a complaint. Defendant was standing in line at the service window with a few other individuals. Defendant could not recall if Alexander was one of the people waiting in the line. As she waited, the bus terminal became loud because people were talking. A man exited the nearby office and asked if he could assist her. She told him that she wanted to file a complaint. He took her into his office. She spoke with him regarding her complaint, but he did not write anything down. As defendant spoke to the man, the police entered the office and arrested her. She had no idea why the police were arresting her and initially assumed that she was being removed because there was some sort of emergency. Defendant insists that she did not see Alexander at the terminal, did not speak to Alexander at the terminal, and did not push Alexander at the terminal.

¶ 8 During closing arguments, the State maintained that Alexander testified credibly and that her testimony established that defendant had committed the charged battery. Defense counsel argued that Alexander's story was incredible and that she was successfully impeached regarding her inconsistent stories as to where she was pushed, how many hands defendant had used, and whether she was injured. Counsel insisted that defendant's testimony was not contradicted.

¶ 9 The trial court found defendant guilty of battery. In announcing its decision, the court explained:

“I’ve got one person [Alexander] who says that she’s waiting in line to check in so she could start her shift and that this woman, [defendant], is ranting and raving and after she checked in she turned and [defendant] shoved her, pushed her in the shoulders.

I’ve got [defendant] saying she never met this woman, she didn’t touch her, she wasn’t ranting and raving. She was in a room making a complaint separately.

What is relevant? [Defendant] is not charged with great bodily harm. You guys make all kinds of a big to do about whether or not there’s a torn rotator cuff. It’s not relevant. The only issue is whether [Alexander] was pushed. I find that she is pushed.

Finding of guilty. I don’t find anything that the defendant said – when the defense said that the complaining witness’s statements were self-serving, that was [al]so applicable to [defendant’s] testimony. Everything she said was completely self-serving. I didn’t believe one word. I find her credibility to be less than zero.”

¶ 10 Immediately after finding her guilty, the court proceeded to sentencing. The court sentenced defendant to 12 days’ imprisonment, 20 days of SWAP, and a mental health evaluation. The trial court denied defendant’s motion for a new trial. The court granted, in part, defendant’s motion to reconsider sentence and reduced defendant’s SWAP to one day.

¶ 11 On appeal, defendant contends that the trial court improperly shifted the burden of proof because, in finding her guilty, its oral pronouncement focused exclusively on her credibility and did not mention the credibility of the State’s witness.

¶ 12 In setting forth this argument, defendant acknowledges that she has forfeited her burden-shifting argument on appeal by failing to raise the issue in the trial court. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (explaining that both a trial objection and a written posttrial motion

raising the issues are required in order to preserve the issue for review on appeal). Defendant argues, however, that the trial court's alleged error in allocating the burden of proof satisfies either prong of the plain-error doctrine and, therefore, we may review the issue. See Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967).

¶ 13 Under the plain error doctrine, a reviewing court may consider unpreserved error when “(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 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. Sargent*, 239 Ill. 2d 166, 189 (2010). However, before considering whether the plain error exception to the rule of forfeiture applies, a reviewing court conducting plain-error analysis must first determine whether an error occurred, as “without reversible error, there can be no plain error.” *People v. McGee*, 398 Ill. App. 3d 789, 794 (2010). Here, we find no error.

¶ 14 Due process requires that the State bear the burden of proving beyond a reasonable doubt all of the elements of the charged offense. *People v. Howery*, 178 Ill. 2d 1, 32 (1997). The defendant is presumed innocent and, thus, does not have to prove her innocence, testify, or present any evidence. *People v. Cameron*, 2012 IL App (3d) 110020, ¶ 27. Rather, for the duration of the trial, the burden remains with the State and never shifts to the accused. *Howery*, 178 Ill. 2d at 32 (citing *Mullaney v. Wilbur*, 421 U.S. 684, 701 (1975)). The trial court is presumed to know, and properly apply, the law regarding burden of proof. *Howery*, 178 Ill. 2d at 32; *Cameron*, 2012 IL App (3d) 110020, ¶ 28. When the record shows that there is strong

affirmative evidence to the contrary, however, that presumption may be rebutted. *Howery*, 178 Ill. 2d at 32. On review, therefore, our question is whether the record indicates strong affirmative evidence that the trial court improperly allocated the burden of proof to defendant.

¶ 15 After reviewing the record, we find no evidence that the trial court erroneously diluted the State's burden of proof or shifted the burden of proof to defendant. The record shows that, in announcing its finding, the trial court summarized the testimony of both eyewitnesses and assessed their credibility. See *People v. Hutchinson*, 2013 IL App (1st) 102332 ¶ 27 (the trier of fact is responsible for assessing the credibility of the witnesses, weighing the testimony, and drawing reasonable inferences from the evidence). In doing so, the court specifically noted defense counsel's attack on Alexander's credibility during closing arguments. The court then pointed out that counsel's allegation that Alexander's answers were "self-serving" was equally applicable to defendant's testimony and found her testimony incredible. The trial court did not err in commenting on defendant's credibility and the alleged comments do not, on their own, constitute strong affirmative evidence that the court misapplied the burden of proof. See *Cameron*, 2012 IL App (3d) 110020, ¶ 28 (citing *Howery*, 178 Ill. 2d at 35) ("The trial court's efforts to test, support, or sustain the defense's theories cannot be viewed as improperly diluting the State's burden of proof or improperly shifting that burden to the defendant.").

¶ 16 In reaching this conclusion, we are not persuaded by defendant's reliance on *People v. Kluxdal*, 225 Ill. App. 3d 217 (1991). Here, unlike in *Kluxdal*, the trial court, in announcing its ruling, did not repeat the wrong burden of proof multiple times and this court is not "uncertain that the proper burden of proof was applied to the evidence ***." *Kluxdal*, 225 Ill. App. 3d at 224. Rather, as mentioned, the trial court's comments in this case were merely an assessment of

the credibility of the witnesses. Therefore, because the trial court did not commit any error, defendant's claim is forfeited. *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 63.

¶ 17 Having found that the court did not err, we necessarily reject defendant's claim that her counsel was ineffective for failing to raise the issue of the court's alleged improper shifting of the burden of proof. As mentioned, defendant has not shown that the trial court improperly shifted the burden of proof. Accordingly, defendant cannot succeed on her ineffective assistance of counsel claim because she cannot show that she was prejudiced by counsel's failure to object to the trial court's alleged shifting of the burden of proof. See *Strickland*, 466 U.S. 668, 687 (1984) (holding that a defendant must show, both, that counsel's performance was deficient and that the deficient performance prejudiced the defendant).

¶ 18 For these reasons, we affirm the judgment of the circuit court of Cook County.

¶ 19 Affirmed.