2017 IL App (3d) 150473-U

Order filed December 20, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 21st Judicial Circuit, Iroquois County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal Nos. 3-15-0473, 3-15-0474, 3-15-0475
v.	)	Circuit Nos. 09-CF-200, 11-CF-15, 12-CF-170
	)	
KEITH J. WALESA,	)	Honorable Gordon L. Lustfeldt,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices O'Brien and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: The extent and nature of the circuit court's questioning of defense witnesses effectively turned the court into an advocate for the prosecution, depriving defendant of his due process right to be tried before a disinterested and impartial trier of fact.

¶ 2 Defendant, Keith J. Walesa, appeals from his conviction for escape and the revocation of his probation for theft and aggravated possession of a stolen vehicle. He argues that the circuit

court undermined the fairness of his combined bench trial and probation revocation hearing when it became an advocate for the State. We reverse and remand.

¶ 3 FACTS

¶ 4 Defendant pled guilty on August 10, 2010, to theft (720 ILCS 5/16-1(a)(1)(A) (West 2008)) and aggravated possession of stolen vehicle (625 ILCS 5/4-103.2(a)(5) (West 2008)). The circuit court sentenced defendant to a term of 48 months' probation, including a condition that defendant spend 28 weekends in the Iroquois County jail.

¶ 5 On March 2, 2011, the State charged defendant by indictment with bringing contraband into a penal institution (720 ILCS 5/31A-1.1(b) (West 2010)). The State also sought to revoke defendant's probation, alleging that, in addition to the contraband charge, defendant failed to appear at the jail on four designated weekends.

¶ 6 The circuit court conducted a bench trial on the contraband charge, which served simultaneously as a hearing on the probation revocation. The court found defendant guilty of bringing contraband into a penal institution; it also found defendant had violated his probation. The court sentenced defendant to remain on his original term of probation, with an additional 30 weekends of jail time included. The court also sentenced defendant to a second, 30-month term of probation on the contraband conviction. Defendant filed a motion to reconsider, citing his wife's failing health and his being her only caregiver. At a hearing on the motion, defendant testified that his wife had been diagnosed with chronic pancreatitis. The court denied the motion on August 20, 2012.

¶ 7 On August 27, 2012, the State filed a second petition to revoke defendant's probation, alleging that defendant had failed to report to the jail on August 24, 2012. Just over two months later, the State also charged defendant by indictment with one count of escape (720 ILCS 5/31-

6(a) (West 2012)),[1] alleging that he had failed to report to the jail on August 24, 2012, as well as the five subsequent weekends. A bench warrant was issued for defendant.

¶ 8 On May 22, 2015, the circuit court held a bench trial on the escape charge, which again served simultaneously as a hearing on revocation of defendant's probation. At the trial, Vincent Fox testified that he was defendant's probation officer. At the outset of Fox's testimony, the court asked a question ensuring that Fox was referencing defendant's most recent court order. Fox testified that defendant failed to report to the jail on August 24, 2012. Further, defendant stopped reporting to probation in January 2013.

¶ 9 Joseph Jaskula testified that he was a day shift supervisor at the Iroquois County jail. Jaskula initially testified that defendant called the jail on the weekend of September 16, 2010, and reported that he would be arriving late. The State clarified that it was asking about August 2012. Jaskula stated that he did not have the reports from that time period with him. After the State refreshed his memory with an incident report, Jaskula testified that defendant was required to report to the jail on August 24, 2012, but failed to do so.

¶ 10 On cross-examination, defense counsel pointed out to Jaskula that his incident report regarding defendant was dated August 27, 2012. Jaskula testified that he did not know if he was working at the jail on August 24. Jaskula stated that the jail kept logs of weekend inmates' calls to the jail, but he did not have those logs with him. He could not recall whether defendant had called the jail that weekend. Jaskula admitted that he did not know if he or another officer had typed up the report of defendant's absence. The report did not indicate whether defendant had

[1]The full title of the escape statute is "Escape; failure to report to a penal institution or to report for periodic imprisonment." 720 ILCS 5/31-6(a) (West 2012). It criminalizes not just actual escape from the confines of a penal institution, but also the failure "to report for periodic imprisonment at any time." *Id*. While it is the latter clause that applies to defendant, we will continue to describe the charge in question simply as "escape."

contacted the jail with a reason for his absence. Jaskula testified: "It could have been word of mouth that he didn't show up. It could have been me working on the 24th when he didn't show up. Maybe I didn't type it till the 27th."

¶ 11 The State did not seek redirect examination, but the court asked a number of questions of Jaskula. During the line of questioning, it was established that Jaskula would not have been at the jail at 10 p.m. on a Friday, when defendant was to report. Jaskula explained that whoever was working at the time, if defendant did not show up, should have "typed [it] up." Jaskula stated that he was not sure why the information was left for him to enter into the computer the following Monday. The following questions ensued:[2]

"THE COURT: So this is like a record?

THE WITNESS: It's a record.

THE COURT: Stuff that you do?

THE WITNESS: That he didn't show up.

THE COURT: Then when you get ready for this hearing at the request of probation, you printed that out on the computer record?

THE WITNESS: *** [W]hen I went and printed these out, these were all records of when he was entered before [in 2010].

THE COURT: Yeah, but there's one here from August 27 of '12. That was in the computer. You printed it out. You signed it, right?

THE WITNESS: I actually typed that report."

[2]Because defendant's primary contention in this appeal turns almost entirely on the trial transcript, we will quote excerpts from the trial at length numerous times.

The court ended its questioning, and, when the parties indicated they had no further questions, told Jaskula he could step down. However, the court then asked two more questions:

"THE COURT: *** You are saying then that based on your records and your knowledge [defendant] did not show up for August 24 weekend and did not call?

THE WITNESS: That's what I typed on August 27th.

THE COURT: Now, based on your position as jail supervisor did he do any weekends in the county jail after August 24?

THE WITNESS: None."

¶ 12 The State rested. Just before the defense called its first witness, the court interjected to ask the State if it would move to admit People's Exhibit No. 1—apparently the August 27 report typed by Jaskula—into evidence.

"THE COURT: Before you start, too, I need to make a reminder. I like to clean up the record. The State never moved to admit People's 1. Are we going to do that?

[THE STATE]: Your honor it is–I mean, this is a police record. I think really the issue is testimony offered by the–offered by the officer.

THE COURT: I am just asking.

[THE STATE]: I don't know that the record itself would come in. I did mark it for identification, but I'm not in a position to move it into evidence at this point."

¶ 13 The defense called defendant's wife, Jeannette Kain, as its first witness. Kain testified that she had been battling an illness since May 2011. She was eventually diagnosed with chronic

pancreatitis. On August 24, 2012, she had a particularly bad bout with the illness. She detailed immense pain, vomiting, and impaired vision that she experienced that weekend. She testified that she went to two hospitals and underwent multiple tests and procedures. Defendant was with her and had to make many decisions for her. She was in the hospital for approximately a week and a half, and remained ill on the subsequent weekends.

¶ 14 Kain testified that she was still sick and was on medication to control her pain. She required constant help at home, for activities such as bathing or going up and down stairs. Defendant helped her with those things. Kain testified that, on average, she entered the hospital every three weeks. Her children were over 18 years old and lived at home with her.

¶ 15 On cross-examination, Kain testified that she needed defendant to accompany her to the hospital "to make my medical decisions for me. I don't have anybody else and he stays in the room with me ***."

¶ 16 On redirect examination, defense counsel asked Kain if her illness had been a concern on August 24, 2012. The court interjected:

> "THE COURT: You say.
>
> [DEFENSE COUNSEL]: Pardon?
>
> THE COURT: You say. He knew when he left here after the sentencing what he had to do. There was a motion to reconsider filed by Mr. Anthony, which I heard, which raised this issue and I denied it and ordered that he serve the sentence. Now, so far nobody has disputed that he didn't do what he was ordered to do so I guess the issue's [*sic*] going to be that her medical condition was so bad that he could not obey the order of the court at any time from August 24th of 2012 through today. All right. Let's get to the issue then."

¶ 17 The defense immediately indicated it had no more questions for Kain. The court, however, announced: "I got a couple questions." The examination proceed as follows:

"THE COURT: *** When were you married to [defendant]?

[KAIN]: June 29, 2010.

THE COURT: And you had children from a prior relationship, right?

[KAIN]: Yes.

THE COURT: And they are all over the age of 18?

[KAIN]: Yes—

THE COURT: Do they live with you?

[KAIN]: Yes.

THE COURT: Now, who is the lady in the back that you are here with today?

[Kain]: Aunt Kathy.

THE COURT: Who?

[KAIN]: Aunt Kathy.

THE COURT: Whose aunt?

[KAIN]: Keith.

THE COURT: Huh?

[KAIN]: Keith, my husband's.

THE COURT: Where does she live?

[KAIN]: In Chicago.

THE COURT: Do you have other family in the area where you live?

[KAIN]: No.

THE COURT: Does he?

[KAIN]: No.

THE COURT: And you live where? In Joliet?

[KAIN]: No, we live in Oak Forest.

THE COURT: So you have family in the city, right?

[KAIN]: That's his family, that's his aunt.

THE COURT: Where is your family?

[KAIN]: I don't have any family.

THE COURT: Okay. Now, all right. Do you work outside the home?

[KAIN]: No, sir, I'm disabled.

THE COURT: Does he work outside the home? [Defendant]?

[KAIN]: Yes, sir.

THE COURT: Where does he work?

[KAIN]: Schneider Trucking.

THE COURT: Doing what?

[KAIN]: Diesel mechanic.

THE COURT: So how is it that he's able to sit with you day in day out all these days when you are in the hospital and still keep a job?

[KAIN]: He had PTO time and his boss was very lenient.

THE COURT: Well, yeah, but then you are not making any money when you are not working either, right?

[KAIN]: I understand that.

THE COURT: Well, how many days do you think you spent in the hospital in August, August 24 of ’12 until December 2014? It sounds to me like maybe 50 or 60 days?

[KAIN]: Yes, sir.

THE COURT: And he took off work every single one and sat there all day long and all night long with you? That’s your sworn testimony?

[KAIN]: Yes, sir.

THE COURT: Well, let me ask you this, what would you do for help if [defendant] fell over dead? Who would take care of you then?

[KAIN]: I don’t know.

THE COURT: Well, I mean, obviously your kids or Aunt Kathy or somebody?

[KAIN]: I wouldn’t depend on my kids. My kids are starting their life. They are young. My oldest that is 2 children—

THE COURT: They are still your kids.

[KAIN]: That’s fine, but they are both—they are in school. They are working.

THE COURT: There’s people their age in Afghanistan, too, ma’am, making life and death decisions.

[KAIN]: Well—

THE COURT: So if you want to tell me that they are not old enough to do it, you and me are just going to have to differ.

[KAIN]: Okay.

THE COURT: Now, you are still treating. How many different doctors do you have?

[KAIN]: I have about 6 different doctors.

THE COURT: And where are most of them located?

[KAIN]: All at UIC.

THE COURT: Pardon me?

[KAIN]: All at UIC.

THE COURT: Okay. Now, there was a warrant out for your husband March of 2013 until November of 2014. That's over 18 months we didn't know where he was. I—where—do you know where he was? Was he with you that whole time?

[KAIN]: Yes.

THE COURT: And it is your testimony then under oath that you were so sick for so long that at no time from August 24 of 2012 through today, 2 and a half years, at no time could [defendant] have served a single day in the Iroquois County Jail? That's what you're telling me?

[KAIN]: Yes, sir, I was sick.

THE COURT: No, that's not my—there is no time he could have done a day in jail because you were so sick? Is that true or false?

[KAIN]: True.

THE COURT: Every single day?

[KAIN]: Yes, sir.

THE COURT: For 2 and a half years whether you were in the hospital or not?

[KAIN]: Yes, sir.

THE COURT: He has to stay home and look after you?

[KAIN]: Yes.

THE COURT: Well, how does he work then, ma'am?

[KAIN]: He goes to work and he comes home.

THE COURT: So during the day you are by yourself anyway?

[KAIN]: I'm half the time sleeping because of the combination of my medication.

THE COURT: Then nobody needs to be there anyway.

[KAIN]: He still has to be home to take care of me to do what I need to do.

THE COURT: All right. All right. Anything else of this witness?"

The court's examination of Kain covers six pages of trial transcript. In comparison, the State's cross-examination covers three.

¶ 18 The defense next called defendant. He testified that around noon on August 24, 2012, he was at work when he received a telephone call from a hospital informing him they were admitting Kain. Defendant wanted to be at the hospital with her. He called his then-attorney, who advised him to call the jail. Defendant called the jail and informed them that he could not report because he had to be with his wife in the hospital. Defendant testified: "[T]hey said okay."

¶ 19 Defendant testified that he was arrested less than a week later. After that, the State moved to revoke his probation. From that point forward, defendant believed his probation to have been revoked, and did not believe he had to continue reporting to the jail or to his probation officer. With respect to the bench warrant, defendant testified that he was simply at home with his wife "stay[ing] out of trouble." No attempt was made to serve the warrant at his home.

¶ 20 Defendant also detailed Kain's illness. He testified that Kain would sometimes be in the hospital for five or six weeks. He described an incident in which he discovered Kain having an allergic reaction to her medication. She was passed out in the bathroom; defendant thought she was dead. The court interjected:

> "THE COURT: Was this before or after August 24?
>
> [DEFENDANT]: This was right after that, sir.
>
> THE COURT: I figured. Go ahead."

Defendant testified that no one else could care for his wife.

¶ 21 On cross-examination and redirect examination, defendant clarified that once the State filed a petition to revoke his probation, he believed his probation had been revoked. Believing his probation revoked, defendant testified that he did not think he needed to continue to report to jail. No one told him otherwise. Defendant recalled seeking a modification of his probation terms based on his wife's health, but did not recall that his motion was denied.

¶ 22 The court then questioned defendant:

> "THE COURT: Well, [defendant], you were here on August 20 of 2012 with Mr. Anthony on a motion to reconsider and you testified you are saying now you don't remember that?
>
> [DEFENDANT]: I remember sitting here talking—

THE COURT: Huh?

[DEFENDANT]: I remember sitting up here, yes, sir.

THE COURT: And I said no and I ordered you to do the sentence, right? Right? I denied your motion to reconsider, said my order stood and you had the weekends to do, right? Starting on August 24.

[DEFENDANT]: That was my original—that was the original.

THE COURT: Yeah. I imposed a sentence of weekends and your attorney filed a motion asking me to reconsider that decision. You came in here on August 20 of 2012 with him, you argued the motion, you testified, I said no and I said defendant to report to jail August 24 by noon [*sic*].

[DEFENDANT]: Right.

THE COURT: And you didn't do it?

[DEFENDANT]: Right.

THE COURT: And you said you thought, well, since I didn't do it they just redo it. What did you think was going to happen if you didn't do the weekends and you thought they were—we were going to do something different with your sentence? What did you think it was going to be when you basically defied the court order? What did you think was going to happen? Well, you are the one, [defendant], that said it. Let me ask you this, who told you you didn't have to do the weekends?

[DEFENDANT]: Nobody.

THE COURT: Nobody. Did you ask your lawyer if you still had to do the weekends?

[DEFENDANT]: No, sir.

THE COURT: Did you ask this court all the times we were here did you ever once say, judge, am I still on probation? Judge, do I still have to do the weekends? Did you ever once do that?

[DEFENDANT]: No, sir, I didn't.

THE COURT: So you cooked this idea up in your mind that because you hadn't done what you were supposed to do now you didn't have to do it, right?

[DEFENDANT]: I didn't cook nothing up, I just—

THE COURT: Well, you said nobody told you that and you didn't ask your lawyer and you didn't ask me so obviously you thought this up in your own mind, right?

[DEFENDANT]: No, I didn't think nothing up—

THE COURT: Well, then where did this come from, this idea that you didn't have to be on probation anymore because you violated probation? Where did that idea come from?

[DEFENDANT]: I wasn't thinking straight, your Honor. I had a lot—

THE COURT: For 2 and a half years you weren't thinking straight.

[DEFENDANT]: Well, I have a lot with my wife.

THE COURT: Well, you manage to show up for work every day when you had to work.

[DEFENDANT]: I go to work—

THE COURT: Well, how is it you were able to go to work, but not able to come here when a court ordered you to do, sir?

[DEFENDANT]: Because I was—

THE COURT: Because you didn't want to.

[DEFENDANT]: No, I didn't ask, it was my bad.

THE COURT: Yeah.

[DEFENDANT]: Apologize for that, sir.

THE COURT: Okay. All right. All right. I don't have anything else."

¶ 23 The court found that defendant had violated his probation and found defendant guilty of escape. The court rejected the necessity defense, finding it implausible that no one other than defendant could care for Kain. At sentencing, the court and parties agreed that the sentences for theft and aggravated possession of a stolen vehicle, bringing contraband into a penal institution, and escape were mandatorily consecutive. The court sentenced defendant to terms of four years, one year, and two years' imprisonment, respectively, for an aggregate total of seven years' imprisonment. No posttrial or postsentencing motions were filed.

¶ 24 ANALYSIS

¶ 25 On appeal, defendant argues that the circuit court deprived him of his due process right to a fair trial where it became an advocate for the prosecution throughout the trial. Conceding that he failed to preserve that issue, defendant requests this court review his argument under the rubric of plain error. Alternatively, defendant argues that the court erred in ordering his sentences for bringing contraband into a penal institution and escape to run consecutively.

¶ 26 The United States Supreme Court has made clear that the due process clause "entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). The Court explained that this requirement

> "preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done' [citation] by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Id.* (quoting *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring)).

"[E]ven if there is no showing of actual bias in the tribunal, [the United States Supreme Court] has held that due process is denied by circumstances that create the likelihood or the appearance of bias." *Peters v. Kiff*, 407 U.S. 493, 502 (1972); see also *Village of Kildeer v. Munyer*, 384 Ill. App. 3d 251, 260 (2008) ("Not only is it important that the trial court avoid explicitly acting as an advocate for the prosecution, it is equally important that the trial court avoid appearing as if it is advocating on behalf of the prosecution."). This right applies in both jury and bench trials. *Peters*, 407 U.S. at 502.

¶ 27 Due process is denied where the trial judge's examination of a witness "depart[s] from his function as a judge to assume the role of an advocate." *People v. Wesley*, 18 Ill. 2d 138, 155 (1959). The propriety of such an examination is largely dependent upon the circumstances of an individual case and rests within the discretion of the circuit court. *Id.* A trial judge may question witnesses "in order to elicit the truth or to bring enlightenment on material issues which seem obscure." *Id.* at 154-55. "It should rarely be extensive and should always be conducted in a fair and impartial manner." *Id.* at 155. A more extensive examination may be justified if the court has reason to believe a witness is being untruthful. *Id.*

¶ 28 While the propriety of a trial judge's examination is dependent on individual circumstances, Illinois appellate courts have developed broad guidelines for determining when

such an examination crosses over into advocacy. In *People v. Jackson*, 409 Ill. App. 3d 631, 648 (2011), for example, the court found that the tone and manner of the trial judge's questions were "more similar to a cross-examining prosecutor than an impartial jurist." *Id.* In finding that the court's examination of the defense witness rendered the defendant's trial fundamentally unfair, the *Jackson* court also cited the fact that "[t]he trial court also constantly interrupted [the witness], contradicting or questioning many of his answers." *Id*. The appellate court also noted that the trial judge's questioning to defense witnesses was not the same in tone or manner to its question of the State's witnesses. *Id*. The court concluded: "The majority of the trial court's questions to [the defense witness] were not to 'elicit truth' or 'to bring enlightenment on material issues which seem obscure,' but rather were argumentative and hostile." *Id*. at 649.

¶ 29 In *People v. Murray*, 194 Ill. App. 3d 653, 659 (1990), the court concluded that the trial judge's examination was not improper. In so finding, the court emphasized what the trial judge had *not* done: "The trial court here did not repeatedly interrogate or lead the witness *** or elicit inadmissible hearsay evidence ***." *Id*. See also *People v. Taylor*, 357 Ill. App. 3d 642, 650 (2005) (noting that the trial judge did not belittle defendant or defense counsel); *Munyer*, 384 Ill. App. 3d at 261 (finding the circuit "created the appearance that it was assisting in the prosecution of the defendant" by admitting evidence without motion from the State.).

¶ 30 We find that the circuit court in the present case abandoned its role as neutral and impartial arbiter and assumed the role of advocate. In doing so, the court deprived defendant of his due process right to be tried before an impartial tribunal. *Jerrico, Inc.*, 446 U.S. at 242.

¶ 31 The circuit court's examinations of both Kain and defendant were nearly identical to a prosecutorial cross-examination and far from the questioning of an impartial jurist. See *Jackson*, 409 Ill. App. 3d at 648. The court's questions were terse, leading, and accompanied by a fair

amount of sarcasm. See *People v. Rega*, 271 Ill. App. 3d 17, 25 (1995). Any reading of the trial transcript shows that that circuit court's apparent goal in questioning Kain and defendant was to paint them into the proverbial corner on points on which the court disagreed, such as the extent of Kain's illness or the ability of others to care for her. The court repeatedly reminded Kain that she was under oath as a way to express its skepticism.

¶ 32 Further, the court interrupted defendant's answers on numerous occasions, failing to let him answer the very questions the court itself had posed. See *Jackson*, 409 Ill. App. 3d at 648. That portion of the trial transcript reads more like the court sternly lecturing defendant than it does the judicial examination of a witness. Relatedly, the court belittled both witnesses. It invoked the war in Afghanistan in implying that Kain was making poor judgments with her children, and accused defendant—in the middle of his testimony—of "cook[ing] this idea up." See *Taylor*, 357 Ill. App. 3d at 650.

¶ 33 Contrasting the circuit court's conduct during defendant's case with that during the State's case strengthens our conclusion. Neither Fox nor Jaskula were submitted to any sort of combative examination. Moreover, the court's examination of Jaskula was plainly an attempt to bolster the State's case. Jaskula admitted that he was not at the jail when defendant was to report, and that he had no firsthand knowledge of whether defendant reported or called in. While Jaskula typed the report showing that defendant had not checked into the jail, he admitted that he did so based on information provided by some unknown person. After generously characterizing the unattributed report as a "record," the court reformulated Jaskula's testimony in asking him: "You are saying then that based on your records and your knowledge [defendant] did not show up for August 24 weekend and did not call?" Even Jaskula did not accept that characterization of his testimony, responding simply with: "That's what I typed on August 27th." Later, the circuit court

suggested the State introduce the report—which, again, was based upon what Jaskula described as "word of mouth"—into evidence, only for the State to tell the court that it could not do so. See *Murray*, 194 Ill. App. 3d at 659.

¶ 34 The State argues that all of the circuit court's questions were "designed to avoid confusion, provide clarification on the necessity defense, and further explore the elements of the offense of escape." The State begins its defense of the circuit court's conduct by pointing out that the court's questioning of Fox and Jaskula were benign and relevant. This point, however, only reinforces our conclusion. The questioning of Fox and Jaskula stands in stark contrast to the combative cross-examination to which the defense witnesses were subjected.

¶ 35 The State also maintains that the court's questioning of Kain and defendant was nothing more than an attempt to "clarify*** the defendant's position." We disagree. The court's badgering of Kain with the same repeated questions did not provide any clarification. The court's personal opinions regarding the war in Afghanistan, the responsibilities of Kain's children, or whether anyone had to be at home with Kain when she was asleep did not elicit any truth. Nor did the court's constant expression of skepticism *during* Kain's testimony clarify any issues:

> "THE COURT: *** I guess the issue's [*sic*] going to be that her medical condition was so bad that he could not obey the order of the court at any time from August 24th of 2012 through today. ***
>
> * * *
>
> THE COURT: And he took off work every single one and sat there all day long and all night long with you? That's your sworn testimony?
>
> * * *

THE COURT: So if you want to tell me that they are not old enough to do it, you and me are just going to have to differ.

* * *

THE COURT: And it is your testimony then under oath that you were so sick for so long that at no time from August 24 of 2012 through today, 2 and a half years, at no time could [defendant] have served a single day in the Iroquois County Jail? That's what you're telling me?"

¶ 36 Similarly, there was no appropriate purpose behind the court's haranguing defendant about why he believed he no longer had to report to jail after missing the first time. Under no circumstances would defendant's mistaken belief have been a viable defense—that is, the reason he came to that belief was simply immaterial. Yet the court submitted defendant to an aggressive cross-examination as to how defendant "cooked this idea up in [his] mind." Indeed, it is difficult to imagine any truth-seeking function where the court cuts off defendant's answers and inserts its own:

"THE COURT: Well, how is it you were able to go to work, but not able to come here when a court ordered you to do, sir?

[DEFENDANT]: Because I was—

THE COURT: Because you didn't want to."

¶ 37 Having found error, we must next consider whether the circuit court's deprivation of defendant's due process right to be tried before an impartial tribunal warrants reversal under the plain error doctrine. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Under the second prong of the plain error test, a defendant may show that an error is so grave that prejudice must be presumed, regardless of how closely balanced the evidence was at trial. *People v. Sebby*, 2017 IL

119445, ¶ 50. Second-prong errors occurs where the error "was so serious it affected the fairness of the trial and challenged the integrity of the judicial process." *Id.*

¶ 38 The due process right to be tried before an impartial and disinterested tribunal is inextricably tied to the fairness of a trial and the integrity of the judicial process. This is especially true when we consider that the Supreme Court has held the mere appearance of fairness to be a part of that right. *Jerrico, Inc.*, 446 U.S. at 242. A court's abandoning of its role as neutral arbiter in favor of the role of advocate plainly impacts the fairness of a trial and challenges the integrity of the judicial process. Accordingly, we find the error reversible under the second prong. See *Jackson*, 409 Ill. App. 3d at 647 (reaching the same conclusion); *Munyer*, 384 Ill. App. 3d at 261 (reaching the same conclusion).

¶ 39 The State argues against reversal under the second prong on the grounds that the "trial was not improperly influenced or prejudiced by the trial judge's questioning." This argument misunderstands the basis of reversal under the second prong. The second prong of plain error does not contemplate a test for actual prejudice. *Sebby*, 2017 IL 119445, ¶ 50 (citing *People v. Herron*, 215 Ill. 2d 167, 193 (2005)). Instead, where the error is of such magnitude, prejudice is presumptive, with no further analysis required.

¶ 40 Similarly, both parties devote significant portions of their briefs to the First District case of *People v. Smith*, 299 Ill. App. 3d 1056 (1998). In that case, the court held that "[i]n a nonjury trial, prejudice is shown when the tenor of the court's questioning indicates the court has prejudged the outcome before hearing all of the evidence." *Id.* at 1063. The parties disagree over whether that standard should be applied. However, that proposition of law is, explicitly, a standard for determining *prejudice*, not for determining error. Because the deprivation of a defendant's right to be tried by an impartial tribunal is an error of such great magnitude,

prejudice is presumed under the second prong of plain error, and any standard for determining *actual* prejudice is inapplicable.

¶ 41 Accordingly, we reverse the circuit court's judgment finding defendant guilty of escape. Because the right to a neutral arbiter applies in probation revocation hearings as well (*Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973)), we also reverse the circuit court's revocation of defendant's probation. We remand the matter so that the State may pursue a new trial and new probation revocation hearing if it so chooses.

¶ 42 CONCLUSION

¶ 43 The judgment of the circuit court of Iroquois County is reversed and remanded with instructions.

¶ 44 Reversed and remanded with instructions.