2017 IL App (4th) 140843-U

NO. 4-14-0843

FILED
January 27, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
MIGUEL CELESTINO CRUZ,	)	No. 13CF1210
Defendant-Appellant.	)	
	)	Honorable
	)	Robert L. Freitag,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Appleton and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant was not denied his right to effective assistance of counsel when his attorney failed to tender the accomplice jury instruction because the witness-informant lacked the intent necessary to be considered an accomplice. Additionally, the trial court appropriately conducted *voir dire* pursuant to Illinois Supreme Court Rule 431(b) (eff. July1, 2012).

¶ 2 In September 2013, a McLean County grand jury returned a bill of indictment charging defendant, Miguel Celestino Cruz, with two counts of unlawful delivery of a controlled substance containing cocaine within 1,000 feet of a church (counts I and III) (720 ILCS 570/407(b)(1) (West 2012)) and unlawful delivery of a controlled substance containing cocaine (count I and IV) stemming from January 2013 (counts I and II) and February 2013 (counts III and IV) police-controlled purchases of cocaine (720 ILCS 570/401(c)(2) (West 2012)).

¶ 3 In May 2014, a jury found defendant guilty on all counts. During an August 2014 hearing, the trial court granted defendant's motion to reconsider his conviction on count I and

vacated it, finding the evidence presented failed to prove the January 2013 controlled purchase took place within 1,000 feet of a church. During the same hearing, the court sentenced defendant to concurrent seven-year terms in prison on counts II and III.

¶ 4 Defendant appeals, arguing (1) he was denied effective assistance of counsel when his attorney failed to tender Illinois Pattern Jury Instruction, Criminal, No. 3.17 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 3.17) concerning accomplice testimony; and (2) the trial court failed to properly conduct *voir dire* pursuant to Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) because it asked the four principles from *People v. Zehr*, 103 Ill. 2d 472, 477, 469 N.E.2d 1062, 1064 (1984), in compound form. We affirm.

¶ 5 I. BACKGROUND

¶ 6 In September 2013, a McLean County grand jury returned a bill of indictment against defendant, alleging he sold cocaine to "source 977," a criminal informant (informant), on January 25, 2013—referred to as "buy one" in the indictment—and February 6, 2013—"buy two." In relation to buy one, he was charged with one count of unlawful delivery of cocaine within 1,000 feet of a church (count I) (720 ILCS 570/407(b)(1) (West 2012)) and unlawful delivery of cocaine (count II) (720 ILCS 570/401(c)(2) (West 2012)). In relation to buy two, he was charged with one count of unlawful delivery of cocaine within 1,000 feet of a church (count III) (720 ILCS 570/407(b)(1) (West 2012)) and unlawful delivery of cocaine (count IV) (720 ILCS 570/401(c)(2) (West 2012)).

¶ 7 Defendant's case went before a jury in January 2014.

¶ 8 A. *Voir Dire*

¶ 9 In conducting *voir dire*, the trial court seated, at one time, 32 prospective jurors. The court directed that 14 prospective jurors be placed in the jury box, while the remaining 18

were placed in the first three rows of the gallery. Thereafter, the court questioned the entire group. During *voir dire,* the trial court informed the venire "there are certain basic propositions of law" it was required to explain. It then stated the following:

> "The [defendant] is presumed to be innocent of all of the charges against him. This presumption of innocence remains with him throughout every stage of the trial and during the jury's deliberations on the verdict. Before the defendant can be convicted, the State must prove the defendant guilty beyond a reasonable doubt. The State has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden remains on the State throughout the case. The defendant is not required to offer any evidence on his own behalf, or to prove his own innocence.
>
> If, during the trial, the defendant should choose not to testify, or if the defense should choose not to present any evidence during the trial, then this choice not to testify or to not present any evidence cannot be held against the defendant in any way in arriving at the jury's verdict."

¶ 10 The trial court then endeavored to confirm the venire's understanding and acceptance of those principles.

> "I would like to ask you kind of a two-part question related to these principles of law. The question is this: I'm going to ask each of you whether you understand the question—these principles

of law. Now, everyone is required to respond to this question, but the way you're going to respond is a little bit different than what we have been doing thus far. What I'm going to do is go row by row, again, ask the question of each row if you understand these propositions of law. I would like you to signify that to me in a very visual manner, kind of with an up-and-down nodding of the head, if you will.

However, if there are any of those propositions you don't understand, or you disagree with any of them, I ask you then to raise your hand, and we can discuss that a little bit further. All right.

So once again, I'm going to ask the two-part question of each row, starting with the front. Do each of the six of you understand and accept these basic propositions of law? I see all affirmative responses and no hands raised in that row. In the back row, do each of the eight of you understand and accept these propositions of law? I see all affirmative responses and no hands raised.

Turning over here, the front row. Do each of the six of you understand and accept these basic responses? I see all affirmative responses and no hands raised. In the middle row, do each of you understand and accept these basic propositions of law? And I see all affirmative responses and no hands raised. Usually I have to

shift for the last row. But do each of the six of you in the back row, do the six of you understand and accept these basic propositions of law? I do see all affirmative responses and no hands raised in the back row."

¶ 11 B. Testimony

¶ 12 After the jury was sworn, the following pertinent facts were adduced from the testimony presented at trial.

¶ 13 1. *Criminal Informant*

¶ 14 The informant testified that in January 2013, Detective Kevin Raisbeck of the Bloomington police department arrested him for selling cocaine and recruited him as an informant. In exchange for the informant's work as an informant, the police provided him cash payments, did not charge him in relation to his arrest, and assisted him in obtaining a work permit to legally stay in the country. At the time of the trial, the informant stated he had bought drugs as an informant three times in total.

¶ 15 The informant, on the day of his arrest, called defendant in Raisbeck's presence and arranged a meeting to purchase cocaine. Defendant told the informant he would try to find cocaine and told the informant to pick him up at his home. Prior to meeting with defendant, Raisbeck searched the informant's person and vehicle for money, drugs, and other contraband. He then provided the informant with buy money for the controlled purchase. The informant picked defendant up and drove to a McDonald's restaurant and parked. The informant gave defendant the buy money. Defendant left the vehicle and returned with cocaine a few minutes later. Defendant asked the informant if he could keep some of the cocaine as payment, which the informant permitted. After driving defendant home, the informant met with Raisbeck and gave

him the cocaine. Raisbeck searched the informant's person and car again.

¶ 16 In February 2013, the informant called defendant and arranged to buy more cocaine. Prior to meeting defendant, the informant met with Raisbeck, who searched the informant and his vehicle. The informant picked defendant up at his home and drove him to a McDonald's parking lot. The informant gave defendant the buy money. Defendant left and returned with cocaine. Defendant asked to keep some of the cocaine as payment, which the informant again permitted. The informant drove defendant home. On the way, defendant asked the informant to stop so he could buy beer. The informant stopped and waited while defendant purchased beer. After the informant dropped defendant off at home, the informant met with Raisbeck and gave him the cocaine.

¶ 17 2. *Todd McClusky*

¶ 18 Officer Todd McClusky testified he was tasked with conducting surveillance of the January and February 2013 controlled purchases. During both transactions, he drove a surveillance van and positioned it between McDonald's and Clobertin Court, an adjacent apartment complex, to give himself a clear view of both areas. During both purchases, he observed the informant's car arrive at McDonald's and saw a passenger exit the vehicle and walk toward Clobertin Court. McClusky identified the passenger as defendant as he walked past the van and got into another car parked at Clobertin Court. Defendant exited the vehicle after a short period and returned to the informant's car. The informant's vehicle then left McDonald's.

¶ 19 3. *Steven Brown*

¶ 20 Detective Steven Brown was assigned to conduct surveillance during the February 2013 controlled purchase. Brown drove to a residence on Rainbow Avenue in anticipation of the informant's arrival. He observed as the informant parked and an individual entered the

informant's vehicle. Brown followed the informant's vehicle from defendant's residence to McDonald's and parked across the street to observe. He saw the passenger exit the vehicle and walk toward Clobertin Court. The passenger returned a few minutes later and the informant's vehicle exited the McDonald's parking lot. The vehicle returned to defendant's residence on Rainbow Avenue and the passenger exited.

¶ 21 4. *Michael Gray*

¶ 22 Sergeant Michael Gray testified regarding both the January and February 2013 controlled purchases. In January 2013, Gray followed the informant's car to defendant's residence on Rainbow Avenue and stopped a couple of blocks away from where the informant parked. He observed the informant's car as it left and travelled to the area of the McDonald's. Gray then continued driving away without stopping. During the February 2013 purchase, Gray again followed the informant's vehicle to the Rainbow Avenue address. He continued to follow the vehicle as it left Rainbow Avenue and headed in the direction of the McDonald's. Before reaching McDonald's, Gray pulled up next to the passenger's side of the informant's vehicle at a stoplight and looked directly at the passenger through the window, whom he recognized as defendant. Gray observed the informant's car turn into the McDonald's parking lot. Gray passed by and continued on.

¶ 23 5. *Kevin Raisbeck*

¶ 24 Detective Kevin Raisbeck testified regarding his interactions with the informant, police protocols involving controlled purchases, and the two controlled purchases involving defendant.

¶ 25 Raisbeck testified that in January 2013, he arrested the informant for selling cocaine. The informant agreed to be an informant for him. The informant communicated with

defendant via text messages and phone calls, asking him questions about drug costs. The informant and defendant arranged to meet later that day. Raisbeck searched the informant's person and vehicle for drugs, money, and other contraband, finding none. Raisbeck gave the informant buy money for the controlled purchase. Raisbeck followed the informant to the Rainbow Avenue address, where he observed someone get into the informant's vehicle. Raisbeck followed them to McDonald's but lost sight until the informant's car exited the parking lot. Raisbeck followed the informant's vehicle back to the Rainbow Avenue address and observed the passenger get out. He and the informant met at another location, where the informant gave Raisbeck the drugs and submitted to another search.

¶ 26 Raisbeck testified that in February 2013, he used the informant to conduct another controlled purchase from defendant. The informant placed a call to defendant and arranged to buy cocaine later that day. Raisbeck searched the informant and his vehicle and gave him buy money. Raisbeck followed the informant to the Rainbow Avenue address, but he kept his car out of sight. After other officers reported the informant and a passenger were headed toward McDonald's, Raisbeck resumed following the informant's vehicle. Raisbeck saw the vehicle turn into the McDonald's entrance and then did not see it again until it left the parking lot. When the informant stopped and his passenger got out and entered a convenience store, Raisbeck observed from across the street. The passenger returned with a bag in his hand. Raisbeck followed the vehicle back to the Rainbow Avenue address. He then met up with the informant, retrieved the cocaine, and searched the informant's person and vehicle.

¶ 27 6. *Defendant*

¶ 28 Defendant testified on his own behalf. According to defendant, in January 2013, the informant contacted him about buying cocaine. The informant told defendant to call

defendant's source and the informant would give defendant a ride to go pick up the cocaine from the source. Defendant picked the drugs up from his source at Clobertin Court and brought the drugs back to the informant's vehicle. They left the McDonald's parking lot and returned to defendant's home on Rainbow Avenue. At no point, according to defendant, did he give the informant any of the drugs he purchased.

¶ 29 Defendant testified, in February 2013, the informant called him again. The informant picked him up from his home on Rainbow Avenue and drove him to the McDonald's parking lot. Defendant left the car, retrieved the cocaine from his source at Clobertin Court, and returned to the informant's vehicle. In the car, the informant pulled a scale from under his seat and began weighing some cocaine of his own. The informant gave defendant some of his cocaine, telling him he could pay later. The informant returned defendant to his home. Defendant stated while he was a drug user, he did not sell drugs.

¶ 30 C. Verdict and Posttrial

¶ 31 Following closing arguments, the jury found defendant guilty on all four counts of the indictment. During an August 2014 hearing, the trial court granted defendant's motion to reconsider the conviction on count I and vacated it, finding the evidence presented failed to prove the January 2013 controlled purchase took place within 1,000 feet of a church. During the same hearing, the court sentenced defendant to concurrent seven-year terms in prison on counts II and III.

¶ 32 This appeal followed.

¶ 33 II. ANALYSIS

¶ 34 Defendant appeals, arguing (1) he was denied his right to the effective assistance of trial counsel when his attorney failed to tender IPI Criminal 4th No. 3.17 concerning

accomplice testimony; and (2) the trial court failed to conduct *voir dire* appropriately pursuant to Rule 431(b), because it inquired about the four *Zehr* principles in compound form. We affirm.

¶ 35 A. Ineffective Assistance of Counsel

¶ 36 Defendant first argues he was denied his right to the effective assistance of trial counsel when his attorney failed to tender IPI Criminal 4th No. 3.17, the accomplice witness jury instruction. The State argues trial counsel did not err by not requesting IPI Criminal 4th No. 3.17 because the informant did not participate in the crime, either as a principal or under a theory of accountability.

¶ 37 We note claims of ineffective assistance of counsel are generally better addressed in postconviction proceedings. *People v. Kunze*, 193 Ill. App. 3d 708, 725-26, 550 N.E.2d 284, 296 (1990). ("Where, as here, consideration of matters outside of the record is required in order to adjudicate the issues presented for review, the defendant's contentions are more appropriately addressed in proceedings on a petition for post-conviction relief."). Here, however, the ineffectiveness alleged does not require consideration of information outside the record. Therefore, we address whether defendant's trial counsel was ineffective for failing to tender IPI Criminal 4th No. 3.17.

¶ 38 Whether counsel provided ineffective assistance is a mixed question of fact and law. *Strickland v. Washington*, 466 U.S. 668, 698 (1984). Therefore, we defer to the trial court's findings of fact, but we make an independent judgment about the ultimate legal issue. *People v. Crane*, 195 Ill. 2d 42, 51, 743 N.E.2d 555, 562 (2001). We review *de novo* whether counsel's omission supports an ineffective assistance claim. *People v. Daniels*, 187 Ill. 2d 301, 307, 718 N.E.2d 149, 155 (1999).

¶ 39 The purpose of the effective assistance guarantee of the sixth amendment is to

ensure a criminal defendant receives a fair trial. *Strickland*, 466 U.S. at 684. The ultimate focus of the inquiry is on the fundamental fairness of the challenged proceedings. *Id.* at 696. However, there is a strong presumption in favor of the outcome's reliability, so a defendant must show counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686. To do so, the defendant must establish both (1) counsel's performance was deficient; and (2) the deficiency prejudiced the defense. *Id.* at 687; see also *People v. Chandler*, 129 Ill. 2d 233, 242, 543 N.E.2d 1290, 1293 (1989).

¶ 40 Defendant argues counsel's performance in this case was deficient because he failed to tender IPI Criminal 4th No. 3.17, the standard instruction regarding accomplice testimony. It states as follows:

> "When a witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case." Illinois Pattern Jury Instructions, Criminal, No. 3.17 (4th ed. 2000).

¶ 41 The test for determining if a witness constitutes an accomplice, thus making the giving of the accomplice witness instruction appropriate, is " 'whether there is probable cause to believe that [the witness] was guilty either as a principal, or on the theory of accountability.' " *People v. Cobb*, 97 Ill. 2d 465, 476, 455 N.E.2d 31, 35 (1983) (quoting *People v. Robinson*, 59 Ill. 2d 184, 191, 319 N.E.2d 772, 776 (1974)). That is, the evidence must show there is probable cause to believe that the witness was not merely present " 'and failed to disapprove of the crime,

but that he participated in the planning or commission of the crime.' " *People v. Kirchner*, 194 Ill. 2d 502, 541, 743 N.E.2d 94, 114 (2000) (quoting *People v. Henderson*, 142 Ill. 2d 258, 315, 568 N.E.2d 1234, 1261 (1990)). An individual's presence at the scene of the crime, knowledge the crime is being committed, close affiliation to the defendant before and after the crime, failing to report the crime, and fleeing from the scene of the crime may be considered in determining whether the individual may be accountable for the crime or shared a common criminal plan or agreement with the principal. *People v. Taylor*, 164 Ill. 2d 131, 140-41, 646 N.E.2d 567, 571 (1995).

¶ 42 The State analogizes the facts in this case with those in *People v. Villanueva*, 46 Ill. App. 3d 826, 361 N.E.2d 357 (1977), in which the Third District rejected the defendant's argument the trial court erred by refusing to give an accomplice instruction since the informant-witness lacked the requisite intent to qualify as an accomplice. *Id.* at 832, 361 N.E.2d at 362. In *Villanueva*, as here, the witness was arrested and agreed to be an informant in exchange for leniency and other considerations. *Id.* at 828, 361 N.E.2d at 359. The witness made calls to the defendant to purchase cocaine and arranged and participated in the purchase of cocaine. *Id.* at 828-29, 361 N.E.2d at 359-60. In *Villanueva* and in this case, the witnesses participated in the drug purchases at the direction of law enforcement.

¶ 43 Defendant contends *Villanueva* is factually distinguishable because the informant did more to promote and facilitate the offense than the witness-informant in *Villanueva*—"especially because there, the defendant delivered the drugs directly to the police officer." We disagree. The court in *Villanueva* did not consider the extent of the facilitation of the witness-informant but made its decision solely on the grounds "[i]t [was] clear from the record that [the witness-informant] did not have common intent with defendant to commit the offense, but rather

had the intent merely to gather evidence against defendant." *Id.* at 832, 361 N.E.2d at 362. Here, as in *Villanueva*, the informant participated in the purchase of cocaine at the direction of law enforcement and for the purpose of gathering evidence against the seller. Accordingly, the informant's cooperation with the police behind the scenes prevented the successful commission of the offense and relieved the informant of accountability for the offense.

¶ 44 Defense counsel, therefore, did not provide deficient representation by not tendering IPI Criminal 4th No. 3.17 regarding accomplice witness testimony.

¶ 45 B. *Voir Dire*

¶ 46 Defendant argues the trial court erred by failing to comply with the mandates of Rule 431(b) by "collapsing the principles [in *Zehr*, 103 Ill. 2d at 477, 469 N.E.2d at 1064], rather than asking about each principle individually." Since we are construing a supreme court rule, our standard of review is *de novo*. *People v. Suarez*, 224 Ill. 2d 37, 41-42, 862 N.E.2d 977, 979 (2007). Defendant concedes he failed to preserve this issue for review but maintains the issue may be addressed by this court as it constitutes plain error.

¶ 47 Under the plain-error doctrine, a reviewing court may consider an unpreserved and otherwise forfeited error when (1) "the evidence in the case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence; or (2) where the error is so serious that the defendant was denied a substantial right, and thus a fair trial." *People v. McLaurin*, 235 Ill. 2d 478, 489, 922 N.E.2d 344, 351 (2009). However, before we consider applying the plain-error doctrine to the case at bar, we must determine whether the trial court erred in its application of Rule 431(b).

¶ 48 In *Zehr*, the supreme court held a trial court erred during *voir dire* when it failed to ensure jurors understood four principles now memorialized in Supreme Court Rule 431(b)

(eff. July 1, 2012), which states the following:

> "The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that if a defendant does not testify it cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's decision not to testify when the defendant objects.
>
> The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." Ill. S. Ct. R. 431(b) (eff. July 1, 2012).

¶ 49 This court's decision in *People v. Willhite,* 399 Ill. App. 3d 1191, 1193-97, 927 N.E.2d 1265, 1267-70 (2010), considered a question similar to the one here and concluded the trial court did not err when it recited the four *Zehr* principles in compound form and asked whether the jurors (1) understood the principles and (2) accepted the principles.

¶ 50 Defendant concedes *Willhite* is on point but requests that this court "re-examine the *Willhite* [decision], which preceded the Illinois Supreme Court's decision in [*People v.*] *Thompson*, [238 Ill. 2d 598, 939 N.E.2d 403 (2010)]." We find the supreme court's decision in *Thompson* to be distinguishable and otherwise consistent with this court's decision in *Willhite.* In

Thompson, the supreme court examined the question of whether the trial court must ask the venire if it both understands and accepts each *Zehr* principle. The supreme court found the trial court erred in its application of Rule 431(b) when it failed to ask the venire whether it accepted and understood all of the *Zehr* principles. *Thompson*, 238 Ill. 2d at 607, 939 N.E.2d at 410. In *Willhite*, this court considered the question of whether a trial court may inform the venire of the *Zehr* principles in compound form or must present one principle at a time and ask the venire if they understand and accept each one separately. This court found the trial court had not erred in its application of Rule 431(b) when it recited the *Zehr* principles in compound form and asked for a group response regarding whether the venire understood and agreed with the principles. Therefore, while both *Willhite* and *Thompson* interpret Rule 431(b), the decisions do not address identical issues and are not otherwise inconsistent.

¶ 51 Accordingly, the trial court committed no error in reciting the four *Zehr* principles to the venire and inquiring about its understanding and acceptance of those principles as a group. Therefore, in the absence of any error, we need not consider defendant's contention under plain-error analysis.

¶ 52 III. CONCLUSION

¶ 53 For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 54 Affirmed.