2018 IL App (1st) 151034-U
No. 1-15-1034
March 27, 2018

SECOND DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. PATRICK HARBIN, Defendant-Appellant.	Appeal from the Circuit Court Of Cook County. No. 13 CR 18693 The Honorable Maura Slattery Boyle, Judge Presiding.

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.
Justice Pucinski and Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: In a case with closely balanced evidence, the trial court committed plain error by failing to ask members of the venire whether they understood and accepted the principle that they must not treat the defendant's decision not to testify as a reason for finding him guilty.

¶ 2 A jury found Patrick Harbin guilty of armed robbery, aggravated vehicular hijacking, and possession of a stolen motor vehicle. Harbin argues that the trial court committed plain error when it failed to question members of the venire as to whether they understood and accepted the principle that they must not hold Harbin's decision not to testify as grounds for finding

him guilty. Because we find the evidence closely balanced, largely dependent on the testimony of a single eyewitness, we find that Harbin has sufficiently shown that the trial court's error affected the fairness of the trial. Accordingly, we reverse the convictions and remand for a new trial.

¶ 3 BACKGROUND

¶ 4 As Deon Gardiner-Smith drove on the near north side of Chicago at around 2 a.m. on September 9, 2013, he saw Marissa Cashion walking towards her car. He stopped to talk to her. A black man in a hoodie came up to Gardiner-Smith's car. The man in the hoodie pointed a gun at Gardiner-Smith and said, "get the f--- out." Gardiner-Smith got out of his car. Two men got in and drove off. Cashion let Gardiner-Smith use her phone to call police. Gardiner-Smith described the man who stole the car as about 6 feet tall and 185 to 200 pounds, with a short nose, a mustache and a beard.

¶ 5 On September 16, 2013, Officer Joe Bemis of the Chicago Police Department saw Gardiner-Smith's car, still bearing its original license plates, in a driveway on South Perry Avenue. Officer Bemis, sitting in an undercover police car, saw Harbin enter the passenger side of Gardiner-Smith's car and come back out. Officer Bemis arrested Harbin, who stood about 5 feet 6 inches tall, weighed 165 pounds, and had a mustache and a beard. Police never found the keys to the car.

¶ 6 Gardiner-Smith viewed a lineup on September 16, 2013. He identified Harbin as the man who pointed a gun at him and stole his car. Prosecutors charged Harbin with armed robbery, aggravated vehicular hijacking, and possession of a stolen motor vehicle.

¶ 7 Before trial, Harbin filed a motion to bar the prosecution from using Harbin's prior convictions to impeach him if he testified. The trial court held that if Harbin testified, the State could impeach him by presenting evidence of his prior conviction for aggravated battery. Harbin chose not to testify.

¶ 8 The trial court asked the members of the venire whether they understood and accepted that "a person accused of a crime is presumed to be innocent of the charge against him or her;" that the presumption "is not overcome unless from all the evidence you believe that the State proved him guilty beyond a reasonable doubt;" that "Mr. Harbin does not have to prove his innocence;" and that "Mr. Harbin does not have to present any evidence on his own behalf." Defense counsel did not object to the questioning, and the parties did not bring to the court's attention the lack of any question concerning the effect of Harbin's decision not to testify.

¶ 9 At trial, Gardiner-Smith identified Harbin in court as the man who pointed a gun at Gardiner-Smith and stole Gardiner-Smith's car. Bright street lights illuminated the area where the robbery took place. Defense counsel attempted to undercut the identification by presenting evidence of the circumstances of the robbery. Gardiner-Smith admitted that in 2013 he worked during the day as a paralegal and some nights he worked promoting parties in nightclubs. He promoted a party that started on September 8 and ended on September 9, shortly before the robbery. In the course of his work at the party, he had two alcoholic drinks.

¶ 10 Defense counsel also elicited some inconsistencies in Gardiner-Smith's accounts of the robbery. Gardiner-Smith testified that he rolled down his car window to talk to Cashion. He

did not see the second man who entered the car with the robber before the robber got into the car to drive off. Gardiner-Smith said he described the second man to police only as a black man wearing a hoodie and blue jeans. Gardiner-Smith testified that he did not say to police that he had stopped to drop off a friend and he did not say to police that he walked with Cashion before the robbery.

¶ 11 Cashion corroborated Gardiner-Smith's account of their meeting on the street. Although Cashion heard the robbery, she only saw the robber's back and could not identify him.

¶ 12 Police officers testified that Gardiner-Smith told them he dropped off a friend, then he got out to walk on the street with Cashion before he got back into his car. He said he saw two men approach his car, the robber and a second man who stayed on the passenger side of the car. Gardiner-Smith described the second man as a black man who stood about 6 feet tall and weighed about 185 to 200 pounds.

¶ 13 An officer testified that he checked Gardiner-Smith's car for fingerprints and found no useful evidence. The detective who conducted the lineup admitted that he knew which person in the lineup Bemis brought to the station as the suspect.

¶ 14 Harbin's mother, Gerdie Thomas, testified that three of her children lived in the building on South Perry where Bemis saw Gardiner-Smith's car. A different family lived in the basement apartment. Although Harbin had lived in the building on South Perry briefly in 2010, at the time of the offense Harbin lived with Thomas on a different street, some distance away. Harbin went to the house on South Perry on September 16, 2013, and Thomas drove there later to pick him up. She noticed the unfamiliar car in the driveway. She asked Harbin who owned the car. Harbin opened the passenger door to the car, then came back to

Thomas's car and told her he did not know who owned that car. Harbin "had a girl in the house," so he did not leave with Thomas. When Thomas returned 30 minutes later, she saw Harbin getting into a police car, under arrest.

¶ 15 Defense counsel did not request a jury instruction on the effect of prior statements on the credibility of a witness.

¶ 16 The jury found Harbin guilty as charged. The trial court sentenced Harbin to 22 years in prison for armed robbery, 22 years for aggravated vehicular hijacking, and 7 years for possessing a stolen motor vehicle, with the sentences to run concurrently. Harbin now appeals.

¶ 17 ANALYSIS

¶ 18 Harbin argues that three errors made his trial unfair. First, the trial court should have asked whether members of the venire understood and accepted the principle that they must not hold Harbin's decision not to testify against him. Second, defense counsel should have requested the pattern instruction on impeachment with prior inconsistent statements. Third, defense counsel should have presented expert testimony on the reliability of eyewitness identification testimony. Harbin admits that his trial counsel failed to preserve the issues for appeal. He asks us to address the issues either as plain error or under the rubric of ineffective assistance of counsel.

¶ 19 Admonishments

¶ 20 Supreme Court Rule 431(b) directs the trial court to ask all members of the venire whether they understand and accept the principle that if the defendant chooses not to testify, they must not hold that decision against him. Ill. S. Ct. R. 431(b) (eff. July 1, 2012); *People*

v. Wilmington, 2013 IL 112938, ¶ 32. The trial court here erred by failing to ask this question. *Wilmington*, 2013 IL 112938, ¶ 32. To show plain error despite counsel's failure to object, Harbin must show that "the evidence was so closely balanced the error alone severely threatened to tip the scales of justice." *People v. Sebby*, 2017 IL 119445, ¶ 51.

¶ 21 Here, Harbin did not testify and presented no alibi evidence. Only Gardiner-Smith identified Harbin as the robber, and Gardiner-Smith, who worked two jobs, saw the robber only briefly, late at night, after he had drunk some alcohol. A trier of fact could find Gardiner-Smith's memory of the incident unreliable. Several police officers testified that Gardiner-Smith made prior statements that conflicted in several particulars with his trial testimony, casting further doubt on the reliability of his memory. Apart from Gardiner-Smith's identification testimony, only Bemis's testimony that he saw Harbin get into the passenger side of the car connected Harbin to the crime. Harbin's mother explained why he entered the car. Thus, the State's case rested largely on the impeached identification testimony of a single eyewitness.

¶ 22 The Supreme Court of New Jersey extensively reviewed scientific evidence on the reliability of eyewitness identification testimony in *State v. Henderson*, 27 A.3d 872 (2011). The research uncovered many problems with overreliance on eyewitness identification testimony. "Empirical evidence reveals eyewitness identification to be 'the single greatest cause of wrongful convictions in this country.' " *People v. Starks*, 2014 IL App (1st) 121169, ¶ 85 (Hyman, J., specially concurring) *quoting Perry v. New Hampshire*, 565 U.S. 228, 263 (2012) (Sotomayor, J., dissenting).

¶ 23 Here, the specific circumstances of the identification gave the trier of fact some grounds for doubting Gardiner-Smith. Apart from the conflicts between Gardiner-Smith's recollection of what he said to police immediately after the crime and the testimony of officers, the jury could find the identification unreliable because Gardiner-Smith described the robber as a man significantly larger than Harbin. Gardiner-Smith said he stood outside his car and looked Harbin in the face from only a few feet away. Because Gardiner-Smith stands six inches taller than Harbin, one would expect him to notice the height difference. Also, defense counsel presented evidence that the officer who conducted the lineup, where Gardiner-Smith first identified Harbin as the robber, knew which person in the lineup Bemis had arrested as the primary suspect. As the *Henderson* court said, "a non-blind lineup procedure can affect the reliability of a lineup because even the best-intentioned, non-blind administrator can act in a way that inadvertently sways an eyewitness trying to identify a suspect." *Henderson*, 27 A.3d at 897.

¶ 24 During oral argument, the State argued that the evidence cannot count as closely balanced, because Harbin presented no alibi evidence and no witness directly contradicted Gardner-Smith's identification testimony. The defendant in *People v. Piatkowski*, 225 Ill. 2d 551 (2007), similarly presented no alibi and no evidence to directly contradict identification testimony. Our supreme court found the evidence in *Piatkowski* closely balanced. We apply the general principles stated in *People v. Sebby*, 2017 IL 119445: “In determining whether the evidence adduced at trial was close, a reviewing court must evaluate the totality of the evidence and conduct a qualitative, commonsense assessment of it within context of the case. *** [The] inquiry involves an assessment of the evidence on the elements of the charged

offense or offenses, along with any evidence regarding the witness' credibility." *Sebby*, 2017 IL 119445, ¶ 53. We find that the problems with Gardiner-Smith's identification testimony show that the evidence in this case was closely balanced.

¶ 25 The trial court's error had especially prejudicial effect. The court failed to ask the venire members whether they understood and accepted the principle that they must not treat Harbin's failure to testify as a reason to find him guilty. Justice McDade's thoughtful observations about Supreme Court Rule 431(b) merit repetition:

> "[T]o potential jurors drawn from a pool of persons unfamiliar with trial procedures, [the Rule 431(b) principles] are inherently counter-intuitive.
>
> What do you mean, we have to presume the defendant is innocent? *** [A]ren't we here because all of these professionals believe he is guilty?
>
> ***
>
> If your story is true, you want to tell it so everyone will know you are telling the truth. If he won't get on the stand and tell his story under oath, he must be lying." *People v. Alexander*, 396 Ill. App. 3d 563, 585 (2009) (McDade, concurring in part, dissenting in part) *vacated* 239 Ill. 2d 556 (2011).

¶ 26 Here, the jurors may have wanted to know how Gardiner-Smith's car arrived at the driveway of a home where members of Harbin's family lived. Pretrial proceedings indicate that Harbin seriously considered testifying, but he concluded that the detrimental effect of his prior conviction for aggravated battery would outweigh the benefit of his testimony. Jurors

may well have reasoned that if Harbin had an innocent explanation for the presence of the car in the driveway, he would have told the jurors about it.

¶ 27 In this case, with closely balanced evidence, where the trial court erred when it failed to ask jurors whether they understood and accepted the principle that they must not treat Harbin's failure to testify as a reason to find him guilty, and where jurors may well have thought that Harbin's failure to testify meant he committed the crime, we cannot ignore the trial court's violation of Rule 431 and must reverse Harbin's conviction and remand for a new trial. We need not address the other bases Harbin suggests for ordering a new trial.

¶ 28 CONCLUSION

¶ 29 The trial court erred by not asking the required question concerning the venire members' understanding and acceptance of the principle that they must not count the defendant's failure to testify as grounds for finding him guilty. We find that, with closely balanced evidence, the error severely threatened to tip the balance of the scales of justice against Harbin. We reverse the convictions and remand for a new trial.

¶ 30 Reversed and remanded.