2018 IL App (1st) 152639-U

No. 1-15-2639

Order filed September 19, 2018

Third Division

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. 12 CR 15688
	)	
DEVIN BRADLEY,	)	Honorable
	)	Frank G. Zelezinski,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court. Justices Howse and Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's procedural default must be honored when, although the trial court erred when questioning the venire, the evidence at trial was not closely balanced.

¶ 2 Following a jury trial, defendant Devin Bradley was found guilty of first degree murder and sentenced to 55 years in prison. On appeal, he contends that this cause should be remanded for a new trial because the trial court violated Illinois Supreme Court Rule 431(b) (eff. July 1, 2012), when questioning the venire and the evidence at trial was closely balanced. We affirm.

¶ 3 Defendant's arrest and prosecution arose out of the July 25, 2012, shooting death of the victim, his cousin Oshun Washington.

¶ 4 The evidence at trial established that after defendant borrowed a gun from Tishawn Hunter, he went to Washington's house accompanied by his girlfriend LaParicea Temple and Ivory Williams. Defendant and Williams went inside while Temple stayed in the car. While inside, defendant shot Washington twice, and then took certain firearms, marijuana and jewelry. When defendant and Temple later returned to Temple's home, he told Temple that he shot Washington twice. Defendant left the items he took from Washington at Temple's home. The following day, over the course of two phone calls, defendant instructed Joshua Johnson, Temple's 14-year-old cousin, to dispose of those items. Although defendant testified that it was Williams rather than he who fatally shot Washington, he was convicted of first degree murder.

¶ 5 After swearing in the venire, the trial court stated the four principles enumerated in Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). During the individual questioning of each potential juror, the trial court questioned that person regarding the principles enumerated in Illinois Supreme Court Rule 431(b). The trial court did not ask those questions of the person chosen as alternate juror number 1. When a member of the jury became ill, alternate juror number 1 was placed on the jury. The matter proceeded to trial.

¶ 6 Tishawn Hunter testified in July 2012, he was 17 years old. On July 25, he went to LaParicea Temple's house. Once there, he put his gun under her bed. That evening, defendant asked him for the gun multiple times, so he gave it to defendant. Defendant then left and Hunter went to sleep. About three hours later, defendant returned and gave him the gun. When he gave the gun to defendant there were eight bullets in the clip. There were only six bullets when

defendant returned it. Hunter went home and put the gun in the backyard because he "felt something [was] wrong." The next day, defendant called him and told him to throw the gun in the river. Several days later, Hunter was picked up by police and questioned about the gun. He took them to the gun. During cross-examination, Hunter testified that he bought the gun on the street and that he had lent it to defendant before.

¶ 7 Ivory Williams testified that in July 2012, she was dating Washington. She and defendant's girlfriend, LaParicea Temple, were friends. On the morning of July 25, 2012, she was at Temple's house when Washington came to see defendant. The two men left, but she did not know where they went. That evening, Williams, Temple and defendant went to Washington's house. She believed that defendant went there to buy marijuana. Williams and defendant went inside while Temple stayed in the car.

¶ 8 Once inside, defendant and Washington went into a different room. She could see the men through an open door and heard talking. Defendant was standing behind Washington. Williams then heard a gunshot and Washington crying and telling defendant to "take" whatever he wanted and asking not to be killed. Defendant was holding a gun. As defendant walked past Washington to exit the room, he shot Washington again. Defendant took Washington's wallet and then walked to another room where he began "taking stuff." Defendant took a jewelry box, "some chains," "weed," and two guns. Williams and defendant then left and got into Temple's car. Once inside the car, Temple stated that she heard two gunshots and Williams's scream. Defendant then told Temple to take him to her house. When they arrived at Temple's house, Hunter and defendant "got into it," and defendant gave Hunter a gun. Williams called 911 the next morning, spoke to the police and took officers to Washington's home.

¶ 9 Williams testified that after defendant shot Washington, he did not threaten her or point the gun at her; rather, he went to a different room. At that point, she did not try to leave or call the police. She explained that she did not leave because she did not have a car and was not "100 percent sure" whether defendant would have killed her or not. Williams denied having a gun while in Temple's car and denied shooting Washington. She did not recall defendant telling her the location of Hunter's gun.

¶ 10 Officer Wallace of the Harvey police department testified that he spoke to Williams on the phone on the morning of July 26, 2012. Williams was "extremely upset" and "very hesitant" about sharing her personal details. She stated that she observed defendant shoot Washington, ultimately revealed her name and location, and went with officers to Washington's home.

¶ 11 Joshua Johnson, Temple's cousin, testified that in July 2012 he was 14 years old. On the evening of July 25, 2012, Johnson and defendant were playing a videogame when defendant turned his microphone off and called Clifton Wright, defendant's mother's boyfriend. During the subsequent phone call, Johnson heard defendant say he was "fixing to shoot" Washington. Johnson then heard defendant on the phone with Washington. Defendant said he was going to Washington's home to buy "weed." At one point, defendant, Temple and Williams left the house. When they returned, defendant had a bag of weed. The next day, defendant called Johnson and told him to go to a hamper in a closet, take the guns that were inside and throw them away. Johnson threw the guns into a garbage can in the alley. During a second phone conversation, defendant told him to throw the weed away. Johnson got the weed and a jewelry box and went to throw them away. However, police officers were "out there" so he put the items

in a truck in the garage. When police later came to the house, he showed them where these items were located.

¶ 12 During cross-examination, Johnson testified that while playing a videogame defendant snuck up behind Washington in the game and laughingly said he was going to shoot. During redirect, Johnson agreed that that when he gave a statement on July 26, 2012, he did not say that defendant was sneaking up behind Washington in a game when defendant stated that he was going to shoot Washington.

¶ 13 Assistant medical examiner Marta Helenowski testified that she performed an autopsy on Washington, and that he had two gunshot wounds to the head. One bullet was found between the scalp and the bone, and one was inside the brain cavity.

¶ 14 Defendant testified that Washington was his cousin and that they were very close. On the morning of Washington's death, they ran errands together. That night, he and Temple dropped Williams off at Washington's house so that Williams and Washington could have a sexual encounter. When they arrived, Washington called defendant inside and asked him to come get Williams in an hour so that Williams would be gone when Washington's "baby mama" returned. Defendant then went to the basement to get his phone charger. At this point, Williams was sitting in a chair and Washington was in another room. Defendant was coming upstairs when he heard gunshots. Once upstairs, he observed Williams in the doorway of the office holding a gun with a "nervous shaking in her hand" and Washington on the floor. Williams had Hunter's gun. When defendant asked Williams what happened, she said that if he said anything, she was "going to blame it" on him. Defendant noticed certain items in Williams's hands when they got into the

car. She left these items at Temple's house. Williams also gave defendant Hunter's gun, which he returned to Hunter. He returned the gun because it did not belong to him.

¶ 15 The next day, defendant learned that Temple was in police custody, so he went to his mother's home. Defendant told Johnson to get rid of the guns, weed and the jewelry box that Williams took from Washington's house. He knew that Williams got these items from Washington's house because she was holding them as she left. He denied telling Hunter to throw the gun in the river. Defendant later went to a police station, however, he did not tell police that Williams had a gun or that he heard two shots while he was in the basement. Defendant owned a gun and had a Firearm Owner's Identification Card. He denied asking to borrow Hunter's gun; rather, he put it away because there were children in the house. He told Williams the gun's location. Defendant denied telling Temple that he killed Washington.

¶ 16 During cross-examination, defendant denied saying that he was going to shoot Washington and denied ever borrowing Hunter's gun. He admitted that he gave the gun back to Hunter when he returned from Washington's house, but explained that Williams gave it to him in the car and told him to give it back to Hunter.

¶ 17 Clifton Wright, who was previously in a relationship with defendant's mother, denied having a conversation with defendant in 2012 during which defendant stated that he was going to shoot someone.

¶ 18 In rebuttal, the State presented the testimony of LaParicea Temple. Temple testified that after dropping Williams off, she and defendant went home. There, in her bedroom, defendant told her that he killed Washington by shooting Washington twice. During cross-examination,

Temple testified that she was taken into custody by the police on July 26, 2012, and that she did not make a statement immediately.

¶ 19 During deliberations, the jury requested the transcripts of Williams and defendant's testimony, and asked the court to define "reasonable doubt." The jury also requested the transcript of Temple's testimony, but as the transcbript had not been reduced to writing, the court reporter read Temple's testimony to the jury. Ultimately, the jury found defendant guilty of first degree murder during which he personally discharged a firearm. Defendant was subsequently sentenced to 55 years in prison.

¶ 20 On appeal, defendant argues that the trial court violated Illinois Supreme Court Rule 431(b) (eff. July 1, 2012), when it failed to question alternate juror number 1, who was later placed on the jury, regarding the four principles enumerated in the rule.

¶ 21 Pursuant to Supreme Court Rule 431(b):

> "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 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).

¶ 22 The State correctly argues that defendant has forfeited review of this error because he failed to object during *voir dire* and to raise the issue in his motion for a new trial. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (in order to preserve an issue for appeal, "a trial objection *and* a written post-trial motion raising the issue are required" (Emphasis in original.)). Defendant acknowledges this forfeiture and asks this court to review this issue pursuant to the plain error doctrine.

¶ 23 Pursuant to the plain error doctrine, a court may consider a forfeited error when "(1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). Our supreme court has explained that:

> "[i]n the first instance, the defendant must prove 'prejudicial error.' That is, the defendant must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him. The State, of course, can respond by arguing that the evidence was not closely balanced, but rather strongly weighted against the defendant. In the second instance, the defendant must prove there was plain error and that the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Id*. at 187.

¶ 24 Under a plain error analysis, the defendant bears the burden of persuasion. *People v. Wilmington*, 2013 IL 112938, ¶ 43.

¶ 25 Our review of the record shows that the trial court did not comply with Supreme Court Rule 431(b) when questioning alternate juror number 1, when the court did not question this person pursuant to the rule. Alternate juror number 1 was later placed on the jury after another juror became ill. Accordingly, the record reveals that error occurred. We must therefore determine whether the evidence here was closely balanced such that the error threatened to tip the scales of justice against defendant. See *People v. Thompson*, 238 Ill. 2d 598, 614-15 (2010) (holding that Supreme Court Rule 431(b) errors are usually only subject to first prong plain error analysis).

¶ 26 Because a Rule 431(b) violation is not cognizable under the second prong of the plain error doctrine (*Wilmington*, 2013 IL 112938, ¶ 33), we therefore look only to the closeness of the evidence to determine whether the error severely threatened to tip the scales of justice against defendant (see *People v. Sebby*, 2017 IL 119445, ¶ 51). In determining whether the evidence adduced at trial was closely balanced, we, as a reviewing court, must evaluate the totality of the evidence and conduct a qualitative assessment of it within the context of the case. *Id.* ¶ 53.

¶ 27 In the case at bar, defendant contends that the evidence was closely balanced because the outcome at trial "hinged" on credibility, that is, whether the jury found defendant or Williams more credible. Defendant argues that because he testified that Williams shot Washington and Williams testified that he shot Washington, the outcome of trial depended upon which version of events the jury determined was true. In further support of his argument that the evidence was close, defendant notes that during its deliberations the jury requested the transcripts of Williams and his testimony and asked the court for the definition of reasonable doubt.

¶ 28 Our supreme court has emphasized that "a reviewing court must undertake a commonsense analysis of all the evidence in context when reviewing a claim under the first prong of the plain error doctrine." *People v. Belknap*, 2014 IL 117094, ¶ 50. See also *People v. White*, 2011 IL 109689, ¶ 139 ([a] qualitative—as opposed to strictly quantitative—commonsense assessment of the evidence demonstrates that the evidence was not closely balanced").

¶ 29 A commonsense assessment of the evidence in this case leads us to conclude that the evidence was not closely balanced. At trial, Williams testified that defendant and Washington were in another room where defendant was standing behind Washington. Williams then heard a gunshot and Washington begging for his life. After defendant shot Washington a second time, defendant took Washington's wallet. He then went to another room where he took jewelry, marijuana and two guns. The next day Williams contacted police and took them to Washington's home. Johnson testified that the day after Washington's death, defendant instructed him, over the course of two phone calls, to throw away two guns and marijuana. Hunter testified that defendant asked him multiple times on July 25, 2012 to borrow a gun, that he lent his gun to defendant and that there were two fewer bullets in the gun when defendant returned it. Finally, Temple testified that defendant told her that he killed Washington by shooting Washington twice.

¶ 30 Defendant, however, testified that Williams was the person who shot Washington, that he only returned the gun to Hunter because Williams told him to, and that he was afraid to go to the police because Williams threatened to blame him for the shooting. Defendant further testified that he told Johnson to get rid of the things taken from Washington's home, but denied telling Hunter to get rid of the gun.

¶ 31 On the one hand, the jury heard the testimony of a witness to the shooting and the person to whom defendant admitted that he shot Washington as well as testimony regarding the weapon used and what happened to the items taken from Washington's home. On the other hand, the jury heard defendant testify that it was Williams who shot Washington, that he returned the gun despite knowing that it killed his cousin, and that he orchestrated the disposal of the items Williams took from Washington's house. Contrary to defendant's contention that the outcome of trial was purely based upon a credibility determination between himself and Williams, we note that Temple testified that defendant admitted to her that he shot Washington, and Hunter and Johnson testified as to how defendant obtained the firearm used and attempted to orchestrate the disposal of the firearm and the items taken from Washington's home. Cf. *People v. Naylor,* 229 Ill. 2d 584, 607 (2008) ("Given these opposing versions of events, and the fact that no extrinsic evidence was presented to corroborate or contradict either version, the *** finding of guilty necessarily involved the *** assessment of the credibility of the two officers against that of defendant.").

¶ 32 We are similarly unpersuaded by defendant's argument that the evidence was closely balanced because the jury asked to review the testimony of defendant, Williams and Temple and asked the trial court to define the concept of reasonable doubt as there is no indication in the record that the jury had reached an impasse or that the jurors considered this to be a close case. Rather, the jury appeared to be taking its task seriously. See *Wilmington,* 2013 IL 112938, ¶ 35 ("Careful consideration of the evidence adduced and exhibits admitted is what we expect of jurors in any trial."). There is nothing in the record to indicate that the deliberations in this case "were in any way extraordinary." *Id.*

¶ 33 Ultimately, viewing the entire record, defendant has not established that the evidence was so closely balanced that the guilty verdict in this case resulted from the trial court's error. See *Id.* ¶ 43 (under a plain error analysis, the defendant bears the burden of persuasion). Accordingly, there is no plain error, and defendant's procedural default must be honored. See *Sebby*, 2017 IL 119445, ¶ 69 ("The only question in a first-prong case, once clear error has been established, is whether the evidence is closely balanced.").

¶ 34 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 35 Affirmed.