2018 IL App (1st) 153160-U

No. 1-15-3160

Order filed September 7, 2018

Fifth 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. 15 CR 311
	)	
DEMOUND HAWKINS,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge, Presiding.
	)	
	)	

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Rochford and Justice Reyes concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant waived review of his challenge to the State's chain of custody and the trial court's failure to comply with the *Zehr* principles (*People v. Zehr*, 103 Ill. 2d 472 (1984)) and Illinois Supreme Court Rule 431(b) (Ill. S. Ct. R. 431(b) (May 1, 2007)); defendant failed to satisfy plain error to afford this court review of his claims; fines and fees order is corrected to reflect that the $5 court system and $5 electronic citation fees are vacated and his monetary penalties offset by a credit of $285 for 57 days of pre-sentence custody.

¶ 2 Following a jury trial, defendant Demound Hawkins was convicted of possession of a controlled substance and was sentenced to 15 months' imprisonment. On appeal, defendant contends that: the State failed to establish a sufficiently complete chain of custody; the trial court failed to comply with the requirements of *People v. Zehr*, 103 Ill. 2d 472 (1984) and Rule 431(b) (Ill. S. Ct. R. 431(b) (eff. July 1, 2012)) and his case should be remanded for a new trial; and improperly imposed fees should be vacated and the mittimus corrected to reflect that the fines are offset by his pre-sentence credit. For the following reasons we affirm.

¶ 3 BACKGROUND

¶ 4 Defendant was charged with possession of 1.2 grams of heroin. During jury selection, with respect to the Rule 431(b) admonishments, the trial court addressed the prospective jurors as follows:

> "Under the law, the defendant is presumed to be innocent of the charge against him. This presumption remains with him throughout every stage of the trial and during your deliberations on the verdict and it is not overcome, unless from all the evidence in this case you are convinced beyond a reasonable doubt that the defendant is guilty.
>
> 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 prove his innocence, nor is he required to present any evidence on his own behalf. He may rely upon the presumption of innocence.

* * *

Does anybody have any problems understanding that constitutional principle of being presumed innocent of the charge against you? Please raise your hand in either the outer or inner part of the courtroom.

And nobody has raised their hand.

Does anybody have any qualms or problems applying that constitutional principle, that presumption of innocence, please raise your hand.

And, again, nobody in the inner or outer part of the courtroom has raised their hand.

* * *

Does anybody have any problems understanding the principle of proof beyond a reasonable doubt? Please raise your hand.

And, again, nobody in the outer or inner part of the courtroom has raised their hand.

Does anybody have any problems applying that constitutional principle about reasonable doubt, either in - - or any qualms about applying that constitutional principle? Please raise your hand.

And, again, nobody in the courtroom has raised their hand.

* * *

Does anybody have any problems understanding that constitutional principle [that the State has the burden of proof throughout each and every stage of the trial]? Please raise your hand.

And nobody's raised their hand.

Does anybody have any problems applying that constitutional principle or qualms about applying that constitutional principle? Please raise your hand.

And, again, nobody in the courtroom has raised their hand.

* * *

[I]f [defendant] decides it (sic) testify in his own behalf, you judge his credibility like you would any other witness. Does anybody have any problems understanding that constitutional principle? Please raise your hand.

And, again, nobody's raised their hand.

Does anybody have any problems applying that constitutional principle or qualms about applying that constitutional principle? Please raise your hand.

And again, nobody's raised their hand.

* * *

If [defendant] decides not to testify, no inference whatsoever can be drawn from his silence. Does anybody have any problems understanding

that constitutional principle? Please raise your hand.

And, again, nobody in the courtroom has raised their hand.

Does anybody have any qualms about applying that constitutional principle or problems applying that constitutional principle? Please raise your hand.

And, again, nobody in the courtroom has raised their hand.

Thank you, ladies and gentlemen."

¶ 5 After jury selection, the trial commenced.

¶ 6 Chicago Police Officer Eric Haney testified that he had been a police officer for approximately eight years and had been assigned to the 11th District for five years and was currently a tactical team officer when he testified. On December 5, 2014, he was working patrol with three other officers: Conner, Acevedo and McCarthy. They were in civilian clothes but wearing vests with their stars, service belts and service weapons visible, and they were in an unmarked vehicle. At approximately 1:30 p.m., Officer Haney saw defendant standing on the west sidewalk of Pulaski road near the corner between Van Buren Street and the alley while they were on patrol. Defendant was approximately 200 feet away when the officer first saw him. As the officers got closer, defendant looked at them and began to flee on foot. The officers travelled across oncoming traffic to follow defendant, who ran into a vacant lot just off Pulaski. Officers Haney and Acevedo exited the vehicle and pursued defendant on foot. Defendant ran through the vacant lot and eventually reached the sidewalk on Gladys Street. At this point, Officer Haney was approximately 18 to 20 feet from defendant and Officer Acevedo was approximately 10 feet from defendant. Defendant ran westbound on the sidewalk, and Officer Haney saw their

police vehicle also in pursuit, travelling parallel to them. Defendant ran to another vacant lot, located at approximately 4029 West Gladys Street and subsequently dropped a white item on his left side to the ground from his right hand. Defendant was subsequently detained at the alley near the vacant lot by Officer Acevedo. Officer Haney recovered the item that defendant dropped, which he described as a "Ziplock pack of suspect heroin bound by a black rubber band," approximately 5 to 10 seconds after he saw defendant throw it. Officer Haney identified People's Exhibit Number 1 as the items that defendant dropped, namely six items total, along with the black rubber band. After he recovered the items, they remained in his care, custody and control until he got back to the station. When he got back to the station, Officer Haney put the six items on the processing table, and Officer Acevedo typed up an inventory report. The items were placed in a heat-sealed bag and inventoried under number 133278059. The heat-sealed bag was then put into a safe and its contents subsequently sent to the Illinois State Police Crime Lab for testing.

¶ 7 Officer Conner testified that he was employed as a Chicago police officer for seven years at the 11th District. His testimony concerning their initial sighting and subsequent chase of defendant was substantially similar to Officer Haney's. Officer Conner testified that he drove the police car through the vacant lot where defendant ran and was approximately 10 feet behind him on the right when he saw defendant drop a white "item" across his body to the ground. The "item" was subsequently recovered by Officer Haney. Officer Conner described the "item" as six clear mini Ziplocks with pink panther logos containing a white powdery substance suspected to be heroin, bound by a black rubber band. He identified People's Exhibit Number 1 and stated that to his knowledge, they appeared to be in substantially the same condition as when he last

saw them. He noted, however, that "there was a significant amount more of suspect heroin in those bags,"[1] and that they were sent to the Illinois State Crime Lab for testing.

¶ 8 On cross-examination, Officer Conner indicated that he wrote both reports in this case and that the reports did not indicate that the plastic baggies had pink panther logos.

¶ 9 Debra Bracey testified that she was employed by the Illinois State Police Forensic Science Center as a forensic chemist, and had been so employed since April 1995. She identified People's Exhibit 1 as a bag she received from an evidence technician on December 9, 2014, which contained her initials, the exhibit number, the case number and the date. Bracey compared the inventory number on the bag to the inventory sheet she received, and they matched, as did the descriptions. She opened the bag and weighed the contents, which had a total weight of 1.256 grams. She then performed a color test on the contents, which tested positive for the presence of heroin, and a gas chromatography-mass spectrometry (GC-MS) test, which tested positive for heroin. Bracey stated that she tested four items, with a total weight of 1.256 grams.[2] After testing, she returned the items to the original evidence bag and resealed it.

¶ 10 The State moved to have its exhibits entered into evidence and rested its case. The defense entered its exhibits, consisting of photographs of the vacant lot at 4029 West Gladys Street and 4031 West Gladys Street showing multiple cameras, into evidence and rested its case. An instructions conference was held, after which both sides gave closing arguments. After closing arguments, the jury retired to deliberate and subsequently returned a guilty verdict.

[1] It is unclear whether Officer Conner was referring to the state of the bags when he initially saw them or after the substance was tested.

[2] We note that Bracey testified that the total weight of the items was 1.256 grams and that the four items she tested had a total weight of 1.256 grams.

¶ 11 Defendant filed two post-trial motions, one for a judgment notwithstanding the verdict and for a new trial, both of which were denied by the trial court.

¶ 12 At defendant's sentencing hearing, the trial court heard evidence in aggravation, mitigation and defendant's statement in allocution before sentencing him to 15 months' imprisonment. The court noted that there were fees and fines of $1,224, and defendant had 57 days credit. Defendant's subsequent motion to reconsider sentence was denied, and this timely appeal followed.

¶ 13 ANALYSIS

¶ 14 On appeal, defendant contends that the State failed to establish a sufficiently complete chain of custody to make it improbable that the recovered evidence was subject to tampering or substitution; the court failed to comply with the requirements of *People v. Zehr*, 103 Ill. 2d 472 (1984) and Rule 431(b) (Ill. S. Ct. R. 431(b) (eff. July 1, 2012)) and his case should be remanded for a new trial; and his fines and fees order should be corrected to account for the 57 days he spent in pre-trial custody and improperly imposed fees should be vacated.

¶ 15 A. Chain of Custody

¶ 16 Defendant first contends that the State failed to establish a sufficiently complete chain of custody to make it improbable that the recovered evidence was subject to tampering or substitution because the description of the recovered items did not match the description of the tested items, the chemist did not state the inventory number on the record, and there was evidence of actual tampering or substitution.

¶ 17 In cases involving controlled substances, the rules of evidence require that before the State can introduce results of chemical testing of a purported controlled substance, it must

provide a foundation for its admission by showing the police took reasonable protective measures to ensure that the substances recovered from the defendant was the same substance tested by the forensic chemist. *People v. Alsup*, 241 Ill. 2d 266, 275 (2011). The State bears the burden of establishing a chain of custody that is sufficiently complete to make it improbable that the evidence has been subject to tampering or accidental substitution. *People v. Woods*, 214 Ill. 2d 455, 467 (2005). Unless the defendant produces evidence of actual tampering, substitution or contamination, "a sufficiently complete chain of custody does not require that every person in the chain testify, nor must the State exclude every possibility of tampering or contamination" (*Alsup*, 241 Ill. 2d at 275); the State must demonstrate, however, that reasonable measures were employed to protect the evidence from the time that it was seized and that it was unlikely that the evidence has been altered. *Woods*, 214 Ill. 2d at 467; *People v. Harris*, 352 Ill. App. 3d 63, 68-69 (2004). It is not erroneous to admit evidence even where the chain of custody has a missing link if there was testimony which sufficiently described the condition of evidence when delivered, which matched the description of the evidence when examined. *Alsup*, 241 Ill. 2d at 275. Deficiencies in the chain of custody go to the weight, not admissibility, of the evidence. *Woods*, 214 Ill. 2d at 467.

¶ 18 We must first determine whether we can consider defendant's challenge to the chain of custody. A challenge to the chain of custody is an evidentiary issue that is generally subject to waiver on review if not properly preserved in the trial court. *People v. Wilson*, 2017 IL App (1st) 143183, ¶ 24.

¶ 19 To preserve an issue for appeal, a defendant must object at trial and raise the issue in his post-trial motion. *People v. Wilson*, 2017 IL App (1st) 143183, ¶ 22. The failure to do so results

in forfeiture. *Id*. Defendant acknowledges, and the record shows, that defendant made no objection to the chain of custody during trial and did not raise it in his post-trial motion. As a result, defendant deprived the State of any reasonable opportunity to correct the alleged errors in the chain of custody evidence it presented at trial. *Wilson*, 2017 IL App (1st) 143183, ¶ 22. See also *Woods*, 214 Ill. 2d at 470. Thus he did not preserve this error for review and it is considered waived. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988).

¶ 20 Defendant submits that his claims can be considered under either prong of plain error. The plain error doctrine allows a reviewing court to address defects affecting substantial rights if the evidence is closely balanced or if fundamental fairness so requires rather than finding the claims waived. *Woods*, 214 Ill. 2d at 471. A defendant raising a plain error argument bears the burden of persuasion. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 21 To establish plain error, a defendant must first show that a clear or obvious error occurred (T*hompson*, 238 Ill. 2d at 613), and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error (*People v. Naylor*, 229 Ill. 2d 584, 593 (2008)) or that the error was sufficiently grave that it deprived defendant of a fair trial (*People v. Herron*, 215 Ill. 2d 167, 187 (2005)).

¶ 22 In this case, defendant argues that there was a complete breakdown in the chain of custody because the State failed to establish the inventory number of the items tested, there was an inconsistency between the testimony of the two police officers and Bracey as to the number of items recovered and items tested and there was contradictory testimony about what number the items were inventoried under constituted a complete failure to prove the chain of custody. Defendant maintains that Bracey did not testify to anything that connected the items she tested to

the items Officer Haney recovered because she did not say the date, case number, or inventory number on the record so it was not possible to compare them with any markings on the recovered items. Additionally, defendant contends that Bracey's and Conner's testimonies were affirmative evidence that the substance tested was not what defendant dropped as Conner testified that there was more suspect heroin in the People's Exhibit Number 1 than what was recovered on the day of the incident, and Bracey testified that there were four items inventoried while Haney and Conner testified that there were six items. According to defendant, the State's failure to link the items defendant dropped with what Bracey tested, and the additional evidence of tampering and/or substitution magnified the complete breakdown in the chain of custody. Defendant further contends that the evidence was closely balanced as to whether or not the items Bracey tested were the items defendant dropped.

¶ 23 As for the second prong of plain error, defendant contends that the trial court's serious error denied him a fair trial because it allowed the heroin into evidence even though the State failed to establish that the recovered items were what the chemist tested. This error prejudiced him because he was forced to defend himself against evidence that was not connected to the items he dropped.

¶ 24 The first step in a plain error review is to determine whether the trial court committed error and the burden is on defendant to establish that an error occurred. *Thompson*, 238 Ill. 2d at 613. To establish error in the State's chain of custody in the plain error context, a defendant must show that there was a "complete breakdown" in the chain of custody. *Woods*, 214 Ill. 2d at 471-72; *Wilson*, 2017 IL App (1st) 143183, ¶ 32. This is a formidable standard. *Wilson*, 2017 IL

App (1st) 143183, ¶ 32. Accordingly, we begin by considering whether there was a complete breakdown in the chain of custody for the recovered items.

¶ 25 We find that the State's evidence met the standard articulated in *Woods*. The evidence showed that the two testifying officers saw defendant drop an item, one of the officers recovered it and transported it to the station, where he observed the inventory report being written, an inventory number assigned, and the items heat sealed to send to the crime lab for testing. The second officer also saw defendant drop the item, which he described in more detail and that it was sent to the crime lab for testing. The chemist testified that she received an inventory envelope in sealed condition and tested four of the six items, which tested positive for heroin. While the testimony did not present an exhaustive chain of custody, deficiencies in the chain of custody go to the weight, not admissibility, of the evidence. *Woods*, 214 Ill. 2d at 467. Thus we find that the record does not support defendant's argument that there was a complete breakdown in the chain of custody. In the absence of error, defendant's plain error argument fails.

¶ 26 B. Compliance with *Zehr* and Rule 431(b)

¶ 27 Defendant next contends that this case should be remanded for a new trial because the trial court failed to comply with *Zehr* and Rule 431(b) when the court did not ask the venire if they understood and accepted that defendant did not need to present evidence, and again when it misstated the principle that defendant's silence could not be held against him by saying "no inference whatsoever c[ould] be drawn from his silence." Defendant concedes that this issue was not preserved for review, but contends that it is reviewable under the plain error doctrine because this was a clear and obvious error that prejudiced him. The State contends that evidence of his guilt was overwhelming, which precludes review under plain error.

¶ 28 As stated previously, the failure to make a timely objection at trial or raise an issue in a post-trial motion waives the issue from consideration on appeal. *Wilson*, 2017 IL App (1st) 143183, ¶ 22. However, it may be reviewable under plain error. *Woods*, 214 Ill. 2d at 471. A defendant raising a plain error argument bears the burden of persuasion. *Thompson*, 238 Ill. 2d at 613.

¶ 29 Defendant contends that it is reviewable under the first prong of plain error because the evidence was so closely balanced that the court's failure to comply with *Zehr* and Rule 431(b) tipped the scales of justice against him, especially because he rested without testifying or offering any evidence. He maintains that the evidence was closely balanced as to possession (based on his initial contention that there was a complete breakdown in the chain of custody), thus the error was prejudicial and his conviction should be reversed and remanded for a new trial.

¶ 30 The State contends that defendant forfeited review of this claim and further that plain error review does not apply where the evidence of defendant's guilt was overwhelming.

¶ 31 The first step in a plain error review is to determine whether the trial court committed error, and the burden is on defendant to establish that an error occurred. *Thompson*, 238 Ill. 2d at 613.

¶ 32 In *Zehr*, our supreme court held that "essential to the qualification of jurors in a criminal case is that they know that a defendant is presumed innocent, that he is not required to offer any evidence in his own behalf, that he must be proved guilty beyond a reasonable doubt, and that his failure to testify in his own behalf cannot be held against him." *Zehr*, 103 Ill. 2d at 477. Rule 431(b) was amended in 2007 to impose "an affirmative *sua sponte* duty on the trial court to ask

potential jurors in each and every case whether they understand and accept the *Zehr* principles." *People v. Magallanes*, 409 Ill. App. 3d 720, 729 (2011). Rule 431(b) requires the trial court to address all four *Zehr* principles in a manner that allows each venireperson an opportunity to respond whether he or she understands and accepts those principles. *Magallanes*, 409 Ill. App. 3d at 730. The only exception to this requirement applies to the principle that the defendant's failure to testify cannot be held against him when the defendant objects to inquiry being made into that principle. Ill. S. Ct. R. 431(b)(4) (eff. May 1, 2007).

¶ 33 In the case at bar, the record reveals, and the State concedes, that the trial court did not expressly ask the prospective jurors if they understood and accepted each of the *Zehr* principles. The State further concedes that the trial court's remarks constitute error under *People v. Wilmington*, 2013 IL 112939, ¶ 32.

¶ 34 Thus we find that the trial court's failure to comply with *Zehr* and Rule 431(b) was error, and that defendant met his initial burden to establish error.

¶ 35 The next step under the plain error doctrine where a defendant claims first-prong plain error, is to determine whether the defendant has shown that the evidence was so closely balanced the error alone severely threatened to tip the scales of justice. *Herron*, 215 Ill. 2d at 193; *People v. Sebby*, 2017 IL 119445, ¶ 51. Accordingly, we turn our attention to the trial evidence because a requisite to relief under the first prong is a finding that the evidence was closely balanced. *Sebby*, 2017 IL 119445, ¶ 52.

¶ 36 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 the context of the case. *Sebby*, 2017 IL 119445, ¶ 53. " 'When error occurs in a close

case, we will opt to 'err on the side of fairness, so as not to convict an innocent person.' " *People v. Piatkowski*, 225 Ill. 2d 551, 566 (2007), quoting *Herron*, 215 Ill. 2d at 193. Whether the evidence in a criminal trial is closely balanced depends solely on the evidence adduced in that particular case. *People v. Naylor*, 229 Ill. 2d 584, 609 (2008).

¶ 37 In this case, defendant was charged with possession of 1.2 grams of heroin. To sustain a charge of possession of a controlled substance, the State must prove that defendant had knowledge of the presence of an illicit substance and that the substance was in his immediate and exclusive control. *People v. Carodine*, 374 Ill. App. 3d 16, 24 (2007). Thus the relevant evidence at defendant's trial involved two elements: whether defendant knowingly possessed an illicit substance and whether the substance was in his immediate and exclusive control.

¶ 38 The State's evidence was as follows: The two testifying officers (Haney and Conner) saw defendant standing on a corner with other people; when defendant saw the police car, he began to run; the officers pursued defendant; they saw defendant drop an item which was recovered by one of the officers who also transported it to the station; an inventory report was written and an inventory number assigned; the items were heat sealed and sent to the crime lab for testing. The second officer described the item defendant dropped in more detail, namely that it consisted of six plastic baggies held together with a rubber band; and testified that the package was sent to the crime lab for testing. The chemist testified that she received an inventory envelope in sealed condition and tested four of the six items, which tested positive for heroin.

¶ 39 Defendant maintains that there was a discrepancy between the officers' testimony and Bracey's testimony because Bracey did not testify to the inventory number of the items she received and that she only tested four items. Defendant also maintains that Officer Conner's

response "other than there being a significant amount more of suspect heroin in those bags" to the State's question of "whether People's Exhibit Number 1 was in substantially the same condition as when he last saw it" proved that the items had been tampered with and that these discrepancies makes the evidence closely balanced. We disagree.

¶ 40 Unlike in the *Sebby* case, the outcome of this case did not turn on how the factfinder resolved a credibility contest. See *Sebby*, 2017 IL 119445, ¶ 63. There were no opposing versions of the events surrounding defendant's arrest, retrieval of the items or testing of the items. A commonsense assessment of the evidence presented at trial is that the State proved the elements necessary for conviction of possession of a controlled substance and that no real conflict between the evidence existed. We find that the evidence was not closely balanced, and defendant has not satisfied the first prong of plain error that would require reversal in this case.

¶ 41 C. Monetary Penalties

¶ 42 Finally, defendant contends that his fines and fees order should be corrected to vacate improperly imposed fees ($5 electronic citation fee and $5 court system fee) and corrected to account for the 57 days he spent in pre-sentence custody to offset the fees and fines assessed. Defendant did not object to the imposition of the fees and he did not include them in his post-trial motion. However, the State does not argue that defendant forfeited this issue and instead concedes that the two fees were improperly assessed and should be vacated. The State also concedes that defendant should receive credit for his 57 pre-sentence custody days in the amount of $285.

¶ 43 The electronic citation fee (705 ILCS 105/27.3e (West 2014)) does not apply to felony convictions and must be vacated. The court system fee (55 ILCS 5/5-1101(a) (West 2014)) was

improper because that provision only applies upon conviction for violation of the Illinois Vehicle Code or similar provisions in county or municipal ordinances. We agree and vacate those fees.

¶ 44 The defendant correctly asserts that he is entitled to a $5-per-day credit for each day spent in custody before he was sentenced. 725 ILCS 5/110-14 (West 2014). Defendant served 57 days in pre-sentence custody, and thus he is entitled to a credit of $285 against all fines imposed.

¶ 45 CONCLUSION

¶ 46 For the foregoing reasons, we affirm the judgment of the circuit court; fines and fees order modified.

¶ 47 Affirmed; fines and fees order modified.