2018 IL App (3d) 170774-U

Order filed October 15, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 13th Judicial Circuit,
	)	La Salle County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-17-0774
v.	)	Circuit No. 16-CF-318
	)	
WILLIAM D. WEBB,	)	Honorable
	)	Cynthia M. Raccuglia,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justice McDade concurred in the judgment.
Justice O'Brien dissented.

ORDER

¶ 1 *Held*: The circuit court erroneously considered the defendant's criminal history before pronouncing its findings of guilt, and this violation of the defendant's right to due process is reversible under the second prong of plain-error review.

¶ 2 The defendant, William D. Webb, appeals from his convictions for attempted first degree murder and armed robbery. On appeal, the defendant argues that remand is required for a new trial because the circuit court considered his criminal history before it pronounced its findings of guilt.

¶ 3 FACTS

¶ 4 The State charged the defendant by indictment with attempted first degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2016)), armed robbery (*id.* § 18-2(a)(3)), and aggravated discharge of a firearm (*id.* § 24-1.2(a)(2)). The court appointed counsel to represent the defendant, and the case proceeded to a bench trial.

¶ 5 The State's evidence established that on August 25, 2016, around 9 p.m., Circle K gas station clerk Hailey Burash was completing a sale to Michael Hallam when a black man wearing a ski mask, blue latex gloves, a blue or black hooded sweatshirt, and dark-colored blue jeans entered the gas station. The masked man pointed a black handgun at Burash and Hallam and demanded money. Burash placed the money from the cash register on the counter. The masked man put the money in his pocket, told Hallam to go into the office, and directed Burash to "act normal." The masked man went into the office with Hallam while Burash assisted another customer. After the customer left, the masked man told Burash to fill his bag with cigarettes. While filling the bag, Streator Police Officer Jason Moore entered the gas station. Burash indicated to Moore that something was amiss and motioned toward the office area. Moore saw the masked man in the office area. At trial, Moore identified the masked man as the defendant. After notifying dispatch of a robbery in progress, Moore noticed that the defendant was holding a gun. Moore drew his gun and backed out of the doorway to gain cover. Moore told the defendant to put his gun down. Instead, the defendant pointed his gun at Moore and fired one shot. The shot missed Moore. Moore fired two shots back at the defendant. The defendant ran from the gas station. Moore pursued the defendant and found him sitting nearby. The defendant no longer wore a mask or carried a gun, but the defendant was still wearing blue latex gloves and dark clothing. Moore discovered a ski mask and handgun on the ground near the defendant. Moore

asked the defendant "why did you shoot at me then?" The defendant responded "to get you out of my way." Moore and Officer Ryne Reel took the defendant into custody. The officers found money in the defendant's pocket.

¶ 6 The defendant's exchange of gunfire with Moore damaged both a Chevrolet Tahoe parked at the gas station and a nearby house. The crime scene investigators recovered three shell casings from the scene and bullet fragments from the house. Forensic scientist Dustin Johnson determined that two of the shell casings had been discharged from Moore's gun and one of the shell casings had been discharged from the gun found near the defendant.

¶ 7 Forensic scientist Anna Maria Yeagle conducted a DNA analysis on the mask discovered near the defendant. Yeagle determined that DNA collected from the mask matched the defendant's DNA profile.

¶ 8 The defense presented no evidence.

¶ 9 Following the parties' closing arguments, the court said

> "Now, Mr. Webb, the fact that you waived a jury puts a real awesome burden on this court, particularly in light of the fact of your criminal history and the fact that this is your life. I have told you that before. And depending what's done in my sentencing, which is another day if I get to that, I take this responsibility very seriously."

The court found the defendant guilty of attempted first degree murder, armed robbery, and aggravated discharge of a firearm.

¶ 10 The defendant discharged his appointed attorney and filed several *pro se* motions for a new trial. In one of his motions, the defendant argued that the court erred when it commented on the defendant's criminal history before finding the defendant guilty. At the hearing on this

motion, the defendant argued that the court had erroneously considered his criminal history as evidence against him. The defendant acknowledged that he did not raise this issue at the time of the court's statement because the court had received no testimony about his criminal history during the trial. Therefore, the court's comment indicated that it had considered information outside the record, which violated the defendant's right to due process. The court responded:

> "I in no way, Mr. Webb, considered your criminal history when it came to innocence or guilt. The only thing and point that I can gather, because I've been at this a long time—and you are right. I mean, a criminal history in no way gears the guilt or innocence of the defendant. But I did make that comment. And I know I didn't consider your criminal history.
>
> I guess my point was making sure that you—which is the Judge's job—that you continually understand how serious things are when you waive a jury or you waive a right. But you're absolutely correct. I should not have considered your criminal history. I didn't even have it, either. I did not have your criminal history in writing, Mr. Webb, until the presentence investigative report. The only thing I knew is that your record allowed you to be eligible for the extended sentencing. I had no idea what your real criminal history was and didn't even get the list until I received the presentence report.
>
> I can totally understand why you thought I considered it, because of the statement I made. And I'm sorry that led you to believe that. But I am confident to say in the record that I considered only the evidence in this case. And I've been a judge 26 years; and the last thing I would ever do is find somebody guilty based on their criminal history. I mean, that's a given. You don't have to go to law

> school for that, to know that, and to also know that would have been a violation of your rights. I did not. But I said it that way. And all I think I was saying was the significance of the situation."

The court denied the defendant's motion.

¶ 11 Before the defendant's sentencing hearing, the State prepared a presentence investigation report (PSI). The PSI stated that the defendant had eight prior felony convictions, including a 1993 conviction for murder that resulted in a sentence of 45 years' imprisonment.

¶ 12 At the conclusion of the sentencing hearing, the court merged the aggravated discharge of a firearm count into the attempted first degree murder count. The court sentenced the defendant to 65 years' imprisonment for attempted first degree murder and 50 years' imprisonment for armed robbery. The defendant appeals.

¶ 13 ANALYSIS

¶ 14 The defendant argues that the circuit court denied his right to due process and a fair trial when it commented on his criminal history before it found him guilty of the charged offenses. The defendant has forfeited review of this issue because he did not object to the alleged error at trial. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (to preserve an issue for appellate review, there must be both a contemporaneous objection at trial and a written posttrial motion raising the issue). Nevertheless, the defendant contends that the alleged error is equivalent to "structural error," and therefore, is reversible under the second prong of the plain-error doctrine.

¶ 15 First, we must consider whether error occurred in this case. When the circuit court sits as trier of fact, we presume that it considered only admissible evidence and disregarded inadmissible evidence. *People v. Naylor*, 229 Ill. 2d 584, 603 (2008). This presumption is overcome where the record affirmatively demonstrates that the court's finding relied on matters

outside of the record. *People v. Tye*, 141 Ill. 2d 1, 26 (1990). "A determination made by the trial judge based upon a private investigation by the court or based upon private knowledge of the court, untested by cross-examination, or any of the rules of evidence constitutes a denial of due process of law." *People v. Wallenberg*, 24 Ill. 2d 350, 354 (1962). "Due process does not permit [the court] to go outside the record, except for matters of which a court may take judicial notice, or conduct a private investigation in a search for aids to help him make up his mind about the sufficiency of the evidence." *People v. Yarbrough*, 93 Ill. 2d 421, 429 (1982). We review *de novo* the issue of whether the court violated a defendant's right to due process. *People v. Williams*, 2013 IL App (1st) 111116, ¶ 75.

¶ 16 Before the circuit court pronounced its findings of guilt, it referred to the defendant's "criminal history." Generally, evidence of the defendant's criminal history is inadmissible if it is relevant only to show the defendant's propensity to commit crime. *People v. Cortes*, 181 Ill. 2d 249, 282 (1998). There is no indication in the record that either party sought to introduce evidence of the defendant's criminal history. *E.g.*, *People v. Pikes*, 2013 IL 115171, ¶ 11 (other-crimes evidence is admissible if it is relevant for any purpose other than to show a propensity to commit crime). Therefore, the court's comment indicated that it had considered a matter outside of the record in its guilt determination.

¶ 17 The court's explanation of its reference to the defendant's criminal history further indicated that it had erroneously considered the defendant's criminal history. In an attempt to explain its erroneous statement, the court made the contradictory comments that it had both not considered the defendant's criminal history and said "I should not have *considered* your criminal history." (Emphasis added.) The court then stated that although it did not have the defendant's criminal history until the PSI was prepared, it was aware that the defendant was eligible for an

extended-term sentence due to his prior convictions. These comments indicate that the court was aware of the defendant's criminal history and had considered at least part of it before finding the defendant guilty of the charged offenses.

¶ 18 We are further unpersuaded by the court's explanation that its reference to the defendant's "criminal history" was a type of admonishment used to insure that the defendant "continually underst[ood] how serious things are when you waive a jury or you waive a right." This type of admonishment is typically required *before* the court accepts a defendant's waiver of his right to a jury trial and enters a plea of guilty. See Ill. S. Ct. R. 402(a) (eff. July 1, 2012). However, in the instant case, the court's would-be admonishment is completely out of place as the court made it after the parties' closing arguments and before the pronouncement of the court's findings of guilt. At that time, the defendant was not entering a guilty plea, had previously entered a written waiver of his right to a jury trial, and had sat through the State's case and the parties' closing arguments. As a result, the defendant was well aware of his right to a jury trial and the gravity of the charges. Moreover, the court did not treat its reference to the defendant's criminal history as an admonishment as it did not afford the defendant an opportunity to respond by revoking his jury waiver or making an assertion of his right to a jury trial. Therefore, we conclude that the court's consideration of this off-record information was error and deprived the defendant of his right to due process.

¶ 19 Next, the defendant argues that this error constituted structural error and he need not show prejudice for a reversal. Structural error arises when the error "was so serious it affected the fairness of the trial and challenged the integrity of the judicial process." *People v. Sebby*, 2017 IL 119445, ¶ 50. When a court of review finds structural error occurred, it is automatically reversible without a showing of prejudice. *People v. Thompson*, 238 Ill. 2d 598, 613-14 (2010).

¶ 20 We find the court's consideration of the defendant's criminal history, a fact outside of the record, and reliance on this information to be reversible under the second prong of plain-error review. It is fundamental that a defendant's guilt must be proven by only relevant evidence. See *People v. Johnson*, 208 Ill. 2d 53, 87-88 (2003). The court's reference to the defendant's criminal history calls into question this core precept as his criminal history was both irrelevant and not introduced into evidence. As a result, we find that the court's comment infringed on the defendant's right to due process (*Wallenberg*, 24 Ill. 2d at 354) and undermined the fairness of his trial. Therefore, this error is reversible under the second prong of plain-error review.

¶ 21 CONCLUSION

¶ 22 The judgment of the circuit court of La Salle County is reversed and remanded for a new trial.

¶ 23 Reversed and remanded.

¶ 24 JUSTICE O'BRIEN, dissenting.

¶ 25 I respectfully dissent from the majority's finding that defendant's due process right to a fair trial was violated when the circuit court commented on his criminal history prior to finding him guilty of the charged offenses. Instead, I believe the record establishes that the circuit court's mention of defendant's "criminal history" was not error because the record affirmatively establishes that defendant's "criminal history" did not influence the court's guilt determination.

¶ 26 In this case, defendant alleges that the court's statement "particularly in light of the fact of your criminal history" constitutes second-prong plain error because the statement established that the court relied on matters outside of the record to determine his guilt. At the outset, I believe defendant has failed to establish the existence of any error, which is a prerequisite to application of the plain-error doctrine. *People v. Rinehart*, 2012 IL 111719, ¶ 15. After the court

referenced defendant's criminal history and found defendant guilty of the charged offenses, defendant filed a motion for a new trial. The motion alleged for the first time that the court's statement was erroneous. The court's ruling on defendant's motion readily establishes that, while the court mentioned defendant's criminal history, it was not a basis for the court's guilt determinations. Instead, the court intended its reference to be a sort of warning or admonishment used to convey the seriousness of the situation.

¶ 27 More significantly, the court, after referencing defendant's criminal history, expressly stated: "I in no way, Mr. Webb, considered your criminal history when it came to innocence or guilt." The court then expressly reaffirmed this point on two separate occasions: (1) "But I did make that comment. And I know I didn't consider your criminal history," and (2) "I've been a judge 26 years; and the last thing I would ever do is find somebody guilty based on their criminal history." Finally, the court expressly noted: "I did not have your criminal history in writing, Mr. Webb, until the [PSI]." The record confirms this point as the State did not file a report of defendant's criminal history, in the form of a PSI, until after the court found defendant guilty. Therefore, I believe that the record, when viewed *in toto*, establishes that the court's reference to defendant's criminal history was not error.

¶ 28 As support for its reversal, the majority relies, in part, on the fact that the court made a second misstatement indicating that it had considered defendant's criminal history. *Supra* ¶ 17. Viewed in isolation, the court's statement "I should not have considered your criminal history" appears to be an admission that the court had erroneously considered defendant's criminal history. However, when viewed in context of the court's entire ruling, it is clear that this comment was purely a misstatement because the court repeatedly said that it did not consider defendant's criminal history.

¶ 29 Even if I thought that the court's reference to defendant's criminal history was error, I do not believe that it is reversible under the second prong of the plain-error doctrine. Under the second prong, defendant bears the burden of persuasion to show that a clear or obvious error warrants reversal because that error " 'is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process.' " *Thompson*, 238 Ill. 2d at 613 (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)). Defendant cannot satisfy his burden of persuasion because the record rebuts any inference that the court's statement evidenced bias where the court explained that the reference did not influence its findings of guilt. See, *e.g.*, *People v. Wilmington*, 2013 IL 112938, ¶ 33 (noting that defendant had not established that the court's Rule 431(b) violation resulted in a biased jury). Therefore, I believe that defendant cannot establish that his claim is subject to reversal under the second prong. Accordingly, I would affirm defendant's convictions.