2018 IL App (4th) 150622-U

NO. 4-15-0622

FILED
April 27, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
CARLOTTA ANDERSON,	)	No. 14CM2276
Defendant-Appellant.	)	
	)	Honorable
	)	William A. Yoder,
	)	Judge Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court.
Justices Holder White and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err by allowing the jury to view a surveillance video in the courtroom. Defense counsel's representation of defendant was not ineffective. Fee assessment reduced.

¶ 2 A jury found defendant, Carlotta Anderson, guilty of one count of retail theft (720 ILCS 5/16-25(a)(1) (West 2012)). The trial court sentenced her to court supervision and 90 days in jail. On appeal, defendant argues (1) the trial court erred by allowing the jury to view a surveillance video in the courtroom during its deliberations; (2) defendant received ineffective assistance of counsel; and (3) fines and fees improperly imposed by the circuit clerk should be vacated or, in the alternative, reduced. We reduce the "community service fee" to $200 but otherwise affirm defendant's conviction and sentence in all other respects.

¶ 3 I. BACKGROUND

¶ 4 In December 2014, the State charged defendant with one count of retail theft (720 ILCS 5/16-25(a)(1) (West 2012)), alleging defendant knowingly stole a coat from her employer, Macy's Department Store.

¶ 5 In June 2015, a jury trial was conducted. The only testimony presented at trial was from Dustin Richardson, a loss prevention specialist. Richardson testified that defendant was employed by Macy's as a sales associate. Richardson stated that, on November 22, 2014, he observed, on a store security camera, a male and a female select a child's coat. The male, later identified as the father of defendant's child, walked to defendant's cash register and handed defendant the coat. Defendant scanned the coat and loaded $35 onto a gift card. At that point, the male swiped a debit or credit card. Defendant then opened and closed the cash drawer without placing anything inside it. According to Richardson, the cash drawer should only open for cash transactions.

¶ 6 Richardson testified that the male and female exited the store without the coat while defendant started a new transaction on the cash register. Defendant purchased the $49.99 coat and a candy bar. By purchasing the candy bar, defendant was able to pass the $50 threshold necessary to use a $20 coupon. Defendant then used the $20 coupon and the $35 gift card to pay for the candy bar and the coat. A coworker paid the remaining $0.49 balance. The next morning, Richardson reviewed the store's accounting program and discovered that defendant's cash register was missing $34.50.

¶ 7 During the trial, the State published to the jury part of the video footage from the store's security system. When the jury retired to deliberate, the jurors sent a note asking to watch the video footage again.

¶ 8 The State requested that the video footage be played in the courtroom so that the first 2 minutes and 27 seconds on the video, which had not been previously shown to the jury, would not be viewed by the jurors. In response, defense counsel stated, "I don't think there's anything on there that requires redaction. Our position would be that the jury should be sent back the video and the bailiffs should instruct them as to how the player works, and they should be able to view it to their hearts content." The trial court then stated as follows:

> "I'm not going to send the disk back with other material on it. They were only shown 2:27 to 8:30 ***. *** [T]his [video footage] can be played for the jury, but only [from] 2:27 to 8:30. *** I think the only way we can do that is to bring them in. There won't be any communication with the jury, we'll just bring them in. Ms. Martucci, I'm going to have you start the video and stop it at those precise time frames. And then we'll send them back.
>
> * * *
>
> [A]gain, there won't be any communication with the jury. *** [W]e'll bring them in then douse the lights. *** [T]hen we're going to get them up and right back into the jury room."

¶ 9 The trial court responded to the jury note as follows: "Yes, you will be brought into the courtroom and the video will be played for you. You will then be returned to the jury deliberation room." The jury was brought into the courtroom where it was shown the video, and it returned to the jury deliberation room. The record does not reflect that anyone spoke during the time the jury was in the courtroom.

¶ 10 Ultimately, the jury found defendant guilty of retail theft. The trial court

sentenced defendant to court supervision and 90 days in jail and ordered fines and fees. In June 2015, defendant filed a "motion for judgment of acquittal or in the alternative for new trial," arguing that the jury's verdict was against the manifest weight of the evidence. The court denied the motion.

¶ 11 This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 Defendant argues on appeal that (1) the trial court erred by allowing the jury to view the surveillance video in the courtroom during its deliberations; (2) defendant received ineffective assistance of counsel; and (3) fines and fees improperly imposed by the circuit clerk should be vacated or, in the alternative, reduced.

¶ 14 A. Jury Deliberations

¶ 15 Defendant maintains that the trial court committed reversible error by allowing the jury, during its deliberations, to view the surveillance video in the courtroom while in the presence of the judge, parties, and attorneys. We disagree.

¶ 16 Initially, we note that defendant acknowledges that she forfeited this issue by failing to raise the claim in a posttrial motion. *People v. Rathbone*, 345 Ill. App. 3d 305, 308-09, 802 N.E.2d 333, 336 (2003). However, defendant maintains that her forfeiture may be excused under the plain-error doctrine. A reviewing court may consider an unpreserved error if it was clear or obvious and (1) the evidence was closely balanced or (2) the error was so serious defendant was denied a fair hearing. *People v. Hillier*, 237 Ill. 2d 539, 545, 931 N.E.2d 1184, 1187 (2010). The burden of persuasion rests with the defendant in plain-error review. *People v. Thurow*, 203 Ill. 2d 352, 363, 786 N.E.2d 1019, 1025 (2003). We first determine whether a clear

or obvious error occurred.

¶ 17 "It is a basic principle of our justice system that jury deliberations shall remain private and secret." *People v. Johnson*, 2015 IL App (3d) 130610, ¶ 17, 46 N.E.3d 274. "[W]e review outside jury intrusions for prejudicial impact." *Id.* ¶ 19. A trial court generally "has discretion to determine whether to grant or deny the jury's request to review evidence ***." *People v. McKinley*, 2017 IL App (3d) 140752, ¶ 16, 74 N.E.3d 482.

¶ 18 The parties address three appellate court decisions where the trial judge in each case, during deliberations, allowed the jury to view a video recording in the courtroom instead of the jury room. *People v. Rouse*, 2014 IL App (1st) 121462, 16 N.E.3d 97; *Johnson*, 2015 IL App (3d) 130610; *McKinley*, 2017 IL App (3d) 140752.

¶ 19 In *Rouse*, 2014 IL App (1st) 121462, the jury sent a note during deliberations requesting to view surveillance footage that had been played during the trial. *Id.* ¶ 69. However, due to technical difficulties, the jury could not play it in the jury room. *Id.* The jury also would have had access to "unauthorized material" on the laptop computer used to play the video. *Id.* The jury was permitted to view the surveillance footage in the courtroom while in the presence of the judge and the parties. *Id.* ¶ 71. The judge instructed the jury to refrain from discussing the recording while it was being played in the courtroom. *Id.* ¶ 72. The jury then returned to the jury room to deliberate after viewing the surveillance footage. *Id.* On appeal, the First District panel rejected the defendant's claim of error, reasoning that there were no indicia of prejudice because no one communicated with the jury while the recording was played in the courtroom and the jury immediately returned to the jury room to deliberate. *Id.* ¶ 79. The court concluded that there was no abuse of discretion in the trial court's response to the jury's request. *Id.* ¶ 84.

¶ 20 In *Johnson*, 2015 IL App (3d) 130610, the jury was permitted to watch a surveillance video in the courtroom, during deliberations, because there was no video equipment in the jury room. *Id.* ¶ 9. On appeal, defendant argued that the "manner in which the jury was allowed to review the video was presumptively prejudicial because the presence of the judge, attorneys and parties impaired the jury's ability to deliberate and thoroughly examine the evidence." *Id.* ¶ 14. The court rejected this argument, explaining that "[t]he essence of the decision to allow the jury to view the video in the courtroom was based on the lack of video equipment readily available in the jury room." *Id.* ¶ 20. The court further explained that "[t]he jury's continued deliberation, without requesting to view the video again, indicates that it thoroughly examined and considered the evidence to its satisfaction." *Id.* Thus, the court found that "the record shows no prejudice." *Id.*

¶ 21 In *McKinley*, 2017 IL App (3d) 140752, the jury viewed a video of a field sobriety test, in the courtroom, during deliberations while in the presence of the prosecutor, defense counsel, a substitute judge, defendant, and the bailiff. *Id.* ¶ 23 (majority opinion). The lead opinion, authored by Justice Carter, noted that no one in the courtroom spoke to the jury while the video was shown. *Id.* Nor did any of the jurors request to view portions of the video again. *Id.* Justice Carter concluded that "defendant was not prejudiced by the jury viewing the videotape in the courtroom where nothing in the record suggests that the presence of others in the courtroom affected the jury in any way." *Id.* ¶ 14. In a special concurrence, Justice O'Brien agreed with the lead opinion that the evidence was not closely balanced, and the alleged error did not rise to the level of plain error. *Id.* ¶ 36 (opinion of O'Brien, J., specially concurring).

¶ 22 This court recently had occasion to address a similar situation. In *People v. Lewis*,

2018 IL App (4th) 150637, ¶ 58, during deliberations, the jury sent a note requesting to listen again to a recording of a 911 call. Only a portion of the 911 call had been played for the jury during the trial. The prosecutor argued that the recording should be played for the jury in the courtroom because it would be inappropriate for the jury to hear that portion of the recording that was not played during trial. *Id.* ¶ 60. The court agreed with the prosecutor and ordered that the recording be played for the jury in the courtroom. *Id.* ¶ 61. The jurors then returned to the jury room, resumed their deliberations, and ultimately returned a guilty verdict. *Id.*

¶ 23 In *Lewis*, this court found that allowing the jury to listen to the recording in the courtroom during deliberations was not erroneous. *Id.* ¶ 95. "[I]f a jury, during its deliberations, requests to see or hear a recording again, the trial court need not send the recording and equipment into the jury room but instead may, in its discretion, have the jury brought back into the courtroom for a replaying of the recording." *Id.* ¶ 97. The *Lewis* court cautioned:

> "[I]f the court chooses to have the recording replayed in the courtroom, the court, parties, and counsel must be present to view or hear the evidence, and the court should instruct the jury not to discuss the evidence while in the courtroom. The court should also in the jury's presence admonish everyone else in the courtroom not to comment on the evidence, communicate with the jury, or try in any manner to influence the jury. [Citation.] Further, *** the court should instruct the jury that after the replay, the jury will return to the jury room and should then continue its deliberations, which may include, if it wishes, the replay." *Id.*

Although the jury in *Lewis* did not receive this instruction and admonishment, the court found no

evidence in the record of prejudice or anything improper having occurred when the recording was played in the courtroom. *Id.* ¶ 98.

¶ 24 Just like *Lewis*, the trial court in this case allowed a recording to be replayed in the courtroom during jury deliberations. The trial judge indicated the lights would be "doused" while the jury viewed the video in the courtroom, and then the jurors would be sent "right back [to] the jury room." The trial judge also cautioned that "there won't be any communication with the jury." Nothing in the record suggests that defendant was prejudiced or that harm resulted by allowing the jury to view the surveillance video in the courtroom. Thus, we cannot conclude that error occurred. See *Id.* ¶ 95 ("To be clear, we now reject outright the argument that this procedure is even erroneous, let alone structurally erroneous.").

¶ 25 Next, defendant argues that she received ineffective assistance of counsel because counsel failed to preserve the jury deliberation issue in a posttrial motion. We disagree. Because we find that the trial court's decision to allow the jury to view the surveillance video in the courtroom was not erroneous, we reject the argument that she was denied effective assistance of counsel when her attorney failed to raise the issue in a posttrial motion. *Strickland v. Washington*, 466 U.S. 668 (1984) (defense counsel is ineffective only if counsel's performance fell below an objective standard of reasonableness and counsel's error substantially prejudiced defendant).

¶ 26 B. Fines and Fees

¶ 27 Defendant argues that assessments improperly imposed by the circuit clerk should be vacated. First, defendant contends that a $25 "court system" assessment was improperly imposed by the circuit clerk. However, in her reply brief, defendant concedes the trial court

properly assessed this fine. We accept defendant's concession. Second, defendant argues the circuit clerk should not have assessed a $450 "community service fee." Alternatively, defendant contends this assessment was incorrectly calculated and should be reduced.

¶ 28 Because the imposition of the "community service fee" raises a question of statutory interpretation, we review the issue *de novo*. *People v. Rogers*, 2014 IL App (4th) 121088, ¶ 34, 13 N.E.3d 1280. A reviewing court's "primary objective when construing a statute is to ascertain and effectuate the legislature's intent." *People v. Warren*, 2016 IL App (4th) 120721-B, ¶ 99, 55 N.E.3d 117. "The best indication of the legislature's intent is the language of the statute, which should be given its plain and ordinary meaning." *Id.*

¶ 29 Pursuant to section 5-5-10 of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-5-10 (West 2014)), a "[c]ommunity service fee" may be assessed in certain circumstances:

> "When an offender or defendant is ordered by the court to perform community service and the offender is not otherwise assessed a fee for probation services, the court shall impose a fee of $50 for each month the community service ordered by the court is supervised by a probation and court services department ***." 730 ILCS 5/5-5-10 (West 2014).

Defendant contends she was "otherwise assessed a fee for probation services" where the trial court already imposed a $10 fee for "probation operation services" under section 1.1 of the Clerks of Courts Act (Clerks Act) (705 ILCS 105/27.3a(1.1) (West 2014)). Thus, defendant argues, the circuit clerk's $450 "[c]ommunity services fee" for probation services (730 ILCS 5/5-5-10 (West 2014)) should be vacated.

¶ 30 We disagree with defendant's contention. We find that the $10 "probation operations fee" under section 1.1 of the Clerks Act (705 ILCS 105/27.3a(1.1) (West 2012)) does not constitute "a fee for probation services" under section 5-5-10 of the Unified Code (730 ILCS 5/5-5-10 (West 2014)).

¶ 31 The "probation operations fee" (705 ILCS 105/27.3a(1.1) (West 2014)) is imposed as follows:

> "[A] clerk of the circuit court in any county that imposes a fee pursuant to subsection 1 of this Section [for automated record keeping] shall also charge and collect an additional $10 operations fee for probation and court services department operations." 705 ILCS 105/27.3a(1.1) (West 2014).

¶ 32 We find that the $10 "probation operations fee" is not a "fee for probation services" under section 5-5-10 of the Unified Code. It simply applies where the operations of the probation department are utilized, such as when a presentence investigation report is prepared (*Rogers*, 2014 IL App (4th) 121088 ¶ 36), while the "community service fee" applies specifically when the defendant is supervised by the probation department. Because defendant was ordered to perform community service, and apparently was supervised by a probation and court services department, we conclude that defendant owed a "community service fee" in this case.

¶ 33 Defendant argues in the alternative, and the State agrees, that the $450 "community service fee" was incorrectly calculated. We agree. The State concedes that defendant was only supervised for a period of 4 months. Under section 5-5-10 of the Unified Code, the court "shall impose a fee of $50 for each month" of supervision. 730 ILCS 5/5-5-10

(West 2014). As such, the "community service fee" should have been $200 (4 months x $50 per month = $200).

¶ 34 III. CONCLUSION

¶ 35 For the reasons stated, we reduce the "community service fee" to $200. We affirm defendant's conviction and sentence in all other respects. As part of our judgment we award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2014).

¶ 36 Affirmed as modified.