2019 IL App (1st) 163416-U

No. 1-16-3416

Order filed June 6, 2019

Fourth 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 16649
	)	
REGINALD JOHNSON,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice McBride and Justice Reyes concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for armed habitual criminal is affirmed where: (1) the State presented sufficient evidence to establish beyond a reasonable doubt that defendant possessed the firearm; (2) the trial court did not commit plain error in failing to comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012); and (3) the trial court did not err in sentencing defendant.

¶ 2 Following a jury trial, defendant, Reginald Johnson, was found guilty as an armed habitual criminal (AHC) (720 ILCS 5/24-1.7(a) (West 2014)) and sentenced to 15 years in prison. On appeal, defendant contends that: (1) the State failed to prove beyond a reasonable

doubt that he possessed the handgun; (2) the trial court committed plain error by failing to comply with Rule 431(b) during *voir dire*; and (3) the trial court erred in sentencing defendant to 15 years in prison by considering a fact not in evidence during sentencing. For the reasons that follow, we affirm.

¶ 3 On September 23, 2015, about 4:30 a.m., defendant was found asleep or unconscious in a vehicle at the intersection of Lake Shore Drive and Marquette Drive. After law enforcement gained entry to the vehicle, a handgun was discovered under defendant's thigh on the seat and he was transported to the police station. On October 15, 2015, defendant was charged by indictment with one count of AHC, nine counts of aggravated unlawful use of a weapon, two counts of unlawful use of a weapon by a felon, and two counts of felony driving while license was suspended or revoked. The case proceeded to a jury trial on solely the AHC charge.

¶ 4 During jury selection, the trial court addressed the venire:

> "Is there anybody here that has a disagreement or problem with that proposition that when a criminal trial starts the accused is presumed to be innocent? If you have a problem with that, raise your hand. No hands are raised.
>
> ***
>
> Is there anybody here that would hold it against the accused simply because somebody from the government filed a piece of paper indicating what the charges are against him?
>
> ***
>
> Is there anybody here who has disagreement or problem with that proposition that the charging instrument is a piece of paper just to put defendant on notice so he or she

can be prepared for the case? If you have a disagreement or problem with that, please raise your hand. No hands are raised.

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Does anybody have a disagreement or problem with that that the only way you can be guilty in a criminal trial is if the government who brought the charge against the accused can prove their case beyond a reasonable doubt? If you have a disagreement or problem with that, please raise your hand. No hands are raised.

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Is there anybody who disagrees or has a problem with that proposition that a defendant does not have to testify? They don't have to call any witnesses in their own behalf. Anybody hold it against the accused if they did exercise their right to not testify or not call witnesses in their own behalf?

Anybody think I heard the government's case. You better explain this away and give your side of the story which the law does not require. Does anybody have a disagreement or problem with that? They don't have to testify or call any witnesses and you are not to consider it in any way. If you have a disagreement or problem with that, please raise your hand. No hands are raised."

Defense counsel did not object.

¶ 5 At trial, Chicago police officer Pierce testified that about 4:30 a.m. on September 23, 2015, she and her partner, Officer Smith, responded to a call of a man slumped over the steering wheel at the intersection of Lake Shore Drive and Marquette Drive.[1] Upon arrival, they saw the

[1] The first names of Officers Pierce and Smith do not appear in the record.

vehicle stopped at a traffic light and it remained there through a light change. Pierce approached the vehicle and observed defendant "sleeping" in the driver's seat. The vehicle was running and defendant's foot was on the brake. No one else was inside the vehicle. Pierce knocked on the window, and defendant remained sleeping. The officers were unable to gain entry to the vehicle because the doors were locked. Pierce also heard loud music playing in the vehicle.

¶ 6 Other police officers arrived at the scene. The officers activated their sirens, knocked on the windows, and yelled but were unable to awaken defendant. Pierce then called for assistance from the fire department. By the time the fire department arrived about 10 minutes later, traffic in the area was beginning to steadily increase. While directing traffic, Pierce observed the firemen rocking the vehicle at which point the vehicle began rolling into the intersection. The vehicle came to a stop blocking the southbound lane of traffic on Lake Shore. Pierce also observed firefighters beating on the windows and eventually breaking one of them with a baton. Although Pierce was present when the firearm was recovered, she did not observe it because she was directing traffic. Pierce then placed defendant in her police vehicle and transported him to the police station. He remained asleep or unconscious throughout these events.

¶ 7 On cross-examination, Pierce testified she was unaware as to whether her police vehicle was equipped with a video camera and she did not check to determine if there was a video recording of the incident. She also testified that the video equipment did not always work in the vehicles.

¶ 8 Chicago police officer Robert Dolezil testified that on September 23, 2015, he and his partner, Officer Brett Polson, arrived at the intersection of Lake Shore and Marquette as backup to a call of a man slumped over his steering wheel. Defendant was inside a 2013 Chrysler 300

that was stopped at a traffic light. Dolezil observed officers knocking on the window and yelling to try to wake the defendant up. When Dolezil observed defendant, he noticed that his eyes were closed and he was not moving. He also heard very loud music coming from inside the vehicle. In addition to banging on the windows, the officers also used the air horn on a police vehicle in an attempt to wake defendant.

¶ 9 Dolezil explained that eventually the fire department arrived on the scene and attempted the same things to wake defendant up. After the firefighters started to rock the vehicle, it began moving through the intersection and Dolezil drove his vehicle alongside it for safety purposes. He observed one of the firefighters break the driver's-side window and the vehicle came to a stop in the southbound lane of traffic. Dolezil then went to the passenger door, which was now unlocked, and observed a black pistol grip sticking out from underneath defendant's right thigh. He testified that the gun was not in a holster or a container. He alerted the other officers to the presence of a gun and removed it from underneath defendant, who was still sleeping. He then cleared the gun by releasing the magazine. The magazine contained nine rounds, and there was a tenth round in the gun chamber. Dolezil secured and later inventoried the gun. Dolezil also testified that his vehicle's video recording equipment was not working that day.

¶ 10 On cross-examination, Dolezil testified that he searched the vehicle and he did not find anything in the vehicle indicating defendant's ownership or any documents with defendant's name. He ran the license plate number of the vehicle and learned that the owner was Kelly Kenard. He also testified that no field sobriety tests were conducted. On redirect examination, Dolezil testified that he did not smell any alcohol coming from the vehicle or defendant.

¶ 11 Chicago police officer Matthew Savage testified that he was assigned to the Laser and Latent Fingerprint Recovery Unit of the Forensic Science Division and received the gun inventoried in this case for testing. Savage did not find any latent fingerprint impressions and the gun was not submitted for DNA analysis.

¶ 12 The parties stipulated to the introduction into evidence of defendant's two qualifying felony convictions for purposes of the charge of AHC. Defendant's motion for directed verdict was denied. The case was submitted to the jury, which found defendant guilty of AHC. Defendant filed a motion for a new trial, which the court denied.

¶ 13 At the sentencing hearing, the presentence investigation report (PSI) was submitted and reviewed. It contained several references to defendant's history with alcohol and marijuana use. Officer Polson testified that 15 small Ziploc bags of cannabis were found on defendant's person. The State then submitted in aggravation defendant's criminal history, consisting of convictions for aggravated driving under the influence in 2012, aggravated battery with a firearm in 2006, criminal drug conspiracy in 2002, and aggravated unlawful use of a weapon in 2000. The State asked for a significant sentence based on defendant's criminal background and because he is a danger to society. Defense counsel argued that defendant had an alcohol problem but he had a supportive family and prior to this case he was gainfully employed. In allocution, defendant stated that he was trying to be a productive citizen, that he was working, and that he was taking care of his family.

¶ 14 After hearing arguments, the court sentenced defendant to 15 years' imprisonment. In announcing sentence, the court noted:

> "Well, I'm looking at this presentence investigation, and you've never really been a productive citizen. You were selling drugs when you were a juvenile. You caught a gun case 16 years ago. You got probation. Couldn't make that probation and ended up in the penitentiary. You shot 3 people. You went back to jail just recently on a DUI.
>
> And now you're here very inebriated on something. And you've got another gun. And you've been a career criminal. Anything else other than drug conviction that got you some time in the penitentiary. I don't see a lot of mitigation here.
>
> I can give you up to 30 years. I'm not going to do that based on the fact that he pleads. Your sentence would be 15 years in the penitentiary."

Defense counsel did not object. Defendant moved for reconsideration of his sentence, which the court denied.

¶ 15 On appeal, defendant first argues that the State failed to prove beyond a reasonable doubt that he possessed the firearm recovered from the vehicle. When faced with a challenge to the sufficiency of the evidence, we must determine whether, "after viewing the evidence in a light most favorable to the State, any rational trier of fact could find all the elements of the crime proven beyond a reasonable doubt." *People v. White*, 2017 IL App (1st) 142358, ¶ 14. "All reasonable inferences from the evidence must be drawn in favor of the prosecution." *People v. Hardman*, 2017 IL 121453, ¶ 37. It is the fact finder's role "to determine the credibility of witnesses, to weigh their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from the evidence." *People v. Williams*, 193 Ill. 2d 306, 338 (2000). For that reason, upon review, we will not reweigh the evidence or substitute our judgment for that of the fact finder. *White*, 2017 IL App (1st) 142358, ¶ 21. However, the great deference given to the trier of

fact's determinations is not without limits; the reviewing court may reverse a conviction where the evidence "is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of defendant's guilt." *People v. Wheeler*, 226 Ill. 2d 92, 115 (2007).

¶ 16 In this case, defendant was convicted of AHC. 720 ILCS 5/24-1.7(a) (West 2014). Pursuant to the statute, the State was required to prove beyond a reasonable doubt that defendant: (1) possessed a firearm; and (2) had been convicted two or more times of certain qualifying offenses. 720 ILCS 5/24-1.7(a) (West 2014). Defendant stipulated to his qualifying convictions at trial, and he does not now dispute that those convictions satisfy the second element of the offense. Rather, he argues that the State failed to prove beyond a reasonable doubt that he possessed the firearm. Specifically, he maintains that he did not have actual or constructive possession of the gun.

¶ 17 Possession may be proved by evidence of actual possession or constructive possession. *People v. Dismuke*, 2017 IL App (2d) 141203, ¶ 44. Although it is arguable that defendant had actual possession of the firearm, we find constructive possession to be more applicable here. Constructive possession exists where the defendant had knowledge of the firearm and exercised immediate and exclusive control over the area where the firearm was found. *People v. Spencer*, 2012 IL App (1st) 102094, ¶ 17. "Knowledge may be shown by evidence of a defendant's acts, declarations, or conduct from which it can be inferred that he knew the [firearm] existed in the place where it was found." *Spencer*, 2012 IL App (1st) 102094, ¶ 17. Control over the location where the firearm was found "gives rise to an inference that he possessed the [firearm]." *Spencer*, 2012 IL App (1st) 102094, ¶ 17. It is the trier of fact's role to determine the factual questions of knowledge and control. *People v. Schmalz*, 194 Ill. 2d 75, 81 (2000).

¶ 18 After viewing the evidence in the light most favorable to the State, we find that a rational trier of fact could have concluded that defendant possessed the firearm recovered by law enforcement. Here, law enforcement found defendant asleep or unconscious in a locked vehicle with the engine running, music playing, and his foot on the brake. The vehicle was at an intersection and stopped at a traffic light. Defendant was alone inside the locked vehicle and the uncased gun was found underneath his thigh, wedged between the front driver's seat and his leg. Although the vehicle was registered to another individual (Kelly Kenard), it is clear that defendant had immediate and exclusive control over the vehicle and the items contained within it, including the firearm. See *People v. Moore*, 2015 IL App (1st) 140051, ¶ 23 ("Constructive possession is typically proved entirely through circumstantial evidence."). Moreover, although defendant was not conscious at the time the gun was recovered, his knowledge of the weapon can be reasonably inferred from the fact that: the gun was wedged underneath his body; and, given that he was the driver and sole occupant of the running vehicle, he must have transported himself to the intersection. See *People v. Givens*, 237 Ill. 2d 311, 335 (2010) ("[W]here possession has been shown, an inference of culpable knowledge can be drawn from the surrounding facts and circumstances."). Accordingly, we conclude that the State presented sufficient evidence to prove beyond a reasonable doubt that defendant possessed the gun and thus sustain his conviction for AHC.

¶ 19 Defendant next contends that the trial court erred by failing to conduct an adequate *voir dire* in accordance with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012), which is reviewed *de novo*. *People v. Belknap*, 2014 IL 117094, ¶ 41. Defendant acknowledges that he has forfeited review of this issue by failing to timely object to and include this issue in a posttrial

motion. *People v. Brown*, 2017 IL App (1st) 142197, ¶ 30 (citing *People v. Denson*, 2014 IL 116231, ¶ 11). However, he requests that this court review this issue under the plain error doctrine.

¶ 20 Under the plain error doctrine, a reviewing court may excuse a defendant's procedural default when a clear and obvious error occurred and: (1) the evidence was so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Sebby*, 2017 IL 119445, ¶ 48. Defendant argues that review under plain error is warranted under the first prong because the evidence is closely balanced. However, the first step in our plain error analysis is to determine whether an error occurred. *People v. Wilmington*, 2013 IL 112938, ¶ 31.

¶ 21 Rule 431(b) is a codification of the principles outlined in *People v. Zehr*, 103 Ill. 2d 472 (1984). The rule provides that:

> "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 own behalf; and (4) that the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure 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." (Emphasis added.) Ill. S. Ct. R. 431(b) (eff. July 1, 2012).

¶ 22 In accordance with this rule, the trial court must ask the venire whether they both "*understand* and *accept* the enumerated principles, mandating 'a specific question and response process.' " (Emphases in original.) *People v. Wilmington*, 2013 IL 112938, ¶ 32 (quoting *People v. Thompson*, 238 Ill. 2d 598, 607 (2010)). "[T]he language of Rule 431(b) is clear and unambiguous." *People v. Belknap*, 2014 IL 117094, ¶ 44. Although there have been cases allowing for some flexibility in the word choice used in complying with Rule 431(b), recently our supreme court in *Sebby* specifically found that asking jurors whether they "had any problems with" or "believed in" those principles was insufficient and constituted clear error. *Sebby*, 2017 IL 119445, ¶ 49; see also *People v. McGuire*, 2017 IL App (4th) 150695, ¶ 35 ("Trial courts must exercise diligence when instructing the jury of the *Zehr* principles as codified in Rule 431(b) and must not deviate in any way from the precise language chosen by the Illinois Supreme Court to be in that rule."). We review a trial court's compliance with Rule 431(b) *de novo*. *Belknap*, 2014 IL 117094, ¶ 41.

¶ 23 Here, during *voir dire*, the trial court advised the venire of the Rule 431(b) principles and asked them if they had "a disagreement or problem" with each of the principles and to raise their hand if so. We conclude that this is clear error because the trial court did not ask the potential jurors if they understood and accepted these principles. See *Belknap*, 2014 IL 117094, ¶ 46 ("[T]he trial court's failure to ask whether the jurors understood the principles constitutes error alone.").

¶ 24 The next step under the plain error doctrine 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." *Sebby*, 2017 IL 119445, ¶ 51. If the evidence is closely balanced, the trial court's Rule 431(b) violation requires us to reverse and remand for a new trial. *Sebby*, 2017 IL 119445, ¶ 78 ("[A] clear Rule 431(b) violation is reversible error under the first prong, where the defendant demonstrates that the trial evidence was close.").

¶ 25 The State argues that the evidence was not closely balanced, and we agree. "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. As mentioned, to sustain defendant's AHC conviction, the State had to prove beyond a reasonable doubt that he possessed a firearm and he had qualifying prior convictions. 720 ILCS 5/24-1.7(a) (West 2014). Because defendant stipulated to the qualifying convictions, the only question is whether the evidence that defendant possessed a firearm is closely balanced.

¶ 26 After conducting a commonsense evaluation of the totality of the evidence, we find the evidence that defendant possessed the gun was not closely balanced. Here, unlike in *Sebby*, where the supreme court found that the evidence was closely balanced, the outcome of the trial in this case did not depend upon the trier of fact resolving a contested credibility dispute. *Sebby*, 2017 IL 119445, ¶¶ 61-63. Rather, the facts and circumstances surrounding the recovery of the firearm are not in dispute. See *People v. Montgomery*, 2018 IL App (2d) 160541, ¶ 32 (distinguishing *Sebby* where there was no contest of credibility and the evidence was unrefuted). The accounts from the police officers were consistent with one another, and there was no

conflicting testimony from defendant. The only issue was whether, for purposes of AHC, the location of the firearm under defendant's thigh while he was sleeping or unconscious constituted possession. We have resolved this issue in detail above and found that defendant constructively possessed the firearm because he had: exclusive control over the vehicle and the contents of it; and knowledge of the firearm based on the placement of it underneath his thigh. Accordingly, we conclude that the evidence was not closely balanced. Therefore, defendant cannot obtain relief under the plain error doctrine because the error does not rise to the level of plain error and this claim is thus forfeited. See *People v. Albarran*, 2018 IL App (1st) 151508, ¶ 62.

¶ 27 Finally, defendant argues that he is entitled to a new sentencing hearing because the court considered facts not in evidence in determining his sentence. Specifically, he contends that the trial court's statement that defendant was "very inebriated on something" was not a fact admitted into evidence and was improperly considered by the court at sentencing.

¶ 28 Defendant has failed to preserve this issue for review by not raising it contemporaneously at sentencing or in his written postsentencing motion. See *People v. Thompson*, 238 Ill. 2d 598, 611 (2010). Failure to preserve an issue causes a defendant to forfeit his argument on appeal. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). Defendant acknowledges this failure and once again requests that we review his claim for plain error. *People v. Winchester*, 2016 IL App (4th) 140781, ¶ 69 (stating that the forfeiture rule requiring preservation is not absolute and reviewing courts may review plain errors pursuant to Illinois Supreme Court Rule 615(a)). We must first determine whether any error occurred at sentencing. *People v. Walker*, 232 Ill. 2d 113, 124-25 (2009). Here, we find no error.

¶ 29 The Illinois Constitution requires a trial court to impose a sentence that balances the seriousness of the offense and the defendant's rehabilitative potential. Ill. Const. 1970, art. I, § 11; *People v. Lee*, 379 Ill. App. 3d 533, 539 (2008). To achieve such balance, the trial court must consider both aggravating and mitigating factors including: "the nature and circumstances of the crime, the defendant's conduct in the commission of the crime, and the defendant's personal history, including his age, demeanor, habits, mentality, credibility, criminal history, general moral character, social environment and education." *People v. Maldonado*, 240 Ill. App. 3d 470, 485-86 (1992). The trial court, as opposed to the reviewing court, is the best situated to assess these factors. *People v. Sullivan*, 2014 IL App (3d) 120312, ¶ 51. As such, the imposition of a sentence is generally a matter of judicial discretion. *People v. Wilson*, 2012 IL App (1st) 101038, ¶ 60.

¶ 30 However, the question of whether a court relied on an improper factor in imposing sentence presents a question of law that is reviewed *de novo*. *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 49. Defendant bears the burden of establishing that his sentence was based on an improper sentencing factor. *Bowen*, 2015 IL App (1st) 132046, ¶ 49. In making this determination, a reviewing court should consider the record as a whole, rather than focusing on a few words or statements by the trial court. *Bowen*, 2015 IL App (1st) 132046, ¶ 49 (citing *People v. Ward*, 113 Ill. 2d 516, 526 (1986)). This court will not reverse a sentence unless it is clearly evident that the sentence was improperly imposed. *Bowen*, 2015 IL App (1st) 132046, ¶ 49; see also *People v. Kelley*, 2015 IL App (1st) 132782, ¶ 93 (this court defers to the decisions of the trial court regarding sentencing and " 'presumes that the trial court considered only appropriate

factors in sentencing, unless the record affirmatively shows otherwise' " (quoting *People v. Quintana*, 332 Ill. App. 3d 96, 109 (2002)).

¶ 31 In this case, defendant does not dispute that his 15-year sentence falls within the statutory range for AHC. See 720 ILCS 5/24-1.7(b), 5/5-4.5-25 (West 2014) (AHC is a Class X felony with a statutory sentencing range of 6 to 30 years' imprisonment). Rather, he asserts that the trial court erred in imposing his sentence by improperly referring to a fact not in evidence. Specifically, defendant points out that in announcing sentence the court stated that he was inebriated at the time of this offense.

¶ 32 As mentioned, in reviewing the imposition of a sentence, "we do not focus on isolated statements but consider the record as a whole." *People v. Walker*, 2012 IL App (1st) 083655, ¶ 30. After considering the record as a whole, we find that the trial court did not err in sentencing defendant. Although the court remarked that defendant was inebriated at the time of this incident, the record shows that in imposing its sentence the court focused primarily on defendant's criminal history and his failure to be a "productive citizen" than it did on this passing remark. Specifically, the court reviewed defendant's PSI and recounted his criminal history. In doing so, the court pointed out that he sold drugs as a juvenile, "caught a gun case 16 years ago," failed to satisfactorily complete probation for that gun case, "ended up in the penitentiary," "shot three people," and "went back to jail just recently on a DUI." The court also pointed out that in this case he was found in possession of another gun and that defendant was essentially a "career criminal." The court further noted that it did not "see a lot of mitigation here." Nevertheless, the court sentenced him to a term in the lower half of the sentencing range for the Class X offense of AHC. Given this record, the court did not err in imposing its sentence.

¶ 33 In support of this conclusion, we briefly note that even if the trial court's comment was improper, an isolated remark made in passing does not mandate resentencing. *People v. Hayden*, 338 Ill. App. 3d 298, 308 (2003); see also *People v. Lavelle*, 396 Ill. App. 3d 372, 386 (2009) (finding that even if the court may have considered a fact not in evidence, the court did not err because it considered aggravating and mitigating factors, the parties' arguments, and the defendant's allocution). Thus, we find that the trial court did not err in sentencing defendant and we do not need to address whether the first prong of the plain error doctrine is applicable here.

¶ 34 Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 35 Affirmed.