2019 IL App (1st) 170226-U

No. 1-17-0226

April 29, 2019

First 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. 16 CR 10738
	)	
LATROY HODGES,	)	Honorable
	)	Vincent Gaughan,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WALKER delivered the judgment of the court.
Justices Pierce and Griffin concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court failed to comply with Illinois Supreme Court Rule 431(b), but the error did not rise to the level of plain error because the evidence was not closely balanced.

¶ 2 Following a jury trial, defendant Latroy Hodges was convicted of three counts of aggravated assault (720 ILCS 5/12-2(b)(5) (West Supp. 2015)) based on a theory of accountability and sentenced to concurrent terms of 15 months' imprisonment on each count. He appeals, arguing that the trial court failed to comply with Illinois Supreme Court Rule 431(b)

(eff. July 1, 2012), and that this error was prejudicial because the evidence was closely balanced. We affirm.

¶ 3 BACKGROUND

¶ 4 Defendant and Tacorey Killebrew[1] were indicted on three counts of aggravated battery (720 ILCS 5/12-3.05(g)(3) (West Supp. 2015)). The charges arose from an incident in which they, then inmates in the Cook County Department of Corrections, were alleged to have knowingly caused three correctional officers to come into contact with urine. Defendant and Killebrew were tried separately.

¶ 5 At the beginning of *voir dire*, the trial court admonished the venire that:

> "Under the law, a defendant is presumed to be innocent of the charges 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."

¶ 6 The court further stated:

> "Anybody charged with an offense and placed on trial is presumed to be innocent of the charge against him. Basically, what that means, if you were selected as jurors and I sent you back to the jury room without hearing any

[1] Killebrew currently has an appeal pending in case number 1-17-0546. He is not a party to this appeal.

evidence and told you, I want you to reach a verdict, and you came back, the only verdict you could come back with is not guilty because there was no evidence presented against [defendant] and he has the presumption of innocence.

Does anybody have any problems with understanding the presumption of innocence? In the outer or inner part of the courtroom, please raise your hand.

* * *

All right. Does anybody have any problems or qualms about applying that constitutional principle that anybody placed on trial in a criminal case is presumed to be innocent of the charges against them? Please raise your hand."

¶ 7 Next, the court explained:

"I want to talk about the burden of proof. Some of you may have sat on civil juries. In a civil case, the burden of proof is preponderance of the evidence. That means if it was a scale, all you have to do is tilt it. And the definition there is it's more likely than not that the event occurred. But in a criminal case, the burden of proof is proof beyond a reasonable doubt. And this is the highest burden of proof at law.

Does anybody have any problems understanding that proof beyond a reasonable doubt is the highest burden of proof at law? Please raise your hand.

***

Does anybody have any qualms or problems about applying that principle—constitutional principle that proof beyond a reasonable doubt is the highest burden of law?

***

The next constitutional principle I want to talk to you about is the State has the burden of proof throughout each and every element of the trial. And that burden of proof, again, is proof beyond a reasonable doubt. Does anybody have any problems understanding that the State has the burden of proof and that burden of proof is proof beyond a reasonable doubt and that burden exists throughout the trial? Please raise your hand.

***

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

¶ 8 Finally, the court stated:

"The next constitutional principle I want to talk to you about is anybody placed on trial in a criminal case has a constitutional right to testify on their own behalf. And if [defendant] decides to testify in his own behalf, his credibility should be judged [in] the same manner as any other witness. Does anybody have any problems understanding that constitutional principle in the outer or inner part of the courtroom? Please raise your hand.

***

> Does anybody have any problems or qualms about applying that constitutional principle? Please raise your hand.
>
> ***
>
> If you look at this as a constitutional coin and turn it over, anybody placed on trial in a criminal case has a constitutional right not to testify. And if [defendant] decides not to testify, no inference whatsoever should be gained from his silence. Does anybody have any problems understanding that constitutional principle in the inner or outer part of the courtroom? Please raise your hand.
>
> ***
>
> Does anybody have any problems or qualms about applying that constitutional principle of law? Please raise your hand."

¶ 9 The only members of the venire who raised their hand or stated they had trouble understanding or accepting the court's admonishments were two prospective jurors who have difficulty with English. They were eventually dismissed upon the agreement of the parties. Defense counsel did not object to the court's Rule 431(b) admonishments.

¶ 10 At trial, the State proceeded on all three counts of aggravated battery. Joseph Baluk testified that he was working as a "movement officer" at the Cook County Department of Corrections on June 28, 2016. Baluk's duties entailed escorting inmates between their housing units and court. At approximately 1:18 p.m., a group of inmates returned from court. The State introduced and published five clips of surveillance video from multiple cameras within the jail,

which Baluk stated accurately depicted the events that occurred that day. The clips, which are in the record on appeal, do not have audio.

¶ 11 Baluk identified himself in one video clip standing at a gate and preparing to retrieve the group of inmates from a holding cell. Baluk identified defendant and Killebrew standing near each other in the group. Baluk explained that the inmates are called forth from the holding cell by their respective housing units, directed to the "scan machine," and scanned for contraband before being taken back to their units. Baluk also explained that the inmates are given court lunches with "a little plastic [bottle of] juice with a plastic cap," which they are allowed to bring back to the jail. A video clip shows defendant remove a bottle of yellow liquid from his pants while in the holding cell and place it in his breast pocket. In a different clip, Baluk identified defendant and Killebrew standing in line to be scanned. However, Killebrew walks away from the scanning machine without being scanned. Two of the subsequent video clips show defendant reveal a small bottle, hand it to Killebrew, and grin. After making the handoff, defendant keeps his distance as Killebrew walked to the edge of camera range and interacted with a correctional officer.

¶ 12 Baluk testified that after Killebrew walked out of the line, he heard a "commotion" and left his post at the scanning machine to investigate. He is shown on the video leaving the machine and walking away from the camera toward Killebrew. Upon arrival, he saw Killebrew holding a bottle of urine. The bottle was the same type that inmates are given in their court lunches. Baluk identified himself on video attempting to "handle the situation" with Killebrew, and stated that he was concerned about "[a]n attack of some sort" involving the urine. Killebrew did not comply with officers' commands to drop the bottle, so Baluk notified his superior,

Sergeant William Zurella. Zurella arrived and subdued Killebrew by taking him to the ground, causing the bottle of urine to go up in the air and come down on Baluk and "other officers." The State introduced and published 10 photographs, which are not in the record on appeal, that Baluk identified as stills from the surveillance video. One of the photographs showed defendant holding the same bottle of urine that he later saw Killebrew holding.

¶ 13 On cross-examination, Baluk acknowledged the video clips introduced by the State did not show the entirety of the time the inmates spent in the holding cell. He did not hear any conversations between defendant and Killebrew. Later, when officers confronted Killebrew, defendant was not present. Baluk stated that it was "hard to say" whether Killebrew ever threw the bottle, and he was "[n]ot really sure" whether the urine left the bottle before Zurella tackled him. Baluk acknowledged that he told an investigator on the day of the incident that Zurella's tackle is what caused the urine to "splash everywhere."

¶ 14 Louis Hovel, another Cook County correctional officer, testified that he went to the holding area to help process the group of inmates returning from court. When he arrived, Killebrew was engaged in "a very heated exchange" with an unnamed sergeant. Killebrew walked back to the area by the scanning machine, and defendant handed him a juice bottle of "a very dark yellow liquid." Hovel identified the same photograph as Baluk, which he stated showed defendant holding the bottle of urine and "[p]assing it off" to Killebrew. Killebrew walked back to the sergeant, took the cap off the bottle, and exchanged more words with him. Hovel and other officers "box[ed] him in," while Baluk secured the other inmates in the holding cell. Hovel testified that he thought the bottle contained urine, and that he feared Killebrew

would throw it at him. "Another sergeant" came upon the scene and subdued Killebrew. As this sergeant took Killebrew to the ground, "the bottle popped out and fluid went everywhere."

¶ 15 On cross-examination, Hovel agreed that Zurella's tackle is what caused the bottle to "fly out of [Killebrew's] hand." He stated that Killebrew was an active member of the jail gang "Savage Life," and was known for "[m]ultiple assaults on staff."

¶ 16 Zurella testified that he responded to a radio call about the incident with Killebrew. Zurella was approximately 75 feet away and arrived on the scene in one minute. Upon arrival, he noticed Killebrew holding a bottle of yellow liquid and talking in "an aggressive manner." Zurella believed the liquid was urine, and feared that Killebrew would throw it at him. When Killebrew turned his back to talk to other officers, Zurella tackled him. He was "not sure" what happened to the bottle afterwards, but Killebrew was no longer holding it when they were on the ground.

¶ 17 On cross-examination, Zurella acknowledged that he did not see defendant during the incident, and did not know how Killebrew obtained the bottle. He did not see Killebrew throw the bottle.

¶ 18 The State rested, and the court denied defendant's motion for a directed verdict. The defense rested without presenting evidence. The court then instructed the jury on principles of accountability, circumstantial evidence, and at defendant's request, on the lesser included offense of aggravated assault.

¶ 19 The jury found defendant guilty on three counts of aggravated assault. The court denied defendant's motions for judgment notwithstanding the verdict and for new trial. Following a sentencing hearing, defendant was sentenced to three concurrent terms of 15 months in prison.

¶ 20 ANALYSIS

¶ 21 On appeal, defendant argues that we should grant him a new trial due to the trial court's failure to admonish the venire in compliance with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). The State concedes the error, but contends that a new trial is not necessary because the evidence against defendant was "overwhelming" and not closely balanced.

¶ 22 Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) provides that the trial court "shall ask" every prospective juror whether he or she "understands and accepts" four fundamental 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 if a defendant does not testify it cannot be held against him or her***."

The admonishments are mandatory and strict compliance is required. *People v. Wilimington*, 2013 IL 112938, ¶ 32; *People v. Thompson*, 238 Ill. 2d 598, 607 (2010). Notably, the court must ask members of the venire both whether they understand *and* accept the principles. Ill. S. Ct. R. 431(b) (eff. July 1, 2012); *Wilmington*, 2013 IL 112938, ¶ 32. Whether the trial court's admonishments strictly complied with Rule 431(b) is a matter of law which we review *de novo*. *People v. Belknap*, 2014 IL 117094, ¶ 41.

¶ 23 Here, the parties agree and the record indicates that the trial court did not expressly ask the prospective jurors whether they understood and accepted that defendant was not required to present any evidence, and whether they accepted that defendant's election not to testify could not

be held against him. The record clearly shows that the trial court did not ask these questions. Thus, we find that the trial court erred in its Rule 431(b) admonishments. See *People v. Sebby*, 2017 IL 119445, ¶ 49 (finding "clear error" where the trial court did not ask potential jurors whether they understood each principle).

¶ 24 The parties also agree that defendant has forfeited this issue by failing to raise it in the trial court. In order to preserve a claim of error for appeal, a defendant must both object in the trial court and raise the error in a posttrial motion. *Belknap*, 2014 IL 117094, ¶ 66 (citing *People v. Enoch*, 122 Ill. 2d 176, 186 (1988)). As defendant did not raise an objection to the Rule 431(b) admonishments in the trial court, we agree that he has forfeited the issue.

¶ 25 Defendant nevertheless contends that we may review the issue for plain error. The plain-error doctrine is a "narrow and limited exception" to the general forfeiture rule. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). The first step of a plain-error analysis is determining whether a "clear or obvious" error occurred at trial. *Sebby*, 2017 IL 119445, ¶ 49. If a defendant shows that there was such an error, the analysis proceeds to whether (1) the evidence was "closely balanced" such that the error alone threatened "to tip the scales of justice," or (2) the nature of the error was so serious that it affected the fundamental fairness of the trial and the integrity of the judicial process. *Id.* ¶ 48. Under either prong, the defendant bears the burden of persuasion. *Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 26 As prong two of the plain-error doctrine is generally not applicable to Rule 431(b) violations (*Sebby*, 2017 IL 119445, ¶ 52), defendant argues only under prong one, *i.e.*, that the evidence adduced at trial was closely balanced. Whether the evidence was closely balanced "depends upon the quantum of evidence presented by the State against the defendant." *People v.*

Herron, 215 Ill. 2d 167, 193 (2005). A reviewing court must conduct a qualitative, commonsense evaluation of the evidence based on the totality of the circumstances. *Sebby*, 2017 IL 119445, ¶ 53. The evaluation deals not with the sufficiency of close evidence, but with the closeness of sufficient evidence. *Id.* ¶ 60; see also *People v. Piatkowski*, 225 Ill. 2d 551, 566 (2007) (whether the evidence is closely balanced is a "separate question" from whether the evidence is sufficient). The inquiry requires a reviewing court to assess the evidence with respect to the elements of the offense and the witnesses' credibility. *Sebby*, 2017 IL 119445, ¶ 53.

¶ 27 Here, defendant was found guilty on three counts of aggravated assault, which required the State to prove that he knowingly engaged in conduct which placed the victims in reasonable apprehension of unwanted physical contact, and that he knew the victims were correctional officers performing their official duties. 720 ILCS 5/12-1(a) (West 2016); 720 ILCS 5/12-2(b)(5) (West Supp. 2015). More specifically, defendant was prosecuted under the theory that, by supplying Killebrew with the urine, he became accountable for Killbrew's actions in committing the assaults. A person is legally accountable for the conduct of another when, with the intent to promote or facilitate the underlying offense, he "solicits, aids, abets, agrees, or attempts to aid" the other person in the planning or commission of the offense. 720 ILCS 5/5-2(c) (West 2016). Additionally, when two or more people engage in a "common criminal design," all participants in the design are responsible for "any acts in furtherance of that common design" committed by other participants. *Id.* Thus, the State can prove a defendant's intent to facilitate a crime "by showing *either* (1) that the defendant shared the criminal intent of the principal, *or* (2) that there was a common criminal design." (Emphases in original.) *People v. Fernandez*, 2014 IL 115527, ¶ 21.

¶ 28 Defendant does not contest that Killebrew committed the underlying assaults, but argues that the evidence was "closely balanced" with respect to his intent to facilitate Killebrew's offenses. In response, the State argues that, under the common design rule, defendant "attached himself to Killebrew" by enabling his "illegal possession" of the urine. Thus, the State contends that defendant was accountable for Killebrew's assaults on correctional officers because they were done in furtherance of a common design.

¶ 29 Under the common design theory of accountability, "[e]vidence that a defendant voluntarily attached himself to a group bent on illegal acts with knowledge of its design supports an inference that he shared the common purpose and will sustain his conviction for an offense committed by another." *In re W.C.*, 167 Ill. 2d 307, 338 (1995). The offense for which a defendant is held accountable need not be the ultimate goal of the common design; rather, a defendant is responsible for *all* acts done by his fellow members in furtherance of the common design. *Fernandez*, 2014 IL 115527, ¶ 17.

¶ 30 Here, the evidence was not closely balanced as to whether defendant entered into a criminal design with Killebrew. The State adduced testimony from three witnesses, who testified consistently with one another and with the surveillance footage it introduced into evidence. In particular, Hovel testified that he saw defendant hand Killebrew a bottle of urine from his pocket after Killebrew began arguing with one of the correctional officers. Less than a minute later, Killebrew uncapped the bottle and held it as he continued yelling at the officers who tried to contain the situation. The standoff ended when Zurella arrived on the scene and tackled Killebrew. This account was entirely corroborated by Baluk, Zurella, and the surveillance footage.

¶ 31 Although defendant argues that there is no direct evidence establishing his intent, this does not render the evidence closely balanced. See *Belknap*, 2014 IL 117094, ¶ 56 (circumstantial evidence was not closely balanced where it both implicated the defendant and "excluded any reasonable possibility" of his innocence). The circumstantial evidence in this case comes from video footage that showed defendant handing a bottle of urine to Killebrew. The evidence also showed that defendant made this exchange after he and Killebrew walked away from a security checkpoint and Killebrew began arguing with a correctional officer. Defendant grinned after making the handoff and proceeded to keep his distance from Killebrew. Within a minute, Killebrew removed the cap and held the bottle as he continued to argue with correctional officers. Killebrew disregarded their commands to drop the bottle and only let go after Zurella tackled him. "Applying a commonsense approach based on the context of the case," as we must, the only reasonable inference is that defendant handed Killebrew the urine pursuant to a common criminal design. See *People v. Jackson*, 2019 IL App (1st) 161745, ¶ 49. Defendant is legally accountable for Killebrew's actions in furthering their design, including his assaults on Baluk, Hovel, and Zurella. See 720 ILCS 5/5-2(c) (West 2016); *Fernandez*, 2014 IL 115527, ¶ 13.

¶ 32 CONCLUSION

¶ 33 The State's evidence against defendant was strong and unrefuted on all elements of the aggravated assault charges. Thus, the evidence was not closely balanced, and defendant is not entitled to relief under the plain-error doctrine.

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

¶ 35 Affirmed.