2019 IL App (1st) 171515-U

No. 1-17-1515

Order filed October 11, 2019

Fifth Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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 12848
	)	
MILTON CHALMERS,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Rochford and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in *sua sponte* calling the victim as a court's witness. With regard to defendant's challenge to the fines and fees imposed by the trial court, the cause is remanded pursuant Illinois Supreme Court Rule 472(e) (eff. May 17, 2019).

¶ 2 Following a bench trial, defendant Milton Chalmers was convicted of aggravated battery with a firearm (720 ILCS 5/12-3.05(e)(1) (West 2014)) and sentenced to 10 years in prison. On appeal, defendant contends that the trial court impermissibly assumed the role of an advocate for

the State by *sua sponte* recalling the State's chief witness as a court's witness after both parties had rested and the additional testimony was overwhelmingly favorable to the State. Defendant also challenges the fines and fees imposed by the trial court.

¶ 3 For the reasons that follow, we affirm and remand.

¶ 4 Defendant's conviction arose from the July 19, 2015, shooting of Nikeemia Howell. Following his arrest, defendant was charged by indictment with six counts of attempted first degree murder, one count of aggravated battery with a firearm, and one count of aggravated discharge of a firearm.

¶ 5 At trial, Howell testified that, in July of 2015, she was working at a restaurant called Beefee's. For about three months, she had been dating one of her coworkers, Mahmoud Badran, whom she exclusively referred to by the name "Muhammad" in her testimony. After Howell got off work around midnight on July 18, 2015, Badran drove her to a location to meet her cousins. Her cousins then drove her to the area of West 18th Street and South Central Park Avenue so she could attend an informal outdoor gathering with some friends. According to Howell, defendant, whom she identified in court, lived near this intersection, in a house with metal stairs. Howell stated that she had met defendant a "few weeks" prior, and their relationship had become intimate. However, he had become obsessive and possessive, so she stopped returning his calls and text messages.

¶ 6 At around 2 a.m., Howell walked to a house down the block to get cigarettes. On her way back to her friends, Howell stopped in front of defendant's house and smoked a cigarette with his cousin. When she finished the cigarette, Howell resumed walking toward her friends. At this point, defendant appeared. Howell testified, "He just started talking and approached me, asked

me if I was going to stay with him, talk to him. He wanted me to hang out with him. *** He asked me like if I was going to stay with him, if I was going to hang out with him, asked me if I was in love with the Arabian." Howell explained that by "the Arabian," defendant meant Badran.

¶ 7 At some point after returning to her friends, Howell went to get cigarettes a second time. On her way back to her friends again, Howell tried to walk past defendant, but he grabbed her arm and said it was crazy that she was not with him. Defendant expressed how upset he was at their not being together. Howell recalled him repeatedly asking about "the Arabian." Defendant was irate, belligerent, rude, and seemed furious, "like he was just going to pop off like by the head like just a pop bottle." Defendant asked Howell if she wanted to be with Badran. Howell told him yes, Badran was going to be her husband. Defendant asked if she was willing to "die by him," and when Howell said yes, he retrieved a gun from a man named Antwan Fibbs, said, "Take this with you," and shot her in the left side of her stomach.

¶ 8 Howell, who had been standing in front of defendant's house when she was shot, crossed the street and walked a little way before she called 911. When the police arrived, she told them defendant lived in the house with the metal stairs. A few minutes later, they brought defendant to her. She identified him and noted to the police that he had changed his clothes. Howell was taken to the hospital, where she was treated and released. The bullet was not removed from her body. Although she stated she had a scar on her stomach from where she was shot, she declined to show it in court.

¶ 9 On cross-examination, Howell stated that she had been working at Beefee's for a couple of months before the shooting. During that time, she also worked at a restaurant called Dolphin's. She had met Badran at Dolphin's before she was hired at Beefee's, and had been

engaged to him for about a month before the shooting. Howell acknowledged that she first met defendant about a month before the shooting, through Fibbs, who was her mother's boyfriend. Howell's relationship with defendant did not become intimate until after the 4th of July weekend. At that point, she started supporting him financially and bought him an iPhone. However, she was also seeing Badran almost every day during this time.

¶ 10 Howell further admitted that she had told defense counsel and a defense investigator that she had been in a relationship with Badran for eight months before the shooting, and that he had proposed to her about three months into their relationship. She testified that there was "a ring involved," and that Badran did not know about her relationship with defendant.

¶ 11 On re-direct, Howell clarified that prior to the night of the shooting, defendant did not know about her relationship with Badran. She first told defendant when he confronted her on the street about why she was rejecting him.

¶ 12 Chicago police officer Genghis Harris testified that about 2:25 a.m., he and his partner responded to a call of a person shot. At the reported location, they found a woman, later determined to be Howell, slumped over on the curb holding her stomach. Howell gave the officers defendant's name and directed them to his house. She did not know the address, but stated it was the only house with iron stairs.

¶ 13 Harris, his partner, and other assisting units went to the house, where they were admitted by a woman later determined to be defendant's mother. The officers looked in all the rooms and found defendant in the kitchen, washing dishes. After confirming defendant's identity, the officers handcuffed him and brought him outside. Howell, who was being treated by paramedics,

identified the defendant as the man who shot her. When Howell made a positive identification, the officers placed defendant under arrest. No weapons were recovered.

¶ 14 The parties stipulated that a gunshot residue test was administered on defendant on July 19, 2015, at 3:05 a.m., revealing that defendant may not have discharged a firearm with either hand, or that if he did discharge a firearm, then particles were removed by activity, were not deposited, or were not detected by the procedure. The parties also stipulated that an evidence technician recovered one expended shell casing at the crime scene, in front of the residence at 1829 South Central Park Avenue. Finally, the parties stipulated that an EMT would have testified that Howell suffered a gunshot wound to the right lower quadrant; and that an emergency room physician would have testified that Howell presented with a gunshot track extending through the mid-abdomen onto the left inguinal region and left labia majora subcutaneous tissue, and that x-rays revealed a bullet fragment in the soft tissue of the left femur.

¶ 15 Defendant made a motion for a directed finding, which the trial court denied.

¶ 16 Mahmoud Badran testified, through an interpreter, that he had been living in the United States for three years and could understand and speak English. However, he was more comfortable testifying in Arabic. At the time of trial, he had been married for about a year, had a two-month-old son, and had been working as an Uber driver for about a year.

¶ 17 In July 2015, Badran was working as a manager and cook at Beefee's restaurant. He met Howell when she started working at Beefee's sometime that summer. She worked there for two or three weeks. During that time, Badran and Howell worked together two or three times per week, for a total of four to nine shifts. They did not spend time together outside of work, did not have a dating relationship, had not spent the night at each other's homes, were not engaged, and

had not discussed marriage. Badran denied having given Howell a ring. At the end of Howell's shift on July 18, 2015, Badran gave Howell a ride home. He did not recall the exact location where he dropped her off, and stated that he had never given her a ride before. Badran saw Howell one or two times after that night, when she came by the restaurant to see if she was scheduled to work.

¶ 18 On cross-examination, Badran agreed that there was a restaurant called Dolphin's near Beefee's, and that he would sometimes go to Dolphin's to pick up "products" that Beefee's needed. He did not know whether Howell worked at Dolphin's. Badran stated that in July 2015, he lived in Berwyn in an apartment with a friend. When asked when he met his wife, Badran answered, "We got married here, but I knew her from overseas."

¶ 19 After the State indicated it had no further questions, the trial court questioned Badran as follows:

> "THE COURT: Are you also known as Muhammad?
>
> [BADRAN]: No, that's my father. That's my father's name.
>
> THE COURT: Is there a Muhammad -- does your father work at the restaurant?
>
> [BADRAN]: My father is deceased.
>
> THE COURT: Is there another -- was there a Muhammad that worked at the restaurant?
>
> [BADRAN]: No."

Following this exchange, the court had the bailiff bring Howell back into the courtroom. The court directed Howell to "take a look at the individual on the witness stand here." After Howell did so, the court had her step back out of the courtroom.

¶ 20 On re-direct by defense counsel, Badran agreed it was fair to say that some English speakers would see his first name as Mahmoud and call him Muhammad, and further agreed that this happened often. He stated that to the best of his knowledge, he was the only Mahmoud or Muhammad who worked as a manager at Beefee's while Howell was employed there. Badran clarified that his roommate in Berwyn was male. He denied having ever been intimate with Howell, described their relationship as a "working relationship," and stated he did not remember whether he ever discussed his personal life with her.

¶ 21 Laura Law, an investigator with the Cook County Public Defender's office, testified that she and others from her office interviewed Howell. Howell reported that defendant did not know about her relationship with Badran because she never told him about it. On cross-examination, Law stated that she did not recall asking Howell about defendant's knowledge before a particular date or time. On re-direct, Law clarified that, when Howell was asked whether defendant ever found out about her relationship with Badran, she said no.

¶ 22 The parties stipulated that if called, a reporting officer on the original case incident report would have testified that in the report, Howell's sobriety was listed as "unknown."

¶ 23 Defendant elected not to testify.

¶ 24 After the State indicated that it was not offering any evidence in rebuttal, the court called Howell as a court witness. Once Howell was seated, the court questioned her as follows:

> "Q. Ms. Howell, did you take a look at the gentleman who was in the witness stand when you walked out in the courtroom a little bit ago?
>
> A. Yes.
>
> Q. Who is that?

A. Muhammad.

Q. Is that the Muhammad that you were engaged to?

A. Yes."

Following this exchange, the court asked whether anyone had any questions for Howell. Defense counsel indicated she wished to make some inquiries. In response to counsel's questions, Howell stated that Badran was the "Muhammad" she had been dating for eight months before the shooting. She indicated he had proposed to her at the Shedd Aquarium, and stated she had been to his residence, which, in July 2015, was "somewhere east towards the water." The prosecutor asked about Badran's residence, which Howell indicated was an apartment.

¶ 25 The court then asked Howell, "What happened to the engagement?" Howell answered:

"Once this situation happened, he told me that it was too much confusion and that he didn't want to be dragged into this and that it was like against his culture and that he didn't want to be involved in it. And then a few months later, he told me that his mother had arranged a marriage for him overseas because she's really old and his father is already deceased and she wants to see him married before she goes and because of his age. He still wasn't married."

Following this statement, the trial court asked whether defense counsel had any questions for Howell.

¶ 26 Defense counsel asked Howell how religion played into her relationship with Badran. Howell answered that the problem was not so much religion as culture, explaining, "He just said that it was against his culture to be -- he said it was causing a conflict and that the conflict -- the police were coming to his job, asking him questions, they were calling him, and I guess that

somehow goes against his culture." When counsel asked whether Badran lived alone, Howell answered that he said he had a roommate, but the roommate was not there when she went to the apartment. In answer to further questions posed by defense counsel, Howell stated that she pawned the engagement ring, and that she did not continue to work at Beefee's after the shooting. She stated that Badran quit his job there and told her he was going to be a truck driver.

¶ 27 Following Howell's testimony, the court allowed the defense to recall Badran. Badran testified that he never lived near the water on the east side of Chicago, never took Howell to the Shedd Aquarium, and never had a physical or sexual relationship with Howell. Defense counsel then attempted to ask Badran the following questions:

"Q. Mr. Badran, do you consider yourself a religious individual?

A. No, I don't follow it exactly.

Q. Culturally and/or religiously, do you believe in sex before marriage?

[ASSISTANT STATE'S ATTORNEY]: Objection.

THE COURT: Sustained. Ask another question.

[DEFENSE COUNSEL]: You stated you married your wife about a year ago. Had you had sexual relationship with any other women before the relationship with your wife?

[ASSISTANT STATE'S ATTORNEY]: Objection, relevance.

THE COURT: Sustained.

[DEFENSE COUNSEL]: How did you feel about dating outside of your culture or religion?

A. What do you mean?

Q. Prior to your relationship with your wife, would you have dated someone who did not -- would you have dated someone outside of your religion even if you don't practice it exactly?

[ASSISTANT STATE'S ATTORNEY]: Objection.

THE COURT: Sustained.

[DEFENSE COUNSEL]: Thank you, Mr. Badran. Nothing further."

¶ 28 On cross-examination, Badran reiterated that his relationship with Howell was always professional. He stated that he became engaged to his wife a few months after Howell left employment at Beefee's, agreed that it was "an arranged engagement," and indicated he could not remember whether he had ever discussed his engagement with Howell. On re-direct, Badran stated he had always known his family was going to have an arranged marriage for him.

¶ 29 Following closing arguments, the trial court acquitted defendant of attempted first degree murder but found him guilty of aggravated battery with a firearm and aggravated discharge of a firearm. In the course of doing so, the court stated that Howell had "credibility issues," commenting, "Taking her testimony as truthful that she was in a relationship with one individual while she was sleeping with the Defendant and that she only told the Defendant about at that time to explain why she was returning his calls, she has the capacity to be duplicitous, deceitful." Nevertheless, the court noted that Howell identified defendant to the police while she was sitting on the curb suffering from a gunshot wound, and opined that in such a situation, "a person is motivated to be truthful." The court further noted that Howell's testimony was corroborated by the officers' discovery of defendant washing his hands in his house shortly after the shooting, as well as by the recovery of a shell casing in front of his house. As to motive, the court found that

Howell's testimony that defendant became angry after learning she was seeing someone else explained why he would shoot her.

¶ 30 The court also addressed Badran's testimony, stating as follows:

> "I did notice *** his body language with his arms being folded and nervous laugh that he had. Certainly, I think that he may be motivated to deny the relationship in that he is Arabic from Jordan who [*sic*] he is now married in an arranged relationship. The victim is African-American and he doesn't want to have anything to do with it."

¶ 31 The court stated that, to some extent, Badran's testimony was collateral, since whether or not Badran was in a relationship with Howell was "peripheral" to the question of whether defendant shot Howell. The court found that Howell could have lied to defendant regarding Badran so as to provide an excuse as to why she was no longer interested in him. The court concluded, "But, again, it goes down to what is an individual's motive when the police ask you who shot you. You're sitting on a curb, you're suffering from a gunshot wound and you name the defendant. The court cannot get around that."

¶ 32 Defendant filed a posttrial motion, arguing, among other things, that the trial court improperly shifted the burden to the defense to provide a motive for Howell to lie about who shot her.

¶ 33 The trial court denied defendant's motion. In explaining its ruling, the court noted that it had found Howell had the capacity to lie, but that it was permitted to accept some portions of a witness's testimony and reject others. The court also characterized its comments at the end of trial regarding Howell's credibility as "thinking out loud in trying to reach my conclusions," and ruled that it had not shifted the burden of proof.

¶ 34 At sentencing, the trial court merged the guilty findings and sentenced defendant to 10 years in prison for aggravated battery with a firearm. The court also imposed various fines and fees. Defendant filed a motion to reconsider sentence, which the trial court denied.

¶ 35 On appeal, defendant contends that the trial court impermissibly assumed the role of an advocate for the State by *sua sponte* calling Howell as a court's witness after both parties had rested, and by eliciting testimony that rehabilitated her credibility and bolstered her claim that she and Badran had been romantically involved. Defendant asserts that the court then compounded its error by sustaining the State's objections to defense counsel's attempts to challenge the veracity of Howell's testimony during Badran's subsequent testimony through questions regarding his religious and cultural beliefs. According to defendant, whether Howell and Badran were in a relationship was significant because, if they were not involved, then defendant's alleged motive for shooting Howell, *i.e.*, that he was jealous, was not credible. Defendant argues that the court demonstrated its decision to call Howell as a court's witness was intended to benefit the State where, after opening the door to the topic of Badran's religious and cultural beliefs through its questioning of Howell, it then denied defense counsel the opportunity to explore this same line of inquiry. Finally, defendant maintains that the court's reliance on its questioning of Howell in assessing her credibility was highly prejudicial.

¶ 36 Defendant acknowledges that he did not object, either at trial or in his posttrial motion, to the court's decision to call Howell as a court's witness, and that, therefore, the issue is forfeited for appeal. Nevertheless, defendant argues that this court may reach the issue (1) because where a court demonstrates bias against a party, error in the court's conduct will not be considered forfeited, (2) via either prong of the plain error doctrine, or (3) due to ineffective assistance of

trial counsel. Whether forfeiture may be avoided under any of these theories requires us to first determine whether any error occurred. See *People v. Johnson*, 238 Ill. 2d 478, 490-91 (2010) (excusing forfeiture based on the trial judge's conduct is warranted only when the trial court has overstepped its authority); *People v. Cosby*, 231 Ill. 2d 262, 273 (2008) (the first step in plain error analysis is determining whether an error actually occurred); *People v. Edwards*, 195 Ill. 2d 142, 165 (2001) ("Counsel cannot be considered ineffective for failing to make or pursue what would have been a meritless objection.").

¶ 37 In general, a trial judge may aid in bringing out the truth of a case in a fair and impartial manner. *People v. Kuntz*, 239 Ill. App. 3d 587, 591 (1993). The proper function of a judge in a criminal trial includes a duty to ensure that justice is done when, for example, a certain fact has not been developed or a certain line of inquiry has not been pursued. *People v. Evans*, 2017 IL App (1st) 150091, ¶ 24. However, the judge must not in any way assume the role of an advocate for one side or the other. *Id.* ¶¶ 24, 25.

¶ 38 As such, a trial court may *sua sponte* call its own witnesses and may question witnesses called by either party. *Id.* ¶ 25 (citing Ill. R. Evid. 614(a), (b) (eff. Jan. 1, 2011)). In its discretion, a trial court may reopen a case on its own motion if a sound basis to do so appears in the record. *Kuntz*, 239 Ill. App. 3d at 592. The propriety of the judicial examination rests largely in the trial court's discretion and depends on the circumstances of each case. *Evans*, 2017 IL App (1st) 150091, ¶ 25.

¶ 39 Here, we conclude that the trial court did not abandon its role as neutral arbiter and assume the role of an advocate for the State when it called Howell as a court's witness. Rather, the court was simply trying to gain clarification on a tangential issue, that is, whether Mahmoud

Badran, who testified for defendant, was the same person as "Muhammad" Badran, whom Howell had testified was her former fiancée. In our view, the trial court did not take an extraordinary course of action in calling Howell as a court's witness. The court did so in a fair and impartial manner, asking simple, factual questions. We find that the court called Howell not in an attempt to bolster the State's case, but in a good-faith effort to mitigate its own confusion. See *People v. Brisco*, 2012 IL App (1st) 101612, ¶ 31. Moreover, the factual issue on which the court was seeking clarity – Badran's identity – was an issue that the court explicitly recognized as collateral and peripheral to the question of defendant's guilt. Finally, because the questions posed by the trial court related to its fact-finding role, the risk of prejudice to defendant was low. See *Evans*, 2017 IL App (1st) 150091, ¶ 26. We find no abuse of discretion.

¶ 40 We are mindful of defendant's argument that the trial court "compounded its error" in calling Howell as a court's witness when it sustained the State's objections to defense counsel's subsequent questions to Badran regarding whether he "believe[d] in" sex before marriage, whether he had had a sexual relationship with any woman other than his wife, and whether he ever would have dated someone outside of his religion. We reject defendant's position. First, we have found that the court did not abuse its discretion in calling Howell as a court's witness. Second, we agree with the State that defense counsel's questions "were so far afield that the trial court would have been remiss in not sustaining the prosecutor's objections." Badran's beliefs about premarital sex and his dating history were wholly irrelevant to the determination of whether defendant shot Howell. Although Howell's credibility was at issue, the trial court correctly observed when denying defendant's posttrial motion that it was permitted to accept as true some portions of Howell's testimony while rejecting other portions. See, *e.g.*, *People v.*

Peoples, 2015 IL App (1st) 121717, ¶ 67 (a trier of fact is free to accept or reject as much or as little of a witness's testimony as it pleases).

¶ 41 The trial court did not abuse its discretion in calling Howell as a court's witness. As such, the issue remains forfeited. Defendant's contention fails.

¶ 42 Defendant's second contention on appeal is that the fines, fees, and costs order should be amended to vacate one fee and to reclassify several assessments as "fines" to be offset by the $5-per-day presentence custody credit.

¶ 43 On February 26, 2019, while this appeal was pending, our supreme court adopted new Illinois Supreme Court Rule 472, which sets forth the procedure in criminal cases for correcting sentencing errors in, as relevant here, the imposition or calculation of fines, fees, and assessments or costs, and the application of *per diem* credit against fines. Ill. S. Ct. R. 472(a)(1), (2) (eff. Mar. 1, 2019). On May 17, 2019, Rule 472 was amended to provide that "[i]n all criminal cases pending on appeal as of March 1, 2019, or appeals filed thereafter in which a party has attempted to raise sentencing errors covered by this rule for the first time on appeal, the reviewing court shall remand to the circuit court to allow the party to file a motion pursuant to this rule." Ill. S. Ct. R. 472(e) (eff. May 17, 2019). "No appeal may be taken" on the ground of any of the sentencing errors enumerated in the rule unless that alleged error "has first been raised in the circuit court." Ill. S. Ct. R. 472(c) (eff. May 17, 2019). Defendant's appeal was pending on March 1, 2019. Therefore, pursuant to Rule 472, we "remand to the circuit court to allow [defendant] to file a motion pursuant to this rule," raising the alleged errors regarding fines, fees, and *per diem* credit. Ill. S. Ct. R. 472(e) (eff. May 17, 2019).

¶ 44 For the reasons explained above, we affirm defendant's conviction and sentence and remand to the circuit court to allow defendant to file a motion pursuant to Rule 472(c).

¶ 45 Affirmed and remanded.