2019 IL App (2d) 160893-U
No. 2-16-0893
Order filed March 5, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. CHRISTINA Y. WINIARCZYK, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 14-DV-689 Honorable Jeffrey S. MacKay, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Hutchinson and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defense counsel was not ineffective for failing to object to hearsay, as counsel strategically chose to argue the weakness of the hearsay instead of prompting the State to call the declarant herself to offer stronger evidence; (2) an alleged confrontation-clause violation was not subject to review as second-prong plain error.

¶ 2 Defendant, Christina Y. Winiarczyk, appeals the trial court's revocation of her supervision for attempted battery (720 ILCS 5/8-4(a), 12-3(a)(2) (West 2014)) and assault (*id.* § 12-1). She contends that her counsel was ineffective for failing to object to hearsay and that the trial court plainly erred in revoking her supervision based on that hearsay. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In February 2015, defendant pleaded guilty and was placed on one year of supervision and ordered to pay fines and costs. In February 2016, the State petitioned to revoke defendant's supervision. That petition was later amended on multiple occasions, with the final version alleging that defendant willfully failed to pay fines and costs, failed to report to the probation department on October 23, 2015, and January 4, 2016, and failed to report from January through May of 2016.

¶ 5 Defendant was taken into custody on April 14, 2016. She was released on her own recognizance to allow her to apply for admission to a treatment facility in Georgia to address mental health and addiction issues. On April 22, 2016, defendant informed the court that she had been accepted to the facility and would be gone for at least two months before she could appear back at court. However, defendant never got to the facility, as she was arrested for domestic battery in another county before she could leave.

¶ 6 On June 2, 2016, a hearing was held on the petition to revoke. Kevin Paulsen, an officer with the Du Page County probation department, testified that he had been assigned to defendant's case, but that it had since been referred to Will County where probation officer Suzanne Stamp handled it. Without objection, Paulsen testified that Stamp told him that defendant failed to report on October 23, 2015, and January 4, 2016, and had not reported at all from January through May of 2016. Paulsen received a written report that defendant had been in various treatment facilities during her term of supervision. The record contains a probation-violation notice signed by Paulsen stating that defendant failed to report to Stamp on October 23, 2015, and January 4, 2016, and that, after failing to report on October 23, 2015, she left the state without permission to go to a treatment facility in California.

¶ 7 On cross-examination, defense counsel questioned Paulsen about his communications with Stamp, noting that Paulsen never personally met with defendant, had spoken with Stamp rarely or only a handful of times, had never met Stamp in person, and had never personally reviewed the notes of the Will County probation department. Counsel elicited an admission that Paulsen did not know that defendant was in custody during May 2016, because the only communication he had with Stamp was before that date. Paulsen was also not aware that defendant had been in various treatment centers in January and February of 2016.

¶ 8 Defendant testified that she visited Stamp's office twice and that Stamp made one home visit, but she did not provide the dates. She said that she reported to Stamp pretty much every month by telephone and that she left messages for Stamp that had not been returned. Defendant was in a treatment center in California in mid-October 2015 and saw someone at the facility send a fax to Stamp notifying her that defendant was at the facility. In December 2015, defendant was at a facility in Georgia that had a policy of calling probation officers to confirm that patients had permission to travel there. Defendant also testified about other treatment facilities that she entered in January, February, and March of 2016. She had no documentation to support her testimony but said that she let Stamp know when she was in treatment. Defendant admitted that she did not report to Stamp after being released on bond in April 2015, but she said that she did not know that she was still required to do so at that time.

¶ 9 The trial court found that the State proved by a preponderance of the evidence that defendant failed to report on October 23, 2015, and January 4, 2016. The court stated that it did not think that defendant tried to contact Stamp, because, had she done so, Stamp would not have told Paulsen the opposite. The court revoked defendant's supervision and sentenced her to jail time and probation. Defendant moved for reconsideration, arguing in part that the State failed to

prove a violation of supervision when the evidence was based on uncorroborated hearsay. Defendant did not argue that the hearsay was inadmissible or that it violated her right to confront the witnesses against her. The court denied the motion, and defendant appeals.

¶ 10 II. ANALYSIS

¶ 11 Defendant contends that her counsel was ineffective for failing to object to the hearsay testimony and that the court plainly erred by revoking her supervision based on uncorroborated hearsay in violation of her right to confrontation.

¶ 12 To establish a claim for ineffective assistance, a defendant to establish that (1) counsel's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). Courts indulge a strong presumption that counsel's conduct is the result of strategic choices rather than incompetence. *People v. Clendenin*, 238 Ill. 2d 302, 317 (2010); *People v. Evans*, 186 Ill. 2d 83, 93 (1999). Decisions about what matters to object to and when to object are generally matters of trial strategy. *People v. Graham*, 206 Ill. 2d 465, 478-79 (2003); *People v. Pecoraro*, 175 Ill. 2d 294, 327 (1997). Reviewing courts will be highly deferential to counsel on matters of trial strategy, making every effort to evaluate counsel's performance from his perspective at the time, rather than through the lens of hindsight. *People v. Madej*, 177 Ill. 2d 116, 157 (1997).

¶ 13 "A defense counsel's decision not to object to the admission of purported hearsay testimony involves a matter of trial strategy and, typically, will not support a claim of ineffective assistance." *People v. Theis*, 2011 IL App (2d) 091080, ¶ 40; see also *In re Charles W.*, 2014 IL App (1st) 131281, ¶ 38 ("counsel's decision not to object at trial was presumptively a matter of sound trial strategy, which we afford great deference"). In *People v. Perry*, 224 Ill. 2d 312, 345

(2007), the supreme court refused to second-guess counsel's decision not to object to hearsay testimony, finding it "entirely likely [that] counsel chose to let these statements pass rather than object and run the risk of the declarants themselves being called to testify." "If these individuals had been put on the stand, they may have offered even more damaging evidence." *Id.*

¶ 14 Here, counsel's failure to object to the hearsay evidence was presumably a strategic decision, reflecting a concern that an objection would have prompted the State to call Stamp, whose testimony might have been far more damaging. Indeed, the record shows that counsel attacked Paulsen's testimony as unreliable based on his limited conversations with Stamp. Had Stamp herself been brought in and testified to the same matters, the evidence would have been stronger, and counsel would have been deprived of the theory that it was unreliable because it was provided only by phone reports to Paulsen. Thus, counsel was not ineffective for failing to object.

¶ 15 In regard to the admission of the hearsay in violation of defendant's confrontation rights, defendant admits that she failed to preserve the matter in the trial court, but argues that second-prong plain error applies. To preserve an issue, a defendant must make a timely objection at trial and raise the issue in a posttrial motion. *People v. Leach*, 2012 IL 111534, ¶ 60. However, under the plain-error doctrine, a reviewing court may excuse a procedural default in two instances: "(1) when 'a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error,' or (2) when 'a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.' " *People v. Sebby*, 2017 IL 119445, ¶ 48 (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)). Under either prong of the

plain-error doctrine, the first step in the analysis is ordinarily to determine whether there was a clear or obvious error. *Sebby*, 2017 IL 119445, ¶ 49. We need not do so here, however, as it is evident that any error was not reversible plain error. See *People v. Czapla*, 2012 IL App (2d) 110082, ¶¶ 10-11 (declining to decide whether there was a confrontation-clause violation, and instead determining that any error was not reversible plain error).

¶ 16 Defendant contends that second-prong plain error applies. Prejudice is presumed under the second prong if the defendant can demonstrate that "the error was so serious [that] it affected the fairness of the trial and challenged the integrity of the judicial process." *Sebby*, 2017 IL 119445, ¶ 50. Very few trial errors meet that standard. Indeed, second-prong plain error is generally equated with "structural error," though not necessarily the limited categories of structural error recognized by the Supreme Court of the United States. *People v. Clark*, 2016 IL 118845, ¶ 46. The first district has reviewed confrontation issues for second-prong plain error (see, *e.g.*, *People v. Hood*, 2014 IL App (1st) 113534, ¶ 20; *People v. Feazell*, 386 Ill. App. 3d 55, 64-65 (2007). However, we have held that confrontation-clause violations are not structural errors and are "not cognizable under the second prong of plain error." *Czapla*, 2012 IL App (2d) 110082, ¶ 19.

¶ 17 Defendant contends that, under *Clark*, our decision in *Czapla* is no longer good law, because *Clark* clarified that plain error is not limited to the types of structural error recognized by the United States Supreme Court. *Clark*, 2016 IL 118845, ¶ 46. But *Clark* does not hold that a confrontation-clause violation is second-prong plain error. While second-prong plain error is not restricted to the types of structural error that have been recognized by the Supreme Court, the error nevertheless must be of a similar kind such that it affects the framework within which the

trial proceeds, rather than simply an error in the trial process itself. *People v. Johnson*, 2017 IL App (2d) 141241, ¶ 51.

¶ 18 Second-prong plain errors are so fundamental to the integrity of a trial that they warrant automatic reversal without a showing of prejudice, and confrontation errors are not considered part of that class. "[T]he denial of the opportunity to cross-examine an adverse witness does not fit within the limited category of constitutional errors that are deemed prejudicial in every case." *Delaware v. Van Arsdall*, 475 U.S. 673, 682 (1986). Thus, even fully preserved confrontation errors are subject to harmless-error review. *People v. Patterson*, 217 Ill. 2d 407, 428 (2005). It would be illogical if a preserved confrontation error could be found harmless beyond a reasonable doubt, but the same error, when forfeited, required automatic reversal. Thus, the error alleged by defendant, that the revocation resulted from the improper admission of hearsay and a confrontation-clause violation, is not of such a serious character that it challenges the integrity of the judicial process. See *People v. Pearson*, 2019 IL App (1st) 142819, ¶ 28.

¶ 19 Further, in light of our conclusion that defense counsel had a valid reason for not objecting to the evidence, we would be hard-pressed to find plain error. As one court has held, when counsel's trial strategy was to use testimony to attempt to weaken the State's case rather than objecting to its admission, the admission of the evidence was not plain error. *People v. Robinson*, 20 Ill. App. 3d 777, 783 (1974). Accordingly, plain error does not apply here.

¶ 20 III. CONCLUSION

¶ 21 Defendant's counsel was not ineffective for failing to object to hearsay, and the trial court did not plainly err in revoking her supervision based on the hearsay. Accordingly, the judgment of the circuit court of Du Page County is affirmed. As part of our judgment, we grant the State's

request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 22 Affirmed.