2019 IL App (3d) 170074-U

Order filed May 7, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
	)	Rock Island County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-17-0074
v.	)	Circuit No. 13-CF-875
	)	
TRACY EUGENE JOHNSON,	)	Honorable
	)	Thomas C. Berglund,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice Schmidt and Justice O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Evidence presented at trial was sufficient for a reasonable trier of fact to find defendant guilty beyond a reasonable doubt of burglary; and (2) the circuit court's error in delivering Rule 431(b) admonishments did not amount to plain error where evidence at trial was not closely balanced.

¶ 2 Defendant, Tracy Eugene Johnson, was found guilty of burglary and sentenced to a term of 20 years' imprisonment. On appeal, he argues that the evidence presented by the State was insufficient to prove him guilty beyond a reasonable doubt. In the alternative, he contends that the Rock Island County circuit court erred in the delivery of the Rule 431(b) admonishments (see

Ill. S. Ct. R. 431(b) (eff. July 1, 2012)), and seeks remand for a new trial under the plain error doctrine. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On October 2, 2013, the State charged defendant with burglary (720 ILCS 5/19-1(a) (West 2012)). The information alleged that defendant entered a building without authority and with the intent to commit theft therein. The information also asserted that defendant was subject to Class X sentencing based on his commission of prior felonies (see 730 ILCS 5/5-4.5-95(b) (West 2012)).

¶ 5 Defendant's jury trial commenced on April 8, 2015. During *voir dire*, the court asked two panels of potential jurors whether they understood that defendant was presumed innocent. Similarly, the court asked each panel if it understood that the State must prove defendant guilty beyond a reasonable doubt, that defendant was not required to present his own evidence, and that the jury could not hold defendant's decision not to testify against him. Each potential juror was given an individual opportunity to respond to each question.

¶ 6 At trial, Jimmie Nettles testified that he was the owner of a tavern in Rock Island. He recalled that on May 23, 2013, he received a call late at night from an alarm company, which caused him to go to the tavern. When he arrived, multiple police officers were on the scene. He learned that the tavern had been robbed. Nettles testified that "all of" his change was missing, including a bag full of quarters, two cherry jars filled with nickels and dimes, and an aluminum soda can filled with pennies. Nettles denied that there was a $20 bill missing, but testified that the alarm that went off was in the cash register, and would have been triggered when a bill was removed.

¶ 7 Nettles identified as accurate a number of photographs depicting the outside of the tavern. Collectively, the photographs show that a portion of the tavern is two stories, while other portions are only one story. One section of the first-floor roof is flat, while an adjacent section of the first-floor roof is steeply angled. The photographs show that a small second-floor window overlooks the angled portion of the first-floor roof. Two air conditioner units sit on the flat portion of the roof. Nettles testified that the small second-floor window was approximately eight feet above the interior floor in the upstairs portion of the tavern. The window had previously been boarded up, but Nettles noticed on the night in question that it had been opened.

¶ 8 On cross-examination, Nettles agreed that he originally told police officers that a $20 bill and approximately $20 in change was missing from the tavern. He clarified that he had more change upstairs. He did not remember if the investigating officers went onto the roof that night.

¶ 9 Nettles also testified on cross-examination that on the day following the break-in, he asked a person to board up the window again. Nettles did not know the person. Nettles testified that he remained on the ground while the man went up a ladder toward the first-floor roof. When the man was halfway up the ladder, he informed Nettles that a pair of sandals and a baseball bat were on the roof. Nettles testified that the man brought those items down from the roof and that Nettles himself never touched them. Nettles also stated that he called the police immediately after learning about the items, and that it was the police who removed the items from the roof.

¶ 10 Willie Brown testified that he has done heating and air conditioning work for Nettles for approximately 10 years. He went to the tavern on two or three occasions in the time period around May 2013, to work on the air conditioning units, though he could not remember the exact dates. Brown recalled that on the second occasion, Nettles informed him that there had been a break-in at the tavern. Nettles asked Brown if he remembered seeing anything on the roof the

first time he was there working on the air conditioning. Brown told Nettles he had not noticed anything.

¶ 11 On cross-examination, Brown conceded it was possible that he was so focused on the air conditioning units that he would not have noticed other items on the roof. He testified that when Nettles asked him if he had seen a bat on the roof, Nettles showed him a bat. Brown did not know if the bat Nettles was showing him was the one that had been on the roof.

¶ 12 Nicholas Pauley, a patrol officer with the Rock Island Police Department, testified that he was dispatched to an alarm call at "Jimmie's Tavern" around 9 p.m. on May 23, 2013. After arriving on the scene, Pauley and another officer noticed that the front door to the tavern was open. After going into the building they confirmed that no one else was there. When Nettles arrived at the scene, they walked through the building with him. Pauley testified that the upstairs portion of the tavern was an old apartment. On that floor, Pauley observed a window from which a piece of wood had been pried off from the outside. He testified that that window was the point of entry. Pauley estimated that the window was seven feet from the interior ground, "definitely above *** where you can see out of it." Pauley did not go onto the roof that night.

¶ 13 Pauley testified that Nettles told him at the scene that a $20 bill was missing from the register, and that the removal of that bill from the register would have set off the alarm. Nettles also told Pauley that approximately $20 in change had been taken "from the register." Nettles did not mention any bags or cans containing coins.

¶ 14 On cross-examination, Pauley testified that there were no exterior stairs leading directly to the roof of the tavern. Further, Pauley did not observe any ladders near the building. He agreed that a person would not be able to simply pull themselves onto the roof.

¶ 15 Officer Tyson Nichols of the Rock Island Police Department testified that he went to the tavern around 12:30 p.m. on May 25, 2013. Nettles told him that the tavern had been broken into two days prior, and that in fixing the window on the roof he discovered some items. Nettles told him that he had not moved the items. Nichols went up a ladder to see the roof and observed those items. He then photographed the scene. Nichols admitted that the cover sheet for his collection of photographs was dated May 21, but attributed that to a clerical error. He reiterated that he visited the tavern and took the photographs on May 25.

¶ 16 The photographs depict, *inter alia*, a pair of sandals and an aluminum baseball bat on the tavern roof. The items sit on the flat portion of the first-floor roof, directly adjacent to the portion of the roof that pitches up toward the window. The photographs show that a piece of wood has been pried back from the window. Three nails are sticking out of the wood. Two air conditioning units can also be seen on the flat portion of the roof. The photographs also show that the tavern has a side door, with four steps and a banister leading up to that door. In one of the photographs, the window in question is actually boarded up. That photograph also shows a sky more overcast than the remainder of the photographs. Nichols testified that he collected the bat and sandals into evidence. The separate bags into which he placed the sandals and the bat were both labeled May 24.

¶ 17 Debra Minton, a forensic scientist, conducted DNA testing on swabs taken from the bat and sandals. Minton identified a single male DNA profile on the undersides of the straps of the sandals. That profile matched defendant's DNA profile. Minton also identified two profiles from the handle of the bat, one complete major profile and a minor profile. The major profile matched defendant's DNA profile. Minton also examined a DNA profile from Nettles, and found that it could be excluded as the minor profile found on the bat.

¶ 18 The parties stipulated that defendant had requested retesting of the items, and that they had been tested by Stephanie Beine at a private laboratory. They further stipulated that Jennifer MacRitchie, a forensic scientist with the Illinois State Police, could testify regarding the contents of Beine's report. MacRitchie testified that Beine's testing of the bat revealed a partial DNA profile from which defendant could not be excluded as a contributor. That partial profile was expected to occur in 1 in 1700 African-American individuals. Beine obtained two DNA profiles from the right sandal, one major and one minor. The major profile was identical to that of defendant. Beine found only a partial profile on the left sandal. Defendant could be excluded as a contributor to that profile.

¶ 19 Emerald Klemmer testified that defendant is her uncle. She recalled that at a time "close to summer" in 2013, she was at her sister's house. Defendant arrived at the house and asked Klemmer if she wanted to drink and get high. Klemmer declined, but asked defendant where he got money, because he had recently been broke. Klemmer testified: "He said he had went to Jimmie's and broke in." Defendant further told Klemmer that "he had got a lockbox with some change in it."

¶ 20 Klemmer testified that she was arrested for unlawful use of a credit card in November 2014. She relayed the conversation with defendant to Detective Leo Hoogerwerf in December. In doing so, Klemmer asked whether providing the information would enable her to be released from custody without posting bond. She was released on her own recognizance the next day. Klemmer's criminal case remained pending, but Klemmer had not received any offer in exchange for her testimony in defendant's case. Klemmer testified that she nevertheless hoped that she could gain some benefit by testifying. After her family had learned that she had spoken with the police about defendant, Klemmer's grandmother kicked her out of her house.

¶ 21 On cross-examination, Klemmer agreed that she told the police that defendant told her "he went up some stairs somewhere around the building and went through a window or something." She also testified that defendant did not *tell* her about a lockbox, but that he actually had a lockbox with him. She described the lockbox as little, square, and gray, with a latch on it. Klemmer admitted that she had been questioned by Hoogerwerf about a year prior, and at that time denied having any knowledge about defendant or the burglary at the tavern.

¶ 22 Hoogerwerf testified that he initially spoke with Klemmer in January 2014. At that time she denied having any knowledge of the incident in question. He testified that it would not be unusual in Rock Island County for a person charged with unlawful use of a credit card, without a prior record, to be released on recognizance. Such a result would not require "any special consideration."

¶ 23 The parties stipulated to two weather reports for Moline, Illinois. The report for May 25, 2013, indicated that the weather had been rainy, mostly cloudy, or overcast for the entire day. The report for May 21, 2013, indicated that there had been no rain that day, with the sky fluctuating between clear and cloudy.

¶ 24 The jury found defendant guilty. The circuit court sentenced him to a term of 20 years' imprisonment.

¶ 25 II. ANALYSIS

¶ 26 On appeal, defendant argues that the evidence presented at trial was insufficient to establish his guilt beyond a reasonable doubt. In the alternative, he argues that the circuit court's error in delivering the required Rule 431(b) admonishments during jury selection amounted to reversible plain error because the evidence at trial was closely balanced. We address each argument in turn.

¶ 27 A. Sufficiency of the Evidence

¶ 28 When a challenge is made to the sufficiency of the evidence at trial, we review to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Baskerville*, 2012 IL 111056, ¶ 31; *People v. Collins*, 106 Ill. 2d 237, 261 (1985). In making this determination, we review the evidence in the light most favorable to the prosecution. *Baskerville*, 2012 IL 111056, ¶ 31. All reasonable inferences from the record in favor of the prosecution will be allowed. *People v. Bush*, 214 Ill. 2d 318, 327 (2005). The relevant question is whether any rational trier of fact could have found the elements of the crime proven beyond a reasonable doubt. See *People v. Pintos*, 133 Ill. 2d 286, 292 (1989).

¶ 29 It is not the purpose of a reviewing court to retry a defendant. *People v. Milka*, 211 Ill. 2d 150, 178 (2004). Instead, great deference is given to the trier of fact. See, *e.g.*, *People v. Saxon*, 374 Ill. App. 3d 409, 416-17 (2007). Resolution of any conflicts or inconsistencies in the evidence is the responsibility of the trier of fact. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006).

¶ 30 In the present case, Nettles and Pauley testified that an alarm had gone off at Nettles's tavern and that an amount of money had been stolen from therein. After walking through the tavern, Pauley discovered a window that had been pried open on the second floor. He testified that the window had been the point of entry for the burglary. On the roof just below that point of entry, a pair of sandals and a baseball bat were discovered. The State's forensic scientist testified that a DNA profile matching that of defendant was found on both the sandals and the bat. Further, defendant's niece testified that defendant admitted to her that he had robbed the tavern.

Viewing this evidence in the light most favorable to the prosecution, a rational trier of fact could find defendant guilty beyond a reasonable doubt of burglary.

¶ 31 In reaching this conclusion, we recognize that defendant has identified a number of purported shortcomings in the State's evidence. However, many of defendant's arguments on these points amount to nothing more than the reweighing of the evidence. See *Milka*, 211 Ill. 2d at 178.

¶ 32 For example, defendant contends that Klemmer's credibility was impeached by her previous lies to the police as well as her expectation of benefitting from her testimony. The determination of a witness's credibility is the province of the jury and is entitled to great weight and deference. See *People v. Wheeler*, 226 Ill. 2d 92, 114-15 (2007). Further, the State presented evidence that Klemmer had never received, nor had she ever been offered, any benefit for testifying against defendant. Her hope that she might receive some benefit does not render a jury's finding of credibility "so unreasonable, improbable, or unsatisfactory" that we would disturb that finding on review. *People v. Smith*, 185 Ill. 2d 532, 542 (1999).

¶ 33 Similarly, defendant also contends that the contradictions between Klemmer's testimony and other evidence in the case rendered her testimony incredible. Specifically, he points out that Klemmer testified that defendant had a lockbox that he said was full of change, while there was no testimony that a lockbox was stolen. Klemmer also testified that defendant told her he had gone "up some stairs somewhere around the building and went through a window," while there were actually no stairs leading up to the roof of the tavern.

¶ 34 However, there are a number of consistent facts. While there was no testimony regarding a lockbox, defendant's indication that he had "change" comports with the testimony that it was primarily change that was taken from the tavern. Further, Klemmer's testimony that defendant

told her he entered through a window aligns with Pauley's testimony that the upstairs window had been the point of entry for the burglary. Finally, while there were no stairs that led all the way to the roof of the tavern, the State's pictures show that there were, in fact, "some stairs somewhere around the building." Klemmer did not testify that defendant told her he took stairs all the way to the roof. In short, Klemmer's testimony did not present such "serious inconsistencies" that this court would take the extreme step of undermining the factfinder's determination that she was credible. *Id*. at 545.

¶ 35 Next, defendant asserts that the State's DNA evidence should be discounted because it failed to "satisfy both physical and temporal proximity criteria." He contends that "it was unreasonable to infer that the window was the point of entry for the burglary." He also contends that the sandals and bat were discovered "well after" the burglary, in an area that had been accessible to other people.

¶ 36 Initially, we note that defendant relies primarily on the case of *People v. Rhodes*, 85 Ill. 2d 241 (1981), in making this argument. While that case deals with fingerprint evidence, defendant argues that the same reasoning applies to DNA evidence. Of more concern to us, is the *Rhodes* court's statement that: "In order to sustain a conviction *solely* on fingerprint evidence, fingerprints corresponding to the fingerprints of the defendant must have been found in the immediate vicinity of the crime under such circumstances as to establish beyond a reasonable doubt that the fingerprints were impressed at the time the crime was committed." (Emphasis added.) *Id*. at 249. In the present case, the DNA evidence was not the *sole* evidence of defendant's guilt. The connection between the statement of law in *Rhodes* and the present case is tenuous.

¶ 37 Also, Pauley testified that the second-floor window was the point of entry for the burglary. The jury was not required to infer that fact. Indeed, where a previously boarded up window is discovered, in the course of investigating a break-in, to have been pried open, the conclusion that that window was the point of entry for the break-in is not unreasonable. Furthermore, it is unclear how the passage of time between the offense and the discovery of the items on the roof is of any apparent benefit to defendant's case. While the roof was accessible to certain repairmen, there was no reason to believe that it was accessible to defendant at any time. The jury was left to determine why items containing defendant's DNA were left on the roof of the tavern, just below the window that had been the point of entry for the burglary. As the *Rhodes* court pointed out, "the trier of fact need not search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt." *Id*.

¶ 38 B. Plain Error

¶ 39 Illinois Supreme Court Rule 431(b) (eff. July 1, 2012), requires the circuit court to ask all potential jurors whether they understand and accept four enumerated principles of law. In the present case, the court asked two panels of the venire only if they understood those principles. It did not inquire as to whether the potential jurors accepted the principles. The State concedes that the court committed a clear error.

¶ 40 Defendant concedes that he failed to preserve that error for review by failing to object at trial. He argues, however, that the error is reversible under the first prong of the plain error doctrine because the evidence at trial was closely balanced. That State argues that this court should find the issue forfeited because the evidence was not closely balanced.

¶ 41 Where a defendant can show that a clear error was committed and that the evidence at trial was closely balanced, the error is reversible and the defendant is entitled to a new trial.

People v. Piatkowski, 225 Ill. 2d 551, 568, 572 (2007). "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." *People v. Sebby*, 2017 IL 119445, ¶ 53. This holistic inquiry necessarily requires "an assessment of the evidence on the elements of the charged offense or offenses, along with any evidence regarding the witnesses' credibility." *Id.* Our supreme court has held that trial evidence will not be deemed closely balanced where a "defendant's explanation of events, though not logically impossible, was highly improbable." *People v. Adams*, 2012 IL 111168, ¶ 22.

¶ 42 It was undisputed that a break-in had occurred at the tavern owned by Nettles. Pauley testified that he responded to an alarm at that location. Pauley learned from Nettles that some money had been stolen. While walking through the building with Nettles, Pauley observed that a piece of wood covering an upstairs window had been pried away. Pauley concluded that the window had been the point of entry for the burglary.

¶ 43 Defendant takes exception to that conclusion, arguing that the evidence supporting Pauley's conclusion was scant. We disagree. Neither Pauley nor Nettles testified that there had been any other signs of tampering at any other point of entry in the tavern. Pauley undertook his own commonsense assessment, just as we do here, and rationally concluded that the window that had been pried open was where the burglar had entered. Defendant also asserts that Nettles's testimony that the tavern had been broken into on prior occasions "indicated that the window may have been opened at some other point prior to the burglary." But Nettles's testimony provides no such indication.

¶ 44 A qualitative review of the evidence also demonstrates the significant weight of the State's DNA evidence. A pair of sandals and a baseball bat were found on the roof of the tavern,

as close to the point of entry for the burglary as possible. Each item contained a DNA profile matching that of defendant. The commonsense conclusion from this evidence is that defendant was on the roof of the tavern, directly adjacent to the window that was pried open in the course of the burglary.

¶ 45 The conclusion that defendant left those items on the roof in the course of the burglary is bolstered by the testimony of Brown, who had been on that roof working on the air conditioner units prior to the burglary. Brown testified that he did not notice sandals or a bat on the roof at that time. While he did allow for the *possibility* that he may simply not have noticed those items, our assessment of the photographic evidence indicates that such a possibility would have been remote. In the photographs taken by Nichols, the sandals and bat are located no more than 10 feet from the air conditioning units, and stand out against the bright white color of the roof. Moreover, the positioning of the items are such that they would be visible upon any approach to the air conditioning units.

¶ 46 As referenced above (*supra* ¶ 35), defendant raises a number of issues with regard to those items. He argues that it is unclear what day the items were discovered, what day they were photographed by police, who discovered the items, and who did or did not touch the items. None of these concerns, however, refute the fact that defendant's DNA was found on objects on the roof. There was no apparent reason for defendant or his items to be on the roof. Any potential explanation for the presence of those items, other than defendant's actual presence on the roof, is "highly improbable." *Adams*, 2012 IL 111168, ¶ 22.

¶ 47 In addition to the DNA evidence, the State presented testimony that defendant admitted to Klemmer that he had broken into the tavern. To be sure, Klemmer's credibility was imperfect. She had previously denied any knowledge of the offense, and, even though she was never

offered a tangible benefit for testifying against defendant, still hoped that one might be forthcoming. Still, her testimony demonstrated knowledge of key facts. She testified that defendant told her that he had stolen change and that he entered the tavern through a window. In any event, despite her credibility issues, Klemmer's testimony was not, as defendant argues, wholly worthless.

¶ 48 Furthermore, the State's evidence that defendant was on the roof just outside the place of entry for the burglary of the tavern was thus bolstered, even if minimally, by Klemmer's testimony that defendant had told her that he entered the tavern through a window and took change. Though it is possible that defendant's DNA was on the roof of the tavern for some other reason than defendant breaking in *and* that Klemmer falsely accused her uncle of committing that offense, it is highly improbable. See *id.* Accordingly, we find that the evidence was not closely balanced, and therefore find that issue has been forfeited by defendant.

¶ 49 III. CONCLUSION

¶ 50 The judgment of the circuit court of Rock Island County is affirmed.

¶ 51 Affirmed.