2019 IL App (3d) 170085-U

Order filed August 23, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-17-0085 Circuit No. 16-CF-676
TAVAREIS M. VEAZY,	)	Honorable John P. Vespa,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Carter and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defense counsel's waiver of defendant's right to be present in the judge's chambers during *voir dire* questioning did not violate defendant's right of presence; and (2) trial court's admission of officer's statements as investigative procedure did not constitute plain error.

¶ 2 A jury found defendant, Tavareis M. Veazy, guilty of residential burglary (720 ILCS 5/19-3(a) (West 2016)), and the trial court sentenced him to 13 years in prison. He appeals, claiming that (1) the jury selection process denied him a fair trial and (2) the trial court

improperly admitted statements of two witnesses as investigative procedure rather than hearsay. We affirm.

¶ 3 BACKGROUND

¶ 4 Defendant was charged with one count of residential burglary. During *voir dire* examination of potential jurors, the trial judge informed the venirepersons that if anyone felt uncomfortable answering a question, or if the answer would be embarrassing or humiliating, he would take the individual back to his chambers with the court reporter and both attorneys. As a result, five potential jurors were questioned in the judge's chambers, outside the defendant's presence. One of those individuals, Gloria Meachem, was eventually empanelled as a juror in defendant's case.

¶ 5 During the *voir dire* proceedings, all potential jurors stated that they would be fair and impartial and would follow the law given them. When the court asked, "Can you judge the credibility of every witness in the same way as every other witness, including police officers?" Meachem responded, "No." She was then asked if she could be fair and impartial to both sides and if she accepted and understood that a defendant is presumed to be innocent, that the State must prove defendant guilty beyond a reasonable doubt, that defendant is not required to offer any evidence, and that defendant does not have to testify. Meachem answered all five questions in the affirmative.

¶ 6 At the conclusion of his inquiry, the trial court asked Meachem to go to the court's chambers. In chambers, the court explained to Meachem that she was being questioned individually due to her answer regarding the credibility of witnesses. She stated that she had not understood the court's question, and she agreed that she would not give any witness "any kind of an advantage" over any other witness. Meachem confirmed to defense counsel that her sons

were police officers. Defense counsel then asked if she believed police officers were more credible witnesses, or that their testimony should be valued above that of other witnesses. Meachem responded, "I have always—I'm thankful of my sons to serve, but I've always told them to be fair and impartial, and that's how our values are in our home, so everybody should be treated equal, regardless of race, creed, or gender."

¶ 7 After returning to the courtroom, the trial court tendered the four-member venire panel to the parties. Defense counsel excused two of the four potential jurors in the group, but accepted Meachem. During the entire jury selection process, defense counsel used five peremptory challenges. At the conclusion of the proceedings, 12 jurors and 2 alternates were empanelled. The jury was dismissed for the day, and the following discussion occurred:

> "THE COURT: Be seated. The jury has left the room. I don't think I made a record about—I asked Attorney Justice [defense attorney] I had both lawyers up here at the beginning of the jury selection. Asked if it was–I don' t remember how I said it, but I asked Defense Attorney Justice if it's okay—when we have in-chambers meetings, is it okay if your client is not there. And she said, 'Yes, that's okay.' Right Attorney Justice?
>
> MS. JUSTICE [DEFENSE ATTORNEY]: That's correct. And I did discuss that with my client and did tell him everything that happened back there, each time we went back there.
>
> THE COURT: Yeah. And I'm not saying—I phrased the question, right now, when I'm approaching Attorney Justice about this. I'm not saying that's how I said it. But anyway, on that issue, I did ask something like, 'Is it okay, Attorney Justice? Are you giving up your right?' Or however I said it—to have your client

in the—go with us into my chambers on these things. And she said yes, that that it is all right. Right Attorney Justice?"

MS. JUSTICE: Yes."

¶ 8 At trial, Aaron Vitatoe testified that he left his apartment around 9:30 a.m. on August 22, 2016. When he returned 45 minutes later, he noticed the front door was slightly ajar. As he opened the door, he saw defendant's face as defendant ran out of the apartment. Vitatoe had previously seen defendant around the apartment building. He testified that he knew defendant did not live in the apartment complex but thought he stayed with someone in a downstairs apartment. As Vitatoe entered the living room, he noticed a second man who was wearing something over his face. He was able to push him out of the apartment. He struggled with the second man outside the apartment. He then ran inside and shut the door.

¶ 9 Vitatoe identified a tire iron that was found in his apartment that did not belong to him. He testified that he did not notice anything missing but that "everything was just taken apart." He identified a photograph of the broken part of his front door and another photograph of his front room, which depicted his gaming console and several other items in a box. He testified that the items were not in the same place he had left them.

¶ 10 Investigators called Vitatoe to the police station two weeks later and showed him a photo lineup. He selected a photo of defendant and identified him as the person who ran from the apartment as he opened the door. He was unable to identify the second individual.

¶ 11 Detective Phillip Mahan testified that he created the photo lineup that included defendant's picture a few days before Vitatoe's identification. He talked to another officer, Officer Robinson, who had reported to the scene shortly after the incident. Vitatoe informed Robinson that he thought one of the suspects stayed in an apartment below his apartment.

Robinson then learned that the apartment below Vitatoe's was rented to Tatiana Veazy, and she indicated that her brother, Tavareis Veazy, occasionally stayed with her. Based on that information, Mahan included defendant's photo in the lineup composite.

¶ 12 Defense counsel objected to Mahan's testimony as hearsay. In response, the prosecutor argued that Mahan's testimony was "in-the-course-of-investigation" testimony, explaining to the jury how defendant's photograph ended up in the lineup, and was not hearsay. The court overruled defense counsel's objection and Mahan continued to testify. He stated, "Tatiana indicated that her brother occasionally stays with her. And based on that information, I put [defendant] in a photo lineup." The court then made a statement to the jury:

> "Let me interrupt you for a second. Let me explain, Jury, the officer's answer is to indicate only how the defendant's picture got to be placed in the lineup. Whether he really does live there at the other person whose last name was Veazy, whether he really does live there is not the point of that, and that's not what I'm allowing that in for as to whether he really lived there. Just that's how his picture came to be in the photo lineup."

¶ 13 Detective William Calbow testified that he presented the photo lineup to Vitatoe and asked if he recognized anyone in the group. Vitatoe pointed to photo No. 1, which he then circled and initialed. Vitatoe told Calbow that the man in photograph No. 1 was the person who ran past him as he opened the door and that he recognized him from an apartment downstairs.

¶ 14 The jury found defendant guilty, and the trial court sentenced him to 13 years in prison.

¶ 15 ANALYSIS

¶ 16 I. *Voir Dire*

¶ 17 Defendant claims that the trial court's *in camera voir dire* of Juror Meachem violated his constitutional right to be present at every stage of his trial. He concedes that no objection was made at trial and that the issue was not raised in a posttrial motion but asks that we consider the issue under the plain error doctrine. In the alternative, he argues that counsel's waiver of his presence from the *in camera* portion of *voir dire* resulted in ineffective assistance of counsel.

¶ 18 A. Plain Error

¶ 19 Plain error exists "when a defendant is deprived of a substantial right, and thus is deprived of a fair trial, or when an error is made with closely balanced evidence." *People v. Bean*, 137 Ill. 2d 65, 80 (1990). In this case, the evidence was not closely balanced. The victim Vitatoe, knew defendant from previous encounters in the apartment complex. He identified defendant in a photo lineup and in court as the man who ran out of his apartment. Testimony and exhibits also demonstrated that there was forced entry into Vitatoe's apartment and that items had been moved and placed in boxes. This evidence was substantial enough to prove defendant guilty beyond a reasonable doubt. Consequently, his conviction will only be reversed if defendant's exclusion from the *in camera voir dire* deprived him of his constitutional right to be present and denied him a fair trial. See *Bean*, 137 Ill. 2d at 80-81 (court analyzed *voir dire* violation under the second prong of plain error).

¶ 20 A defendant is guaranteed the right to be present at any stage of a criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure. Jury selection is a critical stage of a criminal trial, triggering the defendant's right to be present and participate in person and by counsel. *People v. Bean*, 137 Ill. 2d 65, 84 (1990). As such, "the procedure of *in camera voir dire* without defendant's presence and without defendant's

express waiver of this right is improper and, in some cases, will inevitably result in the denial of a defendant's fundamental right to a fair trial by an impartial jury." *Id.* at 88.

¶ 21 However, like any other constitutional right, the right to be present can be waived by a defendant. *People v. Martine*, 106 Ill. 2d 429, 439 (1985); *People v. Wilson*, 257 Ill. App. 3d 670, 678 (1993). A defendant may waive the right to be present if done knowingly, intelligently, and voluntarily and "with sufficient awareness of the relevant circumstances and likely consequences." *People v. Johnson*, 75 Ill. 2d 180, 187 (1979). A waiver made by counsel in the defendant's presence, to which the defendant does not object, may constitute a valid waiver. See *Martine*, 106 Ill. 2d at 439 (defendant waived her right to be present during an offer of proof in a voluntary, knowing, and intelligent manner when she departed from the courtroom without objection, fully aware of what was happening); *People v. Justice*, 349 Ill. App. 3d 981, 988 (2004) (defendant waived his right to be present at a hearing to withdraw his guilty plea where defense counsel filed a written "waiver of presence" on defendant's behalf and defendant was aware he had a right to be present); *Wilson*, 257 Ill. App. 3d at 679 (defendant knowingly waived his right to be present during *in camera voir dire* where defense counsel, in defendant's presence, informed the court that he had discussed various options with defendant and defendant had chosen to waive his presence during individual questioning).

¶ 22 Here, the record demonstrates that defendant waived his right to be present during the individual *voir dire* of prospective jurors in the judge's chambers. Responding to the court's question with defendant in the courtroom, defense counsel informed the court that defendant had waived his right to be present in chambers. She also stated, in defendant's presence, that she had discussed waiver of presence with defendant and that she told defendant "everything that happened back there." Defendant did not refute counsel or oppose her statement at that time, and

the record does not indicate that defendant attempted to exercise his right of presence during any other portion of the *voir dire* proceedings. Thus, he knowingly, voluntarily, and intelligently waived his right to be present through counsel.

¶ 23 Defendant argues that defense counsel's statements do not constitute a valid waiver because defendant was not personally admonished by the court. He contends that his right to be present can only be waived by his own personal declaration. We disagree. An express waiver of the right to be present made by defense counsel in open court and in the presence of the defendant may be binding on the defendant. See *People v. Phillips*, 383 Ill. App. 3d 521, 549-550 (2008), *People v. Justice*, 349 Ill. App. 3d 981, 987 (2004); *Wilson*, 257 Ill. App. 3d at 678. The duty to examine a defendant directly has been imposed on the trial court by rule and statute involving the acceptance of guilty pleas and the waiver of jury trials. Ill. S. Ct. R. 402 (eff. Jan 1. 1991); 725 ILCS 5/103-6 (West 2018). However, no supreme court rule or statute requires a direct inquiry to defendant personally to establish a waiver of the right to be present at trial or jury selection. See *Justice*, 349 Ill. App. 3d at 988 (reasoning that no supreme court rule or statute requires the trial court to personally admonish a defendant prior to accepting a waiver of presence). In this case, the trial court discussed defendant's waiver of his right to be present and defense counsel affirmatively waived it on defendant's behalf. The court was not required to obtain defendant's personal waiver.

¶ 24 We note that the discussion of defendant's waiver of his right to be present during the jury selection process on the record occurred after the trial court tendered the venire panel to the parties. The better procedure would be to get an express waiver *before* conducting *voir dire* outside a defendant's presence. The procedure followed in this case, however, while hardly

favored, was not constitutionally defective or violative of defendant's rights. Accordingly, we find no plain error.

¶ 25 B. Ineffective Assistance of Counsel

¶ 26 In the alternative, defendant contends that counsel was ineffective for waiving his presence during the *in camera voir dire* proceedings.

¶ 27 To establish a claim of ineffective assistance of counsel, defendant "must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Petrenko*, 237 Ill. 2d 490, 496 (2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Since defendant must establish both prongs of the *Strickland* test, we need not consider defendant's allegations of deficient performance if defendant cannot show that he suffered prejudice. *Strickland*, 466 U.S. at 694. "A defendant establishes prejudice by showing that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different." *People v. Houston*, 229 Ill. 2d 1, 4 (2008).

¶ 28 As discussed, the evidence was more than sufficient to prove defendant guilty of robbery beyond a reasonable doubt. Moreover, there is no evidence that Meachem was biased or impartial. Consequently, we cannot say that the result of the proceedings would have been different if Meachem had not served as a juror at defendant's trial.

¶ 29 II. Admission of Hearsay Statements

¶ 30 Next, defendant argues that the trial court erred in allowing Officer Mahan to answer questions explaining how defendant's photograph was included in the photo lineup shown to Vitatoe. He argues that Mahan's answers included hearsay statements by the apartment manager and defendant's sister and claims that the court erred in admitting them.

¶ 31 Defendant failed to raise this issue below and seeks plain error review. See *People v. Virgin*, 302 Ill. App. 3d 438, 443-44 (1998) (admissibility of hearsay testimony may be addressed under the plain error rule). Under plain error, a reviewing court may consider a trial error not properly preserved when (1) the evidence in a criminal case is closely balanced or (2) where the error is so fundamental and of such magnitude that the accused was denied the right to a fair trial. See *People v. Belknap*, 2014 IL 117094, ¶ 48. In undertaking a plain error analysis, however, a reviewing court must first determine whether error occurred. *People v. Wilmington*, IL 112938, ¶ 31**.**

¶ 32 Hearsay is an out of court statement offered to prove the truth of the matter asserted. *People v. Dobbey*, 2011 IL App (1st) 091518, ¶ 43. Such statements are generally inadmissible. *Id.* However, a police officer may testify about a conversation that he had with an individual and his actions pursuant to the conversation to recount the steps taken in his investigation of the crime. *People v. Ochoa*, *2*017 IL App (1st) 140204, ¶ 41. Such testimony will not constitute hearsay, since it is not being offered for the truth of the matter asserted. *Id; People v. Hunley*, *3*13 Ill. App. 3d 16, 33 (2000). While the officer may testify "to the fact that he spoke to a witness without disclosing the contents of that conversation," the officer "should not testify to the contents of the conversation." *People v. Trotter*, 254 Ill. App. 3d 514, 527 (1993). The officer's testimony may only be used to establish the investigative process. See *Jura*, 352 Ill. App. 3d at 1085; see also *People v. Gacho*, 122 Ill. 2d 221, 248 (1988) (permissible for a police officer to testify that after he spoke to the victim he went to look for the defendant; but court indicated that it would have been error to permit the officer to testify as to the contents of that conversation). The admissibility of testimony and other evidentiary rulings are generally within

the discretion of the trial court and will not be reversed unless the court has abused that discretion. *People v. Caffey,* 205 Ill. 2d 52, 89 (2001).

¶ 33 Here, the trial court's ruling to allow the officer's testimony was not an abuse of discretion. Mahan testified regarding the process he used to develop the photo lineup. He did not specifically reiterate the statement of either Tatiana or the apartment manager. Mahan only stated that another officer learned from the victim that defendant occasionally stayed in the apartment below him. Mahan stated that the other officer then contacted the apartment manager and learned that the apartment was rented to Tatiana and that her brother occasionally stayed with her. After Mahan spoke with that officer, he included defendant's photo in the lineup. Mahan did not testify as to the contents of the conversation with the apartment manager or Tatiana. His testimony was properly limited to the purpose of explaining his investigative process. Moreover, immediately following Mahan's testimony, the trial court reminded the jury, that his statements were being used only to establish how defendant's picture was placed in the lineup. Accordingly, no error occurred in the trial court's decision to admit Mahan's testimony, and plain error does not apply.

¶ 34 CONCLUSION

¶ 35 The judgment of the circuit court of Peoria County is affirmed.

¶ 36 Affirmed.