2019 IL App (3d) 170443-U

Order filed December 20, 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,	)	
	)	Appeal No. 3-17-0443
v.	)	Circuit No. 16-CF-477
	)	
ERNEST LEROY KING, JR.,	)	The Honorable
	)	John P. Vespa
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Carter and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Evidence was sufficient to support defendant's conviction for armed robbery where two eyewitnesses and an accomplice identified defendant; (2) no plain error occurred where trial court failed to question two potential jurors about one principle because evidence against defendant was overwhelming; (3) trial court did not abuse its discretion in sentencing defendant to 35 years in prison where he had prior robbery convictions and was on parole when he committed armed robbery; (4) remand is necessary for trial court to determine if defendant is entitled to additional credit for time spent in custody.

¶ 2 Defendant Ernest Leroy King, Jr. was convicted of armed robbery and sentenced to 35 years in prison. He filed a motion for a new trial and a motion to reconsider sentence, which the

trial court denied. Defendant appeals, arguing that (1) his conviction must be reversed because there was insufficient evidence to prove him guilty; (2) he is entitled to a new trial because the trial court failed to ask two prospective jurors if they understood and accepted one of the principles set forth in Illinois Supreme Court Rule 431 (eff. July 1, 2012); (3) he should be given a new sentencing hearing because his sentence is excessive; and (4) he is entitled to additional days of credit against his sentence and monetary credit against his fines for time spent in custody between entry of the sentencing order and denial of his posttrial motion. We affirm defendant's conviction and sentence but remand for the trial court to determine defendant's proper presentence credits.

¶ 3 I. BACKGROUND

¶ 4 Defendant Ernest Leroy King, Jr. was charged with armed robbery (720 ILCS 5/18-2(a)(2) (West 2016)). His case proceeded to a jury trial. During jury selection, the trial judge failed to ask two prospective jurors if they understood and accepted that a defendant's decision not to testify could not be held against him. Both individuals became jurors at defendant's trial. Defendant did not object to the trial court's failure to fully question the two prospective jurors.

¶ 5 Christopher Heaton, a Peoria police officer, testified that he was dispatched to Harrison Homes shortly after 1:00 a.m. on June 26, 2016, where the suspected getaway vehicle from a robbery was parked. When Heaton arrived, he found the vehicle, a white Jeep, in a parking spot with a woman behind the wheel. He took the woman into custody and turned her over to county officers.

¶ 6 Aaron Witt, a deputy for the Peoria County Sheriff's Office, testified that he reported to Harrison Homes on June 26, 2016. Witt took custody of the woman in the white Jeep, who was later identified as Ashley Collins. Witt searched the Jeep and found a pistol and a round of ammunition inside the Jeep owner's manual, which was in the glovebox. He also found four rounds

of ammunition in the center cup holder. In the backseat, he found a .22 caliber long rifle, and behind the backseat he found two black sweatshirts, a hat and a backpack. Inside the backpack, he found .22 caliber rounds and a wallet that contained identification for Israel Payton.

¶ 7 Collins testified that on June 25, 2016, she was driving around in her white Jeep Cherokee with defendant and Israel Payton. At the time, Collins had been romantically involved with defendant for a month or two. Collins knew Payton only through defendant and met him around the same time she met defendant. Collins admitted she had been angry at defendant earlier that day but picked up defendant and Payton "[o]nce everything was settled."

¶ 8 Collins picked up defendant and Payton from the north end of Peoria. According to Collins, defendant had a handgun, and Payton had "the big gun" when she picked them up. Collins then drove to the west side of Peoria so defendant could retrieve his black hoodie. After obtaining the hoodie, defendant put it on. After that, Collins drove around while defendant and Payton talked about robbing a gas station. Collins parked a block or two away from the BP gas station on Western, and Payton and defendant continued discussing robbing it for about 45 minutes, but they were nervous because they saw police nearby. Collins said she was ready to go, and Payton suggested that they rob Laramie Liquors.

¶ 9 Collins parked a block away from Laramie Liquors. Defendant and Payton exited the vehicle and came back a couple times. Eventually, they walked away and did not return for 20 to 30 minutes. As Collins waited in her vehicle, she heard gun shots and started pulling off as defendant and Payton jumped into her vehicle. Collins noticed that someone was following them. Defendant said it was "[t]he man from the store." Payton told her to go to Harrison Homes because his sister lived there. Collins drove to Harrison Homes and parked. Once Collins parked, Payton

got out and ran. Defendant then said, "I'm not goin' back to jail" and got out of the vehicle and ran. Before getting out of the vehicle, defendant took off his hoodie.

¶ 10 Defendant left his gun in the center console of Collins' vehicle. Collins moved it and placed it inside the Jeep owner's manual in the glove compartment. A few minutes after she parked, she saw the man who was following them park his vehicle. Soon after that, the police arrived.

¶ 11 When Collins first talked to police, she denied knowing the men in her vehicle. After officers told her that they already knew who the men were, she identified them as defendant and Payton. She testified that she was charged with armed robbery and made a deal with the State's Attorney to plead guilty in exchange for a sentence of four years in prison. She testified that she had already identified defendant and Payton before she entered into the plea agreement.

¶ 12 Mohamed Samhan testified that he and his brother, Samhan Samhan, were working at their family owned business, Laramie Liquors, in the early morning hours of June 26, 2016. The store is very small and completely open with no aisles and only one entrance/exit. Shortly after 1:00 a.m., Mohamed was getting ready to stock the coolers when he turned around and saw two gunmen. One had a rifle, and one had a revolver. The two men were "masked up." One had a hoodie cinched to conceal his face. The other had on a mask or sheet that covered the bottom part of his face, but it fell down, and Mohamed recognized him as Payton. Mohamed knew Payton because he had come into the store wearing a mask about six months earlier, and Mohamed remembered him.

¶ 13 After Mohamed turned around, the men asked for money. Payton pointed a rifle at Mohamed, then at Samhan. Mohamed was very close to Payton and "a little distance" from the second gunman, who had a revolver, and was standing near the door. Mohamed could see the face of the second man. Mohamed did not know him by name him but recognized him as a customer. He had come into the store before with Payton and alone. Samhan gave Payton the money in the

cash register while the man with the revolver pointed his gun at Mohamed. After obtaining the money, the men fled. The whole encounter lasted about 45 seconds.

¶ 14 After the men left, Samhan went outside, discharged his firearm and chased the men, while Mohamed stayed in the store and called 911. Security cameras at the store contained footage of the robbery. That footage was shown to the jury.

¶ 15 Shortly after the robbery, Mohamed was shown a photo lineup by police officers. Mohamed identified defendant as the man with the revolver. Mohamed agreed that there were many items between where he was standing at the time of the robbery and the door, where the second gunman was standing. Nevertheless, he said he could see the man.

¶ 16 Samhan testified that he was working behind the counter at Laramie Liquors on June 26, 2016, at approximately 1:15 a.m., when two individuals walked in. The first thing Samhan saw was a long barrel gun and Payton with a shirt "kind of like *** down his face." Payton pointed his gun at Mohamed and said something like, "Give us the money." Samhan knew Payton because he visited the store almost daily and had been involved in a prior incident at the store.

¶ 17 The second gunman was approximately 10 feet away from Samhan, holding the door. Samhan could "kind of see him in a way" from behind the cash register but could see him clearly through the video monitor next to him. The monitor showed footage from all the cameras in the store. Samhan focused mainly on the monitor showing defendant, who was pointing his revolver at Mohamed. Defendant was wearing a hoodie that was tightened up around his face.

¶ 18 After Payton demanded money, Samhan took the cash drawer out, pulled out the money and gave it to Payton, who stuffed it in his hoodie. Samhan pressed the silent alarm to alert the police. After obtaining the money, the men ran out of the store. Samhan followed them outside and fired shots from his gun when one of the men turned around like he might come back. Samhan

saw the men get into a white vehicle parked on the corner of Laramie and Seibold. Samhan got into his vehicle, called the police and followed the vehicle approximately three blocks to Harrison Homes.

¶ 19 The driver of the white vehicle parked at Harrison Homes, and both men ran out of the vehicle. When defendant exited the vehicle at Harrison Homes, his head and face were no longer covered. Samhan could clearly see defendant's face when he ran from the vehicle. After the men fled, Samhan waited for the police. Samhan was interviewed and shown a photo lineup. He identified defendant as the man with the revolver standing by the front door. Samhan gave the officers both men's names.

¶ 20 Defendant did not testify. The jury found defendant guilty. Defendant filed a motion for a new trial, arguing that (1) there was insufficient evidence to support his conviction, and (2) the trial court erred in ruling that his prior convictions could be used for impeachment if he testified. The court denied the motion, stating that "there was a mountain of evidence" against defendant.

¶ 21 On June 30, 2017, the trial court held a sentencing hearing. At the hearing, the court noted that defendant had two prior felony convictions for aggravated robbery. The State also pointed out that defendant had been out of prison and on parole for only six months when he committed armed robbery of the liquor store. Defense counsel argued that defendant is a young man who has behaved himself in jail and even earned his GED. The court found no statutory factors in mitigation but three in aggravation: (1) "the defendant's conduct threatened serious harm[;]"; (2) "[t]he defendant has a history of criminal activity[;]" and (3) "[t]he sentence is necessary to deter others from committing the same crime." The court sentenced defendant to 35 years in prison.

¶ 22 Defendant filed a motion to reconsider his sentence arguing that (1) it was excessive, (2) the trial court overemphasized deterrence, (3) the court placed too much weight on his criminal

history, and (4) the court did not give adequate consideration to his rehabilitation potential. On July 10, 2017, the trial court denied defendant's motion to reconsider his sentence. The court granted defendant 365 days of presentence credit, from June 30, 2016, the date he was taken into custody, to June 30, 2017, the date he was sentenced.

¶ 23 II. ANALYSIS

¶ 24 A. Sufficiency of the Evidence

¶ 25 First, defendant argues that the evidence was insufficient to prove him guilty of armed robbery because there was no physical evidence linking him to the crime.

¶ 26 When considering a challenge to the sufficiency of the evidence of a defendant's guilt, it is not the function of this court to retry the defendant. *People v. Smith,* 177 Ill.2d 53, 73 (1997). Rather, on review, a conviction will not be set aside on grounds of insufficient evidence unless the proof is so improbable or unsatisfactory that there remains a reasonable doubt as to the defendant's guilt. *People v. Doll,* 371 Ill.App.3d 1131, 1135 (2007). The relevant inquiry "is 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (Emphasis in original.) *People v. Cunningham,* 212 Ill.2d 274, 278 (2004) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

¶ 27 The sufficiency of eyewitness identification, the credibility of witnesses, the weight to be given testimony, and the inferences to be drawn therefrom are matters within the province of the jury. *People v. James,* 100 Ill. App. 3d 884, 890 (1981). While "the testimony of an accomplice witness has inherent weaknesses and should be accepted only with caution and suspicion," such testimony, "whether corroborated or uncorroborated, is sufficient to sustain a criminal conviction if it convinces the jury of the defendant's guilt beyond a reasonable doubt." *People v. Tenney,* 205

Ill.2d 411, 429 (2002). Testimony by an accomplice alone, even if uncorroborated, is sufficient to sustain a defendant's conviction. *James*, 100 Ill. App. 3d at 890. A jury's finding of guilt will not be reversed on appeal where the only witness is an accomplice who already pled guilty as part of a plea bargain. See *People v. Harmon*, 194 Ill. App. 3d 135, 141-42 (1990).

¶ 28 A single witness's testimony is sufficient to convict if the testimony is positive and the witness is credible. *People v. Island*, 385 Ill.App.3d 316, 346 (2008). Testimony of two eyewitnesses who both identified the defendant shortly after the crime is more than sufficient to uphold a conviction. See *People v. Negron*, 297 Ill. App. 3d 519, 530-33 (1998). Where two eyewitnesses both identify the defendant, their identifications reinforce each other. *Id*. at 530. A witness' prior acquaintance with the accused strengthens identification testimony. *People v. Zarate*, 264 Ill. App. 3d 667, 674 (1994). No physical evidence corroborating eyewitness identification is necessary. *Negron*, 297 Ill. App. 3d at 529.

¶ 29 Here, the jury's finding of guilt was supported by the testimony of Collins, Samhan and Mohamed. While Collins was an accomplice in the robbery, her testimony was corroborated by other evidence presented at trial, including the testimony of Samhan and Mohamed, who identified defendant in a photo array shortly after the robbery and at trial. Because both eyewitnesses identified defendant, their identifications reinforced each other. See *Negron*, 297 Ill. App. 3d at 530. Additionally, both men had seen defendant in the store on prior occasions, thereby strengthening their identification testimony. See *Zarate*, 264 Ill. App. 3d at 674. After viewing the evidence in the light most favorable to the prosecution, there was more than sufficient evidence to support defendant's conviction for armed robbery.

¶ 30 B. Rule 431 Violation

¶ 31 Next, defendant argues that he is entitled to a new trial because the trial court failed to ask two witnesses if they understood and accepted that a defendant's decision not to testify could not be used against him.

¶ 32 Illinois Supreme Court Rule 431(b) states as follows:

> "The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following 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." Ill. S. Ct. R. 431 (eff. July 1, 2012).

"The language of Rule 431(b) is clear and unambiguous." *People v. Thompson*, 238 Ill. 2d 598, 607 (2010). A trial court's failure to strictly comply with Rule 431(b) constitutes a violation of the rule. *Id*.

¶ 33 To preserve a purported error for consideration by a reviewing court, a defendant must object to the error at trial and raise it in a posttrial motion. *People v. Belknap*, 2014 IL 117094, ¶ 66. Failure to do either, results in forfeiture unless the error rises to the level of plain error. *See id*. Plain error arises 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. Piatkowski*, 225 Ill.2d 551, 565 (2007).

¶ 34 In determining whether the evidence at trial was closely balanced, 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. Belknap*, 2014 IL 117094, ¶¶ 52–53. Evidence is not closely balanced when the defendant was positively identified by one or more eyewitnesses See *People v. French*, 2017 IL App (1st) 141815, ¶ 61 (three eyewitnesses); *People v. Jackson*, 2016 IL App (1st) 133741, ¶ 66 (two eyewitnesses); *People v. Sharp*, 2015 IL App (1st) 130438, ¶ 66 (two eyewitnesses); *People v. Furdge*, 332 Ill. App. 3d 1019, 1032 (2002) (one eyewitness); *People v. Brookins*, 333 Ill. App. 3d 1076, 1083-84 (2002) (one eyewitness); *People v. Berry*, 264 Ill. App. 3d 773, 777 (1994) (three eyewitnesses, one of whom was co-conspirator); *People v. Ayala*, 208 Ill. App. 3d 586, 595 (1990) (two eyewitnesses). A Rule 431(b) violation is not cognizable under the second prong of the plain error doctrine, absent evidence that the violation produced a biased jury. *People v. Wilmington*, 2013 IL 112938, ¶ 33; *Thompson*, 238 Ill.2d at 610-11.

¶ 35 Here, the parties agree that the trial court violated Supreme Court Rule 431(b) by failing to ask two jurors if they understood and accepted that a defendant's decision not to testify could not be held against him. Defendant did not present any evidence that this error produced a biased jury; thus, he can only establish plain error if the evidence was closely balanced.

¶ 36 In this case, three witnesses positively identified defendant: Collins, an accomplice, and Mohamed and Samhan, both victims of the armed robbery. The victims testified that they had a good opportunity to see defendant and recognized him from being in the store on prior occasions. Based on the testimony at defendant's trial, the evidence against defendant was overwhelming, not closely balanced. Thus, defendant failed to establish plain error.

¶ 37 C. Sentence

¶ 38 Defendant also argues that the trial court abused its discretion in sentencing him to 35 years in prison because (1) the court was overly focused on general deterrence, and (2) his sentence is longer than either of his accomplices even though he played only a "small role" in the crime.

¶ 39 The trial court has broad discretion in sentencing. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). A reviewing court may not disturb a sentence that is within the statutory limits unless it is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. *Id*. We may not substitute our judgment for that of the trial court merely because we might have weighed the pertinent factors differently. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000).

¶ 40 Factors that may be considered by a court "as reasons to impose a more severe sentence" include (1) "the defendant's conduct caused or threatened serious harm;" (2) "the defendant has a history of prior delinquency or criminal activity;" and (3) "the sentence is necessary to deter others from committing the same crime." 730 ILCS 5/5-5-3.2(a)(1), (3) & (7) (West 2016). Trial courts are allowed to consider general deterrence as a factor in aggravation. See *id*. at (7).

¶ 41 Here, the sentencing guidelines required defendant to receive a sentence between 21 and 45 years in prison. See 720 ILCS 5/18-2(a)(2), (b) (West 2016). The trial court imposed a sentence of 35 years, near the middle of the sentencing range, after considering defendant's criminal history, which included two convictions for aggravated robbery. The court also considered the need to deter others as an aggravating factor. These considerations were appropriate. See 730 ILCS 5/5-5-3.2(a) (West 2016).

¶ 42 Defendant's attempt to compare his sentence to the sentences received by his accomplices is improper because both Collins and Payton pled guilty. "A sentence imposed on a codefendant who pleaded guilty as part of a plea agreement does not provide a valid basis of comparison to a

sentence entered into after a trial." *People v. Caballero*, 179 Ill. 2d 205, 217 (1997). Because defendant's accomplices pled guilty and received shorter sentences as part of plea agreements, it would be improper to compare the sentences they received to defendant's sentence. See *id*. The trial court did not abuse its discretion in sentencing defendant.

¶ 43 D. Sentencing Credits

¶ 44 Finally, defendant contends that he is entitled to ten additional days of presentence credit and $50 against his fines because the trial court erroneously determined that his presentence custody ended on June 30, 2017, when he was sentenced, rather than on July 10, 2017, when the trial court denied his motion to reconsider sentence.

¶ 45 Illinois Supreme Court Rule 472(a) provides:

> "(a) In criminal cases, the circuit court retains jurisdiction to correct the following sentencing errors at any time following judgment and after notice to the parties, including during the pendency of an appeal, on the court's own motion, or on motion of any party:
>
> (1) Errors in the imposition or calculation of fines, fees, assessments, or costs;
>
> (2) Errors in the application of *per diem* credit against fines;
>
> (3) Errors in the calculation of presentence custody credit; and
>
> (4) Clerical errors in the written sentencing order or other part of the record resulting in a discrepancy between the record and the actual judgment of the court.
>
> ***

> (e) In 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 (eff. May 17, 2019).

¶ 46 Pursuant to Rule 472, we remand to allow defendant to file a motion in the trial court raising the alleged errors regarding the calculation of his presentence credit.

¶ 47 III. CONCLUSION

¶ 48 For the foregoing reasons, we affirm the judgment of the circuit court of Peoria County and remand for further proceedings consistent with this decision.

¶ 49 Affirmed; cause remanded.