2019 IL App (4th) 160913-U

NO. 4-16-0913

Rule 23 filed March 26, 2019

Modified upon denial of Rehearing April 4, 2019

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DONNY LEVY, Defendant-Appellant.	) Appeal from the) Circuit Court of) Vermilion County) No. 14TR2644)) Honorable) Karen E. Wall,) Judge Presiding.

JUSTICE CAVANAGH delivered the judgment of the court.
Justices Steigmann and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant has forfeited his argument that the trial court failed to fully comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012), and because (contrary to his contention) the evidence in the jury trial was not closely balanced, the doctrine of plain error does not avert the forfeiture.

(2) In his closing argument to the jury, what the prosecutor said about reasonable doubt had the approval of case law, or at least case law had declined to find reversible error in such remarks.

¶ 2 A jury found defendant, Donny Levy, guilty of driving while his driver's license was revoked. See 625 ILCS 5/6-303 (West 2014). The Vermilion County circuit court sentenced him to a year of conditional discharge, a fine of $300, and 90 days in jail. Defendant appeals on two grounds.

¶ 3 First, defendant argues that during *voir dire* the trial court failed to fully comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). This argument is procedurally forfeited, and the doctrine of plain error does not avert the forfeiture.

¶ 4 Second, defendant argues that the trial court abused its discretion by denying his motion *in limine*, which sought to bar the prosecutor from attempting to define "reasonable doubt" to the jury. We conclude that what the prosecutor said about reasonable doubt, in his closing argument to the jury, had the approval of case law or, at least, that nothing he said on the subject was reversible error.

¶ 5 Therefore, we affirm the judgment.

¶ 6 I. BACKGROUND

¶ 7 A. The Trial Court's Questioning of the Potential Jurors

¶ 8 During *voir dire*, the trial court assembled one group of potential jurors and questioned them and then assembled a second group of potential jurors and asked them the same questions. The court asked the potential jurors in each group if they could "accept" that the State had the burden of proving defendant guilty beyond a reasonable doubt and that defendant was not required to present any evidence. The court also asked them if they could "accept" that defendant was presumed innocent. Finally, the court asked them if they could "accept" that defendant had a constitutional right not to testify and that no inference of guilty should arise from his "failure" to testify. The court never asked the potential jurors, however, if they *understood* those principles. See *id*. ("The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles ***.").

¶ 9 The parties selected a jury from the two groups of potential jurors.

¶ 10 B. Defendant's Motion *in Limine*

¶ 11 Before the jury trial, defendant filed a motion *in limine*, in which he requested the trial court to bar the prosecutor from attempting to define "reasonable doubt" to the jury.

¶ 12 In response to the motion, the prosecutor stated he merely intended to tell the jury that proof beyond a reasonable doubt was "not proof beyond all doubt" and that instead of being "some mystical unobtainable standard of proof," proof beyond a reasonable doubt was "the same kind of proof [that was] used every day in courtrooms across America."

¶ 13 Over defendant's objection, the trial court ruled it would be permissible for the prosecutor to use that language in his closing argument to the jury.

¶ 14 C. Evidence in the Jury Trial

¶ 15 The jury trial took place on March 31, 2016. A Danville police officer, Chris Comrie, testified he was on patrol on May 7, 2014, when at about 1:11 a.m., he saw a red Jeep Cherokee (Jeep) run a stop sign. He pulled the Jeep over. In the courtroom, Comrie identified defendant as the driver of the Jeep. During the traffic stop, defendant handed Comrie an Illinois identification card (Comrie testified). The card had defendant's name and date of birth on it as well as defendant's picture. Upon running defendant's information, Comrie learned that defendant's driver's license had been revoked. Consequently, after searching defendant and the Jeep, Comrie wrote him a ticket for driving while his driver's license was revoked and released him on a notice to appear.

¶ 16 The traffic stop was recorded by a video camera mounted on the dashboard of Comrie's squad car. Because, however, it was a seemingly unremarkable traffic stop in which nothing "major" had happened, Comrie took no measures to preserve the video footage. In accordance with the standard procedures of the Danville Police Department, the digital video

disk (DVD) eventually was written over, and, hence, the footage of the traffic stop no longer existed at the time of the trial.

¶ 17 Comrie had no doubt, though, that defendant was the driver of the Jeep he pulled over on May 7, 2014.

¶ 18 On cross-examination, Comrie testified that, since May 7, 2014, he had performed probably over 300 traffic stops. He agreed that, under the police department's DVD evidence retention policy, videos were kept for only 90 days and then were written over if they were not set aside and stored as evidence. The Jeep that Comrie stopped was registered to someone other than defendant. Comrie did not write in his report that defendant gave him photographic identification. In preparing for his testimony, Comrie reviewed a photograph of defendant in the expectation that he would be asked to identify someone at the defense table as the man he had pulled over.

¶ 19 On redirect examination, Comrie testified that, in preparing for testimony, it was standard practice for him to review the police report and a photograph of the defendant. In his police report, Comrie wrote defendant's name and birthdate of July 1, 1976—information he had obtained from defendant. Before testifying, Comrie saw defendant in the hallway and recognized him as the driver he stopped in the early morning of May 7, 2014.

¶ 20 On recross-examination, Comrie agreed with defense counsel that his (Comrie's) report stated: " [']Officer Comrie identified the driver as Donny, no middle initial, Levy *** M/B, 7-01-76.['] "

¶ 21 The State moved to admit in evidence, and to publish to the jury, People's exhibit No. 1. The State also requested the trial court to take judicial notice of this exhibit as a self-authenticating certified copy of defendant's driver's license abstract from the Illinois Secretary

of State showing that as of May 7, 2014, defendant's driving privileges had been revoked. Defense counsel responded that he had no objection. The court granted the State's motion, took judicial notice of the information in People's Exhibit No. 1, and published the exhibit to the jury. The State rested.

¶ 22 Defendant then took the stand on his own behalf. He testified that the last time he was in physical possession of his Illinois identification card "was like 2013, somewhere in there." He continued: "But I can't remember the pacific [*sic*] date and month, but I know it was like three years back." Asked whether he had a copy of his Illinois identification card with him on May 7, 2014, defendant answered, "That's impossible."

¶ 23 Recalled by the State, Comrie testified that when he approached the Jeep after pulling it over, he asked defendant for his driver's license and proof of insurance and that defendant handed him his Illinois identification card. From the Illinois identification card, Comrie obtained defendant's name and date of birth.

¶ 24 D. The Prosecutor's Closing Argument

¶ 25 The prosecutor argued to the jury: "[The burden in proof in criminal cases is] not proof beyond all doubt, but it's only beyond reasonable doubt. It's not some mystical unobtainable [*sic*] standard of proof. It's the same kind of proof that's used every day in courtrooms across America *** everyday—day in and day out. So[,] that's what *** beyond a reasonable doubt is."

¶ 26 E. Defense Counsel's Closing Argument

¶ 27 In his own closing argument to the jury, defense counsel insisted: "[T]hat couldn't of [*sic*] been any [s]tate ID that Officer Comrie saw on May 7th of 2014. Couldn't of [*sic*] been [defendant]'s." Defense counsel suggested that, instead of obtaining defendant's name and

birthdate from defendant's Illinois identification card, Comrie actually was given that information, verbally, by an imposter, someone posing as defendant. A name and a birthdate were, after all, "[i]nformation that easily could have been given to [Comrie] as somebody who knows [defendant], knows his information." Because all the State had provided as evidence was "some recollection from an incident that occurred [695] days ago that was just like something that Officer Comrie does every day," defense counsel maintained that the State had failed to prove, beyond a reasonable doubt, that it was defendant who drove the Jeep on May 7, 2014.

¶ 28 II. ANALYSIS

¶ 29 A. The Trial Court's Noncompliance With Rule 431(b)

¶ 30 By asking the potential jurors only if they *accepted* the principles in Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) but not asking the potential jurors if they *understood* those principles, the trial court clearly erred. See *People v. Belknap*, 2014 IL 117094, ¶ 46; *People v. Wilmington*, 2013 IL 112938, ¶ 32. Rule 431(b) provides that "[t]he court *shall* ask each potential juror, individually or in a group, whether that juror understands *and* accepts" the four principles in Rule 431(b). (Emphases added.) Ill. S. Ct. R. 431(b) (eff. July 1, 2012).

¶ 31 The trouble is, this issue is unpreserved. Defendant acknowledges that, to preserve an issue for review, it generally is necessary both to make a contemporaneous objection and to raise the issue in a posttrial motion (see *Belknap*, 2014 IL 117094, ¶ 47) and that, with respect to the Rule 431(b) instructions, he did neither of those things. He attempts to avert the forfeiture of this issue by invoking the doctrine of plain error, arguing that the evidence in the trial was so closely balanced that the trial court's noncompliance with Rule 431(b) threatened to tip the scales of justice against him. See *id.* ¶ 48.

¶ 32 In our qualitative assessment of the evidence (see *People v. Sebby*, 2017 IL 119445, ¶ 53), we disagree with defendant's characterization of the evidence as closely balanced. Although, as defendant argues, this case pits the credibility of Comrie against the credibility of defendant, Comrie had no apparent incentive to lie, whereas defendant had such an incentive. Besides, it seems unlikely that, under the circumstances, a police officer would have accepted a verbal self-identification from the driver before releasing him at the scene on a notice to appear. The citation was for a Class A misdemeanor (625 ILCS 5/6-303 (West 2014))), more than a petty offense. Not only that, but it was 1 in the morning, and the driver purported to be someone other the registered owner of the Jeep. Surely, photographic identification would have been essential to, at a minimum, hedge against the possibility that the driver was a car thief. It would have been improbably lackadaisical of a police officer to accept the driver's word as to who he was. Because defendant's story is improbable, the evidence is not closely balanced, and we will give effect to the procedural forfeiture of the Rule 431(b) issue. See *People v. Lopez*, 2012 IL App (1st) 101395, ¶ 90.

¶ 33 In his petition for rehearing, defendant requests that we address an alternative theory "that someone other than himself presented the ID card to Comrie." We do not see where defendant argued that alternative theory in the pages of his opening brief and reply brief that he cites in his petition for rehearing. In any event, that theory is even more implausible. Apparently, trial counsel perceived it would strain the jury's credulity to argue that an imposter who coincidentally looked like defendant presented Comrie with defendant's lost identification card. Trial counsel insisted to the jury: "[T]hat couldn't of [*sic*] been any [s]tate ID that Officer Comrie saw on May 7th of 2014. Couldn't of [*sic*] been [defendant]'s." "The doctrines of invited error, waiver[,] and judicial estoppel prevent a party from taking one position at trial and a

different position on appeal." *Woodland Community Consolidated School District 50 v. Illinois State Charter School Comm'n*, 2016 IL App (1st) 151372, ¶ 40. The doctrine of plain error can avert a procedural forfeiture but not a judicial estoppel. See *People v. Lucas*, 231 Ill. 2d 169, 174 (2008); *People v. Boston*, 2018 IL App (1st) 140365, ¶ 109. The petition for rehearing is denied.

¶ 34 B. The Denial of Defendant's Motion *in Limine*

¶ 35 Defendant argues the trial court committed reversible error by denying defendant's motion *in limine* and by allowing the prosecutor "to affirmatively define reasonable doubt as 'not proof beyond all doubt' [and] as 'not some mystic unobtainable standard of proof' " and by allowing the prosecutor to tell the jury that "[i]t's the same kind of proof that's used every day in courtrooms across America," "everyday—day in and day out."

¶ 36 1. "*Not Proof Beyond All Doubt*"

¶ 37 The supreme court discourages making the seemingly obvious linguistic observation that "proof beyond a reasonable doubt" is not "proof beyond all doubt." See *People v. Edwards*, 55 Ill. 2d 25, 35 (1973). The "better practice," according to the supreme court, is to refrain from pointing out to the jury that the correct adjective is "reasonable" instead of "all." See *id.* Even so, the supreme court repeatedly has concluded that when a prosecutor ventures to point out this distinction, " 'no error result[s] which requires reversal.' " *People v. Barrow*, 133 Ill. 2d 226, 265 (1989) (quoting *Edwards*, 55 Ill. 2d at 35).

¶ 38 2. "*Not Some Mystic Un*[*att*]*ainable Standard of Proof*"

¶ 39 This seems another way of saying that " '[the] standard of proof does not require perfection' "—a statement the supreme court declined to condemn in *People v. Harris*, 129 Ill. 2d 123, 161 (1989); see also *People v. Carroll*, 278 Ill. App. 3d 464, 468 (1996) ("Nor is it error

for a prosecutor to state that the standard is not ' "an insurmountable burden, some mystical thing." ' " (quoting *People v. Trass*, 136 Ill. App. 3d 455, 467 (1985))).

¶ 40 3. *Everyday Use of the Standard of Proof in Courtrooms Across America*

¶ 41 The supreme court has held it is permissible for a prosecutor to tell the jury that the standard of proof beyond a reasonable doubt is used every day in courtrooms across America. *People v. Collins*, 106 Ill. 2d 237, 277 (1985).

¶ 42 On the basis of such authorities, we find no abuse of discretion in the denial of defendant's motion *in limine* (*People v. Hillis*, 2016 IL App (4th) 150703, ¶ 127), and we add that, to the extent the defendant had a valid objection to distinguishing "proof beyond a reasonable doubt" from "proof beyond all doubt," binding precedent declares the error (if such it is) to be no reason for reversal.

¶ 43 III. CONCLUSION

¶ 44 For the foregoing reasons, we affirm the trial court's judgment, and we award the State $50 in costs.

¶ 45 Affirmed.