2019 IL App (4th) 170269-U

NO. 4-17-0269

FILED
June 10, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
TELLY C. YOUNG,	)	No. 16CF1070
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas E. Griffith Jr.,
	)	Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Justices Turner and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, finding the State's evidence was sufficient to prove defendant guilty of being an armed habitual criminal.

¶ 2 In January 2017, the trial court found defendant, Telly C. Young, guilty of being an armed habitual criminal. Thereafter, the court sentenced him to 10 years in prison.

¶ 3 On appeal, defendant argues (1) his waiver of counsel was invalid, (2) the trial court committed plain error in admitting police officers' testimony to a witness's statements as substantive evidence, and (3) the State's evidence was insufficient to prove him guilty beyond a reasonable doubt. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In August 2016, the State charged defendant by information with single counts of being an armed habitual criminal (count I) (720 ILCS 5/24-1.7(a) (West 2016)), unlawful possession of a weapon by felon (count II) (720 ILCS 5/24-1.1(a) (West 2016)), and reckless

discharge of a firearm (count III) (720 ILCS 5/24-1.5(a) (West 2016)) and two counts of resisting a peace officer (counts IV and V) (720 ILCS 5/31-1(a) (West 2016)). The two counts at issue on appeal are counts I and III.

¶ 6 In count I, the State alleged defendant committed the offense of being an armed habitual criminal in that he, a person who had been convicted of the offense of unlawful possession of a weapon by a felon, knowingly possessed a firearm. In count III, the State alleged defendant committed the offense of reckless discharge of a firearm in that he discharged a firearm in a reckless manner that endangered the bodily safety of another.

¶ 7 On January 12, 2017, defendant's bench trial commenced on counts I and III. Since the start of the case, defendant had proceeded *pro se*. Prior to the start of the bench trial, the trial court admonished defendant on the two offenses and the possible penalties, which defendant indicated he understood. The court also offered to appoint counsel, but defendant persisted in proceeding *pro se*. The State began its case-in-chief with certified copies of defendant's two convictions for unlawful possession of a weapon by a felon.

¶ 8 Decatur police officer Jacob Gilbert testified he was dispatched to the area of 1056 East Lincoln Street in Decatur on July 10, 2016, in reference to a report of shots fired. Once on the scene, Gilbert observed and collected a spent 9-millimeter bullet casing and a black Samsung Galaxy 7 cellular telephone outside of a house near the intersection of Lincoln Street and Illinois Street.

¶ 9 Darrell Foster testified he had known defendant for 15 to 20 years and considered him to be one of his "very good friends." At approximately 4 p.m. on July 10, 2016, Foster was under a car installing a transmission when he heard "a little pop sound." When he came out from underneath the vehicle, he heard a "neighbor's statements saying somebody had fired a gun off."

He did not see who fired the gun. The following exchange occurred between the prosecutor and Foster:

> "Q. Now when the detectives talked to you that day, did you say that you saw a man shoot a firearm into the ground on July 10, 2016?
>
> A. To correct that statement that somebody changed my statement around, I did not say I saw anybody shooting anything. I said people said. So evidently somebody turned my words around. I didn't say I seen [*sic*] it myself because I was not—how could I see when I was up under that car working?
>
> * * *
>
> Q. All right, Judge. I am going to continue. Now when detectives talked to you, did you say that the man who shot the firearm into the ground was [defendant]?
>
> A. I might have. I don't remember what I said. I probably did."

¶ 10 Donna Foster, Darrell's wife, testified she did not remember the events of July 10, 2016, because she had a "massive stroke" seven years prior to the trial and her mind was "messed up." She stated she knew defendant but did not recall being interviewed by the police.

¶ 11 Charlotte Cook testified she lived at 1056 East Lincoln Street. At approximately 4 p.m. on July 10, 2016, Charlotte was inside her house cooking. Sometime later, she spoke with a police officer. She testified she did not tell the officer she saw the man who shot the firearm

into the yard at 860 South Illinois Street. She testified she "didn't see no man shoot no gun because [she] was in the house."

¶ 12 William Bunch testified he did not remember being at Charlotte's residence on July 10, 2016, at approximately 4 p.m. He also stated he did not remember telling Officer Gilbert that he saw the man who shot the firearm into the yard at 860 South Illinois Street. Instead, he claimed he was intoxicated at the time.

¶ 13 Tony Cook, Charlotte's husband, testified he lived at 1056 East Lincoln Street, which is across the street from the Foster residence. On July 10, 2016, police officers arrived to talk about a possible shooting, but Tony stated he was "drinking real good" at the time. When asked if an officer asked whether he saw the man who shot the firearm, Tony stated he did not remember. He also did not remember telling an officer that defendant was the man who shot the firearm into the yard. He recalled talking to two detectives on August 2, 2016, but he did not remember telling officers that he saw defendant shoot the firearm into the ground.

¶ 14 Recalled to the stand, Officer Gilbert testified he spoke with Tony Cook, Charlotte Cook, William Bunch, Donna Foster, and Jerry Talliferno. He stated all the witnesses were "very reluctant" to speak with him. Gilbert testified Tony said " 'it is Telly Young' " and defendant walked around the corner and said, " ' "I am for real," ' pow, [and] shot a round into the ground." Charlotte stated she knew defendant from parties and his work at Baloo's BBQ. She gave a description and was "pretty adamant" that the person was defendant. Charlotte also told Gilbert she saw defendant exchanging words and yelling with Donna and Darrell Foster. Defendant then reached for his waistband and pulled out a black semiautomatic pistol, fired one round, yelled " ' "I am for real," ' " and continued walking.

¶ 15 Decatur police detective Jeremy Appenzeller testified he went to 860 South Illinois Street on August 2, 2016, with Detective Troy Kretsinger. During an interview, Darrell Foster told Kretsinger he did not need to look at a photo lineup because he knew the person was defendant. Darrell stated defendant fired a gun into the ground. Tony Cook also stated it was defendant who shot the gun.

¶ 16 Detective Kretsinger testified he interviewed Darrell and Donna Foster and Tony Cook on August 2, 2016. Darrell stated defendant fired the handgun. Tony also mentioned defendant was the individual who fired the weapon. Kretsinger stated he lifted a fingerprint from the phone at the scene but it was not suitable for comparison. He also stated a number on the phone was traced to Veronica Dixon, who explained she had a birthday party nearby and one of the children at the party lost their phone and she had tried to call it.

¶ 17 Following closing arguments, the trial court found the occurrence witnesses "were not being truthful" as "nobody recalled a lot in terms of the incident either because of strokes, they'd been drinking too much or they simply did not recall." However, the court relied on Tony Cook's and Darrell Foster's out-of-court statements to police officers as substantive evidence and found those detailed statements "clearly identified the defendant as the shooter." The court found defendant guilty of being an armed habitual criminal (count I) but not guilty of reckless discharge of a firearm (count III).

¶ 18 In January 2017, defendant filed a *pro se* motion for a new trial. Thereafter, the trial court appointed counsel to represent defendant. In March 2017, defense counsel filed a posttrial motion, arguing, *inter alia*, the court erred in considering testimony used to impeach Darrell Foster and Tony Cook. The court denied the motion. The court then sentenced

defendant to 10 years in prison. Defense counsel filed a motion to reconsider the sentence, which the court denied. This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 A. Waiver of Counsel

¶ 21 In his opening brief on appeal, defendant argues his waiver of counsel was invalid because the trial court failed to substantially comply with Illinois Supreme Court Rule 401(a) (eff. July 1, 1984) at the time he waived his right to counsel. Specifically, defendant argued the court failed to admonish him at his first appearance, the time of the purported waiver, of the minimum and maximum sentences of any of the five charges and did not sufficiently inform him of the nature of the charges.

¶ 22 In its brief, the State contends, although the trial court did not admonish defendant of the minimum and maximum sentences he faced on the day of his first appearance when he initially informed the court he wanted to proceed *pro se*, the court did fully comply with Rule 401(a) and inquired on the day of trial as to whether defendant wanted to persist in his desire to proceed *pro se* or have counsel appointed. Thus, the State argues the court substantially complied with Rule 401(a) and defendant was not prejudiced by the court's failure to earlier provide complete admonishments.

¶ 23 In his reply brief, defendant concedes the waiver of counsel admonishments given immediately before trial on January 12, 2017, substantially complied with Rule 401(a). He notes that although he was not admonished of the potential for consecutive sentences on the day of trial, the omission did not constitute lack of substantial compliance with Rule 401(a) because he was acquitted of the other charge. Further, defendant acknowledges the record shows he made a knowing and voluntary waiver of counsel on January 12, 2017. Thus, defendant concedes the

admonishments given on the day of trial constituted substantial compliance with Rule 401(a) and withdraws his argument on this issue. Accordingly, we need not address it.

¶ 24 B. Sufficiency of the Evidence

¶ 25 Defendant argues the evidence was insufficient to prove him guilty beyond a reasonable doubt where the State's case rested on unreliable and uncorroborated out-of-court statements. We disagree.

¶ 26 " 'When reviewing a challenge to the sufficiency of the evidence in a criminal case, the relevant inquiry is whether, when 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.' " *People v. Ngo*, 388 Ill. App. 3d 1048, 1052, 904 N.E.2d 98, 102 (2008) (quoting *People v. Singleton*, 367 Ill. App. 3d 182, 187, 854 N.E.2d 326, 331 (2006)). The trier of fact has the responsibility to determine the credibility of witnesses and the weight given to their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from that evidence. *People v. Jackson*, 232 Ill. 2d 246, 280-81, 903 N.E.2d 388, 406 (2009). When considering the sufficiency of the State's evidence, the reviewing court does not retry the defendant. *People v. Beauchamp*, 241 Ill. 2d 1, 8, 944 N.E.2d 319, 322 (2011). Instead, "[a] conviction will be reversed only where the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of the defendant's guilt." *People v. Belknap*, 2014 IL 117094, ¶ 67, 23 N.E.3d 325.

¶ 27 To sustain defendant's conviction for being an armed habitual criminal, the State must prove the defendant possessed a firearm after having been convicted of two qualifying offenses. See 720 ILCS 5/24-1.7(a) (West 2016). Here, the State tendered certified copies of defendant's convictions for unlawful possession of a weapon by a felon. Along with a spent

shell casing found on the sidewalk, the State's main evidence relied on the out-of-court statements made to police officers.

¶ 28 Darrell Foster testified he has known defendant for a period of 15 to 20 years and considered him to be a good friend. While underneath a car working on a transmission on July 10, 2016, Foster heard "a little pop sound." He then heard a neighbor say someone had fired a gun. He admitted talking to the police and "might have" said and "probably did" say defendant was the man who shot the gun into the ground. Detective Kretsinger testified he spoke with Foster on August 2, 2016, and Foster indicated defendant was the one who fired the handgun. Detective Appenzeller heard Foster say he did not want to be involved but stated defendant fired the shot into the ground.

¶ 29 The prior statements by Foster were admissible as substantive evidence, and he was consistent in naming defendant as the man who fired the gun. While Foster was reluctant to testify and claimed not to remember much of what occurred on the day of the offense, the trial court, as trier of fact, had the opportunity to hear the testimony and weigh the credibility of the witnesses. See *People v. Digirolamo*, 179 Ill. 2d 24, 46, 688 N.E.2d 116, 126 (1997) (stating "it is the function of the trier of fact to weigh the credibility of witnesses and to resolve conflicts or inconsistencies in their testimony"). The court found the occurrence witnesses "were not being truthful" but concluded Foster's statements to police officers "clearly identified the defendant as the shooter."

¶ 30 Defendant argues the State failed to link him to the phone found at the scene. However, the State was not required to do so. Instead, the State presented a reasonable explanation for its presence and its lack of connection with defendant. Defendant also argues Foster's prior identification of defendant as the shooter was unreliable where he testified his

identification was based on hearsay. However, as stated, the trial court is in the best position to consider the testimony and judge the credibility of the witnesses. Foster knew defendant and was at the scene of the shooting. The court could reasonably find Foster's prior statements more credible than his in-court testimony and find defendant guilty. Viewing the evidence in the light most favorable to the prosecution, we find the court could find defendant guilty of being an armed habitual criminal beyond a reasonable doubt.

¶ 31 C. Tony Cook's Statements to Police Officers as Substantive Evidence

¶ 32 Defendant argues the trial court committed plain error in admitting police officers' testimony as to Tony Cook's purported statements as substantive evidence. We find this issue forfeited.

¶ 33 Initially, we note defendant acknowledges he has forfeited this issue because he did not object at trial to the admission of Cook's prior inconsistent statements as substantive evidence. See *People v. Hestand*, 362 Ill. App. 3d 272, 279, 838 N.E.2d 318, 324 (2005) (a defendant must object at trial and raise the issue in a posttrial motion to preserve the issue for review). However, he argues this court should review the issue as a matter of plain error.

¶ 34 The plain-error doctrine allows a court to disregard a defendant's forfeiture and consider unpreserved error in two instances:

> "(1) where 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 and (2) where 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 ***." *Belknap*,

2014 IL 117094, ¶ 48, 23 N.E.3d 325.

¶ 35 "[T]he plain error rule is not a general savings clause for any alleged error, but instead is designed to address *serious injustices*." (Emphasis in original.) *People v. Williams*, 299 Ill. App. 3d 791, 796, 701 N.E.2d 1186, 1189 (1998). Under both prongs of the plain-error analysis, the burden of persuasion remains with the defendant. *People v. Wilmington*, 2013 IL 112938, ¶ 43, 983 N.E.2d 1015.

¶ 36 "Where the defendant claims first-prong plain error, a reviewing court must decide whether the defendant has shown that the evidence was so closely balanced the error alone severely threatened to tip the scales of justice." *People v. Sebby*, 2017 IL 119445, ¶ 51, 89 N.E.3d 675. "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." *Sebby*, 2017 IL 119445, ¶ 53, 89 N.E.3d 675.

¶ 37 Even if we were to assume, *arguendo*, that a clear and obvious error took place in this case, we would not find the evidence was closely balanced. As stated in the previous section, the evidence included a spent shell casing and Foster's statements to police implicating defendant as the one who fired the gun. Even if Cook's statements could be found to have been improperly admitted as substantive evidence, the remaining evidence was more than enough for the trial court to find defendant guilty beyond a reasonable doubt. Since the evidence was not closely balanced, we find defendant cannot satisfy the first prong of the plain-error doctrine to overcome forfeiture.

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 40 Affirmed.