2019 IL App (4th) 170274-U

NO. 4-17-0274

FILED
August 28, 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.	)	Jersey County
DALE S. BELL,	)	No. 16CF226
Defendant-Appellant.	)	
	)	Honorable
	)	Eric S. Pistorius,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Holder White and Justice Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court reversed and remanded, concluding the trial court's reliance on inadmissible hearsay evidence at defendant's revocation hearing constituted plain error.

¶ 2 On March 6, 2017, defendant, Dale S. Bell, pleaded guilty to possession of a stolen firearm (720 ILCS 5/24-3.8(a) (West 2016)) and was sentenced "to 10 years to the Illinois Department of Corrections [(IDOC)], stayed pending successful completion of a four year conditional discharge." One week later, the State filed a "Motion to Lift IDOC Stay" alleging defendant violated the terms of his conditional discharge by committing a criminal offense and requesting that "Defendant's IDOC Stay be lifted and defendant be resentenced on the charge of Possession of Stolen Firearm ***." At the hearing on the State's motion, the State's only witness was a sheriff's deputy whose testimony included the substance of his conversations with two

nontestifying witnesses. The trial court granted the State's motion, sentenced defendant to 10 years' imprisonment, and ordered him to pay court costs only.

¶ 3 On appeal, defendant raises the following arguments: (1) the trial court's order granting the State's "Motion to Lift IDOC Stay" was actually a revocation of his conditional discharge; (2) the trial court's finding that the State proved he violated the terms of his conditional discharge was against the manifest weight of the evidence; (3) the trial court based its decision on inadmissible hearsay evidence; and (4) this court should remand to the trial court with directions to enter a new fees order. We reverse and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 In November 2016, the State charged defendant by information with possession of a stolen firearm (count I) (720 ILCS 5/24-3.8(a) (West 2014)) and theft (count II) (720 ILCS 5/16-1(a)(1)(A) (West 2014)). On March 6, 2017, defendant pleaded guilty to count I in exchange for the State's agreement to dismiss count II. The trial court sentenced defendant "to 10 years to the Illinois Department of Corrections, stayed pending successful completion of a four year conditional discharge." The trial court's written sentencing order stated the following: "Defendant shall consecutively serve 10 years in confinement at the IDOC and be subject to the terms of this order. Mittimus to issue, effective stayed ***." The terms of the order mandated defendant pay court costs, "stay out of I[llinois] except for court purposes," and refrain from committing any criminal offense or using any illegal substances.

¶ 6 On March 13, 2017, the State filed a "Motion to Lift IDOC Stay" alleging defendant violated the terms of his conditional discharge by committing a criminal offense and by remaining in Illinois. Attached to the motion was a copy of an information charging defendant in case No. 17-CF-55 with attempt (burglary) (count I) (720 ILCS 5/8-4(a), 19-1(a) (West

2016)), attempt (theft) (count II) (720 ILCS 5/8-4(a), 16-1(a)(1)(A) (West 2016)), and criminal trespass to real property (count III) (720 ILCS 5/21-3(a)(2) (West 2016)). The State requested "Defendant's IDOC Stay be lifted and defendant be resentenced on the charge of Possession of Stolen Firearm, in Jersey County Case number 16-CF-226."

¶ 7 On April 10, 2017, the trial court conducted a hearing on the State's motion, which the court described as follows: "In essence what this is is a [m]otion to [r]evoke. It's a combination of [m]otion to [r]evoke, [m]otion to [l]ift [s]tay. Whether or not he's in violation of conditional discharge." At the hearing, the State's evidence consisted solely of the testimony of Jersey County Sheriff's Deputy Kevin Ayres.

¶ 8 Ayres testified he had been employed as a deputy with the Jersey County Sheriff's Department for 15 years. On March 12, 2017, Ayres was dispatched, along with Deputy Vetter, to the area of Lake West Side Tavern in response to a complaint of "a suspicious subject that [sic] was knocking on doors and *** attempting to get into a vehicle." Upon arrival, Ayres observed defendant walking away from a red truck parked at the west end of the tavern's parking lot and approaching the entrance to the tavern. Ayres exited his vehicle and approached defendant.

¶ 9 Ayres testified that as he approached defendant, defendant said, "glad you're here they just let the jurors out. I'm a federal witness and I'm here to be [*sic*] my handler." Ayres believed defendant was on some kind of drug. Ayres asked defendant if he was all right, and defendant responded he was fine. Ayres also asked defendant why he was knocking on doors and trying to get into vehicles. Defendant replied he was knocking on doors because he "was trying to meet his handler" and he was trying to get into vehicles because he "was trying to get a cigarette." Deputy Vetter then placed defendant in the back of his vehicle and advised him he

was not under arrest but merely being detained. Once Vetter detained defendant, Ayres walked to the nearby residence of Tony Brown, the individual who reported the suspicious activity.

¶ 10 Deputy Ayres testified about the substance of his conversation with Brown. Brown told Ayres he heard a knock on his door but did not initially answer as he had just awoken and was not dressed. Brown observed "a female knocking on the door and [defendant] standing in the yard and another male subject in a vehicle sitting inside of the vehicle." While Brown got dressed, defendant began knocking on Brown's door. Brown looked out the window and "observed the female, the male in the vehicle *** had left the scene." Brown then opened the door to speak to defendant. Defendant told Brown he was a federal witness and asked if Brown was his handler. Brown told defendant to leave. Defendant asked Brown if he had any cigarettes, and Brown informed him there was a cigarette machine inside the tavern. Brown then returned inside, and defendant left. Once inside his home, Brown observed defendant looking inside Brown's truck, but defendant did not attempt to get inside the truck. Defendant then walked to the red truck parked at the west end of the tavern's parking lot. Brown "observed [defendant] trying to get into that vehicle." According to Brown, defendant "was liftin[g] the doors and seeing if they were locked and *** jiggling the handles, trying to get into the vehicle." Brown then called the police.

¶ 11 After speaking with Brown, Ayres walked to the red truck to take photographs. Ayres testified there were two cartons of cigarettes on the truck's front seat. He photographed the truck and the cigarette cartons, and the State introduced these photographs into evidence. Ayres further testified that although he never asked defendant if he owned the red truck, Ayres "knew that was not [defendant's] truck." Ayres admitted he never asked defendant if the truck belonged

to a friend or if defendant had arrived at the tavern in the truck. After photographing the truck, Ayres walked inside the tavern to speak with the bartender, Melissa Barnes.

¶ 12 Deputy Ayres testified about the substance of his conversation with Barnes. Barnes was unaware defendant was outside of the tavern on the day he committed the alleged offenses. However, Ayres testified that Barnes told him defendant had been "hanging around" the parking lot the previous night and "that he has been warned in the past not to be on the property of Lake West Side Tavern." Ayres could not provide specific dates of the warnings but said Barnes told him that she had "advised [defendant] several times in the past" not to be on the property.

¶ 13 Defense counsel never objected to Ayres's testimony about the substance of his conversations with Brown and Barnes.

¶ 14 Following Ayres's testimony and argument of defense counsel, the trial court found the State had proved the alleged violations by a preponderance of the evidence. The court stated as follows:

> "[T]he court has to find by a preponderance of the evidence that it's more likely true than not true that [defendant] violated the [terms of conditional discharge]. One of the terms *** was not violate any penal statute [of] any jurisdiction or use any illegal or controlled substances. Either way you go on this, if he's clearly on some type of substance, but even with that even with the argument he's just pullin[g] up door handles. What's he doin[g] pullin[g] up door handles? What's the purpose in that? Other than what he's trying to do. What else is the substantial step? Does he have to throw a brick through the window? Is that the attempting to get into the car? But quite frankly, I can…the State could rest

their case on criminal trespass. He was told to stay off the property, he didn't stay off the property. He clearly didn't stay off the property. Therefore, he is in violation of the Order and therefore, the stayed sentence is going to be enforced effective today."

The same day, the trial court entered a written order granting the State's "Motion to Lift IDOC Stay" and sentenced defendant to 10 years' imprisonment.

¶ 15 This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 On appeal, defendant raises the following arguments: (1) the trial court's order granting the State's "Motion to Lift IDOC Stay" was actually a revocation of his conditional discharge; (2) the trial court's finding that the State proved he violated the terms of his conditional discharge was against the manifest weight of the evidence; (3) the trial court based its decision on inadmissible hearsay evidence; and (4) this court should remand to the trial court with directions to enter a new fees order.

¶ 18 A. Procedural Posture

¶ 19 Initially, defendant suggests that, although labeled as a "Motion to Lift IDOC Stay," the State's filing was tantamount to a petition to revoke his conditional discharge and the hearing conducted on the petition was a revocation hearing. See 730 ILCS 5/5-6-4(a), (b) (West 2016). The State essentially agrees stating it "concedes that it would be logical to evaluate these proceedings in the same fashion as a revocation hearing." We again note the court's comments made at the conclusion of the hearing on the State's motion—"In essence what this is is a [m]otion to [r]evoke *** whether or not he's in violation of his conditional discharge." Based on

the above, we agree with the parties' characterization of the State's motion and will treat the underlying proceeding as a revocation hearing for purposes of this appeal.

¶ 20 B. Sufficiency of the Evidence

¶ 21 Defendant argues this court "should reverse the revocation order, the re-sentencing order, and the order of commitment" because the State presented insufficient evidence to prove he violated the terms of his conditional discharge and the trial court's finding to the contrary was against the manifest weight of the evidence.

¶ 22 At a hearing to revoke conditional discharge, "[t]he State has the burden of going forward with the evidence and proving the violation by the preponderance of the evidence." 730 ILCS 5/5-6-4(c) (West 2016). "A preponderance of the evidence is proof that the fact at issue is more likely true than not." *Wells Fargo Bank, N.A. v. Hansen*, 2016 IL App (1st) 143720, ¶ 17, 47 N.E.3d 1185. Where the alleged violation is the commission of a criminal offense, the State must satisfy its burden as to each element of that offense. See *People v. Halterman*, 45 Ill. App. 3d 605, 608, 359 N.E.2d 1223, 1224 (1977) (The State failed to prove the defendant violated the terms of probation by committing theft because it failed to prove all four elements of the offense by a preponderance of the evidence.). "When the trial court finds that a violation *** has been proved, a challenge to the sufficiency of the evidence *** will succeed only if the trial court's finding is against the manifest weight of the evidence." *People v. Colon*, 225 Ill. 2d 125, 158, 866 N.E.2d 207, 226 (2007). "A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident or if the finding itself is unreasonable, arbitrary, or not based on the evidence presented." *People v. Deleon*, 227 Ill. 2d 322, 332, 882 N.E.2d 999, 1005 (2008).

¶ 23 Here, the State alleged defendant violated the terms of his conditional discharge by committing (1) attempt (burglary) (720 ILCS 5/8-4(a), 19-1(a) (West 2016)), (2) attempt (theft) (720 ILCS 5/8-4(a), 16-1(a)(1)(A) (West 2016)), and (3) criminal trespass to real property (720 ILCS 5/21-3(a)(2) (West 2016)). (The State also alleged defendant violated the terms of his conditional discharge by remaining in Illinois. However, the court specifically stated it did not find a violation on this basis. And even if it had, we question the legality of such a broad "banishment" term of conditional discharge. See, *e.g.*, *People v. Harris*, 238 Ill. App. 3d 575, 582, 606 N.E.2d 392, 397 (1992) (condition of probation requiring defendant to leave the State of Illinois was unlawful)). The trial court found the State proved defendant violated the terms of his conditional discharge by committing criminal trespass to real property. We conclude the trial court's finding was not against the manifest weight of the evidence.

¶ 24 Section 21-3 of the Criminal Code of 2012 (720 ILCS 5/21-3(a)(2) (West 2016)) defines the offense of criminal trespass to real property as follows:

> "(a) A person commits criminal trespass to real property when he or she:
>
> ***
>
> (2) enters upon the land of another, after receiving, prior to the entry, notice from the owner or occupant that the entry is forbidden ***."

Thus, the State had the burden of proving two elements by a preponderance of the evidence: (1) knowing entry upon the land of another and (2) prior notice that the entry was forbidden. See *People v. Hsiu Yan Chai*, 2014 IL App (2d) 121234, ¶ 34, 16 N.E.3d 887 ("[C]ase law has established that the 'knowingly' mental state applies to all elements of the offense.").

¶ 25 Here, the State presented sufficient evidence to prove defendant committed criminal trespass to real property by a preponderance of the evidence. In satisfaction of the first

element—knowing entry upon the land of another—Ayres testified that when he arrived on the scene defendant was walking away from a truck parked in the tavern's parking lot and approaching the entrance to the tavern. Regarding the second element—prior notice the entry was forbidden—Deputy Ayres further testified that Barnes, the tavern's bartender, told him defendant "ha[d] been warned in the past not to be on the property of Lake West Side Tavern." While defendant argues Ayres's testimony conveying the *substance* of Barnes's and Brown's statements to him constituted inadmissible hearsay evidence (see section C. *supra*), defense counsel did not object to Ayres's testimony. Under such circumstances, in considering defendant's sufficiency-of-the-evidence argument, we will give Ayres's hearsay testimony its natural probative effect. See *People v. Collins*, 106 Ill. 2d 237, 263, 478 N.E.2d 267, 278 (1985) ("[H]earsay evidence, if admitted without objection, 'is to be considered and given its natural probative effect.' ") (quoting *People v. Akis*, 63 Ill. 2d 296, 299, 347 N.E.2d 733, 735 (1976)). We find the above evidence was sufficient to prove defendant committed the offense of criminal trespass to real property. Accordingly, the trial court's finding the State established defendant violated the terms of his conditional discharge was not against the manifest weight of the evidence.

¶ 26 C. Trial Court's Consideration of Hearsay Evidence

¶ 27 Alternatively, defendant argues if we conclude the trial court's finding that defendant violated his conditional discharge was not against the manifest weight of the evidence, we should reverse and remand for a new revocation hearing because the court based its decision on Ayres's inadmissible hearsay testimony. Defendant acknowledges he has forfeited his claim by failing to object but asks this court to review his claim for plain error. See *People v. Sebby*, 2017 IL 119445, ¶ 48, 89 N.E.3d 675 ("To preserve a purported error for consideration by a

reviewing court, a defendant must object to the error at trial and raise the error in a posttrial motion.").

¶ 28 Under the plain-error doctrine, we may consider a forfeited claim when "(1) 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) 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, 870 N.E.2d 403, 410-11 (2007). The first analytical step under the plain-error doctrine is to determine whether a clear or obvious error occurred. *Sebby*, 2017 IL 119445, ¶ 49. Thus, we first consider whether the trial court based its decision on inadmissible hearsay evidence. "The determination of whether a specific statement is hearsay is purely a legal question reviewed *de novo*." *People v. Sundling*, 2012 IL App (2d) 070455-B, ¶ 82, 965 N.E.2d 563.

¶ 29 1. *Clear or Obvious Error Occurred*

¶ 30 "Hearsay is an out-of-court statement offered to establish the truth of the matter asserted ***." *People v. Banks*, 237 Ill. 2d 154, 180, 934 N.E.2d 435, 449 (2010). Hearsay evidence "is generally inadmissible due to its lack of reliability unless it falls within an exception to the hearsay rule." (Internal quotation marks omitted.) *People v. Caffey*, 205 Ill. 2d 52, 88, 792 N.E.2d 1163, 1187 (2001); see also *People v. Shum*, 117 Ill. 2d 317, 342, 512 N.E.2d 1183, 1191 (1987) (stating the fundamental basis for excluding hearsay evidence is the lack of an opportunity to cross-examine the out-of-court declarant). Hearsay evidence is inadmissible at revocation proceedings and therefore "is not competent to sustain the State's burden of proof ***." *People v. Renner*, 321 Ill. App. 3d 1022, 1026, 748 N.E.2d 1272, 1276 (2001).

¶ 31 On the other hand, "testimony about an out-of-court statement which is used for a purpose other than to prove the truth of the matter asserted in the statement is not hearsay." *Banks*, 237 Ill. 2d at 180. For example, and as the State argues occurred here, testimony by a police officer about an out-of-court statement offered "to show the investigative steps taken by the officer leading to the defendant's arrest" is not inadmissible hearsay. *People v. Pulliam*, 176 Ill. 2d 261, 274, 680 N.E.2d 343, 350 (1997). However, the officer's testimony must be limited to that which is "necessary and important to fully explain the State's case to the trier of fact." *People v. Simms*, 143 Ill. 2d 154, 174, 572 N.E.2d 947, 954-55 (1991). "The State may not use the limited investigatory procedure exception to place into evidence the substance of any out-of-court statement that the officer hears during his investigation ***." *People v. Edgecombe*, 317 Ill. App. 3d 615, 627, 739 N.E.2d 914, 924 (2000); see also *People v. Boling*, 2014 IL App (4th) 120634, ¶ 107, 8 N.E.3d 65 ("Testimony about the steps of an investigation may not include the *substance* of a conversation with a nontestifying witness." (Emphasis in original.)); *People v. Cameron*, 189 Ill. App. 3d 998, 1004, 546 N.E.2d 259, 263 (1989) (An officer's testimony that he acted "upon information received" should be sufficient. (Internal quotation marks omitted.)).

¶ 32 Applying these authorities, we find Deputy Ayres's testimony about the substance of the out-of-court statements by Brown and Barnes, neither of whom testified, was inadmissible hearsay evidence. Further, we conclude the trial court committed clear or obvious error when it relied on this inadmissible evidence in finding defendant had violated his conditional discharge. Deputy Ayres's testimony went beyond that which was "necessary and important" to explain the State's case. (*Simms*, 143 Ill. 2d at 174) or show the "investigative steps" he took. *Pulliam*, 176 Ill. 2d at 274. His initial testimony that he was dispatched to Lake West Side Tavern "for a suspicious subject *** knocking on doors and *** attempting to get into a vehicle" was indeed

admissible to show the investigative steps leading to defendant's arrest. *Id.* However, Ayres proceeded to testify about the *substance* of his conversations with the two nontestifying witnesses, Brown and Barnes. See *Boling*, 2014 IL App (4th) 120634, ¶ 107 ("Testimony about the steps of an investigation may not include the *substance* of a conversation with a nontestifying witness." (Emphasis in original.)). Ayres testified that Brown told him defendant attempted to get into the red truck by "jiggling the handles." Ayres further testified that Barnes told him defendant "ha[d] been warned in the past not to be on the property of Lake West Side Tavern." These out-of-court statements, which were clearly offered for the truth of the matter asserted, went beyond an explanation of investigatory procedure and instead went to the very essence of the dispute (*i.e.*, whether defendant committed the alleged crimes). The substantive details about the out-of-court statements made by the nontestifying witnesses constituted inadmissible hearsay evidence. Moreover, the trial court specifically relied on these same substantive portions of the out-of-court statements in finding defendant had violated his conditional discharge. Accordingly, we find the trial court committed clear or obvious error when it based its decision on inadmissible hearsay evidence. See *Renner*, 321 Ill. App. 3d at 1026 (Hearsay evidence is inadmissible at revocation proceedings and therefore "is not competent to sustain the State's burden of proof ***.").

¶ 33 2. *The Evidence was Closely Balanced*

¶ 34 Having determined clear or obvious error occurred, the next analytical step under the plain-error doctrine is to determine whether defendant "has shown that the evidence was so closely balanced the error alone severely threatened to tip the scales of justice." *Sebby*, 2017 IL 119445, ¶ 51. (Because we can resolve defendant's claim under the first prong of the plain-error doctrine, we do not address his second-prong argument.) In determining whether the evidence

was closely balanced, we "must evaluate the totality of the evidence and conduct a qualitative, commonsense assessment of it within the context of the case." *Id*. ¶ 53. Our inquiry "involves an assessment of the evidence on the elements of the charged offense or offenses ***." *Id*.

¶ 35 We find that defendant has shown that the evidence was closely balanced in this case. Short of the inadmissible hearsay evidence offered through Deputy Ayres, the State presented no evidence with which it could prove by a preponderance that defendant committed attempt (burglary) (720 ILCS 5/8-4(a), 19-1(a) (West 2016)) attempt (theft) (720 ILCS 5/8-4(a), 16-1(a)(1)(A) (West 2016)) or criminal trespass to real property (720 ILCS 5/21-3(a)(2) (West 2016)). For example, an essential element of attempted burglary charge was that defendant intended to enter a vehicle without authority and an essential element of attempted theft charge was that defendant intended to obtain unauthorized control over property of another. See 720 ILCS 5/8-4(a), 16-1(a)(1)(A), 19-1(a) (West 2016). However, regarding these two offenses, independent of the inadmissible hearsay evidence, the State presented nothing that would prove defendant was *without authority* to enter the vehicle or *unauthorized* to obtain control over the cigarettes.

¶ 36 Deputy Ayres testified that when he arrived at the tavern, he observed defendant walking away from a red truck. Ayres asked defendant why he was trying to get into vehicles and defendant replied he "was trying to get a cigarette." Ayres testified there were two cartons of cigarettes on the front seat of the red truck. However, the State presented no admissible evidence tending to prove defendant was without authority to enter the red truck or unauthorized to obtain control over the cigarettes. Although Ayres testified that he knew the red truck did not belong to defendant, he admitted he never asked defendant if the truck belonged to a friend or if he arrived at the tavern in the truck.

¶ 37 In addition, regarding defendant's alleged criminal trespass to real property, short of the inadmissible hearsay evidence containing Barnes's statements, the State presented no evidence that defendant was not permitted to be on the tavern's property. Thus, the trial court's erroneous reliance on inadmissible hearsay evidence alone "threatened to tip the scales of justice" against defendant. *Sebby*, 2017 IL 119445, ¶ 51. Accordingly, we conclude defendant has demonstrated the existence of a plain error under the first prong of the plain-error doctrine. The case is remanded for a new revocation hearing at which the State will have the opportunity to prove its allegations with competent evidence. See *People v. Malone*, 18 Ill. App. 3d 397, 399, 309 N.E.2d 325, 327 (1974).

¶ 38 D. Fees

¶ 39 Lastly, defendant argues the trial court erred in its sentencing by imposing "Court Costs Only" without specifically identifying the costs in a written order and requests us to vacate and remand with directions to enter an order in compliance with Illinois Supreme Court Rule 452 (eff. Mar. 1, 2019). ("At the time of sentencing in a criminal case, the court shall enter a written order imposing the sentence and all applicable fines, fees, assessments, and costs against the defendant and specifying applicable credits."). However, because we are reversing the court's judgment revoking defendant's conditional discharge and remanding for a new hearing, we need not address this issue.

¶ 40 III. CONCLUSION

¶ 41 For the reasons stated, we reverse the trial court's judgment revoking defendant's conditional discharge and remand for the trial court to conduct another revocation hearing at which the State will have the opportunity to prove its allegations with competent evidence.

¶ 42 Reversed and remanded with directions.