2016 IL App (1st) 141131-U

FIFTH DIVISION
June 24, 2016

No. 1-14-1131

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

	)	Appeal from the
THE PEOPLE OF THE STATE OF ILLINOIS,	)	Circuit Court of
	)	Cook County
Plaintiff-Appellee,	)	
	)	
v.	)	No. 13 CR 11765
	)	
DEXTER HUGHES,	)	
	)	Honorable
Defendant-Appellant.	)	Dennis J. Porter,
	)	Judge Presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Gordon and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming defendant's convictions for robbery and aggravated battery where trial court did not err in failing to provide standby counsel.

¶ 2 After a bench trial, defendant Dexter Hughes (Hughes) was convicted of two counts of robbery and one count of aggravated battery in a public place. He was sentenced to two concurrent terms of 19 years and a concurrent term of five years in the Illinois Department of Corrections. In this direct appeal, defendant contends that the trial court abused its discretion in "refusing" to appoint standby counsel where (1) the trial court "did not consider" the factors set

forth by the Illinois Supreme Court in *People v. Gibson*, 136 Ill. 2d 362 (1990), regarding appointment of standby counsel "and instead applied a blanket policy of denying standby counsel to *pro se* defendants"; and (2) defendant "was unable to present his intended defense" – that he had purchased rather than stolen the items – without the "limited assistance of standby counsel" because he did not know how to introduce a surveillance video into evidence or how to subpoena his witness, a store clerk. The State responds that the "trial court properly admonished defendant pursuant to Supreme Court Rule 401 and properly held defendant to his decision of self-representation." For the reasons stated herein, we affirm the judgment of the trial court.

¶ 3 BACKGROUND

¶ 4 In June 2013, a grand jury indicted defendant on two counts of armed robbery (720 ILCS 5/18-2(a)(2) (West 2012)) and four counts of aggravated battery (720 ILCS 5/12-3.05(c) (West 2012)). According to the indictment, on May 24, 2013, defendant struck Milton Knight (Knight) and Regina Yancy (Yancy) on a public street and took Knight's shoes and Yancy's shoes and money while armed with a firearm.

¶ 5 Pretrial Proceedings

¶ 6 At his arraignment on July 24, 2013, defendant indicated that he could not afford to hire an attorney. After the court informed defendant that it would appoint the Public Defender to represent him, he responded, "I don't want no Public Defender. I want to represent myself." He continued, "They work with the [p]rosecutors. I don't want none of that." He referenced an Illinois Supreme Court Rule 402 conference (Ill. S. Ct. R. 402 (eff. July 1, 2012)), stating, "I want to just get this over with." Defendant was willing to proceed without discovery; however, the assistant State's attorney (ASA) had not yet spoken with the alleged victims. The court appointed the Public Defender "for purposes of arraignment" and informed defendant that "[i]f

you still want to go *pro se* the next time, you can address that with *** your trial judge."[1] Defendant was informed to return to court in one week. Also on July 24, 2013, the assistant public defender (APD) filed an appearance on behalf of defendant and served a request for discovery on the State.

¶ 7 During proceedings on August 1, 2013, the court inquired whether defendant had an issue with his APD or with APDs generally. Defendant responded, "I just want a public defender just to represent me to the best of their ability and not just gone give up on me." The APD stated, "The question is do you want counsel appointed for you?" Defendant responded, "Yeah, yea." The court noted that the current APD was being transferred, and a new APD would start the following week. Defendant also stated, in part: "I want to demand trial. I want to go for a speedy trial." The court ordered a behavioral clinical examination of defendant to determine his fitness to stand trial.

¶ 8 During proceedings on September 4, 2013, defendant expressed concerns regarding the alleged inaction and non-responsiveness of his APD. Defendant also repeatedly demanded a speedy trial. The APD indicated that she was "waiting for additional discovery," including a video. The defendant stated, "I want to go *pro se*. I don't want her representing me anymore." Upon questioning by the court, defendant answered that he had a 10th grade education, was not a lawyer, and had not previously represented himself in a civil or criminal case, but was prepared to "do a lot of research." The court then provided detailed explanations of each of the charges against defendant and the consequences of any conviction, *e.g.*, incarceration and other penalties. Defendant indicated that he understood all of the charges and possible penalties.

¶ 9 The court also explained the ramifications of self-representation. The court initially

[1] Judge Steven J. Goebel stated he was "sitting in" for Judge Dennis J. Porter on July 24, 2013. Judge Porter presided over the trial and the other proceedings discussed herein.

informed defendant that: he would be required to obey certain technical rules that govern the conduct of the trial; the State would be represented by an experienced attorney who is familiar with the court rules; defendant may "allow the prosecutor an advantage" by failing to object to inadmissible evidence and by not making effective use of his rights such as "the right to question the jurors"; and defendant's choices at one point in the trial may have unintended consequences at a later point in the trial. The court also informed defendant that he would not "be allowed to complain on appeal about the competency" of his representation, and that the effectiveness of his defense may be diminished by his dual roles as attorney and defendant. The court then explained to defendant that he would receive "no special consideration." The court stated that an attorney may "render important assistance *** by determining the existence of possible defenses to the charges *** through consultation with a prosecutor regarding possible reduced charges or lesser penalties, and if there is a conviction, the lawyer can present evidence to the court, which might lead to a lower sentence." Defendant indicated that he understood each of the court's statements.

¶ 10 The exchange between the court and defendant continued as follows:

"THE COURT: In the event that I let you represent yourself, you are not going to be given a chance to change your mind during the trial. Once we start that trial, that's going to be it. I don't care if we are ten minutes into it. You say I can't handle this anymore, I'll say well that's too bad. I'll make you go ahead anyway. Do you understand?

THE DEFENDANT: Yes.

THE COURT: I'm not going to appoint standby counsel so you're going to be sitting over there by yourself. Do you understand?

THE DEFENDANT: Yes.

THE COURT: Do you still want to represent yourself?

THE DEFENDANT: Yes.

THE COURT: Okay. The record will reflect that the defendant has been admonished pursuant to Rule 401 and defendant elects to appear *pro se* so the defendant will be allowed to represent himself. *** Public Defender is given leave to withdraw. ***"

¶ 11 On September 12, 2013, defendant filed a *pro se* motion to appoint an investigator to assist him in "obtaining information and evidence to be used in preparation" of his defense. Defendant stated, in part, that he has an "elementry [*sic*] capacity to read, write and comprehend the English language," does not have access to any legal services or materials, and is "mentally handicapped and on several psychotropic [medications]." He indicated that he had no legal training and did not understand most of the words used by the court and the ASA. Due to his "inability to conduct any research or investigation," he asserted that he would be prejudiced without the services of an investigator. Defendant further stated that he had "not waived his right to a speedy trial by jury. Demanded." In a non-notarized document entitled "Affidavit" appended to defendant's motion, a fellow inmate indicated he had assisted in the preparation of the motion and that defendant "has a very obvious mental disability and truly is not capable of filing any type of intelligent pleading." Also on September 12, 2013, defendant filed a *pro se* motion for a bill of particulars.

¶ 12 During proceedings on September 12, 2013, defendant indicated that he did not wish to represent himself on a "new" case in which he was charged with aggravated battery of a peace officer; the APD was appointed as his counsel. Defendant confirmed that he would continue to represent himself in the "original case" and demanded a speedy trial. The court denied his *pro se*

motions for appointment of an investigator and for a bill of particulars. Defendant persisted in his demand for trial without any discovery and informed the court he did not care if he had any discovery.

¶ 13 On October 2, 2013, Dr. Nishad Nadkarni, the supervisor of the psychiatry division at Forensic Clinical Services, testified regarding his evaluation of defendant on August 6, 2013. Although he diagnosed defendant with two "mental conditions" – anti-social personality disorder and "cannabis and PCP use disorder, mild severity in a controlled environment" – Dr. Nadkarni opined that defendant was fit to stand trial, and the court agreed. Defendant stated, in part: "I cannot represent myself because I do not know the legal terms, and half the words he used I don't know what they mean. I do not want no public defender representing me because they not [*sic*] representing me to the best of my ability." The court responded, "[I]f you can afford to hire your own lawyer, you can do that. If you want me to appoint a lawyer for you, I will appoint one for you free of charge." Defendant stated, in part, "I don't want no public defender lawyer. I would rather take a bar associated lawyer." The court stated there was "no reason" to appoint a "bar association lawyer" and denied his request. Defendant confirmed that he was "still demanding trial."

¶ 14 Although defendant stated that he was not ready for trial because he was "waiting on video surveillance," he continued to demand trial during proceedings on October 7, 2013. He viewed the video on October 11, 2013; he indicated he was "still demanding trial."

¶ 15 Trial

¶ 16 Defendant waived his right to a jury trial, and the bench trial commenced on October 21, 2013, with defendant representing himself. After opening statements, defendant asked whether it was possible for a piece of evidence – a bag – to be fingerprinted. The court explained that his

request was "too late" and questioned whether fingerprinting would "prove anything," given defendant's assertion in his opening statement that he had purchased the allegedly stolen items.

¶ 17 Yancy testified that at 7:45 a.m. on May 24, 2013, she and Knight went to her brother's shoe store, where her brother gave her seven pairs of shoes. Yancy carried three pairs in her bag, and Knight carried four pairs in another bag. At approximately 9:10 a.m., the two were dropped off at a corner grocery store on the 2800 block of West Marquette Road. A "young lady and another young man" approached Yancy and Knight as they exited the store and inquired regarding the contents of her bag; a box inside her bag displayed a visible "Nike" name. Yancy responded that the shoes were not for sale. After Yancy and Knight walked approximately one block, a small black vehicle "[d]rove up on" them. According to Yancy, three people "jumped out" of the vehicle: the man and woman from the store and defendant. Yancy identified defendant in court as the driver of the vehicle.

¶ 18 Yancy testified that defendant approached her and Knight, lifting up his shirt and revealing a black handgun. Defendant stated, "You know what this is." Yancy "kind of ran," and defendant and the other man began "beating [Knight] up." Yancy saw defendant hit Knight with his hands, not with a weapon. Knight continued to hold the bag in his hand. As Yancy ran "[t]o the next corner," the woman pursued her. Yancy testified, "I fell down and she jacked the bag out of my hand." The woman did not strike Yancy; she "just snatched the bag then and all of them ran to the car." The men had taken Knight's bag and entered the vehicle. Yancy viewed the license plate before the vehicle left the scene.

¶ 19 The police were contacted, and Yancy relayed the license plate number. At approximately 10:30 a.m., a police officer showed Yancy five photographs of individuals; she identified defendant. Yancy was brought to the police station later that evening, where she

recognized a vehicle in the parking lot as the vehicle from the earlier incident.

¶ 20 During the trial, Yancy identified a bag that her brother had obtained while serving in the Marines; Yancy "had that bag [for] about 10 years." Yancy had carried the shoes from the store in the bag on May 24, 2013. She witnessed the police recovering the bag from the trunk of the car at the police station. Yancy also testified that she was carrying approximately $200 in the "pouch part" of the bag, as well as her wallet and identification. She indicated that she had never seen defendant prior to the incident and that she did not give him permission to take her items.

¶ 21 On cross-examination, defendant questioned Yancy regarding potential inconsistencies between an incident report and her testimony, and he attempted to demonstrate gaps in her recollection of the incident. He showed Yancy photographic exhibits and inquired regarding the description of defendant's appearance that she had provided to the police. Defendant also attempted to impeach her with her prior criminal convictions; the court sustained the ASA's objection because Yancy's felony convictions were not within the previous ten years.

¶ 22 The trial continued on October 25, 2013. Prior to witness testimony, defendant stated, "I want to stop this trial" because he lacked "the capabilities and the intelligence" to plead his case. He continued, in part, that he had "fired" his APD "out of frustration for a crime I didn't do, so I didn't know how to accept myself being here, and I just fired her for no reason, but she was actually doing a nice job for me ***." The court responded, "Well, you seem to be doing about an average job for somebody that was representing themselves. Not to say that is a good job, but I am saying it is about an average job." After defendant stated that he did not know how to subpoena witnesses or file motions, the court reminded him of its earlier admonitions regarding the risks of self-representation. Defendant indicated that he had intended to inform the court of his concerns on the first day of trial but "never got a chance." The court responded that the trial

had commenced, and "[w]e are not going back." The court also observed that defendant had demanded trial "from the get-go" and that defendant had wished to represent himself.

¶ 23 The State's next witness was Chicago police officer David Evans (Evans). Evans arrived at the scene of the incident on May 24, 2013, and met with Yancy and Knight. The two described a four-door "black smaller car," and Yancy provided Evans with the license plate number. Evans "sent a flash message over the radio zone for cars in the area to possibly apprehend the offender." Defendant did not cross-examine Evans.

¶ 24 Chicago police officer Michael Wrobel (Wrobel) testified that he had received the flash message relaying the vehicle description and license plate number. At approximately 4:45 p.m. on May 24, 2013, Wrobel and his partner were driving near 105th Street and State Street when Wrobel observed a vehicle matching the description with the license plate number. When Wrobel curbed the vehicle, "[t]he male subject who was the driver immediately exited the vehicle and attempted to walk away." Wrobel identified defendant in court as the driver of the vehicle. Defendant was stopped and taken into custody, and the vehicle was transferred to a police station. During a search of the trunk of the vehicle at the station, Wrobel recovered an empty green duffel bag. Yancy, who was at the police station, identified the bag as hers. On cross-examination, defendant elicited from Wrobel that defendant was not "committing a crime, local, Federal or State" when he was stopped and that he had cooperated with Wrobel's orders.

¶ 25 The ASA sought to admit certain exhibits into evidence. Referring to "video surveillance" on a "little disk" with "ten different photos" of defendant, defendant stated that he "would like to know if [the video] can be presented here today." The court inquired whether defendant objected to the admission of the State's exhibits into evidence; defendant had no objection. The court allowed the State's exhibits to be admitted, and the State rested. The court

inquired of defendant if he wished to move for a directed finding and explained to defendant the nature of a directed finding. Defendant moved for a directed finding, which the court granted as to the armed robbery charges but denied as to the lesser included offense of robbery. The court also granted the motion with respect to the aggravated battery charge as to Yancy – because Yancy did not testify that she had been stricken – but denied the motion as to the aggravated battery charges involving Knight. Defendant asked whether "that means I have been found guilty of aggravated battery to Milton Knight?" The court explained that the trial was "not over."

¶ 26 When asked by the court whether he wished to present any evidence, defendant responded that he "never had a chance to subpoena any of [his] witnesses." The court pointed out that defendant had indicated he was ready for trial and had repeatedly demanded trial. Defendant then testified on his own behalf, stating that "[e]verything that is right there, the bag, the hat, the jacket, the purple jacket, that's mine." He claimed to "have the witnesses to prove it," but "didn't have enough time" to subpoena them. On cross-examination, defendant testified that the black, four-door vehicle was "[his] girl's vehicle." He confirmed that a man and a woman were with him in the vehicle for part of the day. He also testified that he was driving the vehicle when he was stopped by police later that day and that the police had recovered the bag, which defendant claimed was his property. Defendant did not call any other witnesses.

¶ 27 During closing arguments, defendant argued that the State had not called Knight as a witness. The court opined that defendant made a "good point," but that "the thing that actually removes this case from a single finger robbery is the fact that the proceeds are recovered in your vehicle and you are driving the same vehicle that you were driving at the time of the crime[.]" The court found defendant guilty of two counts of robbery and one count of aggravated battery. The court then informed defendant that an attorney could be appointed to represent him during

sentencing and posttrial proceedings or he could continue to represent himself; defendant requested an attorney. Defendant then asked the court to view the "video surveillance on the disk." The court explained that it could consider only the evidence presented during the trial and suggested that defendant discuss the matter with his attorney.

¶ 28 Posttrial Matters

¶ 29 Defendant – represented by the APD – filed a posttrial motion for a new trial on November 27, 2013, and a supplemental motion for a new trial on February 10, 2014. He argued, among other things, the trial court erred by not allowing defendant to test certain evidence for fingerprints and by not permitting defendant to impeach Yancy regarding "her prior criminal damage to property from 2007." Defendant further asserted in the supplemental motion that the trial court erred by "not allowing [defendant] counsel when he requested it during trial." During a hearing on February 10, 2014, the APD also asked for a new trial "based on the fact that I know there was a video in this case." The court denied both the posttrial motion for a new trial and supplemental motion for a new trial and sentenced defendant to concurrent prison sentences of 19 years on two robbery counts and five years on a count of aggravated battery in a public place. On March 31, 2014, the court denied defendant's motion to reconsider his sentence, and defendant filed a notice of appeal on the same date.

¶ 30 ANALYSIS

¶ 31 Defendant contends on appeal that his "intended defense was that he purchased the items he was accused of taking from the alleged victims, and he intended to substantiate that defense by calling a store clerk to testify and entering a surveillance video into evidence." According to defendant, the trial court "should have appointed standby counsel to help [him] subpoena his intended witness and introduce [the] video into evidence, routine tasks which [defendant] was

unable to complete on his own." Defendant asserts that the "trial court applied a blanket policy of denying standby counsel to *pro se* defendants" and thus abused its discretion. He requests that we reverse his convictions and remand the case for a new trial. The State responds that defendant never requested standby counsel and thus has forfeited his opportunity to argue on appeal that the trial court should have appointed standby counsel. The State further contends that "[w]hile defendant's actual request to 'stop [his] trial' may have implied that he wished to rescind his choice to waive counsel altogether, that option was not available to him in the middle of trial per Illinois law either."

¶ 32 "A *pro se* defendant does not have a right to standby counsel, but since there is no state statute or court rule to the contrary, such appointment is permissible." *People v. Ellison*, 2013 IL App (1st) 101261, ¶ 42. Accord *People v. Gibson*, 136 Ill. 2d 362, 375 (1990); *People v. Ware*, 407 Ill. App. 3d 315, 349 (2011). Standby counsel "may assist a *pro se* defendant 'in overcoming routine procedural or evidentiary obstacles to the completion of some specific task, such as introducing evidence or objecting to testimony, that the defendant has clearly shown he wishes to complete,' and may also help 'ensure the defendant's compliance with basic rules of courtroom protocol and procedure.' " *Gibson*, 136 Ill. 2d at 378, citing *McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984).

¶ 33 The decision whether to appoint standby counsel is left to the broad discretion of the trial court and will not be reversed absent an abuse of that discretion. *Ellison*, 2013 IL App (1st) 101261, ¶ 42. We will find an abuse of discretion "only where the trial court's ruling was arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." (Internal citations omitted). *Ware*, 407 Ill. App. 3d at 349. "[N]o trial court in Illinois has been reversed for exercising its discretion to *not* appoint standby counsel and this

absence of reversals appears consistent with nationwide experience." (Internal quotation marks omitted and emphasis in original.) *People v. Pratt*, 391 Ill. App. 3d 45, 57 (2009), citing *People v. Williams*, 277 Ill. App. 3d 1053, 1061 (1996).

¶ 34 The parties disagree regarding whether the issue on appeal – the trial court's failure to appoint standby counsel – was preserved. To preserve an issue on appeal, a defendant is required to raise the issue by objecting at trial and in a posttrial motion. *Ware*, 407 Ill. App. 3d at 350. "When a defendant has forfeited appellate review of an issue, the reviewing court will consider only plain error." *People v. Thompson*, 238 Ill. 2d 598, 611 (2010). As discussed below, we find that the issue was not properly preserved.

¶ 35 As an initial matter, we agree with the State that defendant did not request standby counsel at any time. In the course of its admonitions pursuant to Illinois Supreme Court Rule 401[2] seven weeks prior to trial, the court stated, "I'm not going to appoint standby counsel so you're going to be sitting over there by yourself. Do you understand?" Defendant answered, "Yes." At the start of the second day of trial, defendant stated, "I want to stop this trial." Although he indicated that he had "fired" the APD "out of frustration," defendant never referenced standby counsel. In his supplemental motion for a new trial, defendant – represented by the APD – argued that the "trial court erred by not allowing [defendant] counsel when he requested it during trial." Simply put, defendant never requested standby counsel and never raised any objection in the trial court to the court's failure to appoint standby counsel.

¶ 36 Defendant contends that "it would not be reasonable to require a *pro se* defendant to enter an anticipatory objection" when "the trial court first announced its blanket policy." He also asserts that any objection during trial would have been futile in light of the court's statement

[2] Rule 401 guides the procedures for a defendant's waiver of counsel. Ill. S. Ct. R. 401 (eff. July 1, 1984). See also *People v. Black*, 2011 IL App (5th) 080089, ¶ 12.

prior to trial that it would not appoint standby counsel. Defendant, however, cites no authority in support of either contention. Furthermore, defendant did not merely fail to object to the court's pretrial admonition that standby counsel would not be appointed; he indicated his understanding and assent. "[T]he right of self-representation does not carry with it a corresponding right to the assistance of a legal adviser; one choosing to represent himself must be prepared to do just that." *Gibson*, 136 Ill. 2d at 383.

¶ 37 We also reject defendant's contention that the supplemental motion for a new trial "can easily be read to preserve the issue presented in this appeal." The motion provided that the "trial court erred by not allowing [defendant] counsel when he requested it during trial." Even if liberally construed, the motion does not refer to standby counsel. Furthermore, by arguing during trial that he lacked "the capabilities and the intelligence" to argue his case, defendant presumably was not requesting standby counsel – an attorney who would merely *assist* defendant in his own defense. See, *e.g.*, *Gibson*, 136 Ill. 2d at 375 (discussing the appointment of standby counsel to assist a criminal defendant); *People v. Redmond*, 265 Ill. App. 3d 292, 306 (1994) (noting that "when a defendant proceeds *pro se*, he controls the substance of his defense and, if appointed, standby counsel's duty is to assist in routine procedural matters and to explain courtroom protocol"). In fact, defendant's statements during the second day of trial suggested that he was requesting representation by his former APD, *e.g.*, " I fired [*APD's name redacted*] out of frustration *** but she was actually doing a nice job for me." Finally, defendant contends on appeal that the trial court erred when it "applied a blanket policy of denying standby counsel without any consideration of the factors *** set forth in [*People v. Gibson*, 136 Ill. 2d 362 (1990)]." As the supplemental motion stated that the court erred "by not allowing [defendant] counsel when he requested it *during* trial" (emphasis added), defendant did not preserve any

objection to any "blanket policy of denying standby counsel" adopted by the court *prior* to trial.

¶ 38 As defendant failed to preserve the issue through objection and a posttrial motion, we apply the plain error doctrine. See *Ware*, 407 Ill. App. 3d at 350. However, the State contends that defendant "has even waived his right to have his claim heard under the plain-error doctrine where he utterly failed to make any argument" to this court "that it should apply plain-error." See, *e.g.*, *People v. Hillier*, 237 Ill. 2d 539, 545 (2010) (stating that "[a] defendant who fails to argue for plain-error review obviously cannot meet his burden of persuasion"). We disagree. Our supreme court has indicated that plain-error review may be based on arguments raised for the first time in a defendant's reply brief. *E.g.*, *People v. Ramsey*, 239 Ill. 2d 342, 412 (2010) (stating that "although defendant did not argue plain error in his opening brief, he has argued plain error in his reply brief, which is sufficient to allow us to review the issue for plain error"). Defendant has addressed plain error in his reply brief, and we apply the doctrine herein.

¶ 39 The plain-error doctrine allows a reviewing court to consider unpreserved error 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." *Ware*, 407 Ill. App. 3d at 350. "In plain-error review, the burden of persuasion rests with the defendant." *Thompson*, 238 Ill. 2d at 613. The first step of plain-error review is determining whether any error occurred. *Id.*; accord *Ware*, 407 Ill. App. 3d at 350. In the instant case, we do not find any error.

¶ 40 Defendant argues that the trial court "adopted a blanket policy of denying standby counsel to any *pro se* defendant without any consideration of the *Gibson* factors." We disagree.

Although the trial court did not expressly reference to *Gibson*, there is no evidence that the court's decision to not appoint standby counsel is indicative of any "blanket policy" applicable to defendant or to all *pro se* defendants appearing before the court. See *Ware*, 407 Ill. App. 3d at 351. Even if the trial court did not recite the *Gibson* factors on the record, it is presumed to know the law and apply it properly. *People v. Phillips*, 392 Ill. App. 3d 243, 265 (2009). In *Gibson*, the trial court "mistakenly believed that it had no discretion to appoint standby counsel." *Pratt*, 391 Ill. App. 3d at 58. Conversely, nothing in the record in the instant case affirmatively indicates that the trial court did not properly apply the law. See *Ellison*, 2013 IL App (1st) 101261, ¶ 47. Based on our review of the record, we find no error.

¶ 41 However, even assuming *arguendo* we agreed with defendant that the trial court failed to exercise its discretion, "we cannot find that defendant was prejudiced because, even if the trial court had exercised its discretion and denied defendant standby counsel, that decision would not have been an abuse of discretion." *Ware*, 407 Ill. App. 3d at 351; see also *Redmond*, 265 Ill. App. 3d at 305. In other words, where a trial court fails to exercise its discretion, a reviewing court examines whether the failure to appoint standby counsel would have been an abuse of discretion if the trial court had refused to make such as appointment after considering the *Gibson* factors. See *Gibson*, 136 Ill. 2d 362, 380-81 (1990)). Our supreme court in *Gibson* stated that the "[r]elevant criteria appropriately considered by a trial court in deciding whether to appoint standby counsel to assist a *pro se* defendant in a criminal case include the nature and gravity of the charge, the expected factual and legal complexity of the proceedings, and the abilities and experience of the defendant." *Id.* at 380.

¶ 42 Applying the first *Gibson* factor – the nature and gravity of the charge – we note that the charges in the instant case were serious. Defendant was indicted for armed robbery and

aggravated battery, and he faced lengthy prison terms. We observe, however, that this court has found no abuse of discretion in cases involving charges more severe than in the instant case. See, *e.g.*, *Ware*, 407 Ill. App. 3d at 316 (defendant was charged with first degree murder and aggravated battery and was ultimately convicted of first degree murder and sentenced to 25 years in prison); *Pratt*, 391 Ill. App. 3d at 46 (defendant was convicted of first degree murder and sentenced to 40 years in prison).

¶ 43 As to the second *Gibson* factor – the expected factual and legal complexity of the proceedings – defendant acknowledges that "neither the facts nor the applicable law was unusually complex." However, defendant claims that his defense called for the introduction of a video surveillance disk, requiring "[a] detailed knowledge of the rules of evidence *** to lay the proper foundation for the introduction of the video." We do not view the potential introduction of evidence as transforming a relatively straightforward criminal case into a factually or legally complex proceeding. Defendant also contends on appeal that he was "unable to subpoena the store clerk" to testify on his behalf; defendant claimed during trial that he "never had a chance" to subpoena witnesses. In light of defendant's repeated demands for trial, we are unmoved by this contention. See *Phillips*, 392 Ill. App. 2d at 266 (stating that the "reason why defendant did not have more time to prepare was because he repeatedly demanded an immediate trial"). The instant case was neither factually nor legally complex. See *id.* at 265 (noting that "[n]o expert testimony or scientific evidence was involved at trial").

¶ 44 According to defendant, the third *Gibson* factor – the abilities and experience of the defendant – weighed heavily in favor of appointing standby counsel. We disagree. Defendant points out, among other things, his tenth grade education and his lack of prior experience in and knowledge of legal matters. We note that the court knew – and, in fact, elicited – much of this

information during its evaluation of defendant's pretrial request to represent himself. Moreover, as the State observes, defendant had extensive familiarity with the court system. Defendant was 27 years old at the time of trial and "was no stranger to criminal proceedings." *Ware*, 407 Ill. App. 3d at 352; *Phillips*, 392 Ill. App. 3d at 265. Defendant counters that his prior convictions were entered on guilty pleas and thus "did not familiarize him with trial procedure, strategy, or the rules of evidence." Although he was not familiar with certain legal concepts, *i.e.*, a directed finding, defendant made opening and closing statements, testified on his own behalf, and cross-examined witnesses. See *Ware*, 407 Ill. App. 3d at 352. The trial court observed that defendant did an "average job" of representing himself and made a "good point" during his closing statement regarding the State's failure to call Knight to testify.

¶ 45 Based on our review of the *Gibson* factors, even if we agreed with defendant that the trial court failed to exercise its discretion, we cannot find that the court would have abused its "considerable discretion" (*Ellison*, 2013 IL App (1st) 101261, ¶ 52) if it had affirmatively refused to appoint standby counsel. Accordingly, "there would be no purpose now in remanding the cause for further proceedings" – as defendant requests – "solely on the ground that the trial judge failed to exercise his discretion." (Internal quotation marks omitted.) *Ware*, 407 Ill. App. 3d at 353, citing *Gibson*, 136 Ill. 2d at 380.

¶ 46 As a final matter, we observe that the evidence in the case strongly supported defendant's conviction. Yancy identified defendant in a photo array after the incident and in court. She provided the license plate number and description of the vehicle to the police; defendant was later stopped driving the vehicle she described. Yancy identified the bag recovered from the trunk of the vehicle as the bag she had owned for ten years. Under plain-error analysis, even assuming *arguendo* that the trial court committed "clear or obvious error," the evidence was not

"closely balanced." Furthermore, based on our review of the record, any alleged error did not affect the fairness of defendant's trial or challenge the integrity of the judicial process. *Ware*, 407 Ill. App. 3d at 350; see also Ill. S. Ct. R. 615(a). Defendant acknowledges that the error he asserts has never been found to constitute plain error under the foregoing standard, and we decline to do so herein.

¶ 47 CONCLUSION

¶ 48 For the reasons stated above, we affirm the judgment of the circuit court of Cook County. The State's request for fees and costs associated with this appeal is denied.

¶ 49 Affirmed.