NOTICE
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2014 IL App (4th) 120900-U

NOS. 4-12-0900, 4-13-0813 cons.

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
June 12, 2014
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
EDWARD L. TAYLOR,	)	No. 12CF98
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

PRESIDING JUSTICE APPLETON delivered the judgment of the court.
Justices Harris and Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Having been tried and sentenced *in absentia*, defendant filed a motion for a new trial, claiming his absence was not willful. The trial court denied defendant's motion, finding defendant had forfeited this issue because he had not contacted his attorney until he was arrested on the outstanding warrant one year later. The appellate court affirmed the court's denial.

(2) Although the jury was provided an instruction containing an incorrect element of the offense of armed robbery, defendant forfeited the issue by not raising it in the trial court, and the error did not rise to the level of plain error, in light of the remaining instructions and the verdict form, which contained the correct elements.

¶ 2 Defendant, Edward L. Taylor, was charged with armed robbery (720 ILCS 5/18-2(a)(2) (West 2010)). Following a jury trial held in defendant's absence, he was found guilty. One month later, the trial court sentenced defendant to 30 years in prison, also in defendant's absence. A warrant was issued for defendant's arrest. Defendant appealed (case No. 4-12-0900). One year later, defendant was arrested on the outstanding warrant and remanded to prison. He filed a motion for a new trial, claiming his absence from trial was not his fault. The trial court

denied defendant's motion. Defendant appealed (case No. 4-13-0813). We consolidated the appeals and now affirm.

¶ 3 I. BACKGROUND

¶ 4 On January 23, 2012, the State charged defendant with armed robbery while armed with a firearm (720 ILCS 5/18-2(a)(2) (West 2010)), alleging he took property by use of force from Carolyn Patterson while she was working at the Meijer gas station in Champaign.

¶ 5 On February 7, 2012, the trial court advised defendant as follows:

> "When I call your name, I am going to give you a new court date, and you must be in court on every court date that you are given thereafter or a warrant will issue for your arrest.
>
> If you fail to appear for trial or sentencing in your case, a trial or sentencing can be held in your absence. You would be waiving or giving up the right to confront the witnesses against you at those proceedings."

¶ 6 On July 24, 2012, defendant appeared for a pretrial hearing and indicated he wanted his private counsel, James Dedman, to withdraw from representation. The court admonished defendant as follows: "I will set this [for trial] for Monday the 13th of August at 9:00. If [defendant] has another attorney to substitute at that point, that will be fine. If not, we'll go to trial with Mr. Dedman."

¶ 7 On August 13, 2012, at 9 a.m., the trial court called the case for a jury trial. Defendant failed to appear. The court stated defendant forfeited his right to be present, as he had been given sufficient notice to appear. The court selected a jury.

¶ 8 On August 14, 2012, Dedman advised the trial court defendant had called him and reported he was in a hospital in Chicago and "he had a lawyer that was going to represent him." He did not give the name of the lawyer or leave a telephone number. The court stated as follows:

> "Well when—we will—I will continue with the trial. One might assume that he could be convicted of this offense. If he is convicted and he's eventually apprehended on the warrant that will be issued after a verdict is issued—now if it's an acquittal obviously I'm not going to issue a warrant—but when and if he's ever apprehended and he can prove at the time that he was in the hospital, that will obviously have an effect on this trial and the results that may have been achieved but right now given the vague nature of his comments[,] I'm going to continue [with] the trial."

¶ 9 Carolyn Patterson testified first for the State. She said that on January 20, 2012, she was working the second shift at the Meijer gas station, when, at approximately 10:40 p.m., she heard someone enter the store. Patterson was restocking shelves on her knees behind the counter. Because she was expecting another employee to come "help [her] out," she did not look up until the person grabbed her arm and asked where the money was. It was a black male with his face covered up to his eyes. He was carrying a backpack. Patterson told him the money was in the cash register. He led her to the register and demanded she open it. She said she "was scared to death." She opened the cash register and laid on the floor as directed. She could hear him removing the cash drawer. He then demanded she put "squares" (cartons of Newport cigarettes) in his backpack. She put six cartons in his backpack. Patterson said the man repeatedly said he did not want to hurt her and she never saw a weapon. When she realized he

had left the store, she hit the panic button, which automatically contacts the police department. She said the register contained between $400 and $500. The police later took her to Baytowne Apartments, where she identified the suspect. The store's surveillance video was admitted and published as People's exhibit No. 1.

¶ 10 On cross-examination, Patterson said she told the police she did not believe the suspect had a gun because he "never displayed it to [her] so [she] had no clue." When the police drove her to the apartment complex, she recognized the suspect from "what he was wearing." She could not recognize the suspect's face, but she did recognize his black coat and the backpack he was carrying.

¶ 11 Robert Martin, the night manager at Meijer, testified when he pulled into the parking lot of the gas station on the night of the robbery he saw "something just really weird." He saw someone exit the store "at a rapid speed at the time carrying something." He watched as the person ran down the road. When Martin entered the store, he saw Patterson, who he described as "very emotional." Martin asked Patterson if she had been robbed. She nodded affirmatively. Martin asked if it was the person who had just left the store. Patterson again nodded affirmatively. Martin called the police from his cellular telephone as he exited the store, looking for the suspect.

¶ 12 Christina Trock Haugen, a City of Champaign police officer, testified she was dispatched to Meijer on the night of the robbery. She drove around the area and saw a male in dark clothing walking. He turned and walked the other direction when he saw her. She turned around in her vehicle and followed him. When she got closer, the man started to run. He jumped over the fence toward Baytowne Apartments. Her police car was equipped with an

onboard video camera, which captured the man's flight. The recorded video was admitted and published to the jury.

¶ 13 Marshall Henry, a City of Champaign police officer, responded to Baytowne Apartments after hearing Officer Haugen's report of a male running in that direction. A male approached the officers and pointed in the direction that he insisted the suspect was walking. Officer Henry and his partner realized, based on the victim's description, the male was actually the suspect himself. They approached the man but he ran. The officers did not lose sight of him and saw him hide underneath a stairwell. The officers arrested him, confiscated the backpack he was carrying, and identified him as defendant. At the jail, Henry searched the backpack and found six cartons of Newport cigarettes and an unloaded Colt .45-caliber handgun. No magazine was found.

¶ 14 The trial court read a stipulation into evidence as follows: if called as a witness, Michelle Jolley, the evidence technician of the Champaign police department, would testify that she retrieved defendant's backpack, clothes, cash, six cartons of Newport cigarettes, and a Colt .45-caliber handgun from the secured evidence locker and secured the items in the evidence vault.

¶ 15 Phillip McDonald, a City of Champaign police officer and Officer Henry's partner, testified consistently with Henry's version of the events. He said, upon hearing Officer Haugen's report that a suspect had fled into the area of the Baytowne Apartments, he and Officer Henry sat in their police vehicle in the parking lot with the lights off waiting "to see if he would pop out anywhere." Defendant approached their vehicle and pointed toward the north, explaining the suspect had fled in that direction. Defendant then started running from the officers but they apprehended him.

¶ 16 After advising defendant of his *Miranda* rights (see *Miranda v. Arizona*, 384 U. S. 436 (1966)), he agreed to give Officer McDonald a statement. Defendant said he had loaned his girlfriend's car to someone who ended up getting stopped by the police and arrested. The car was impounded. Defendant said he needed money to get his girlfriend's car out of impound. He had just purchased the weapon found in his backpack for $20. During the robbery, the gun was in his waistband. He described the incident as Patterson had. He denied displaying a weapon during the robbery. Sometime after the robbery, he put the gun in the backpack. The State rested.

¶ 17 Defendant did not present any evidence. After closing arguments and jury instructions, the jury retired to deliberate. Within one hour, the jury reached a unanimous verdict of guilty of armed robbery.

¶ 18 Defendant's counsel filed a motion for a new trial. He claimed the trial court erred in allowing the trial to proceed *in absentia* when the record did not demonstrate adequate notice to defendant of the possibility that the trial would proceed if he failed to appear.

¶ 19 On September 24, 2012, defendant failed to appear for sentencing. The trial court sentenced defendant *in absentia* to 30 years in prison. A warrant was issued for defendant's arrest. This appeal, docketed as case No. 4-12-0900, followed.

¶ 20 In June 2013, defendant was arrested in Indiana and remanded to prison. On August 8, 2013, defendant filed *pro se* motions, claiming he was involved in an automobile accident in Chicago on August 13, 2012, the first day of trial. He was treated at the University of Chicago Hospital emergency room. As a result, his absence from trial should have been excused. Further, he claimed his attorney was ineffective for failing to inform the trial court of defendant's mental illness.

¶ 21 On August 15, 2013, the trial court (without a hearing) entered an order, finding defendant "waive[d]" the issues raised since he failed to contact his attorney between August 13, 2012, and June 11, 2013. The court also denied defendant's request for a fitness hearing on the basis of waiver, based upon defendant's "willful absence at trial and his failure to notify his attorney of his circumstances." Defendant appealed. This court allowed defendant's late notice of appeal. This appeal, docketed as case No. 4-13-0813, followed. We have consolidated the appeals.

¶ 22 II. ANALYSIS

¶ 23 Defendant raises two issues in these consolidated appeals. First, he claims the trial court erred in proceeding to trial and sentencing *in absentia*, or in the alternative, he claims the case should be remanded for a hearing to determine whether his absence was willful. Second, he claims one of the jury instructions containing the elements of the offense of armed robbery incorrectly included the term "dangerous weapon" rather than "firearm," compromising the accuracy of the jury's verdict.

¶ 24 A. Trial *In Absentia*

¶ 25 Trials *in absentia* are not favored by our legal system as defendants have a right to face their accusers. *People v. Smith*, 188 Ill. 2d 335, 340 (1999). "However, it is well established that [i]t is not only defendant's right to be present, but it is also [defendant's] duty, especially where [defendant] has been released on bail." (Internal quotation marks omitted.) *Smith*, 188 Ill. 2d at 340. When voluntarily absent at trial, he waives his right to be present before his accusers. *Smith*, 188 Ill. 2d at 341. "A trial court's decision to proceed with a trial *in absentia* will not be reversed unless the trial court abused its discretion." *Smith*, 188 Ill. 2d at 341. The same standard applies to a court's decision to deny a defendant a new trial under

section 115-4.1(e) of the Code of Criminal Procedure of 1963 (Criminal Procedure Code) (725 ILCS 5/115-4.1(e) (West 2010)). *People v. Reyna*, 289 Ill. App. 3d 835, 838 (1997).

¶ 26 Section 115-4.1(e) of the Criminal Procedure Code states that a defendant convicted *in absentia* "must be granted a new trial *** if the defendant can establish that his failure to appear in court was both without his fault and due to circumstances beyond his control." 725 ILCS 5/115-4.1(e) (West 2010). Under this language, the burden is on the defendant to establish that his absence at trial was not willful, after the State establishes a *prima facie* case that the defendant's absence was willful. *Smith*, 188 Ill. 2d at 347; *People v. Williams*, 274 Ill. App. 3d 793, 803 (1995). "To establish a *prima facie* case of willful absence, the State must demonstrate that the defendant: (1) was advised of the trial date; (2) was advised that failure to appear could result in trial *in absentia*; and (3) did not appear for trial when the case was called." *Smith*, 188 Ill. 2d at 343. If the defendant introduces some evidence showing the absence was not willful, the court can require more of the State in proving willful absence. *Smith*, 188 Ill. 2d at 343.

¶ 27 In this case, on February 7, 2012, defendant was informed on the record that his trial and sentencing may proceed in his absence should he fail to appear at the scheduled time. On July 24, 2012, defendant was informed on the record of the time, date, and place of trial, which was scheduled for August 13, 2012, at 9 a.m. The record further shows defendant failed to appear and, though defense counsel offered an excuse for his absence the next day, no corroborating evidence was offered at that time. Thus, the State met its burden of making a *prima facie* case of willful absence, and the trial court properly found defendant willfully absent on the record.

¶ 28 Upon filing his motion for a new trial on August 8, 2013, the burden was on defendant to show he was not willfully absent. In his motion, defendant claimed he was struck by an automobile in Chicago on August 13, 2012, at 8:15 a.m., and therefore, his failure to appear at trial was not willful. Defendant attached copies of the police report and medical records from the University of Chicago emergency room regarding the incident. He claimed he telephoned his attorney and advised him on the day of trial about the accident.

¶ 29 Although defendant may have telephoned his attorney on August 13, 2012, counsel had not heard from defendant before he appeared before the trial court on that day at 9 a.m. or after lunch recess at 1:30 p.m. The emergency room issued discharge instructions at 1:30 p.m., with instructions to take ibuprofen for defendant's unidentified chest pain. The next day, day two of the trial, defendant's attorney advised the court defendant had called and reported the accident. Counsel also informed the court defendant suggested he would be represented by another attorney, but defendant did not provide a name or telephone number of his new counsel. After August 13, 2012, defendant did not contact his counsel. Defendant was arrested in Indiana in June 2013.

¶ 30 As the State indicates, even though defendant may have been struck by an automobile and thereafter treated at the emergency room, defendant failed to rebut the presumption that his absence from trial was willful. The State claims the record indicates defendant failed to demonstrate he should be excused from his failure to appear because it was not his fault or due to circumstances beyond his control. We agree with the State. First, the police report (which does not include the name of a reporting officer) indicates defendant was hit by an automobile at 8:15 a.m. on August 13, 2012, in Chicago. Defendant's trial was scheduled to begin at 9 a.m. on August 13, 2012, in Champaign. Even if he was hit by a car, defendant

cannot successfully assert he would have attended his trial otherwise. Second, defendant did not attempt to produce documentation tending to prove his absence was not willful until he was arrested later in Indiana in June 2013. In other words, the record strongly suggests defendant willfully avoided his trial and sentencing. He was not only at least three hours away from the location of his trial at the time the trial was scheduled, but he failed to contact his attorney to make arrangements to appear later at trial or at sentencing one month later.

¶ 31 We find the trial court did not abuse its discretion in denying defendant's motion for a new trial. Further, we find no grounds exist entitling defendant to an evidentiary hearing pursuant to section 115-4.1(e) of the Criminal Procedure Code (725 ILCS 5/115-4.1(e) (West 2010)). See *People v. Sayles*, 130 Ill. App. 3d 882, 888 (1985) (the defendant waived his right to proceed under section 115-4.1 when counsel chose to file a notice of appeal rather than request a hearing).

¶ 32 B. Jury Instruction on Elements of Armed Robbery

¶ 33 Defendant further claims one of the jury's instructions on the elements of the offense was inaccurate. The jury was properly instructed on the definition of a "firearm" and on the State's burden of proving defendant was armed with a firearm during the commission of the offense. However, two of the instructions setting forth the elements of the offense instructed the jury that the State had the burden of proving defendant "carried on or about his person a dangerous weapon or was otherwise armed with a dangerous weapon at the time of the taking." Defendant claims, since the "dangerous-weapon" element constitutes a distinctly different offense, the jury never found the "firearm" element of the offense proved beyond a reasonable doubt. See 720 ILCS 5/18-2(a)(1), (a)(2) (West 2010). He contends the error justifies reversal of his conviction.

¶ 34 We note defendant raises this issue for the first time in this appeal, and thus, we find the issue has been forfeited. Defendant concedes his procedural default, but he insists this error results in a void judgment and is not subject to forfeiture. See *People v. Enoch*, 122 Ill. 2d 176, 190 (1988). Although the error was apparent, in that the jury received an instruction containing an inaccurate element for the offense as charged, we find it did not rise to the level of plain error as explained below.

¶ 35 At the close of the trial, the judge told the jury the State had alleged that during the commission of an armed robbery, "defendant was armed with a firearm." See Illinois Pattern Jury Instructions (IPI), Criminal, No. 28.01 (4th ed. Supp. 2011). The judge read the jury the definition of a "firearm." See IPI, Criminal, No. 18.07A (4th ed. 2000). He then read the instructions regarding the three propositions required in order to sustain the charge of armed robbery. See IPI, Criminal, Nos. 14.05, 14.06 (4th ed. 2000). The third proposition was that "defendant carried on or about his person a dangerous weapon or was otherwise armed with a dangerous weapon at the time of the taking." The next instruction provided that "[t]o sustain the allegation made in connection with the offense of armed robbery, the State must prove *** that during the commission of the offense of armed robbery the defendant was armed with a firearm." See IPI, Criminal, No. 28.03 (4th ed. Supp. 2011). The court continued: "If you find from your consideration of all the evidence that the above proposition has been proved beyond a reasonable doubt, then you should sign the verdict form finding that the allegation was proven." The jury did just that. In fact, the jury signed two verdict forms: one finding (1) defendant guilty of armed robbery, and (2) "the allegation that during the commission of the offense of armed robbery the defendant was armed with a firearm was proven." See IPI, Criminal, No. 28.04 (4th

ed. Supp. 2011). Defendant's counsel did not object to these instructions, nor did counsel include this issue in his posttrial motion.

¶ 36 When addressing an issue regarding the accuracy of jury instructions, the appellate court conducts a *de novo* review. *People v. Parker*, 223 Ill. 2d 494, 501 (2006). "We must determine whether the instructions, taken as a whole, fairly, fully, and comprehensively apprised the jury of the relevant legal principles." *Parker*, 223 Ill. 2d at 501.

¶ 37 A similar issue was addressed in *People v. Watt*, 2013 IL App (2d) 120183, *leave to appeal denied*, No. 117100 (Mar. 26, 2014). There, the State charged the defendant by indictment with armed robbery while armed with a firearm. However, the jury instructions and the verdict form did not include the "firearm" language, but instead used the "dangerous weapon" language. The defendant filed a posttrial motion seeking an acquittal based on this inconsistency, the trial court denied the same, and the defendant appealed. *Watt*, 2013 IL App (2d) 120183, ¶ 26.

¶ 38 On appeal, the defendant argued for a reversal because the jury had not been correctly instructed as to the elements of the offense. *Watt*, 2013 IL App (2d) 120183, ¶ 29. The court noted that, although the defendant included the issue in a posttrial motion, he did not object at the time of the instruction conference. *Watt*, 2013 IL App (2d) 120183, ¶ 33. Therefore, the issue was forfeited and the plain error doctrine did not apply. *Watt*, 2013 IL App (2d) 120183, ¶¶ 33, 39. Even though giving the instruction regarding a "dangerous weapon" rather than a "firearm" was error, the court found the "error did not create a serious risk that the jurors incorrectly convicted defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial." *Watt*, 2013 IL App (2d) 120183, ¶ 39.

¶ 39 The court held:

> "[W]hen the instructions referred to a 'dangerous weapon' rather than a 'firearm,' they misdescribed an element. A person charged under section 18-2(a)(1) is charged with armed robbery with a 'dangerous weapon other than a firearm,' while a person charged under section 18-2(a)(2) is charged with armed robbery with a 'firearm.' Therefore, a firearm is still a class of dangerous weapon. Because an error in an instruction that either omits an element or misdescribes an element is not a structural error [citation], automatic reversal is not required. Moreover, the jury's verdict of guilty of armed robbery in the present case was based on evidence that defendant was armed with a firearm. It follows that, in finding that defendant was armed with a 'dangerous weapon,' the jury implicitly found that defendant was armed with a firearm. The error did not create a serious risk that the jurors incorrectly convicted defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial. [Citation.] *** Accordingly, we affirm the armed robbery conviction." *Watt*, 2013 IL App (2d) 120183, ¶ 39.

See also *People v. Ware*, 2014 IL App (1st) 120485, ¶ 21 (because the jury received six instructions which specifically referred to a "firearm," the instruction referring to a "dangerous weapon" did not affect the jury's understanding of the applicable law or the offense committed).

¶ 40 In this case, a similar error had even less impact on the outcome of the case because here, unlike in *Watt*, the jury was repeatedly instructed regarding defendant's possession

of a firearm. The trial court gave IPI, Criminal, Nos. 14.05 and 14.06, both of which referred to "dangerous weapons." However, the court gave at least five other instructions referring to the element of defendant being armed with a firearm. Like the courts in *Watt* and *Ware*, we conclude, taking the jury instructions as a whole, the jury was fully advised on the relevant legal principles. Defendant cannot prevail under a plain-error analysis and we affirm defendant's conviction of armed robbery.

¶ 41 III. CONCLUSION

¶ 42 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.

¶ 43 Affirmed.