2020 IL App (1st) 180272-U

FIRST DISTRICT,
FIRST DIVISION
December 14, 2020

No. 1-18-0272

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DION IRVIN, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County, Illinois. No. 13 CR 17645 Honorable Stanley J. Sacks, Judge Presiding

---

JUSTICE COGHLAN delivered the judgment of the court.
Justice Hyman and Justice Pierce concurred in the judgment.

ORDER

¶ 1 *Held*: The record does not establish that the trial court failed to comply with Illinois Supreme Court Rule 431(b) (effective July 1, 2012) or that defense counsel provided ineffective assistance of counsel by presenting an incomplete offer of proof of witness's proposed testimony at trial.

¶ 2 On June 21, 2017, a jury convicted Dion Irvin (defendant) of attempt first degree murder (720 ILCS 5/8-4(a) (West 2012)), aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2012)), and unlawful use of a weapon by a felon (720 ILCS 50/24-1.1(a) (West 2012)). The defendant received concurrent sentences in the Illinois Department of Corrections of 15

years for attempt murder, 15 years for aggravated discharge of a firearm, and seven years for unlawful use of a weapon by a felon.

¶ 3 On appeal, defendant asserts that the trial court failed to comply with Illinois Supreme Court Rule 431(b) by not questioning prospective jurors about the presumption of innocence. Defendant also alleges that defense counsel was ineffective because he gave an incomplete offer of proof concerning a witness's proposed testimony and failed to renew his request to present this testimony after defendant had testified. For the reasons set forth herein, we affirm.

¶ 4 BACKGROUND

¶ 5 Jury Selection

¶ 6 The parties proceeded to a jury trial on June 19, 2017. During *voir dire*, the trial court instructed the entire venire on the legal principles specified in Rule 431(b), as follows:

> "I said a moment ago or two I'm going to read you four legal instructions, which you'll hear during the course of the trial and at the end of the trial. I'll then ask you as a group anyone out there as a possible juror who does not understand and accept that instruction. As I said a moment ago, if you don't understand it or accept it, raise your hand and let us know. If you both understand and accept it, we'll move on to the next question.
>
> * * *
>
> The first legal principle, legal instruction I'm going to tell you about is this one. First of all, under the law **(unintelligible)** charge against him **(unintelligible)** the verdict is not overcome unless you are convinced beyond a reasonable doubt that the defendant is guilty. The burden of proof is beyond a reasonable doubt in order to convict. Anyone out

there, a possible juror that does not understand and accept the instruction? If so, raise your hand now. No hands. No response.

Second of all, if the State in this case *** proved the defendant guilty beyond a reasonable doubt, that burden is throughout the entire trial, proof of guilt beyond a reasonable doubt. The burden is on the State throughout the entire case. Anyone out there as a possible juror not understand and accept that instruction? If so, raise your hand now. Again, no hands, no response.

Thirdly, the defendant, Mr. Dion Irvin, is not required to prove his innocence or call witnesses on his own behalf. Anyone out there as a possible juror who does not understand and accept that instruction? If so, raise your hand now. Again, no hands, no response.

Fourthly, defendant has a right to remain silent and not testify. If he chooses not to testify, you cannot hold the fact against the defendant, Dion Irvin. He has the absolute right to remain silent and not testify. Anyone out there as a possible juror who does not understand and accept that instruction? If so, raise your hand now.

Again, no hands. No response."

The defense raised no objections to the Rule 431(b) *voir dire* instructions as given and no juror raised a hand to indicate a lack of understanding or acceptance.

¶ 7 Trial

¶ 8 On August 20, 2013, at about 1:30 p.m. Kenedra Harris (Harris) and Demetrice Allen (Allen) were at the Citgo gas station located at 59th and Halsted in Chicago when Harris began arguing with the defendant, who worked as a security guard at the gas station. The argument continued outside the gas station and Allen punched the defendant in the face. In response, defendant retrieved a .45 caliber handgun from his van and chased Allen around the corner. Allen saw defendant fire "multiple shots" at him as he ran.

¶ 9 While on patrol in the area, Officer John O'Donnell and Sergeant Eugene Bikulcius heard yelling coming from the gas station. O'Donnell saw defendant running around the corner of the gas station and heard three gun shots. "A second later [defendant appeared] back around the corner running towards the entrance of the gas station." Video surveillance showed defendant putting "something into a box that was on the top shelf" in the gas station. Bikulcius subsequently recovered the gun and defendant was arrested.

¶ 10 The parties stipulated that no latent impressions suitable for comparison were obtained from the gun, magazine, and four live cartridge casings recovered at the scene; that no gunshot residue was recovered from defendant's hands (indicating that if defendant discharged a firearm, the particles were either removed by activity, were not deposited, or were not detected by the procedure); and that the fired cartridge casings recovered at the scene were fired from the same gun recovered in the gas station. The parties also stipulated that defendant "ha[d] previously been convicted of a qualifying felony offense."

¶ 11 After the state rested, defense counsel made an informal offer of proof [1] summarizing that Alexander Weatherspoon would testify that "on August 20, 2013, he was walking toward the gas station. When he got to Peoria and 59th [two streets away from the gas station] ***a gentleman runs past him who he knows in the neighborhood as Big G" and says, "I had to get down on a nigga," meaning that "he had to shoot at somebody."

¶ 12 Defense counsel argued that this testimony was an "excited utterance" because "it's a statement relating to a startling event or condition made by a declarant that's under the stress of excitement caused by the statement*** the fact that you just shot someone is a startling event."

[1] Although the record is unclear, the State asserts that the offer of proof was "done through a motion *in limine*" by the defense seeking to admit Weatherspoon's "hearsay" testimony.

The trial court disagreed that the statement was "a spontaneous declaration," and noted the lack of detail in the proffer (i.e. "why he knew about it, what he supposedly saw *** [n]othing -- about where the shooting took place, *** how the shooting took place, who he shot").

¶ 13 Defendant testified that after Allen punched him, he went to his car, retrieved a handgun, and began following after Allen. As he turned the corner, he observed Big G, also known as Big Worm, coming toward him. Despite defendant's "good grip," Big G "snatched [his gun] out [of his] hand" and "opened fire" at Allen. Defendant confirmed that he is 6'3" tall and weighs 450 pounds. He did not know "what Big G was planning to do when he ran up to [him]." After Big G fired two or three shots at Allen, defendant "snatched the gun back from him," ran back to the gas station, and hid the gun.

¶ 14 ANALYSIS

¶ 15 Illinois Supreme Court Rule 431(b) and Plain Error Analysis

¶ 16 Defendant claims that the trial court failed to instruct the venire on the presumption of innocence in violation of Illinois Supreme Court Rule 431(b). The transcript of proceedings reflects the following: "First of all, under the law **(unintelligible)** charge against him **(unintelligible)** the verdict is not overcome unless you are convinced beyond a reasonable doubt that the defendant is guilty."

¶ 17 Defendant argues that the first principle discussed by the trial court concerned only the burden of proof, which is the second principle required under Rule 431(b) and that "the only reasonable interpretation is that the trial court skipped the first principle on the presumption of innocence and divided the second instruction into two parts: explaining first what the burden of proof was and then that it remained on the State." The State contends that "the first principle spoken was the first principle listed in 431(b)" (under the law, **the defendant is presumed**

innocent of the charge against him **and** the verdict is not overcome unless you are convinced beyond a reasonable doubt that the defendant is guilty), maintaining that any other interpretation is "nonsensical." We agree.

¶ 18 Despite failing to object to *voir dire* at trial and in a post-trial motion, defendant seeks review under the first prong of the plain error doctrine, arguing that the evidence is closely balanced. See *People v. Enoch*, 112 Ill. 2d 176, 186 (1988) ("Without raising an issue in both a contemporaneous objection and after trial, the issue is forfeited and can only be reviewed under the plain-error doctrine"). " '[T]he 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 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. Raymond*, 404 Ill. App. 3d 1028, 1053-54 (2010) (quoting *People v. Piatowski*, 225 Ill. 2d 551, 565 (Ill. 2007)).

¶ 19 The plain error doctrine is intended to ensure the defendant gets a fair trial, but this does not equate to a perfect trial. *People v. Herron*, 215 Ill. 2d 167, 177 (2005). Plain error acts as a limited exception to the forfeiture rule applied to unpreserved claims. *Id.* The defendant has the burden of persuasion under both prongs. *People v. McLaurin*, 235 Ill. 2d 478, 495 (2009). Whether an unpreserved claim is reviewable as plain error is a question of law that we review *de novo. Id.* at 485.

¶ 20 The first step in plain error analysis is to determine whether an error occurred. *People v. Walker*, 232 Ill. 2d 113, 124-25 (2009); *People v. Ramirez*, 2017 IL App (1st) 130022, ¶ 16 (declining to undertake plain error analysis because no error occurred).

¶ 21 Our supreme court "has long held that in order to support a claim of error on appeal the appellant has the burden to present a sufficiently complete record." *Webster v. Hartman*, 195 Ill. 2d 426 (2001) (citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984)). The report of proceedings must include "all the evidence pertinent to the issues on appeal." Ill. S. Ct. R. 323(a) (eff. July 1, 2017). If a verbatim transcript is unavailable, the appellant may file an acceptable substitute, such as a bystander's report or an agreed upon statement of facts. Ill. S. Ct. R. 323(c) (eff. Dec. 13, 2005).

¶ 22 Any doubts that arise from an incomplete record are construed against the appellant. *Foutch*, 99 Ill. 2d at 392-93. When the record on appeal is incomplete, a reviewing court should " 'indulge in every reasonable presumption favorable to the judgment from which the appeal is taken, including that the trial court ruled or acted correctly.' " *Smolinksi v. Votja*, 363 Ill. App. 3d 752, 757-58 (2006) (quoting *People v. Majer*, 131 Ill. App. 3d 80, 84 (1985)).

¶ 23 In *Foutch*, the court held that there was an insufficient record on appeal to determine whether an error occurred where the appellant did not file a report of proceedings, bystander's report, or statement of facts. *Foutch*, 99 Ill. 2d at 392. While an appellant's claim of error may fail on this basis under certain circumstances, "the failure of an appellant to include a transcript of proceedings is not necessarily fatal where the record contains sufficient documents to allow meaningful review of the merits on appeal." *Marzouki v. Najar-Marzouki*, 2014 IL App (1st) 132841, ¶ 20 (citing *Whitmer v. Munson*, 335 Ill. App. 3d 501, 512 (2002)); see also *DeVries v. Bankers Life Company*, 128 Ill. App. 3d 647, 650-51 (1984) (distinguishing from *Foutch* because the memoranda and affidavits in the record on appeal revealed the lower court's basis for the denial of a motion to vacate whereas in *Foutch* it was impossible to determine the reasoning absent the transcript of the hearing); *Whitmer*, 335 Ill. App. 3d at 512 (finding a sufficient record

on appeal even absent a report of proceedings where the record contained relevant pleadings and findings of fact and conclusions of law prepared by the trial court).

¶ 24 Here, we are presented with a report of proceedings containing "unintelligible" portions in the transcription of the judge's *voir dire* instructions. Defendant did not seek to introduce a bystander's report or agreed statement of facts to supplement the incomplete record. In *DeVries* and *Whitmer*, unlike the instant case, the court was presented with enough evidence in the record to determine the lower court's reasoning for the decisions at issue in those cases. Defendant argues that "[t]wo missing transcript words does not render the record insufficient to review whether the trial judge addressed the presumption of innocence." However, without an additional bystander's report, agreed statement of facts, or an intelligible transcription of what the judge said, we are unable to discern whether an error occurred during *voir dire*.

¶ 25 Immediately prior to giving the challenged instruction, the judge stated, "I said a moment ago or two I'm going to read you four legal instructions, which you'll hear during the course of the trial and at the end of the trial." Since there are four legal principles covered under Rule 431(b), it is illogical to conclude that the trial court judge would skip the first principle altogether and split the second principle into two separate instructions.

¶ 26 Significantly, the first instruction required under Rule 431(b) is that the defendant is "presumed innocent against the charge(s) against him" and the first instruction given by the judge here concluded with the phrase "charge against him." One could reasonably infer that the judge instructed the jury on the presumption of innocence and explained that this presumption is only overcome if the state meets its burden beyond a reasonable doubt. Significantly, while the court reporter apparently could not decipher what the judge said at trial, neither the attorneys nor any of the jurors indicated any difficulty understanding the judge's instruction.

¶ 27 In any event, based on defendant's failure to supplement the deficient record with an acceptable substitute, this case is appropriate for invocation of the rule that "any doubt arising from the incompleteness of record will be resolved against the party prosecuting the appeal." See *People v. Davenport*, 133 Ill. App. 3d 533, 560 (1985) (case was appropriate for rule that incompleteness of record will be resolved against the appellant where defendant elected to file record containing deficient transcript without supplementation of agreed statement of facts or bystander's report).

¶ 28 The record does not show that an error occurred in this case. Absent an underlying error, we do not undertake plain error analysis. *Piatowski*, 225 Ill. 2d at 565; *People v. Powell*, 2012 IL App (1st) 102363, ¶¶ 7, 19.

¶ 29 Even assuming, *arguendo*, the existence of an underlying error, it does not amount to first prong plain error because the evidence in this case was not closely balanced. In making this determination, we undertake a commonsense qualitative analysis of the totality of evidence presented at trial. *People v. Belknap*, 2014 IL 117094, ¶ 49; see also *People v. Adams*, 2012 IL 111168, ¶ 22; *People v. White*, 2011 IL 109689, ¶ 139 (where a commonsense, qualitative analysis of the evidence demonstrated that the evidence was not closely balanced).

¶ 30 Relying on *People v. Naylor*, 229 Ill. 2d 584 (2008), defendant argues that the evidence was closely balanced because there was "no evidence that Irvin was the shooter other than the complaining witness's testimony, and as Irvin testified that he was not the shooter, the credibility of Irvin and the complaining witness was at issue." In *Naylor*, the "evidence boiled down to the testimony of two police officers against the defendant's" and no other evidence was introduced to contradict or corroborate either version of events. *Id.* at 608. Therefore, "credibility was the only basis upon which defendant's innocence or guilt could be decided." *Id.*

¶ 31 Unlike *Naylor*, there was substantial evidence in this case corroborating the State's version of events; Allen identified defendant as the shooter and Harris saw defendant chasing after Allen with a gun in his hand moments before hearing shots fired. Likewise, Officer O'Donnell saw defendant running around the corner of the gas station prior to the shooting and running back into the gas station after the shooting and Sergeant Bikulcius recovered defendant's gun hidden in a box inside the gas station. Moreover, although he denied pulling the trigger, every other aspect of defendant's testimony corroborated the State's case. For example, defendant admitted arguing with Allen; retrieving a gun from his van after being punched by Allen; following after Allen with his gun; being present when his gun was used to "fire shots" at Allen; and hiding his gun in the gas station after the shooting.

¶ 32 No "credibility contest" exists to render evidence closely balanced where one party's version of events was either implausible or corroborated by other evidence. *People v. Jackson*, 2019 IL App (1st) 161745, ¶¶ 21-22; see, *e.g.*, *People v. Lopez*, 2012 IL App (1st) 101395, ¶ 88 (distinguishing from *Naylor* where "there was evidence corroborating the complaining witness's version of events*** [and] [d]efendant's entire version of events strained credulity"); *People v. Anderson*, 407 Ill. App. 3d 662, 667 (2011) (case was not closely balanced where defendant's version of events was implausible). Not surprisingly, the jury rejected defendant's claim that "Big G" mysteriously appeared and grabbed his gun while he was chasing Allen and "opened fire" at Allen for no apparent reason, after which defendant "snatched the gun back from [Big G] and ran back in the gas station." Here, unlike the evidence considered by the court in *Naylor*, "defendant's entire version of events strained credulity."

¶ 34 Ineffective Assistance of Counsel

¶ 35 Defendant also alleges that defense counsel was ineffective for failing to disclose defendant's proposed testimony in his offer of proof to the judge or, alternatively, for failing to renew his request to call Weatherspoon as a witness after defendant had testified.

¶ 36 Claims of ineffective assistance of counsel are analyzed under the *Strickland* test, where defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Deficiency is shown if the defendant can establish that counsel's performance fell below an objective level of reasonableness and prejudice is established if there is a reasonable probability that the outcome at trial would have been different absent the alleged errors. *Id.*

¶ 37 The defendant must satisfy both prongs to prevail on an ineffective assistance of counsel claim, but if a court can more easily dispose of the claim on the failure to establish prejudice, that course should be followed. *Id.* at 697; *People v. Albanese*, 104 Ill. 2d 504 (1984); *People v. Echols*, 382 Ill. App. 3d 309, 313 (2008).

¶ 38 There is a strong presumption that counsel's performance was effective and resulted from sound trial strategy. *Strickland*, 466 U.S. at 689; *People v. Evans*, 186 Ill. 2d 83, 93 (1999). Our supreme court has "made it clear that a reviewing court will be highly deferential to trial counsel on matters of trial strategy, making every effort to evaluate counsel's performance from his perspective at the time, rather than through the lens of hindsight." *People v. Perry*, 224 Ill. 2d 312 (2007) (citing *People v. Madej*, 177 Ill. 2d 116, 147 (1997)). We review defendant's claim for ineffective assistance of counsel *de novo*. *People v. Jamison*, 2018 IL App (1st) 160409, ¶ 40.

¶ 39 Considering the voluminous and largely uncontradicted evidence of defendant's guilt, we do not find that the trial would have ended differently absent counsel's alleged errors. See

People v. McCarter, 385 Ill. App. 3d 919 (2008) (finding that defendant was not prejudiced by counsel's failure to object to inadmissible hearsay because the circumstantial evidence tying defendant to the crime was overwhelming); *People v. Woods*, 2011 IL App (1st) 192908 (counsel was effective because given the overwhelming evidence against defendant, he likely would not have been acquitted with a different trial strategy). Because defendant has failed to establish prejudice, we need not address whether counsel's performance was deficient. *Strickland*, 466 U.S. at 697 ("there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one").

¶ 40 In any event, since defendant had not decided whether he was going to testify at the time of the initial proffer, it was "objectively reasonable" for counsel to refrain from discussing defendant's testimony in the offer of proof. In addition, "[t]he two primary functions of an offer of proof are to disclose to the trial judge and opposing counsel the nature of the offered evidence, enabling them to take appropriate action, and to provide the reviewing court with a record to determine whether exclusion of the evidence was erroneous and harmful." *People v. Thompkins*, 181 Ill. 2d 1, 10 (1998). Both functions were satisfied in the instant case. With respect to counsel's failure to renew his request to call Weatherspoon as a witness, "decisions concerning which witnesses to call on defendant's behalf are matters of trial strategy reserved to the discretion of trial counsel." *People v. Cooper*, 2013 IL App (1st) 113030, ¶ 72.

¶ 41 CONCLUSION

¶ 42 For the foregoing reasons, we hold that the record does not show that the trial court failed to instruct the venire on the presumption of innocence as required by Illinois Supreme Court Rule 431(b) or that counsel provided ineffective assistance at trial.

¶ 43 Affirmed.