

No. 1-19-0954

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of
)	Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 18 CR 9049
)	
ELLIOT THOMAS,)	Honorable
)	Domenica A. Stephenson,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Hoffman and Cunningham concurred in the judgment.

ORDER

¶ 1 **Held:** The circuit court committed structural error in its cumulative repetition of jury instructions to continue to deliberate after the jury twice indicated deadlock, among other notable concerns, resulting in the return of a hastened and coerced guilty verdict. We reverse the defendant’s conviction and remand for a new trial.

¶ 2 Defendant Elliot Thomas was charged by indictment with one count of delivery of a controlled substance under section 401(d) of the Illinois Controlled Substances Act (720 ILCS 570/401(d) (West 2018)). A jury found defendant guilty and the circuit court sentenced him to two years of probation.

¶ 3 On appeal, defendant argues: (1) the State improperly shifted the burden of proof to defendant on the issue of identification; (2) the circuit court admitted impermissible and prejudicial hearsay testimony of unidentified police officers' radio communications; (3) the jury's verdict was coerced after it indicated multiple times that it was deadlocked and the court failed to provide proper guidance; (4) ineffective assistance of trial counsel; and (5) cumulative errors deprived him of a fair trial¹. The State contends that defendant failed to preserve the first three issues, that plain error does not apply to those issues, and that the remaining claims should likewise fail. We reverse and remand for a new trial.

¶ 4 BACKGROUND

¶ 5 On June 2, 2018, defendant was arrested and charged with delivery of a controlled substance. When police detained him on the front porch of his aunt's residence, they found ten dollars, a Venra transportation card, a debit card, and a cellular phone on his person. He had no prior drug or felony arrest record.

¶ 6 At trial, Chicago police officer Marco DiFranco testified that he was assigned to the narcotics division within the bureau of organized crime and has conducted numerous narcotics investigations in covert operations. On the morning of June 2, 2018, he and several other officers in his unit conducted a controlled drug buy near 4007 West Lake Street. Officer DiFranco served as the undercover "buy" officer responsible for purchasing the contraband. His team had set up surveillance at the location and he drove there in an undercover vehicle. He walked to the intersection of Lake Street and Pulaski Avenue. He was not wearing a body camera at the time. He observed between four and six people waiting at the intersection. He waited until a black

¹ The defendant is represented by *pro bono* counsel through the Volunteer Pro Bono Program for Criminal Appeals and we express thanks for defense counsel's participation in this program.

male approached the group. Officer DiFranco identified defendant in court as the black male he observed approaching the group.

¶ 7 Officer DiFranco followed the group and saw its members conducting hand-to-hand narcotics transactions with defendant. After each of the individuals in the group finished conducting their transactions, defendant turned to Officer DiFranco and asked “how many?” He told defendant to “give me two.” Defendant opened his hand, which contained multiple bags of suspect heroin, and gave two to Officer DiFranco, who then exchanged a prerecorded \$20 bill with him. After they completed the transaction, Officer DiFranco walked eastbound on Lake Street and alerted his team members with a non-audible signal for a positive transaction.

¶ 8 When he returned to his undercover vehicle, he radioed his team members to confirm a positive transaction of suspect heroin. He described that defendant wore a black and green jacket with blue jeans and was last located under the elevated tracks at 4007 West Lake Street. Officer DiFranco next heard the surveillance officer informing the enforcement officers of defendant’s location, describing it as a foot chase. The officers apprehended defendant about two and one half blocks from the location of the transaction. He was then told to drive to the immediate area where defendant had been detained to identify him as the offender. Officer DiFranco drove approximately two blocks, slowed to a speed of five to ten miles per hour, viewed the offender, and informed the enforcement officers that the individual they had detained sold him the suspect narcotics. When he returned to the police station, he inventoried the narcotics.

¶ 9 Officer Esnaf Husic testified that he was assigned to the narcotics division and working with Officer DiFranco’s unit as a surveillance officer on June 2. That morning, he conducted surveillance from an undercover vehicle while parked near the intersection of Lake and Pulaski. From a distance of 15 to 20 feet away, he observed a group of three to five people standing on

the southwest corner of the intersection. Shortly thereafter, he saw an individual wearing a black and green jacket with blue jeans approach the group holding a clear plastic bag in his hand. Officer Husic identified this individual as defendant. He retrieved items from the bag and handed it to the individuals in the group in exchange for money. Officer Husic also observed the transaction between defendant and Officer DiFranco. After Officer DiFranco received the item from defendant in exchange for money, Officer DiFranco walked away and provided a non-audible signal that the transaction was positive. Officer Husic did not take any photographs or video recordings of the incident.

¶ 10 Officer Husic next communicated to the team by radio that the transaction was positive and provided defendant's last observed location. He initially followed defendant in his vehicle, but lost surveillance of him as he walked away from the intersection. Other surveillance officers also observed defendant during and after the transaction. Officer Husic stated that "[a]t some point once I radio[ed] in what direction he went there [were] other cars around in the area that kept [an] eye on him." He again saw defendant after officers detained him at 4246 West West End Avenue and recognized him as the same individual who sold narcotics to Officer DiFranco.

¶ 11 Officer Husic testified that the \$20 prerecorded bill that Officer DiFranco used to purchase the narcotics was never recovered. He observed defendant take the money, but did not see where defendant put it afterwards, stating "I honestly wasn't paying attention to that." Officer Husic never left his vehicle to make an identification of defendant. However, he stated that he was a few yards away from the where defendant had been detained.

¶ 12 Officer Mohammad Yusuf testified that he was working as an enforcement officer on the morning of June 2. He and his partner, Officer Justin Connor, sat in a parked, unmarked police vehicle with municipal license plates about two blocks away from the intersection of Lake and

Pulaski. He monitored the communications from the surveillance team's radio, as well as the zone radio communicating the crime occurring in the same area. He heard on the surveillance team's radio that an undercover officer was talking to a male subject at the corner of Lake and Pulaski and that officers observed a hand-to-hand transaction. After the transaction, the offender walked westbound on Lake. Officer Yusuf received a description of the offender on his radio – a male black wearing a green and black jacket with blue jeans. The description of the offender did not include any height, weight, age, or indication of facial hair. He continued to monitor the radio until the undercover officer was secure. At that point, the surveillance officers directed Officer Yusuf and his partner to the north alley of West End, to the immediate west of Keeler Avenue, where defendant was walking. He testified that the surveillance officers “never lost sight of the target.” They arrived at that location in less than 45 seconds. Officer Yusuf made an in-person identification of defendant in court as the individual he observed in the alley.

¶ 13 As the officers entered the alley, they observed defendant walking about two-thirds or, approximately 400 feet, down the alley. When defendant saw the officers, he fled southbound towards West End. The officers did not have their police lights activated when defendant first saw their vehicle. Officer Yusuf exited his police vehicle and ran through a gangway after defendant. He lost sight of defendant but heard from surveillance officers on his police radio that defendant ran onto the front porch of a house on West End. He then observed defendant trying to enter the front door of a home, banging on a door. Officer Yusuf ran up the stairs and detained defendant. After Officer Yusuf placed defendant in handcuffs the undercover officer who conducted the narcotics transaction drove by and made a positive identification of defendant as the offender. Officer Yusuf took defendant to the police station and recovered \$10, a Ventura transportation card, a debit card, and a cellular phone from his person. Officer Yusuf did not

recover any narcotics or prerecorded funds from defendant. Neither Officer Yusuf nor Officer Connor wore body cameras on the date of the incident.

¶ 14 Fella Johnson, a forensic scientist with the Illinois State Police, testified that the substance in the plastic bags submitted by Officer DiFranco tested positive for heroin.

¶ 15 After Johnson's testimony, the State rested and moved for a directed finding. The circuit court denied the State's motion.

¶ 16 Defendant testified that on the morning of June 2, 2018, he exited the elevated train platform at the Pulaski Avenue station, walked down the stairs, and proceeded to walk on Lake towards the direction of his aunt's house located at 4246 West West End. He was visiting his aunt to clean up her yard. He stated that he performs yard work for his aunt three times per week. Eventually, defendant turned left onto Keeler Avenue and began skipping "[b]ecause my bowel movement start[ed] to come down so I was like trying to get -- I got closest to my aunt['s] house so I had to use it so I tried to like pace my walk faster." After he arrived at his aunt's house, he looked to his right and saw a police officer approaching from the gangway with his gun drawn. The officer told defendant to "[g]et on the floor." Defendant raised his hands, the officer approached the porch, grabbed defendant, shoved him towards the front door, and laid him on the ground. Defendant's aunt opened the front door and began asking the officer questions as other officers began to approach. Defendant was handcuffed, picked up off the ground, and searched. Then "three guys who came out the alley, one of them nodded their head in the gangway and turned back around." After that, the officers took defendant to a police vehicle for transport to the police station. Defendant testified that after he exited the train, he did not sell drugs to anyone.

¶ 17 After closing arguments, the circuit court instructed the jury and the jury then retired to deliberate the case at 4:30 p.m. The following events occurred at the times specified during deliberations:

- 5:35 p.m. – the jury sent a note to the circuit court asking, “What happens if we cannot agree on a verdict?” The parties agreed that the suggested response to the jury be “[c]ontinue to deliberate.” The court sent a response stating “[p]lease continue to deliberate.”
- 6:34 p.m. – the jury sent another note to the court stating, “[w]e cannot make a decision. We aren’t in agreement. What’s the next step?” Again, both parties agreed the response to the jury be “[c]ontinue to deliberate.” The court again instructed the jury that “[y]ou have heard all of the testimony and received the instructions, please continue to deliberate.”
- As soon as the jury received that last instruction, the jury sent another note asking, “May we have our phones to contact family for updates, child care, pets, et cetera?” Without objection, the court instructed the jury to continue to deliberate and that jurors were not allowed to have their cellular phones during deliberations. The court instructed jurors to provide the sheriff’s deputy “with a name and contact information should you wish to have someone contacted.”
- 7:05 p.m. – the jury sent back a fourth note that stated, “We do not have a verdict, that’s our final answer.” The parties agreed that the appropriate response was “continue with deliberations.”
- 7:15 p.m. – the circuit court instructed the jury, again stating, “You have heard the testimony, received the instructions, please continue to deliberate.”

- 7:28 p.m. – the jury sent out another note asking, “Your Honor, what is the latest time we stay? I need to know this so you can let my children know when I will pick them up?”

After the parties and the court discussed an appropriate response, the court stated:

“We’re supposed to answer the questions if we can. It’s not asking a legal question. The time for them to -- I’m putting this on the record, even though we all know this. I can’t tell them the latest I’m going to keep them. We haven’t discussed it. They started deliberating at 4:30. It’s not quite 7:30 yet on a relatively simple case. They started sending notes out in about one hour into the process, less than an hour into the process, and they just keep sending note after note after note after note. So that’s what I’m going to write and we’ll see how it goes and if it comes to a point where we need to discuss other options, we’ll do that at the appropriate time, whatever time that may be.”

- 7:30 p.m. – with the parties’ agreement, the circuit court instructed the jury that it heard the testimony, received the instructions, and should continue to deliberate.
- 7:37 p.m. – the jury returned a verdict of guilty. The circuit court polled the jury and each juror responded affirmatively to the question “[w]as this then and is this now your verdict.”

¶ 18 Defendant moved for a new trial, arguing that the circuit court erred by not *sua sponte* declaring a mistrial based on the notes tendered from the jury stating that it was unable to reach a verdict and was not in agreement. The court denied the motion for new trial and sentenced defendant to two years of probation. Defendant moved to reconsider sentence, which the court denied. This appeal followed.

¶ 19

ANALYSIS

¶ 20 Defendant first argues the State improperly shifted the burden of proof when it elicited testimony that he could have requested fingerprint and DNA analysis of the bags containing heroin. However, in his reply brief, he withdrew that argument. The first remaining argument is that the circuit court allowed impermissible and prejudicial hearsay statements of unidentified police officers' radio communications concerning defendant's location and actions during the incident. Next, defendant argues the jury's verdict was coerced or unduly influenced by the circuit court's repeated instruction to "continue to deliberate." He also contends that he received ineffective assistance of trial counsel and that the cumulative effect of these errors deprived him of a fair trial. In response, the State argues that defendant failed to preserve the first three issues, that plain error does not apply to those issues, and that the remaining claims should likewise be rejected. We address only the argument that the jury's verdict was coerced or unduly influenced, because it is dispositive.

¶ 21

Alleged Jury Coercion

¶ 22 Defendant argues that, under the specific circumstances of this case, the jury's verdict was coerced or unduly influenced by the circuit court's repeated instruction to "continue to deliberate." He concedes that trial counsel agreed to the circuit court's suggested responses to the jury's questions during deliberations. However, he argues that this court must assess the totality of the circumstances – not only the words of the circuit court, but the actions of the court, the words and actions of the jury, and the overall context – in determining whether the verdict was unduly influenced or coerced. Considering the entirety of the jury's deliberative process and interactions with the court, defendant argues the court's actions resulted in minority jurors deferring to the majority for the sole purpose of expediting a verdict.

¶ 23 The State responds that defendant has forfeited this issue for review for failure to object at trial and present this claim in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defendant concedes this point, but seeks to apply the second prong of the plain error doctrine, specifically contending that the circuit court committed structural error because the instructions it provided to the jury affected his right to a fair trial and challenged the integrity of the judicial process.

¶ 24 The plain error rule bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either: (1) the evidence is close, regardless of the seriousness of the error; or (2) the error is serious, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 185-87 (2005). “In plain-error review, the burden of persuasion rests with the defendant.” *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). In the first instance, the defendant must prove “prejudicial error.” *Herron*, 215 Ill. 2d at 187. By contrast, in the second instance, prejudice to the defendant is presumed because of the importance of the right involved, regardless of the strength of the evidence. *Thompson*, 238 Ill. 2d at 613. Our supreme court has equated the second prong of plain-error review with structural error, asserting that “ ‘automatic reversal is only required where an error is deemed “structural,” *i.e.*, a systemic error which serves to “erode the integrity of the judicial process and undermine the fairness of the defendant’s trial.” ’ ” *Id.* (quoting *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009) (quoting *Herron*, 215 Ill. 2d at 186)). “A finding that defendant was tried by a biased jury would certainly satisfy the second prong of plain-error review because it would affect his right to a fair trial and challenge the integrity of the judicial process.” *Id.* at 614.

¶ 25 During deliberations, if the jury poses a question to the circuit court, it is “entitled” to have its question answered. *People v. Reid*, 136 Ill. 2d 27, 39 (1990). Generally, the “court must

provide instruction when the jury has posed an explicit question or asked for clarification on a point of law arising from facts showing doubt or confusion.” *People v. Averett*, 237 Ill. 2d 1, 24 (2010). “When a jury makes explicit its difficulties, the court should resolve them with specificity and accuracy.” *People v. Childs*, 159 Ill. 2d 217, 229 (1994). However, when the jury’s question “is unclear, it is the court’s duty to seek clarification of it.” *Id.* The court has discretion to refuse to answer a jury’s question under certain circumstances, such as “when the jury instructions are readily understandable and sufficiently explain the relevant law, when additional instructions would serve no useful purpose or may potentially mislead the jury, when the jury’s request involves a question of fact, or when giving an answer would cause the trial court to express an opinion likely directing a verdict one way or the other.” *Averett*, 237 Ill. 2d at 24. Further, when the jury communicates to the court its inability to reach a unanimous verdict, the court may, in its discretion, proffer some guidance including the giving of a supplemental instruction under *People v. Prim*, 53 Ill. 2d 62 (1972) (*cert. denied*, 412 U.S. 918 (1973)). See *People v. Branch*, 123 Ill. App. 3d 245, 250-51 (1984) (citing *Prim*). *Cf. People v. Cowan*, 105 Ill. 2d 324, 328 (1985) (the circuit court can choose to have the jury continue to deliberate even though it has reported that it is deadlocked). Accordingly, we review the circuit court’s responses to the jury in this case for an abuse of discretion. *People v. Preston*, 76 Ill. 2d 274, 283-84 (1979) (“great latitude must be accorded to the trial court in the exercise of its informed discretion” on the issue of supplemental instruction).

¶ 26 In this case, defendant argues that the circuit court “hastened” the jury’s verdict by giving repeated instructions to “continue to deliberate” after receiving two notes indicating a deadlock. At 6:30 p.m., the jury sent a note to the court stating, “[w]e cannot make a decision. We aren’t in agreement. What’s the next step?” At 7:05 p.m., the jury sent out another note stating, “[w]e do

not have a verdict, that's our final answer." At 7:15 p.m., the court responded, "you have heard the testimony, received the instructions, please continue to deliberate." At 7:28 p.m., the jury sent a note asking, "Your Honor, what is the latest time we stay? I need to know this so you can let my children know when I will pick them up." At 7:30 p.m., the court responded, "you have heard the testimony, received the instructions, please continue to deliberate." At 7:37 p.m., the jury returned a guilty verdict. Defendant argues this timeline demonstrates the court improperly influenced the jury to return a verdict to his prejudice, depriving him of a fair trial and challenging the integrity of the judicial process.

¶ 27 In determining the propriety of the circuit court's comments to the jury, the test is whether, upon examination of the totality of circumstances, the language used actually interfered with the jury's deliberations and coerced a guilty verdict. *People v. Fields*, 285 Ill. App. 3d 1020, 1029 (1996) (citing *People v. Defyn*, 222 Ill. App. 3d 504, 515-16 (1991) and *People v. Ferro*, 195 Ill. App. 3d 282, 292 (1990)). "Since coercion is a highly subjective concept that does not lend itself to the precise definition or testing, the reviewing court's decision often turns on the difficult task of ascertaining whether the challenged comments imposed such pressure on the minority jurors that it caused them to defer to the conclusions of the majority for the purpose of expediting a verdict." *Id.* (citing *Branch*, 123 Ill. App. 3d at 251).

¶ 28 In this case, instructing a deadlocked jury to continue to deliberate, on its face, is not inherently coercive. Indeed, such a bare instruction is commonly given and appropriate in many circumstances. See *People v. Pulliam*, 176 Ill. 2d 261, 284-85 (1997) (finding no error where the circuit court instructed the deadlocked jury to "[k]eep deliberating"). We must look beyond the words of the circuit court's responses in determining whether those instructions imposed confusion or pressure. *Defyn*, 222 Ill. App. 3d at 515-16.

¶ 29 Considering the totality of the circumstances here, the circuit court’s multiple responses of “continue to deliberate” after the jury twice indicated that it was deadlocked and expressed concerns regarding childcare due to the lateness of the hour, along with the return of a verdict seven minutes after the last instruction it received, demonstrated jury coercion.

¶ 30 In *Prim*, our supreme court addressed the issue of what a circuit court should do when a jury indicates that it may be deadlocked and unable to reach a verdict. The supreme court noted that providing additional instruction to a jury has possible coercive effects. 53 Ill. 2d at 74. However, the court stated that, “[j]urors, and especially those voting in the minority, conceivably could feel a coercive influence if when seeking guidance from the court they are met with stony silence and sent back to the jury room for further deliberation.” *Id.* The *Prim* court then developed a model instruction with the purpose of addressing the coercive effect concerns. *Id.* at 75-76. IPI 26.07 sets forth its own *Prim*-based instruction:

“The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are judges – judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.” Illinois Pattern Jury Instructions, Criminal, No. 26.07 (4th ed. 2000).

¶ 31 The circuit court “may not ‘hasten’ a verdict by giving the jury an instruction that has the effect of coercing jurors into surrendering their views.” *People v. Boyd*, 366 Ill. App. 3d 84, 99 (2006) (citing *People v. Gregory*, 184 Ill. App. 3d 676, 680-81 (1989)). “The mere failure to give a *Prim* instruction is not reversible error.” *Id.* Although the circuit judge’s responses in this case, with the parties’ agreement, were neutral, we conclude that the same responses delivered to the jury in the early evening hours multiple times after clear indications of deadlock and concerns regarding childcare cumulatively had the effect of “hastening” the verdict. The repeated instructions of “continue to deliberate,” although not exactly the “stony silence” described in *Prim*, but within the context of this case, conceivably caused minority jurors to feel a coercive influence.

¶ 32 Further, brief deliberations provide an inference of juror coercion. *People v. Wilcox*, 407 Ill. App. 3d 151, 163 (2010) (citing *Ferro*, 195 Ill. App. 3d at 292). Based on the short amount of time that passed between the circuit court’s last response to the jury’s note and the jury’s return of a verdict, we find the instructions were indicative of a coerced verdict.

¶ 33 In short, defendant has met his burden to show that, under the totality of the circumstances, the circuit court’s responses to the jury’s questions “actually coerced or interfered” with jury deliberations. We find the circuit court abused its discretion in instructing the jury to continue deliberating in response to the jury’s multiple notes under the specific circumstances of this case. The cumulative and repeated responses, although neutral on their face, were coercive. The jury’s return of a verdict seven minutes after receiving their last

instruction bolsters this conclusion. Accordingly, we find that there was error with respect to the court's responses to the jury's notes such that the circuit court committed structural error under the second prong of plain error review. Because structural error by the court undermined a fair trial, we reverse defendant's conviction and remand the cause for a new trial.

¶ 34

CONCLUSION

¶ 35 The judgment of the circuit court of Cook County is reversed and this cause is remanded for a new trial.

¶ 36 Reversed and remanded.