2021 IL App (4th) 180838-U

NO. 4-18-0838

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
February 2, 2021
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MARK A. BANKS, Defendant-Appellant.	) Appeal from the) Circuit Court of) Macon County) No. 18CF1177)) Honorable) Thomas E. Griffith Jr.,) Judge Presiding.

JUSTICE CAVANAGH delivered the judgment of the court.
Presiding Justice Knecht and Justice Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: (1) To ask the potential jurors if they disagree with the constitutional principles in Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) is not to ask them if they understand the principles.

(2) The threshold question in plain error review is whether there was a clear or obvious error as distinct from an arguable error, and in the absence of an error that was clear or obvious, plain error review can proceed no further.

(3) If an asserted legal error was less than clear or obvious, it probably was within the wide range of reasonable professional assistance for defense counsel to refrain from objecting to it.

(4) Unless the record specifies otherwise, such as by a limiting jury instruction, an exhibit admitted in evidence is admitted for all relevant substantive purposes, not just as demonstrative evidence.

(5) A physical description of someone is a statement of identification within the meaning of the hearsay exception in section 115-12 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-12 (West 2018)).

(6) A lay witness's identification of someone in a video as being the defendant is "helpful" within the meaning of Illinois Rule of Evidence 701(b) (eff. Jan. 1, 2011) if there is some basis for supposing that the witness is more likely than the jury to correctly identify the defendant from the video—regardless of the source of the witness's advantage, whether from the witness's prior personal contacts with the defendant or otherwise.

(7) For tactical reasons, a defense counsel might refrain from tendering an applicable pattern jury instruction, and a defendant alleging ineffective assistance on the ground of the non-tender must overcome a strong presumption that the tactical decision was reasonable.

¶ 2 In the circuit court of Macon County, a jury found defendant, Mark A. Banks, guilty of aggravated battery in a public place (720 ILCS 5/12-3.05(c) (West 2018)). The court sentenced him to imprisonment for four years. Defendant appeals on six grounds.

¶ 3 First, defendant complains that the circuit court neglected to ask the potential jurors if they understood the constitutional principles in Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). We agree with defendant that this omission was a clear or obvious error. Because, however, defendant never alerted the circuit court to this omission in its Rule 431(b) inquiries, let alone reiterated the objection in his posttrial motion, the issue is forfeited. Further, because we disagree with defendant's further contention that the evidence in the jury trial was closely balanced, the doctrine of plain error does not avert the forfeiture.

¶ 4 Second, defendant argues that, in the jury trial, a police officer violated the hearsay rule by testifying to the victim's physical description of the assailant. This argument likewise is forfeited because defense counsel made no hearsay objection to the testimony, nor did he raise the issue in his posttrial motion (the two indispensable steps to preserving an issue for appellate review). Given the hearsay exception in section 115-12 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-12 (West 2018)) for statements of prior identification, we find no clear or obvious error, and, hence, the doctrine of plain error does not avert this forfeiture either.

¶ 5 Third, defendant challenges lay opinion testimony identifying him in videos that, according to him, had been admitted only as demonstrative evidence, not as substantive evidence. Defense counsel never objected on this ground in the proceedings below and never reiterated the objection in a posttrial motion. Consequently, we again have a procedural forfeiture. Because it is unclear that the videos were indeed admitted only as demonstrative evidence (as defendant assumes), the doctrine of plain error does not avert the forfeiture. The lack of a clear or obvious error disposes of defendant's alternative claim that defense counsel rendered ineffective assistance by omitting to object to the identification testimony.

¶ 6 Fourth, defendant maintains that, even if the videos were admitted as substantive evidence, the lay witness's identification of defendant as the assailant pictured in the videos was unhelpful to the jury and, thus, the lay identification testimony was inadmissible under Illinois Rule of Evidence 701(b) (eff. Jan. 1, 2011). Because such an objection was never made in the trial and was never reiterated in the posttrial motion, the issue is forfeited. The doctrine of plain error is inapplicable because it is unclear that the witness's identification testimony was, as defendant claims, unhelpful. After all, the witness had watched earlier portions of the surveillance video, which were unavailable to the jury, and the witness had used the zoom function of the surveillance equipment, an enhancement that likewise was unavailable to the jury. Thus, the witness had advantages that the jury lacked. The alternative claim of ineffective assistance fails because, given the arguable helpfulness of the lay identification testimony, it is unclear that an objection under Rule 701 would have been meritorious.

¶ 7 Fifth, defendant argues that the foregoing errors, regarded cumulatively, deprived him of a fair trial. The trouble is, we find a failure to preserve the asserted errors for appellate

review—and for purposes of plain error review, we find almost all of the asserted errors to be less than clear or obvious.

¶ 8 Sixth, defendant accuses his defense counsel of rendering ineffective assistance in that defense counsel omitted to tender to the circuit court Illinois Pattern Jury Instructions, Criminal, No. 3.15 (approved July 28, 2017) (hereinafter IPI Criminal No. 3.15). This pattern instruction would have given the jury some commonsense guidance regarding the circumstances of identification, but it is unclear that, on balance, the guidance would have been beneficial to the defense. Defendant has failed to rebut the strong presumption that refraining from tendering this jury instruction was a reasonable tactical decision.

¶ 9 Therefore, we affirm the judgment.

¶ 10 I. BACKGROUND

¶ 11 A. The Admonitions and Inquiries Under Illinois Supreme Court Rule 431(b)

¶ 12 Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) requires the circuit court, during *voir dire*, to "ask each potential juror, individually or in a group, whether that juror understands and accepts" four principles of constitutional law, called the "*Zehr* principles," after *People v. Zehr*, 103 Ill. 2d 472 (1984). The *Zehr* principles are these:

> "(1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that[,] before a defendant can be convicted[,] the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that[,] if a defendant does not testify[,] it cannot be held against him or her." Ill. S. Ct. R. 431(b) (eff. July 1, 2012).

"The court's method of inquiry [must] provide each juror an opportunity to respond to specific questions concerning the principles ***." *Id.*

¶ 13 During *voir dire* in this case, the circuit court recited the four *Zehr* principles to the potential jurors. Each time, after reciting a *Zehr* principle, the court asked the potential jurors to raise their hands if they had any "difficulty or disagreement" with that principle. None of the potential jurors raised their hands (the court noted for the record). At the conclusion of its Rule 431(b) admonitions, the court stated: "[L]et the record reflect that all of the jurors understand and accept the [*Zehr*] principles."

¶ 14 B. Testimony in the Jury Trial

¶ 15 1. *Jamel Witherspoon*

¶ 16 Jamel Witherspoon testified that on August 4, 2018, in Concord Apartments, Decatur, Illinois, he got into an altercation with Charles Waltrip. At the time, Witherspoon was in an elevator. Waltrip was standing in the doorway of the elevator, keeping the door from closing. Witherspoon asked him if he were going down, or words to that effect. Waltrip responded, " ['I feel like I got to be [eff]ing rushed by black people.'] " Witherspoon rejoined, " ['S]ir, I'm just letting you know are you still on the elevator.'] " The conversation deteriorated to cursing and yelling.

¶ 17 The elevator arrived in the lobby, and Witherspoon exited the elevator and stormed out of the apartment building. As Waltrip shouted threats at him through a lobby window, Witherspoon urged Waltrip to come outside. Eventually, Waltrip came outside, onto the circle drive. A man who had been sitting on a bench across the street stood up and approached. As Waltrip, still uttering threats, attempted to walk past Witherspoon, this third man struck Waltrip. The assailant, Witherspoon testified, was defendant.

¶ 18 Two videos had been made of the battery: one by a camera mounted on the exterior of the apartment building and the other by a bystander using her cell phone. Both videos were admitted in evidence, without any limiting jury instruction, and were played for the jury.

¶ 19 People's exhibit No. 1, the surveillance video, showed Witherspoon looking animated as he came out of the apartment building. It also showed Waltrip coming out of the apartment building afterward and being struck by the third man, who had been sitting on a bench. The vantage point of the surveillance video was too far away for the facial features of the assailant to be discernable, but Witherspoon testified that it was defendant (although no evidence was presented that Witherspoon knew defendant before the incident). People's exhibit No. 2, the cell phone video, likewise was too far away and too grainy to identify the assailant. Witherspoon, however, identified the man sitting on the curb in that video as Waltrip and identified defendant as the man who had hit him.

¶ 20 Witherspoon revealed in his direct examination that he had a deal with the State and that his testimony was part of the deal. Two criminal cases were pending against Witherspoon: one for the aggravated battery that was the subject of the present case and the other for an unrelated act of criminal damage to property. Witherspoon had agreed to testify in the present case, to plead guilty to misdemeanor property damage, and to stay away from Banks. In return, the aggravated battery charge against him would be dismissed, and, in the property damage case, he would receive 24 months of conditional discharge and an order to pay restitution.

¶ 21 While in jail on the charges pending against him, Witherspoon was provided the police reports pertaining to the Waltrip battery. The police reports revealed that a woman named "Barb" had identified defendant as the man who had struck Waltrip. On November 5, 2018, after seeing the police reports, Witherspoon met with the prosecutor and was shown the two videos of

the battery. This was about a week before defendant's trial. In this meeting with the prosecutor, Witherspoon for the first time identified defendant as the assailant.

¶ 22 2. *Barbara Vogelsang*

¶ 23 Barbara Vogelsang testified that she was the property manager of Decatur Housing Authority and that one of her duties was managing Concord Apartments. The apartment building was equipped with video cameras: they were mounted inside, on the first floor, as well as outside. When, on August 10, 2018, the police asked Vogelsang about a battery that happened on August 4, 2018, she gave the police some video footage, People's exhibit No. 1, from the surveillance system.

¶ 24 The surveillance system in the apartment building had a magnifying capability that could not be captured in the copy video, People's exhibit No. 1. The prosecutor asked Vogelsang:

> "Were there any functions that the surveillance video had at the one you were playing it on your computer that you didn't have on the copy you gave to the officer?
>
> A. There is. There's an enhancement that we can't download.
>
> Q. Like a zoom function?
>
> A. Yes.
>
> Q. And did you try to give that to the officer as well?
>
> A. Tried, but I could not."

¶ 25 In addition to giving the police a copy of the surveillance video minus the zoom function, Vogelsang gave the police a cell phone video that a tenant had given her. This cell phone video, People's exhibit No. 2, was played again for the jury. According to Vogelsang's testimony, the man wearing the gray hoodie in this video was defendant, a tenant, whose nickname was Tony.

Although the man in the hoodie had no visible scars or tattoos, Vogelsang recognized his "facial features," his "profile," as belonging to defendant. She also recognized the other two men in the cell phone video. They likewise were tenants. The man sitting on the ground, who had been hit, was Waltrip, and the man in blue with the topknotted ponytail was Witherspoon.

¶ 26 On cross-examination, Vogelsang acknowledged that she did not witness the battery personally as it was happening. Rather, she watched video footage of the battery a couple of days afterward, on the surveillance system of the apartment building. Vogelsang further admitted that "the action *** at the end of the driveway [was] pretty far away in terms of the video viewability." Nevertheless, Vogelsang testified, video cameras were mounted throughout the apartment building, and, consequently, she had been able to backtrack or "back trail[ ]" from the battery. As she put it in her testimony:

> "I—we have a lot of cameras, and so I back trailed it to be able to tell who it was. I could see the person coming off the elevator[,] through another hallway[,] and then out the entry door.
>
> Q. So what you're saying is that there's other video of this individual that you claim you see off down the end of the road from coming in the building earlier that day?
>
> A. No, from coming from upstairs downstairs off the elevator.
>
> Q. Okay. Were you able to follow that person to where they go and sit on a bench?
>
> A. I could, yes."

¶ 27 Defense counsel asked Vogelsang if she had provided the additional, clearer video footage to the police. Vogelsang answered: "I tried to, and I did not record it correctly, and we only have 30-day cameras."

¶ 28 3. *Charles Waltrip*

¶ 29 Charles Waltrip remembered riding the elevator down with Witherspoon, who seemed "agitated" at the time. Waltrip had no idea why Witherspoon was "agitated." He denied threatening or intimidating Witherspoon or saying anything at all to him. When Waltrip exited the apartment building to smoke a cigarette, a black man about 50 years old, of approximately Waltrip's height, whose name Waltrip did not know, approached from across the street and likewise showed signs of being inexplicably "agitated" with Waltrip. The next thing Waltrip knew, he was hit on the back of the head. He thereby was "knocked somewhat unconscious."

¶ 30 Waltrip could not remember much of the incident. His powers of memory were impaired. All he knew was that, when he was hit in the back of the head, he "managed to get to the curb and cower and cover [his] face as best [he] could." The attack remained mystifying to him. He did not know either the man in the blue shirt or the bald-headed man, although he previously had seen the man in the blue shirt in the apartment complex. Prior to the trial, the prosecutor showed Waltrip a photographic lineup (Waltrip testified), and, out of the lineup, Waltrip chose the photographs of defendant and Witherspoon. In the courtroom, Waltrip identified defendant as his assailant—admitting, though, that defendant was the only black man seated at the defense table.

¶ 31 4. *Brandon Rolfs*

¶ 32 The same day that Waltrip was battered, Brandon Rolfs, a Decatur police officer, interviewed Waltrip. Rolfs testified that "it was hard *** to engage [Waltrip] in conversation that

followed a logical process and order because he kept getting confused and saying that he didn't remember certain things or what happened." Rolfs was able, however, to obtain "a vague suspect description." Waltrip told him he that had been beaten up by two black men. One of the assailants was younger with "afro-type hair" that was tied into a "top bun." The other assailant was older and "bald or almost bald with very short gray hair." At the time, after receiving this minimal physical description, Rolfs did not do any follow-up investigation. Waltrip had stated that he was unsure he wanted to pursue a criminal investigation. Later, Vogelsang contacted Rolfs and provided him the videos, People's exhibit Nos. 1 and 2, as well as the names of the blue-shirted man and the bald man who were pictured in the videos. This information from Vogelsang restarted the investigation.

¶ 33 5. *Melanie Long*

¶ 34 Melanie Long, the state's attorney's victim advocate, contradicted Waltrip's testimony that he had been shown a photographic lineup. Long testified that she was present when Waltrip was shown some photographs and that, instead of being shown a photographic lineup, Waltrip was shown only two photographs and was asked if the two individuals in the photographs were his assailants.

¶ 35 II. ANALYSIS

¶ 36 A. The Noncompliance With Illinois Supreme Court Rule 431(b)

¶ 37 Under Illinois Supreme Court Rule 431(b) (eff. July 1, 2012), "[t]he court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the [*Zehr*] principles." Defendant claims that, by neglecting to ask the potential jurors if they understood the *Zehr* principles, the circuit court failed to comply with Rule 431(b). To be sure, the court *found* that the potential jurors understood and accepted the *Zehr* principles. But the court

never *asked* the potential jurors if they understood the *Zehr* principles, and "ask[ing]" them if they "underst[ood] and accept[ed]" the *Zehr* principles was what the rule required. *Id.*

¶ 38 Defendant admits that, during *voir dire*, he never alerted the circuit court to the omission in its Rule 431(b) inquiries and that, in his posttrial motion, he never raised the omission. He acknowledges that, normally, both measures are necessary to preserve an issue for appellate review. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). He contends, however, that the evidence in the trial was closely balanced and that the doctrine of plain error, therefore, should avert a procedural forfeiture of the Rule 431(b) issue. See *People v. Sebby*, 2017 IL 119445, ¶ 48.

¶ 39 The first step in plain error review is to decide whether there was a clear or obvious error: not just an arguable error, not just a reversible error, but a clear or obvious error. See *id.* ¶ 49; *People v. Keene*, 169 Ill. 2d 1, 17 (1995). The State disputes that the circuit court clearly or obviously erred in its Rule 431(b) inquiries. In an attempt to demonstrate that the law is unclear, the State cites a number of decisions by the appellate court, including *People v. Kidd*, 2014 IL App (1st) 112854, ¶ 41. In *Kidd*, the First District held that, "when the trial court asked prospective jurors whether they disagreed with the *Zehr* principles, that was sufficient to indicate that the court was asking them whether they understood and accepted such principles, even though the court did not use that precise language." *Id.*

¶ 40 Given the choice, however, between an appellate court decision, such as *Kidd*, and a decision by the supreme court, there is no legitimate conflict in the law, and the decision by the supreme court must be followed. See *People v. Artis*, 232 Ill. 2d 156, 164 (2009). So, while it is true that *Kidd* equates "Do you disagree?" with "Do you understand?" (see *Kidd*, 2014 IL App (1st) 112854, ¶ 41), there is a contrary decision by the supreme court, *People v. Wilmington*, 2013 IL 112938, and it prevails over *Kidd* and any similar appellate court decisions. See *Artis*, 232 Ill.

2d at 164. In *Wilmington*, the circuit court asked the potential jurors only if they " 'disagree[d] with' " the first three *Zehr* principles (and never asked the potential jurors if they understood and accepted the fourth *Zehr* principle). *Wilmington*, 2013 IL 112938, ¶ 28. In the supreme court's view—which is the view that prevails—asking the potential jurors if they disagreed with *Zehr* principles was not the same as asking them if they understood the *Zehr* principles. "While it may be arguable," the supreme court wrote, "that the court's asking for disagreement, and getting none, is equivalent to juror *acceptance* of the principles, the trial court's failure to ask jurors if they *understood* the four Rule 431(b) principles is error in and of itself." (Emphases in original.) *Id.* ¶ 32. Thus, notwithstanding *Kidd* and any other appellate court decisions, it is the law that asking potential jurors whether they disagree with a *Zehr* principle *fails* to fulfill the obligation to ask them whether they *understand* the principle. See *id.*

¶ 41 In the present case, the circuit court asked the potential jurors merely if they had any "difficulty or disagreement" with the *Zehr* principles—a question that was reducible to whether the potential jurors disagreed with the *Zehr* principles, since "difficulty" meant "controversy" or "disagreement." Merriam-Webster's Online Dictionary, https://www.merriam-webster.com/dictionary/difficulty (last visited on Dec. 3, 2020). The court clearly erred because, under *Wilmington*, asking the potential jurors whether they disagreed with the *Zehr* principles was not the same as asking them whether they understood the *Zehr* principles. See *Wilmington*, 2013 IL 112938, ¶ 32.

¶ 42 In a case in which the evidence is closely balanced, the jury's uncertainty over the meaning of a *Zehr* principle could pose an enhanced danger to the fairness of the trial. See *Sebby*, 2017 IL 119445, ¶ 66. If the verdict could go one way or the other, a misguided concern about the defendant's choice not to testify (for example) might be just enough to unfairly tilt the balance

beam in the State's favor. We consider, then, whether the evidence in this case was closely balanced, as defendant claims.

¶ 43 This means "evaluat[ing] the totality of the evidence and conduct[ing] a qualitative, commonsense assessment of it within the context of the case." *Id.* ¶ 53. For the following reasons, defendant regards the evidence as closely balanced. The video footage shown in the trial was too unclear to reveal who the assailant was. Witherspoon did not identify defendant as the assailant until he learned in jail that Vogelsang had done so. No evidence was presented that Witherspoon knew defendant before the trial, and Witherspoon, facing criminal liability, was under pressure to deliver up someone for the State. As for Waltrip, he testified that he had memory problems and that, besides, he did not see much of the incident because he cowered down, covered his head, and sat on the curb as soon as he was hit. He did not even know the name of his assailant.

¶ 44 Those are fair critiques of the testimonies of Witherspoon and Waltrip. But not much can be said against the believability of Vogelsang's identification testimony (the admissibility of which we will discuss in a moment). She had no apparent bias. She had no apparent motive to lie or to exaggerate. She had technological resources that made her identification of defendant reliable and convincing, namely, the zoom feature and the backtracking ability of the apartment building's surveillance equipment. Given Vogelsang's testimony, the evidence was not closely balanced, and, therefore, the procedural forfeiture of the Rule 431(b) issue "must be honored." (Internal quotation marks omitted.) *People v. Walker*, 232 Ill. 2d 113, 124 (2009).

¶ 45 If the evidence had been closer, we would have reversed the judgment. We would have been required to do so. By deviating from the "understand[ ] and accept[ ]" language that the supreme court prescribes in Rule 431(b) (Ill. S. Ct. R. 431(b) (eff. July 1, 2012)), a trial judge unnecessarily introduces a defect into the proceedings that may well cause the conviction to topple

on appeal, undoing all the time and labor that had gone into trying the case. And yet, in one appeal after another, we are asked to decide whether alternative language that trial courts chose to use in their Rule 431(b) inquiries "substantially complied" with the rule, which comes down to deciding whether the language was "close enough." Consequently, a ridiculous new branch of case law has sprouted to adjudicate these semantic disputes. And what has the branch sprouted from? Judicial and prosecutorial malpractice. That is what it comes down to. There is no excuse for failing to ask the potential jurors if they "understand[ ] and accept[ ]" the constitutional essentials of a fair trial. *Id.* We include the prosecutor in our criticism because the prosecutor is an officer of the court whose responsibility is to protect the integrity of the prosecution by ensuring that Rule 431(b) is followed. As we often tell litigants, supreme court rules are not suggestions; they are commands, having the force of law. The supreme court commands in Rule 431(b): "The court shall ask each potential juror, individually or in a group, whether that juror *understands and accepts* the [*Zehr*] principles ***." (Emphasis added.) *Id.* That, simply, is what the court must do. Innovations and omissions in Rule 431(b) inquiries are irrational because they quite needlessly invite trouble—and trouble is surely what the prosecutor will receive when explaining to victims and the State's witnesses why a case has to be retried, if indeed it can be retried.

¶ 46 B. Hearsay

¶ 47 Defendant contends that it was hearsay for Rolfs to recount Waltrip's physical description of his alleged assailants. Acknowledging that defense counsel never made a hearsay objection to this testimony, defendant invokes the doctrine of plain error, arguing, again, that the evidence in the trial was closely balanced. See *Sebby*, 2017 IL 119445, ¶ 48.

¶ 48 As we already have explained, the initial step in plain-error analysis is to decide whether there was a clear or obvious error. *Id.* ¶ 49. Clearly, Rolfs's testimony included hearsay.

He repeated, in his own testimony, Waltrip's description to him of what the alleged assailants looked like. Rolfs testified that Waltrip "described the second black male as being older and *** being bald or almost bald with very short gray hair"—a description that matches defendant's appearance, as defendant demonstrates from a photograph of himself that he has downloaded from the official website of the Illinois Department of Corrections (Department) and has "pasted" into his brief. See *People v. Ware*, 2014 IL App (1st) 120485, ¶ 29 (holding that the appellate court may take judicial notice of the Department's official web site). This physical description by Waltrip, recounted by Rolfs in his testimony, was "a statement, other than one made by the declarant [(the maker of the statement)] while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ill. R. Evid. 801(c) (eff. Oct. 15, 2015). It is reasonably inferable that the State wanted the jury to believe that the physical description was true. Thus, Waltrip's statement, in Rolfs's mouth, was hearsay.

¶ 49 Because the jury trial took place in November 2018, after the Illinois Rules of Evidence went into effect, the admissibility of hearsay in the trial depended on the Illinois Rules of Evidence, the Illinois Supreme Court Rules, and statutory law. Illinois Rule of Evidence 802 (eff. Jan. 1, 2011) provides: "Hearsay is not admissible except as provided by these rules, by other rules prescribed by the Supreme Court, or by statute as provided in Rule 101." Illinois Rule of Evidence 101 (eff. Jan. 1, 2011) in turn provides that "[a] statutory rule of evidence is effective unless in conflict with a rule or a decision of the Illinois Supreme Court." Defendant relies on a 1978 decision by the appellate court—as distinct from the supreme court—which holds: "[T]he hearsay rule is inapplicable to the admission of testimony concerning out-of-court statements, and thus no error occurs at all, if the out-of-court declarant himself is available at trial *and competently testifies to the same matter*." (Emphasis added.) *People v. Riley*, 63 Ill.

App. 3d 176, 181 (1978) (citing cases). Because Waltrip never testified to the statement that he had made to Rolfs, defendant maintains that Waltrip's statement, recounted in Rolfs's testimony, was inadmissible hearsay under *Riley*. See *id.* But the Illinois Rules of Evidence did not exist when *Riley* was decided. Under Rules 802 and 101, which were in force at the time of defendant's trial, hearsay was admissible if (1) a statute so provided and (2) the statute did not conflict with a decision or rule of the supreme court.

¶ 50 Section 115-12 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-12 (West 2018)) is a hearsay exception for statements of prior identification: "A statement is not rendered inadmissible by the hearsay rule if (a) the declarant testifies at the trial or hearing, and (b) the declarant is subject to cross-examination concerning the statement, and (c) the statement is one of identification of a person made after perceiving him." The supreme court interpreted and applied this statute, without any hint of disapproval, in *People v. Lewis*, 223 Ill. 2d 393, 396 (2006) (holding "that the trial court did not err by admitting the disputed testimony under section 115-12"). As far as we know, then, section 115-12 is not "in conflict with a rule or a decision of the Illinois Supreme Court." Ill. R. Evid. 101 (eff. Jan. 1, 2011). Therefore, the "statutory rule of evidence" in section 115-12 "is effective" (*id.*), and we agree with the State that section 115-12, enacted in 1984, supersedes *Riley*.

¶ 51 On the authority of *People v. Tisdel*, 201 Ill. 2d 210, 219 (2002), and *People v. Newbill*, 374 Ill. App. 3d 847, 853 (2007), however, defendant maintains that section 115-12 is inapplicable because, according to Rolfs's own testimony, Waltrip's physical description of his assailants was not "the first step in the entire identification process" (internal quotation marks omitted) (*id.*). Defendant reasons as follows:

> "Rolfs's testimony is plain: after Waltrip gave him a suspect description[,] there were no 'other steps taken at that time to pursue this like a criminal investigation would be pursued.' [Citation.] Instead, it was not until [Vogelsang] contacted Rolfs and provided him with the name of a suspect and video footage that a criminal investigation began. And, two days later, on August 12, 2018, [defendant] was arrested and taken into custody."

But obtaining a physical description of the perpetrator is, inherently, a step in the "identification process" even if the police officer's investigation halts after that step—even if the "process" abruptly or prematurely ends. (Internal quotation marks omitted.) *Id.* Nothing in the language of section 115-12 suggests that the statement of identification had to lead to further action in the police investigation. See 725 ILCS 5/115-12 (West 2018). Because "[w]e will not depart from the plain statutory language by reading into the statute exceptions, limitations, or conditions that the legislature did not express" (*Lewis*, 223 Ill. 2d at 402), we find no clear or obvious error in the admission of the hearsay statement of prior identification, and the forfeiture of the hearsay objection will be honored (see *Walker*, 232 Ill. 2d at 124).

¶ 52 The failure to show a clear or obvious error in this respect disposes of defendant's alternative theory of ineffective assistance. Because the supposed inadmissibility of Rolfs's hearsay testimony was less than clear or obvious, it was "within the wide range of reasonable professional assistance" to refrain from objecting to the testimony. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). A reasonable defense counsel could have concluded that the prior identification testimony was admissible under section 115-12 (725 ILCS 5/115-12 (West 2016)).

¶ 53 C. Lay Opinion Testimony

¶ 54 1. *The Contention That, in Vogelsang's Testimony, Demonstrative Evidence Was Used as Substantive Evidence*

¶ 55 Defendant argues that the videos, People's exhibit Nos. 1 and 2, were demonstrative evidence instead of substantive evidence and that, as such, "they had no probative value independent of illustrating Witherspoon's testimony." Consequently, defendant concludes, "it was improper for [Vogelsang] to provide lay identification testimony purportedly based on People's [exhibit Nos.] 1 and 2." Defendant acknowledges that "counsel failed to object to [Vogelsang's] testimony in which she was allowed to provide lay identification testimony of an individual depicted in videos that had only been admitted for demonstrative purposes." Nevertheless, reiterating his argument that the evidence was closely balanced, defendant urges us to disregard the procedural forfeiture and to review this error under the plain-error doctrine. See *Sebby*, 2017 IL 119445, ¶ 48. Alternatively, he argues that the failure to object to Vogelsang's testimony was ineffective assistance.

¶ 56 Again, we find no clear or obvious error and, hence, no ineffective assistance. Contrary to defendant's assumption, the videos were admitted as substantive evidence. All evidence admitted at trial is admitted substantively unless (1) a particular piece of evidence is offered for a limited purpose, (2) the trial judge agrees with that limited purpose, and (3) the jury is so instructed. See *People v. Edwards*, 144 Ill. 2d 108, 168-69 (1991); *People ex rel. Sherman v. Cryns*, 321 Ill. App. 3d 990, 993 (2001).

¶ 57 2. *The Alternative Contention That Vogelsang's Lay Opinion Testimony Was Not Rationally Based on Her Perception of the Videos Admitted in Evidence*

¶ 58 Even if People's exhibit Nos. 1 and 2 were usable as substantive evidence, defendant contends that "[Vogelsang's] identification testimony was improper" because, instead of basing her identification of defendant on her viewing of those two exhibits, she based her identification of defendant on "her viewing of purportedly clearer videos that were not presented to the jury." In Vogelsang's reliance on unpresented original surveillance footage, she is

comparable, defendant argues, to the loss prevention manager in *People v. Sykes*, 2012 IL App (4th) 111110.

¶ 59 *Sykes*, however, is distinguishable because in *Sykes* the manager did more than identify the defendant as the person pictured in the video. The manager went further by opining that the video showed the defendant taking money out of the cash register and pocketing the money. *Id.* ¶ 6. The appellate court in *Sykes*, 2012 IL App (4th) 111110, ¶ 40, specifically distinguished cases such as *People v. Starks*, 119 Ill. App. 3d 21, 25 (1983), and *State v. Thorne*, 618 S.E.2d 790, 795 (N.C. Ct. App. 2005), in which witnesses merely identified defendants pictured in videos.

¶ 60 While it is true that Vogelsang, in her identification testimony, relied on additional video footage that was not shown to the jury, it is unclear that, for that reason, her testimony violated Illinois Rule of Evidence 701 (eff. Jan. 1, 2011). Her additional observations of defendant—even though they had been *via* the surveillance system instead of in person—gave her some advantage over the jury in identifying defendant in People's exhibit Nos. 1 and 2. See *Thompson*, 2016 IL 118667, ¶ 41. Her testimony that the assailant in People's exhibit Nos. 1 and 2 was defendant was "rationally based" on her "perception" of (1) those exhibits and (2) the original video in the surveillance system, with its useful magnifying and backtracking capabilities. Ill. R. Evid. 701 (eff. Jan. 1, 2011).

¶ 61 In sum, then, because we find no clear or obvious violation of Illinois Rule of Evidence 701(eff. Jan. 1, 2011), the procedural forfeiture of defendant's objection to Vogelsang's lay opinion identification testimony will be honored. See *Walker*, 232 Ill. 2d at 124.

¶ 62 The theory of ineffective assistance fails for essentially the same reason. Because Vogelsang's testimony was not clearly or obviously inadmissible under Rule 701, it was within

"the wide range of reasonable professional assistance" to refrain from objecting to her testimony. *Strickland*, 466 U.S. at 689.

¶ 63 D. The Omitted Jury Instruction on the Circumstances of Identification

¶ 64 Defendant contends that defense counsel rendered ineffective assistance by failing to tender IPI Criminal No 3.15, which would have informed the jury as follows:

> "When you weigh the identification testimony of a witness, you should consider all the facts and circumstances in evidence, including, but not limited to, the following:
>
> [1] The opportunity the witness had to view the offender at the time of the offense.
>
> [2] The witness's degree of attention at the time of the offense.
>
> [3] The witness's earlier description of the offender.
>
> [4] The level of certainty shown by the witness when confronting the defendant.
>
> [5] The length of time between the offense and the identification confrontation."

¶ 65 The decision of whether to tender a jury instruction is a tactical decision within the discretion of defense counsel. *People v. Mims*, 403 Ill. App. 3d 884, 890 (2010). "[W]hen the record is silent on the motivations underlying counsel's tactical decisions, the appellant usually cannot overcome the strong presumption that counsel's conduct was reasonable." (Internal quotation marks omitted.) *People v. Jackson*, 2018 IL App (1st) 150487, ¶ 26. In the present case, defense counsel might have anticipated that certain factors in IPI Criminal No 3.15 would be grist

for the prosecutor's mill. For that reason, defense counsel might have decided it would be wise to refrain from tendering IPI Criminal No 3.15.

¶ 66 Here is the danger that defense counsel perhaps foresaw. A standard rhetorical strategy in closing arguments is "I expect the judge will instruct you that ***." Although Vogelsang was not present "at the time of the offense" (IPI Criminal No. 3.15), the prosecutor could have made some good arguments by analogy to IPI Criminal No. 3.15. The prosecutor could have argued to the jury that, by virtue of the zoom feature and the backtracking capability of the video surveillance system, Vogelsang had ample "opportunity *** to view the offender" (IPI Criminal No 3.15[1])—and that her "degree of attention" when watching the surveillance video would have been elevated (IPI Criminal No. 3.15[2]). The prosecutor could have further argued that, having viewed defendant at several different angles, vantages, and magnifications in the surveillance video, the "level of certainty" that Vogelsang had "shown" in her identification testimony was deservedly high. IPI Criminal No. 3.15[4].

¶ 67 By tendering IPI Criminal No. 3.15, defense counsel would have provided the prosecutor an ideal springboard for those arguments. The benefits to the defense from IPI Criminal No. 3.15 (with respect to the testimonies of Witherspoon and Waltrip) could reasonably have been regarded as being outweighed by the risks (with respect to the testimony of Vogelsang). Therefore, defendant has failed to rebut the strong presumption that refraining from tendering IPI Criminal No. 3.15 was a reasonable tactical decision. See *Jackson*, 2018 IL App (1st) 150487, ¶ 26; *Mims*, 403 Ill. App. 3d at 890.

¶ 68 III. CONCLUSION

¶ 69 For the foregoing reasons, we affirm the circuit court's judgment.

¶ 70 Affirmed.