2024 IL App (4th) 231258-U

NO. 4-23-1258

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
October 11, 2024
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. CHARLES D. ANDERSON, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Sangamon County No. 23CF92 Honorable Adam Giganti, Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Justices Lannerd and Vancil concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, holding the State proved defendant guilty beyond a reasonable doubt because a shank constitutes a weapon for purposes of possessing contraband in a penal institution.

¶ 2 In an April 25, 2023, bench trial, the circuit court found defendant, Charles D. Anderson, guilty of possession of contraband in a penal institution (720 ILCS 5/31A-1.1(a)(1) (West 2022)), a Class 1 felony. Defendant afterwards filed a posttrial motion, arguing the State's evidence was insufficient to prove him guilty and asking the court to either vacate the guilty verdict and enter an acquittal or, alternatively, grant a new trial. In a November 2023 hearing, the court denied defendant's motion and sentenced him to four years in the Illinois Department of Corrections (DOC), followed by two years' mandatory supervised release.

¶ 3 On appeal, defendant challenges his conviction on two grounds: (1) the State failed to prove him guilty beyond a reasonable doubt because it did not establish he possessed contraband as defined by statute and (2) the circuit court committed plain error in admitting

defendant's admission because defense counsel rendered ineffective assistance to defendant by failing to file a motion to suppress defendant's statements to corrections officers on February 2, 2023. We disagree and affirm defendant's conviction.

¶ 4 I. BACKGROUND

¶ 5 On February 2, 2023, by way of complaint, the State charged defendant with one count of possession of contraband in a penal institution (720 ILCS 5/31A-1.1(a)(1) (West 2022)), a Class 1 felony, alleging "defendant[ ] knowingly possessed an item of contraband, a weapon, being a plastic shank, while in the Sangamon County Jail, a penal institution." The charge stemmed from a jail search, where officers found the plastic shank among defendant's possessions. Defendant appeared in the circuit court to be arraigned on the charge on February 2, where the court appointed the public defender to represent defendant and kept defendant's bond at $150,000. The court had set the same bond amount for defendant's three pending cases during a hearing the day before, February 1, 2023.

¶ 6 As defendant returned from one of his court appearances, either February 1 or 2, Officer Scott Loftus, a corrections officer in the Sangamon County Sheriff's Office, asked him questions about the contraband. After defendant denied knowing about the shank, Loftus asked him more questions, and defendant eventually admitted to possessing the shank.

¶ 7 A. Pretrial Proceedings

¶ 8 Defendant appeared in the circuit court for a preliminary hearing on February 17, 2023. The State called Loftus as its lone witness. Loftus testified about a shakedown he and other corrections officers conducted on January 31, 2023. He asserted "a shakedown [is] a physical inspection of each cell in the area for searching for contraband." He testified they were looking for a lighter. Loftus confirmed the shakedown took place in trustee block B, which housed

defendant. Loftus testified officers found contraband in defendant's "area," meaning "where he has his bunk and where he sleeps and spends time." He stated officers found three items of contraband: "a homemade shank made out of a broken piece of cup. It had a sheet wrapped around it used as a handle," "138 pills," and "tobacco items." Loftus specified these items were found around defendant's "bedding area where he keeps his belongings at."

¶ 9 Loftus next testified he encountered defendant on February 2, 2023, after the arraignment. He testified defendant admitted to possessing the plastic shank officers found during the shakedown. On cross-examination, Loftus acknowledged there should be a video recording of his encounter with defendant on February 2. He stated defendant "stopped [him] in the hallway *** from just being arraigned on this charge," and he and another officer "questioned why he had all the pills and the tobacco and the shank and [defendant] claims he was holding it for somebody." Loftus reiterated he specifically asked defendant about the shank and defendant acknowledged "that he was holding it."

¶ 10 The circuit court determined "there [was] probable cause to believe that [defendant] was in possession of a sharp enough piece of plastic that could be considered a weapon in the eyes of the jail and it will be a factual determination whether or not it's contraband to a jury later." The parties exchanged minimal discovery during February 2023, which included the video from the Sangamon County jail from February 1, 2023.

¶ 11 B. Bench Trial

¶ 12 This matter culminated in a bench trial on April 25, 2023. The State called three witnesses and offered one exhibit—the plastic shank found in the jail on January 31, 2023.

¶ 13 The State first called Officer Corey Lee Cas, who testified he was employed by the Sangamon County jail as a corrections officer. He confirmed he was working on January 31,

2023. Based upon reports of someone possessing a lighter, Cas and other correctional officers at the jail conducted a "shakedown" of trustee block B, which housed defendant. He testified a "shakedown" is another word for a search, where officers remove the inmates and then search a designated area. When searching defendant's bunk and possessions, Cas found a plastic shank. He defined a shank as "a sharpened pointy edge, and there's usually a handle of some sort." Cas testified shanks are "improvised item[s]" or "something that has been modified" into a sharp point. He described the shank he found near defendant's bunk as "a plastic piece with a blue bed sheet wrapped around it as a handle." Cas testified inmates are not allowed to possess shanks in the jail because they are dangerous items capable of puncturing skin or harming another person. Through Cas's testimony, the State introduced the shank he found as an exhibit.

¶ 14 On cross-examination, Cas described trustee block B as a "dayroom" near the kitchen, with multiple bunks, tables, chairs, a television, and a bathroom. Cas testified the inmates could move around freely in the dayroom and surrounding areas before the shakedown. He stated inmates would watch TV in the dayroom or play cards. He confirmed inmates would walk through the room to get to the bathroom or the kitchen. Cas testified trustee block B housed 9 or 10 inmates on January 31, 2023, and those inmates did not have assigned bunks, though they typically kept the same bunk while there. Cas confirmed he did not find the shank in defendant's property bag, but either on or under the bunk defendant had used. Cas testified he did not photograph the shank or swipe it for DNA or fingerprints, but rather, he handed it over to his supervisor once he found it.

¶ 15 The State next called Loftus, who testified he worked as "a corrections officer with the Sangamon County Sheriff's Office." Loftus confirmed he was working on January 31, 2023. In his capacity as a shift lieutenant, he supervised the shakedown in trustee block B, where

defendant resided. He stated he observed Cas search defendant's bunk and saw Cas recover "a piece of plastic from a cup that had been sharpened down to a knife blade edge and it had a blue sheet wrapped around the handle." Loftus classified the object as "a shank."

¶ 16 Loftus next testified about his encounter with defendant following a court appearance. Loftus said the interaction occurred on February 1, 2023, the day after the shakedown, as defendant "was coming back from a court appearance." Loftus testified defendant "stopped me and Assistant Superintendent Smith in the hallway" and during the encounter, he asked defendant about the shank. Loftus noted defendant initially denied knowing what a shank was, to which Loftus responded by saying defendant "was full of it, that he did know what a shank was." Loftus next asked defendant why he possessed the shank, and defendant "stated *** it wasn't his, but he was holding it for somebody." The State followed up by asking, "So, he admitted to being in possession of it?" Loftus answered, "Yes."

¶ 17 On cross-examination, Loftus testified he did not see exactly where Cas found the shank, "but it was pulled from over there where [defendant's] possessions were at." Loftus testified defendant was not present in the room when the shank was found. Pivoting to Loftus's discussion with defendant "on the following day when [he] saw him in the hallway," counsel asked if Loftus showed defendant the shank, a photo of the shank, or a video of the shank. Loftus answered "no" each time.

¶ 18 The State called William Smith as its final witness. Smith testified he was employed by the Sangamon County Corrections Division as the assistant superintendent of the Sangamon County jail. Smith stated his job duties included coordinating shakedowns. He said the purpose of a shakedown was to ensure the safety and security of the facility and to reprimand individuals who possess contraband. Smith defined a shank as a "[s]harpened item to do injury to

another." Smith testified about the January 31, 2023, shakedown and confirmed officers found a shank among defendant's possessions. He also testified about Loftus and defendant's interaction in the hallway. Smith recalled, "I came in from jail administration through the administration doors to find Lieutenant Loftus speaking with [defendant] in the hallway." Smith testified, "From what I understand, [defendant] had just been re-fingerprinted and photographed on the charges of having contraband in the facility." When about to testify about what Loftus said to defendant, defense counsel interjected a hearsay objection, which was overruled. When the State asked about what Smith overheard within the conversation, defense counsel again offered a hearsay objection. The State defended its line of questioning by arguing, "[W]hat we are getting at here with regards to Loftus and his questions to the Defendant, those are not statements." The State maintained, "They are questions." The circuit court overruled the objection. Smith testified Loftus "asked [defendant] about a shank that was found." Smith observed defendant did not answer when Smith walked into the conversation. Smith noted, "After we talked, he was asked again where it came from, and he said another inmate had given it to him."

¶ 19 On cross-examination, defense counsel focused on Smith's observations during Loftus's questions to defendant in the hallway. Smith testified he did not show defendant the shank found during the shakedown, nor did he show him a photo of the shank, nor did he describe the shank to defendant.

¶ 20 The State rested and the circuit court took a recess to allow defense counsel to confer with defendant. When the proceedings resumed, defense counsel informed the court that he spoke with defendant and defendant elected "to waive his right to take the stand and is not going to take the stand." The court then questioned defendant to ensure his decision not to testify

was a knowing, voluntary decision. Defense counsel stated the defense would present no evidence.

¶ 21 The State began its closing argument by explaining it was "going to work backwards chronologically on this. Starting with the statements of the Defendant himself when speaking with Lieutenant Loftus and Assistant Superintendent Smith." The State noted that when asked about the shank, defendant "ultimately admitted to having had it in his possession, stating that while he did not make it, it was given to him by another inmate to hold on to." After distinguishing between making, owning, or possessing a shank in a penal institution, the State reiterated defendant "admits to having possessed it." The State then argued defendant possessed the shank because officers found it "in his bunk area during the shakedown." The State further argued it met its burden because the Sangamon County jail clearly constituted a penal institution and the plastic shank "clearly meets the requirements as counting as a dangerous weapon." The State explained the shank "had a sharpened edge, a point" and had "the fabric wrapped around it as a grip so it could be utilized in that manner, making it very clearly a weapon and making it contraband." The State concluded the argument by reiterating, "The Defendant admits to knowing that it was there. He possessed it, and as noted, while he may not claim ultimate ownership or manufacture of that item, he did admit to possessing it, and that is the charge is Possession of Contraband in a Penal Institution."

¶ 22 The defense's closing argument focused on the perceived deficiencies in the State's case, namely the State's failure to establish that a plastic shank constituted contraband. The defense highlighted discrepancies in the officers' reports about exactly where they found the shank, whether it was on or under the bunk or around defendant's possessions. In the same vein, defense counsel noted the State did not produce any physical evidence linking defendant to the

shank, like DNA, fingerprints, or video or pictures showing where officers found the shank. As for defendant's statements to Loftus and Smith that he was holding the shank for someone else, defense counsel emphasized that defendant initially said he did not know what a shank was and noted Loftus and Smith did not show defendant the shank or a picture of the shank when questioning him to confirm defendant knew what they were asking him about. Counsel likened the State and the State's case to a used car salesman who asks a prospective car buyer to take his word a car is a good car and will meet the buyer's needs but who offers limited proof and does not allow the buyer to see the car. Counsel argued the State was simply asking the circuit court to take its word that defendant knowingly possessed the shank in the jail and not offering the "demonstrative evidence" needed to prove defendant guilty.

¶ 23 In rebuttal, the State reinforced that it produced the shank officers found among defendant's possessions. The State again stated defendant admitted to Loftus and Smith that he was holding the shank for someone else. The State maintained defendant "knew exactly what he was—what they were talking about, which is why he admitted to being in possession of it." As for defense counsel's argument that the State had not established the shank as contraband, it noted "the law's definition" of "[c]ontraband means a weapon, and a weapon is a dangerous weapon of like character to a knife being that shank and that envelope right there with a sharpened cutting edge and a handle."

¶ 24 In giving its decision on the record, the circuit court noted the State sufficiently defined "contraband" and presented evidence officers found the shank in defendant's area. The court rejected defense counsel's argument that the State had to prove exactly where officers located the shank or that the State had to produce video or photographic evidence. The court summed up its decision with the following:

> "The key to me is that [defendant] admitted that it was in his possession. He admitted it was in his possession. There's absolutely nothing to contradict that.
>
> I won't go into great detail about the car example, but I suppose the way to look at that would be the question was whether or not the vehicle was in an accident before, and the dealer got up on the stand and said, 'We told Mr. Reiser that,' and he said, 'Okay, I understand,' and then that's it. Mr. Reiser never took the stand and said, 'They never said that to me.' That's really the example here, I think. There's no evidence to contradict that he admitted it was—that he possessed it. So, I do believe the State has proven their case beyond a reasonable doubt that [defendant] possessed contraband in a penal institution. So, I find him guilty at this point of the sole count in this matter."

¶ 25 Defense counsel filed a motion for a judgment notwithstanding the verdict or, in the alternative, a motion for a new trial on May 8, 2023. Meanwhile, defendant also filed various *pro se* motions for a new trial based, in part, on ineffective assistance of counsel, insufficient evidence, and due process violations. The matter eventually proceeded to sentencing on November 8, 2023. The circuit court first took up defendant's posttrial motions, particularly his *pro se* motion alleging ineffective assistance of counsel. Defendant confirmed he did not want to proceed with his *pro se* motions and opted to proceed with counsel's motion for a judgment notwithstanding the verdict. Defense counsel argued there was insufficient evidence to support the court's guilty finding and no reasonable factfinder would have found defendant guilty. The

State countered by arguing there was sufficient evidence. The court denied the motion. Turning to sentencing, the parties informed the court they reached an agreement whereby defendant agreed to a four-year sentence in DOC, served at 50%, with credit for time served, in the underlying case, while the State agreed to dismiss Sangamon County case Nos. 22-CF-828 and 22-CF-1073. Upon ensuring defendant entered into the agreement knowingly and voluntarily, the court accepted the agreement and imposed the sentence accordingly.

¶ 26 This appeal followed.

¶ 27 II. ANALYSIS

¶ 28 Defendant challenges his conviction on two grounds: (1) the State failed to prove him guilty beyond a reasonable doubt because it did not establish "that the confiscated plastic item qualified as a weapon under the statute" and (2) the circuit "court committed plain error and defense counsel provided ineffective assistance of counsel by allowing evidence of [defendant's] admission that occurred after [his] sixth amendment [(U.S. Const., amend. VI)] right to counsel attached at his arraignment." We disagree on both grounds.

¶ 29 A. Sufficiency of the Evidence

¶ 30 "The due process clause of the fourteenth amendment to the United States Constitution requires that a person may not be convicted in state court 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' " *People v. Cunningham*, 212 Ill. 2d 274, 278, 818 N.E.2d 304, 307 (2004) (quoting *In re Winship*, 397 U.S. 358, 364 (1970)). When a defendant appeals his conviction, arguing the State failed to satisfy this burden of proof, a reviewing court will not retry the defendant but asks " 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' "

(Emphasis in original.) *Cunningham*, 212 Ill. 2d at 278 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). But in applying this standard, we will neither reweigh evidence nor judge witness credibility; rather, we defer to the factfinder's credibility determinations. See *People v. Smith*, 185 Ill. 2d 532, 542, 708 N.E.2d 365, 370 (1999). We will not set aside a criminal conviction based on insufficient proof "unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *People v. Beverly*, 278 Ill. App. 3d 794, 798, 663 N.E.2d 1061, 1064 (1996).

¶ 31 To prove defendant guilty beyond a reasonable doubt of possessing contraband in a penal institution, the State had to establish defendant "knowingly possess[ed] contraband in a penal institution, regardless of the intent with which he *** possess[ed] it." 720 ILCS 5/31A-1.1(b) (West 2022). Defendant argues the State did not prove the plastic shank qualified as "contraband" under the statute. The Criminal Code of 2012 (Code) identifies a weapon as contraband and, in turn, defines "weapon" as:

> "any knife, dagger, dirk, billy, razor, stiletto, broken bottle, or other piece of glass which could be used as a dangerous weapon. This term includes any of the devices or implements designated in subsections (a)(1), (a)(3) and (a)(6) of Section 24-1 of this Code or any other dangerous weapon or instrument of like character." 720 ILCS 5/31A-0.1(v) (West 2022).

Section 24-1(a)(1) of the Code lists other weapons, including, as is relevant here,

> "any knife, commonly referred to as a switchblade knife, which has a blade that opens automatically by hand pressure applied to a button, spring or other device in the handle of the knife, or a

> ballistic knife, which is a device that propels a knifelike blade as a projectile by means of a coil spring, elastic material or compressed gas." 720 ILCS 5/24-1(a)(1) (West 2022).

Defendant contends the plastic shank recovered on January 31, 2023, among his possessions in the Sangamon County jail does not meet any of the above definitions. We disagree.

¶ 32 Defendant premises his argument on his contention that a shank is not a knife. Because the Code does not define "knife," defendant asks us to construe it, and he directs our attention to dictionary definitions of "knife." While it is true the Code does not define "knife," our case law provides a sufficient definition and belies any further need for statutory construction.

¶ 33 The Appellate Court, First District, considered this precise issue in *People v. Bowen*, 2015 IL App (1st) 132046, 38 N.E.3d 98, and we note the striking similarities between *Bowen* and this case. There, during a shakedown in the Cook County jail, correctional officers "discovered a 7 ½ inch long 'large metallic piece shaped like a knife, *** with a handle made out of a piece of sheet.' " *Bowen*, 2015 IL App (1st) 132046, ¶ 3. The defendant was charged and later convicted of possession of contraband in a penal institution. See 720 ILCS 5/31A-1.1(b) (West 2010). He appealed, arguing the State failed to sufficiently prove his guilt because "the evidence did not support a finding that it qualified as an item of contraband under the statute." *Bowen*, 2015 IL App (1st) 132046, ¶ 21. Because the correctional officer had described what he found in the defendant's cell as a "shank," the *Bowen* court, just as we do now, considered whether a shank constituted contraband.

¶ 34 The court began with the common understanding of the term "shank," noting it is "generally understood to refer to a type of knife—specifically, one that is homemade." *Bowen*,

2015 IL App (1st) 132046, ¶ 23. The court next considered two dictionary definitions. First, "Black's Law Dictionary define[d] a 'shank' as a 'pointed or sharp-edged weapon, [like] a dagger or knife, that is *** either homemade or made by a prisoner.' " *Bowen*, 2015 IL App (1st) 132046, ¶ 23 (quoting Black's Law Dictionary (10th ed. 2014)). Second, "Merriam-Webster define[d] 'shank' as a slang term for 'an often homemade knife.' " *Bowen*, 2015 IL App (1st) 132046, ¶ 23 (quoting Merriam-Webster's Collegiate Dictionary 1076 (10th ed. 1997)). The *Bowen* court then looked to our supreme court's precedent, noting that court "recognized that a shank is a type of weapon, or specifically, a 'homemade knife.' " *Bowen*, 2015 IL App (1st) 132046, ¶ 23 (citing *People v. Baez*, 241 Ill. 2d 44, 72, 946 N.E.2d 359, 377 (2011); *People v. Lucas*, 151 Ill. 2d 461, 469, 603 N.E.2d 460, 463 (1992)). The *Bowen* court ultimately concluded: "Based on the abovementioned definitions, we would conclude that a 'shank' would generally fit within the statutory definition of contraband proscribed by the statute, which includes '*any* knife.' " (Emphasis in original) *Bowen*, 2015 IL App (1st) 132046, ¶ 23 (citing 720 ILCS 5/31A-1.1(c)(2)(v) (West 2010)).

¶ 35 The *Bowen* court held the State presented sufficient evidence to show the recovered shank constituted contraband. It noted the officer called the item a "shank" and described it as "a 7 ½ inch long 'large metallic piece shaped like a knife, *** with a handle made out of a piece of sheet.' " *Bowen*, 2015 IL App (1st) 132046, ¶ 24. The court further noted defendant's statement that he had the item to " 'protect himself' " provided evidence the shank was contraband. *Bowen*, 2015 IL App (1st) 132046, ¶ 24. The court affirmed the defendant's conviction for possession of contraband in a penal institution.

¶ 36 We see no reason to depart from *Bowen*'s analysis and conclusion. Under Illinois law, a shank "is generally understood to refer to a type of knife—specifically, one that is

homemade." *Bowen*, 2015 IL App (1st) 132046, ¶ 23. Through testimony from Officers Cas and Loftus, the State established the officers found what they characterized as a "shank." Cas described a shank as "a sharpened pointy edge, and there's usually a handle of some sort." He explained shanks are "improvised" or "something that has been modified"—other ways to say "homemade." Cas described the specific shank found amongst defendant's possessions as "a plastic piece with a blue bed sheet wrapped around it as a handle." Cas testified shanks were outlawed in the jail because they were dangerous items capable of harming others. Loftus also classified the object they found around defendant's bunk as a "shank." He described it as "a piece of plastic from a cup that had been sharpened down to a knife blade edge and it had a blue sheet wrapped around the handle."

¶ 37 Defendant does not challenge this evidence. He does not question either Cas's or Loftus's training or experience to classify what they found during the shakedown as a "shank." Nor does he challenge their testimony that they found the shank amongst his possessions. Rather, defendant contends the shank Officer Cas found does not qualify as contraband because it is not a weapon because it is not a knife. But Illinois law belies this argument. Courts have already determined that a shank is a homemade knife. See *Bowen*, 2015 IL App (1st) 132046, ¶ 23; *Baez*, 241 Ill. 2d at 72; *Lucas*, 151 Ill. 2d at 469. Furthermore, the Code provides that "any knife" qualifies as a weapon for purposes of defining "item of contraband." 720 ILCS 5/31A-0.1(v) (West 2022); see *Bowen*, 2015 IL App (1st) 132046, ¶ 23. Defendant's argument that a knife can only be "sharpened metal" affixed or fastened to a handle is too reductive and ultimately unrealistic. Any picnicker knows there are plastic knives. But more importantly, though the *Bowen* court described the particular shank it considered a " 'large metallic piece shaped like a knife,' " it did not focus on the shank being metal. See *Bowen*, 2015 IL App (1st) 132046, ¶ 24.

It focused on the sharp blade. See *Bowen*, 2015 IL App (1st) 132046, ¶ 24. Defendant insists that we need to construe sections 31A-0.1(v) and 1.1(b) of the Code to determine if "item of contraband" includes a "shank." We have already answered this query. We need not do it again. A shank qualifies as a knife, which is a weapon, which is contraband under the Code. Consequently, the State presented sufficient evidence for a rational factfinder to find defendant knowingly possessed contraband in a penal institution. See *Cunningham*, 212 Ill. 2d at 278.

¶ 38 B. Admission of Defendant's Statement

¶ 39 Defendant next argues the circuit court "committed plain error and defense counsel provided ineffective assistance of counsel by allowing evidence of [defendant's] admission" that he possessed the shank because it "occurred after [defendant's] sixth amendment right to counsel attached at [the] arraignment." Based on this record, we cannot agree.

¶ 40 We begin with what is clear in the law and in the record. The sixth amendment guarantees that " '[o]nce adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him.' " *People v. Martin*, 102 Ill. 2d 412, 421, 466 N.E.2d 228, 232 (1984) (quoting *Brewer v. Williams*, 430 U.S. 387, 401 (1977)). "The various methods for initiation of adversary judicial proceedings have been described as 'formal charge, preliminary hearing, indictment, information, or arraignment.' " *Martin*, 102 Ill. 2d at 419 (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)). Defendant's sixth amendment right to counsel attached on February 2, 2023, when he was arraigned on the charge of possessing contraband in a penal institution and appointed counsel. The docket entry and record of proceedings confirm this fact. So, if defendant's admission came after this hearing, then his sixth amendment right may be implicated. But the record is not clear on when defendant admitted to possessing the shank.

¶ 41 According to Loftus and Smith, defendant admitted to possessing the shank when he spoke with them in a hallway in the jail on his way back from a court appearance. To be sure, defendant premises his argument on Loftus's testimony in the preliminary hearing, where he said he spoke with defendant "in the hallway" after defendant returned "*from just being arraigned* on this charge." (Emphasis added.) So, this statement indicates the discussion occurred on February 2, 2023. During that conversation in the hallway, defendant stated he was holding the shank for someone else. However, on cross-examination, Loftus indicated the hallway admission occurred on February 3, 2023. Defense counsel asked, "And then on February 3, 2023, you and Lieutenant Smith *** spoke with [defendant]?" Loftus answered, "In the hallway, yes." The docket confirms defendant was arraigned and appointed counsel in this case at the first appearance hearing on February 2, 2023. He did not appear in court on February 3.

¶ 42 During the bench trial, Loftus gave a different date for defendant's admission. On direct examination, Loftus testified his hallway conversation with defendant occurred on February 1, 2023, the day after the January 31 shakedown. Even defense counsel's questioning on cross-examination presumed Loftus spoke with defendant on February 1, 2023, asking once, "Now, you indicated that [defendant], on the following day when you saw him in the hallway, you indicated that [defendant] said he didn't know what a shank was, correct?" At no point in his trial testimony did Loftus indicate he spoke with defendant on February 2, 2023, after the first appearance hearing or arraignment, when defendant's sixth amendment right to counsel attached.

¶ 43 Smith likewise testified the hallway encounter between himself, Loftus, and defendant, where defendant admitted possessing the shank, occurred on February 1, 2023. The State asked if Smith had contact with defendant on *the day following the shakedown*, and Smith answered "yes." There is no dispute the shakedown occurred on January 31, 2023. According to

Smith, defendant "had just been re-fingerprinted and photographed on the charges of having contraband in the facility," when Smith approached Loftus and defendant talking in the hallway. We note there are discrepancies between Loftus's and Smith's accounts of the hallway discussion. Loftus maintained defendant approached him and Smith, while Smith recalled walking up to Loftus and defendant mid-conversation. Still, both Smith and Loftus testified at trial that the conversation occurred the day after the shakedown, February 1, 2023.

¶ 44 Besides Loftus's and Smith's respective trial testimony, the common law record indicates the conversation between Loftus and defendant may very well have occurred on February 1, 2023, and not February 2, 2023. The State submitted additional discovery to the defense on February 27, 2023, which included a log itemizing video captured from the Sangamon County jail dated February 1, 2023. The video was not admitted at trial, although Smith stated he reviewed the hallway video before testifying. From this, we infer that the State submitted video of the encounter between Loftus and defendant. The video was dated February 1, 2023. Furthermore, the docket contains the following entry for February 1, 2023: "Bond Order Signed[.] Judge Perrin Chris." There is a signed bond order file-stamped February 1, 2023, in the record. This indicates the defendant did appear in court on February 1, 2023, for a bond hearing. It is possible Loftus encountered defendant after this court appearance and not the appearance on February 2, 2023.

¶ 45 All told, the record suggests three different dates for when Loftus spoke with defendant in the jail hallway and defendant admitted to holding the shank for someone else—February 1, February 2, and February 3. Defendant's argument presumes the admission occurred on February 2, 2023, after the first appearance hearing when he was arraigned. And the argument must depend upon that presumption because that is when defendant's sixth amendment right to

counsel attached. Unlike defendant, we cannot assume the admission came on February 2, 2023. The record suggests it is possible, if not probable, that defendant appeared for a bond hearing on February 1, 2023, and it was this "court appearance" defendant was returning from when Loftus spoke with him in the hallway and defendant admitted to holding the shank for someone else. Because defendant had not yet been arraigned on a charge of possession of contraband in a penal institution, his sixth amendment right to counsel had not attached on February 1, 2023. See *Martin*, 102 Ill. 2d at 419-21. Given the uncertainty in the record, we cannot reach the merits of defendant's argument the circuit court committed plain error in admitting the statement. There is no clear, obvious error when the date is unknown. See *People v. Melvin*, 2023 IL App (4th) 220405, ¶ 11, 229 N.E.3d 292 ("The threshold step in plain-error review is whether a clear or obvious error occurred."). Likewise, we cannot consider whether counsel rendered deficient performance by not moving to suppress an admission based on the sixth amendment when we do not know when the statement occurred. See *People v. Peck*, 2017 IL App (4th) 160410, ¶ 26, 79 N.E.3d 232 (describing the deferential standard for evaluating the deficient-performance prong when considering ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984)). It is defendant's burden to show a "clear or obvious error" and to provide an adequate record upon which to do so. Defendant has failed at both. See *Melvin*, 2023 IL App (4th) 220405, ¶ 11.

¶ 46 C. Cautious Instruction

¶ 47 As a matter of instruction, we elect to comment on an issue neither party raised in the circuit court below or in the briefing now on appeal. Though the parties forfeited this issue, we find it merits some attention here. See *People v. Thompson*, 238 Ill. 2d 598, 611-12, 939 N.E.2d 403, 412 (2010) (outlining rules governing forfeiture). During closing argument, defense

counsel attacked the State's case, contending the State failed to provide enough evidence to prove defendant guilty beyond a reasonable doubt. Counsel offered an analogy of buying a used car. He likened himself to a car buyer and the State as the dealer. The dealer does not answer any of the buyer's questions but implores the buyer to trust the dealer that this is a good car and will meet the buyer's needs. Counsel argued the State, like the dealer in his analogy, is asking the court to take its word that the officers found a shank around defendant's bunk and that defendant admitted to possessing it. Defense counsel emphasized the State provided no pictures, videos, fingerprints, or DNA to confirm the officers' testimony.

¶ 48 When ruling from the bench, the circuit court identified defendant's admission as a "key" piece of evidence. This is unsurprising since the State emphasized defendant's admission during the trial. The court said, "The key to me is that [defendant] admitted that it was in his possession. He admitted it was in his possession. There's absolutely nothing to contradict that." When explaining its decision, the court said, "I won't go into great detail about the car example." But then it discussed the car example, saying:

> "I suppose the way to look at that would be the question was whether or not the vehicle was in an accident before, and the dealer got up on the stand and said, 'We told Mr. Reiser that,' and he said, 'Okay, I understand,' and then that's it. *Mr. Reiser never took the stand and said, 'They never said that to me.'* That's really the example here, I think. There's no evidence to contradict that he admitted that it was, that he possessed it. So, I do believe the State has proven their case beyond a reasonable doubt that [defendant]

possessed contraband in a penal institution. So, I find him guilty at this point of the sole count in this matter." (Emphasis added.)

We will not mince words—we find the court's comments troubling because they constitute error and verge upon reversible error. See *People v. Moore*, 279 Ill. App. 3d 152, 157, 663 N.E.2d 490, 495 (1996) ("Comment on the exercise of the right to remain silent may serve as the sole basis for the reversal of a conviction."). The court improperly commented on defendant's decision not to testify in his defense. "It is elemental that the accused need not testify in his own behalf; the accused need present no evidence at all." *People v. Bean*, 109 Ill. 2d 80, 97, 485 N.E.2d 349, 357 (1985). Defendants enjoy the right to silence, which cannot be used against them. To that end, our supreme court has held: " 'Both by statute [citation] and by the Federal constitution [citation], the court and the prosecutor are *forbidden* from making any direct reference to a defendant's failure to testify.' " (Emphasis added.) *People v. Ramirez*, 98 Ill. 2d 439, 450-51, 457 N.E.2d 31, 36 (1983) (quoting *People v. Hopkins*, 52 Ill. 2d 1, 6, 284 N.E.2d 283, 285 (1972)); see *Bean*, 109 Ill. 2d at 97 ("The trial judge and the prosecution are forbidden to comment upon the accused's failure to take the stand."). The law forbids comment on a defendant's silence because factfinders should not "draw negative inferences from an accused's exercise of the privilege against self-incrimination." *Bean*, 109 Ill. 2d at 97. Allowing negative inferences from defendants' exercise of a constitutional right diminishes the right to the point where it could become "meaningless." *Bean*, 109 Ill. 2d at 97.

¶ 49 In this bench trial, the circuit court was the factfinder, which makes the comments all the more alarming. The court should have never taken on counsel's civil analogy and put it into a criminal trial context, but it did. It was the court who introduced the concept of "taking the stand" to counsel's inapt used car analogy. It was the court who reduced the example to the

dealer who "got up on the stand" and gave his story and the buyer who "never took the stand" to deny the salesman's testimony. In so doing, the court impermissibly referenced defendant's constitutional right to stand silent against the State's prosecution. See *Ramirez*, 98 Ill. 2d at 450-51. In an abundance of caution, courts should avoid any reference to a defendant's decision not to testify.

¶ 50 The timing of the circuit court's comments only adds to the problem. After identifying defendant's admission as "the key" to the case and before expressly finding "there's no evidence to contradict" defendant's admission, sandwiched in those few seconds, the court (the factfinder) gave an example of a person choosing not to testify to rebut the opposing party's case. The timing of the court's statements undermines any argument that it amounted to an indirect reference to defendant's decision not to testify because it was placed in a hypothetical. See *Ramirez*, 98 Ill. 2d at 450-51. For a judge to insert unprompted the example of a party not taking the stand to rebut his opponent when rendering judgment against a criminal defendant can only be a direct reference to a defendant's decision not to testify. Ordinarily, we presume circuit courts know the law and apply it correctly. *People v. Phillips*, 392 Ill. App. 3d 243, 265, 911 N.E.2d 462, 483 (2009). For example, when the court acts as the factfinder in a bench trial and admits inadmissible evidence for a limited purpose, we would presume the court considers evidence only for its proper purposes. See *People v. Deenadayalu*, 331 Ill. App. 3d 442, 450, 772 N.E.2d 323, 329 (2002). We make no such presumptions now. Confessions are powerful pieces of evidence. *People v. Simpson*, 2015 IL 116512, ¶ 36, 25 N.E.3d 601. They are even more powerful when someone highlights how a defendant did not recant or rebut his prior confession. Ultimately, even from this cold record, it appears the court drew a negative inference from defendant's decision not to testify and did not merely observe how defendant's admission went

unrefuted. See *Bean*, 109 Ill. 2d at 97. Although we are confident this constitutes a clear and obvious error, we remain cautious in addressing it.

¶ 51 As we noted *supra*, the parties forfeited this issue. They did not raise it in the circuit court, nor did they raise it on appeal. *Thompson*, 238 Ill. 2d at 611-12. We have discretion to relax the forfeiture rules to address forfeited issues further. See *People v. McLaurin*, 235 Ill. 2d 478, 485-89, 922 N.E.2d 344, 349-51 (2009) (discussing forfeiture principles and when courts can relax the forfeiture rule); see also *People v. Holland*, 2023 IL App (4th) 220384, ¶¶ 36-38, 229 N.E.3d 328. Nevertheless, we elect not to exercise our discretion to parse whether this error amounts to reversible error. Judicial restraint compels this approach. Because neither party asks us to address this issue, we will not commandeer the case. More importantly, without the benefit of briefing and argument from the parties, we are left to labor over what further analysis is appropriate, if not required, *i.e.*, the *Sprinkle* principle (see *People v. Sprinkle*, 27 Ill. 2d 398, 189 N.E.2d 295 (1963)), first- or second-prong plain error review, or harmlessness beyond a reasonable doubt. Should defendant decide to pursue this issue, we think it best litigated in a petition for postconviction relief.

¶ 52 III. CONCLUSION

¶ 53 For the reasons stated, we affirm the circuit court's judgment.

¶ 54 Affirmed.