

No. 1-10-1617

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 C 660 151
	)	
RODELL NUNLEY,	)	The Honorable
	)	Brian K. Flaherty,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE ROCHFORD delivered the judgment of the court.  
Presiding Justice Hoffman and Justice Hall concurred with the judgment.

**ORDER**

¶ 1 **Held:** Defendant was not denied a fair trial by the State's comments during closing argument regarding his invocation of his right to remain silent; the trial court did not abuse its discretion in allowing evidence of an outstanding, unrelated arrest warrant; judgment affirmed.

¶ 2 Following a jury trial, defendant, Rodell Nunley, was convicted of burglary and sentenced to three years' imprisonment. On appeal, defendant contends his conviction should be reversed and his cause remanded for a new trial because the State made improper comments during its closing argument, and the trial court abused its discretion in allowing the State to introduce evidence of other

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crimes. We affirm.

¶ 3 Prior to trial, defendant filed a motion *in limine* requesting, *inter alia*, the State be barred from introducing evidence he was suspected of, or arrested for committing, charged or uncharged burglaries of other establishments. The State responded it had no intention of eliciting evidence of other burglaries, and the court granted the motion.

¶ 4 The State then asked whether it could show there was an arrest warrant for defendant and what police did in relation to it, without disclosing the nature of the warrant. Defense counsel responded he did not see the purpose of showing there was a warrant, and, whether or not there was a valid arrest, was not the jury's concern. The court stated the warrant would explain to the jury why police did what they did as opposed to simply picking up defendant for no reason whatsoever. The court indicated it would allow the State to introduce the fact that police arrested defendant pursuant to a warrant, so there would be no question as to the timing of the arrest 10 months after the incident.

¶ 5 At trial, Daun DePaul testified that in March 2006, she was the security manager for the Kmart store in Lansing, Illinois. In the early morning hours of March 10, 2006, Kevin Cservenyak, who is a Kmart overnight stocking employee, called Ms. DePaul, and told her the jewelry cases had been broken into. Ms. DePaul went to the store where she noticed the jewelry case upon which she had conducted an audit the day before, was empty. Based on her prior audit, Ms. DePaul determined \$30,444 in jewelry had been stolen.

¶ 6 Ms. DePaul further testified police asked to see the store's video surveillance of the jewelry department. The video showed an unknown black male in the jewelry department at 3 a.m. on March 10, 2006. Mr. Cservenyak and Ms. DePaul testified they could not see the man's face in the

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video, but knew he did not work for the store. Mr. Cservenyak explained he knew the person was not a Kmart employee because he knew all the employees. Ms. DePaul explained she knew he was not an employee because the only people that are supposed to be in the store at the time in question were Mr. Cservenyak and the maintenance man. Ms. DePaul further testified that based on the video, the unknown man in the store stood approximately 5-feet-10-inches tall and weighed approximately 160 pounds.

¶ 7 Mr. Cservenyak testified he worked the 10 p.m. to 6 a.m. stocking shift for the Lansing, Illinois Kmart. In the early morning hours of March 10, 2006, he was taking a cigarette break at the front of the store when he saw a reflection of someone wearing green jogging pants. He believed it was the loss prevention employee whom he had seen earlier that night wearing green jogging pants.

¶ 8 Mr. Cservenyak further testified the lights in the store are turned off at 3 a.m. every morning, and it was his responsibility to turn them back on. When the lights turned off at 3 a.m., Mr. Cservenyak went to the back of the store, turned the lights on, and, as he was walking back to the front of the store, he saw a black male running in the opposite direction, but did not see his face. Mr. Cservenyak continued to the front of the store, and two minutes later, the store alarm was set off. Shortly thereafter, Lansing police arrived and secured the store. After police left, Mr. Cservenyak noticed a jewelry case had been broken into and jewelry was missing, so he called police back to the store.

¶ 9 Dawn Fliszar testified that in 2006, she was an evidence technician for the Lansing Police Department. On March 10, 2006, she went to the Kmart store where she first viewed the video

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surveillance which showed a man without gloves on taking jewelry. She observed the areas he touched, and focused on those sections in looking for fingerprints. Ms. Fliszar further testified when she was in the jewelry department, she observed there had been a forced entry into one of the jewelry cases. Ms. Fliszar lifted several latent fingerprints from the jewelry department, 10 of which were submitted to the Illinois State Police crime lab (crime lab).

¶ 10 Lauren Wicevic testified she is a latent-print examiner for the Illinois State Police, and she examined the 10 latent-fingerprint lifts taken from the Kmart store. Ms. Wicevic entered the suitable prints into the automated fingerprint identification system (AFIS) which is a computerized database of images of fingerprints. AFIS came up with 10 candidates whose prints Ms. Wicevic then compared to the suitable ones lifted at the Kmart store. Based on one of the candidates matching the latent fingerprints, Ms. Wicevic requested a print card from the Bureau of Identification (bureau) for further comparison. The bureau sent her a card for defendant which she compared to the latent fingerprints sent to her from the Kmart store, and found six of the latent-fingerprint lifts matched the fingerprints on defendant's card.

¶ 11 Ms. Wicevic further testified she asked the Lansing Police Department to send her a current inked fingerprint card for defendant. On January 29, 2007, she received that card, compared it to the card she had received from the bureau, and determined the prints from both cards were from defendant. Ms. Wicevic also compared the current inked print card to the prints lifted at the Kmart store, and determined they were made by the same person, namely, defendant.

¶ 12 Lansing Detective Tony Curtis testified he was assigned to investigate the Kmart burglary in March 2006. He observed the video surveillance, but was unable to make out the facial

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characteristics of the man in the video. Based on the lack of information as to who committed the crime, Detective Curtis suspended the investigation. In November 2006, he was informed by the crime lab that six of the latent fingerprints taken from the crime scene matched those of defendant. The investigator located as many addresses as he could for defendant, but did not find him at any of them.

¶ 13 Detective Curtis further testified defendant had on file in the LEADS database a warrant from another police agency. When the State asked Detective Curtis what the LEADS database is, counsel objected. During a sidebar, counsel indicated he did not want the officer questioned about other warrants. The court noted it already overruled counsel's objection to such testimony, and the State indicated it just wanted to ask Detective Curtis the purpose of the LEADS database, to which defense counsel had no objection. Detective Curtis then explained to the jury that the LEADS database allows police agencies to communicate with one another, and on January 18, 2007, he added an entry to defendant's file that he wanted to discuss his investigation.

¶ 14 Lansing Police Officer Kevin LaPointe testified that at 12:30 a.m. on January 24, 2007, he was conducting random license plate registration checks at the Pioneer Motel which is two blocks from the Kmart store. One of the registration checks listed a warrant out of Forest Park, Illinois for defendant. Based on this information, the officer placed defendant, who was staying at the motel, under arrest.

¶ 15 On that same date, Detective Curtis was notified defendant had been taken into custody. Detective Curtis testified he met with defendant and read him his *Miranda* rights. Defendant signed a waiver of these rights, and Detective Curtis asked him if he worked for Kmart. Defendant said he

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did not and that he had never been in that store. When asked why his fingerprints would be present on the jewelry cases of that store, defendant responded he had no idea why they would be there. Detective Curtis then showed defendant the fingerprint identification report completed in the Kmart burglary case. When asked if he was the person listed in the report, defendant responded "it appears to be." Defendant then "terminated the interview," before Detective Curtis could question him as to whether he committed the burglary. Detective Curtis later did an ink card of defendant's fingerprints which he submitted to the crime lab.

¶ 16 During closing arguments, the State noted, in relevant part, defendant "terminate[d] the interview" with police when shown the fingerprint report. The defense then argued, *inter alia*, that defendant never admitted to committing the burglary. In rebuttal, the State noted defendant said he was never inside the store, and argued that when he was shown the fingerprint report, he had nothing else to say, which indicated a "consciousness of guilt." At that point, defense counsel objected, but was overruled. The State then argued defendant "knew it was over and he terminated that interview, so he didn't have to say he was there, because now we know."

¶ 17 Following closing arguments, the court instructed the jury, in relevant part, that defendant's refusal to testify "must not be considered," in any way, in arriving at their verdict. The jury subsequently found defendant guilty of burglary beyond a reasonable doubt.

¶ 18 On appeal, defendant first claims the State improperly commented on his right to remain silent three times during its closing argument. The three objectionable comments, as they appear in the order of the State's closing, are as follows: (1) defendant terminated the interview; (2) defendant's refusal to comment further indicated his consciousness of guilt; and (3) defendant terminated the

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interview because he knew the interview was over and he did not have to verbalize what the state already knew. The State maintains that because defendant only objected to the second comment, he failed to preserve this issue for review as to the other comments. Defendant asserts, however, a violation pursuant to *Doyle v. Ohio*, 426 U.S. 610 (1976), *i.e.*, the State improperly used defendant's invocation of his right to remain silent to suggest his guilt, in which waiver is inapplicable. *People v. Dominique*, 86 Ill. App. 3d 794, 805 (1980).

¶ 19 The record shows defendant objected at trial to the second comment and raised the matter in a post-trial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). The first comment, that defendant terminated the interview after being shown the fingerprint report, was a recitation of what transpired with Detective Curtis and police procedure, which is permissible. *People v. Rivera*, 409 Ill. App. 3d 122, 134 (2011). As for the third comment, counsel was not required to object to this because counsel had already objected when the issue became apparent with the second comment. *Nave v. Rainbo Tire Service, Inc.*, 123 Ill. App. 3d 585, 589-90 (1984). Accordingly, we find the issue is not waived. *Id.* at 590.

¶ 20 Substantively, the State maintains its comments were proper because defendant did not invoke his right to remain silent. The State claims Detective Curtis' testimony, that defendant terminated the interview after he showed him the fingerprint report identifying him, does not indicate defendant invoked his right to remain silent. We disagree.

¶ 21 The right to remain silent may be invoked verbally or through conduct that clearly indicates a desire to end all questioning. *People v. Diaz*, 377 Ill. App. 3d 339, 347 (2007). If verbal, the demand to end the interrogation must be specific. *Id.*

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¶22 In this case, the record does not reflect whether defendant verbally indicated his desire or not. It does show, however, defendant terminated the interview with Detective Curtis, and this termination ended the interview such that the detective could not ask any more questions. The detective specifically testified defendant had terminated the interview after he showed him the fingerprint report identifying him, and he did not get to question whether or not defendant committed the burglary. This evidence is sufficient to show defendant invoked his right to remain silent (*People v. Nielson*, 187 Ill. 2d 271, 287 (1999)), and we reject the State's contrary contention.

¶23 In turning to the propriety of the prosecutor's closing argument, we observe the law gives the prosecutor wide latitude in argument, and he may comment on facts and legitimate inferences that may be drawn therefrom. *People v. Campbell*, 332 Ill. App. 3d 721, 727 (2002). He also may respond to comments made by defense counsel. *Id.* In reviewing allegations of prosecutorial misconduct, the arguments of the prosecutor and defense counsel must be examined in their entirety and allegedly improper comments must be placed in the proper context. *Id.* We briefly note that due to a conflict between two supreme court cases (*People v. Wheeler*, 226 Ill. 2d 92 (2007); *People v. Blue*, 189 Ill. 2d 99 (2000)), it is unclear whether we review this issue *de novo* or for an abuse of discretion. However, we need not determine which is the proper standard of review because the result here is the same under either. *People v. Woods*, No. 1-09-1959, slip op. at 10-11 (2011); *People v. Raymond*, 404 Ill. App. 3d 1028, 1060 (2010); *People v. Phillips*, 392 Ill. App. 3d 243, 274-75 (2009).

¶24 In this case, defendant contends the State improperly commented on his right to remain silent during its closing argument. While it is generally error to comment on defendant's post-arrest

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silence, it is not error to elicit a complete recitation of police procedure, even if it refers to defendant's exercise of his right to remain silent, as long as the recitation is not argued to be indicative of guilt. *Rivera*, 409 Ill. App. 3d at 134.

¶ 25 Here, the State essentially argued defendant's right to remain silent was indicative of guilt where it stated his invocation of his right to remain silent was "consciousness of guilt." The State then further argued defendant's silence was indicative of guilt where it stated defendant "knew it was over and he terminated that interview, so he didn't have to say he was there, because now we know."

¶ 26 That said, the record shows the State's comments were made in response to defendant's closing argument that he never admitted to committing the burglary. Defendant clearly used his silence as evidence of his innocence thereby inviting the State's response that his silence was indicative of guilt, and, as a result, defendant cannot claim any error. *People v. Gonzalez*, 212 Ill. App. 3d 839, 844 (1991). Moreover, the trial court instructed the jury that defendant's refusal to testify must not be considered, in any way, in arriving at its verdict. *Id.* There was also strong evidence of defendant's guilt where he claimed he was not an employee of the Kmart store, or ever inside of it, yet his fingerprints were found on the jewelry cases where the contents were removed. *Id.* Under these circumstances, we find the State's comments did not prejudice defendant or deprive him of a fair trial. *Id.*

¶ 27 Defendant next claims he is entitled to a new trial because the trial court abused its discretion in allowing evidence of other crimes. He maintains the evidence of an outstanding arrest warrant for an unrelated crime was other-crimes evidence which prejudiced him.

¶ 28 We observe, contrary to the State's contention, defendant preserved this issue for review

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when he filed a motion *in limine* to exclude it, objected at trial, then included it in a post-trial motion. *People v. Maldonado*, 398 Ill. App. 3d 401, 415-16 (2010). The State further contends, however, that the outstanding warrant does not constitute other-crimes evidence because it could have been for outstanding child support or failure to appear before the grand jury as a witness. An outstanding, unrelated arrest warrant could suggest other-criminal activity, and, therefore, we may review it under the principles used to determine whether other-crimes evidence is admissible. *People v. Fauntleroy*, 224 Ill. App. 3d 140, 148-49 (1991).

¶ 29 The decision to admit other-crimes evidence is within the sound discretion of the trial court. *Id.* at 148. Other-crimes evidence is inadmissible to show defendant had a propensity to engage in criminal activity, but is admissible to show the steps in an investigation of a crime and the events leading up to an arrest when necessary and important to fully explain the State's case. *People v. Lewis*, 165 Ill. 2d 305, 346 (1995). However, other-crimes evidence is not admissible merely to show how the investigation unfolded unless it is relevant to connect defendant with the crimes for which he is tried. *Id.* This limitation exists to prevent the risk of prejudice to defendant. *Id.* at 347.

¶ 30 Here, the narrative that defendant was arrested on an outstanding warrant illustrated to the jury the steps police took in the investigation, and how defendant came to be identified, arrested and charged with the crime almost a year after it had occurred. In addition, the nature of the underlying crime for which the warrant was issued was not disclosed to the jury. Under these circumstances, we find the evidence presented did not have a tendency to over-persuade the jury on the issue of defendant's guilt, and there was no abuse of discretion in the trial court's ruling allowing it. *Id.*

¶ 31 In light of the foregoing, we affirm the judgment of the circuit court of Cook County.

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¶ 32 Affirmed.