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No. 3-10-0002

Order filed June 10, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Plaintiff-Appellant,)	Will County, Illinois.
)	
v.)	No. 09-CF-782
)	
DAVID A. HELSTERN,)	Honorable
)	Carla Policandriotes,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justice Schmidt concurred in the judgment.
Justice Wright specially concurred.

ORDER

Held: Even if certain hearsay testimony presented by the prosecution during grand jury proceedings created the false impression that the State's witness was an occurrence witness, such prosecutorial misconduct would not justify the dismissal of the indictment because it did not cause actual and substantial prejudice to the defendant.

The defendant was charged by indictment with aggravated driving while his driver's license was revoked. The circuit court found that a portion of the hearsay testimony presented to the grand jury by the State's witness was misleading and granted the defendant's motion to

dismiss the indictment. The State filed a timely motion to reconsider, which the circuit court denied. This appeal followed.

BACKGROUND

The defendant was charged by indictment with driving a motor vehicle while his driver's license was revoked in violation of section 6-303(d-3) of the Illinois Vehicle Code (625 ILCS 5/6-303 (West 2008)). Because the defendant had three prior convictions for driving while his license was revoked, he was charged with an aggravated offense (a Class 4 felony). 625 ILCS 5/6-303(d-3) (West 2008).

The defendant moved to dismiss the indictment. He argued that his right to due process was violated because the testimony of Joliet Police Detective Ronald Nagra, the only witness to testify during the grand jury proceedings, created the false impression that Detective Nagra was the arresting officer when, in fact, he was not present at the time of the defendant's arrest. The transcript of the grand jury proceedings reveals that Nagra testified as follows:

“Q. Once again, Officer, would you please state your name?

A. Ronald Nagra.

Q. You understand you're still under oath; is that correct?

A. Yes.

Q. And on February 17th of '09, at Willow Lakes Drive at *** Cedar Lakes Court in Joliet, was defendant pulled over for driving with a rear window through which you could not see?

A. Yes.

Q. His driver's license was revoked for a prior DUI conviction; is that correct?

A. Yes.

Q. Defendant has three prior convictions for driving while license revoked; is that correct?

A. Yes.”

This represents the entirety of Nagra’s testimony before the grand jury.

The State stipulated that the defendant was pulled over and arrested by Joliet Police Officer Robert Anderson, that Nagra was not present at the time of the defendant’s arrest on February 17, 2009, and that Nagra never saw the rear window of the defendant’s vehicle on that date. The defendant argued that the indictment should be dismissed because Nagra’s testimony falsely suggested that Nagra was an occurrence witness rather than a hearsay witness. In response, the State noted that indictments may be based on hearsay testimony and argued that Nagra did not state that he was the arresting officer or otherwise attempt to mislead the grand jury. The State also argued that the defendant’s argument was “irrelevant” because there was sufficient evidence presented during the grand jury proceedings to support the indictment.

The circuit court granted the defendant’s motion. Although it acknowledged that “the nature of the underlying facts was not of issue,” the court found “the manner in which the proceedings were presented before the Grand Jury” problematic. The court recognized that it was “not uncommon” for the State to present testimony from officers who relied upon police reports or traffic citations issued by other officers. However, it stated that “[g]enerally when that is done, there is a representation to the Grand Jury of how this particular [testifying] officer under oath has acquired his information.” The court went on to say that “the issue here was whether or not the use of the word, ‘you,’ would otherwise have been in a position to mislead the jury

relative to the officer's *** personal ability to observe or otherwise present sworn testimony.” For this reason, the court dismissed the indictment. The court did not indicate whether the dismissal was with or without prejudice.

The State filed a timely motion to reconsider the court's ruling. In its motion, the State noted that an indictment may be dismissed on due process grounds only if the due process violation is “unequivocally clear” and results in “actual and substantial prejudice” to the defendant, which occurs only if the grand jury would not have indicted the defendant but for the due process violation. The State argued that the alleged due process violation in this case did not result in actual and substantial prejudice to the defendant because there was “ample evidence” that the jury would have indicted the defendant absent the offending testimony. The State noted that the unchallenged portions of Nagra's testimony established the defendant drove his vehicle while his driver's license was revoked and that he had three prior convictions for driving while his license was revoked. The State argued that the grand jury could have indicted the defendant based on this evidence alone. Moreover, the State noted that the defendant did not allege that there were any discrepancies between Officer Anderson's police report and Nagra's testimony or that Nagra had mischaracterized the observations of an actual eyewitness. The State argued that this distinguished the defendant's case from cases wherein this court has upheld the dismissal of an indictment on due process grounds.

The circuit court denied the State's motion to reconsider. It concluded that the cases cited by the parties established that “though hearsay testimony may be presented before a Grand Jury, the State has the burden of making sure that testimony is not misleading or false ***.” The court found that the State should have informed the grand jury of the “manner in which *** the

testimony was being presented” so that the grand jury could have had the actual arresting officer brought before them to testify under oath and evaluated his credibility if they so chose. The court rejected the State’s argument that the denial of the defendant’s due process rights did not cause actual and substantial prejudice because it found that “we don’t know at which point or on what evidence that was presented the Grand Jury relied upon,” and added that it “[was] not [the court’s] job” to “make a finding of what the Grand Jury would have done or should have done.” Accordingly, the circuit court upheld its dismissal of the indictment. Once again, however, the court did not specify whether it was dismissing the indictment with or without prejudice.

This appeal followed.

ANALYSIS

The issue on appeal is whether the circuit court committed reversible error when it dismissed the indictment. As a preliminary matter, we must determine whether we have jurisdiction over this appeal. Although the parties do not question our jurisdiction, we have an independent obligation to consider our jurisdiction. *Ferguson v. Riverside Medical Center*, 111 Ill. 2d 436, 440 (1985); *People v. Mattis*, 367 Ill. App. 3d 432, 435 (2006). In this case, the circuit court did not specify whether it dismissed the indictment with or without prejudice. In a civil case, an order dismissing a complaint without prejudice is not appealable. *Paul H. Schwendener, Inc. v. Jupiter Electric Co.*, 358 Ill. App. 3d 65, 73 (2005); see also *Mattis*, 367 Ill. App. 3d at 435. However, the State may appeal an order dismissing an indictment for prosecutorial misconduct even if the dismissal is without prejudice. *Mattis*, 367 Ill. App. 3d at 435. In determining whether such an order is appealable, the controlling question is whether the order has the “substantive effect” of dismissing a charge. *People v. Harris*, 68 Ill. App. 3d 12,

15-16 (1979) (quoting Supreme Court Rule 604(a)). Thus, an order dismissing an indictment should be treated as appealable unless the circuit court indicates that further proceedings are contemplated. *Harris*, 68 Ill. App. 3d 12, 15-16. For example, a dismissal would not be appealable if the circuit court gives the State a specific amount of time to file an amended charge. *Harris*, 68 Ill. App. 3d at 15.

In this case, the circuit court did not contemplate that the State would file an amended charge. To the contrary, the transcripts of the court's rulings reveal that the court expressly contemplated that the State would appeal its order dismissing the indictment. Accordingly, even though the court did not explicitly state that the dismissal was with prejudice, we have jurisdiction to decide this appeal. *Mattis*, 367 Ill. App. 3d at 435; *Harris*, 68 Ill. App. 3d at 15-16.

Turning to the merits, we begin our analysis by noting that challenges to grand jury proceedings are limited. *Mattis*, 367 Ill. App. 3d at 435. Generally, a defendant may not challenge the validity of an indictment returned by a legally constituted grand jury. *People v. DiVincenzo*, 183 Ill. 2d 239, 255 (1998). The character of the evidence presented to the grand jury does not affect the validity of the indictment. *People v. Fassler*, 153 Ill. 2d 49, 60 (1992); *People v. Sampson*, No. 3-10-0237, slip op. at 6 (Feb. 9, 2011). An indictment may be based solely upon hearsay (*People v. Fassler*, 153 Ill. 2d 49, 60 (1992)), and the prosecutor is not obligated to inform the grand jury that a witness's testimony constitutes hearsay. *People v. Creque*, 72 Ill. 2d 515, 523-24 (1978); *People v. Holmes*, 397 Ill. App. 3d 737, 742 (2010); *People v. Pulgar*, 323 Ill. App. 3d 1001, 1010 (2001).

However, a defendant may challenge an indictment that is procured through prosecutorial misconduct (*DiVincenzo*, 183 Ill. 2d at 255), and a circuit court may dismiss an indictment where a prosecutor's misconduct causes the defendant to suffer a prejudicial denial of due process. *DiVincenzo*, 183 Ill. 2d 239 at 257-58; *People v. Oliver*, 368 Ill. App. 3d 690, 694 (2006); *People v. Hunter*, 298 Ill. App. 3d 126, 130 (1998). The due process rights of a defendant may be violated if the prosecutor deliberately or intentionally misleads the grand jury, uses known perjured or false testimony, or "presents other deceptive or inaccurate evidence." *DiVincenzo*, 183 Ill. 2d at 257. For example, although the State is generally not obligated to inform the grand jury that a witness's testimony constitutes hearsay, a due process violation may occur if a hearsay witness explicitly or implicitly suggests that he is testifying as an occurrence witness. See, e.g., *Oliver*, 368 Ill. App. 3d at 695 (finding a due process violation where the witness "testified as if he were conveying his personal observations rather than those of someone else" even though he did not expressly state that he had personally observed the events in question); cf. *Creque*, 72 Ill. 2d at 524 (finding no due process violation where the grand jury "could not *** have thought from the investigator's [testimony] that he was relating his personal observations of the incident.")

However, a prosecutor's presentation of such deceptive or inaccurate evidence does not *per se* warrant dismissing an indictment. *DiVincenzo*, 183 Ill. 2d at 256; *Mattis*, 367 Ill. App. 3d at 435. To justify the dismissal of an indictment, the denial of due process must be "unequivocally clear" and the resulting prejudice must be "actual and substantial." *Oliver*, 368 Ill. App. 3d at 695; *People v. Maxson*, 285 Ill. App. 3d 585, 597 (1996) (ruling that "courts must proceed with restraint and dismiss the indictment only when the [due process] violation is clear

and has been found with certainty,” and only when the defendant has carried the “heavy burden of showing an actual and substantial prejudice to him”).

In order to show prejudice sufficient to warrant dismissal, a defendant must show that the prosecutorial misconduct at issue “affected the grand jury’s deliberations.” *DiVincenzo*, 183 Ill. 2d at 257; *Mattis*, 367 Ill. App. 3d at 435. This occurs only if the grand jury would not have indicted the defendant but for the misconduct. *Oliver*, 368 Ill. App. 3d at 696-97. If the evidence was strong enough that the grand jury would have indicted the defendant despite the prosecutor’s misconduct, the misconduct was not prejudicial. *Oliver*, 368 Ill. App. 3d at 697. However, if the evidence was so weak that the misconduct induced the grand jury to indict, prejudice is shown. *Oliver*, 368 Ill. App. 3d at 697. Accordingly, an indictment may be dismissed based upon a hearsay witness’s misleading suggestion that he was an occurrence witness only if the misleading testimony was “crucial to the determination of probable cause” such that the grand jury would not have indicted the defendant without that misleading testimony. See *Oliver*, 368 Ill. App. 3d at 698-99. Where, as here, the circuit court does not determine any disputed issue of fact and bases its decision to dismiss the indictment solely on the transcript of grand jury proceedings, we review *de novo* whether defendant was denied due process and, if so, whether that denial was prejudicial. *Oliver*, 368 Ill. App. 3d at 695; *People v. Mattis*, 367 Ill. App. 3d 432, 435-36 (2006).

The circuit court’s dismissal of the indictment in this case cannot be upheld under these rigorous standards. First, it is not “unequivocally clear” that any portion of Nagra’s testimony violated the defendant’s due process rights. The defendant argues that, by answering “yes” when the prosecutor asked him whether the defendant was pulled over for driving with a rear window

“through which you could not see,” Nagra created the false impression that he was the arresting officer. However, as used in this context, the word “you” is ambiguous; it can mean either the specific person being addressed (Nagra), or a generic, unspecified person (*i.e.*, “one”). Thus, although it is possible that the grand jury could have been misled by Nagra’s answer to this question, it is equally possible that the use of the word “you” in the question was intended by the prosecutor and interpreted by Nagra and the members of the grand jury to mean “through which *one* could not see,” rather than “through which *you, Detective Nagra*, could not see.” In other words, the grand jury could have reasonably believed that the prosecutor was inquiring as to the reason for the traffic stop generally, not asking whether Nagra himself could see through the defendant’s window at the time. Moreover, unlike the hearsay witness in *Oliver*, Nagra did not expressly claim his testimony was based on personal observations. Thus, this case does not present the type of clear and unequivocal due process violation that would justify the dismissal of the indictment. See *Sampson*, No. 3-10-0237, slip op. at 7-8.

Further, even assuming *arguendo* that Nagra’s testimony created the false impression that he was testifying as an occurrence witness, the defendant cannot show that he suffered “actual and substantial” prejudice as a result. Nagra testified that the defendant was pulled over while driving in Joliet on February 17, 2009, that his driver’s license was revoked at that time, and that he had three prior convictions for driving under the influence. This testimony, standing alone, presented sufficient probable cause to indict the defendant for an aggravated offense of driving while his driver’s license was revoked. The defendant does not contest the accuracy of this testimony. Nor does he claim that Nagra misrepresented or mischaracterized anything in Officer Anderson’s police report. Instead, he merely claims that Nagra’s response to the prosecutor’s

question about the reason for the traffic stop falsely suggested that Nagra was the arresting officer. However, Nagra's response to that question had no relevance to the grand jury's determination of probable cause to indict him for the charge at issue and could not have affected the grand jury's deliberations on that matter. The relevant question was not the reason for the traffic stop, but whether the defendant was driving while his license was revoked and whether he had prior convictions for that offense. The defendant does not claim that Nagra's testimony regarding those facts was false. Accordingly, even if Nagra's response regarding the reason for the traffic stop is disregarded, the additional evidence before the grand jury—the accuracy of which is not disputed—was sufficient to support the indictment.¹ Under these circumstances, the

¹ That distinguishes this case from cases wherein our appellate court has found that deceptive suggestions in a witness's hearsay testimony substantially prejudiced a defendant. See, e.g., *Oliver*, 368 Ill. App. 3d at 697 (affirming dismissal of indictment where the testifying witness "mischaracterized the observations of the actual eyewitness so as to establish probable cause where none existed"). Here, as the defendant concedes, the portions of Nagra's testimony that supported the grand jury's determination of probable cause were accurate and did not mischaracterize anything in Officer Anderson's police report. Thus, the grand jury would have indicted the defendant regardless of whether it knew that Nagra's testimony was hearsay. See generally *Oliver*, 368 Ill. App. 3d at 697 (noting that "if the only defect in [the witness's testimony] were that its hearsay nature was concealed, we would be hard-pressed to determine that, had the grand juries known that the testimony was hearsay, they would not have indicted defendant").

defendant cannot show prejudice sufficient to warrant dismissal of the indictment. See, *e.g.*, *People v. Hruza*, 312 Ill. App. 3d 319, 323 (2000).

The defendant also argues that he suffered actual and substantial prejudice because the prosecutor failed to comply with section 112-4(b) of the Code of Criminal Procedure of 1963 (the Criminal Code) (725 ILCS 5/112-4(b) (West 2008)). That section provides, in pertinent part, that “[t]he Grand Jury has the right to subpoena and question any person against whom the State’s Attorney is seeking a Bill of Indictment, or any other person,” and it requires the State’s Attorney to inform the grand jury of this right “[p]rior to the commencement of its duties and, again, before the consideration of each matter or charge before [it].” (725 ILCS 5/112-4(b) (West 2008)). The defendant argues that by improperly suggesting that Nagra was the arresting officer rather than a hearsay witness, the prosecutor effectively failed to notify the grand jury of its right to call the actual arresting officer or other actual occurrence witnesses.

The defendant did not raise this argument before the circuit court, and both of the parties analyze the issue under the rubric of plain error in their briefs on appeal. However, that analysis is inappropriate here. The plain error doctrine is an exception to the general rule that a criminal defendant forfeits the right to challenge a trial court’s error on appeal when he fails to object to the error during the trial and in a posttrial motion. However, as the appellee in this matter, the defendant is seeking to *uphold* the circuit court’s judgment; he is not arguing that the circuit court committed *any* error, “plain” or otherwise. Because the defendant is the appellee in this case, we may review any arguments he raises in support of the circuit court’s judgment—even those raised for the first time on appeal—if they are based on facts contained in the record. *People v. Laliberte*, 246 Ill. App. 3d 159, 173 (1993) (although an issue not presented to or

considered by the trial court cannot be raised by the *appellant* for the first time on review, “an appellee may sustain the lower court decree by any argument based upon issues appearing in the record”) (quoting *In re Estate of Leichtenberg*, 7 Ill. 2d 545, 549 (1956)); see also *Jinkins v. Lee*, 337 Ill. App. 3d 403, 417 (2003) (“an appellee *** may urge any point in support of the judgment on appeal, as long as a factual basis for such point was before the trial court”) (quoting *Shaw v. Lorenz*, 42 Ill. 2d 246, 248, 246 N.E.2d 285 (1969)). The defendant appears to base his new argument entirely on Nagra’s testimony, which is in the record. We will therefore address the merits of the defendant’s argument.

As a preliminary matter, we note that defendant does not appear to be arguing that the prosecutor actually failed to inform the grand jury of its right to subpoena witnesses prior to the commencement of its duties and that such failure is an independent ground for dismissing the indictment. Rather, he seems to argue that Nagra’s suggestion that he was the arresting officer prevented the grand jury from fully understanding and exercising its right to call actual occurrence witnesses (regardless of whether the prosecutor formerly informed the grand jury of that right prior to the proceedings), and that this amounted to a prejudicial denial of due process. Any argument that the prosecutor actually failed to inform the grand jury of its right to subpoena witnesses prior to the commencement of its duties would not be based on facts in the record and would therefore be unreviewable. In any event, any such argument would fail. “The burden of showing [an] irregularity in grand jury proceedings rests upon the defendant and may not be based upon speculation.” *In re May 1991, Will County Grand Jury*, 216 Ill. App. 3d 1033, 1034 (1991), *aff’d in part and rev’d in part on other grounds*, 152 Ill. 2d 381 (1992) (quoting *People v. Haag*, 80 Ill. App. 3d 135, 138 (1979)). Here, the defendant has produced no evidence that the

prosecutor failed to advise the grand jury of its right to call witnesses prior to the commencement of its duties. Moreover, even assuming *arguendo* that the grand jury was not advised of this right, the indictment would not be subject to dismissal on that ground alone. *Haag*, 80 Ill. App. 3d at 139 (noting that, “[w]hile section 112-4(b) of the Code imposes a duty upon the State’s Attorney to advise the Grand Jury *** [of its right to call witnesses], it does not authorize dismissal of an indictment or provide any other penalty or sanction for his failure to do so.” *Haag*, 80 Ill. App. 3d at 139.

As noted, the defendant contends that, by improperly suggesting that Nagra was an occurrence witness rather than a hearsay witness, the prosecutor committed misconduct which prevented the grand jury from properly understanding its right to call occurrence witnesses under section 112-4(b) of the Criminal Code. However, even if that were true, it would not warrant the dismissal of the indictment. As noted, an indictment may be dismissed for prosecutorial misconduct only if the misconduct affected the grand jury’s decision to indict. Here, the defendant does not indicate how or why the grand jury would have reached a different decision if it understood that it had the right to subpoena witnesses other than Nagra. As noted above, the defendant has conceded the accuracy of Nagra’s testimony before the grand jury, and he does not suggest that either of the actual occurrence witnesses (*i.e.*, either himself or Officer Anderson) would have contradicted any aspect of Nagra’s testimony had he been subpoenaed to testify before the grand jury. Thus, any alleged failure to inform the grand jury of the right to call these witnesses could not support the dismissal of the indictment. See, *e.g.*, *Haag*, 80 Ill. App. 3d at 139-40.

Accordingly, we must reverse the circuit court's ruling because the defendant failed to demonstrate sufficient prejudice to warrant dismissal of the indictment. This does not mean, however, that we endorse the manner in which the prosecutor handled the grand jury proceedings in this case. As noted above, although a prosecutor is generally not obligated to inform the grand jury that a witness's testimony constitutes hearsay (*Holmes*, 397 Ill. App. 3d at 742), a due process violation may occur if the testimony creates the false impression that a hearsay witness is testifying as an occurrence witness (*Oliver*, 368 Ill. App. 3d at 695). This may amount to the presentation of "deceptive or inaccurate evidence" by the prosecutor, which is prohibited. *DiVincenzo*, 183 Ill. 2d at 257. Because of the demanding standard imposed by our supreme court, it will always be extremely difficult for a defendant to show that the presentation of such evidence resulted in actual and substantial prejudice warranting dismissal of the indictment. However, this does not mean that we countenance potentially deceptive or inaccurate testimony by prosecution witnesses, and prosecutors should take steps to ensure that such testimony is not presented irrespective of its potential effect on the grand jury's decision to indict. The prosecutor's rather sloppy examination of Nagra in this case created risks to the defendant's due process rights which could have been easily avoided if the prosecutor had simply asked Nagra to explain the basis of his knowledge. We strongly encourage the State to follow this procedure in future cases where there is any possibility that a witness's hearsay testimony might mislead the grand jury.

CONCLUSION

For the foregoing reasons, we reverse the judgment of the circuit court of Will County that dismissed the indictment and remand the cause for further proceedings.

Reversed and remanded.

JUSTICE WRIGHT, specially concurring:

This case involves nothing more than the prosecutor's personal lexicon which carelessly substituted the colloquial term "you," when making a generic reference meaning, "any person" or "a person." Perhaps it would have been preferable for the prosecutor to employ the Queen's English when before the grand jury. However, poor word choice does not an unethical lawyer maketh.

It is not unusual for the written word to translate differently than words spoken. Here, the pivotal pronoun involves poor grammar but does not involve professional misconduct by either the prosecutor or the detective in this case.

The defense's decision to characterize the prosecutor's direct examination of Detective Nagra as rising to the level of "prosecutorial misconduct" is unfair. Moreover, for the defense to characterize the detective's testimony as false, gravely prejudicial, or "totally deceptive" does a disservice to this detective who provided a one word answer simply by stating, "Yes", in response to the prosecutor's poorly worded, leading, question.

I agree with the majority that the judge's decision dismissing the indictment must be reversed. I write separately to express my strong view that the prosecutor's hurried approach when before the grand jury did not rise to the level of attorney misconduct and could not have created any prejudice for the defense.