

2013 IL App (2d) 110897-U
No. 2-11-0897
Order filed March 22, 2013

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Lake County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 11-CF-72
)	
MYESHA T. SAWYER,)	Honorable
)	Theodore S. Potkonjak,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Schostok and Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court denied defendant her right to a fair trial when it allowed the State, during its closing argument, to make an improper propensity argument, to impermissibly shift the burden to defendant, and to improperly argue that the victim's testimony was more credible because he was in the military. We reverse and remand for a new trial.

¶ 2 Defendant, Myesha T. Sawyer, appeals her conviction for aggravated battery. She contends that (1) she was denied her right to a fair trial in front of an unbiased jury, and (2) the trial court erred in denying her motion *in limine* to prohibit the State from introducing evidence of a prior altercation

between herself and the victim. Because we determine that the trial court allowed multiple errors to occur in this case, we reverse and remand.

¶ 3 Defendant was charged with five counts of aggravated battery stemming from a physical altercation with the victim, Robert Jinks, that occurred on December 12, 2010. 720 ILCS 5/12-4(a) (West 2010). Prior to trial, defendant filed a motion *in limine* requesting that the trial court prohibit the State from introducing evidence of an altercation between her and the victim that occurred one week prior to the alleged incident. During the prior altercation, defendant and the victim met for the first time and argued about religion, homosexuality, and child sex offenders. This led to a brief physical confrontation where defendant grabbed the victim's collar and pushed him against a wall after the victim called defendant a "child molester." In her motion, defendant argued that evidence regarding the prior altercation had little probative value with respect to the current charges and could prejudice the jury against her.

¶ 4 The State responded that the prior altercation was probative of identity and motive. Specifically, the State argued:

"Regarding the other acts, Judge, it goes to identity, once again; and it goes to motive, to show the similarities, Judge; the motive being that, *** the defendant takes exception with being called derogatory names; and when doing so, on both occasions, she went after the victim in this case."

The trial court denied defendant's motion and determined that the State would be permitted to present evidence regarding the prior altercation.

¶ 5 After assembling the jury pool, the trial court told the venire:

“a citizen may serve the community in many ways: by joining the armed forces; by voting, by paying taxes; and by being a juror. Other than serving in the armed forces, being a juror is the most direct and significant.”

¶ 6 The case proceeded to trial. At the trial, the victim, an active member of the U.S. Navy, testified while attired in his naval uniform. During direct examination, the victim gave extensive testimony regarding his naval career. The victim also described his experiences with defendant. He testified that he met defendant through a mutual friend, D’Arsenio Sloan. The victim testified that on December 12, 2010, after an evening out where he ingested four beers, he went to Sloan’s house. Approximately 15 minutes after his arrival, defendant arrived at Sloan’s house. The victim testified that he recognized defendant as a woman he met a week earlier.

¶ 7 Defense counsel objected to any testimony regarding the victim’s previous altercation with defendant, arguing that the evidence was not relevant. The trial court overruled the objection, and the victim testified regarding the prior altercation. The victim testified that around December 6, 2010, he and a friend visited with Sloan. Around midnight, the three men walked to a store where they purchased liquor. Afterward, the men walked to a party; en route, they encountered defendant. The three men and defendant continued to the party, arriving together. During the party, the victim began discussing religion with a group of fellow party-goers. The victim testified that defendant did not agree with the victim’s religious beliefs. In response, the victim changed the subject to homosexuality. Defendant accused the victim of being a homosexual. The victim responded by stating that, if defendant could tell he was a homosexual by his mannerisms, he could tell from defendant’s mannerisms that she was a child molester. The victim testified that defendant responded by grabbing him by the collar and pushing him against a wall.

¶8 The victim next testified regarding the events of December 12, 2010. He testified that he was in Sloan's apartment when defendant arrived. He recognized her from the prior week. Defendant apologized for her previous behavior. Sloan, the victim, and defendant engaged in conversation regarding the apartment's decor. The victim suggested covering the entire apartment with mattresses. Defendant disagreed and began insulting the victim. The victim accused defendant of "acting like an ignorant bitch." The victim testified that defendant responded by grabbing him by the throat and pushing him up against a wall. The victim testified that he reacted by grabbing defendant's head, sweeping her legs from under her, and bringing her to the floor. After doing so, he offered his hand to help her back to her feet. At this point, defendant grabbed a beer bottle from the floor, broke it against the wall, and slit the victim's arm with the bottle. The victim testified that defendant proceeded to stand up and hit him in the nose with the broken bottle. Although Sloan attempted to step in, defendant separated herself from Sloan and proceeded to hit the victim "a few more times" with the broken bottle. The police arrived and transported the victim to a medical center. The victim admitted that the written statement he gave police lacked some of the details described in his testimony and stated that, when he gave the written statement he had just come from the hospital, was under the influence of Vicodin, and had ingested at least 12 alcoholic beverages that evening.

¶9 Defendant testified that on December 12, 2010, she arrived at Sloan's house at approximately 12:30 a.m. Defendant testified that she recognized the victim from the prior altercation. They discussed the Illuminati, and when defendant stated that she did not believe such an order existed, the victim came very close to her face and began making inappropriate sexual comments to her. Defendant asked the victim to "get out of my face." The victim responded by grabbing defendant

by the arm. Defendant pushed the victim away. The victim proceeded to grab defendant's hair and state, "I'm tired of talking to you, you ignorant bitch." The victim testified that defendant grabbed her by the hair, put her in a headlock, and tripped her. While defendant was on the floor, the victim pulled a clump of her hair from her skull and punched her in the head. When the victim refused to release defendant, she grabbed a beer bottle, broke it against the wall, and cut the victim's arm. When the victim tried to back away, defendant jabbed the victim's nose with the broken bottle and cut the victim again before leaving the apartment.

¶ 10 During the State's closing argument, the prosecutor referenced that the victim was a trained soldier and further stated,

"Look at the big picture here. Look at the evidence. Determine who is telling the truth: *** the guy who is your modern-day Gomer Pyle or this mass communications major."

The State continued,

"Not one time did defendant deny that she pinned him up that week prior. *** Two times she has been violent. Two time violent against [the victim]. *** What makes sense is that this woman was violent. She has a violent tendency."

Defense counsel objected, and the trial court overruled the objection.

The State continued,

"Here, she is claiming: This man attacked me. *** I jacked his face up; blood is spewing everywhere. *** I better let somebody know. No, she walked right past the police department. And then for the next 24 days *** living five measly blocks from the North Chicago Police Department, *** she did not go into the department not one time."

“Clearly after being pummeled as she said she was; after losing a large chunk of her hair; it goes to exactly what I was saying; she skipped or walked right past the North Chicago Police Department.”

“But, clearly, a person who went through all that; yet; she doesn't make any report; doesn't tell anybody; her story does not add up. It don't make any sense.”

“Only people who have done something wrong don't go to the police.”

“The only people that don't go to the police departments to say stuff that happened to them is the guilty.”

¶ 11 The jury found defendant guilty of Count I which alleged that defendant committed aggravated battery in that she knowingly caused great bodily harm to the victim when she struck him with a glass bottle. The jury acquitted defendant of the four remaining aggravated battery charges. Defendant was sentenced to probation. She timely appealed.

¶ 12 Defendant contends that she was denied her right to a fair trial in front of an unbiased jury. Defendant argues that the trial court erred when it admonished the venire that “other than serving in the armed forces, being a juror is the most direct and significant” way of serving the community, where the State’s main witness, the victim, was a serving in the United States Navy and testified regarding his military service while attired in his military uniform. Defendant further argues that the error was compounded when the prosecutor told the jury during closing argument that the victim was to be believed over defendant because the victim was serving in the military. Specifically, the prosecutor stated that the victim was to be believed above defendant because he was placing himself on the line for our country and was a “modern-day Gomer Pyle,” as opposed to defendant, “a mass communications major.” The State responds that the issue is forfeited. See *People v. Enoch*, 122

Ill. 2d 176, 186 (1988). Moreover, the State argues that neither the trial court's comments to the venire nor the prosecutors's closing argument comments resulted in substantial prejudice to defendant and were not a material factor in her conviction.

¶ 13 Defendant admits that this issue was not preserved for appellate review. See *People v. Woods*, 214 Ill. 2d 455, 470 (2005) (holding that, to preserve an issue for appeal, a defendant must object on a specific basis at trial and raise the same specific issue in a pretrial motion). We review whether an issue has been preserved for appeal *de novo*. *People v. Herron*, 215 Ill. 2d 167, 180 (2005). Defendant urges that we, instead, review pursuant to the plain-error doctrine. See *People v. Crawford*, 343 Ill. App. 3d 1050, 1055 (2003) (The application of the forfeiture rule is relaxed when the trial court's conduct would have been a basis for objection.); see also *People v. Lang*, 346 Ill. App. 3d 677, 680 (2004) (issue of whether the trial court created the appearance of impropriety, although forfeited by defendant, can be reviewed under plain-error.)

¶ 14 To determine whether an error amounts to plain error, we must decide whether the evidence “is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence. *Herron*, 215 Ill. 2d at 178. Under the plain-error doctrine, “errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court.” *Crawford*, 343 Ill. App. 3d at 1055. A reviewing court may consider an unpreserved error when (1) a clear error occurred and the evidence was “so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error,” or (2) a clear error occurred and that error was “so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.” *People*

v. Hagler, 402 Ill. App. 3d 149, 152 (2010); see also *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 15 In the present matter, the evidence was closely balanced and thus, the plain error doctrine is applicable if we determine that error occurred. See *People v. Ford*, 113 Ill. App. 3d at 661 (“When the outcome of a case depends on which of two witnesses the jury believes to be more credible, the evidence can be described as closely balanced”). Thus, we will consider the errors under the plain-error doctrine, so long as we determine error occurred. Next, we determine whether error occurred. *Herron*, 215 Ill. 2d at 178.

¶ 16 Here, there were only two testifying witnesses to the alleged battery: the victim, who was currently serving in the military, testified extensively regarding his military experience, and did so while attired in his military uniform, and defendant. Defendant’s testimony offered a different version of the events, and did not corroborate the victim’s version. The only other testifying party was the police officer who arrived on the scene after the altercation and did not offer any testimony regarding first-hand knowledge of the altercation. Thus, the jury’s determination rested solely on the credibility they assigned to the victim and to defendant.

¶ 17 The evidence in this case was closely balanced, and thus, the first prong of the plain-error analysis would apply. See *People v. Ford*, 113 Ill. App. 3d at 661 (“When the outcome of a case depends on which of two witnesses the jury believes to be more credible, the evidence can be described as closely balanced”). Because the evidence was closely balanced, the conduct cited above may well have tipped the scales against the defendant, and denied her the right to a fair trial in front of an unbiased jury.

¶ 18 In the current matter, error existed. The cumulative effect of the trial court's comments to the venire and the prosecutor's comments during closing argument was clear and unmistakable; they bolstered the victim's credibility and encouraged the jury to disregard defendant's version of the events. Defendant argues that "these types of comments reflecting on the credibility of a State witness have been found to be reversible error in cases where the guilt or innocence of defendant would necessarily be determined or influenced by the credibility of the State witness." In support, defendant cites *People v. Ford*, 113 Ill. App. 3d 659, 662 (1983), where the defendant was granted a new trial because the prosecutor improperly bolstered the credibility of a testifying police officer. Specifically, the prosecution in that case stated "Now on the one hand you have got Donna. She is a sworn Warren County Deputy, and on the other hand you have got Paula who, in the words of her attorney, is a drug addict." On appeal, the appellate court held:

"a police officer's testimony is to be evaluated in the same manner as any other witness and there is no presumption that such testimony is more credible than that of any other witness. The manner in which the prosecutor made repeated references to [Donna's] status as a police officer and a sworn deputy was an improper attempt to enhance the credibility of his witness *** the remarks in this case exceeded the boundaries of proper argument." *Id.* at 662.

¶ 19 Defendant also cites *People v. Gray*, 406 Ill. App. 3d 466 (2010), where it was found to be error for the prosecutor, in closing argument, to comment on the status of a serving soldier. Specifically, the appellate court determined: "the prosecutor should not have used the risk [the soldier] faced as a reason for the jurors to find him credible." Quoting *People v. Threadgill*, 166 Ill. App. 3d 133 (1997), the reviewing court stated that "this line of argument was calculated to inflame the jurors' fears that if they found the defendant not guilty, they were turning their backs on ***

[those] risking their lives for the jurors. This argument was uncalled for and exceeded the bounds of propriety.” *Gray*, 406 Ill. App. 3d at 476. In the present matter, not only did the prosecution tell the jury that the victim was more credible than defendant because he was a soldier putting his life on the line, but this error was also compounded by the trial court’s comments to the venire that serving in the armed forces was the most direct and significant way one can serve the community. Here, both the trial court and the prosecutor committed error.

¶ 20 Moreover, we determine that the trial court committed error when it allowed the State to repeatedly shift the burden to defendant to prove her innocence in its closing argument. Here, the State was allowed to argue that defendant's inactions proved her guilt. The transcript of the State's closing argument provides numerous examples of the State’s attempt to shift the burden to defendant to prove her innocence. One of many examples includes that the State argued, “The only people that don’t go to the police departments to say stuff happened to them is the guilty.” Statements such as this constitute improper statements of opinion by the State. See *People v. Teis*, 2011 IL App (2d) 091080, ¶ 52 (Statements regarding the personal opinions of the prosecutor are generally improper). Shifting the burden to defendant to prove she is not guilty is also error. See *People v. Adams*, 281 Ill. App. 3d 339, 345 (1996) (holding that, although a prosecutor is allowed a great deal of latitude in making closing argument, improper argument by prosecution shifting the burden of proof to defendant constitutes reversible error, notwithstanding fact that jury is otherwise properly instructed on burden of proof).

¶ 21 Furthermore, the trial court allowed the State to offer improper propensity arguments. In its closing argument, the State used the evidence of the prior altercation to show that defendant has the propensity to be violent; specifically, the State argued: "Two times she has been violent. Two times

violent against [the victim]. *** What makes sense is that this woman was violent. She has a violent tendency.” We determine that this was also error. See *People v. Wilson*, 214 Ill. 2d 127, 135 (2005) (Evidence of other crimes is admissible if it is relevant for any purpose other than to show a defendant’s propensity to commit crime).

¶ 22 In the current matter, the States attorney, in his closing argument, argued that evidence of the prior altercation showed that defendant is a violent person with the propensity to commit crimes. The defense objected to the argument, but was overruled. This error is also basis for reversal. See *People v. Harding*, 401 Ill. App. 3d 482, 486 (2010). (Generally, evidence of other crimes is not admissible to show that a defendant has the propensity to commit crimes).

¶ 23 Here, multiple errors, when compounded, caused defendant to be denied a fair trial. See *People v. Speight*, 153 Ill. 2d 365, 377 (1992). Therefore, we reverse and remand. Because we have determined that reversible error occurred, defendant is entitled to a new trial.

¶ 24 We must also address the question of whether the evidence admitted at trial was sufficient to conclude that defendant was guilty beyond a reasonable doubt. See *People v. Olivera*, 164 Ill. 2d 382, 393 (1995). When we consider all of the evidence presented at trial, we find the State presented sufficient evidence of defendant's guilt to protect defendant's constitutional right against double jeopardy. See *People v. Taylor*, 76 Ill. 2d 289, 309-10 (1979). We emphasize, however, that this determination is not binding on retrial and does not express an opinion concerning respondent's guilt or innocence.

¶ 25 Because the issue may come up during defendant's new trial, we also address defendant's second contention. Defendant further contends that the trial court abused its discretion when it denied her motion *in limine* to prohibit the State from introducing evidence of a prior altercation with

the victim. Specifically, defendant argues that evidence of the prior altercation was irrelevant and prejudicial and, because the evidence was closely balanced, denied defendant her right to a fair trial. Moreover, defendant argues that, although the State claimed to need the evidence to prove identity and motive, the State instead used the evidence to show that defendant was a violent person with the propensity to commit the alleged battery. The State responds that, because defendant claimed self-defense, the evidence was relevant to prove defendant's intent.

¶ 26 The admissibility of other-crimes evidence is within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *People v. Dabbs*, 239 Ill. 2d 277, 284 (2010); *People v. Boand*, 362 Ill. App. 3d 106, 122 (2005). An abuse of discretion occurs when the trial court's ruling is arbitrary or fanciful, or where no reasonable person would take the view adopted by the trial court. *Boand*, 362 Ill. App. 3d at 122.

¶ 27 A criminal defendant is entitled to have his or her guilt or innocence determined solely with reference to the crime with which he or she is charged. *People v. Gregory*, 22 Ill. 2d 601, 602-03 (1961). The improper admission of other crimes-evidence implicates a defendant's right to due process and a fair trial by an unbiased jury. U.S. Const., amend. V, VI, XIV; Ill. Const. 1970, art. I, §§ 2, 8,13; *People v. Roberts*, 100 Ill. App. 3d 469, 474-76 (1981). Evidence of other crimes is admissible if it is relevant for any purpose other than to show a defendant's propensity to commit crime. *People v. Wilson*, 214 Ill. 2d 127, 135 (2005). Other-crimes evidence may be permissibly used to show, by similar acts or incidents, that the act in question was not performed inadvertently, accidentally, involuntarily, or without guilty knowledge. *Id.* at 136. Where other-crimes evidence is offered, it is admissible so long as it bears some threshold similarity to the crime charged. *Id.* Even

if offered for a permissible purpose, such evidence will not be admitted if its prejudicial effect substantially outweighs its probative value. *Dabbs*, 239 Ill. 2d at 284.

¶ 28 Here, the admission of other-crimes evidence, while not necessary to prove identity, was admissible to show intent. Case law supports that prior attacks on a victim of which a defendant stands accused are probative of both motive and intent and are admissible because the prior attack illustrates the defendant's hostility toward the victim. *People v. Heard*, 187 Ill. 2d 36, 57-60 (1999); *People v. Abraham*, 324 Ill. App. 3d 26, 34 (2001); *People v. Sutton*, 316 Ill. App. 3d 874, 889-92 (2000). Moreover, the probative effect of the evidence outweighed any prejudice. We agree with defendant that the State improperly suggested, during closing argument, that the prior altercation evinced that defendant had the propensity to commit further crimes. Although this may have been prejudicial; we note that the jury acquitted defendant of four of the five charges. Contrarily, defendant testified that she responded to the victim's actions in self-defense. Thus, as the State argues, evidence of the prior altercation was probative to show that the alleged incident began, not because defendant was forced to defend herself but because defendant lashed out when insulted by the victim.

¶ 29 Defendant asserts that the trial court failed to explain the basis of its decision to allow evidence of the prior altercation. However, the record reflects that the trial court considered the probative value of the evidence in regards to its prejudicial effect and allowed the evidence to show defendant's intent. Specifically, when asked by defense counsel during a pretrial conference, whether evidence of the prior altercation was admissible to show motive, the trial court responded, "No. It is not motive." The prosecuting attorney then stated that the evidence was being offered "to dispel the defendant's innocent construction of events as well; seeing how she handles the self-

defense claim,” to which the trial court responded, “The Court finds that the probative value outweighs the prejudicial effect. Granted.” Hence, we disagree with defendant’s assertion that the trial court failed to offer any basis for its decision. Because we cannot say that trial court’s ruling was arbitrary or that no reasonable person would take the trial court’s view, we conclude that the trial court’s decision to admit the other-crimes evidence was not an abuse of discretion. See *Boand*, 362 Ill. App. 3d at 122.

¶ 30 For the reasons stated, we reverse the judgment of the circuit court of Lake County and remand the case for a new trial.

¶ 31 Reversed and remanded.