2015 IL App (4th) 130761-U

NO. 4-13-0761

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
October 6, 2015
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
BOBBY J. JIMERSON,	)	No. 13CF274
Defendant-Appellant.	)	
	)	Honorable
	)	Rudolph M. Braud,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Pope and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court (1) reversed and remanded for a new trial, finding the court erred in refusing to instruct the jury on self-defense where there was some evidence introduced to warrant a self-defense instruction; but (2) affirmed the trial court's ruling admitting other-crimes evidence pursuant to section 115-7.4 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-7.4 (West 2012)).

¶ 2 In March 2013, the State charged defendant, Bobby J. Jimerson, with one count of aggravated battery (720 ILCS 5/12-3.05(d)(1) (West 2012)) and one count of domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2012)). In July 2013, a jury convicted defendant of both counts. In August 2013, the trial court sentenced defendant to four years' imprisonment.

¶ 3 Defendant appeals, arguing (1) the trial court abused its discretion in (a) refusing to instruct the jury on self-defense, and (b) admitting other-crimes evidence pursuant to section 115-7.4 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-7.4 (West 2012)); and (2) defendant is entitled to a new trial because (a) the prosecutor improperly misrepresented

why no self-defense instruction was given, and (b) pervasive prosecutorial misconduct denied defendant a fair trial. We affirm in part, reverse in part, and remand for a new trial.

¶ 4 I. BACKGROUND

¶ 5 In March 2013, the State charged defendant by information with one count of aggravated battery (720 ILCS 5/12-3.05(d)(1) (West 2012)) and one count of domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2012)). In July 2013, defendant's jury trial commenced.

¶ 6 A. State's Motion *in Limine*

¶ 7 Prior to trial, the State filed a motion *in limine* to admit evidence of defendant's previous conviction for domestic violence against the same victim to show propensity pursuant to section 115-7.4 of the Code. 725 ILCS 5/115-7.4 (West 2012). The State sought to introduce this evidence through testimony from the victim, Catherine Marshall, and Loami police officer Troy Snider, and through a certified copy of the conviction. Defendant did not file a written opposition to the motion *in limine*, but he orally stated his opposition at the hearing on the motion. Defense counsel acknowledged the law, following a balancing test, allowed for the admission of other-crimes evidence but asserted "the balance is so in favor of the State that a fair trial can't be had." Counsel requested the prior domestic-violence conviction only be presented to the jury if defendant testified to "some peacefulness or some other defense that says he was peaceful at all times."

¶ 8 The trial court recognized this argument might have held sway prior to the enactment of section 115-7.4 of the Code but found the evidence admissible, stating: "Here[,] I believe that the evidence does fall within the ambit of *** [section 115-7.4], as it is approximate [*sic*] in time to the charged offense, very factually similar, and in all circumstances would be

very probative here, so I'm going to allow the [m]otion [*in limine*] and allow that evidence in over your objection."

¶ 9 B. Trial

¶ 10 1. *State's Case*

¶ 11 The State presented three witnesses in its case-in-chief. First, Springfield police officer Dane Cookson testified he had been trained to investigate incidents of domestic violence. In March 2013, Cookson responded to a 9-1-1 call from Marshall, claiming her boyfriend battered her. When Cookson arrived, he entered the house and observed dirt thrown around the house and a hole in one wall. He further observed large bruises and open, bleeding cuts on both of Marshall's forearms.

¶ 12 On cross-examination, defense counsel asked Cookson how old the bruises on Marshall's arms were and Cookson stated he could not give an exact date. When asked how old the cut was, Cookson replied, "I am not qualified to tell you exactly when" Marshall got the cut. On redirect, Cookson testified Marshall's wound was still bleeding when he arrived at the scene. The State asked, based on Cookson's training and experience, whether the swelling and bruising looked recent. Cookson responded affirmatively.

¶ 13 Cookson testified he was outside in his squad car getting a report number for Marshall as defendant pulled his truck into the driveway. Cookson identified himself and informed defendant he needed to speak with him. Cookson stated, "[defendant] told me if I wanted to speak with him, I could speak to him within the house; and he ran inside." After Cookson followed defendant into the house, defendant said, "my name is Bobby Jimerson, go ahead, take me to jail." Defendant then turned around and placed his hands behind his back. Finally, Cookson testified defendant made two spontaneous statements, which Cookson wrote

down verbatim, following his arrest: (1) "next time I will just kill that bitch"; and (2) "wait until I get out, I will beat her ass and you can come arrest me again."

¶ 14 The State then called Marshall to testify. She testified she and defendant lived together for approximately four years. Marshall explained the incident from which the instant charges stemmed began as a verbal altercation. According to Marshall, defendant began throwing potting soil at her and calling her bad names, then he picked up a baseball bat and began swinging it at her head. Marshall raised her arms up to protect her head, and the bat hit her forearms. Marshall testified she somehow got hold of the baseball bat, took it outside, and placed it in the bed of defendant's truck.

¶ 15 On cross-examination, Marshall's story changed. She testified defendant was potting plants and seeds inside the house before the March 2013 argument began. At that time, Marshall was angry with defendant, grabbed a fork, and initiated the physical altercation by attacking defendant with the fork. On redirect, the assistant State's Attorney asked when Marshall picked up the fork and Marshall responded, "It was after he took the bat to me." Marshall also testified about an incident in December 2011 in which defendant held a hacksaw to her throat and threatened to kill her.

¶ 16 Finally, the State called Loami police officer Troy Snider. Snider testified he responded to a domestic-battery dispute between defendant and Marshall in December 2011. When Snider arrived at the scene, Marshall told Snider the argument began over a radio and escalated to the point where defendant threw Marshall against a wall and held a hacksaw to her throat. Snider recovered a hacksaw from the kitchen counter. Snider also observed grab marks on Marshall's arms and red marks on her throat. While Snider was there, defendant continued to threaten to kill or hurt Marshall. The State introduced a certified conviction memorializing

defendant's guilty plea to the domestic-battery charge arising out of the December 2011 incident and rested its case.

¶ 17 2. *Defendant's Case*

¶ 18 Defendant testified, on his own behalf, he was preparing his plants for the spring on the day of the March 2013 incident. Defendant set up his pots, bulbs, and potting soil in the living room on plastic bags. According to defendant, "[Marshall] said you got to pick that stuff up. And I just turned and said she's a stupid bitch and then she just went and got the fork[,] as she said. She went and got the fork." Defendant said Marshall advanced upon him with the fork, at which time defendant grabbed the baseball bat and said, "if you come closer to me with that fork, I'm going to pluck you." Defendant testified Marshall then dropped the fork, grabbed the bat, and wrestled for control of the bat. Defendant let go of the bat, Marshall fell on the bed, and Marshall told defendant she was going to call the police and tell them he hit her with the bat. Defendant then got his car keys and left the house. Defendant testified he spent about an hour at a friend's house, then returned home. When he arrived home, the police officers were still present. Defendant was surprised when officers recovered the baseball bat from the bed of his truck, and he testified Marshall put the bat there.

¶ 19 On cross-examination, the assistant State's Attorney questioned defendant about Cookson's testimony that defendant returned to the house, did not stop when asked to do so by Cookson, and entered the house. The following exchange occurred:

"Q. [Assistant State's Attorney] You went into the home, and then the police officer followed you, correct?

A. Correct.

Q. And then you stated [']my name is Bobby Jimerson, go ahead and take me to jail,['] correct?

A. Wrong, wrong, wrong.

Q. So it's your testimony that Officer Cookson lied?

A. Yes.

Q. Lied in his police report?

A. Yes.

Q. Lied when he—

A. He lied up here, yes.

Q. —when he was sworn on oath?"

The assistant State's Attorney further asked defendant if his testimony was that Cookson lied about the other two spontaneous statements by defendant—"next time I will just kill that bitch" and "wait until I get out, I will beat her ass and you can come arrest me again"—and defendant testified he never made those statements.

¶ 20 Defendant further testified he never touched or struck Marshall and did not cause the bruises or cuts on her forearms. The assistant State's Attorney questioned defendant's claim of self-defense. Defendant responded, "She's coming at me with a fork. What am I supposed to do, say, whoa, here she come, I'm going to stand there? What do you think?" The prosecutor replied, "I think that you hit her with a bat." The assistant State's Attorney then asked about the December 2011 incident, and defendant denied holding a hacksaw to Marshall's throat. Thereafter, the assistant State's Attorney asked, "It's your testimony that the testimony of Officer Snyder and [Marshall] about that incident was a lie as well?" Defendant responded affirmatively.

¶ 21 On redirect, defendant again testified he and Marshall tussled over the bat, Marshall said she was going to call the police and tell them he hit her with the bat, and he left so he "wouldn't do nothing stupid." Following defendant's testimony, the defense rested.

¶ 22 3. *Rebuttal*

¶ 23 The State called Springfield police officer Michael Newman to testify on rebuttal. Newman testified he had been a police officer for eight years and had training in investigating domestic violence. Newman testified he responded to the March 2013 emergency call, and when he arrived Marshall was very emotional, crying, and had what appeared to be defensive wounds on her forearms. The cuts were still bleeding. Newman left the scene to search the area for a suspect, but he returned to the scene when Cookson radioed to inform him defendant was in custody. Newman testified defendant was angry, argumentative, and "screaming out insults."

¶ 24 The State also recalled Cookson to testify on rebuttal. Cookson testified Marshall's injuries appeared to be fresh. The State asked if the injuries were "consistent with what [he] learned through [his] investigation had happened," and Cookson replied, "Yes." On cross-examination, defense counsel established Cookson was neither a medical doctor nor trained in first aid. No further witnesses were presented.

¶ 25 C. Jury-Instruction Conference

¶ 26 Prior to the State's rebuttal witnesses, the trial court held a jury-instruction conference. Defendant presented his instruction No. 1, which read, "A person is justified in the use of force when and to the extent that he reasonably believes that such conduct is necessary to defend himself against the imminent use of unlawful force." The State objected, arguing no evidence had been presented to warrant a self-defense jury instruction. The State asserted, "Self[-]defense is more appropriately called justifiable use of force in defense of person, Your

Honor. And the [d]efendant himself testified that no force was used against him. [Marshall] testified that no force was used against [defendant], and the [d]efendant himself testified that he didn't use force against [Marshall]." Defense counsel argued, "the injuries we're talking about could have been caused by the tussle [over the bat]. He said he didn't hit anybody, but the injuries could have been caused some other way during the altercation. I think there's no question that at some point a bat was fought over by [*sic*], my client said that and the alleged victim said that."

¶ 27 The trial court stated, "Either [defendant] did it, and it was self[-]defense; or, as the gentleman testified, he didn't do anything. I just don't know at this point which theory you want these folks to believe." Defense counsel responded, "I think we're entitled to argue both theories, number one. Number two, if during the struggle for the bat injuries were caused, that could be construed as a battery if my client had no justification to struggle over the bat. But he did have justification to struggle over the bat because of her assault on him." Counsel argued defendant was justified in grabbing the bat to defend himself when Marshall brandished the fork. Once defendant picked up the bat, "a struggle *** commenced over the bat when [Marshall] grabbed it. Injuries might have occurred. I don't have to agree that we inflicted the injuries, but we have a right to defend ourself [*sic*]." The State maintained self-defense required defendant to admit to using force and that he was justified in doing so, and defendant repeatedly testified he did not hit Marshall. The court agreed with the State and refused to give the self-defense instruction, stating, "I want that record to be crystal clear as my ears heard [defendant] say one, two, three, at least four times, that he did not touch [Marshall]. You can't have it both ways."

¶ 28 D. Posttrial Motions and Sentencing

¶ 29 In August 2013, the matter proceeded to a sentencing hearing. At that hearing, defendant presented the trial court with a motion for judgment notwithstanding the verdict, or in the alternative, a motion for a new trial. The motion alleged, *inter alia*, defendant did not receive a fair trial because he was not allowed to argue self-defense. Defense counsel argued, "There was enough evidence, in my opinion, that we should be able to raise self-defense because there was a struggle between two individuals that resulted in injuries. How the injuries came about should be a jury question and not a question of law, and that's our argument, and that's why I think we were denied a fair trial." The court denied the motion.

¶ 30 The trial court ruled the domestic-battery conviction merged with the aggravated-battery conviction. The court thereafter sentenced defendant to four years' imprisonment.

¶ 31 This appeal followed.

¶ 32 II. ANALYSIS

¶ 33 Defendant appeals, arguing (1) the trial court abused its discretion in refusing to instruct the jury on self-defense; (2) during closing argument, the State improperly misrepresented why no self-defense instruction was given to the jury; (3) the court abused its discretion in admitting other-crimes evidence by failing to conduct the requisite balancing test; and (4) pervasive prosecutorial misconduct denied defendant a fair trial. Defendant contends these myriad errors require reversal of his conviction and remand for a new trial. We turn first to defendant's self-defense-jury-instruction claim.

¶ 34 A. Self-Defense Jury Instruction

¶ 35 Defendant first argues the trial court erred in refusing to instruct the jury on self-defense. The State contends the court properly refused the self-defense instruction because

defendant repeatedly testified he did not strike Marshall, thus self-defense was not available as an affirmative defense.

¶ 36 As a general matter, instructing the jury is within the sound discretion of the trial court. *People v. Dunlap*, 315 Ill. App. 3d 1017, 1024, 734 N.E.2d 973, 980 (2000). However, "[t]he underlying decision regarding whether there is sufficient evidence in the record to warrant giving the jury a particular instruction *** is a question of law and will be reviewed *de novo*." *People v. Lewis*, 2015 IL App (1st) 122411, ¶ 56, 28 N.E.3d 923.

¶ 37 Self-defense is an affirmative defense and, once raised, the State has the burden to prove beyond a reasonable doubt the defendant did not act in self-defense. *People v. Young*, 347 Ill. App. 3d 909, 920, 807 N.E.2d 1125, 1134 (2004).

> "To establish a claim of self-defense, the defendant must present some evidence as to each of the following six elements: (1) that unlawful force was threatened against him; (2) that he was not the aggressor; (3) that the danger of harm was imminent; (4) that the use of force was necessary; (5) that he actually and subjectively believed a danger existed that required the use of the amount of force applied; and (6) that his beliefs in that regard were objectively reasonable." *People v. Holman*, 2014 IL App (3d) 120905, ¶ 57, 20 N.E.3d 450.

"A defendant is entitled to the benefit of any defense shown by the entire evidence, even if the facts on which such defense is based are inconsistent with the defendant's own testimony. [Citations.] Even very slight evidence on a given theory of a case will justify giving an

instruction. [Citations.]" *People v. Whitelow*, 162 Ill. App. 3d 626, 629, 515 N.E.2d 1327, 1329 (1987). See also *Dunlap*, 315 Ill. App. 3d at 1024, 734 N.E.2d at 981.

¶ 38 The court must determine whether the record contains some evidence of the defendant's subjective belief in the need to use force in self-defense. *People v. Washington*, 2012 IL 110283, ¶ 36, 962 N.E.2d 902. If so, the court should appropriately instruct the jury on self-defense. *Id.* "This is so because *** it is the function of the jury to determine whether the subjective belief existed and whether it was objectively reasonable or unreasonable." *Id.* In determining whether a defendant has successfully raised self-defense, the evidence we may consider is fairly broad. *People v. Everette*, 141 Ill. 2d 147, 158, 565 N.E.2d 1295, 1299 (1990). The defendant's testimony, motive, or intent, whether there was physical contact between the defendant and the victim, the type of wound suffered, and the surrounding circumstances are a few of the factors properly considered. *Id.* at 158, 565 N.E.2d at 1299-1300. "Once a slight amount of evidence has been produced, it is a decision for the jury as to the justification of defendant's behavior." *Whitelow*, 162 Ill. App. 3d at 630, 515 N.E.2d at 1330.

¶ 39 As to the first element, defendant testified Marshall advanced upon him, brandishing a fork. This is some evidence "unlawful force was threatened against him." *Holman*, 2014 IL App (3d) 120905, ¶ 57, 20 N.E.3d 450. Defendant further testified Marshall initiated the physicality, and Marshall, on cross-examination, agreed she initiated the physicality, thus satisfying the second element.

¶ 40 As to the third element, defendant testified Marshall angrily advanced upon him with a fork. When he saw this, defendant picked up the baseball bat and warned Marshall to stop her approach. Defendant testified Marshall then dropped the fork and grabbed the other end of the baseball bat, at which point the alleged struggle ensued. When defendant let go of his end of

the bat, Marshall fell. The State makes much of the fact that Marshall dropped the fork and argues there was no imminent danger because she did so. We are not persuaded by this argument. Although Marshall dropped the fork, that does not necessarily mean defendant no longer faced unlawful force threatening imminent injury, especially when Marshall grabbed the other end of the bat and wrestled with the bat. Although the State contends the conflicting evidence somehow precludes defendant from arguing self-defense, we disagree. The conflicting accounts regarding (1) when Marshall brandished the fork and (2) the struggle over the bat instead resulted in at least a slight amount of evidence to support a self-defense claim and the jury, as triers of fact, should have been instructed on self-defense. *Whitelow*, 162 Ill. App. 3d at 630, 515 N.E.2d at 1330 ("Once a slight amount of evidence has been produced, it is a decision *for the jury* as to the justification of defendant's behavior." (emphasis added)).

¶ 41 Finally, the State contends defendant's testimony precludes him from showing sufficient evidence to warrant a self-defense instruction because he cannot show a subjective belief that danger existed where he "repeatedly denied using any force against the victim." The record belies this claim. Defendant testified he did not hit Marshall with the bat, but he also testified a struggle ensued when Marshall grabbed the other end of the bat and "wrestled" with it. Moreover, when the assistant State's Attorney questioned defendant regarding his self-defense claim, defendant responded, "She's coming at me with a fork. What am I supposed to do, say, whoa, here she come, I'm going to stand there? What do you think?" This is clearly some evidence as to the necessity of using force and defendant's subjective belief a danger existed that required the use of force. The record reveals some evidence as to the required elements to raise self-defense and, however slight the evidence may be, it is sufficient to warrant a self-defense instruction, leaving the ultimate determination of whether defendant actually acted in self-

defense to the trier of fact, and not to the court. See, *e.g.*, *People v. Robinson*, 163 Ill. App. 3d 754, 770-71, 516 N.E.2d 1292, 1305-06 (1987).

¶ 42 Accordingly, we conclude the trial court committed reversible error in refusing to instruct the jury on self-defense and reverse and remand for a new trial. See *id.* at 771, 516 N.E.2d at 1305. Because our consideration of the self-defense jury instruction requires reversal and remand for a new trial, we need not address defendant's claims regarding prosecutorial misconduct. We briefly discuss defendant's claim regarding other-crimes evidence, as that issue will undoubtedly arise during the new trial.

¶ 43 B. Other-Crimes Evidence

¶ 44 Defendant contends the trial court abused its discretion in admitting other-crimes evidence by failing to conduct the requisite balancing test. Specifically, defendant contends the court failed to consider the undue prejudice to defendant in allowing all the State's evidence regarding his prior conviction for domestic violence. The State contends the court properly conducted the balancing test and properly admitted evidence of defendant's previous conviction for domestic violence against the same victim to show propensity pursuant to section 115-7.4 of the Code (725 ILCS 5/115-7.4 (West 2012)). We agree with the State.

¶ 45 Section 115-7.4 of the Code provides, in part, "evidence of the defendant's commission of another offense or offenses of domestic violence is admissible, and may be considered for its bearing on any matter to which it is relevant." 725 ILCS 5/115-7.4(a) (West 2012). The statute directs courts to weigh the probative value of the other-crimes evidence against undue prejudice to the defendant. In so doing, courts may consider (1) the proximity in time from the other crime to the charged offense; (2) the degree of factual similarities between the two instances of domestic violence; and (3) "other relevant facts and circumstances." 725

ILCS 5/115-7.4(b)(3) (West 2012). The probative value must not be substantially outweighed by the risk of undue prejudice. *People v. Dabbs*, 239 Ill. 2d 277, 291, 940 N.E.2d 1088, 1097 (2010). The admissibility of this type of evidence is within the trial court's sound discretion and will not be disturbed absent an abuse of that discretion. *People v. Torres*, 2015 IL App (1st) 120807, ¶ 40, 33 N.E.3d 880.

¶ 46 Defendant contends the trial court did not conduct the balancing test to weigh the probative value of his prior domestic-violence conviction against its prejudicial effect. At the hearing on the State's motion *in limine* to admit this evidence, the court stated, "I believe that the evidence does fall within the ambit of the statute I mentioned [section 115-7.4], as it is approximate [*sic*] in time to the charged offense, very factually similar, and in all circumstances would be very probative here." Although the court did not state it was considering the probative value of the evidence against prejudicial effect, the court did explicitly list the factors the statute directs courts to consider when weighing probative value against undue prejudice. The factual similarities render this other-crimes evidence even more probative, as both incidents involved defendant using some type of weapon to threaten the same victim. Under these circumstances, we cannot say the prejudicial effect substantially outweighed the probative value. *People v. Donoho*, 204 Ill. 2d 159, 170, 788 N.E.2d 707, 715 (2003). The trial court's ruling did not constitute an abuse of discretion. *Id.* at 182, 788 N.E.2d at 721.

¶ 47 Defendant complains the level of detail elicited by the State unduly prejudiced him because testimony from the arresting officer was irrelevant and cumulative and should have been excluded. We disagree. The State presented testimony from the victim herself, who testified about the December 2011 domestic-violence incident and about the March 2013 incident which led to the instant charges. The State also presented testimony from the officer

who responded to the prior offense. The prior offense did not become the focus of the trial. See *People v. Chambers*, 2011 IL App (3d) 090949, ¶ 19, 953 N.E.2d 1026 (trial court did not abuse its discretion in the amount of other-crimes evidence admitted where three of the State's six witnesses testified to prior domestic violence). Moreover, this court may affirm the trial court's judgment on any basis in the record. *Id.* ¶ 21, 953 N.E.2d 1026. The record shows the State sought to admit the evidence under section 115-7.4 and section 115-20. Section 115-20 provides for the admission of a prior conviction of domestic violence perpetrated by the defendant against the same victim. 725 ILCS 5/115-20 (West 2012). Marshall was the victim of the prior domestic-violence charge to which defendant pleaded guilty, so the evidence was also admissible under section 115-20 of the Code. See *Chambers*, 2011 IL App (3d) 090949, ¶¶ 20-21, 953 N.E.2d 1026 (discussing the similarities between the two sections and relying on section 115-7.4 as an alternative to section 115-20 as a basis to affirm the trial court's ruling). We therefore conclude the court did not abuse its discretion in admitting the other-crimes evidence to show defendant's propensity in the instant case.

¶ 48 III. CONCLUSION

¶ 49 For the reasons stated, we affirm in part, reverse in part, and remand for further proceedings. As part of our judgment, because the State successfully defended a portion of this appeal, we award the State its $50 statutory assessment against defendant as costs of this appeal. See *People v. Smith*, 133 Ill. App. 3d 613, 619-20, 479 N.E.2d 328, 333 (1985) (citing *People v. Nicholls*, 71 Ill. 2d 166, 178, 374 N.E.2d 194, 199 (1978)).

¶ 50 Affirmed in part and reversed in part; cause remanded with directions.