2015 IL App (5th) 120319-U

NO. 5-12-0319

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Clinton County.
	)	
v.	)	No. 11-CF-177
	)	
JUSTIN RODE,	)	Honorable
	)	Dennis E. Middendorff,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE CATES delivered the judgment of the court.
Justices Welch and Schwarm concurred in the judgment.

ORDER

¶ 1 *Held*: A reversal of the defendant's conviction is not warranted where the defendant failed to establish that improper comments made by the prosecutor during closing argument contributed to his conviction or resulted in substantial prejudice which deprived him of a fair trial. The trial court did not violate the prohibition against *ex post facto* laws when it imposed the $250 DNA-analysis fee in effect at the time of the defendant's sentencing rather than the $200 fee in effect at the time of the defendant's offense. The fines improperly assessed by the circuit clerk must be vacated and the cause remanded to the circuit court for assessment of the statutorily mandated fines.

¶ 2 Following a jury trial in the circuit court of Clinton County, the defendant, Justin Rode, was found guilty of reckless conduct causing great bodily harm, and he was sentenced to a term of two years in prison. On appeal, the defendant contends that he

was denied his right to a fair trial because of improper and inflammatory comments made by the prosecutor during closing argument. The defendant also challenges the amount of the DNA-analysis fee that was imposed by the trial court, and the imposition of additional fees and fines by the circuit clerk. We affirm in part, vacate in part, and remand with directions.

¶ 3 In November 2011, the defendant was charged by indictment with recklessly performing acts that caused great bodily harm to his infant son, Reis, in violation of section 12-5(a)(2) of the Criminal Code of 1961 (720 ILCS 5/12-5(a)(2) (West 2010)). The indictment alleged that the defendant used excessive force while handling Reis, and while changing Reis's diaper. After considering evidence and testimony from witnesses, police investigators, and medical experts, the jury found that the defendant was guilty of reckless conduct that caused great bodily harm. A summary of the evidence follows.

¶ 4 On October 22, 2011, the defendant was changing the diaper of his four-month-old son, Reis. While the defendant was removing the dirty diaper, Reis began to kick his legs and one of them fell into the dirty diaper. The defendant immediately grabbed Reis's leg and pulled it up and out of the diaper. The defendant stated that he did not want to make a mess so he pulled Reis's leg up "real fast" and "a little bit harder than usual," and when he did that, he heard a pop. Krystallynn Rode, the defendant's wife and Reis's mom, was nearby, gathering laundry. She saw the defendant grasp Reis's leg between the ankle and knee and lift it in a normal motion, and then heard a pop. The defendant told her that he was sure that Reis's leg was hurt, so she called 911. An ambulance arrived, and Krystallynn accompanied Reis in the ambulance on the ride to a local hospital in Breese,

Illinois. Reis was evaluated and diagnosed with a femur fracture. He was transferred to Children's Hospital in St. Louis for further evaluation and treatment of the injury. The orthopedic team at Children's Hospital treated the fracture, and then called in the child-protection team to consult on the case.

¶ 5 Dr. Adrienne Atzemis headed the child-protection team at Children's Hospital. Dr. Atzemis is board-certified in both pediatrics and child-abuse pediatrics. Dr. Atzemis testified that an evaluation by the child-protection team typically includes a physical examination of the child, X-rays and other appropriate studies, a review of pediatric records, and interviews with the parents or caretakers. Dr. Atzemis testified that when she examined Reis, she found that he was interactive and that his general demeanor was normal for a four-month-old baby. She noted swelling in his right leg consistent with the femur fracture, but the physical examination was otherwise fairly normal. Dr. Atzemis ordered a skeletal survey which revealed additional fractures. The study showed healing fractures to the sixth, seventh, and eighth ribs on the left side of the rib cage, and a possible healing fracture to the fifth rib. It also showed a healing fracture of the left wrist, a fracture of the right tibia near the ankle, and a possible fracture of the left tibia near the ankle. A CT scan of the baby's head was normal. Dr. Atzemis testified that the absence of pathology on the CT scan was significant because she would not expect a normal scan if the baby had certain metabolic bone diseases. Dr. Atzemis ordered a bone scan which showed that Reis had healthy bones. She also ordered tests to determine whether Reis might have a vitamin D deficiency or rickets. She testified that she ruled out a vitamin D deficiency and rickets based, in part, on the baby's normal electrolyte

levels and the appearance of his bones. Dr. Atzemis obtained a consult with the genetics team. The genetics team found no evidence of a genetic disorder that could have caused defects or weakness to the baby's bone structure. Dr. Atzemis reviewed the records from Reis's pediatrician and noted that Reis was meeting developmental milestones and in good health overall.

¶ 6 Dr. Atzemis interviewed the defendant and Krystallynn separately. Krystallynn provided a history of Reis's leg injury. She reported that the defendant was changing the baby's diaper, that she heard a pop, and that the defendant said he thought the baby's leg was dislocated or broken. Krystallynn noted that in hindsight, she thought the defendant was sometimes "too rough" with Reis when he swaddled Reis in a blanket. Krystallynn related that there were a couple of other instances in which Reis could have been accidentally injured by another child, but he did not act fussy or appear injured during or after those incidents. Krystallynn reported that she was found to be vitamin D deficient while pregnant with Reis, that vitamin D had been prescribed, and that she did not comply with the recommendation for taking that prescription. Krystallynn reported that she breast-fed Reis for six weeks, and then switched to formula because he tolerated it better.

¶ 7 The defendant provided a similar history of the injury. The defendant told Dr. Atzemis that he was changing Reis's diaper, and that during the diaper change, Reis began kicking his legs and kicked his foot into the dirty diaper. The defendant stated that he caught the baby's leg above the ankle, and that when he did, he heard a pop. The defendant stated that he knew immediately that the bone was broken. Dr. Atzemis

testified that the defendant took responsibility for the baby's femur fracture and that he also took responsibility for the baby's rib fractures. The defendant thought that Reis's rib fractures may have resulted from swaddling Reis too tightly in a blanket. Dr. Atzemis testified that the femur fracture was consistent with the defendant's description of the diaper change, and that the rib fractures were consistent with the defendant's description of aggressively and tightly swaddling Reis in the blanket.

¶ 8 After considering all of the information gathered during the evaluation, Dr. Atzemis opined that Reis's fractures resulted from inflicted trauma, that Reis was developmentally unable to inflict those types of injuries on himself, and that the defendant's manner of handling the baby posed a risk of harm. Dr. Atzemis further opined that the baby's fractures were healing as expected, and that there was no evidence of a physiological condition or an illness that was interfering with the healing process.

¶ 9 Dr. Deborah Bross was Reis's pediatrician since his birth on June 20, 2011. Dr. Bross testified that Reis was delivered by a cesarean section and that his newborn evaluation was normal. She noted that she had seen Reis for his well-baby visits and that he was developing normally. Dr. Bross testified that she saw Reis on October 20, 2011, when his mother reported that he was irritable when changing positions and that he had clear nasal drainage and congestion, but no fever. Dr. Bross examined Reis and diagnosed a viral infection with muscle aches. Dr. Bross testified that she received reports from the local hospital and from Children's Hospital about Reis's fractured femur and other injuries. She saw Reis for follow-up visits after he was discharged from

Children's Hospital, and noted that his fractures were healing and that he was active and healthy.

¶ 10 Krystallynn Rode testified that on October 22, 2011, she was gathering laundry while the defendant was changing Reis's diaper. She was nearby and saw the defendant grasp Reis's leg between the ankle and knee and lift it up "in a normal motion." She then heard a loud pop. Krystallynn testified that the defendant immediately stated that he was sure that Reis's leg was hurt. Krystallynn called 911, and rode with Reis to the hospital. Krystallynn testified that she often told the defendant that he was swaddling Reis too tightly, and she sometimes went back to loosen the blanket. She stated that the defendant performed the swaddling duties because she was unable to tie the blanket tightly enough. During cross-examination, Krystallynn explained that she was concerned about the swaddling because she had a brother who died as a result of SIDS (sudden infant death syndrome).

¶ 11 Sherri Johnson, Reis's maternal grandmother, testified that she thought the defendant swaddled the baby too tightly. She acknowledged that her own son had died from SIDS, and that she was concerned that the defendant's swaddling might interfere with the baby's ability to breathe.

¶ 12 Courtni Hug, a friend of Krystallynn, testified that Krystallynn and her two boys came to visit her a few days before Reis sustained the leg fracture. Courtni stated that her daughter lifted Reis from his car seat and carried him over to her. Courtni noted that Reis was not fussy and did not cry. Courtni did not believe that her daughter's handling of Reis caused any injury to him.

¶ 13 The defense called Dr. David Ayoub as an expert witness in its case. Dr. Ayoub testified that he is a radiologist with an interest in metabolic bone diseases and rickets, and that he has appeared in court as an expert on infantile rickets. Dr. Ayoub stated that in his work as a radiologist, he evaluates patients' X-rays and also performs forensic consulting work. He estimated that 2% to 4% of his income is derived from patient evaluations. Dr. Ayoub stated that he reviewed Reis's medical records and X-rays and some of Krystallynn's medical records. He did not perform a physical examination on Reis. Dr. Ayoub noted that the medical records indicated that Reis and his mother had several risk factors for rickets. He noted that the baby's X-rays showed that many of his fractures were healing, and that the X-rays showed classic signs of healing rickets. Dr. Ayoub testified that the baby's rib fractures, femur fracture, and ankle fractures could have been caused by excessive force, or by the exertion of an appropriate amount of force on bones weakened by rickets or a vitamin D deficiency. He acknowledged that he could not offer an opinion within a reasonable degree of medical certainty as to what caused the baby's fractures. Dr. Ayoub noted that when an infant is swaddled in a blanket, the pressure is uniformly spread over the infant's entire chest wall. He testified that the average person could not break the ribs of a healthy baby by swaddling, but that Hulk Hogan or Brian Urlacher could do so.

¶ 14 The defendant testified in this case. The defendant acknowledged that Reis's broken femur was caused by his actions, but he could not understand how the bone could have fractured because he did not believe that he exerted sufficient force when he lifted Reis's leg to cause the fracture. The defendant admitted that he continued to wrap Reis

tightly in the swaddling blanket, even though his wife, Krystallynn, had voiced concern that he was swaddling Reis too tightly. He noted that he had swaddled his other child in that same fashion without any problem. The defendant admitted that there were nights when he was frustrated with his children, but not to the point he would hurt them. He stated that he told the investigators that sometimes, when he worked faster to swaddle the baby, he was rougher. He acknowledged that sometimes he knew he was using more force than he should have. The defendant recalled that there may have been one or two times when he wrapped Reis in the blanket too tightly, and had to loosen it. He testified that he stopped wrapping Reis in the swaddling blanket after he was two months old.

¶ 15 On appeal, the defendant contends that he was denied his right to a fair trial because of improper and inflammatory comments made by the prosecutor during closing argument. The defendant concedes that he did not object to the comments at trial and that he did not raise the issue in the posttrial motion. He seeks review under the plain-error exception to the forfeiture rule.

¶ 16 The plain-error doctrine is a narrow and limited exception to the general waiver rule. *People v. Herron*, 215 Ill. 2d 167, 177, 830 N.E.2d 467, 474 (2005). Under the plain-error doctrine, normal forfeiture principles are bypassed and the reviewing court is permitted to consider unpreserved error where either (1) the evidence is so closely balanced that the jury's verdict may have resulted from the error rather than the evidence; or (2) the error was so fundamentally unfair and of such magnitude that it affected the fairness of the trial and challenged the integrity of the judicial process. *Herron*, 215 Ill. 2d at 178-79, 830 N.E.2d at 475. In undertaking a plain-error analysis, we first consider

whether the prosecutor's comments were improper. *Herron*, 215 Ill. 2d at 184, 830 N.E.2d at 478.

¶ 17 A prosecutor is given wide latitude during closing arguments, and he has the right to comment on the evidence and on reasonable inferences arising from the evidence, even if the inference is unfavorable to the defendant. *People v. Hudson*, 157 Ill. 2d 401, 441, 626 N.E.2d 161, 178 (1993). When reviewing a claim of prosecutorial misconduct during closing arguments, the closing arguments must be viewed in their entirety and the challenged remarks must be considered in context. *People v. Wheeler*, 226 Ill. 2d 92, 122, 871 N.E.2d 728, 745 (2007). Misconduct during closing arguments is substantial and warrants a reversal of the conviction if the improper comments constituted a material factor in the defendant's conviction. *People v. Linscott*, 142 Ill. 2d 22, 28, 566 N.E.2d 1355, 1358 (1991). If the jury could have reached a contrary verdict had the improper remarks not been made or the reviewing court cannot say that the improper remarks did not contribute to the conviction, a new trial should be granted. *Wheeler*, 226 Ill. 2d at 123, 871 N.E.2d at 745; *Linscott*, 142 Ill. 2d at 28, 566 N.E.2d at 1358.

¶ 18 In this case, the defendant contends that the prosecutor made improper and inflammatory comments during closing argument that resulted in unfair prejudice. The defendant argues that the prosecutor compared him to Hulk Hogan, and that this comparison was designed to unfairly paint the defendant as a brute and to direct the jury's attention to the defendant's size and strength in relation to that of his infant son.

¶ 19 The record shows that it was the defendant's expert, Dr. Ayoub, who first made the reference to Hulk Hogan. During cross-examination, the prosecutor asked Dr. Ayoub

whether it would be possible to wrap a child so tightly in a blanket so as to cause damage to the rib cage. Dr. Ayoub responded, "I think Hulk Hogan could do that but probably the average person couldn't." The prosecutor asked, "Do you have to be Hulk Hogan?" Dr. Ayoub replied, "Brian Urlacher." We note that Hulk Hogan is a notorious professional wrestler, and that Brian Urlacher is a retired professional football player, a linebacker who played with the Chicago Bears for his entire career. In closing argument, the prosecutor made reference to Hulk Hogan as he described the sound of the baby's leg popping when the defendant pulled it up and out of the dirty diaper. The prosecutor stated, "It wasn't like the little snap of a twig. It didn't sound like something breaks easy. Pop. It was a substantial break because there were forces at play of a healthy leg bone in the hands of Hulk Hogan." Even though the prosecutor referenced the diaper-changing incident rather than the swaddling, the challenged comments were derived from the testimony of the defendant's own expert and were in response to and a comment on the defense claim that the baby's fractures resulted from a medical condition or deficiency that weakened the baby's bones. In the context of the record, we do not find that this isolated reference to Hulk Hogan resulted in unfair prejudice.

¶ 20 The defendant further contends that the prosecutor made highly inflammatory religious references designed to arouse the passions of the jury. In the first of the religious references, the prosecutor was commenting on the testimony of the defendant's wife in regard to how tightly the defendant swaddled or wrapped the baby in a blanket. The prosecutor remarked: "But she did not like the way the defendant−and I hate the word swaddled. Because I have to confess, when I think of swaddling, I think of Jesus. I

think of swaddling clothes in a manger. This is a long way from Jerusalem. *** This is a lot different than swaddling as I would consider it." In the second reference, the prosecutor was commenting on the appearance of the broken femur in the X-ray. The prosecutor stated that the two bones in the femur are "broken crossed over each other like a cross on Calgary [*sic*]." After considering these comments in light of the record, we conclude that they are gratuitous and without any relation to the facts or to the issue of whether the defendant was guilty of the offense charged. We are troubled by the gratuitous and irrelevant references to religious imagery, as these comments were inappropriate under the facts in this case. Considering, however, that our review is limited under the plain-error doctrine, we do not find that the prosecutor's comments were so prejudicial that they constituted a material factor in the defendant's conviction or undermined the integrity of the judicial process.

¶ 21 In our view, the determination of the defendant's guilt turned on the credibility of the medical witnesses and the weight given to their testimony. Based on the verdict, the jury apparently gave little or no weight to the conclusion of the defendant's expert that the baby may have had a vitamin D deficiency or rickets which could have caused or greatly contributed to cause the fractures. There was sufficient evidence to support the jury's finding that the defendant was guilty beyond a reasonable doubt of reckless conduct causing great bodily harm to his son. In addition, the trial court properly instructed the jury that closing arguments are not evidence, and that any statements made by the attorneys which are not based on the evidence should be disregarded. The defendant has failed to establish that the jury reached its verdict based on the challenged comments,

rather than the evidence at trial, or that the challenged comments were so fundamentally unfair and of such magnitude that they undermined the fairness of the defendant's trial or called into doubt the integrity of the judicial process. The defendant has failed to show that he was deprived of a fair trial and is entitled to a reversal of his conviction and a new trial.

¶ 22 The defendant next contends that the trial court's assessment of a DNA-analysis fee in the sum of $250 constituted a violation of the prohibition against *ex post facto* laws. The defendant claims that the court erroneously assessed a $250 DNA-analysis fee, which was the fee in effect at the time of the sentencing, when it should have assessed a $200 fee, which was the fee in effect at the time of his offense. The State counters that the prohibition against *ex post facto* laws does not apply because the DNA-analysis fee is a compensatory assessment, not a punishment.

¶ 23 The imposition of a punishment greater than the one that was in effect when the crime was committed constitutes a violation of the prohibition against *ex post facto* laws under the United States Constitution and the Illinois Constitution. U.S. Const., art. I § 10; Ill Const. 1970, art. I, § 6. The ban on *ex post facto* laws applies only to laws that are punitive in nature, and not to compensatory costs or fees. *People v. Bishop*, 354 Ill. App. 3d 549, 561, 821 N.E.2d 677, 688-89 (2004).

¶ 24 A fine is a pecuniary punishment imposed as part of a sentence. *People v. Johnson*, 2011 IL 111817, ¶ 16. A fee is a charge for labor or services. *Bishop*, 354 Ill. App. 3d at 562, 821 N.E.2d at 690. The DNA-analysis fee is intended to cover the actual costs of analyzing an offender's DNA analysis. See 730 ILCS 5/5-4-3(j) (West 2008);

People v. Marshall, 242 Ill. 2d 285, 950 N.E.2d 668 (2011). The fee is assessed only one time as only one analysis is necessary to satisfy the purposes of the DNA database statute. *Marshall*, 242 Ill. 2d 285, 950 N.E.2d 668. The DNA-analysis fee is assessed for a compensatory purpose rather than a punitive purpose. *Johnson*, 2011 IL 111817, ¶ 28. It is not a fine. *Johnson*, 2011 IL 111817, ¶ 28. Since the DNA-analysis fee is compensatory and a collateral consequence of a conviction, the trial court did not violate the prohibition against *ex post facto* laws when it imposed the $250 fee in effect at the time of the defendant's sentencing rather than the $200 fee in effect at the time of the defendant's offense.

¶ 25 The defendant also contends that the clerk of the circuit court improperly assessed fines in absence of an order of the trial court imposing the fines. The State concedes this point. The defendant and the State agree that the fines imposed by the circuit clerk are void and must be vacated. They also agree that the statutorily mandated fines may be judicially assessed by this court or by the trial court on remand, but they are not in complete agreement as to which fines are properly assessed in this case. Therefore, we will vacate the fines that were improperly assessed by the circuit clerk, and we will remand this case to the circuit court for consideration, calculation, and imposition of the appropriate fines and for a correction of the mittimus.

¶ 26 For the reasons stated, we hereby vacate the fines that were improperly assessed by the circuit clerk, and we remand this case to the trial court for consideration and imposition of all appropriate, statutorily mandated fines and for a correction of the mittimus. In all other respects, the defendant's conviction is affirmed.

¶ 27 Affirmed in part and vacated in part; cause remanded with directions.