2016 IL App (2d) 131333-U
No. 2-13-1333
Order filed February 29, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RAFAEL VARGAS, JR., Defendant-Appellant.	)))))))))))	Appeal from the Circuit Court of Kendall County. Nos. 13-CF-260 13-TR-8036 13-TR-8037 Honorable Timothy J. McCann, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Hutchinson and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court did not abuse its discretion in excluding defendant's exculpatory statements, as the admission of those statements was not required under the completeness doctrine or Illinois Rule of Evidence 106; (2) defendant showed no error, and thus no plain error, in the State's closing argument: the State did not actually argue that defendant's control of the vehicle where cocaine was found was sufficient to establish his knowing possession of the cocaine, although, in any event, such an argument would not have been improper; (3) we vacated defendant's successive (and thus unauthorized) DNA analysis fee.

¶ 2 Defendant, Rafael Vargas, Jr., appeals from the judgment of the circuit court of Kendall County, contending (1) that his exculpatory statements made when he was arrested were

admissible under either the completeness doctrine or Illinois Rule of Evidence 106 (eff. Jan. 1. 2011), (2) during closing argument the prosecutor misstated the law regarding possession, and (3) the imposition of a DNA analysis fee was improper. Because the trial court properly barred the admission of defendant's exculpatory statements, the State's closing argument was not plain error, and the DNA fee was improperly imposed, we affirm in part and vacate in part.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged by complaint with speeding (625 ILCS 5/11-601(b) (West 2012)) and driving with a suspended driver's license (625 ILCS 5/6-303(a) (West 2012)) and was indicted on one count of unlawful possession of a controlled substance (cocaine) (720 ILCS 570/402(c) (West 2012)).

¶ 5 Before trial, the State filed a motion *in limine*, seeking to bar the admission of defendant's exculpatory statements that his mother owned the vehicle and that the cocaine found in the car was not his. The State excluded from its motion *in limine* statements defendant made to an officer in which he referred to the vehicle as "his." Defendant contended that, if his statements that the vehicle was his were admitted, then his exculpatory statements should be admitted under either the common-law completeness doctrine or Illinois Rule of Evidence 106.

¶ 6 The trial court, in granting the motion *in limine*, ruled that defendant's exculpatory statements were not admissible under the completeness doctrine, because they were not necessary to explain defendant's references to the vehicle as his. The court further ruled that the State could introduce defendant's statements referring to the vehicle as his, but only through Officer Dilg's testimony and not via an audio recording.

¶ 7 The following facts are taken from the trial. On August 24, 2013, at approximately 2 a.m., Officer Ryan Melhouse of the Oswego police department stopped a vehicle for speeding.

Defendant was driving. There were two passengers, a female seated in the right front and a male seated in the rear behind defendant.

¶ 8 After ascertaining that defendant's driver's license was suspended, Officer Melhouse arrested defendant and placed him in the back seat of his squad car. Officer Brandon Dilg of the Oswego police department, who arrived to assist Officer Melhouse, monitored the two passengers, who remained in the vehicle. After Officer Melhouse told the passengers that they needed to leave, because he was going to tow the vehicle, they exited the vehicle. When each of them asked to reenter the vehicle to retrieve his or her cigarettes, Officer Melhouse monitored them doing so. He did not see either of them place anything in the center console or under the seats. Officer Melhouse then directed them to a nearby Walmart to wait for a ride.

¶ 9 Because he was having the vehicle towed, Officer Melhouse searched the vehicle. In doing so, he found under the front passenger seat a clear plastic bag containing a white powdery substance. He found in the center console between the driver's and front passenger's seats a clear plastic bag containing a white powdery substance. The bag in the console was "right on top" of the contents and "immediately visible" when Officer Melhouse opened the console. The contents of each bag tested positive for cocaine.

¶ 10 While Officer Melhouse searched the vehicle, Officer Dilg spoke to defendant, who was still seated in the back of Officer Melhouse's squad car. According to Officer Dilg, defendant stated that he did not give Officer Melhouse consent or approval to search "his vehicle." Defendant later asked Officer Dilg if he would get defendant's cell phone from "his car."

¶ 11 The State played a recording that showed defendant's vehicle and simultaneously displayed the rear interior of Officer Melhouse's squad car. The audio portion of the recording

did not contain defendant's statements referring to the vehicle as his or his exculpatory statements that his mother owned the vehicle and that the cocaine was not his.

¶ 12 The jury was instructed that a person commits the offense of possessing a controlled substance when he "knowingly possesses" such a substance. The jury was further instructed that it must be proved that defendant "knowingly possessed" cocaine. The instructions also stated that possession could be either actual or constructive and that two or more persons could jointly possess an item. The instructions provided that a defendant actually possesses an item when he has immediate and exclusive control over it and that a defendant constructively possesses an item when he lacks actual possession but has both the power and intent to exercise control.

¶ 13 In closing, the State read the elements instruction for possession of a controlled substance, including the portion that it must be proved that defendant "knowingly possessed" the cocaine. The State then discussed what constitutes possession, including both actual and constructive possession. In doing so, the prosecutor pointed out that control over an item was necessary to establish either actual or constructive possession. The State argued that defendant's control of the vehicle showed his control of the cocaine. Defendant did not object to the State's argument regarding possession.

¶ 14 Defendant's closing argument reminded the jury that one of the instructions defined possession as "knowingly possess[ing]" a controlled substance. Moreover, defendant told the jury that the State must prove beyond a reasonable doubt that he "knowingly possessed [the] controlled substance"; his knowledge was "what's important." Defendant advised the jury that when considering whether someone possessed something they must decide if the person had "control over [it]" and that there was no evidence that defendant knew that the cocaine was in the vehicle or that he controlled it.

¶ 15 The jury found defendant guilty of possessing the cocaine, and the trial court sentenced him to 30 months' probation and 180 days in jail and ordered him to pay a $250 DNA analysis fee. Defendant filed a motion for a new trial in which he argued, among other things, that his exculpatory statements should have been admitted under the completeness doctrine. Alternatively, he asserted that, because the State was allowed to play a portion of the recording, Rule 106 required admission of the entire recording, including the audio portion containing his exculpatory statements. Defendant did not raise any issue regarding the State's closing argument. The trial court denied the motion for a new trial, and defendant filed a timely notice of appeal.

¶ 16 II. ANALYSIS

¶ 17 On appeal, defendant contends that: (1) under the completeness doctrine he was entitled to introduce his statements that his mother owned the vehicle and that the cocaine was not his, because those statements were necessary to provide proper context for, and meaning to, his statements that referred to the vehicle as his; (2) under Rule 106 the entire audio portion of the recording, including those two statements, should have been played; (3) it was plain error when the prosecutor stated during closing argument that defendant's control of the vehicle was sufficient to prove that he knowingly possessed the cocaine; and (4) the portion of the sentence ordering him to pay the $250 DNA analysis fee should be vacated, as he was required to pay such a fee in a previous case.

¶ 18 The State responds that: (1) the trial court did not err in barring defendant's exculpatory statements; (2) defendant forfeited any challenge to the State's closing argument, because he failed to object to it or raise an issue regarding it in his posttrial motion, and any error did not rise to the level of plain error; and (3) the DNA analysis fee should not have been imposed.

¶ 19 We review evidentiary questions for an abuse of discretion. *People v. Craigen*, 2013 IL App (2d) 111300, ¶ 41. A trial court abuses its discretion where its decision is arbitrary, fanciful, or unreasonable. *Craigen*, 2013 IL App (2d) 111300, ¶ 41. A resolution of the proper interpretation of Rule 106, however, involves a legal question, and our review is *de novo*. *Craigen*, 2013 IL App (2d) 111300, ¶ 41.

¶ 20 We first address defendant's contention that the trial court abused its discretion in not allowing admission of his exculpatory statements. The common-law completeness doctrine provides that, if one party introduces part of an utterance or writing, the opposing party may introduce the remainder, or so much as is needed to place the part originally introduced into proper context, so that a correct and true meaning is conveyed to the trier of fact. *Craigen*, 2013 IL App (2d) 111300, ¶ 42 (citing *People v. Williams*, 109 Ill. 2d 327, 334 (1985)). Rule 106 did not codify the entire common-law doctrine, because the common-law doctrine applies to both oral, as well as written and recorded, statements, whereas Rule 106 applies only to written and recorded statements. *Craigen*, 2013 IL App (2d) 111300, ¶ 42. Moreover, the completeness doctrine is limited to what was said on the same subject at the same time, whereas Rule 106 allows admission of statements, if written or recorded, that were not made at the same time as the admitted statement, if fairness so requires. *Craigen*, 2013 IL App (2d) 111300, ¶ 43. Nonetheless, aside from the differences between the common-law rule and Rule 106, Rule 106 did not alter the common-law requirements that to admit the remainder of an oral, written, or recorded statement, it must be necessary to do so to prevent the trier of fact from being misled, to place the admitted portion in proper context so that a correct and true meaning is conveyed, or to shed light on the meaning of the statement already received. *Craigen*, 2013 IL App (2d) 111300, ¶ 45. Put another way, a defendant has no right to introduce portions of a statement that are

unnecessary to enable the trier of fact to properly evaluate the portions admitted. *Craigen*, 2013 IL App (2d) 111300, ¶ 45.

¶ 21 In this case, the completeness doctrine did not compel the admission of defendant's exculpatory statements. The statements that were admitted, in which defendant referred to the vehicle as his, required no clarification to prevent the jury from being misled. As the driver, it was only natural that defendant would refer to the vehicle as his. In that vein, the import of those statements was perfectly clear and called for no clarification. Moreover, by merely referring to the vehicle as his, defendant was not stating that he owned the vehicle. Therefore, his statement that his mother was the owner would not have clarified his statements that, as the driver, the vehicle was his. Likewise, by stating that the vehicle was his, he was not stating that he knew that there was cocaine in the vehicle. Therefore, his statement that he did not know that there was cocaine in the vehicle would not have clarified his statements referring to the vehicle as his. Accordingly, his exculpatory statements, that his mother owned the vehicle and that he did not know that the cocaine was in the vehicle, were not necessary to prevent the jury from being misled, to place the admitted statements in the proper context, or to shed light on their meaning. See *Craigen*, 2013 IL App (2d) 111300, ¶ 45. Thus, the completeness doctrine did not require admission of the exculpatory statements.

¶ 22 As for Rule 106, it is inapplicable in this case.[1] Rule 106 provides that "[w]hen a written or recorded statement or part thereof is introduced by a party, an adverse party may require the

[1] Defendant did not forfeit his contention regarding Rule 106, as he raised it in response to the State's motion *in limine* and in his posttrial motion. See *People v. Herron*, 215 Ill. 2d 167, 175 (2005). He also adequately developed it in this court. See *Lozman v. Putman*, 379 Ill. App. 3d 807, 826 (2008).

introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Ill. R. Evid. 106 (eff. Jan. 1, 2011). By its terms, Rule 106 applies only to the introduction of written or recorded statements. *Craigen*, 2013 IL App (2d) 111300, ¶ 42.

¶ 23 Here, defendant's statements regarding the vehicle being his were not introduced as written or recorded statements. Rather, the trial court, in ruling on the State's motion *in limine*, confined their admission to the testimony of Officer Dilg. In doing so, the court expressly prohibited the admission of the statements via the audio portion of the recording. In playing that recording, the State, consistent with the trial court's pretrial ruling, carefully excised the audio portion of the recording containing the admitted statements. Therefore, there was no introduction of a written or recorded statement of defendant referring to the vehicle as his. Thus, Rule 106 did not apply.

¶ 24 Finally, even if the trial court erred in barring admission of defendant's exculpatory statements, that would not require reversal. An evidentiary error does not require reversal of a jury verdict if the error is not likely to have influenced the jury. *People v. Nixon*, 2015 IL App (1st) 130132, ¶ 120 (citing *People v. Miller*, 173 Ill. 2d 167, 195 (1996)). Indeed, an error in applying the completeness doctrine can be harmless. *People v. Demeron*, 153 Ill. App. 3d 440, 446 (1987).

¶ 25 In assessing whether any error was harmless, defendant's statements that referred to the vehicle as his must be considered in the context in which they were made. As explained, defendant did not proclaim to Officer Dilg that he owned the vehicle. Rather, in stating to Officer Dilg that he did not consent to the search of the vehicle he was driving, he naturally referred to the vehicle as his. Similarly, when defendant asked Officer Dilg if he would get

defendant's cell phone, he naturally referred to the cell phone as the one in his vehicle. We recognize that the State stated in closing that defendant said "in his words" that it was "his truck." However, it did so in the context of its argument that the driver of a vehicle typically decides who is a passenger and how the vehicle is driven. As such, the comment was no more than a passing reference to defendant's statements. More importantly, it was nowhere near an argument that, because defendant referred to the vehicle as his, he admitted that he knowingly possessed the cocaine. When considered in the context of the overall argument, the jury would not have interpreted the State's brief reference to defendant's statements that the vehicle was his as an admission by defendant that he owned the vehicle or, more importantly, that he possessed the cocaine. Thus, any error in admitting the statements without also admitting the exculpatory statements was harmless.

¶ 26 We next address whether the prosecution committed plain error when it suggested during closing argument that defendant's control of the vehicle was sufficient to prove that he knowingly possessed the cocaine. The plain-error rule is a narrow and limited exception to the general rule of procedural default for failing to raise an issue in the trial court. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008). To obtain plain-error relief, a defendant must show a clear or obvious reversible error. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). He must further show one of two things: (1) that the evidence was so closely balanced that the error threatened to tip the scales of justice against him, or (2) that the error was so serious that it affected the fairness of his trial and challenged the integrity of the judicial process. *Naylor*, 229 Ill. 2d at 593. A defendant bears the burden of persuasion under both prongs, and, if he fails to establish plain error, his procedural default will be enforced. *Naylor*, 229 Ill. 2d 593. In this case, defendant relies only on the closely-balanced prong of plain error.

¶ 27 The purpose of closing argument is to give each party a final opportunity to review with the jury the evidence, discuss what it means, apply the law to the evidence, and argue why the evidence and law compel a favorable verdict. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). The State generally has wide latitude in closing argument (*People v. Evans*, 209 Ill. 2d 194, 225 (2004)), but it may not misstate the law (*People v. Ramsey*, 239 Ill. 2d 342, 441 (2010)). There is reversible error only where the State's remarks were improper and so prejudicial that real justice was denied or that the verdict might have resulted from the error. *Evans*, 209 Ill. 2d at 225.

¶ 28 Here, there was no error, let alone plain error, in the State's closing argument. That is so because the prosecutor did not misstate the law regarding possession. In discussing the possession charge, the prosecutor began by reading to the jury the elements instruction on possession. In doing so, he read, in part, that "the State must prove *** [t]hat the defendant knowingly possessed *** cocaine." That, of course, was legally accurate. See *People v. Woods*, 214 Ill. 2d 455, 466 (2005). In reviewing the evidence, the prosecutor focused on whether defendant executed control over the cocaine found in the vehicle. That also was consistent with the law. See *Woods*, 214 Ill. 2d at 466 (to possess narcotics a defendant must not only know of their presence but must have immediate and exclusive control over them). In the context of arguing that defendant had control of the cocaine, he emphasized that defendant had control over the vehicle. That was proper argument in an effort to persuade the jury that defendant controlled, or intended to control, the cocaine. However, in discussing defendant's control of the vehicle, the prosecutor never told the jury that such control evinced defendant's knowledge of the cocaine. In fact, other than the prosecutor's mention of the knowledge element in the context of

the instructions, he never mentioned knowledge again.[2] Therefore, the prosecutor did not misstate the law regarding what was sufficient to prove knowledge. As such, no error occurred.

¶ 29 Even if the prosecution did suggest that knowledge of the cocaine could be based on defendant's control of the vehicle, that statement did not constitute clear or obvious reversible error. As discussed, there is reversible error only where the State's remarks in closing argument were improper and so prejudicial that real justice was denied or that the verdict might have resulted from the error. *Evans*, 209 Ill. 2d at 225. Here, the jury was unequivocally instructed that it must find that defendant had both knowledge of, and control over, the cocaine. Indeed, the prosecutor, by reading the possession instructions, advised the jury that knowledge was a question separate from possession. Further, the prosecutor reminded the jury that possession required proof of either control or intent to control. Not only that, defense counsel reiterated in his closing argument that the State must prove that defendant "knowingly possessed [the] controlled substance," adding that defendant's knowledge was "what's important." He emphasized that the State did not present any evidence that defendant knowingly possessed the cocaine. In light of the instructions and arguments overall, even if the prosecutor suggested that defendant's control of the vehicle was sufficient to establish knowledge, such a comment was not so prejudicial as to have deprived defendant of real justice or resulted in an improper verdict. Thus, there was no clear or obvious reversible error and hence no plain error.

[2] To the extent that the prosecutor implied that defendant's control of the vehicle supported an inference of defendant's knowledge of the cocaine, that implication was proper. See *People v. Wells*, 241 Ill. App. 3d 141, 146 (1993).

¶ 30 Finally, because the State properly concedes that imposition of the DNA fee was improper, we vacate that part of the judgment. See *People v. Marshall*, 242 Ill. 2d 285, 303 (2011).

¶ 31 III. CONCLUSION

¶ 32 For the reasons stated, we vacate that part of the judgment of the circuit court of Kendall County imposing the $250 DNA analysis fee and otherwise affirm the judgment. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 33 Affirmed in part and vacated in part.