2017 IL App (1st) 142485-U

SECOND DIVISION
March 28, 2017

No. 1-14-2485

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ADONIS WALKER, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County 11 CR 189 Honorable Luciano Panici, Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Hyman and Justice Neville concurred in the judgment

ORDER

¶ 1 *Held*: Trial court's comment on defendant's credibility while he was testifying on cross-examination was not harmless error.

¶ 2 Following a jury trial, defendant Adonis Walker, was convicted of armed robbery (720 ILCS 5/18-2(A)(2) (West 2010)) and aggravated battery with a firearm (720 ILCS 5/12-4.2(A)(1) (West 2010)) and was sentenced to two concurrent terms of 25 years' imprisonment. On appeal defendant argues: (1) he was denied a fair trial based on improper comments by the prosecutor during closing argument, (2) he received ineffective assistance of counsel when counsel failed to lay the foundation to impeach a State witness, (3) the trial judge exhibited bias against him but making sardonic and sarcastic comments and commenting on his testimony in front of the jury, (4) his conviction for aggravated battery with a firearm must be vacated under

the one-act, one-crime rule, (5) his sentence for aggravated battery with a firearm should be vacated because the trial court mistakenly believed that a 15-year add on applied, (6) his sentence violates the eighth amendment and the Illinois proportionate penalties clause, and (7) he is entitled to a new discretionary transfer hearing in juvenile court based on a recent amendment to section 5-130 of the Juvenile Court Act (Act) (705 ILCS 405/5-130 (West 2016)). For the following reasons, we reverse the judgment of the trial court and remand to the juvenile court for further proceedings.

¶ 3 BACKGROUND

¶ 4 In November 2010, defendant was charged with two counts of attempt first degree murder, one count of armed robbery with a firearm, one count of aggravated battery with a firearm, two counts of aggravated discharge of a firearm, one count of unlawful use of a weapon, one count aggravated unlawful restraint, and one count of reckless discharge of a firearm based on his involvement in the shooting of Tristan Addison. The State proceeded to trial on attempt first degree murder, aggravated battery with a firearm, and armed robbery.

¶ 5 Defendant does not challenge the sufficiency of the evidence against him. Therefore, we provide a summary of only the evidence relevant to the disposition of this appeal. The evidence presented at trial established that defendant, who was 16-years-old and his codefendant E.F.,[1] who was 13-years-old at time of the offense, approached Tristan Addison when he was walking to the school bus after a day at high school. Addison testified that defendant and E.F. ordered him to empty his pockets. Defendant took Addison's cell phone and then handed a gun to E.F. and said, "Do what you got to do." E.F. took the gun and held it six inches away from Addison

[1]E. F. is not a party to this appeal.

and shot him in the leg. Defendant and E.F. fled the scene, dropping Addison's cell phone, which Addison later recovered. Addison later identified defendant and E.F. in a photo array.

¶ 6 Shekai Hennings, a sophomore at the same high school, corroborated Addison's version of the events. Shekia dragged Addison into the school for help after he was shot. Although she initially identified another student as the person involved in the shooting, she later viewed a physical line up and identified both defendant and E.F as the offenders.

¶ 7 Defendant denied any involvement in the shooting. He stated that he knew E.F. from school. He testified that he was standing with a group when Addison walked by. E.F. began to walk toward Addison. Defendant did not have a gun and did not see E.F. with a gun. E.F. shot Addison. Defendant stated that he and E.F. did not talk about robbing or shooting anyone and did not know that E.F. was going to rob and shoot Addison. After the shooting, E.F. fled on his bike and defendant called for a ride home.

¶ 8 For the defense, Jovan Thomas testified that he was present when Addison was shot. Jovan, Tiffany Moore, and Shekai Hennings were walking near the school when E.F. and defendant walked toward them and eventually met up with them near the parking lot. While they were talking, Moore walked toward the back door of the school and E.F. walked off. Joven then heard popping sounds. He stated that Shekai and defendant were still standing next to him. After the popping sound, E.F. got on his bike and rode away. Jovan stated that he never saw defendant hand E.F. anything or go through Addison's pockets. On cross-examination, Jovan stated that he did not know defendant or E.F. He moved to Kentucky the day after the shooting and learned he would be a witness after he had several conversations with an investigator almost two years after the shooting. He stated that he never called the police about what happened.

¶ 9 The jury found defendant guilty of aggravated battery with a firearm and armed robbery, but not guilty of attempt first degree murder. The trial court sentenced defendant to 25 years in prison for the armed robbery conviction (ten years for the conviction plus a fifteen-year firearm enhancement), and a concurrent 25 years in prison for the aggravated battery with a firearm conviction (ten years for the conviction, plus a fifteen-year firearm enhancement). It is from this judgment that defendant now appeals.

¶ 10 ANALYSIS

¶ 11 On appeal, defendant advances several arguments for reversing his conviction and granting him a new trial. We agree with defendant's argument that comments made by the trial court during the defendant's testimony was directed at the defendant's credibility and likely to have had an effect on the jury thereby depriving defendant of a fair trial in a credibility case. As such, we find this issue dispositive of this appeal.

¶ 12 Defendant contends that the trial judge demonstrated antagonism and hostility towards him beginning at the pre-trial motion to suppress hearing and continuing through the trial. Defendant faults the trial judge for making a legally indefensible ruling on a pretrial motion and unprofessional and hostile remarks during sidebars, including a statement that defendant's witnesses were "all BS." He argues the most egregious and prejudicial comment occurred in front of the jury during the State's cross-examination of defendant when the trial court stated that defendant "changes his mind every three seconds." This blatant bias, defendant argues, denied him a fair and impartial trial and requires reversal and remand for a new trial.

¶ 13 The State contends that this issue is waived because defendant failed to assert a specific judicial bias claim in his post-trial motion. As a general rule, where the grounds for a new trial are stated in writing, a defendant is limited to those errors alleged therein and is deemed to have

waived all other errors. *People v. Crosby*, 39 Ill. App. 3d 1008, 1010 (1976).

¶ 14 However, in *People v. McLaurin*, 235 Ill. 2d 478 (2009), our supreme court first noted that the application of the forfeiture rule is less rigid where the basis for the objection is the trial judge's conduct, citing to *People v. Kliner*, 185 Ill. 2d 81, 161 (1998), and *People v. Sprinkle*, 27 Ill. 2d 398 (1963). The *McLaurin* court noted that courts generally only relax application of the forfeiture rule in the "most compelling of situations," such as when a trial judge makes inappropriate remarks to the jury or in cases involving capital punishment because failure to raise a claim properly denies the trial court an opportunity to correct an error or grant a new trial, thus wasting time and judicial resources. *McLaurin*, 235 Ill. 2d at 488. The *McLaurin* court ultimately determined that the defendant had not presented an extraordinary or compelling reason to relax the forfeiture rule because the defendant did not claim "that the trial court overstepped its authority in the presence of the jury" or that counsel's objection to the trial court's conduct " 'would have fallen on deaf ears.' " *Id.* at 488. Here, defendant has alleged that the trial court overstepped its authority in the presence of the jury. See *id.* We will therefore consider the merits of this issue.

¶ 15 Waiver aside, the State argues the trial court's comment "[defendant] changes his mind every three seconds" was not a commentary on defendant's credibility, but rather a comment directed at the defendant's ability to answer the questions posed by the prosecutor. This argument is without merit.

¶ 16 The following exchange occurred during the State's cross-examination of defendant:

> "[PROSECUTOR]: If I am [co-defendant], how am I positioned? Am I facing you, am I like this, how am I facing you?

[DEFENDANT]: You are not facing towards me, no. He was looking at the victim.

[PROSECUTOR]: Is it this way? Is it this way? Which way is [co-defendant]?

[DEFENDANT]: Sidewalk. [Co-defendant] this way and victim right there.

[PROSECUTOR]: So the jury could understand because they are not there either. You're in the group. I'm [co-defendant] and Tristan. How is [co-defendant] positioned in relation to you? Is he facing you?

[DEFENDANT]: No.

[PROSECUTOR]: Is he this way?

[DEFENDANT]: This way.

[PROSECUTOR]: Is he like this or like this?

[DEFENDANT]: I would say this way.

[PROSECUTOR]: Like I am right now?

[DEFENDANT]: Yes.

COURT: Facing the jury?

[PROSECUTOR]: Yes.

[DEFENSE COUNSEL]: 90 degrees.

[PROSECUTOR]: You don't have a side-view?

[DEFENDANT]: No.

[PROSECUTOR]: Do you have a back view of him?

[DEFENDANT]: Yeah, you could see his back. We were in a circle group.

[PROSECUTOR]: If I am [co-defendant]. This is the view you have of me.

[DEFENDANT]: Yes.

[PROSECUTOR]: Is Tristan here facing you looking this way at you?

[DEFENDANT]: Tristan was not looking at me.

[PROSECUTOR]: Which way is Tristan facing?

[DEFENDANT]: After he got shot?

[PROSECUTOR]: Before. When you see [co-defendant] say "up everything," you're saying [co-defendant] is like this with his back to you. How is Tristan?

[DEFENDANT]: This is what happened. [Co-defendant] here facing toward the jury.

[DEFENSE COUNSEL]: Objection.

COURT: He changes his mind every three seconds. Overruled.

[DEFENSE COUNSEL]: I disagree with that. The cross is misleading.

COURT: Overruled Counsel."

¶ 17 Our review of the record indicates this exchange and the comment by the judge came at a point during defendant's cross-examination where the prosecution was attempting to demonstrate to the jury the physical location and relationships of the defendant, E.F., and Tristan at the time of the shooting. It is clear that the prosecutor had the verbal and educational advantage over the minor defendant so that a rapid fire cross-examination would generate unclear and confusing

testimony. As such, the jury's determination of whether the defendant's testimony is credible is susceptible to influence by even an unintentional comment or gesture by the court.

¶ 18 In a criminal prosecution, every defendant has a constitutional right to a fair trial before an unbiased and open-minded trier of fact. U.S. Const., amends VI, XIV; Ill. Const. 1970, art. I, § 8; *People v. Taylor*, 357 Ill. App. 3d 642, 647 (1990). A trial judge has wide discretion in the conduct of trial but must not make comments or insinuations, by word or conduct, indicative of an opinion on the credibility of a witness or the argument of counsel. *People v. Heidorn*, 114 Ill. App 3d 933, 936 (1983). For comments by a trial judge to constitute reversible error, the defendant must show that the remarks were prejudicial and that he or she was harmed by the comments. *Id.* at 937. "Where it appears that the comments do not constitute a material factor in the conviction, or that prejudice to the defendant is not the probable result, the verdict will not be disturbed." *People v. Williams*, 209 Ill. App. 3d 709, 718-19 (1991). "[I]n each case an evaluation of the effect upon the jury of a trial court's interjections must be made in the light of the evidence, the context in which they were made and the circumstances surrounding the trial." *Id.* at 719 (trial judge "must not interject opinions or comments reflecting prejudice against or favor toward any party.").

¶ 19 In the instant case, the judge made direct commentary on the credibility of defendant's testimony in the presence of the jury by stating the defendant "changes his mind every three seconds" during his attempt to answer the prosecutor's questions regarding where he was at the time of the shooting. From the jury's perspective, the State presented a case where the victim and another student, Hennings, testified as to the circumstances of the shooting. However, there were discrepancies between them as to certain details relevant to how the cell phone was taken and when the gun was seen and whether it was given to E.F. by the defendant. The defense, on the

other hand, presented a different version. Jovan and defendant's testimony took defendant completely out of the picture and depicted E.F. as the sole actor. This case involved no physical evidence, admissions, or confessions from defendant and hinged entirely on the credibility of witnesses. In view of this record we cannot, therefore, find the trial judge's comment to be harmless error.

¶ 20 The trial judge's comment that the defendant "changes his mind every three seconds" conveyed an impression to the jury that the defendant's testimony was not reliable. We find the trial judge's comment constitutes an improper invasion of the jury's province and was unnecessary to the conduct of the trial. *People v. Sprinkle*, 27 Ill. 2d 398, 401-402 (1963) (judge must not invade the province of the jury by making comments, insinuations or suggestions indicative of belief, or disbelief in the integrity or credibility of a witness); *People v. Lewerenz*, 24 Ill. 2d 295, 301(1962) ("Jurors are quick to perceive any leaning of the court and place great reliance upon what he says and does, so that his statements and intimations are liable to have the force of evidence and be most damaging to an accused."). *People v. Eckert*, 194 Ill. App. 3d 667, 674 (1990) ("The trial judge must exercise a high degree of care to avoid influencing the jurors in any way, to remain impartial, and to not display prejudice or favor toward any party."). As a result of the judge's comment, the defendant may have been prejudiced in the eyes of some or all of the jurors. This case must be remanded for a new trial.

¶ 21 Defendant also argues that this cause should be remanded to the juvenile court because he is entitled to a new discretionary transfer hearing as procedural amendments to section 5-130 of the Act apply to cases pending on direct appeal.

¶ 22 In 2010, when Walker was convicted, section 5-130 of the Act read:

> "The definition of delinquent minor under Section 5-120 of this Article shall not apply to any minor who at the time of an offense was at least 15 years of age and who is charged with: (i) first degree murder, (ii) aggravated criminal sexual assault, (iii) aggravated battery with a firearm where the minor personally discharged a firearm as defined in Section 2-15.5 of the Criminal Code of 1961, (iv) armed robbery when the armed robbery was committed with a firearm, or (v) aggravated vehicular hijacking when the hijacking was committed with a firearm." 705 ILCS 405/5-130(1)(a) (West 2010).

Under this section, the State was required to prosecute defendant in criminal court, rather than juvenile court because he was 15-years-old at the time of the offense. While this case was pending on direct appeal, the General Assembly amended section 5-130 of the Act raising the minimum age for automatic transfer to criminal court for certain offense from 15-years-old to 16-years-old. Pub. Act 99-258 (eff. Jan. 1, 2016) (amending 705 ILCS 405/5-130(1)(a) (West 2014)).

¶ 23 We agree with defendant that under section 5-130 as amended, the automatic transfer provision does not apply to him because he had not reached 16-years-old at the time of the alleged offense. See 705 ILCS 405/5-130(1)(a) (West 2016). Because the amended section 5-130 applies retroactively (*People ex rel. Alvarez v. Howard*, 2016 IL 120729, ¶ 28), and applies to cases pending on direct appeal at the time of the amendment (*People v. Scott*, 2016 IL (1st) 141456, ¶ 46), defendant would be entitled to a discretionary hearing in the juvenile court. 705 ILCS 405/5-130(1)(a) (West 2016). As such, we remand to the juvenile court, where the State may file a motion to transfer the

case to criminal court for trial. See *People v. Patterson*, 2016 IL App (1st) 101573-B, ¶ 21.

¶ 24 In light of the foregoing determinations, we need not address the remaining issues raised by defendant regarding other judicial conduct outside the presence of the jury; improper appeals to juror's emotions by the prosecution; ineffective assistance of counsel; the one-act, one-crime doctrine; and improper sentencing procedure. However, we need to assess whether, after reviewing the record in the light most favorable to the State, the evidence was sufficient to prove defendant guilty of armed robbery and aggravated battery with a firearm beyond a reasonable doubt. *People v. Stevens*, 338 Ill. App. 3d 806, 811 (2003). If we reverse a criminal conviction and remand for a new trial without deciding the sufficiency of the evidence at the first trial, we risk subjecting defendant to double jeopardy on retrial. *People v. Taylor*, 76 Ill. 2d 289, 309 (1979) (citing *Burks v. United States*, 437 U.S. 1, 11 (1978) (the double jeopardy clause precludes a second trial giving the State another opportunity to offer evidence not presented in the first trial).

¶ 25 Having reviewed the record in the instant case in the light most favorable to the State, we conclude that a rational trier of fact could have found the essential elements of armed robbery and aggravated battery with a firearm beyond a reasonable doubt. This holding does not imply that we have made a finding as to defendant's guilt that would be binding on the court on retrial. *Taylor*, 76 Ill. 2d at 310.

¶ 26 CONCLUSION

¶ 27 The judge's comment, made in the presence of the jury, on defendant's credibility while he was testifying on cross-examination amounted to reversible error where the judgment rested solely on the credibility of witnesses at trial. For the foregoing reasons, the judgment of the trial

court is reversed and remanded for a new trial.

¶ 28 Furthermore, the automatic transfer provision does not apply to defendant, and we therefore remand to the juvenile court to allow the State the opportunity to decide whether to file a petition to transfer the case to criminal court. If the State seeks a discretionary transfer, then defendant is entitled to a discretionary transfer hearing.

¶ 29 Reversed; remanded with directions.