2020 IL App (2d) 170911-U
No. 2-17-0911
Order filed September 15, 2020

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. SHAUN RAMIREZ, Defendant-Appellant.	)	Appeal from the Circuit Court of Kane County. No. 16-CF-2225 Honorable David P. Kliment, Judge, Presiding.

PRESIDING JUSTICE BIRKETT delivered the judgment of the court.
Justices Zenoff and Brennan concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant established neither plain error nor ineffective assistance of counsel due to the trial court's failure to instruct the jury that defendant had a right to use force to prevent a robbery. There was no prejudice because the jury was already instructed that the defendant had a right to use force to prevent death or great bodily harm. Also, the prosecutor's comment that no one saw the victim bring a knife to his fight with defendant was not error but was based on the evidence. Finally, the prosecutor's comment that it could consider defendant's criminal history as evidence that he was more likely the aggressor was harmless error.

¶ 2 Following a jury trial, defendant, Shaun Ramirez, was convicted of armed violence (720 ILCS 5/33A-2(a)(1) (West 2016)) and attempted first-degree murder (*id.* §§ 8-4(a), 9-1(a)(1)). He appeals, contending that (1) the trial court erred in not instructing the jury that defendant was

justified in using deadly force to prevent an armed robbery, and (2) the prosecutor misstated the facts and the law by telling the jury that no one saw the victim, Dexter Darden, bring a knife to the fight and that it could consider defendant's prior convictions—admitted for impeachment purposes only—as evidence that defendant was more likely the aggressor. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged following a fight with Darden during which Darden was stabbed. At trial, Darden testified that he had known defendant for 20 years. On December 21, 2016, he rode with Kevin Thompson to defendant's house. He wanted to talk to defendant about a "situation" between defendant and Darden's stepson, Daqwae Rogers.

¶ 5 Rogers arrived a short time later and Darden sent him to get defendant so that Darden could talk to him. When defendant came outside, Darden got out of the car and walked up to him. Defendant was holding a Red Bull and a bottle of Hennessy. Defendant drank the Red Bull and threw the can on the ground. He appeared to Darden to be intoxicated.

¶ 6 Darden approached defendant and asked what was going on between defendant and Rogers, as he had heard that defendant took money from him. Defendant told Darden to stay out of his business and punched him in the mouth. Darden decided to deal with the situation at another time and began to walk away. Darden felt something, as if defendant were trying to grab him, but kept walking. He got in the car, then turned and realized that he had been cut.

¶ 7 Darden got back out of the car and approached defendant. They resumed fighting, and Darden soon "got the best of" defendant who appeared intoxicated. Darden let him up and returned to the car, thinking that the incident was over. Thompson wanted to leave immediately, but Darden wanted to wait for Rogers.

¶ 8 While Darden and Thompson were talking, defendant approached the car. He produced a knife and attempted to stab Darden in the face and neck. He stabbed Darden in the chest. Thompson panicked because blood was "shooting out of" Darden's hand. Thompson attempted to close the window but opened it instead. Darden was attempting to push defendant away from him, but defendant then grabbed Darden's arm and cut down on the arm. Thompson then drove away.

¶ 9 Thompson testified that Darden asked him to drive him to an address on Glen Circle. Darden was upset but not angry during the drive; he said he just wanted to talk to defendant. They pulled into a parking spot and, sometime later, defendant came outside. Darden got out and told defendant that he wanted to talk to him. They began arguing. Thompson saw defendant with a knife, but he was just holding it. At some point, Darden returned to the car and defendant put away the knife. When Darden got back in the car, he lifted his shirt and Thompson saw that he was bleeding.

¶ 10 Darden again approached defendant and they began fighting. Thompson did not see a knife at this point. Defendant fell. Darden kept hitting him for awhile before returning to the car. As Darden and Thompson sat in the car waiting for Rogers, defendant reached through the window and began "tussling" with Darden. Thompson felt blood splash on his face and Darden told him to drive away. Thompson did not see Darden being stabbed, but as he pulled onto Randall Road, he saw Darden's arm and realized that he had been stabbed.

¶ 11 Thompson drove Darden to the hospital. Blood was everywhere. Darden gave the knife to hospital personnel.

¶ 12 Rogers testified that he was at defendant's apartment on December 21, 2016. He did not see the fight, and Darden was gone when he went outside. Rogers could tell that defendant was

angry, but defendant did not appear to be injured. Defendant said that they had to leave, and Rogers left in defendant's car with defendant driving. During the ride, defendant said that he tried to stab Darden.

¶ 13 Police evidence technician Scott Reed photographed defendant shortly after the incident. The pictures showed some blood under his nose and a possible mark on his nose but no other injuries. Reed noticed some swelling around his right eye. Reed also photographed the crime scene. Snow was on the ground, but Reed did not see any blood at the scene. He did not find any blood on defendant's clothing. However, blood was "everywhere" on the front passenger's seat of Thompson's car. Detective Dave Brian also saw no blood at the scene.

¶ 14 Jamontez Ross, defendant's stepson, testified that he was home watching television when Rogers came in and said that Darden wanted to talk to defendant. Ross went outside when he heard screaming. He saw Darden and defendant fighting, then saw Darden standing over defendant. As defendant was on the ground, Darden tried to grab a knife from his waist but dropped it. Defendant's nose was bleeding and he had scratches on his face. Defendant yelled for Ross to go back inside.

¶ 15 Teyanna Hunter testified that she went to defendant's apartment to pick up her children. She saw Darden and defendant arguing. Darden punched defendant in the face, precipitating a fight. Defendant fell to the ground and Darden stomped on his head. While still standing over defendant, Darden dropped a knife that he was attempting to retrieve from his pants. Defendant reached for the knife. Darden stomped on defendant's arm, but he eventually retrieved the knife. At one point, Darden walked back to the car, but then got out and resumed the altercation. Hunter did not see a knife during the second fight. Eventually, Darden got back in the car and drove away.

¶ 16 Defendant testified that he was close to Darden and that he thought of Rogers as a little brother. Defendant and Rogers had planned to buy phones together pursuant to a special offer. Rogers paid $100 of the initial $130 payment, but the store cancelled the order and told defendant that it would take some time to get the $130 refunded.

¶ 17 Defendant was home on December 21, 2016, when Rogers came over, which he often did. Rogers said that Darden was outside and wanted to speak to defendant. Defendant went outside, where Darden demanded that defendant pay back money he purportedly owed Darden and Rogers. Defendant suggested they go inside and talk about it, but Darden demanded the money immediately.

¶ 18 The pair began fighting between Thompson's black Lincoln and another parked car. The fight was relatively even until Darden overpowered defendant, who fell to the ground due to the slippery conditions. Darden began kicking defendant, who balled up to protect himself. Defendant saw a knife fall to the ground. He did not actually see Darden with a knife but knew that he sometimes carried one.

¶ 19 Defendant eventually gained control of the knife. He pointed it toward Darden's face and chest. He was holding it in place, trying to get Darden off of him. Darden continued punching defendant, trying to knock the knife out of his hand. Defendant feared for his life.

¶ 20 Darden then put his hand in defendant's right pocket, where he had more than $1000. Defendant sprang up, still holding the knife. He was able to get Darden's hand out of his pocket by repeatedly cutting the inside of Darden's forearm. Darden began picking up money that had fallen from defendant's pocket. Defendant then went after Darden because he was enraged and believed he was still in a fight. Defendant tried to cut Darden's side as Darden fell back. Darden started to open the car door, then charged at defendant. Darden tried to grab defendant who

dropped the knife during the struggle. Thompson yelled, " 'Let's go. I have the money. Let's go,' " and they drove away.

¶ 21 On cross-examination, defendant said that he cut Darden because Darden was robbing and attacking him. He denied that he cut Darden solely because he was trying to steal defendant's money. Defendant acknowledged that he had previously been convicted of robbery in 2007 and aggravated battery in 2014.

¶ 22 Darden's wife, Cassandra Renee Rogers, testified that she did not remember any prior incidents of violence by Darden against her. However, she acknowledged her signed statement from 2005 in which she wrote that Darden, while drunk, threatened to beat up Cassandra and her sister. Darden took her phone away when she tried to dial 911. In another statement from 2012, she wrote that Darden yelled at her after she refused to take him out to buy cigarettes. She was able to call 911 only after Darden twice took her phone away from her.

¶ 23 In closing, defense counsel argued that Darden was the aggressor throughout the fight. She contended that he was large, controlling, and violent. Darden's violent nature was proved, she said, "because Cassondra [*sic*] Rogers told you." Counsel argued that Darden went to defendant's house armed with a knife, intending to fight him, and defendant was merely defending himself.

¶ 24 In rebuttal, the prosecutor argued that the only evidence of Darden's violence came from his wife's testimony about incidents that did not result in convictions. By contrast, he argued, defendant had actually been convicted of violent felonies. The prosecutor continued that there was no evidence that Darden used a knife. "No one has Dexter bringing a knife to this fight," he said. Defense counsel did not object to these remarks.

¶ 25 The trial court instructed the jury on the affirmative defense of self-defense, including the use of force intended or likely to cause death or great bodily harm. However, the court did not

include the portion of the pattern instruction providing that one is justified in using force likely to cause great bodily harm to prevent the commission of a forcible felony.

¶ 26 The jury found defendant guilty of attempted first-degree murder and armed violence. Finding that the armed violence conviction merged, the court sentenced defendant to 22 years' imprisonment for attempted murder. The court denied defendant's posttrial motion and defendant timely appeals.

¶ 27 II. ANALYSIS

¶ 28 Defendant first contends that the court should have instructed the jury that defendant was entitled to use deadly force to prevent a forcible felony. He asserts that his testimony that Darden tried to reach into defendant's pocket where he had a large roll of cash entitled him to an instruction on the use of force to prevent robbery, which is a forcible felony.

¶ 29 The State responds that, by finding defendant guilty, the jury necessarily rejected the fundamental premise of his self-defense argument. The State further argues that the theory that defendant was being robbed was based solely on defendant's testimony, which was inconsistent with the other witnesses' testimony as well as with the physical evidence. Because defendant was not prejudiced, the State asserts, the failure to give the instruction was not plain error nor was trial counsel ineffective for failing to request it.

¶ 30 A defendant is entitled to have the jury instructed on any defense theories for which there is at least " 'slight' " evidence. *People v. Davis*, 213 Ill. 2d 459, 478 (2004). Such theories typically provide affirmative defenses to or mitigate the charged offenses. *Id.*

¶ 31 Illinois Pattern Jury Instruction, Criminal, No. 24-25.06 (4th ed. 2000) (hereafter IPI Criminal 4th No. 24-25.06) provides as follows:

> "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) (another)] against the imminent use of unlawful force.
>
> [However, a person is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent [(imminent death or great bodily harm to [(himself) (another)] (the commission of _____).]"

The committee note for IPI Criminal 4th No. 24–25.06 states that the blank space should be filled in with the forcible felony involved, "[w]hen applicable." IPI Criminal 4th No. 24-25.06, Committee Note. The court gave the entire instruction except for identifying a forcible felony.

¶ 32 Defendant contends that his testimony that Darden was trying to reach into his pocket and grab the roll of cash was sufficient to support giving the second paragraph of the instruction, with robbery being the forcible felony. Defendant concedes that he did not tender such an instruction or object to the instruction given, thus forfeiting the issue. See *People v. Rodriguez*, 2014 IL App (2d) 130148, ¶ 70 (defendant forfeits review of alleged instructional error if he fails to object to the instruction or tender an alternative). However, he urges us to consider these issues as plain error (arguing that the evidence against him was close and that these errors affected the integrity of his trial), or as ineffective assistance of counsel (arguing there was no conceivable strategy for agreeing to IPI Criminal 4th No. 24-25.06 as given). To establish plain error, defendant must show that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him or that there was an error so serious that it affected the fairness of his trial and challenged the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551, 565

(2007). However, before a plain error analysis may be undertaken, the defendant must show that an error occurred, for, absent error, there can be no plain error. *Id.*

¶ 33 To show ineffective assistance, defendant must establish both that counsel's performance fell below an objective standard of reasonableness and that it is reasonably probable that, but for these unprofessional errors, the result of the proceeding would have been different. See *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). If defendant was not prejudiced, we need not decide whether counsel's performance was deficient. See *People v. Brooks*, 187 Ill. 2d 91, 137 (1999) (in such instance, examination of performance prong is not warranted). Under either a plain-error or ineffectiveness theory, "we first consider whether defendant's proposed issue has merit." *People v. Miller*, 2014 IL App (2d) 120873, ¶ 19.

¶ 34 Here, defendant was not prejudiced by the failure to give the jury the forcible-felony component of IPI Criminal 4th No. 24-25.06. Courts have repeatedly rejected similar arguments that the failure to give the forcible-felony portion of the instruction was prejudicial where the jury received the general self-defense portion and the force used was necessarily the same.

¶ 35 In *People v. Jackson*, 304 Ill. App. 3d 883 (1999), the defendant was charged with, *inter alia*, first-degree murder. Despite being instructed on self-defense, the jury found the defendant guilty. On appeal, the defendant, citing evidence that the victim attempted to kiss him, argued that the jury should have been instructed on the use of force to prevent the forcible felony of sexual assault. The court found no evidence to support this theory but, even if it had, would have found the error harmless. Noting that the jury had been instructed on self-defense, the court held that the defendant "received the jury's informed consideration of his theory of defense." *Id.* at 892. The court cited *People v. Flores*, 282 Ill. App. 3d 861 (1996), and *People v. Wilburn*, 263 Ill. App. 3d 170 (1994). In both cases, the defendants were convicted of murder. They asked for

instructions on the use of deadly force to prevent an aggravated battery. The appellate courts reasoned that, in deciding whether the defendants used deadly force to prevent imminent death or great bodily harm, the juries necessarily considered whether the defendants used deadly force to prevent aggravated batteries upon themselves. *Jackson*, 304 Ill. App. 3d at 892 (citing *Flores*, 282 Ill. App. 3d at 866 and *Wilburn*, 263 Ill. App. 3d at 178).

¶ 36 Here, if the jury rejected defendant's contention that he was justified in stabbing Darden because he feared for his life, it necessarily rejected any notion that the stabbing was justified to protect the money in his pocket. Thus, the failure to give the forcible-felony component of IPI Criminal 4th No. 24-25.06 was, at most, harmless.

¶ 37 *People v. Milton*, 72 Ill. App. 3d 1042 (1979), which defendant cites, is distinguishable. There, witnesses testified that the defendant and one of the victims had been gambling. The defendant apparently had won some money, and witnesses testified that the victim repeatedly demanded money from the defendant before eventually reaching for a gun. Thus, there was evidence from which the jury could have concluded that the victim was attempting to rob the defendant but not to kill or injure him. *Id.* at 1049. Accordingly, the reviewing court held that it was error for the trial court to instruct the jury on the use of force to avoid death or great bodily harm but not on the use of force to prevent the forcible felony of robbery. *Id.*

¶ 38 Here, by contrast, defendant testified that Darden reached into his pocket for the money in the course of beating defendant while he was on the ground. Defendant's own account did not allow the possibility that defendant believed that potentially deadly force was needed to prevent the robbery but not to prevent great bodily harm or death.

¶ 39 Defendant also complains of the prosecutor's comments during his rebuttal closing argument. Acknowledging that he did not object to these comments, he again urges us to consider

them as plain error or, alternatively, argues that he received ineffective assistance of counsel. We thus first decide whether error occurred.

¶ 40 A prosecutor is afforded wide latitude in closing arguments and may comment on the evidence and any reasonable inferences therefrom. *People v. Rogers*, 2015 IL App (2d) 130412, ¶ 74. Moreover, prosecutorial comments are not improper if they were invited by defense counsel's closing argument. *People v. Bakr*, 373 Ill. App. 3d 981, 990 (2007).

¶ 41 Defendant first argues that the prosecutor misstated the evidence when he said that no one saw Darden bring a knife to the scene. He points out that Ross and Hunter both saw Darden reach for a knife in his waistband, while defendant testified that a knife fell to the ground as defendant was standing over him. However, none of these witnesses saw Darden arrive at the scene. Ross and Hunter went outside after the fight was already in progress, and thus could not see whether Darden brought the knife with him to defendant's complex. Defendant, too, came outside only after Darden arrived and, further, never even saw the knife in his hand. Thus, the prosecutor's statement that no one saw Darden bring a knife to the scene was literally true. Only by drawing inferences could the jury conclude that Darden had the knife when he arrived at defendant's apartment complex. Because the right to draw reasonable inferences necessarily presumes the right not to draw other inferences, the prosecutor was not required to draw the inference that Darden brought the knife with him.

¶ 42 Defendant further argues that, in Darden's statement to police, he admitted that hospital personnel found a knife in his pocket. However, this statement was never admitted into evidence and, in any event, evidence that Darden had a knife at the hospital after the fight would still not prove that he had it with him when he arrived.

¶ 43 Defendant also complains that the prosecutor improperly referred to defendant's prior convictions when those convictions were admitted for the limited purpose of assessing defendant's credibility as a witness. Even if the remarks were improper, any error was harmless beyond a reasonable doubt. Thus, the failure to object to them was neither plain error nor ineffective assistance of counsel. The only defense defendant raised was self-defense, and that defense was based solely on defendant's testimony that he stabbed Darden while the latter was standing over defendant, who was on the ground. Conversely, Darden and Thompson testified that defendant attacked Darden after the fight was over and Darden was sitting in the car waiting to leave. Defendant's version was severely undermined by the testimony of Reed and Brian. Despite undisputed evidence that Darden's wounds were bleeding profusely, the officers testified that they found no blood in the snow on the ground where the fight took place. By contrast, Reed and Thompson both testified that blood was "everywhere" around the passenger seat of Thompson's car.

¶ 44 III. CONCLUSION

¶ 45 The judgment of the circuit court of Kane County is affirmed.

¶ 46 Affirmed.