

No. 1-12-0042

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 11 CR 3207
)	
ROBERT MALIK,)	Honorable
)	Kevin M. Sheehan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Justices Simon and Liu concurred in the judgment.

ORDER

¶ 1 *Held:* Judgment entered on residential burglary conviction affirmed over defendant's contentions that he was deprived of a fair trial by the admission of prejudicial and irrelevant evidence, which was exacerbated by the State's comments in closing argument.

¶ 2 Following a jury trial, defendant Robert Malik was found guilty of residential burglary and sentenced to nine years' imprisonment. On appeal, he contends that he was denied his constitutional right to a fair trial when the trial court allowed the State to present highly

prejudicial and irrelevant evidence, which was exacerbated by the State's comments on it during closing arguments.

¶ 3 At trial, Kimberly Onik acknowledged that she was currently in custody for failing to appear for this trial, but stated that she failed to appear because she was afraid to testify. Onik then testified that in 2011, she and her boyfriend, James Potts, resided in the second floor apartment at 925 South Monitor Avenue in Chicago which has a front and back door. During the afternoon of January 7, 2011, Potts left for work, and a short while later, Onik heard a girl at her back door. Onik did not want to answer, and remained quiet. A few minutes later, someone knocked on her front door, and when she looked through the peephole, she saw a black male with a screwdriver in his hand. He first knocked, then tried to open the handle, and backed up. At that point, Onik saw a white male with a shamrock tattoo on his chin coming up the stairs, and identified defendant in court as this person.

¶ 4 Onik ran into her bedroom, and heard a loud "boom." She then slammed the bedroom door shut and locked it, looked out the window, and saw the two men that were at her door leave in a car. When Onik came out of her bedroom, she observed that her front door was propped open, the table was moved forward, and her closet door was open. She then called Potts.

¶ 5 Onik told police that defendant was between 20 to 25 years of age, and on cross-examination, stated that she believed she told police that defendant had tattoos on his face. Onik further testified that she gave police a detailed description of the black male offender.

¶ 6 On January 11, 2011, Onik met with Chicago police officer Timothy Hawkins, who showed her a photo array from which she identified defendant as the white male offender. Onik did not know defendant before the incident and did not give him permission to enter her home.

¶ 7 On January 30, 2011, Onik met with Chicago police detective Johnson. She did not recall if she told Detective Johnson that defendant took a step, ran toward the door, and raised his foot. She also did not recall if she told the detective that she looked out the bedroom window and saw the two offenders drive away. Onik testified that she told police "[e]verything that happened," and "thought" she told them that defendant had a shamrock tattoo on his chin.

¶ 8 James Potts testified that when he left the apartment on the day in question, the front door was secured. When he returned home after receiving a call from Onik, he noticed that the door to the apartment building had been "jimmied [open] with some type of tool." Potts also noticed that his apartment doorframe was damaged and sticking out. Potts entered the apartment, and met Onik, who was "very scared," then called police.

¶ 9 Officer Hawkins testified that he investigated the residential burglary at bar, and met with Onik on January 8, 2011, who told him that one of the two offenders had "tattoos on his face." Onik also told him that one tattoo "stuck out in her mind," which was a green clover on defendant's chin. Officer Hawkins put together a photo array for Onik to view, which included five individuals with tattoos on their faces. On January 11, 2011, Onik identified defendant from this photo array.

¶ 10 Officer Hawkins further testified that defendant also has facial tattoos on both cheeks and along his jaw lines. When asked about the tattoos' writing on the jaw line, defense counsel objected based on relevance. The court, however, allowed the questioning because it went to "identification," and Officer Hawkins then testified that the tattoo on the right jaw line says, "fuck the rest," and on the left, "I'm the best."

¶ 11 Chicago police detective Derrick Johnson testified that he was assigned to this residential burglary case on January 30, 2011, and met with Onik who told him that defendant took a step, started to run toward the door, and then raised his foot. He further testified that he did not recall Onik telling him that she looked out her bedroom window and saw the offenders run to a car.

¶ 12 Chicago police officer Oswald testified that he responded to the residential burglary on January 7, 2011, and met with Onik, who described defendant as between the ages of 20 and 25 years old. Onik also told him that defendant had multiple tattoos.

¶ 13 During closing arguments, the defense maintained that this was a case of misidentification, and that Onik was focused on the black male offender as evidenced by the detailed description she gave to police. On the other hand, Onik was unable to provide any details regarding the white offender describing him as a white male between the ages of 20 to 25 years old, and not mentioning the green clover tattoo until the next day. In rebuttal, the State argued that what you see when you look at defendant are his tattoos, which was what Onik focused on, and further, that defendant was a person with "fuck the rest, I'm the best on [his] face. He wasn't afraid." The State argued that defendant was at the apartment with the black male offender, and had the intent to commit a crime.

¶ 14 Jury deliberations began at 2:30 p.m., and in the evening hours, the jurors sent the court a total of five questions, including whether defendant had altered his facial appearance. The court replied that they had all the evidence and exhibits, and to continue to deliberate. The jury was unable to reach a verdict that day, and was sequestered over night. At 9:45 a.m. the next day, the jury reached a verdict, finding defendant guilty of residential burglary.

¶ 15 On appeal, defendant contends that he was denied his constitutional right to a fair trial when the trial court erroneously allowed the State to present evidence that defendant had a tattoo on his face that said "fuck the rest," and "I'm the best." He maintains this evidence was highly prejudicial and irrelevant, and that the State exacerbated the problem when it referred to it in closing argument for the purpose of arousing the passions and prejudices of the jury.

¶ 16 Defendant acknowledges that he has forfeited his objection to this evidence due to his failure to raise it in his post-trial motion, and also failed to preserve any issue regarding the State's comments during closing argument by failing to object. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). He maintains, however, that there was plain error, and that we should consider his claim as such.

¶ 17 The plain error doctrine is a narrow and limited exception to the general waiver rule allowing a reviewing court to consider a forfeited issue that affects substantial rights. *People v. Herron*, 215 Ill. 2d 167, 177-79 (2005). Defendant has the burden of persuasion, and the first step is to determine whether error occurred. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). For the reasons that follow, we find none here.

¶ 18 Evidence is relevant, and thus admissible, where it tends to prove a material fact at issue and where the probative value of the evidence outweighs the prejudicial effect. *People v. Decaluwe*, 405 Ill. App. 3d 256, 266-67 (2010). Contrary to defendant's contention, we review the trial court's decision to admit evidence under the abuse of discretion standard, and will not disturb the trial court's exercise of discretion unless there has been an abuse that has prejudiced defendant. *Decaluwe*, 405 Ill. App. 3d at 266. That said, we additionally observe that an

evidentiary error may be deemed harmless where there is no probability that the jury would have acquitted defendant absent the error. *People v. Pelo*, 404 Ill. App. 3d 839, 865-66 (2010).

¶ 19 Here, the trial court allowed testimony about the words permanently inked into the side of defendant's face stating the testimony was relevant to Onik's identification of defendant.

Defendant disagrees and asserts that it served no other purpose than to portray him in an unflattering and offensive light to the jury.

¶ 20 The testimony elicited at trial shows that the tattoos on defendant's face helped Onik identify him as the offender. Although she specifically mentioned the shamrock tattoo, she also told the police and testified at trial that defendant had multiple facial tattoos, and identified defendant from the photo array where the tattoos were clearly evident. We note that the photo array containing defendant's photo was admitted into evidence without objection and it reveals the incredibly distinctive shamrock tattoo in the middle of his face on his chin. It also revealed other distinctive facial tattoos prominent on both sides of defendant's face and neck. We safely assume defendant did not attend his trial with a hood over his head so that his unique facial appearance was on full display to the jury. Thus, the jury would have been able to make an inevitable comparison between the defendant's appearance in the photo and his appearance in court which would include the verbiage inked into his face and neck. The tattoo in question was thus relevant to defendant's identification as the offender (*People v. Hernandez*, 313 Ill. App. 3d 780, 787 (2000)) as found by the trial court, and properly admitted into evidence for this purpose (*People v. Speirs*, 231 Ill. App. 3d 807, 811 (1992)).

¶ 21 Defendant further contends that the State's questioning regarding the tattoos on his jaw line improperly encouraged the jury to draw an inference about his moral character based on his

physical appearance. The tattoos on defendant's jaw line, as explained, were relevant to Onik's identification of him and of probative value where she had indicated that she specifically noticed that defendant had multiple tattoos on his face. *Speirs*, 231 Ill. App. 3d at 811.

¶ 22 That said, any evidentiary error in admitting the text of the tattoos in question was harmless where there is no reasonable probability that the jury would have acquitted defendant absent the error (*Pelo*, 404 Ill. App. 3d at 865-66), and, thus, defendant was not prejudiced by its admission. The evidence showed that defendant was identified as one of the perpetrators of the offense based on the identification made of him by Ms. Onik. Applying the factors set forth in *Neil v. Biggers*, 409 U.S. 188 (1972), for determining the reliability of an identification, we observe that Onik saw defendant's face through the peephole as he came running up the stairs, and she thus had a good opportunity to observe him. *People v. Zarate*, 264 Ill. App. 3d 667, 674 (1994). Her attention was also clearly focused on him, as she noticed the green shamrock tattoo on his chin and the multiple tattoos on his face (*Zarate*, 264 Ill. App. 3d at 674-75), and was confident in her identification of him in a photo array, which took place only four days later, and again at trial (*People v. Malone*, 2012 IL App (1st) 110517, ¶36). In addition, she accurately described the offender as having multiple facial tattoos, including a green shamrock tattoo on his chin, and obviously identified him based on her opportunity and observation of him. *People v. Slim*, 127 Ill. 2d 302, 309 (1989).

¶ 23 Defendant, nonetheless, contends that the questions posed by the jury during deliberations and the need for overnight sequestering indicates that the evidence was far from overwhelming, citing *People v. Palmer*, 125 Ill. App. 3d 703, 712 (1984). In *Palmer*, 125 Ill. App. 3d at 708, the jury began deliberating at 4:15 p.m. and continued to 11 p.m., then

reconvened the next day at 9:30 a.m., and when at 10:25 a.m. the jury informed the court that it could not reach a unanimous verdict, the court told the jury to continue to deliberate. On appeal, defendant argued that the court coerced the verdict by instructing the jury to continue deliberations, and this court found that the issue was not waived because the evidence was closely balanced in light of the jury's deliberation and note. *Palmer*, 125 Ill. App. 3d at 712. In this case, the jury questions were somewhat typical and not indicative of a jury having difficulty performing their duty: when were the photos of the scene taken, could they obtain a transcript of the testimony, could they see the police reports, did defendant's appearance change since the photo was taken and what is the definition of reasonable doubt. No error is claimed regarding the court's response to these inquiries. Unlike *Palmer*, the jury did not inform the court that it could not reach a unanimous decision, and the jury promptly returned a verdict the following morning. We also reject defendant's premise that a lengthy deliberation necessarily means that the evidence was closely balanced (*People v. Nugen*, 399 Ill. App. 3d 575, 584 (2010)), for a request for guidance during deliberations may merely indicate that the jury took its job seriously and conscientiously worked to come to a just decision (*People v. Minniweather*, 301 Ill. App. 3d 574, 580 (1998)).

¶ 24 Defendant also contends that the State's reference to the tattoo during closing arguments improperly encouraged the jury to draw an inference about his moral character based on his physical appearance. Defendant specifically points to the State's comments that defendant had tattoos all over his face, including along his jaw line, and commented, "[h]e wasn't afraid."

¶ 25 As noted, defendant failed to preserve this issue for review, but maintains that we may review it for plain error. Without error there can be no plain error (*People v. Lopez*, 2012 IL App

(1st) 101395, ¶64), and we thus consider whether any error occurred (*Lewis*, 234 Ill. 2d 32, 43 (2009)).

¶ 26 Defendant claims that the State exacerbated any error by the court in allowing the evidence of the tattoos on his jaw-line by inviting the jury to infer his guilt from the tattoos on his face. He maintains that the testimony regarding the jaw-line tattoos did nothing more than arouse the passions of the jury by portraying him in an offensive light, as one of low moral character, based on his physical appearance.

¶ 27 We observe that a prosecutor is accorded wide latitude in closing and rebuttal arguments, and may comment on evidence and any fair and reasonable inferences the evidence may yield. *People v. Runge*, 234 Ill. 2d 68, 142 (2009). When reviewing claims of prosecutorial misconduct during closing argument, we consider the entire closing argument of both parties to place the comments in context. *People v. Maldonado*, 402 Ill. App. 3d 411, 422 (2010).

¶ 28 Here, during closing argument the State referred to the words defendant had inked into his face, and argued that "he was not afraid." In context, it appears the "afraid" reference was an isolated comment that was perhaps tied to the defendant's attempt to portray the eye witness as being afraid at the time of the incident and unable to make a reliable identification and her reluctance to appear at trial, whereas the defendant was "not afraid" to commit the burglary. In any event, the comment cannot be reasonably considered as material to the jury's verdict. The State further argued that he was the offender, and that he had the intent to commit a crime. The State properly commented on the facts presented at trial, and permissible inferences therefrom (*Runge*, 234 Ill. 2d at 142), and used the tattoos to establish defendant's identification.

Accordingly, we find no error and defendant's contrary argument unpersuasive. *People v.*

Davenport, 301 Ill. App. 3d 143, 153 (1998).

¶ 29 In reaching this conclusion, we have considered *People v. Kannapes*, 208 Ill. App. 3d 400 (1990), cited by defendant in support of his claim that the State improperly used the evidence of the tattoos on his jaw lines to prove that he lacked moral character, and find his reliance on it misplaced. In *Kannapes*, defendant was convicted of delivery of a controlled substance in a jury trial in which the State was allowed to introduce into evidence a photograph found in his car of him wearing a shirt which said, "Enjoy Cocaine," and the fact that he had asked for its return. *Kannapes*, 208 Ill. App. 3d at 403. During closing arguments the State argued that the shirt was circumstantial evidence that defendant was a cocaine dealer. *Kannapes*, 208 Ill. App. 3d at 403-04. On appeal, this court concluded that it was error to admit the evidence, and that directing the jury's attention to it during closing argument was not harmless given the fact that the evidence against defendant was not overwhelming. *Kannapes*, 208 Ill. App. 3d at 406-07.

¶ 30 Here, by contrast, the State commented on evidence properly admitted at trial for purposes of identification. We cannot accept defendant's argument that what he chose to permanently place on his face should be immune from comment and grounds for reversal of his conviction because his body art aroused juror passion and portrayed him in an offensive light. These comments were directed to his identifying characteristics and not to the "moral character" he chose to advertise on his face. His distinctive appearance was his downfall not a singular reference from the prosecutor in closing argument. Unlike *Kannapes*, the identification evidence in this case was consistent with the eye witness description of the unusual shamrock tattoo, its unique green color and location in the middle of defendant's face. *Pelo*, 404 Ill. App. 3d at 866.

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We therefore find no error to excuse defendant's forfeiture of this issue, and affirm the judgment of the circuit court of Cook County.

¶ 31 Affirmed.