2013 IL App (1st) 113325-U

FIFTH DIVISION
April 12, 2013

No. 1-11-3325

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 5537
	)	
JOVON HOWARD,	)	Honorable
	)	Luciano Panici,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Presiding Justice McBride and Justice Howse concurred in the judgment.

O R D E R

¶ 1 ***Held*:** Defendant was not prejudiced by the trial court allowing a police officer to testify that defendant did not want to be handcuffed or placed in custody. Defendant failed to preserve issue of whether the trial court erred in barring evidence of out-of-court statements that were intended to explain why defendant made an incriminating statement. Because the evidence of defendant's guilt was overwhelming, this issue could not be considered as plain error.

¶ 2 In a bench trial, defendant Jovon Howard was convicted of resisting or obstructing a peace officer, resulting in injury to that officer. 720 ILCS 5/31-1(a-7) (West 2010). He was sentenced to three years in prison. On appeal, defendant contends that he was prejudiced when the trial court allowed a police officer to testify that defendant did not want to be placed in

handcuffs and did not want to be placed in custody as he was being arrested. He also contends that the trial court erred in barring testimony about out-of-court statements that were intended to explain why defendant made an incriminating statement.

¶ 3 At trial, Chicago Heights police officer Kostecka testified that at about 2 p.m. on March 18, 2011, he was on patrol in his marked squad car near the intersection of 12th Street and State Avenue in Chicago Heights. Kostecka was wearing a tactical uniform which included a vest with a Chicago Heights star on the front and "police" on the back. His partner, Detective Woodrow Stacey, radioed him from another car that he had observed a hand-to-hand narcotics transaction and he was attempting to catch a person involved in that transaction. Kostecka got out of his car and saw Stacey running after defendant. Kostecka also began to chase defendant. Both officers repeatedly yelled "Stop, police," but defendant kept running. Kostecka finally stopped him by putting his arms around him and taking him to the ground. Defendant kept pushing and pulling, trying to get away. Over defense objection, Kostecka also testified that defendant did not want to be placed in handcuffs and did not want to be placed in custody. He was finally able to subdue defendant with the aid of Stacey. Kostecka testified that he sustained lacerations and bruises to his left hand in the course of wrestling with defendant. That same day, Kostecka went to the hospital, where his injuries were treated. Kostecka identified a photograph as accurately depicting those injuries. That photograph has not been included in the record on appeal.

¶ 4 Detective Stacey testified that at the time in question he was on patrol in a marked squad car in the same area as Officer Kostecka. He was wearing a vest with his badge on the front and a police emblem on the back, a gun belt and a radio. From his position he saw defendant engaged in a hand-to-hand transaction. Stacey testified that based upon his experience he believed that a narcotics transaction was taking place. He drove his squad car toward defendant, who looked in his direction and then ran. Stacey pursued defendant and blocked him with his

car. Defendant began to run in another direction, toward Kostecka. Stacey got out of his squad car and saw that Kostecka was trying to grab hold of defendant, who was trying to escape. Kostecka was telling defendant to stop moving around, to stop resisting and to put his hands behind his back, but defendant did not obey those commands. Stacey then assisted Kostecka in subduing and handcuffing defendant, who was taken to the police station. It was subsequently determined that defendant was on parole. Stacey spoke to defendant, who had agreed to talk after being advised of his *Miranda* rights. In a written statement, defendant said that he had been in the area with some friends when he saw a police car headed in his direction. Defendant knew he "wasn't supposed to be down there," so he ran from the police. One of the officers caught up with him and fell to the ground. Defendant was then taken to the police station.

¶ 5 Testifying on his own behalf, defendant admitted that he ran from the police that day. He testified that at the time in question he had been visiting his sister, who lived in the area. He was standing outside with some friends when the police came and he ran. As he ran, he turned around and saw a police officer who said "Stop before I beat your ass." Defendant stopped running and began to kneel, as the officer told him to do. He had one knee on the ground when the officer tackled him, struck him on the side of the face and said "That's what you get for running, bitch." Defendant denied that he resisted the officer. When Detective Stacey came up, he placed defendant in a squad car. Defendant was taken to the police station where he spoke with Stacey, who asked if he wanted help. When defendant responded that he did want help, Stacey told him they had gone back to the scene and recovered some drugs. The court sustained the State's objection to this statement on the grounds of hearsay. However, the State subsequently asked defendant if he gave his statement because he was afraid he would go back to prison, and defendant responded in the affirmative. At the close of all the evidence, defendant was convicted of resisting or obstructing a peace officer, resulting in injury to that officer, and sentenced to three years in prison.

¶ 6 Defendant contends that the trial court erred when it allowed Officer Kostecka to testify that defendant did not want to be placed in handcuffs and did not want to be placed in custody as he was being arrested. Although defendant objected to this testimony, he did not cite it as error in his motion for a new trial, thereby forfeiting it. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defendant contends that we should consider this as plain error. The plain error doctrine is an exception to the general rule of procedural default. *People v. Walker*, 232 Ill. 2d 113, 124 (2009). It applies when a clear error has been committed and the evidence of the defendant's guilt is so closely balanced that the error may unfairly "tip the scales of justice" against the defendant. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Alternatively, plain error applies when the error is so serious that it affects the integrity of the judicial process, without regard to the strength of the evidence against the defendant. *Id*. Defendant asserts that plain error in this case applies only on the basis of the first type, when the evidence is closely balanced. In evaluating the applicability of plain error, we must first determine whether any error occurred at all, by engaging in a substantive review of the issue. *Walker*, 223 Ill. 2d at 124-25.

¶ 7 Defendant objects to Officer Kostecka's testimony that, as he was arresting him, defendant did not want to be placed in handcuffs and did not want to be placed in custody. But Kostecka and Detective Stacey both testified that defendant fled from them. Kostecka testified that he struggled with defendant, who was pushing and pulling as Kostecka attempted to handcuff him. Stacey testified that defendant did not obey Kostecka's orders to stop moving and to put his hands behind his back. According to their testimony, it took both men to subdue and handcuff defendant. In this context we find that Kostecka's characterizations of defendant as not wanting to be handcuffed and not wanting to be placed in custody were merely used to describe defendant's actions in struggling with the two officers. *People v. Gill*, 355 Ill. App. 3d 805, 808-809 (2005) (In prosecution for resisting arrest, State witnesses were properly allowed to testify that the defendant was "resisting" as part of their description of defendant's actions.). In any

event, even assuming this testimony was improperly allowed, the evidence of defendant's guilt was overwhelming. Two police officers testified that defendant was tackled when he ran from them. Defendant admitted in his testimony that he ran from the police and that Kostecka tackled him, although he claimed that he had stopped running when Kostecka did so. It was undisputed that Kostecka injured his hand in his physical encounter with defendant. He identified photographs of those injuries, although the photographs have not been included in the record on appeal. Because the evidence of defendant's guilt was overwhelming, defendant has failed to establish that he was prejudiced by the trial court's rulings on this evidence, even assuming they were erroneous. *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005).

¶ 8 Defendant also contends that it was error for the trial court to exclude testimony that Detective Stacey, who questioned defendant at the police station, told him that he had gone back to the scene of his arrest and recovered drugs. Stacey was barred from testifying that he told defendant this, and defendant was barred from testifying that Stacey made this statement to him. Again, defendant has failed to preserve this alleged error for review, so we must determine whether it can be considered as plain error. We first consider whether any error occurred. The State contends that this testimony was properly barred as hearsay. The hearsay rule bars the introduction of an out-of-court statement if it is being used to prove the truth of what is asserted in the statement. *People v. Spicer*, 379 Ill. App. 3d 441, 449 (2007). But these statements were not intended to prove the truth of the matter asserted. They were intended to explain why defendant gave a statement, because he feared that he would otherwise be charged with a drug offense. When out-of-court statements are used for a purpose other than to establish the truth of the matter asserted, they are not hearsay and may be admitted. *People v. Williams*, 181 Ill. 2d 297, 313 (1998). Thus an out-of-court statement is admissible to show why someone acted as he did. *People v. Sorrels*, 389 Ill. App. 3d 547, 553 (2009). In this case, the defense was attempting to offer an explanation for why defendant would incriminate himself, and the defense was not

relying upon the truth of whether the officers went back and found drugs. Accordingly, the trial court erred in barring this testimony. Having established that there was error, we must determine whether the evidence was so closely balanced that this error improperly tipped the evidence in favor of the State. *Piatkowski*, 225 Ill. 2d at 565. We have already found that the evidence of defendant's guilt was overwhelming. Accordingly we find that the trial court's error in barring this testimony does not amount to plain error and has been forfeited by defendant.

¶ 9 For these reasons, we affirm defendant's conviction and sentence.

¶ 10 Affirmed.