2014 IL App (1st) 130478-U

THIRD DIVISION
November 12, 2014

Nos. 1-13-0478 and 1-13-2173
(CONSOLIDATED)

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.	)	Nos. 01 CR 2914
	)	04 CR 14266
	)	
DESHAWN BOYD,	)	Honorable
	)	Arthur F. Hill,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Hyman and Mason concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant is not entitled to a new trial where error in the State's rebuttal closing arguments was cured by the trial court's sustaining of defense counsel's objection and by its instructions to the jury that closing arguments are not evidence and arguments not borne out by the evidence should be disregarded.

¶ 2 Following joined jury trials, defendant Deshawn Boyd was convicted of attempted murder, armed robbery, and two counts of aggravated criminal sexual assault (case No. 01 CR 2914), and aggravated criminal sexual assault (case No. 04 CR 14266). He was sentenced to five

consecutive terms of 30 years' imprisonment, for a total of 150 years. On appeal, defendant contends that the State's rebuttal closing argument denied him a fair trial because the prosecutor improperly encouraged to jury to convict for reasons other than the evidence presented. For the reasons that follow, we affirm.

¶ 3 Defendant was charged separately in case No. 01 CR 2914 and case No. 04 CR 14266 for crimes committed against T.K. and G.E., respectively. Pursuant to defendant's motion, the cases were joined for trial.

¶ 4 At trial, G.E. testified that about 9 p.m. on October 31, 2000, she was walking to her brother's house to get more candy for trick-or-treaters when defendant, whom she identified in court, approached her. G.E. stated that she had not met defendant before. They engaged in general conversation as they walked the same direction. Defendant reached into a bag, pulled something out, and then hit her in the face with it repeatedly. G.E. lost consciousness. When she awoke, she was in a vacant lot and defendant was on top of her, choking and hitting her. Defendant took off her pants and sexually assaulted her by inserting his penis in her vagina. After some time, defendant got up and left.

¶ 5 G.E. testified that she could not see because her eyes were bloody and swollen shut. She held one eye open and walked towards some lights, eventually ending up at a fast food restaurant. The police arrived shortly thereafter. G.E. testified that she did not realize she was naked from the waist down until an officer asked her to put on her pants. G.E. was taken by ambulance to St. Bernard Hospital, where a rape kit was completed. She was later transferred to another hospital, where she underwent surgery for her head injuries, which included multiple

facial fractures, fractures of her orbital bones, and a concussion. She remained in the hospital for 11 days.

¶ 6 G.E. testified that almost four years later, in April 2004, Chicago police officers came to her home and showed her a photo array. Although one man looked familiar, G.E. did not make an identification and told the officers that she would prefer to view a lineup. A few weeks later, G.E. viewed a lineup at the police station and identified defendant as her assailant. She testified that she was a "hundred percent" sure when she made the identification.

¶ 7 Chicago police officer Bryan Strong testified that he observed G.E. outside the fast food restaurant with blood on her face, naked from the waist down, holding her pants and underwear in her hand. Officer Strong asked G.E. to put on her clothes. He noticed she had major swelling to the face and head and one of her eyes was protruding outward. G.E. was covered in blood and very confused and disoriented. She was taken from the scene in an ambulance.

¶ 8 The parties stipulated that G.E. suffered fractures to the walls of both eye sockets, a fracture to her cheek bone, and a fracture to the left nasal bone, and that she underwent reconstructive surgery of her eye sockets so that fragments of bone and the eye itself would not sink into the sinus cavities.

¶ 9 T.K. testified that on December 19, 2000, she was home alone at the apartment she shared with her grandmother when defendant, who is her second cousin and lived in the building next door, arrived at the apartment. T.K. testified that her grandmother did not allow defendant in the apartment because he had stolen from her in the past. T.K. and defendant talked briefly and then defendant departed, but said he would return.

¶ 10 T.K. went upstairs to a friend's apartment. About 10 to 15 minutes later, defendant showed up there. The group watched television and defendant drank a beer. At some point, defendant appeared to be asleep on the floor, so T.K. went home. While she was watching television, defendant walked in and went into the kitchen. He came out of the kitchen with a beer and a knife. When T.K. asked why he had the knife, defendant said he was going to use it to break down a blunt.

¶ 11 T.K. testified that defendant stood in front of her and then stabbed her in the chest. At first she did not know she had been stabbed; she just felt a "push" or "pressure" to her chest. Then she saw the knife coming at her and grabbed at it with her left hand, cutting her finger. Defendant put his hands around her neck and choked her. T.K. urinated on herself and lost consciousness.

¶ 12 When T.K. regained consciousness, she was on her grandmother's bed, naked from the waist down, with defendant on top of her with his penis penetrating her vagina. When she asked him why her chest hurt, he ripped her shirt and bra open and showed her the stab wound in her chest. Defendant asked T.K. to perform oral sex on him, which she did because she was scared and he was holding a knife to the side of her head. After that, defendant attempted to have vaginal sex with her again, but could not maintain an erection.

¶ 13 T.K. used the bathroom with defendant's permission and then sat down in the dining room. Defendant said he was sorry, indicated he was going to leave but come back, and made T.K. drink some beer. Defendant then cut the telephone cord. He took the cordless phone, T.K.'s keys and bracelet, and the VCR and left. After a minute, T.K., who was weak and in pain, went upstairs to another neighbor's apartment and called 911.

¶ 14 T.K. testified that she was taken by ambulance to the hospital. A rape kit was completed in the emergency room. T.K. underwent surgery that evening "because everything on the inside had collapsed." She remained at the hospital for five days.

¶ 15 Shirley Carter testified that in 2000, she lived upstairs from T.K.'s grandmother. She also knew defendant, whom she referred to by his nickname, "Man-Man." Carter testified that on the night of December 19, 2000, she was asleep when she heard T.K. screaming and calling her name. Carter got up and saw that T.K. was naked, bleeding from her chest, and crying. T.K. told her that defendant had choked, stabbed, and raped her. Carter gave T.K. a t-shirt and let her use her phone to call 911.

¶ 16 Dr. Jennifer Libbin testified that she treated T.K. in the emergency room. She explained that T.K. had been stabbed in the "cardiac box," directly under her sternum. Her liver was lacerated, and an injury to her diaphragm had caused her right lung to collapse. T.K. also had lacerations on her left hand.

¶ 17 The State presented evidence that defendant was arrested on December 23, 2000. At the time of his arrest, he was wearing an undershirt with blood stains on it. When the police asked if he knew why he was being arrested, he stated "it was because he had gotten into it with his cousin and he stabbed her." He also stated that the blood on his undershirt was from the fight with his cousin. Defendant's clothing was taken into evidence and a buccal swab was performed. DNA analysis revealed that defendant's DNA matched the profiles deduced from a knife recovered from T.K.'s apartment, T.K.'s rape kit, and G.E.'s rape kit. DNA extracted from the blood stain on defendant's undershirt matched T.K.'s DNA profile.

¶ 18 The trial court denied defendant's motions for directed verdicts. Defendant did not testify or present any evidence.

¶ 19 Toward the end of rebuttal closing argument, the prosecutor made the following statement:

> "Ladies and gentlemen, the nightmares that [G.E.] and [T.K.] had to endure almost 12 years [*sic*], it needs to stop today. Their physical and emotional scars, they may never go away. Your verdicts will not cause those physical and emotional scars to go away, but you, ladies and gentlemen, you can give them something, you can give these two ladies something that may help heal these scars, that may help these two ladies move forward, to allow them to rest comfortably at night. Maybe your verdict will allow them to close their eyes at night and not have this nightmare again and again."

Defense counsel objected, and the trial court stated, "You know I'm going to sustain that objection. Please go forward, [prosecutor]." The prosecutor then concluded as follows:

> "Your verdicts will give them something they deserve. Your verdicts will give [G.E.] and [T.K.] the only thing that's left, your verdict will give them justice, justice in this case, ladies and gentlemen, means finding this defendant, [defendant], guilty of all charges. Ladies and gentlemen, on behalf of the people, do justice."

¶ 20 After the jury was instructed, defendant moved for a mistrial, asserting, among other things, that the prosecutor improperly stated that G.E. and T.K. had been suffering nightmares for 12 years and improperly asked the jury to convict defendant to relieve the victims' nightmares and give them justice. The trial court denied the motion, stating that the prosecutor's argument as "assertive" and "full of advocacy," but not inappropriate.

¶ 21 The jury found defendant guilty of aggravated criminal sexual assault with regard to G.E. and attempted murder, armed robbery, and two counts of aggravated criminal sexual assault with regard to T.K. Defendant filed a motion for a new trial which included a claim that the trial court erred in denying his objections to the State's comments and actions during closing arguments and erred in denying the motion for mistrial. The trial court denied the motion. Subsequently, the trial court sentenced defendant to 30 years in prison on each count, with all terms running consecutively, for a total of 150 years in prison. Defendant's motion to reconsider sentence was denied. Defendant filed a timely notice of appeal in case No. 04 CR 14266, which was assigned appellate No. 1-13-0478. He later was granted leave to file a late notice of appeal in case No. 01 CR 2914, which was assigned appellate No. 1-13-2173. On defendant's motion, the appeals were consolidated.

¶ 22 On appeal, defendant contends that the State's rebuttal argument improperly encouraged the jury to convict him for reasons other than the evidence presented at trial and, therefore, denied him a fair trial. In particular, defendant argues that it was improper for the prosecutor to ask the jury to convict him in order to end G.E.'s and T.K.'s nightmares, heal their emotional scars, and give them justice. Defendant asserts that this argument was improper because there was no evidence that the victims had been suffering nightmares, and the argument encouraged

the jury to find him guilty not based on the evidence presented, but out of sympathy for the victims. Defendant acknowledges that the trial court sustained his objection after the reference to nightmares and emotional scars, but maintains that this did not cure the impropriety because the court did not instruct the jurors to disregard the statement and the prosecutor immediately followed the objection by improperly urging the jury to deliver justice.

¶ 23 Prosecutors are given wide latitude when making closing arguments. *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007). Reversal based on closing argument is warranted only if a prosecutor made improper remarks that engendered "substantial prejudice," that is, if the remarks constituted a material factor in the defendant's conviction. *Wheeler*, 226 Ill. 2d at 123. In closing, the State may comment on the evidence presented and draw reasonable inferences therefrom. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). The prosecution may attack a defendant's theory of defense (*People v. Doyle*, 328 Ill. App. 3d 1, 12 (2002)) and, during rebuttal, the State may respond to comments made by the defendant which invite a response (*People v. Kliner*, 185 Ill. 2d 81, 154 (1998)). However, a prosecutor may not make "thinly veiled, emotion-laden appeals to the jury" that shift the focus of attention away from the actual evidence in the case. *People v. Johnson*, 208 Ill. 2d 53, 83-84 (2003). On review, we consider challenged remarks in the context of the entire record as a whole, in particular the closing arguments of both sides. *People v. Williams*, 313 Ill. App. 3d 849, 863 (2000).

¶ 24 The appropriate standard of review for closing arguments is currently unclear. In *Wheeler*, 226 Ill. 2d at 121, our supreme court applied a *de novo* standard of review to the issue of prosecutorial statements during closing arguments. However, the *Wheeler* court cited with favor its decision in *People v. Blue*, 189 Ill. 2d 99, 128 (2000), which applied an abuse of

discretion standard. We need not resolve the issue of the proper standard of review in the instant case, as our holding would be the same under either standard. See *People v. Thompson*, 2013 IL App (1st) 113105, ¶¶ 76-77 (acknowledging conflict regarding standard of review).

¶ 25 We agree with defendant that it was improper for the prosecutor to argue to the jury that it could end the victims' nightmares and heal their emotional scars by finding defendant guilty, as this argument did not focus on the actual evidence presented in the case, but rather, appealed to the jurors' sympathy. However, we find that the error in the prosecutor's argument was cured. "Generally, the prompt sustaining of an objection by a trial judge is sufficient to cure any error in a question or answer before the jury." *People v. Alvine*, 173 Ill. 2d 273, 295 (1996). Here, the trial court promptly cured any prejudicial impact caused by the prosecutor's remarks by sustaining defendant's objection. We are not troubled by the fact that the trial court did not, upon sustaining that particular objection, immediately instruct the jurors to disregard the statement. Prior to closing arguments, the trial court admonished the jurors that what the lawyers say is not evidence and that anything said that was not borne out by the evidence should be disregarded. During the course of rebuttal closing argument, the trial court responded to three other objections by admonishing the jurors that if they heard something argued that was not borne out by the evidence, they should disregard it. Then, during jury instructions, the trial court instructed the jury that closing arguments are not evidence and directed them to disregard any statement or argument made by an attorney which was not based on the evidence. In these circumstances, we conclude that the jury was more than adequately instructed. Accordingly, the error in the prosecutor's remarks was cured by the trial court's actions and defendant suffered no prejudice.

See *People v. Willis*, 409 Ill. App. 3d 804, 814 (2011) (admonishments cured error in complained-of comments).

¶ 26 With regard to the prosecutor's urging the jury to give the victims justice, we note as an initial matter that defense counsel did not object to this particular argument. In order to preserve an alleged error for review, a defendant must both specifically object at trial and raise the issue again in a posttrial motion. *People v. Donahue*, 2014 IL App (1st) 120163, ¶ 109; see also *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Forfeited claims may still be considered on appeal if they meet the standards of the plain error doctrine. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007), citing *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). However, before applying the plain error rule, it must be determined that error occurred. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 27 Here, the prosecutor argued that a guilty verdict would give the victims justice and concluded, "Ladies and gentlemen, on behalf of the people, do justice." Contrary to defendant's view, it is not improper for a prosecutor to "urge the fearless administration of justice." *People v. Desantiago*, 365 Ill. App. 3d 855, 864 (2006), citing *People v. Harris*, 129 Ill. 2d 123, 159 (1989); see also *People v. Goins*, 2013 IL App (1st) 113201, ¶ 93 (finding no impropriety in the prosecutor's argument that the victim could "receive justice" through a verdict of guilt). In light of this authority, we cannot find that the prosecutor's comments were improper. Because there was no error, the plain error does not apply. Defendant's argument fails.

¶ 28 For the reasons explained above, we affirm the judgment of the circuit court of Cook County.

¶ 29 Affirmed.