2016 IL App (2d) 140105-U
No. 2-14-0105
Order filed May 18, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. AMMAR A. SULEIMAN, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 12-CF-742 Honorable John J. Kinsella, Judge, Presiding.

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices McLaren and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant showed no error, and thus no plain error, in the trial court's sustaining the State's objection to his closing argument, as the argument misstated the evidence; (2) as defendant's convictions of aggravated vehicular hijacking and armed robbery violated the one-act, one-crime rule, we vacated the latter; (3) the trial court properly denied defendant's motion to suppress his statement, as defendant did not unambiguously invoke his right to counsel.

¶ 2 In this direct appeal from his convictions of armed robbery, aggravated vehicular hijacking, and aggravated battery, defendant, Ammar A. Suleiman, raises three issues. This first is whether he was denied a fair trial when the trial court sustained an objection made by the State during defense counsel's closing argument. The second is whether imposition of judgment and

sentence for armed robbery and aggravated vehicular hijacking violates one-act, one-crime principles. The third is whether the trial court improperly denied his motion to suppress his statement. For the reasons that follow, we vacate defendant's conviction of armed robbery and we otherwise affirm.

¶ 3 I. BACKGROUND

¶ 4 On April 26, 2012, defendant was indicted, along with Amine Rahmouni, on two counts of armed robbery (720 ILCS 5/18-2(a)(1), (a)(2) (West 2010)), one count of aggravated robbery (720 ILCS 5/18-5(a) (West 2010)), two counts of aggravated vehicular hijacking (720 ILCS 5/18-4(a)(3), (a)(4) (West 2010)), one count of unlawful possession of a stolen motor vehicle (625 ILCS 5/4-103(a)(1) (West 2010)), and one count of aggravated battery (720 ILCS 5/12-4(b)(8) (West 2010)). The charges stemmed from an incident that occurred on December 2, 2010, during which defendant and Rahmouni attacked the victim, Arnuflo Islas, in a parking lot behind North Park Mall and stole a vehicle owned by Islas's boss. Rahmouni was arrested hours after the incident occurred. Defendant was not arrested until April 11, 2012. On September 24, 2012, Rahmouni pleaded guilty to armed robbery. He received a sentence of nine years, in exchange for his plea and his truthful testimony at defendant's trial. Defendant elected to proceed to a jury trial.

¶ 5 Prior to trial, on July 11, 2012, defendant filed a motion to suppress his oral statement. Defendant argued that, during his interrogation, after being advised of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), he invoked his right to have an attorney present. According to defendant, when he thereafter stated that he was willing to let the officers ask him questions, they were required to readvise him of his rights and their failure to do so warranted suppression of his subsequent statement.

¶ 6 At the hearing on defendant's motion to suppress, Villa Park police officer Jose Pagan testified that, during the investigation of the offenses, he learned from Rahmouni that defendant was the other individual involved. On April 11, 2012, at about 4 p.m., Pagan went to defendant's place of employment, along with other officers, and told defendant that he needed to come with them to the Villa Park police department for questioning. Pagan handcuffed defendant and advised him of his *Miranda* rights. Defendant told Pagan that he understood his rights. When defendant began to ask questions, Pagan told him that they were not going to talk at that time but that he would be interviewed at the police station. During the transport to the police station, defendant continued asking why he was being taken into custody, and Pagan told him that he did not want to discuss it in a vehicle. They arrived at the police station at about 5:15 p.m., and defendant was placed in an interview room. At about 5:20 p.m., Pagan entered the interview room, along with Detective James Krupiczowicz. A camera recorded the interview.

¶ 7 A video recording of the interview, which was played for the trial court, showed that the following occurred. Pagan asked defendant if he remembered that Pagan had read him his *Miranda* rights at his place of employment and whether he understood them. Defendant indicated yes. Pagan then placed the *Miranda* form in front of defendant and read each right to him. When Pagan placed a pen in front of defendant to sign the waiver of rights, defendant replied, "Okay, but—uh—I can't sign this until my lawyer is here." Pagan asked defendant whether that meant that he wanted to exercise his rights, and defendant responded yes. Pagan then asked, "So, you don't want to make a statement right now?" Defendant responded, "No, I don't." Pagan said, "Okay. Alright, then I'll be back with you shortly in a couple minutes, alright?" As Pagan was about to stand up to leave, defendant immediately stated: "[Y]ou wanna ask me something you can go ahead and ask me, it's just I just don't want to sign nothing that's

all." Krupiczowicz then interjected: "So you're saying you're willing to talk to us you just don't want to sign anything without a lawyer, is that what you're saying?" Defendant replied, "That's what I'm saying, man." Krupiczowicz stated, "So you're saying you don't want—you don't need an attorney present for us to talk? You just don't want to sign anything." Defendant replied, "I just don't want to sign nothin', yeah, without my attorney here." Pagan then clarified, "But you're willing to talk to us and you're okay with us—even though you don't have an attorney here—you're okay with us talking to you." As Pagan was speaking, defendant stated: "I'm willing to talk to you, yeah." And after Pagan finished, defendant stated: "Yeah, that's fine, man." The officers then stated that they needed a couple of minutes and that they would be right back to talk. The officers left the room and returned after about two minutes, at which point they interviewed defendant.

¶ 8 On cross-examination, Pagan testified that he recalled that defendant said that he would not sign the *Miranda* form unless he had an attorney present. When defendant next said that he would be willing to discuss the matter with the officers, Pagan and Krupiczowicz exited the room "to discuss the case and kind of what our approach was going to be as far as how the interview was going to go and who was going to conduct the primary interview." Pagan did not recall discussing defendant's refusal to sign the *Miranda* form. Pagan testified that, when defendant told him that he would not sign the form without a lawyer but that the officers could still question him, he was confused. Whether defendant wanted a lawyer was not clear to him. His understanding was that defendant just did not want to sign anything without a lawyer.

¶ 9 Defendant testified that, when he was taken into custody at his place of employment, he was advised of his *Miranda* rights. Defendant asked the officers what was going on, and they told him that they would talk at the police station. When they arrived at the police station, he

was put in an interview room. An officer showed him a *Miranda* form and gave him a pen. According to defendant, "He made me believe it was a very important paper like it meant a lot, that paper. If I sign this paper, I'm waiving my rights. If I don't sign it, I'm practicing my rights." After he told the officers that he was not going to sign anything, they gathered up their stuff. Defendant then told them that if they wanted to ask him something they could go ahead and ask him. The officers asked him questions. Defendant testified that he thought that if he did not sign the paper then nothing he said could be used in court. He thought that, by not signing the paper, he was invoking his rights.

¶ 10 The trial court denied the motion to suppress, finding that "there certainly was not a clear and unequivocal invocation of his right to counsel." The court stated:

> "There was an exchange between the defendant and the officers about clarifying what his position was. And his position quite clearly—and the Court so finds—was that he did not wish to sign anything, did not wish to sign the form. And the fact that the officer mentioned the word invoking or a waiver or engaged in that conversation is certainly part of the discussion, but it is not dispositive of what transpired.
>
> And in its totality, the defendant indicated a willingness and desire to engage in conversations with the officer about why he was there. And that was following his being advised of the consequences that it would be used against him, advised of his rights. And he made it clear that he was only requesting an attorney before he would actually sign any documents."

The court found that "at best, this was an equivocal statement to him placing a condition to the police that I'll talk to you or answer your questions, but I'm not going to sign the form until my attorney is here."

¶ 11 The matter proceeded to trial. The following testimony, relevant to defendant's argument concerning the propriety of the court's rulings during closing arguments, was presented. Islas testified that he was attacked by two men on December 2, 2010, at just past 10 p.m., as he was sitting in the passenger seat of his boss's Honda Pilot parked behind North Park Mall. A man entered through the driver's door, put a gun to his side, and demanded money. Islas exited the car, and the man grabbed him and took him to a van, which was parked nearby. A second man, wearing a mask, exited the van holding a tire iron. The man in the mask hit him in the head. Isla struggled with the man, removed the mask, and saw his face. He did not see the face of the man with the gun. The men threw him to the ground. The man with the gun hit him in the stomach, nose, and face. Islas saw the men drive away in the Honda. He was taken to the hospital and treated. While at the hospital, Islas identified Rahmouni.

¶ 12 Rahmouni testified that, on the day of the offenses, defendant called him and asked if he wanted to commit a robbery. Around 4 p.m., Rahmouni and defendant met and drove around together in a van owned by defendant's mother. They drove to the mall and parked behind it. At about 10 p.m., Islas exited the mall and entered a car parked next to theirs. According to Rahmouni's version of the events, he entered the Honda, pointed a BB gun at Islas, and demanded money. Rahmouni testified that he was wearing a ski mask; he was not wearing gloves. When Islas exited the car, Rahmouni wrestled with him and struck him in the face. Defendant then exited the van holding a tire iron and struck Islas in the head. According to Rahmouni, defendant was wearing a hoodie and gloves. Rahmouni testified that he grabbed the tire iron from defendant, because he thought that Islas was bleeding too much. Islas reached for the ski mask and pulled it down, exposing Rahmouni's face. Rahmouni threw the tire iron and the gun into the van. Defendant jumped into the van and drove off. Rahmouni jumped into the

Honda Pilot, which was still running, and drove away. The police pulled him over and he fled. He was found by the police a few hours later, hiding under a car. Rahmouni identified a picture of the shoes and the shirt that he was wearing on the night of the incident and testified that there was blood on his shoes and shirt. He also identified a picture of the mask that he was wearing. Rahmouni agreed that he asked his lawyer to make a deal with the State because he knew that his DNA had been found on the tire iron and on the mask, that he had been identified by Islas, and that Islas's blood was on his clothes.

¶ 13 Pagan testified that a mask was recovered down the street from where the Honda was stopped. Pagan recovered a tire iron from the scene of the incident. Pagan learned from Islas's boss that there was a surveillance camera in the area of the offenses. Pagan obtained and viewed the video taken from the camera. Pagan continued to investigate the offenses and, on April 10, 2012, went to defendant's home and took pictures of a van located there. Pagan met with Rahmouni and showed him the pictures. Pagan also compared the pictures with still images from the surveillance video. Ultimately, defendant was taken into custody and provided a statement.

¶ 14 The parties stipulated that the tire iron, a glove, and a ski mask were analyzed for the presence of DNA. A mixture of two DNA profiles was found on the tire iron: the DNA profiles could not be identified but were consistent with those of Rahmouni and Islas. The major DNA profile observed on the mask matched Rahmouni's DNA profile. The major DNA profile found on the glove matched Islas's DNA profile.

¶ 15 During closing arguments, defense counsel argued that Rahmouni's claim that defendant was his accomplice was false. He argued many examples of ways in which Rahmouni lied. At one point he stated:

> "He lied and said he was the guy with the BB gun and he didn't hit Mr. Islas—the victim in this case—with a tire iron when Islas said that it was the guy with the tire iron who had the mask and who hit him. And it was Mr. Rahmouni's DNA that's on the mask and the tire iron. So we know he lied about that. It was Mr. Islas's DNA on his shoes. It was Mr. Islas's DNA and blood on his shirt."

The State objected, and the trial court sustained the objection, stating: "The jury will recall the testimony and reject anything that's not supported by the evidence in the case."

¶ 16 The jury found defendant guilty of armed robbery, aggravated robbery, aggravated vehicular hijacking, unlawful possession of a stolen motor vehicle, and aggravated battery. He was sentenced to concurrent prison terms of 16 years for armed robbery, 16 years for aggravated vehicular hijacking, and 5 years for aggravated battery. Following the denial of his motion for reconsideration of his sentence, defendant timely appealed.

¶ 17 II. ANALYSIS

¶ 18 Defendant first argues that he was denied a fair trial when the trial court sustained the objection made by the State during defense counsel's closing argument when defense counsel attempted to establish that Rahmouni was a liar. Defendant concedes that he forfeited the issue by failing to raise the issue in a posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defendant asserts, however, that we should overlook forfeiture, arguing that the error is plain error.

¶ 19 The plain-error doctrine offers criminal defendants a narrow path to appellate review of procedurally forfeited trial error. *People v. Walker*, 232 Ill. 2d 113, 124 (2009). We will apply the plain-error doctrine when:

> "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

The first step of plain-error review is determining whether any error occurred. *People v. Sargent*, 239 Ill. 2d 166, 189 (2010). If it did not, then plain error could not have occurred. *People v. Kitch*, 239 Ill. 2d 452, 465 (2011).

¶ 20 Counsel in closing argument may be vigorous and eloquent and make fair comment upon the evidence. Such latitude, however, does not give counsel the right to go beyond the evidence and the inferences therefrom, misstate the law, or express personal opinions on the evidence. *People v. Wooley*, 178 Ill.2d 175, 209 (1997). The regulation of the substance and style of closing argument lies within the trial court's discretion and the court's determination of the propriety of the remarks will not be disturbed absent a clear abuse of discretion. *People v. Caffey*, 205 Ill. 2d 52, 128 (2001).

¶ 21 We find no abuse of discretion in the court's ruling, as there were misstatements of evidence in defense counsel's statement. Specifically, there was no DNA evidence presented at trial connected to Rahmouni's shirt and shoes. The only evidence regarding Rahmouni's shirt and shoes was that there was blood found on the clothing. Although Rahmouni agreed with counsel when asked whether he made a deal because he knew that Islas's blood was on his clothing, there was no DNA testing done on the blood. Thus, defense counsel's statements that it was Islas's DNA on Rahmouni's shirt and Islas's DNA on Rahmouni's shoes were

misstatements of the evidence, and the objection was properly sustained. Absent error, there can be no plain error, and thus we hold defendant to his forfeiture of the issue.

¶ 22 Defendant next argues that the conviction of armed robbery should be vacated, because it arose out of the same act—the taking of a vehicle by using force, or the threat of force, while armed with a bludgeon—as the aggravated-vehicular-hijacking conviction, thereby violating the one-act, one-crime rule. Under the one-act, one crime rule, a defendant may not be convicted of more than one offense "carved from the same physical act." *People v. King*, 66 Ill. 2d. 551, 566 (1977). The State concedes error. We accept the State's concession, and we vacate defendant's conviction of armed robbery, the less serious offense. See *People v. Artis*, 232 Ill. 2d 156, 169-170 (2009).

¶ 23 Last, defendant argues that the trial court erred in denying his motion to suppress. While we give great deference to the trial court's determinations of fact and credibility (*People v. Slater*, 228 Ill. 2d 137, 149 (2008)), we review the ultimate legal ruling *de novo* (*People v. Luedemann*, 222 Ill. 2d 530, 542 (2006)).

¶ 24 Defendant argues that his motion to suppress should have been granted, because the officers failed to readvise defendant of his *Miranda* rights after he requested an attorney. In *Miranda*, the United States Supreme Court held that, as a safeguard for the Fifth Amendment privilege against self-incrimination, an individual subjected to custodial interrogation is entitled to have counsel present during the questioning. In *Edwards v. Arizona*, 451 U.S. 477, 484 (1981), the Court clarified that, "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." Moreover, "an accused, *** having expressed his desire to deal with the police only

through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id*. at 484-85. Law-enforcement authorities violate this rule if they approach the accused for further interrogation without making counsel available. *People v. Winsett*, 153 Ill. 2d 335, 349 (1992). Thus, "[a]ny waiver of the right to counsel given in a discussion initiated by the police is presumed invalid, and statements obtained pursuant to such a waiver are inadmissible in the prosecution's case in chief." *Id*. at 350.

¶ 25 As the Court observed in *Davis v. United States*, 512 U.S. 452 (1994), the applicability of the rigid prophylactic rule of *Edwards* requires courts to determine whether the accused " '*actually invoked* his right to counsel.' " (Emphasis in original.) *Id*. at 458 (quoting *Smith v. Illinois*, 469 U.S. 91, 95 (1984)). To be entitled to the protection of *Edwards*, "the suspect must unambiguously request counsel." *Id*. at 459. If "a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, [United States Supreme Court] precedents do not require the cessation of questioning." (Emphasis in original.) *Id*.; see also *People v. Quevedo*, 403 Ill. App. 3d 282, 292 (2010).

¶ 26 Here, the trial court found, and we agree, that defendant did not unambiguously invoke his right to counsel. Indeed, defendant said that he would not sign the waiver form without a lawyer but that the officers could still question him, and the officers merely did so. Although defendant claims that the officers left the interview room after defendant stated that he was invoking his right to counsel, and that it was not until they reentered two minutes later that defendant stated that he would answer their questions, a review of the video shows that not to be

the case. Rather, the entire discussion took place as part of one continuous exchange as the officers attempted to determine defendant's intent.

¶ 27 III. CONCLUSION

¶ 28 For the reasons stated, we vacate defendant's conviction of armed robbery and we otherwise affirm the judgment of the circuit court of Du Page County. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 29 Affirmed in part and vacated in part.