2012 IL App (3d) 100007-U

Order filed January 18, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 21st Judicial Circuit, Kankakee County, Illinois
Plaintiff-Appellee,	)	
	)	Appeal No. 3-10-0007
v.	)	Circuit No. 07-CF-771
	)	
CHAVEZ K. SAULSBERRY,	)	Honorable Clark E. Erickson,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Lytton and McDade concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant failed to establish that certain arguments made in closing and rebuttal argument by the prosecution constituted reversible error under the plain error doctrine.

¶ 2 The defendant, Chavez Saulsberry, an inmate in custody at a Kankakee County correctional facility at the time of the alleged offenses, was charged by indictment with two counts of aggravated battery of a correctional institution employee engaged in the performance of correctional duties. 720 ILCS 5/12-4(b)(18) (West 2008). Following a jury trial, the

defendant was found guilty on both counts and was sentenced to two concurrent seven-year terms of imprisonment, to be served consecutively to the offense for which he was incarcerated at the time the offenses occurred. On appeal, the defendant seeks reversal of his convictions and a new trial based upon alleged improper closing argument by the prosecution. The defendant also seeks a $5 credit against the $5 teen court fine imposed against him upon conviction. The State concedes that the defendant is entitled to a $5 credit against the $5 teen court fine.

¶ 3 BACKGROUND

¶ 4 The events giving rise to the defendant's prosecution took place on December 16, 2007, in the 64-man housing unit "C-dorm" at the Jerome Coombs Correction Center, the main detention facility operated by the Kankakee County sheriff's office. The defendant, along with co-defendant, Darrell Denson, were charged as a result of an incident involving assaults upon two correctional institutional employees. The two defendants were tried in a trial before a single jury. Denson is not a party to this appeal.[1] As the defendant makes no challenge to the sufficiency of the evidence, we will recount the evidence adduced at trial.

¶ 5 Angelique Aherns, a corporal with the Kankakee County sheriff's department, testified that, on December 16, 2007, she was in charge of C-dorm at the Coombs facility. When she read a list of detainees who were to be subjected to disciplinary lockdown, one of the names she announced was Denson, who received an infraction notice for retaining a container of orange juice with his personal possessions in violation of department policy. Aherns informed Denson that he would be transferred to "E-pod" for imposition of lockdown. Denson argued with Ahrens

[1] The jury was unable to reach a verdict on one of the counts against Denson and a mistrial was declared in his case.

and ultimately refused to comply with the lockdown restriction. Aherns then requested assistance in removing Denson. Aherns testified that the defendant was not being disciplined for any infraction.

¶ 6 Aherns testified that Officers Miguel Ayala and Manual Villafuerte were escorting Denson when Denson turned toward Villafuerte and struck him. She testified that, in response, Ayala used his taser on Denson, but to no effect. At that moment, the defendant, who was off to the right side of the officers, ran toward Villafuerte and struck him in the face with his fist and then ran between two bunks. Ahrens testified that the defendant then turned and ran back toward the officers, struck her in the face and knocked off her glasses. Officers then subdued the defendant and a few seconds thereafter subdued Denson. Ahrens testified that, as a result of being struck by the defendant, she felt dazed and sought medical treatment the next day for a headache.

¶ 7 Two videotapes showing the incident as described by Aherns were played for the jury without objection. The videotapes clearly showed the defendant first attacking Villafuerte and then attacking Ahrens, just as Ahrens had described in her testimony.

¶ 8 Officers Ayala and Villafuerte each gave substantially similar testimony. Ayala testified that the defendant's blow to Villafuerte knocked him to the ground. Villafuerte testified that he received a lacerated lip as a result of the blow struck by Denson and that the defendant struck him on his right cheek. All officers denied any knowledge of, or participation in, any mistreatment of an inmate named Clarence Reilly, alleged to have occurred earlier that day.

¶ 9 Denson testified on his own behalf. He asserted that his actions were done in self-defense, as he expected to be treated in a manner similar to the treatment he had seen inmate

Clarence Reilly receive earlier that same day. According to Denson, Reilly had been handcuffed, tripped, and slammed face-down on the floor by Officer Villafuerte for no reason. Then, according to Denson, Reilly then had a bag of garbage dropped on his head by an officer. Denson also testified that, prior to the incident recorded on the videotape, Villafuerte told Denson, "I'll beat your ass" and told Denson to "get on the ground before I put you down." At that point, according to Denson, he swung at Villafuerte in self-defense. On cross-examination by the defendant's attorney, Denson testified that he was afraid of Villafuerte, partly because of what Villafuerte had said to him and partly because of what he had seen Villafuerte do to Clarence Reilly earlier in the day. Following Denson's testimony, both defendants rested their cases, and their motions for directed verdicts were each denied.

¶ 10 During closing argument, the prosecutor noted Denson's testimony was in stark contrast to the testimony of the officers, both as to the incident itself, and the alleged mistreatment of inmate Clarence Reilly. The prosecutor then argued:

> "Now [Denson] testified completely contrary to what the evidence was. But I ask you, other than his words, what evidence, if any, is there of his account? None. *** [He was t]he only witness who says he was beat up. The only witness who says he was abused. *** Clarence Reilly's name got thrown around like nothing. Where's he? Where's all the other fifty-eight people to say, oh, it was an atrocity what we saw, boy, they beat up Denson, or he wasn't hurt when he left. They're not there, ladies and gentlemen."

¶ 11 In closing, counsel for the defendant argued that the defendant had acted in defense of himself and Denson and that there had been no evidence that he had caused any actual injuries to the officers.

¶ 12 Denson's attorney then began his closing argument by stating:

> "The Second World War the German Army took prisoners. The American Army took prisoners. The Japanese. At the end of the war all the prisoners went home. 96 percent of the German Army went home, 4% died in captivity. 97% of the prisoners captured by the American Army went home, 3% died in prison. 64% of the prisoners captured by the Japanese went home, because 36% died in captivity. It was the way they were treated by the Japanese that's a big difference."

¶ 13 In rebuttal, the prosecutor stated:

> "Chavez Saulsberry's punch to Officer Villafuerte knocked him to the ground. Since [Denson's counsel] was so fond of talking about Nazis and what the Japanese did in World War II, I think it's a fair characterization that Chavez Saulsberry's Pearl Harbor style sneak attack on Officer Villafuerte, that was truly cowardly and sissy."

¶ 14 None of the prosecutor's comments elicited objections from the defendant's counsel. Following arguments and instructions, the jury convicted the defendant on both counts of aggravated battery. He was subsequently sentenced to two concurrent 7-year terms of

imprisonment to be served consecutively to the sentence he received in the case for which he was incarcerated at the time the instant offenses occurred.

¶ 15 ANALYSIS

¶ 16 On appeal, the defendant maintains that the statements of the prosecutor in closing argument, asking the jury to consider that the defendant had not called witnesses to testify in support of his case, improperly shifted the burden of proof to the defendant, while his comments in rebuttal referring to the defendant as a coward and a sissy and describing the defendant's actions as a "Pearl Harbor style sneak attack" were unduly inflammatory and further minimized the State's burden of proof. The defendant did not object to any of these comments during closing argument, nor did he include them in a posttrial motion. Consequently, the State contends that these claims are forfeited. *People v. Enoch*, 122 Ill. 2d 176 (1988) (issues not raised before the trial court, either in contemporaneous objection or posttrial motion, are procedurally defaulted on appeal).

¶ 17 Recognizing that his claims have been procedurally defaulted, the defendant asks this court to review the issues for "plain error." The so-called plain error doctrine permits appellate review of a forfeited issue when the defendant proves that an error occurred and that either the evidence is closely balanced or the alleged error is so substantial that it deprived him of a fair trial. *People v. Herron*, 215 Ill. 2d 167 (2005). Plain error analysis, necessarily, involves a two-step process. First, the defendant must establish that an error has occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). If the defendant fails to establish that an error occurred, the inquiry is at an end. *Id.* If, however, the defendant can establish that an error occurred, the matter proceeds to the second step where the defendant is permitted to show that he was

prejudiced by the error. *Herron*, 215 Ill. 2d at 193. The defendant may show prejudice in one of two ways--either by showing that the evidence presented at trial was closely balanced, allowing a presumption that the error was prejudicial, or by showing that the error was so serious that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the weight of the evidence against the defendant. *Id.*

¶ 18 The defendant alleges two instances of error: (1) the prosecutor improperly shifted the burden of proof in his initial closing argument when he stated that inmate Clarence Reilly and other witnesses were not called to testify in support of the defendant's theory that he acted in defense of Denson when he attacked Villafuerte and Ahrens; and (2) the prosecutor made improper and inflammatory statements about the defendant in rebuttal when he called the defendant a coward and a sissy and referred to his actions as a "Pearl Harbor style sneak attack." We will examine each allegation separately to determine if either constituted reversible error.

¶ 19 We first consider whether it was error for the prosecutor to comment upon the lack of testimony from certain witnesses. It is axiomatic that an accused is presumed innocent and that the burden of proof as to his guilt lies, at all times, with the State. *People v. Lopez*, 152 Ill. App. 3d 667, 678 (1987). Consequently, the failure of the defendant to call, as witnesses, persons who may be aware of facts material to the question of his guilt or innocence cannot be commented upon by the State. *People v. Beller*, 54 Ill. App. 3d 1053, 1058 (1977). As a general rule, it is improper for the prosecution to comment on a defendant's failure to present witnesses when such witnesses are equally accessible to both parties. *People v. Eddington*, 129 Ill. App. 3d 745, 777 (1984). An exception to the rule exists where potential alibi witnesses are interjected into the

case by the defendant but are not produced at trial. *People v. Anderson*, 250 Ill. App. 3d 439, 454 (1993).

¶ 20 Here, the prosecutor commented about the lack of testimony from inmate Clarence Reilly or anyone else who might have corroborated Denson's testimony regarding why he believed his actions against Officer Villafuerte were justifiable acts of self-defense. Self-defense and defense of another are valid defenses to a charge of aggravated battery. 720 ILCS 5/7-1 (West 2008) ("A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself of another against such other's imminent use of unlawful force."). We note that the judge gave an instruction to the jury informing the jurors that defense of another was a defense to the charge against the defendant and that it was the burden of the State to prove the lack of legal justification beyond a reasonable doubt. As Reilly's name was not interjected into the case as an alibi witness and Reilly's testimony was relevant to an element of the aggravated battery charges against the defendant, *i.e.*, defense of another, it was error for the prosecution to comment upon the defendant's failure to present testimony corroborating the defendant's contention that his actions were legally justifiable.

¶ 21 Having found that error occurred when the prosecutor commented on the lack of witnesses called to support the defendant's contention that his actions were legally justified, we must determine whether such constituted reversible error. As we have previously noted, so-called plain error constitutes reversible error only if: (1) the evidence is closely balanced; or (2) the error was so serious that it denied the defendant a fair trial. *Herron*, 215 Ill. 2d at 193.

¶ 22 On the question of whether the evidence was closely balanced, our review of the entire record leaves no doubt that the evidence against the defendant was not closely balanced. The defendant was charged with two counts of aggravated battery in that he struck Officers Villafuarte and Ahrens with his fist, causing each bodily harm while knowing that each was a correctional employee engaged in authorized duties. Officers Aherns, Ayala and Villafuarte credibly and consistently testified that they were in the process of subduing inmate Denson when the defendant attacked first Villafuarte and then Aherns, striking each officer in the face. More importantly, the videotapes played for the jury clearly corroborated the officers' testimony on each salient point. The tapes show the defendant attacking the officers while they are in the process of subduing Denson after he struck Villafuarte. The tapes show that Denson struck Villafuarte without any apparent justification and that the defendant ran at each of the officers and struck each officer with his fist while the officers were preoccupied with subduing Denson. Thus, we find that the evidence was not closely balanced.

¶ 23 Turning to the second prong of the plain error doctrine, *i.e.*, the error is deemed to be so serious that the error itself denied the defendant a fair trial, we note that this analysis is invoked only in those exceptional circumstances where, despite the absence of an objection, application of the doctrine is necessary to preserve the integrity and reputation of the judicial process. *People v. Herrett*, 137 Ill. 2d 195, 210 (1990). Moreover, even constitutional errors are forfeited unless the defendant can show that the error was so serious that it affected the fairness of his trial. *People v. Allen*, 222 Ill. 2d 340, 352-53 (2006).

¶ 24 Here, even though the prosecutor's comments were an attempt to shift the burden of proof to the defendant, the specific comments cannot be said to have denied the defendant a fair trial.

A single isolated comment wherein the prosecutor attempts to shift the burden of proof to the defendant will not require reversal of a conviction. *People v. Leger*, 149 Ill. 2d 355, 400 (1992) (no error found, in part, because the prosecutor made only one comment which allegedly shifted the burden of proof). Moreover, the jury was properly instructed as to the burden of proof. A proper jury instruction on the burden of proof generally cures any improper comments made to the contrary during closing argument. *People v. Quinn,* 173 Ill. App. 3d 597, 602 (1988); *People v. Rowe*, 115 Ill. App. 3d 322, 328 (1983). Therefore, the defendant has failed to establish that the prosecutor's comments denied him a fair trial.

¶ 25 The defendant next maintains that the prosecutor's comments in rebuttal, likening the defendant's actions to a "Pearl Harbor style sneak attack" and referring to the defendant as a "coward" and a "sissy," constituted reversible error. We find no reversible error. Prosecutors are generally afforded wide latitude to comment upon the relevant evidence as well as any fair and reasonable inferences therefrom. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). Nevertheless, reversible error may be found in closing argument where the defendant can establish that, but for the particular comment, the verdict would have been different. *People v. Leger*, 149 Ill. 2d 355, 399 (1992); *People v. Williams*, 313 Ill. App. 3d 849, 863 (2000) ("improper remarks generally do not constitute reversible error unless they result in substantial prejudice to the accused"). Also, it is important to note that a prosecutor's remarks in rebuttal will not be deemed improper where the record reveals they were the product of defense counsel's provocation or invitation. *People v. Vargas*, 409 Ill. App. 3d 790, 797 (2011).

¶ 26 Here, each of the allegedly inflammatory comments were made in rebuttal following the defendant's counsel's argument that the defendant was justified in striking the officers in defense

of Denson. While the "Pearl Harbor" analogy was prompted by Denson's counsel's World War II reference and not by any comments made by the defendant's counsel, the comment merely sought to highlight the officers' testimony and the video evidence which showed that the defendant attacked the officers from their blind sides and while the officers were not expecting such an attack. In so doing, the prosecutor was attempting to infer from the nature of the defendant's attacks upon the officers that his actions were not motivated out of a desire to protect Denson from brutality. We find no error in the prosecutor's comment comparing the defendant's actions to a "Pearl Harbor style sneak attack" since the comment was a permissible commentary upon the record evidence.

¶ 27 Likewise, we find no error in the prosecutor's rather uncomplimentary use of the terms "coward" and "sissy." Such terms are permissible if they can be supported by the evidence or a reasonable inference therefrom. *Vargas*, 409 Ill. App. 3d at 797. Here again, the prosecution appears to be commenting upon the fact that the defendant's attacks on the two officers were not face-to-face confrontations but were, instead, attacks initiated from outside the field of vision of the officers while the defendant was on the run, and following which the defendant ran from the officers to avoid being caught. The prosecution's argument to the jury was that the defendant sought to strike the officers when they were not able to defend themselves and not as part of a plan to come to the aid of Denson. The evidence and reasonable inferences therefrom would support this argument. Thus, the prosecutor's comments did not constitute error.

¶ 28 Even assuming, *arguendo*, that the comments constituted error, in order to establish that comments during closing argument constitute reversible error, the defendant must establish that, but for the particular comment, the verdict would have been different. *Leger*, 149 Ill. 2d at 399.

Here, given the overwhelming nature of the evidence against the defendant, we find that the defendant has failed to establish that the comments made during rebuttal argument resulted in a guilty verdict. We find, therefore, that the defendant has failed to establish that the prosecutor's comments during rebuttal constituted plain reversible error.

¶ 29 Lastly, we agree with the parties that the defendant is entitled to a credit of $5 for time served in presentence custody which is to be applied against the $5 teen court fine imposed against him in the sentencing order. Under Illinois Supreme Court Rule 615(b)(1), a reviewing court may "reverse, affirm, or modify the judgment order from which the appeal is taken." Ill. S. Ct. R. 615(b)(1) (eff. Aug. 27, 1999). Remand is unnecessary because we have the authority to direct the circuit clerk to make the necessary changes to the defendant's sentencing order. See *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995).

¶ 30 CONCLUSION

¶ 31 For the foregoing reasons, the judgment of the circuit court of Kankakee County is affirmed. We order that the defendant receive a $5 credit for time served in presentence custody which is to be applied against the $5 teen court fine. Pursuant to our authority under supreme court rule 615(b)(1), we order the circuit clerk to correct the mittimus to reflect a $5 credit to be applied toward the teen court fine imposed in the original order.

¶ 32 Affirmed; mittimus corrected.