2011 IL App (3d) 100106-U

Order filed November 8, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
	)	Rock Island County, Illinois
Plaintiff-Appellee,	)	
	)	Appeal No. 3-10-0106
v.	)	Circuit No. 08-CF-385
	)	
ERIC HENRY,	)	
	)	Honorable Charles H. Stengel,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices McDade and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant charged with murder. The prosecutor's remarks during rebuttal concerning reasonable doubt and accountability were not erroneous. As these statements did not equate to error, there can be no plain error. Defendant was not denied a fair trial. Affirmed.

¶ 2 The State convicted defendant, Eric Henry, of first degree murder (720 ILCS 5/9-1(a)(1) (West 2008)) for the death of Katherine Pedigo. The circuit court of Rock Island County sentenced defendant to natural life in prison. Defendant appeals, claiming the prosecutor improperly commented on the reasonable doubt standard of proof during closing arguments thereby denying him a fair trial.

¶ 3 FACTS

¶ 4 The State charged defendant with the murder of Katherine Pedigo. Evidence adduced at trial indicated the victim had abrasions on the forehead and the bridge of the nose. She suffered from multiple stab wounds including 12 to the chest, 4 to the upper thigh, 20 on her back, and 13 to the back of her head and neck. She also had incised wounds to her thumb, neck and vaginal area. An incised wound is "a cutting wound or a wound made by a sharp instrument that is longer than it is deep." Both of the victim's lungs were punctured. Testimony indicated it was impossible to tell which wound was fatal. The incised wound to the neck or the penetrating stab wounds to the chest and back could have been fatal by themselves.

¶ 5 The parties stipulated that on April 20, 2008, defendant made three 911 calls from a landline owned by Becky Yaggie. The 911 calls were made between 8:39 a.m. and 8:45 a.m. In the 911 calls, defendant originally reported smoke in the building and later a dead female in a bathtub.

¶ 6 At trial, a number of Moline firefighters and police officers testified that they responded to a building at the corner of 4th Street and 16th Avenue in Moline, Illinois early in the morning

on April 20, 2008. Katherine Pedigo lived at this address.

¶ 7 Officer Eduardo Alaniz testified that on April 20, 2008, at approximately 8:39 a.m., he received a call regarding a structure fire. When he arrived at the building, he observed smoke coming from the building. He talked to a female, who lived on the first floor, then ascended a stairway where he encountered defendant and the codefendant, Gustavo Dominguez. Defendant told Alaniz the fire was in the basement. Dominguez told Alaniz there was a female tied up in a tub. Dominguez led Alaniz to a downstairs apartment where he observed a deceased female in a bathtub.

¶ 8 Testimony from firefighters that responded to the call indicated there were two small fires in the basement. The fires had been intentionally set and were quickly extinguished.

¶ 9 Margaret Spicer testified that she resided in the building for 13 years. She learned of the fires on the morning of April 20, 2008, when defendant knocked on her door and asked if she smelled smoke. Her apartment is directly below apartment 4 where defendant and Becky Yaggie lived. Gustavo Dominguez lived in apartment 3, which is directly above the victim's apartment.

¶ 10 Officer Greg Couch testified that he observed blood evidence in the common foyer area of the building. He observed blood on the steps going upstairs.

¶ 11 Jasbir Hullon testified that he was the landlord of the building. Defendant and Becky Yaggie originally rented apartment 3 in the building, but later moved into apartment 4 in April of 2008. Dominguez moved into apartment 3 at about the same time. The victim moved into apartment 1 sometime prior to Dominguez moving into apartment 3. The other tenant, Ms.

Spicer, lived in apartment 2 for 12 years.

¶ 12 Hullon continued his testimony by noting the 16th Avenue entrance allows access to all four apartments. Immediately upon entering, there is a staircase. Beyond the staircase on the first floor, the victim's apartment is on the right. Apartment 2 is on the left. At the top of the staircase, apartment 3 is on the right and apartment 4 is on the left. The east side of the complex has an entrance that allows access to apartments 2 and 3. Ms. Spicer and defendant have keys to apartments 2 and 3. Another entrance on the west side of the building allows access to the victim's and Dominguez's apartments. The victim and Dominquez had keys to the west side entrance. The west side entrance also allows access to the basement. Locks on the west side entrance were in working order in April of 2008.

¶ 13 Hullon further testified that the basement door had a padlock on it and the only persons with a key to the padlock were Hullon and defendant. Supplies for repair of the building were stored in the basement. Hullon noted the victim had been living in her apartment at least two weeks prior to her death. Defendant performed painting and repair work in the victim's apartment, including changing the locks, as he and Yaggie were originally going to move there.

¶ 14 Amanda Coulter testified that she lived with her sister, Katherine Pedigo, for a short time in apartment 1. She was familiar with the victim's possessions, which included a Gateway laptop, two types of gaming systems, cell phone, and several names of video games her sister possessed. Well after the murder, the police allowed her into her sister's apartment. While there, she recovered a set of keys from which she recognized as her sister's. The keys would not

unlock either of the apartment's doors. She had never been told that her sister changed the locks.

¶ 15 Detective Brian Johnson testified about his involvement in the investigation of Pedigo's death. He interviewed Dominguez at the police station. Information gathered during this interview resulted in Johnson drafting complaints for search warrants for Dominguez's person and apartment. While Dominguez was at the police station, officers found blood in a bathroom used by him. Johnson testified that the reason he sought to obtain a search warrant "for the person of Gustavo Dominguez" was due to the blood found in the police station bathroom.

¶ 16 Johnson noted that when he obtained the victim's cell phone number, he contacted Sprint and had the phone "pinged." The ping is "just basically to get the GPS location of the cell phone. The ping identified a 698-meter range in which the phone was located. A canvass of that area revealed it to be in the neighborhood of the victim's apartment complex. Calls were made to the phone while police searched for it throughout the complex. While standing next to a closet outside defendant's apartment, Johnson heard a vibration sound that he recognized as a phone on vibrate mode. This led him to obtain a search warrant for the closet. Police also obtained consent from Becky Yaggie to search the closet. They gained access to the closet by prying the hasp off the door. Inside the closet was a trash bag containing possessions of the victim. Johnson noted defendant admitted to handling the victim's phone found within the trash bag.

¶ 17 Scientist Stephanie Beine testified that an iPod found in the trash bag contained a mixture of DNA from which defendant could not be excluded. She also noted that blood samples taken

from the bathroom floor of the Moline police station, where Dominguez went to the bathroom, matched the victim's DNA. Blood samples from Dominguez's shoes also matched defendant's DNA.

¶ 18 Investigator Tom Merchie of the Illinois State Police and Detective Ted Teshak used luminol to locate blood traces not visible to the eye at the crime scene. Merchie and another investigator, Rod Sherpe, discovered a trail of blood left by footwear proceeding through the victim's apartment, out her kitchen door and up the stairs of the complex. The trail indicated two distinct footstep patterns which overlapped. They followed the trail up the stairway to Dominguez's apartment, through his apartment, out the other door of the apartment and across the hallway to defendant's apartment.

¶ 19 Merchie noted that they sprayed the kitchen floor of defendant's apartment with luminol and the entire floor glowed. The luminol illuminated swipe patterns in defendant's apartment, but Merchie did not obtain a finding that blood was present there, which might have been due to someone using bleach on the floor. The police recovered a partly-used container of bleach from defendant's apartment as well as discovered bleach in the drain trap.

¶ 20 Tisha Hare testified she dated defendant in October of 2007, but no longer dated him by January of 2008. She and defendant still talked at that time, however. Prior to his arrest, he called her and told her a murder and fire occurred at his apartment. He stated the police had a suspect but that he was afraid he would also be a suspect. Hare also identified a knife found in the victim's bedroom as one similar to a knife defendant had previously shown to her.

¶ 21 Becky Yaggie testified that defendant had put the lock on the closet outside their apartment during the time they lived there. She did not have a key to that closet. On Friday, April 18, 2008, she picked up a paycheck for defendant and cashed it so she could pay bills. Defendant called her anxious about when she would get home because she had his paycheck. When she arrived home, defendant asked her about the check and how much she had left. She gave defendant $30. He then left indicating he was going to purchase marijuana. When he returned, he asked for more money to acquire more marijuana. She then gave him $50. When he arrived home the second time, he told Yaggie that Pedigo wanted him to put something on her door, possibly weather stripping or a lock. He went downstairs to see what the victim needed and returned 30 to 45 minutes later.

¶ 22 Yaggie continued her testimony noting that defendant told her the victim had "a nice place, a lot of nice things." Yaggie testified that defendant stated that "if he had that kind of stuff, he could pay off his bills, what he owed me and whatever. *** And my comment to that was it doesn't matter how much you owe me or anybody else, don't even think about doing something like that. I just left it at that."

¶ 23 Yaggie indicated defendant did not specifically state an intent to rob Pedigo. Nevertheless, she told defendant that she did not want to be part of anything. She discussed bills with defendant, telling him that buying dope, using dope and borrowing money had to stop. Nevertheless, defendant asked for another $50 the next day, April 19, to buy more drugs. She gave it to him. She went to work on April 19 and attempted to call defendant five or six times.

She finally reached him around 11 p.m. and he indicated he was going to be finishing off his dope and then going to bed.

¶ 24 Yaggie testified that the next morning, April 20, she was with a client when defendant called telling her there was a fire in the basement and that she had better call the landlord. He never told her about a dead body being found. Later that night, she took him to East Moline and dropped him off at a gas station. He told her he was going to stay with a friend, but did not mention where. He called later and told Yaggie that it would not be a good idea for them to stay together. The next day, on April 21, defendant drove Yaggie and her client to Iowa. During the trip, the police called Yaggie to ask permission to search her apartment and the closet outside of it. Defendant told her not to tell the police he was with her. The two later returned to the apartment. When police asked about searching the closet, defendant informed Yaggie that he did not know the location of the key to it.

¶ 25 Anna Shockley testified that she was in a relationship with defendant in April of 2008. Defendant called her a few times on April 19. During a call around 11:30 p.m., defendant stated "that he had done something stupid." He informed Shockley that he had broken into another apartment in the building and taken a laptop, iPod and cell phone. He further stated he had done a sloppy job at breaking into the apartment and that he needed to go make it look like an outside job. He later came to Shockley's house where she asked him if he was the one who murdered Pedigo. Defendant would not answer the question. Shockley asked defendant to look her in the eyes and tell her he did not commit the murder, but defendant would not do so. Later, Shockley

again asked defendant if he committed the murder and he told her that he did not. She stated, “He didn’t say that he did do it, but the way that he was acting, the way he was looking at me, I could tell that he was lying to me.” When she told defendant that he was guilty of the murder if he could not look her in the eyes and deny doing it, he did not respond.

¶ 26 Following the close of the State's evidence, defendant made a motion for a directed verdict, which the trial court denied. Defendant called Detective Scott Williams as his first witness. Williams testified that he searched a trash can at the residence in question on April 20, 2008, and found a paycheck stub for $180. In the note field of the check, it stated "Eric Henry roofing." The defense made a motion to transport the jury to the crime scene, which the trial court granted.

¶ 27 The defense also called Robert Slay who testified that Gustavo Dominguez was known to carry a pocket knife. Slay stated he did not trust Dominguez as he "caught him trying to steal a couple CD's" a couple of times. Even though Slay considered himself a friend of Dominguez, he would not leave Dominguez alone with his belongings.

¶ 28 Defendant also called William Reschly to the stand, who testified he was a friend of Dominguez. Reschly "hung out" with Dominguez during the time of the murder. He gave Dominguez about $30 a week for a four-year period. He never asked to be paid back.

¶ 29 After recalling two police officers that testified during the State's case-in-chief, the defense rested. Following closing arguments, the jury found defendant guilty of first degree murder. In addition, the jury unanimously determined that the murder had been committed by

exceptionally brutal and heinous behavior indicative of wanton cruelty. Defendant filed a posttrial motion identifying numerous claims of error, which the trial court denied. The trial court then sentenced defendant to natural life in prison. Defendant filed a motion to reconsider sentence, which the trial court also denied. This appeal followed.

¶ 30 ANALYSIS

¶ 31 Defendant's sole claim on appeal is that the prosecutors remarks during closing entitle him to a new trial. Specifically, defendant asserts that the prosecutor improperly commented on the reasonable doubt burden of proof and also misstated the law of accountability. Defendant argues these comments allowed the jury to reach its verdict based on a weakened standard of proof and false assumption about legal accountability.

¶ 32 A. Reasonable Doubt Standard

¶ 33 Defendant claims the prosecutor inaccurately commented on the State's burden of proof when stating:

> "Now when you are deciding back there whether the State's proved the elements of the crime beyond a reasonable doubt, you can also consider what that means. Now, that's one thing that you won't get an instruction about. You will get an instruction about everything else but that, and basically what it means is just that. It's not beyond all possible doubt on every fact that you heard in this trial and it doesn't mean absolute certainty."

¶ 34 Defendant notes that following this passage, the prosecutor stated that "certain facts are unknown, but you can reach reasonable conclusions just as you do in every day life." Taken together, defendant argues, the two passages evince the State's desire to reduce its burden of proof by urging "the jury to construe the burden more lightly than it may otherwise have been inclined to construe it."

¶ 35 Defendant acknowledges that he failed to preserve this alleged error for review. He neither objected to the prosecutor's remarks during closing arguments nor raised the issue in his posttrial motion. Nevertheless, defendant seeks review under the plain-error doctrine. See Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). Under the plain-error doctrine, we may consider a forfeited issue "when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). Under the second prong of this test, plain-error analysis is warranted when the error is so substantial that it affected the fundamental fairness of the proceeding so that remedying the error is necessary to preserve the integrity of the judicial process. *People v. Hall*, 194 Ill. 2d 305, 335 (2000). Regardless of which prong defendant seeks review under, our initial step in any plain-error analysis is to first determine if error occurred at all. *People v. Hudson*, 228 Ill. 2d 181 (2008).

¶ 36 "The law in Illinois is clear that neither the court nor counsel should attempt to define the reasonable doubt standard for the jury." *People v. Speight*, 153 Ill. 2d 365, 374 (1992) (citing *People v. Malmenato*, 14 Ill. 2d 52 (1958) and *People v. Cagle* 41 Ill. 2d 528 (1969)). However,

not every comment by the court or counsel regarding the reasonable doubt standard equates to error, let alone plain error. See *People v. Kidd*, 175 Ill. 2d 1 (1996) (court found no error where the prosecutor argued that proof beyond a reasonable doubt is a burden of proof that is met in courtrooms across this country and in this building every day); *People v. Bryant*, 94 Ill. 2d 514 (1983); *People v. Ligon*, 365 Ill. App. 3d 109 (2006) (finding no error where the prosecutor argued both that reasonable doubt did not mean beyond all doubt and noted that the burden was met every single day in courtrooms); *People v. Norwood*, 362 Ill. App. 3d 1121 (2005); *People v. Baugh*, 358 Ill. App. 3d 718 (2005); *People v. Laugharn*, 297 Ill. App. 3d 807 (1998) (finding the statements did not deprive defendant of a fair trial or undermine the trial as the average jury understands the concept of reasonable doubt and is not contaminated when it hears the prosecutor say that reasonable doubt has reason behind it, and is an attainable standard); *People v. Carroll*, 278 Ill. App. 3d 464 (1996); *People v. Guajardo*, 262 Ill. App. 3d 747 (1994); *People v. Jennings*, 142 Ill. App. 3d 1014 (1986).

¶ 37 The comments complained of in the case at bar are similar to those addressed by the court in *People v. Ward*, 371 Ill. App. 3d 382 (2007). In *Ward*, the prosecutor addressed the jury during rebuttal by stating:

> " 'One thing the defense attorney mentioned to you is our burden of proof. We are required to prove the defendant guilty beyond a reasonable doubt.
>
> We are not required to prove the defendant guilty beyond

all doubt, beyond a shadow of a doubt. As a matter of fact, you're not going to get an instruction that says the State must prove the defendant guilty beyond all doubt or a shadow of a doubt.

You will not get an instruction that the defendant must be proved beyond all doubt, that the State must present all sorts of evidence to prove him beyond all doubt. You will get an instruction that says, 'beyond a reasonable doubt.' And that's exactly what that means.

That's a burden that is met everyday in every courtroom.' " *Id.* at 419.

¶ 38 In reviewing that statement, the *Ward* court found no error. Citing to the cases listed above, *Kidd*, *Bryant*, *Ligon*, *Norwood*, *Baugh*, *Carroll*, *Guajardo*, *Jennings* and *Laugharn*, the *Ward* court noted that "the vast majority of courts addressing comments like those here have found such comments to be proper, including our supreme court." *Id*. at 423.

¶ 39 In *People v. Phillips*, 127 Ill. 2d 499 (1989), our supreme court reviewed the following statement by the prosecutor:

" 'Now, the proof in this case, of course, the standard is, of course, proof beyond a reasonable doubt.

***

Ladies and gentlemen, suffice it to say it is not proof beyond all doubt, it is not proof beyond any doubt, it is proof beyond a reasonable

doubt.' " *Id.* at 527.

¶ 40 Despite the general prohibition against attempting to define reasonable doubt, the *Phillips* court found the prosecutor's statement did not amount to error. *Id.* at 528. It noted that the remarks did "not cross the 'boundary of propriety' [citation] that was found in *Starks.*" *Id.* at 528. *People v. Starks*, 116 Ill. App. 3d 384 (1983) involved a prosecutor who told the jury there's nothing special going on here and we don't have a burden, no matter what [defense counsel] would like you to think ***." (Internal quotation marks omitted.) *Id.* at 395.

¶ 41 The comments at issue in this case mirror those reviewed by our supreme court in *Phillips* and the First District in *Ward*. Neither the *Ward* nor *Phillips* court found the remarks equated to error. Similarly, we find the prosecutor's remarks in this matter were not erroneous. "There is no error here; therefore, there can be no plain error." *Hudson*, 228 Ill. 2d at 199.

¶ 42 B. The Law of Accountability

¶ 43 Defendant further claims "the prosecutor misstated the law of accountability." Specifically, defendant quarrels with the prosecutor's statement that, "A person doesn't have to actively participate in the actual murder, and evidence that a person attaches themselves to someone that's done illegal acts with knowledge of what's going on is guilty of that offense." Defendant claims this statement is improper as it "equates 'knowledge of what's going on' with the intent to promote or facilitate the other person's crime." Defendant again seeks plain-error review of this matter; acknowledging that he failed to properly preserve it.

¶ 44 "In reviewing specific statements made in closing arguments we must look to more than

just a few words in isolation; we must look to the entire context in which the words were uttered." *Phillips*, 127 Ill. 2d at 524.

¶ 45 Defendant isolates one sentence of the prosecutor's remarks when arguing the prosecutor misstated the law; somehow allowing the jury to conclude defendant could be liable for Ms. Pedigo's murder even though he had not intended to promote or facilitate another's crime. Defendant's argument is remarkable given the prosecutor's statement directly preceding the isolated sentence. The prosecutor stated:

> "With respect to the involvement in the murder of Ms. Pedigo, you have already heard about the defendant's involvement. But, again, I ask you to look at the instructions when you go back in the room after the judge reads them to you, *the State need only prove defendant intended to promote or facilitate the act*. A person doesn't have to actively participate in the actual murder, and evidence that a person attaches themselves to someone that's done illegal acts with knowledge of what's going on is guilty of that offense. The instructions tell you that, and I ask you to look at those carefully and apply all of the evidence that you heard here to those instructions." (Emphasis added.)

¶ 46 Defendant does not argue that the written instructions given to the jury misstated the law of accountability, only that the single isolated sentence above could allow the jury to hold

defendant accountable for actions of another "for merely being present." We disagree. Clearly, the State's comments accurately reflect that mere presence at the crime scene would be insufficient to prove defendant guilty. The State unequivocally told the jury it needed to prove that "defendant intended to promote or facilitate the act" to be guilty under a theory of accountability.

¶ 47 Defendant further argues that the prosecutor's use of the word "attaches," in the aforementioned sentence, allowed the jury to hold him liable for the murder of Ms. Pedigo based solely on his affiliation with Dominguez after Dominguez already committed the murder. Defendant notes section 5-2(c) of the Criminal Code of 1961 states that a person is accountable for another's crime only if they possessed the intent to promote or facilitate the crime "before or during the commission of an offense." 720 ILCS 5/5-2(c) (West 2008). Defendant further notes that later in the prosecutor's rebuttal, she stated a "person's continued presence and participation in a crime and an attempt to cover it up are enough." Combined with the use of the word "attaches" from the first isolated sentence, defendant argues the State led the jury to believe he would be accountable for the murder of Ms. Pedigo if he merely assisted Dominguez with acts which followed the murder. We disagree.

¶ 48 Initially, we note there is noting inherently improper about using the term "attach" when describing criminal liability based upon accountability. In *People v. Rybka*, 16 Ill. 2d 394 (1959), our supreme court stated that, "One may aid and abet without actively participating in the overt act. [Citations.] Evidence that a defendant voluntarily attached himself to a group bent on

illegal acts with knowledge of its design supports an inference that he shared the common purpose and will sustain his conviction as a principal for a crime committed by another in furtherance of the venture." *Id*. at 405; see also *People v. Gil*, 240 Ill. App. 3d 151, 159 (1992) ("The State also may prove accountability by showing that the defendant attached himself to another bent on illegal acts with knowledge of the illegal design."); *People v. Smith*, 321 Ill. App. 3d 669 (2001); *People v. Johnston*, 267 Ill. App. 3d 526 (1994).

¶ 49 Moreover, as with the first sentence, defendant isolates a few words or phrases from the State's rebuttal and requests that we draw conclusions from those isolated phrases without putting them into the context in which they were made. The entire passage, containing the second set of remarks defendant asserts misled the jury, reads as follows:

> "Again, if he wasn't actively participating why did he give so many different accounts of what happened that night? But also be aware that participating in an actual act of murder is not required here, and when you look through those instructions and you think about the facts you will see that. A person's continued presence and participation in a crime and an attempt to cover it up are enough. And that's what happened that night and the next day."

¶ 50 As noted above, the prosecutor clearly stated that, to prove defendant guilty based on accountability, the State needed to prove defendant "intended to promote or facilitate the act."

The prosecutor further stated that "continued presence *and participation* in a crime *and* an attempt to cover it up" (emphasis added) equated to sufficient proof should the jury determine defendant did not participate "in an actual act of murder." Moreover, the prosecutor instructed the jury to review the written instructions on numerous occasions during both her closing argument and rebuttal. Those written instructions included Illinois Pattern Jury Instructions, Criminal, No. 5.03 (4th ed. 2000) (hereinafter IPI Criminal 4th) which read:

> "A person is legally responsible for the conduct of another person when, either before or during the commission of an offense, and with the intent to promote or facilitate the commission of [(an) (the)] offense, he knowingly solicits, aids, abets, agrees to aid, or attempts to aid the other person in the planning or commission of [(an) (the)] offense." IPI Criminal 4th No. 5.03.

¶ 51 Given the totality of the prosecutor's closing statements, taken in the context in which they were made, we find she did not misstate the law of accountability or leave the jury with the impression that it could find defendant guilty for the murder of Ms. Pedigo based merely upon his presence at the crime scene or attempts to help Dominguez after the murder had occurred. We hold these remarks made by the prosecutor did not equate to error and, as such, no plain error occurred. *Hudson*, 228 Ill. 2d at 198.

¶ 52 CONCLUSION

¶ 53 For the foregoing reasons, the judgment of the circuit court of Rock Island County is affirmed.

¶ 54 Affirmed.