2012 IL App (3d) 100762-U

Order filed April 23, 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 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-10-0762
v.	)	Circuit No. 09-CF-1460
	)	
GILBERTO DAMIAN,	)	Honorable Edward A. Burmila, Jr.,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justice Holdridge concurred in the judgment.
Justice Carter dissented.

ORDER

¶ 1 *Held:* Because defense counsel did not give an offer of proof as to what the State's witness would have testified to on cross-examination, trial court did not abuse its discretion in limiting cross-examination on the reliability of the HGN test. However, the trial court's actions during closing argument demonstrated impermissible bias against the defendant, necessitating reversal under the second prong of the plain error doctrine.

¶ 2 After a jury trial, the defendant, Gilberto Damian, was found guilty of aggravated driving under the influence of alcohol (DUI) and sentenced to 54 months' imprisonment. 625 ILCS 5/11-

501(a)(2); (d)(2)(C) (West 2008). On appeal, the defendant argues that the trial court erred when it: (1) prevented defense counsel from cross-examining the State's primary witness on crucial evidence; (2) *sua sponte* prevented defense counsel from articulating a correct version of the DUI law in closing argument; and (3) allowed the State to propound an incorrect statement of law in its rebuttal argument. He also argues that he is entitled to a monetary credit of $405 to be applied toward his $1,000 DUI law enforcement fine. We reverse the defendant's conviction, and the cause is remanded for further proceedings.

¶ 3 FACTS

¶ 4 The defendant's trial took place on May 3 and 4, 2010. The State's primary witness was Officer Christopher Witt, who testified that on June 26, 2009, at approximately 1:15 a.m., he pulled the defendant over due to a missing headlight. Witt admitted that the defendant had not been driving poorly prior to being pulled over.

¶ 5 Witt approached the vehicle and asked for the defendant's driver's license and proof of insurance. There was a female passenger in the car who stated that the vehicle was in her name. The defendant gave the name "Odilon *** Damian," which was later determined to be false.

¶ 6 Witt noticed that the defendant's eyes were bloodshot and glassy. In addition, when he was speaking, the defendant's speech was slurred and he had a strong odor of an alcoholic beverage on his breath. The defendant stated that he was coming from Buffalo Wild Wings, and admitted to consuming approximately three to four beers. Witt asked the defendant if he would be willing to perform some field sobriety tests, and the defendant agreed.

¶ 7 Witt explained that there were three standardized field sobriety tests that were recognized by the State of Illinois: the horizontal gaze nystagmus test (HGN test), the walk and turn test, and

the one-legged stand test. The HGN test measured involuntary jerking of the eyes which cannot be controlled, and can be used to determine whether someone had consumed alcohol at some point that evening. Witt asked the defendant if he had any medical problems or issues that would affect his performance on the test, and the defendant stated that he was "fine, he had nothing." The defendant failed the HGN test; however, Witt admitted during his testimony that the National Highway Traffic Safety Administration standards require that the stimulus used to measure nystagmus be held 12 to 15 inches from the defendant's nose, and during the test Witt held the stimulus 10 to 12 inches in front of the defendant's face.

¶ 8 On cross-examination, defense counsel further questioned Witt about the accuracy of the HGN test. Specifically, defense counsel inquired:

> "If you're aware, other than the consumption of alcohol, how many other causes of nystagmus is there?
>
> A. There could be a medical condition, preexisting medical condition.
>
> Q. Is that it?
>
> A. He told me that he had none.
>
> Q. Is that it?
>
> A. Off the top of my head, that's all I could say."

¶ 9 Defense counsel then asked whether Witt was taught as part of his training that a percentage of people failed the HGN test though they were not under the influence of any alcohol. The State objected without explanation, and the trial court sustained the objection.

¶ 10 Witt also testified that he administered the walk and turn test. Witt demonstrated the walk and turn test to the defendant, and asked him if he had any questions regarding the test. The

defendant then stated "this whole process is bullshit," and argued that he had already passed the first test. The defendant then agreed to do the test. He then raised his arms out to the sides, and almost fell over.

¶ 11 After the walk and turn test, the defendant stated "I am done doing your fucking tests, take me to jail." He was placed into custody. Officer Dane Stepien testified that he transported the defendant to the Bolingbrook police department. The defendant called Stepien a "dickhead," and stated that he would be coming after the officer's family. At the police station, he refused to take a breath test, and then he "stood up in an aggressive manner" and behaved as if he were going to attack another officer. Stepien opined that the defendant was under the influence of alcohol based on his aggressive and hostile behavior.

¶ 12 After Stepien's testimony, the attorneys gave closing arguments. During his closing argument, defense counsel attempted to argue that consuming alcohol and driving was not illegal in and of itself, but the trial court *sua sponte* interrupted the argument. Specifically, defense counsel argued:

> "And what did that [HGN] test tell the officer? What he already knew. The defendant admitted consuming alcohol. Consuming alcohol and driving in and of itself is not illegal, and that is not what the defendant is on trial for.
>
> THE COURT: Mr. Murphy.
>
> MR. MURPHY: Yes, sir.
>
> THE COURT: Do not mislead the jury. Do not give them any instructions as to what the law is.
>
> MR. MURPHY: Okay.

THE COURT: Please focus on the jury instructions and what the defendant is on trial for."

¶ 13 In rebuttal, the prosecutor made the following statement of law:

"There does not need to be bad driving to be driving under the influence of alcohol. You just have to have it where you consumed alcohol and that alcohol affected your physical and mental faculties.

I would like to go through it and show you why.

MR. MURPHY: Objection.

THE COURT: The jury will disregard any argument that is not supported by the evidence, and the Court will instruct the jury as to the law that is applicable."

¶ 14 The jury was instructed as to the applicable DUI law. Following jury instructions and deliberation, the jury found the defendant guilty. On September 23, 2010, the court sentenced the defendant to 54 months' imprisonment. He was awarded 81 days of presentence custody credit, and application of a $405 credit toward any eligible fine. He was also assessed a DUI fine of $1,000. The defendant appealed.

¶ 15 ANALYSIS

¶ 16 I. Bias of Trial Court

¶ 17 On appeal, the defendant argues that the trial court demonstrated impermissible bias by issuing incorrect rulings in favor of the State. Specifically, the defendant contends that the trial court was biased when it: (1) improperly limited the defendant's cross-examination by prohibiting the jury from being made aware of facts that discredited the reliability of the HGN test; (2) *sua sponte* prevented defense counsel from articulating a correct version of the law in his

closing argument; and (3) allowed the prosecutor to propound an incorrect statement of law in her rebuttal argument.

¶ 18 The defendant acknowledges that his claims of error were not properly preserved, but asks us to review his claims under plain error because they involve judicial misconduct. Under the plain error doctrine, a reviewing court may consider a forfeited error 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, 187 (2005). "To obtain relief under this rule, a defendant must first show that a clear or obvious error occurred." *People v. Hillier*, 237 Ill. 2d 539, 545 (2010).

¶ 19 A. Limitation of Cross-Examination

¶ 20 The defendant's first contention of error is that the trial court improperly limited defense counsel's cross-examination of Witt regarding the reliability of the HGN test, in violation of his rights under the confrontation clause. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. A trial court has discretion to impose reasonable limits on cross-examination to limit possible harassment, prejudice, jury confusion, witness safety, or repetitive and irrelevant questioning, and a defendant's claim of a violation of the confrontation clause is reviewed under the abuse of discretion standard. *People v. Tabb*, 374 Ill. App. 3d 680 (2007).

¶ 21 In the instant case, we cannot find that the trial court abused its discretion because there was no offer of proof as to what Witt would have testified to if the trial court would have allowed additional cross-examination. As stated in *People v. Parchman*, 302 Ill. App. 3d 627, 636-37 (1998) (quoting *People v. Andrews*, 146 Ill. 2d 413, 420-21 (1992)):

" '[T]he key to saving for review an error in the exclusion of evidence is an adequate offer

of proof in the trial court. [Citations.] The purpose of an offer of proof is to disclose to the trial judge and opposing counsel the nature of the offered evidence and to enable a reviewing court to determine whether exclusion of the evidence was proper. [Citation.] The failure to make an adequate offer of proof results in a waiver of the issue on appeal.' "

¶ 22 This rule is particularly appropriate in this case, where there is no indication that Witt or any other witness would have further undermined the reliability of the HGN test. The defendant argues in his brief that nystagmus might be a symptom of as many as 125 diseases or conditions, and people sometimes fail all three field sobriety tests when they have no alcohol in their system. See *People v. McKown*, 236 Ill. 2d 278 (2010). However, there is no indication that Witt had this knowledge when he was testifying. In fact, he specifically stated that, other than alcohol consumption, the only other cause of nystagmus that he knew of was a preexisting medical condition, which the defendant denied having. Moreover, defense counsel did not offer any testimony from any expert or lay person that would have established other causes of nystagmus. Therefore, we cannot say that the trial court abused its discretion in limiting the cross-examination of Witt where there is no indication that Witt's, or any other testimony, would have further undermined the reliability of the HGN test.

¶ 23 B. Interruption and Reprimand of Defense Counsel

¶ 24 Regarding the defendant's second contention of error, we find that the trial court erred by *sua sponte* interrupting and reprimanding defense counsel while counsel was merely stating a correct version of the law during closing argument. Regarding the interruption, the State concedes that defense counsel gave a correct version of the law, but argues that it is the province of the trial court to instruct the jury on the law of the case. *People v. Patel*, 366 Ill. App. 3d 255

(2006). However, attorneys are given wide latitude in closing arguments. *People v. Jones*, 240 Ill. App. 3d 213 (1992). Moreover, the defendant has a right to a closing argument, and in closing argument counsel may properly state what he believes the law to be and what the evidence proves. *In re Salmonella Litigation*, 198 Ill. App. 3d 809 (1990). In this case, defense counsel not only gave a correct version of the law when he told the jury that it was not illegal to consume alcohol and drive (see 625 ILCS 5/11-501(a)(2) (West 2008)), but counsel was also using this law to argue his main theory of the case: that while the defendant had consumed alcohol, he was not impaired. Therefore, the trial court erred by *sua sponte* interrupting defense counsel.

¶ 25 The trial court also erred by reprimanding defense counsel in front of the jury for giving a correct version of the law. After interrupting defense counsel, the court also stated "[d]o not mislead the jury. Do not give them any instructions as to what the law is." The court further stated, "[p]lease focus on the jury instructions and what the defendant is on trial for." In *People v. Shaw*, 98 Ill. App. 3d 682 (1981), the reviewing court found that it was an error for the prosecutor to accuse the defense attorney of deliberately misleading the jury. In this case, considering that the accusation of misleading the jury came from the trial court, we find that this comment was also improper.

¶ 26 C. Prosecutor's Misstatement of the Law

¶ 27 The defendant's third contention of error is that the trial court erred by allowing the prosecutor to propound an incorrect statement of law in her rebuttal argument. Specifically, the prosecutor stated "[y]ou just have to have it where you consumed alcohol and that alcohol affected your physical and mental faculties." However, as the defendant points out, the alcohol

consumption must be such that it reduces the person's ability to "think and act with ordinary care." Illinois Pattern Jury Instructions, Criminal, No. 23.29 (4th ed. 2000). The trial court, without correcting or reprimanding the prosecutor, sustained defense counsel's objection and stated "[t]he jury will disregard any argument that is not supported by the evidence, and the Court will instruct the jury as to the law that is applicable."

¶ 28 Ultimately, we do not find error because the trial court gave this curative instruction. *People v. Modrowski*, 296 Ill. App. 3d 735 (1998). The jury is presumed to understand correct instructions, and in this case they were instructed as to the DUI law. *Id.* Accordingly, even though we find the prosecutor gave an incorrect statement of law, we do not find error.

¶ 29 D. Plain Error

¶ 30 Next, we must determine whether the trial court's errors amount to reversible error under the plain error doctrine. As stated above, under the plain error doctrine we will consider a forfeited error when the evidence is closely balanced or the error is so serious that it affects the integrity of the judicial process. *Herron*, 215 Ill. 2d 167. In this case, we find that the trial court's conduct during closing argument to be sufficiently biased so as to call into question the integrity of the judicial process. *People v. Thompson*, 238 Ill. 2d 598 (2010) (stating trial before a biased judge is an error so serious that it affects the fairness of defendant's trial).

¶ 31 First, as we have noted, the trial court erred by *sua sponte* interrupting defense counsel and preventing him from making his closing argument. *Sua sponte* interruptions by the trial court when defense counsel is articulating a correct statement of law have been held to demonstrate bias on the part of the trial court. *People v. Mitchell*, 228 Ill. App. 3d 167 (1992). In *Mitchell*, the defense attorney was trying to explain that his client was presumed innocent, and

the trial court interrupted the defense attorney. *Id.*

"DEFENSE COUNSEL (Mr. Scholz): And as he sits there before you, Mr. Mitchell is presumed–

THE COURT: No, no, no. We don't want to hear about the law. That's the Court's position. We just want to hear from you, Mr. Scholz, what you expect the evidence will demonstrate.

DEFENSE COUNSEL: Well, Judge I think the evidence and the law put together–

THE COURT: No, no, no. Just what you expect the evidence will demonstrate. I'll instruct the jury as to the law." *Id.* at 171.

¶ 32 Similarly, in this case the trial court *sua sponte* interrupted defense counsel even though counsel was giving a correct version of the law. Also, like in *Mitchell*, the trial court here informed defense counsel that it would instruct the jury as to the law, and that defense counsel should not do so, thus implying that defense counsel had somehow acted improperly for articulating a correct version of the law.

¶ 33 Had the trial court merely improperly interrupted defense counsel, we would be inclined to dismiss the commentary as statements that simply would have been better if they had not been made, but ultimately not prejudicial. See *People v. Young*, 248 Ill. App. 3d 491 (1993). However, in this case, the trial court further demonstrated bias by reprimanding defense counsel in front of the jury. See *People v. Moriarity*, 33 Ill. 2d 606 (1966) (holding that trial court abandons its role as neutral arbitrator when, in part, court improperly rebukes defense counsel in front of the jury in a manner that suggests court thinks little of counsel and the merits of the

case).

¶ 34 In this case, the trial court wrongly accused defense counsel of misleading the jury. In addition, the trial court compounded the error by telling defense counsel to focus on "what the defendant is on trial for[,]" although defense counsel was doing exactly that. These comments were improper, as they implied that defense counsel was engaged in some form of wrongdoing and cast him in a negative light in front of the jury. "Every defendant, regardless of the nature of the proof against him, is entitled to a trial that is free from improper comments that engender prejudice." *People v. Parker*, 40 Ill. App. 3d 597, 605 (1976). That the trial court was the one to wrongfully accuse defense counsel of misleading the jury is especially troubling, given that the jury relies on the trial court for its instructions, and the court is meant to serve in the role of a neutral arbitrator. *People v. Rivera*, 221 Ill. 2d 481 (2006).

¶ 35 Furthermore, we also find evidence of bias where the trial court failed to deal equally harshly with the prosecutor when she did inaccurately state the law. Although we did not find error in this regard due to the curative instruction, we are permitted to compare the trial court's responses to the State and defense when considering bias. See, *e.g.*, *Mitchell*, 228 Ill. App. 3d 167. Again, the trial court's conduct was similar to that of the judge in *Mitchell*, 228 Ill. App. 3d 167. In *Mitchell*:

> "No technical restrictions were applied to the State's opening statement, and the prosecutor explained without interruption the law of accountability and applied the law to the promised evidence. Yet, when defense counsel merely tried to explain to the jury that his client was presumed innocent, the judge interrupted *sua sponte*[.]" *Mitchell*, 228 Ill. App. 3d at 171; see also *People v. Townsend*, 136 Ill. App. 3d 385, 413 (1985) (Pincham,

J., dissenting) (finding defendant was denied a fair trial where trial court took no action against improper remarks by prosecutor, but "swiftly took *** corrective action" when defense counsel made an improper argument).

¶ 36 Accordingly, because the trial court improperly *sua sponte* interrupted defense counsel, reprimanded counsel in front of the jury, and exercised favorable treatment toward the State during closing argument, we find that the court's actions amounted to an impermissible level of bias, and therefore the defendant was deprived of his right to a fair trial. Moreover, we acknowledge that the trial court's actions only took place during closing argument; however, courts have found that a trial court's bias during closing argument can be sufficiently egregious so as to warrant reversal. As stated in *Crawford*:

> "The trial judge's comments made during defense counsel's opening and closing arguments clearly reveal the court's bias against defendant. The State contends that the trial court's comments do not show that the trial court was biased against defendant because the comments were not made during the presentation of any evidence. Again we must reject the State's contention. In *Heiman*, we determined that the law requires a trial court to remain impartial until the close of trial, which included closing arguments, since it is not uncommon for a trial court to change its initial impression following closing argument. *Heiman*, 286 Ill. App. 3d at 112. The right to closing argument would be virtually meaningless if we were to find it appropriate for a trial court to make comments evaluating the evidence and otherwise showing bias toward a defendant–prior to the end of closing argument." *People v. Crawford*, 343 Ill. App. 3d 1050, 1061 (2003).

¶ 37 Consequently, we reverse the defendant's conviction and remand for a new trial.

¶ 38 II. Sentencing Credit

¶ 39 The defendant's second argument on appeal is that the mittimus should be amended to reflect the defendant's $405 credit toward the $1,000 DUI law enforcement fine under section 11-501(j) of the Illinois Vehicle Code. 625 ILCS 5/11-501(j) (West Supp. 2009) (now codified at 625 ILCS 5/11-501.01(f) (West 2010). This issue has been rendered moot. However, we note that under section 110-14 of the Code of Criminal Procedure of 1963, a defendant is allowed a monetary credit of $5 for each day of presentence custody on bailable offenses when a fine is imposed as part of his sentence. 725 ILCS 5/110-14 (West 2010). The DUI fine is subject to the $5-per-day presentence custody credit authorized by section 110-14. *People v. Diaz*, 377 Ill. App. 3d 339 (2007). Thus, should this issue arise on remand, the defendant should receive the statutory credit against any DUI fine.

¶ 40 CONCLUSION

¶ 41 For the foregoing reasons, the judgment of the circuit court is reversed, and the cause is remanded for further proceedings.

¶ 42 Reversed and remanded.

¶ 43 JUSTICE CARTER, dissenting:

¶ 44 I respectfully dissent from the majority's decision to reverse the defendant's conviction for aggravated driving under the influence of alcohol and to remand the case for a new trial. I disagree with the majority's conclusion that the circuit court committed reversible error under the second prong of the plain-error doctrine. In my opinion, the court's interruption of defense counsel during closing argument and failure to correct the prosecutor were not indicative of a pro-State bias and were not so serious as to constitute structural or systemic error. See *People v. Adams*, 2012 IL 111168, ¶ 24 (holding that improper prosecutorial remarks did not constitute

second-prong plain-error); *People v. Thompson*, 238 Ill. 2d 598, 611 (2010) (holding that the failure to provide proper Supreme Court Rule 431(b) (eff. May 1, 2007) questioning did not constitute second-prong plain-error).

¶ 45 In particular, I disagree with the majority's conclusion that the circuit court's "reprimanding" of defense counsel indicated that the court was biased against the defendant. I recognize that a defendant has a constitutional right to make a closing argument. *People v. Faria*, 402 Ill. App. 3d 475, 483 (2010). However, it is also important to note that the circuit court has broad discretion to limit closing arguments. *Herring v. New York*, 422 U.S. 853, 862 (1975) (recognizing that the trial judge can, *inter alia*, "ensure that argument does not stray unduly from the mark"); *Faria*, 402 Ill. App. 3d at 483. In this case, while the court was mistaken in its belief that defense counsel was misstating the law and misleading the jury, I believe the court interrupted defense counsel in an apparent attempt to keep him from straying into tangential matters, and, in doing so, did not evince a pro-State bias. See *People v. Harris*, 132 Ill. 2d 366, 391 (1989); *People v. Smothers*, 55 Ill. 2d 172, 176 (1973) ("[t]he character and scope of argument to the jury is left very largely to the trial court, and every reasonable presumption must be indulged in that the trial judge has performed his duty and properly exercised the discretion vested in him"); *North Chicago Street Railway Co. v. Cotton*, 140 Ill. 486, 503 (1892); *cf. People v. Andrae*, 295 Ill. 445, 460-61 (1920) (finding the court's comment, "'[l]et us try this case by fair means, by any means,'" to have imputed that counsel for the defendants were employing unfair litigation methods).

¶ 46 For the foregoing reasons, I would affirm the defendant's conviction. I would also modify the defendant's sentence as suggested in section II of the majority's analysis. *Supra* ¶ 39.

Accordingly, I respectfully dissent.