2014 IL App (3d) 120196-U

Order filed June 16, 2014

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IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

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| PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court |
| | ) | of the Tenth Judicial Circuit, |
| Plaintiff-Appellee, | ) | Peoria County, Illinois |
| | ) | |
| v. | ) | Appeal No. 3-12-0196 |
| | ) | Circuit No. 10-CF-649 |
| | ) | |
| DIETRICH RICHARDSON | ) | Honorable Timothy M. Lucas, |
| | ) | Judge, Presiding. |
| Defendant-Appellant. | ) | |
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JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice Lytton and Justice McDade concurred in the judgment.

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**ORDER**

¶ 1 Held: Prosecutor committed reversible plain error by eliciting rebuttal testimony from a police officer regarding the defendant's failure to present an alibi during his police interrogation and by referencing during closing argument the defendant's failure to present an alibi during and after his interrogation.

¶ 2 Following a jury trial, the defendant, Dietrich Richardson, was convicted of armed robbery (720 ILCS 5/18-2(a)(2) (West 2010)) and unlawful possession of a firearm by a felon (720 ILCS 5/24-1.1(a) (West 2010)). He was sentenced to 30 years' imprisonment for armed robbery and 10 years' imprisonment for unlawful possession of a firearm, with the sentences to

be served concurrently. In this appeal, the defendant seeks a new trial, arguing that: (1) he was denied a fair trial when a police officer improperly testified that the defendant exercised his right to terminate the interrogation and failed to offer an alibi during the interrogation; and (2) the trial court erred by denying the defendant's request to present surrebuttal testimony of his sister and mother to respond to testimony presented by a new State witness on rebuttal. We agree with the defendant's first argument. We therefore reverse the defendant's convictions and sentence and remand for a new trial.

¶ 3 **FACTS**

¶ 4 The defendant was charged by indictment with armed robbery (720 ILCS 5/18-2(a)(2) (West 2010)) and unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2010)). The indictment alleged that the defendant took property belonging to Joshua Foster while armed with a handgun and threatening the imminent use of force, and that the defendant was in knowing possession of a firearm having previously been convicted of a felony.

¶ 5 Joshua Foster testified during the defendant's trial. Foster stated that, on June 22, 2010, he went to JJ's Fish and Chicken on Western Avenue in Peoria. After Foster parked his car, he heard footsteps behind him. When he turned around, he saw two black males behind him, one of whom put a gun to his chest. The gun was a six shooter with a brown handle. Foster looked at the gunman's face so that he could get a good description. However, Foster did not pay close attention to what the gunman was wearing. The robbers took Foster's wallet and phone. When the two men left, Foster called the police. Foster did not testify as to the time that the robbery took place, but he stated that he called the police about 30 seconds after the robbery.

¶ 6 Peoria police officer Brian Terry testified that, at approximately 4:40 p.m. on June 22,

2010, he was dispatched to JJ's Fish and Chicken regarding a reported armed robbery. Terry arrived at the scene of the robbery at 4:49 p.m. and met with Foster. Foster described the robbers as two black males, one wearing a white t-shirt, a black ball cap, and shorts, and the other wearing a black t-shirt and a dark ball cap. Terry broadcast the description over dispatch. When Peoria police officers Joshua Allenbaugh and Cary Hightower reported that they had stopped a vehicle in the area and detained a possible suspect, Terry took Foster to the area for a show-up. After viewing the suspect, however, Foster stated that the suspect was not the man who robbed him.

¶ 7 Allenbaugh testified that he was working with Hightower on the day of the incident. After hearing the description of the robbers over dispatch, Allenbaugh noticed a white SUV whose driver and front seat passenger were wearing clothing that matched the description given over dispatch. Upon the officers' approach, the vehicle sped away, hopped a curb, and three passengers bailed out of the vehicle. All three were wearing white t-shirts. Two had dark ball caps and one had braids and was wearing a white tank top. One was holding his waist in a manner indicative of running with a weapon. Allenbaugh stayed with the driver while Hightower pursued the passengers who had bailed. When he searched the SUV, Allenbaugh found cell phones but did not verify their ownership. He also found 9-millimeter ammunition in the vehicle, but did not find a gun. During cross-examination, Allenbaugh testified that 9-millimeter ammunition is associated with semi-automatic firearms, not revolvers.

¶ 8 Two days later, Foster discussed the robbery with a co-worker. As a result of this discussion, Foster viewed the June 24, 2010, edition of the *Peoria Journal Star*. He noticed four men pictured on the front page. Foster recognized one of them as the man who held the gun to his chest. Foster testified that he was "[b]eyond a hundred percent" certain that the person

pictured in the newspaper photograph was the man who had robbed him at gunpoint.

¶ 9 Foster identified the defendant in court as the person who held a gun to his chest and robbed him. Foster stated that the defendant was standing one foot away from him at the time and that he focused on the robber's face during the robbery. When the defense attorney challenged Foster's memory of the robber's face, Foster stated "I'm a hundred percent sure it's him if that's what you're asking me."

¶ 10 Detective Aaron Watkins testified that Foster left him a voice mail indicating that he recognized his assailant from a picture in the newspaper. Watkins stated that, when Foster subsequently came to the police station, he was shown a copy of the newspaper. After looking at the newspaper, Foster circled and initialed the picture of the defendant and identified him as the man who had the gun. Watkins did not show Foster any other photos or ask him to identify the defendant in person. A redacted copy of the photographs printed on the front page of the newspaper with the defendant's markings was published to the jury and admitted into evidence.

¶ 11 The defense called Dorothy Buckner (Dorothy), the defendant's grandmother. On the day of the robbery, Dorothy lived at 217 South Western Avenue and worked approximately four or five miles from JJ's Fish and Chicken. Dorothy testified that, on that day, she called the defendant at approximately 4:20 p.m. and asked him to come pick her up because she had to go to a birthday party at Red Lobster. Between 4:30 and 4:40 p.m., the defendant picked her up in a white 1990 Grand Marquis and drove her to Walgreens. While there, Dorothy bought a birthday card and some Oscal tablets. The defendant then drove Dorothy to Red Lobster, where she arrived a little after 5:00 p.m. When Dorothy got out of the car, her coworker Jackie McKenzie began talking with the defendant. The defendant exited the car and continued talking with her. Dorothy stated that the defendant left the Red Lobster a little after 5:00 p.m. After the party,

McKenzie dropped Dorothy off at her home at approximately 7:00 p.m. According to Dorothy, the police were there and would not allow her to enter. Dorothy claimed that she was told that the defendant had been arrested for a robbery. She testified that she told the police that the defendant could not have committed a robbery because he was with her, but they were not receptive to what she had to say.

¶ 12 The defense also called Vicki Kirchgessner, a Walgreens cashier. Kirchgessner was shown a copy of a receipt from Walgreens dated June 22, 2010, at 4:45 p.m.[1] She was the cashier who rang up that purchase, which reflected the sale of Oscal tablets and a Hallmark card. Kirchgessner was unable to remember the identity of the customer who made the purchase.

¶ 13 Jackie McKenzie testified that Dorothy and the defendant arrived at the Red Lobster around 5:00 p.m. The defendant was driving. Upon their arrival, the defendant got out of the car and the two spoke for approximately 15-20 minutes. Defendant then got back into his car but McKenzie did not know when he left because she went into the Red Lobster with Dorothy. McKenzie claimed that she drove Dorothy home after the party but could not get to her house because the police had it barricaded. During cross-examination, McKenzie testified that she was not sure whose birthday was being celebrated at the Red Lobster on the day of the robbery. She stated that she told the prosecutor's investigator in 2011 that the party occurred "possibly two or three years ago," and that she remembered "nothing really specific other than the conversation" she had with the defendant.

¶ 14 The defendant testified that, on the date of the robbery, he was living with his girlfriend in Peoria but he kept a few clothes at his grandmother's house in the 200 block of Western

[1] Dorothy had saved the Walgreens receipt from June 22, 2010. Dorothy testified that she did not usually keep her receipts but kept this receipt "because of what happened."

Avenue. He claimed that, around 4:20 p.m., he got a call from his grandmother to come pick her up from work, as he usually does. It took about 5-10 minutes to get to his grandmother's workplace, so he arrived there between 4:30 and 4:40 p.m. After he picked her up, it took them approximately ten minutes to get to Walgreens. The defendant then drove his grandmother to the Red Lobster, where he saw McKenzie and spoke with her for about 15-20 minutes.

¶ 15 The defendant testified that, when he left the Red Lobster, he went to pick up his sister's children from daycare, which he does when no one else is available. The defendant stated that, after he picked up the children, he brought them to his grandmother's house and stayed there until his sister, LaKeesha Buckner, arrived between 6:15 and 6:30 p.m. While LaKeesha was still there, the police knocked on the door and eventually raided the house. The defendant testified that he did not rob Foster.

¶ 16 After the defense rested, the State called several rebuttal witnesses. First, the State called Hightower. Hightower testified that, after he and Allenbaugh heard about the robbery over the dispatch and followed the white SUV, Hightower chased one of the three men who bailed out of the SUV to the 200 hundred block of Western Avenue. The suspect was wearing a white t-shirt and dark pants and was holding his side in a way that suggested that he was carrying a weapon. Hightower was unable to catch and apprehend this suspect.

¶ 17 The State then called Officer Todd Leach. Leach testified that, on the afternoon of the robbery, he and his partner heard about the robbery over the dispatch and began to look for suspects. At 6:15 p.m., Leach saw a white Mercury Grand Marquis parked in the driveway of 207 South Western Avenue and saw the defendant exiting the back door of the residence. As Leach exited his vehicle, the defendant ran to the front door of the residence. Leach identified himself as a police officer and told the defendant to stop several times, but the defendant ran into

the residence, shut the door, and locked it. Later that night, Leach spoke with Dorothy. Dorothy did not mention that the defendant had been with her earlier in the day.

¶ 18 The State then re-called Detective Watkins to the stand. Watkins testified that, on June 24, 2010, while he was interrogating the defendant about the robbery, the defendant denied being involved in the robbery and "[a]t one point, he requested to just go back to the jail and not talk anymore."[2] The prosecutor asked Watkins if the defendant mentioned during the interrogation that he was with his grandmother at the Red Lobster or that Jackie McKenzie had seen him at the Red Lobster. Watkins responded "no" to both questions. Watkins also testified that it would not have been possible for any police officer to have told Dorothy on the day of the robbery that the defendant was a suspect in the robbery because the police did not identify the defendant as a suspect until two days later.

¶ 19 During the State's closing argument, the prosecutor argued that, when the defendant was interrogated by Officer Watkins, "a reasonable person in the defendant's shoes" would have said, "oh, my gosh, go talk to my grandma. You know, I was there. Get the surveillance video. Get everything. I gotta be on them." The prosecutor also commented that none of the defense witnesses, including the defendant, said anything about the defendant's alibi until a year later.

¶ 20 The jury found the defendant guilty of armed robbery and unlawful possession of a firearm by a felon. He was subsequently sentenced to 30 years' imprisonment for armed robbery and 10 years' imprisonment for unlawful possession of a firearm, to be served concurrently. Following an unsuccessful posttrial motion, the defendant filed this appeal.

¶ 21 **ANALYSIS**

¶ 22 The defendant argues that he was denied a fair trial when: (1) Detective Watkins testified

[2] The defendant was being held in jail on another charge at the time.

that the defendant invoked his right to remain silent when Watkins questioned him about the robbery; (2) the prosecutor elicited testimony from Watkins that, when Watkins questioned the defendant about the robbery, the defendant did not mention his alleged alibi; and (3) during the State's closing argument, the prosecutor stated that the defendant said nothing about his alleged alibi until a year after his arrest and argued that "a reasonable person in the defendant's shoes" would have mentioned his alibi when he was first questioned by Watkins at the police station.

¶ 23 The defendant did not object to any of these statements during trial or in his post-trial motion. Accordingly, the defendant's claims on appeal are subject to a plain error analysis. *People v. Sanchez*, 392 Ill. App. 3d 1084, 1095 (2009). The first step in a plain error analysis is to determine whether a "plain error" occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 564-65 (2007). The word "plain" here "is synonymous with 'clear' and is the equivalent of 'obvious.' " *Id.* at 565 n.2. If the reviewing court determines that a clear or obvious (or "plain") error occurred, it proceeds to the second step in the analysis, which is to determine whether the error is reversible.

¶ 24 Applying this analysis, we must first determine whether the State committed clear and obvious error by eliciting Watkins's testimony regarding the defendant's post-arrest silence and by referencing the defendant's failure to present an alibi during his interrogation. In *Doyle v. Ohio*, 426 U.S. 610 (1976), the United States Supreme Court held that it is a violation of a defendant's constitutional right to due process to use a defendant's post-arrest, post-*Miranda* silence for impeachment purposes. *Doyle*, 426 U.S. at 617-20. The Court reasoned that *Miranda* warnings have an implicit assurance that silence will carry no penalty and that it would be fundamentally unfair to allow a defendant's silence to be used to impeach an explanation subsequently offered at trial. *Doyle*, 426 U.S. at 612, 618. In *Fletcher v. Weir*, 455 U.S. 603

(1982), the Court limited its holding to situations in which the defendant's silence occurred after *Miranda* warnings had been given. The Court left it to the states to determine the admissibility of a defendant's post-arrest, pre-*Miranda* silence. *Id.*; see also *Sanchez*, 392 Ill. App. 3d at 1096.

¶ 25 " '[U]nder Illinois evidentiary law, it is impermissible to impeach a defendant with his or her post-arrest silence, regardless of whether the silence occurred before or after the defendant was given *Miranda* warnings.' " *Sanchez*, 392 Ill. App. 3d at1096 (quoting *People v. Clark*, 335 Ill. App. 3d 758, 763 (2002)). Evidence of the defendant's post-arrest silence is considered neither material nor relevant to proving or disproving the charged offense. *Sanchez*, 392 Ill. App. 3d at 1096. The admission of such evidence is reversible error. *Id.* at 1096-97.

¶ 26 In this case, the record is silent as to whether the defendant was mirandized before he was interrogated by detective Watkins. Thus, contrary to the defendant's suggestion, Watkins's statement that the defendant asked to go back to jail and not talk anymore was not necessarily a comment on the defendant's assertion of his post-*Miranda* right to remain silent. Indeed, when read in context, the statement is not a comment on the defendant's "silence" at all. Watkins testified that the defendant talked to him, denied any involvement in the robbery, "continu[ed] to *** converse with [Watkins] and deny being involved in the robbery," and then "[a]t one point, *** requested to just go back to the jail and not talk anymore." Thus, Watkins merely noted that the defendant asked to terminate the interview at one point after speaking with Watkins for some time. Watkins neither stated nor implied that the defendant stopped the interview by asserting his Fifth Amendment rights or by asking for an attorney. Nor did the State attempt to use the fact that the defendant asked to go back to jail and "not talk anymore" as evidence of the defendant's guilt. Accordingly, Watkins's unsolicited comment about this fact did not amount to a clear or obvious error reviewable under the plain error doctrine.

¶ 27 However, Watkins's and the prosecutor's references to the defendant's failure to mention an alibi when he was questioned about the robbery is a more serious matter. As noted above, evidence regarding the defendant's post-arrest silence, whether before or after *Miranda* warnings were given, is inadmissible under Illinois law. *Sanchez*, 392 Ill. App. 3d at 1096. Such testimony is irrelevant (*id.*), and, if the defendant had been given his *Miranda* warnings, reference to the post-*Miranda* silence is also a constitutional error (*id.*; see also *Fletcher*, 455 U.S. 603). The ban on references to a defendant's post-arrest silence includes any references to the defendant's failure to mention an alibi during police interrogation. See, *e.g.*, *Sanchez*, 392 Ill. App. 3d at 1092, 1096-97; *People v. Gagliani*, 210 Ill. App. 3d 617, 624 (1991); *People v. Ridley*, 199 Ill. App. 3d 487, 492 (1990). Such references are improper because they are "intended to invite the jury to infer from the defendant's silence that his alibi defense is a recent fabrication." *Ridley*, 199 Ill. App. 3d at 492.

¶ 28 There are two exceptions to the general rule that a defendant's failure to present an alibi during police interrogation is irrelevant and inadmissible. *People v. Quinonez*, 2011 IL App (1st) 092333, ¶ 27. A defendant's post-arrest silence may be used to impeach his trial testimony when: (1) the defendant testifies at trial that he made an exculpatory statement to the police at the time of his arrest; or (2) the defendant makes a post-arrest (pretrial) statement that is inconsistent with his exculpatory trial testimony. *Id.*; see also *People v. Simmons*, 293 Ill. App. 3d 806, 811 (1998). Neither exception applies in this case. Here, the defendant did not testify that he made an exculpatory statement to the police. In addition, the defendant made no post-arrest statement that was inconsistent with the alibi he presented at trial. By Watkins's own admission, the defendant offered only a general denial of involvement in the robbery when he was interrogated. "[A] general denial of guilt made upon arrest is not inconsistent with an alibi defense offered for

the first time at trial." *Ridley*, 199 Ill. App. 3d at 493.

¶ 29 Accordingly, Watkins's and the prosecutor's references to the defendant's failure to mention an alibi during interrogation and for almost a year thereafter were clear and obvious errors. See, *e.g.*, *Sanchez*, 392 Ill. App. 3d at 1097. We must therefore proceed to the next step in the plain error analysis, *i.e.*, we must determine whether these errors are reversible. Plain errors are reversible when "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." *Piatkowski*, 225 Ill. 2d at 565; see also *Herron*, 215 Ill. 2d 167, 179 (2005). In this case, the State presented only one occurrence/identification witness (Foster) and no physical evidence. The case turned almost entirely upon whether the jury believed Foster or the defendant and his two alibi witnesses. Accordingly, the evidence in this case was closely balanced. See, *e.g.*, *Sanchez*, 392 Ill. App. 3d at 1095 (holding that evidence of the defendant's guilt was closely balanced for plain error purposes because it "primarily depended on the reliability of [a witness's] identification of the defendant"); see also *People v. Naylor*, 229 Ill. 2d 584, 608 (2008) (holding that evidence was closely balanced where "[t]he evidence boiled down to the testimony of *** two police officers against that of the defendant").

¶ 30 The State's error in eliciting Wakins's testimony and in referring to the defendants' failure to present an alibi during and after his interrogation is therefore reversible. See, *e.g.*, *Sanchez*, 392 Ill. App. 3d at 1097. Moreover, because the evidence of the defendant's guilt depended primarily on one witness's identification of the defendant and the State's use of the defendant's post-arrest silence damaged the defendant's credibility (which was a pivotal issue in the case), the error cannot be considered harmless beyond a reasonable doubt. See *Quinonez*, 2011 IL App (1st) 092333, ¶¶ 40-42.

¶ 31 The State argues that no reversible plain error occurred because the defendant "acquiesced" in any alleged error when his counsel stated during closing argument that the defendant "didn't hide behind the Fifth Amendment." However, in making that statement, defense counsel merely noted that the defendant chose not to exercise his Fifth Amendment right not to testify on his own behalf at trial. In no way did defense counsel suggest that the defendant waived the right not to have his post-arrest silence used against him.

¶ 32 The State also argues that the defendant's failure to offer an alibi during his interrogation was admissible under the "tacit admission rule," which is an exception to the hearsay rule. We disagree. Under the tacit admission rule, when an incriminating statement is made in the presence and hearing of the accused, and the statement is "not denied, contradicted or objected to" by the defendant, both the statement and the fact of the defendant's failure to deny it are admissible as evidence of the defendant's acquiescence in its truth. *People v. Goswami*, 237 Ill. App. 3d 532, 535-36 (1992) (quoting *People v. Miller*, 128 Ill. App. 3d 574, 583 (1984)). However, the tacit admission rule does not apply when the defendant is undergoing custodial interrogation at the time the incriminating statement is made. See, *e.g.*, *Goswami*, 237 Ill. App. 3d at 537 (noting that "*Miranda v. Arizona* changed the rules concerning prosecutorial comment on defendant's silence when accused of a crime," and holding that the tacit admission rule applied where, *inter alia*, the defendant was not in custody at the time of the incriminating statements and the defendants' subsequent silence). In any event, when Officer Watkins asked the defendant about the robbery in this case, the defendant *denied involvement in the crime*. Thus, even assuming *arguendo* that the tacit admission rule could apply in the context of custodial interrogation, it would not support the State's argument in this case.

¶ 33 We hold that the defendant is entitled to a new trial due to the State's erroneous

references to the defendant's failure to present an alibi during and after his interrogation. Because we decide the defendant's appeal on that basis, we need not address the defendant's alternative argument that the trial court erred by denying his request to present certain surrebuttal testimony.

¶ 34 **CONCLUSION**

¶ 35 For the foregoing reasons, we vacate the defendant's convictions and sentence and remand for a new trial.

¶ 36 Reversed; cause remanded.