2014 IL App (3d) 120261-U

Order filed June 10, 2014

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
	)	Peoria County, Illinois.
Plaintiff-Appellee,	)	
	)	Appeal No. 3-12-0261
v.	)	Circuit No. 10-CF-986
	)	
MARLON A. COLEMAN,	)	The Honorable
	)	Timothy M. Lucas,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE LYTTON delivered the judgment of the court.
Justices O'Brien and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Trial counsel was not ineffective for failing to file a motion to suppress videotapes where counsel's decision was a matter of trial strategy and defendant was not prejudice by the admission of the tapes at trial.

(2) While prosecutor's remarks during closing argument were improper, they did not rise to the level of plain error because the evidence was not closely balanced.

(3) The trial court improperly imposed a $150 DUI analysis fee as a condition of defendant's probation.

¶ 2 Defendant, Marlon Coleman, was convicted of possession of a controlled substance (720 ILCS 570/402(c) (West 2010)) and driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(2) (West 2010). The trial court sentenced defendant to 24 months' probation for both offenses. Defendant appeals, claiming that (1) trial counsel was ineffective for failing to file a motion to suppress his videotaped statements to police, (2) he was denied a fair trial because the prosecutor improperly attempted to define reasonable doubt for the jury, and (3) the imposition a $150 DUI analysis fee as a condition of probation should be vacated. We affirm as modified.

¶ 3 Following a traffic stop, defendant was arrested and charged with possession of a controlled substance (morphine), improper lighting for failing to turn on his vehicle's headlights, and two counts of DUI. Prior to trial, the State dismissed the improper lighting charge and one of the DUI charges.

¶ 4 The only witness called at trial was Officer Scott Hulse. Hulse testified that he was on patrol in Peoria on August 20, 2010. Around 1:30 a.m., Officer Alden Conrad called him to the intersection of Hamilton and Glendale to assist with a stop. Hulse testified that Conrad stopped defendant's vehicle because defendant was driving without his headlights on. When Hulse approached defendant's vehicle, defendant informed him that he had just left the downtown area and had forgotten to turn them on. During his conversation with defendant, Hulse noticed that defendant's eyes were glassy and bloodshot. Hulse testified that defendant spoke very fast, mumbled at times and repeated himself. Hulse also detected the odor of alcohol coming from the vehicle. Defendant initially said he had nothing to drink, but then said he had two beers.

¶ 5 Officer Hulse asked defendant to perform three field sobriety tests. Defendant agreed and walked over to the sidewalk. Defendant performed poorly on all three tests.

¶ 6 Officer Hulse testified that after defendant failed the third test, the walk-and-turn test, he "advised [defendant] that he was under arrest" and placed his hands in handcuffs behind his back. Hulse then searched defendant's person. Hulse testified that defendant was wearing shorts and that during his search he noticed an unusual lump on defendant's ankle underneath his sock. When he pushed on the lump, it was soft and malleable. He then asked defendant to remove his shoe. Inside defendant's sock, Hulse found "a crumpled up $1 bill." Hulse asked defendant what was inside the bill, and defendant told him that "somebody at the club" had given it to him. Hulse opened the bill and found seven purple pills inside, which he believed to be ecstasy. Defendant was then placed in the squad car and transported to the police station.

¶ 7 At the station, Hulse read defendant the "Warning to Motorist" form. After waiting the required twenty minute period, Hulse requested that defendant take a breathalyzer test. Defendant said yes, but then refused.

¶ 8 During Hulse's direct testimony, the State introduced two video exhibits: one showing the traffic stop as filmed by a dashboard camera, and the other showing defendant and Officer Hulse at the station before and after defendant refused to take the breathalyzer test. Both videotapes were admitted and played for the jury.

¶ 9 The video at the scene of the stop depicts Officer Hulse conducting the field sobriety tests. A portion of the last test and the conversation during the arrest occur off camera, but the audio of the conversation can be heard. Hulse asks defendant what he has in his sock, to which defendant responds, "I don't have no drugs man, I don't sell no drugs." Hulse then asks, "What's that big lump in there?" Defendant responds, "I don't do no drugs or none of that." Hulse asks defendant to remove his left shoe and finds a dollar bill in defendant's sock. When Hulse asks defendant about the pills inside the bill, defendant replies that he does not know what they are.

Hulse states that he thinks they look like ecstasy. Defendant responds, "No, I don't do no ecstacy." Hulse reminds defendant that it came out of his sock and states that he is worried about what he found. Defendant replies, "I don't sell nothing, man, I don't sell no drugs." Defendant then invites Hulse to check his system for ecstacy and states that someone at the club gave him the dollar. Hulse then places defendant in the squad car.

¶ 10 In the video of the interview at the station, Hulse sits down behind a desk and begins to talk to defendant. He then reads defendant the "Warning to Motorist" form. While Hulse is reading the form, defendant makes several remarks and at one point says "I got a lawyer. I got a lawyer. I been in trouble before, and I got a lawyer." Defendant continues to talk while Hulse completes paperwork, and after a few minutes, Hulse instructs defendant to stop talking. Defendant continues to make remarks. He then asks Hulse why he was not given a warning citation. Officer Hulse responds, "because you were drunk, driving a car, and you had drugs on you." Defendant tells Hulse that a girl at the club gave him the dollar bill and asked him to get her a drink.

¶ 11 Once Hulse finished writing, he explains the breathalyzer testing process to defendant. Defendant asks if he can take it later and Hulse tells him that this would be his only opportunity. Defendant asks what would happen if he declines to take it. Hulse informs him that he would lose his license for a year. Defendant states that he is not drunk. Hulse tells him that the only way to prove it is to take the test. Defendant sits silent for a few seconds. As Hulse begins to uncuff defendant to take the test, defendant again asks what would happen if he did not take the test. Hulse says that he would print out a receipt and they would be done. Defendant states, "I'm not gonna do it." A few seconds later, he begins asking again about taking the test. Hulse and defendant argue for a few minutes, and Hulse eventually leaves.

¶ 12 On cross-examination, defense counsel asked Hulse several questions regarding the traffic stop video. After reviewing the video, Hulse admitted that defendant promptly and safety pulled his vehicle over, that he exhibited a noncombative demeanor and that he complied with the officer's request to produce identification. Defense counsel further elicited that defendant did not stumble as he walked to the sidewalk to take the field sobriety tests and that he also indicated a willingness to perform them. In his examination of Hulse, counsel further noted the pills were not visible until the dollar bill was opened, that defendant repeatedly denied the pills were his and that he consistently stated that the dollar bill had been given to him by a girl at the club.

¶ 13 Following Hulse's testimony, the State introduced the pills, and the parties stipulated that the pills tested positive for morphine. The defense rested without presenting any witnesses.

¶ 14 The prosecutor addressed the jury in his closing argument and asked them to carefully consider the evidence as to both charges. Specifically, he noted that defendant's videotaped statements that he did not "do no drugs" before Officer Hulse found the pills in his sock indicated that defendant knew the pill were inside the dollar bill and knew that they contained an illegal substance.

¶ 15 During his closing argument, defense counsel reminded the jurors that they had sworn to hold the State to its burden of establishing each element of the crime beyond a reasonable doubt. Counsel argued that defendant was not impaired when he was stopped by Officer Conrad and reminded the jurors to observe defendant's demeanor on the video taken from the dashboard camera. Counsel claimed that the videos showed defendant's repeated denials and requests to the officer to check his system for drugs. He argued that the videos also showed that defendant consistently maintained that the dollar bill had been given to him by someone at the club.

¶ 16 In rebuttal, the prosecutor noted that defense counsel had mentioned reasonable doubt numerous times in his opening and closing arguments but had not defined it. The prosecutor stated:

> "He says it a lot, and perhaps you notice he never defines it. And that is because there is no definition of it. We can't give you a definition of it. It's what you say it is, and I notice he held his hand up here as if to simulate something to you. But there is not a definition we can give you for it.
>
> But it is not beyond a mere shadow of a doubt. It's a burden met in courtrooms like this all over the country everyday [sic]. And it's not called an unreasonable doubt. You are 12 reasonable people. That's why we go through the jury selection process. We don't just go grab the first 12 people and sit them in the box. That's why we go through that whole process.
>
> So I understand that's the burden and have no problem with that. But it is not beyond just the mere shadow of the doubt."

¶ 17 The jury found defendant guilty of DUI and possession of a controlled substance. Defendant filed a *pro se* motion for a new trial and a motion to set aside the judgment and stay his sentence. Among other claims, defendant complained that he received ineffective assistance of trial counsel, that the prosecutor committed misconduct in his remarks about reasonable doubt and that his post-arrest statements should not have been used against him.

¶ 18 The trial court appointed new counsel and conducted an evidentiary hearing. At the hearing, defendant testified as to the claims in his motion and supplemental pleadings filed by new counsel. The court denied defendant's claims of ineffective assistance and his request for a

new trial. It then sentenced defendant to 24 months' probation and 30 days in jail for driving under the influence of alcohol and 24 months' probation for possession of a controlled substance.

¶ 19 I

¶ 20 Defendant claims that trial counsel was ineffective for failing to move to suppress the numerous incriminating statements defendant made on the videotapes after Officer Hulse had taken him into custody. He claims that counsel's failure to file such a motion was unreasonable. He further claims that he was prejudiced by counsel's errors because the jurors were repeatedly exposed to his incriminating post-arrest statements during the course of trial and during closing arguments when the prosecutor highlighted defendant's statements as evidence of his guilt.

¶ 21 Claims of ineffective assistance are reviewed under the two-part test established in *Strickland v. Washington*, 466 U.S. 668 (1984). Under the first prong of the *Strickland* test, a defendant must show that counsel's performance fell below an objective standard of reasonableness. To establish that counsel's performance was deficient, the defendant must overcome the strong presumption that counsel's action or inaction was the product of sound trial strategy. *People v. Richardson*, 189 Ill. 2d 401 (2000). Generally, the question of whether to file a motion to quash and suppress is a matter of strategy best left to the discretion of trial counsel. *People v. Velez*, 388 Ill. App. 3d 493 (2009). The defendant must also prove that counsel's deficiencies resulted in prejudice. *People v. Harris*, 206 Ill. 2d 1 (2002). When an ineffective assistance claim is based on counsel's failure to file a motion to suppress, the defendant must show a reasonable probability that (1) the motion to suppress would have been granted, *and* (2) that the outcome of the trial would have been different had the evidence been suppressed. *People v. Givens*, 237 Ill. 2d 311 (2010).

¶ 22 Here, the decision to allow the videos to be viewed by the jury was a matter of sound trial strategy. To succeed at trial, defendant needed to establish that he was not, contrary to Hulse's testimony, under the influence of alcohol when he was stopped and that he had no knowledge of the morphine pills in his sock. Defense counsel used the dashboard video during his cross-examination of Officer Hulse and in his closing argument to establish that defendant was not impaired. He argued that the dashboard video showed defendant's pleasant and cooperative attitude at the time of the stop. He also argued to the jury that the videos depicted someone who was frustrated, not impaired. He reminded them that the videos showed defendant repeatedly denying any knowledge of the pills and asking the officer to check his system for drugs. These arguments, supported by the videos, implied that defendant did not commit the charged offenses. A decision that involves a matter of trial strategy will generally not support a claim of ineffective representation. See *People v Orange*, 168 Ill. 2d 138, 153 (1995).

¶ 23 However, even if counsel's failure to move to suppress the statements satisfies the first prong, defendant cannot satisfy the second prong of his ineffective assistance claim because he was not sufficiently prejudiced by counsel's failure. Notwithstanding the videotaped statements, the evidence against defendant was overwhelming. On the charge of driving under the influence of alcohol, the jury heard evidence that defendant (1) drove without headlights, (2) admitted he had been drinking, (3) failed the field sobriety tests as administered by Officer Hulse, and (4) refused to take a breathalyzer test. See *People v. Johnson*, 353 Ill. App. 3d 954, 958 (2004) (defendant's refusal to take a breathalyzer test may be properly admitted as circumstantial evidence of defendant's guilt). For the offense of possession of a controlled substance, the evidence demonstrated that the pills were discovered pursuant to a search incident to defendant's arrest and were not subject to suppression. See *People v. Rucker*, 346 Ill. App. 3d 873, 886-87

(2003). Testimony also revealed that the pills were found in defendant's sock. Thus, even if the statements had been suppressed, the jury would have heard evidence that in a search incident to arrest a crumpled dollar bill containing seven morphine pills was found inside defendant's sock without explanation as to how the dollar bill came into defendant's possession. From this evidence, the jury could have reasonably inferred that defendant knowingly possessed a controlled substance. Therefore, defendant cannot show that a reasonable probability exists that the outcome of the trial would have been different without the videotaped statements. According, counsel was not ineffective for failing to file a motion to suppress.

¶ 24 II

¶ 25 Next, defendant claims that the prosecutor's remarks during closing argument regarding reasonable doubt were improper because (1) he attempted to define reasonable doubt by describing what it is not, and (2) he tried to diminish the State's burden of proof by arguing that the reasonable doubt standard is "met in courtrooms like this all over the country everyday." Defendant acknowledges that he failed to object to the improper comments but claims they should be reviewed under the plain error doctrine.

¶ 26 Plain error allows us to review unpreserved errors if (1) a clear error occurred and the evidence is so closely balanced that the error alone threatens to tip the scales of justice; or (2) a clear error occurred and that error is so serious that it affected the fairness of defendant's trial and challenged the integrity of the judicial process. *People v. Sargent*, 239 Ill. 2d 166 (2010). We begin any plain error analysis by determining whether an error occurred. *Id*. at 189.

¶ 27 Although the United States Constitution does not prohibit courts from defining reasonable doubt (*Victor v. Nebraska*, 511 U.S. 1 (1994)), Illinois law 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 (1992); *People v. Malmenato*, 14 Ill. 2d 52 (1958)). "Reasonable doubt" is a term which needs no elaboration. *Malmenato*, 14 Ill. 2d at 61.

¶ 28 A distinction exists between improper comments by the prosecutor, which are not considered structural, and a defective reasonable doubt instruction given by the trial court, which "unquestionable qualifies as a structural error." *People v. Washington*, 2012 IL 110283, ¶ 59; see also *People v. Franklin*, 2012 IL App (3d) 100618, ¶ 23. In *People v. Edwards*, 55 Ill. 2d 25 (1973), our supreme court found that the prosecution's attempt to explain reasonable doubt was not reversible error but advised that the better practice was not to attempt to define the term in *voir dire* or closing argument.

¶ 29 In *People v. Burman*, 2013 IL App (2d) 110807, ¶ 40, the prosecutor told the jury that "[w]e have to prove [defendant's guilt] beyond a reasonable doubt. However, it's not beyond all doubt. It's not beyond an unreasonable doubt." The appellate court admonished the prosecution for its remarks, finding that they improperly defined reasonable doubt by "describing what it was not." However, the defendant in that case, as here, did not preserve the error and asked the court to apply the plain error rule. The court found that although the improper comments were error, they were not reversible error under the first or second prong of plain error. *Id*. at ¶ 45-46. The court noted that even if the error had been preserved, reversal would only be warranted where the improper comments resulted in substantial prejudice to the defendant's right to a fair trial. *Id*. at ¶ 47.

¶ 30 In that case, the trial court had given the jury instructions defining the defendant's presumption of innocence, emphasizing the State's burden of proof and noting the defendant's decision not to testify could not be considered in arriving at a verdict. The appellate court

concluded that since the jury was properly instructed on these matters, the prosecutor's comments were not reversible as plain error. *Id*.

¶ 31 Here, after informing the jury that reasonable doubt could not be defined, the prosecutor attempted to describe the term in the negative. He defined what it is not and informed the jury that it is "what you say it is." He then made light of defense counsel's emphasis on the burden by saying that it was one "met in courtrooms everyday." The appellate court has repeatedly held similar comments improper. See *Burman*, 2013 IL App (2d) 110807, ¶ 47; *People v. Mena*, 345 Ill. App. 3d 418 (2003); *People v. Jones*, 241 Ill. App. 3d 228 (1993); and *People v. Frazier*, 107 Ill. App. 3d 1096 (1982). Comments such as these are improper because they have the effect of lessening the State's burden of proof and implying that reasonable doubt is merely a minor detail. *Frazier*, 107 Ill. App. 3d at 1102.

¶ 32 Having found the comments improper, we must still determine whether the error compels a new trial under the plain error rule. Defendant contends that it does because the evidence at trial was closely balanced and the error threatened to tip the scales of justice against him. We disagree. The evidence against defendant was significant, if not overwhelming. Moreover, as in *Burman*, the trial court did not compound the error by giving misleading instructions. The jury was properly instructed regarding reasonable doubt and the State's burden of proof as to both charges. Illinois Pattern Jury Instructions, Criminal, Nos. 17.28 & 23.14 (4th ed. 2000). Thus, the prosecutor's improper comments during rebuttal were not so prejudicial as to amount to plain error. See *Burman*, 2013 IL App (2d) 110807, ¶ 47; *People v. Ward*, 371 Ill. App. 3d 382 (2007) (finding that improper comments by prosecutor did not invoke plain error analysis because they were not so inflammatory or flagrant that defendant could not have received a fair trial).

¶ 33 III

¶ 34 Last, defendant claims that the trial court's order imposing a $150 DUI analysis fee as a condition of his probation should be vacated. The State confesses error.

¶ 35 Under section 5-9-1.9 of the Unified Code of Corrections (730 ILCS 5/1-1-1 *et seq*. (West 2010)), a DUI analysis fee of $150 shall be imposed in any case in which an analysis of blood or urine occurred "for purposes of determining whether a violation of Section 11-501 of the Illinois Vehicle Code has occurred." 730 ILCS 5/5-9-1.9(a), (b) (West 2010). Here, Coleman refused to take a breathalizer test, and there is no evidence that any blood or urine testing was conducted. Since no DUI analysis occurred, the $150 fee was improperly imposed.

¶ 36 Remandment to the trial court is unnecessary in this case because this court has the authority to directly order the clerk of the circuit court to make the necessary corrections. Ill. S. Ct. R. 615(b)(1) (eff. Aug. 27, 1999); *People v. Diaz*, 377 Ill. App. 3d 339, 351 (2007). Accordingly, we direct the circuit clerk to correct the mittimus by removing the $150 DUI analysis fee assessed against defendant.

¶ 37 CONCLUSION

¶ 38 The judgment of the circuit court of Peoria County is affirmed as modified.

¶ 39 Affirmed as modified.