2016 IL App (3d) 140458-U

Order filed March 11, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2016

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
	)	Will County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-14-0458
v.	)	Circuit No. 13-CF-2321
	)	
JOHNNY GOOCH,	)	
	)	Honorable Edward A. Burmila, Jr.,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Presiding Justice O'Brien and Justice Lytton concurred in the judgment.

ORDER

¶ 1 *Held*: The State did not make improper comments during closing arguments.

¶ 2 Defendant, Johnny Gooch, appeals his conviction for unlawful possession of a controlled substance. He argues that the prosecutor's comments in closing arguments regarding defendant's struggle with police officers and concerns for officer safety were unduly prejudicial and constitute plain error. We affirm.

¶ 3 FACTS

¶ 4 The State charged defendant by indictment with unlawful possession of a controlled substance. 720 ILCS 570/402(c) (West 2012). The case proceeded to a jury trial on January 21, 2014.

¶ 5 In opening statements, the State explained that the evidence would show that police officers, upon encountering defendant, attempted to search him for weapons. The evidence would further show that defendant resisted, and a struggle ensued. While no drugs were found on defendant at the motel, the evidence would show that cocaine was found on defendant when he was later searched at the police station.

¶ 6 In defense counsel's opening statement, he stressed that the evidence would show that defendant was searched at the motel. Counsel suggested that defendant was probably searched more than once while at the motel. Counsel concluded: "And again, you are going to hear that my client was in fact searched and nothing was found on him. Later on at the police station somehow something was in his pockets. How that happened, [I] don't know."

¶ 7 The State called, Joliet police officer, Kent Liebermann, as its first witness. Liebermann, testified that he was a member of a tactical unit tasked with patrolling high-crime areas. On the night of defendant's arrest, Liebermann was patrolling a Motel 6 in Joliet. Liebermann explained that the motel had an agreement with the Joliet police department, which allowed police to patrol the premises.

¶ 8 Liebermann testified that he was on foot patrol in the common areas of the motel when he encountered defendant. Liebermann identified himself as a Joliet police officer and asked defendant if he had a room at the motel. Defendant then shoved his hands into his pockets and turned away from Liebermann. Liebermann testified that he told defendant to stop, but defendant started to walk away. Liebermann then grabbed defendant, placed him against the

wall, and patted him down for weapons. Liebermann testified that the pat-down search was conducted out of concern that defendant might have a weapon, based on defendant's unwillingness to talk and his attempt to walk away.

¶ 9 Liebermann testified that defendant acted very nervous during the pat-down search. Defendant repeatedly ignored Liebermann's commands to place his hands behind his back, and attempted to turn away from Liebermann. A struggle ensued, and Liebermann forced defendant to the ground. With the assistance of another officer, Liebermann was able to place defendant in handcuffs. Liebermann again patted defendant down for weapons before transporting him to the police station. Liebermann described that pat-down search as follows: "We were just looking to make sure there is nothing like large guns, knives, anything where he is going to be in the vehicle where he can have any opportunity to hurt us." Liebermann testified that he went through defendant's pockets, but only searched for "large items." He stated that the search at the scene was not a thorough one. On cross-examination, Liebermann further explained that in conducting the pat-down search "[w]e're trained to kind of make a squeezing, like crunching feel of things in order to feel like large, hard objects and things like that which would be identified as weapons."

¶ 10 The State's next witness was Brian Montello of the Joliet police department. Montello testified that on the date in question he was partnered with Liebermann and another officer, Jose Tellez, patrolling the Motel 6. Liebermann proceeded on foot patrol of the motel while Montello and Tellez circled the building in the squad car. Montello testified that he got out of the car when he heard Liebermann giving verbal commands. Montello heard Liebermann repeatedly say: "Let me see your hands." Montello ran to Liebermann's location, where he saw

Liebermann wrestling with defendant. After a brief struggle, Montello and Liebermann were able to handcuff defendant.

¶ 11 Montello testified that defendant was searched for weapons after being handcuffed. Montello described the search as a "fast look." Montello testified, "[i]t's not mulling every pocket, papers, stuff like that." He further testified, "[i]t's mainly looking for hard objects, stuff that you could tell is a weapon[.]"

¶ 12 On cross-examination, Montello testified that defendant was arrested at the motel for resisting arrest. Defense counsel asked Montello why defendant was not thoroughly searched for drugs at the motel. Montello explained:

> "[B]ecause of the nature of the incident with him that he wrestled and was fighting with my partner, for safety we do our business in a more safe environment. So once we are sure he didn't have weapons on him, at that time the more thorough search can wait until a more safe environment."

Montello further explained that defendant was patted down for weapons so the officers would be safe with defendant in the squad car, noting, "We didn't want to get shot in the head."

¶ 13 Tellez testified that he performed a thorough search of defendant at the police station. In performing the search, Tellez found two plastic bags in defendant's sweatshirt pocket. Each bag contained an off-white rocklike substance, which Tellez believed to be crack cocaine.

¶ 14 On cross-examination, Tellez testified that he did not perform the pat-down search of defendant at the motel. He testified that if he had, he would have only searched for large weapons in an effort to get defendant "out of the elements as soon as possible." Tellez noted that

it was chilly on the night of defendant's arrest. Defense counsel then questioned Tellez extensively regarding his ability to access the evidence locker at the police station.

¶ 15 After Tellez's testimony, the trial court *sua sponte* admonished the jury that it should not consider the fact of defendant's alleged resisting arrest in reaching its verdict. The court explained: "You can consider that for only one purpose, and that's why the officers took him into custody."

¶ 16 The State's final witness was Cynthia Koulis, an Illinois State Police forensic scientist. Koulis testified that the bagged substance found in defendant's pocket weighed 0.2 grams and tested positive for cocaine.

¶ 17 Defendant did not present any evidence in his case-in-chief, so the case proceeded to closing arguments. In its closing argument, the State detailed the struggle between Liebermann and defendant, as well as the ensuing pat-down search:

> "When Officer Liebermann tried to question [defendant] further and find out what was going on, the defendant was acting nervous, unwilling to let the officer do a patdown for any weapons or anything. At that point, a struggle ensued, at which point Officer Montello told you he came up the stairs and saw the defendant struggling with his fellow officer. At that point they were able to subdue eventually [defendant], place him in handcuffs, at which point Officer Liebermann did a patdown search for weapons.
>
> You heard a lot of questions about the patdown search for weapons. I believe two of the officers described a patdown search in which they squeeze the outside of the clothing looking for any

> items, large items, small items, hard items, that would resemble weapons. Knives, guns, for both officers' safety and for the safety of the defendant. You heard Officer Montello say we want to ensure the safety of the person we are arresting and ensure our safety. We want to make sure that we don't get shot in the head. Things like this are important. They do this officer safety patdown to make sure there is no obvious weapons on the defendant's person despite the fact that he is handcuffed at this point behind his back. They do not go through nit-picking through all the items in his pocket during the inventory search because they are standing in October at 1:30 in the morning outside the Motel 6 with someone who [has] just resisted arrest, who has been fighting with them. They don't know what other people are going to be coming around. So they go back to the station. And as Officer Montello told you for both their own safety and for the defendant's safety, as well."

¶ 18 In his closing argument, defense counsel expressed disbelief that the officers performed anything less than a thorough search of defendant at the motel. Counsel argued that common sense dictated that such a search would have uncovered the drugs later found at the police station. In explaining incongruence, counsel argued the drugs were planted on defendant once he arrived at the police station: "Where was the first time they allegedly found drugs on my client? Conveniently it was at the police station where other evidence [was] held, other drugs, other

things." Counsel argued that by not extensively searching defendant before placing him in the squad car, the officers were *risking* their own safety, rather than preserving it.

¶ 19 In its rebuttal argument, the State insisted that the officers' cursory search for weapons was necessitated by safety concerns. The State pointed out that Liebermann wanted to be sure "he's not about to get his head blown off," referencing Montello's testimony. Continuing, the State argued:

> "The officers told you, again, this is an area that is not one of the best. This is an area that is a high crime, high volume area. The defense wants you to believe that these three officers would be in the best position to be standing out there at 1:30 in the morning not knowing who else is around, not knowing if he has other people with him, and to start inventorying the pockets in an area that is outside in the middle of the night."

The State argued that the officers' decision to not do a full search until they reached the police station was also motivated by defendant's prior actions:

> "[Defendant] did not want to cooperate. We don't know what his next move is. So, no, we are not going to stand out there and give him the benefit of the doubt in hope that he will follow through and obey as we are trying to go through his pockets. So this situation when we have somebody who fights with us, we drive five minutes back to the station where we are in a secure environment and we do a search."

¶ 20 Following closing arguments, the court delivered jury instructions. The court instructed the jury that evidence received for limited purposes should not be considered for any other purpose. The court further instructed the jury that opening and closing statements did not constitute evidence. The jury instruction packet also included an instruction on other-crimes evidence, which cautioned the jury that such evidence had "been received on the issue of the defendant's presence and may be considered by you only for that limited purpose."

¶ 21 The jury found defendant guilty of unlawful possession of a controlled substance and the court sentenced him to a term of five years' imprisonment.

¶ 22 ANALYSIS

¶ 23 On appeal, defendant argues that the State made a number of improper comments during its closing arguments. Though defendant takes issue with the State's closing argument as a whole, his specific contentions on appeal may be separated into distinct parts. First, defendant argues that the State's repeated references to his struggle with police officers constituted improper references to other-crimes evidence. Second, defendant argues that the State's description of officer safety concerns improperly portrayed him as "dangerous and potentially homicidal." Upon review, we find that none of the State's comments with which defendant takes issue were improper.

¶ 24 Initially, defendant concedes that he failed to preserve the present issue for appellate review. Accordingly, defendant urges that we analyze his argument under the doctrine of plain error. The doctrine of plain error allows a reviewing court to address an otherwise forfeited contention of error where a defendant demonstrates that the error was prejudicial. See *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). To prove that an error was prejudicial, a defendant must show that the evidence at trial was so closely balanced that the error tipped the scales of justice

against him. *Id*. at 187. Alternatively, if the error is so serious that it rises to the level of a structural error, prejudice to the defendant is presumed, regardless of the closeness of the evidence at trial. *Id.*; *People v. Thompson*, 238 Ill. 2d 598, 608 (2010). The first step in a plain-error analysis is to determine whether a clear or obvious error occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 564-65, 565 n.2 (2007).

¶ 25 The prosecution is generally afforded great latitude in making its closing arguments. *People v. Porter*, 372 Ill. App. 3d 973, 978 (2007). While they may argue any fair and reasonable inferences that may be drawn from the evidence introduced, "prosecutors have an ethical obligation to refrain from presenting improper and prejudicial evidence or argument." *Id*. "It is improper to argue assumptions or facts not based upon the evidence in the record." *People v. Johnson*, 208 Ill. 2d 53, 115 (2003).

¶ 26 Initially, defendant contends that the State's references to his struggle with police constituted improperly prejudicial evidence of other crimes. Illinois Rules of Evidence 404(b) holds that other-crimes evidence is inadmissible to prove a defendant's general propensity to commit crimes. Ill. R. Evid. 404(b) (eff. Jan. 1, 2011). Such evidence has traditionally been found inadmissible because it is overly persuasive, leading to the possibility that a jury may convict a defendant solely because it thinks he or she is a bad person deserving of punishment. *People v. Lindgren*, 79 Ill. 2d 129, 137 (1980). Evidence of other crimes, however, "is admissible if it is relevant to establish any fact material to the prosecution." *Johnson*, 208 Ill. 2d at 108.

¶ 27 Defendant's struggle with the police officers and those officers' concerns for their safety were relevant in explaining why the officers did not perform an exhaustive search at the scene of defendant's arrest. The defense's theory of the case—alluded to in opening statements and

cross-examinations, and made explicit in closing arguments—was that the officers found no contraband on defendant after a thorough search at the motel, and later planted drugs on him at the police station. Thus, the defense disputed the officers' testimony that defendant was *not* thoroughly searched at the motel.

¶ 28 The issue of whether defendant was thoroughly searched at the motel—as opposed to a simple pat-down search for weapons or hard objects—was made an issue by the defense. In its closing arguments, then, the State sought to explain why the officers would save the more thorough search for the police station. The State thus argued that concerns for officer safety, as well as the cold weather, motivated the officers to only search defendant for weapons before his transport to the police station. These safety concerns included general concerns about being in a high-crime area late at night. They also included specific concerns about defendant; because he had been willing to struggle with the officers, they considered him volatile, and were unsure what *else* he would be willing to do. Because defendant's struggle was relevant to explaining why defendant was not more thoroughly searched at the motel—and, accordingly, relevant in disputing the defense's theory of the case—the State's references to the struggle in closing argument were not improper.

¶ 29 Defendant also alleges that the State's references to officer safety concerns unfairly portrayed him as "dangerous and potentially homicidal." Specifically, defendant points to the State's comments that Montello was worried he was "about to get his head blown off," and that officers were unsure whether defendant had "other people with him" or "what [defendant's] next move [was]." *Supra* ¶¶ 17, 19.

¶ 30 These comments, however, constitute fair illustrations of the safety concerns described by Liebermann and Montello. The officers did not testify that they had *specific* concerns that

defendant might shoot them in the head, or that defendant had other people with him. Instead, as the State accurately related in closing arguments, the officers described the general caution with which they must proceed in such a situation. That is, because any perpetrator behaving as defendant did *might* have a firearm, officers must take the cautious approach of acting as if that is the case. At no point did the State imply that the officers had specific reason to actually believe defendant would shoot them or that a group of defendant's accomplices would attack them.

¶ 31 We also note that the trial court repeatedly provided the jury with curative admonishments, both during and after witness testimony. The court instructed the jury that defendant's struggle may be considered only insofar as it affected the officers' subsequent decisions. It also informed the jury that closing arguments are not to be considered evidence. Though we find that the State's arguments were not improper, any potential impropriety would have been cured by the trial court's instructions. See *People v. Desantiago*, 365 Ill. App. 3d 855, 866 (2006).

¶ 32 The fact of defendant's struggle with the officers was relevant to show why the officers did not perform an exhaustive search at the scene of defendant's arrest—an issue raised by the defense. The struggle, along with the general safety concerns that accompany all police work, led the officers to save the more thorough search until they could reach a more secure location. Those safety concerns were fairly and reasonably described by the State in its closing arguments. Because we find the State did not make any improper statements in closing arguments, we need not proceed to further steps in plain-error analysis.

¶ 33 CONCLUSION

¶ 34 For the foregoing reasons, we affirm the judgment of the circuit court of Will County.

¶ 35 Affirmed.