2018 IL App (3d) 150040-UB

Order filed February 5, 2018.
Modified upon denial of rehearing March 7, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-15-0040 Circuit No. 14-CF-399
MICHAEL A. WALTON,	)	Honorable Daniel J. Rozak,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice Carter and Justice Holdridge concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The court did not err in allowing the State to elicit testimony regarding defendant's involvement in another crime. (2) The State's comments during its closing argument were not prosecutorial misconduct. (3) The circuit court did not err in denying defendant's motion to reconsider.

¶ 2 This order follows our limited remand to conduct a *de novo Batson* inquiry. It resolves the arguments of defendant, Michael A. Walton, that (1) the circuit court erred in allowing the State to elicit testimony regarding defendant's involvement in an unrelated murder, (2) the State

committed prosecutorial misconduct as a result of its comments during its rebuttal argument, and (3) the court erroneously denied defendant's motion to reconsider sentence when neither defendant nor his counsel were present. We affirm.

¶ 3 FACTS

¶ 4 This order follows our resolution of defendant's first issue with a limited remand to the circuit court to conduct a *de novo Batson* hearing. *People v. Walton*, 2017 IL App (3d) 150040-U. After the proceedings on remand, the parties elected not to file supplemental briefs. Accordingly, the facts of this order are limited to those necessary to resolve the three remaining issues.

¶ 5 The State charged defendant with bringing contraband into a penal institution (720 ILCS 5/31A-1.1(a)(1) (West 2014)) and possessing contraband in a penal institution (*id.* § 31A-1.1(b)). Before defendant's jury trial, the parties agreed not to discuss the unrelated crimes that defendant had mentioned to the detectives before or after they removed him from the Will County Adult Detention Center (ADC) on February 28, 2014.

¶ 6 At trial, correctional officer Jake Debus testified that defendant was removed from the ADC to assist in a police investigation. Around 7 p.m., police officers returned defendant to the ADC. Debus patted defendant down and walked him through the metal detector. The metal detector alerted as defendant walked through it. Debus conducted a strip search of defendant's person and discovered no contraband. As defendant was getting dressed, Debus heard the sound of keys jingling. Debus conducted a patdown in the area of defendant's groin and a pair of handcuff keys fell to the ground. Defendant was not allowed to have the keys in the ADC.

¶ 7 Detective Jerry Tolbert testified that, on the morning of February 28, 2014, he and Detective Daniel Procarion removed defendant from the ADC because defendant had said that he

had information regarding an ongoing investigation. During the day, defendant rode in the passenger-side front seat of Tolbert's car. Tolbert kept a spare set of handcuff keys in the glove box of the car. Around 7 p.m., the detectives returned defendant to the ADC. Tolbert pulled his vehicle into the sally port. Tolbert and Procarion then secured their weapons in the trunk. The detectives could not see defendant while they were securing their weapons. At 7:30 p.m., a correctional officer notified Tolbert that they had discovered a set of keys on defendant. The keys belonged to Tolbert.

¶ 8 On cross-examination, Tolbert explained that the investigation with defendant went on for nine hours and was fruitless. Tolbert did not see defendant open the glove box.

¶ 9 Procarion testified that he spoke with defendant at the jail around 7:30 p.m. Defendant told Procarion he saw Tolbert's spare keys in the glove box earlier in the day. When the detectives went to secure their weapons in the trunk, defendant retrieved the handcuff keys from the glove box.

¶ 10 On cross-examination, Procarion testified that he did not video record defendant's statement or ask defendant to make a written statement. Defense counsel further inquired

> "Q. And at no point did you turn on the video to ask him about the handcuff keys, correct?
>
> A. That's correct.
>
> Q. And, in fact, actually after he told you about those handcuff keys, you did turn on the video, correct?
>
> A. Correct.
>
> Q. And the video lasted for several hours, correct?
>
> A. Correct."

¶ 11 The State objected to defense counsel's question regarding the length of the video-recorded interview. Outside the presence of the jury, the State argued that defense counsel's line of questioning exceeded the parties' pretrial agreement to limit the evidence of the information that defendant had provided for the police investigation and misled the jury. The State explained that Procarion began recording the interview when defendant confessed to a murder. The State asked the court to allow it to elicit testimony that Procarion turned on the recording equipment because defendant was providing information about a murder. Defense counsel objected to the use of the word "murder." Over defense counsel's objection, the court allowed the State to ask Procarion why he turned on the recording equipment.

¶ 12 On redirect examination, Procarion testified that his conversation with defendant started with the missing handcuff keys and then defendant changed the topic. The State asked:

> "Q. Did [defendant] start providing information about a murder?
>
> A. That's correct.
>
> Q. Now, at that point did you initiate video and audio video recording?
>
> A. I did."

¶ 13 At the close of the State's case, defendant elected not to testify and the proceedings moved to closing arguments. The State contended in its rebuttal argument:

> "I'm not going to tell you how to do your job as jurors. Consider each and every piece of evidence very carefully and do your duty as jurors and deliberate and apply the facts to the law but don't kid yourselves into thinking that there's actually a genuine issue to discuss here. There's actually a genuine issue as to whether or not this guy is completely guilty of what everybody's saying he did.

> The only reason we are sitting here today is because he has got a right to a trial, and we are giving him his trial and that's it."

The State also argued "[p]eople are convicted based on this evidence in courtrooms all across America every single day[.]" The State concluded "based on the evidence that we have heard in this case, [defendant] is completely guilty of both of these crimes."

¶ 14 The jury found defendant guilty of both of the charged offenses.

¶ 15 Defendant filed a motion for a new trial that argued the court erroneously allowed the State to elicit testimony regarding the specific reason for the video-recorded interview of defendant. The court denied the motion. Then, pursuant to an agreement between the parties, the State recommended that the court impose a 10-year prison sentence. Defense counsel said "[a]fter numerous discussions with my client, it is his wish to go forward on the ten-year agreed sentence." The court considered in aggravation that defendant's criminal history included four felonies. The court accepted the parties' recommendation and sentenced defendant to 10 years' imprisonment. On August 11, 2014, the clerk filed a notice of appeal on behalf of defendant. On the same date, the court appointed the Office of the State Appellate Defender (OSAD) to represent defendant.

¶ 16 On August 25, 2014, defendant filed a *pro se* motion to reconsider sentence. Defendant argued that defense counsel and the State did not advise him that the sentencing range included probation and a maximum sentence of 15 years' imprisonment instead of 30 years. If defendant had been apprised of this range, "he would have been deterred to indulge a different scenario of sentencing." On August 28, 2014, the court denied the motion without holding a hearing. Neither defendant nor defense counsel were present for the court's pronouncement. Defendant was notified by mail of the court's ruling.

¶ 17 ANALYSIS

¶ 18 I. Unrelated Murder

¶ 19 Defendant argues the court erred in allowing the State to elicit testimony regarding defendant's involvement in an unrelated murder because this evidence was more prejudicial than probative of defendant's guilt of the charged offenses. We find this evidence was not other-crimes evidence but was improperly admitted because it was irrelevant to the charged offense. Ultimately, however this error was harmless.

¶ 20 Generally, all relevant evidence is admissible. Ill. R. Evid. 402 (eff. Jan. 1, 2011). "Relevant evidence" tends to make the existence of any fact of consequence to the determination of the action more or less probable. Ill. R. Evid. 401 (eff. Jan. 1, 2011). "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith ***." Ill. R. Evid. 404(b) (Jan. 1, 2011). "[E]vidence of other crimes committed by the defendant is admissible if it is relevant for any purpose other than to show the propensity to commit a crime." *People v. Thingvold*, 145 Ill. 2d 441, 455 (1991). When the State seeks to admit evidence of another crime, it "must first show that a crime took place and that *the defendant committed it or participated in its commission*." (Emphasis in original.) *Id.*

¶ 21 Procarion's testimony that defendant provided information about a murder is not other-crimes evidence because the State did not affirmatively establish that a murder took place and defendant committed or participated in the commission of the murder. *Id.* The court erred in admitting this evidence because it was not relevant, *i.e.*, it did not make a fact of consequence more or less probable. See Ill. R. Evid. 401 (eff. Jan. 1, 2011). This evidence did not establish any of the elements of bringing contraband into a penal institution or possessing contraband in a

penal institution. 720 ILCS 5/31A-1.1 (West 2014). It solely explained why Procarion turned on the recording equipment after he interviewed defendant about the handcuff keys. Therefore, the court should have excluded this evidence.

¶ 22 However, this error is harmless. There is no reasonable probability that the jury would have acquitted defendant if this nonrelevant evidence were excluded. *People v. Nevitt*, 135 Ill. 2d 423, 447 (1990). The evidence properly before the jury established each of the elements of the charged offenses. Specifically, that defendant knowingly and without authority brought handcuff keys, an item of contraband, into the ADC. 720 ILCS 5/31A-1.1(a) (West 2014). And, defendant knowingly possessed that contraband in the ADC. *Id.* § 31A-1.1(b). This evidence included Debus's testimony that he found a set of handcuff keys on defendant when defendant reentered the ADC, the handcuff keys were an item of contraband, and defendant's confession to Procarion that he knowingly took the keys from the glove box of Tolbert's car.

¶ 23 II. Closing Argument

¶ 24 Defendant argues the State committed prosecutorial misconduct when it told the jurors "don't kid yourselves into thinking that there's actually a genuine issue to discuss here. There's actually a genuine issue as to whether or not this guy is completely guilty of what everybody's saying he did," "[t]he only reason we are sitting here today is because he has got a right to a trial, and we are giving him his trial and that's it," "[p]eople are convicted based on this evidence in courtrooms all across America every single day," and "based on the evidence that we have heard in this case, [defendant] is completely guilty of both of these crimes." Defendant acknowledges this issue is not properly preserved, but he argues that it is reversible under the first prong of the plain error doctrine. While we find the State's comments improper, they do not constitute reversible plain error as the evidence is not close.

¶ 25 The first step of plain error review is to determine whether a clear and obvious error occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). If we find that the court erred, then we must determine if the error is reversible because "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." *Id.*

¶ 26 A prosecutor has wide latitude in closing arguments. *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007). Reversal is warranted if the prosecutor's remarks created "substantial prejudice," that is, the remarks "constituted a material factor in a defendant's conviction." *Id.* To determine if the remarks caused substantial prejudice, we consider the remarks in the context of the entire closing arguments of both parties. *Id.* at 122.

¶ 27 The State's comments improperly diminished its burden of proof and penalized defendant for exercising his right to a jury trial; however, they did not constitute a material factor in defendant's conviction. As we noted above, the evidence in this case was not close. *Supra* ¶ 22. The testimonies of Debus and Procarion readily established each of the elements of the charged offenses.

¶ 28 III. Motion to Reconsider

¶ 29 Defendant argues the court's denial of his motion to reconsider sentence, when neither he nor defense counsel was present, infringed on his constitutional rights to be present and represented by counsel. We take no position on whether defendant has the right to be present or have counsel present for the court's ruling because the court could not properly consider defendant's *pro se* motion to reconsider sentence as defendant had previously filed a notice of appeal and did not meet the Rule 606(b) requirements to revest the court with jurisdiction.

¶ 30 To perfect his right to an appeal, defendant needed to file "a notice of appeal with the clerk of the trial court." Ill. S. Ct. R. 606(a) (eff. Feb. 6, 2013). Defendant satisfied this requirement when he filed a notice of appeal on August 11, 2014. The filing of the notice of appeal had two effects: it divested the circuit court of jurisdiction, and appellate jurisdiction attached *instanter*. *People v. Smith*, 228 Ill. 2d 95, 104 (2008); *People v. Evans*, 2015 IL App (3d) 140753, ¶ 13. Thus, the filing of the notice of appeal left the circuit court without jurisdiction to consider defendant's *pro se* postsentencing motion. *Id.* However, Supreme Court Rule 606(b) includes a revestment provision. It states:

> "[w]hen a timely posttrial or postsentencing motion directed against the judgment has been filed by counsel *or by defendant, if not represented by counsel*, any notice of appeal filed before the entry of the order disposing of all pending postjudgment motions shall have no effect and shall be stricken by the trial court." (Emphasis added.) Ill. S. Ct. R. 606(b) (eff. Feb. 6, 2013).

The language of this rule is clear and unambiguous: where defendant has counsel, the court will only be revested with jurisdiction to consider a postsentencing motion filed after the notice of appeal where the motion was filed by counsel. This is consistent with the jurisprudence that holds a court cannot consider a defendant's *pro se* motion when defendant is represented by counsel. See *People v. Milton*, 354 Ill. App. 3d 283, 292 (2005) ("Typically, a trial court cannot consider *pro se* motions filed by a criminal defendant while he is represented by counsel."); *People v. Serio*, 357 Ill. App. 3d 806, 815 (2005) ("An accused has the right either to have counsel represent him or to represent himself; but a defendant has no right to both self-representation and the assistance of counsel.").

¶ 31 Applied to this case, defendant's *pro se* motion to reconsider sentence did not revest the circuit court with jurisdiction via Rule 606(b) because, at that time, he was represented by "counsel" (Ill. S. Ct. R. 606(b) (eff. Feb. 6, 2013)), that is, the circuit court had previously appointed the OSAD to represent defendant. For purposes of revestment, the plain language of the rule does not draw a distinction between trial counsel and appellate counsel.

¶ 32 In coming to this conclusion, we acknowledge appellate counsel's argument in its petition for rehearing that "the fact that the defendant's *pro se* motion was filed after OSAD was appointed is irrelevant" because counsel was forbid from representing defendant in the circuit court. This argument does not defeat the plain language of Rule 606. The circuit court was divested of jurisdiction upon the filing of the notice of appeal, and at the time defendant filed his motion to reconsider sentence, his case was properly before this court and defendant was represented by appointed "counsel." See *id.* In this scenario, if defendant wanted to proceed on his *pro se* motion in the circuit court, defendant should consult with counsel who can advise defendant of the standing of his case, or in the alternative, move to withdraw if defendant insists on proceeding on his *pro se* motion in the circuit court. See *id.* (following the filing of a *pro se* postjudgment motion, the circuit court must strike the preceeding notice of appeal). This rationale avoids the impermissible hybrid representation scenario where a defendant litigates a postjudgment motion *pro se* in the circuit court while the case is simultaneously on review before the appellate court where defendant is represented by counsel. See *People v. Trotter*, 2015 IL App (1st) 131096, ¶ 37 (defendant has either the right to counsel or the right to represent himself, and is not entitled to hybrid representation).

¶ 33 CONCLUSION

¶ 34 The judgment of the circuit court of Will County is affirmed.

¶ 35 Affirmed.