2018 IL App (3d) 150353-U

Order filed May 2, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 13th Judicial Circuit,
	)	La Salle County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-15-0353
v.	)	Circuit No. 14-CF-393
	)	
MICHAEL J. MANAHAN,	)	Honorable
	)	Cynthia M. Raccuglia,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Holdridge and McDade concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The court's failure to comply with Illinois Supreme Court Rule 431(b) did not constitute plain error. (2) The prosecutor's improper remarks minimizing the reasonable doubt standard of review did not result in reversible error.

¶ 2 Defendant, Michael J. Manahan, appeals his conviction for domestic battery. Specifically, defendant argues: (1) the court violated Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) and (2) the State committed prosecutorial misconduct when it minimized the reasonable doubt standard during closing argument. We affirm.

¶ 3 FACTS

¶ 4 Defendant was charged with domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2014)). A jury trial was held. During jury selection, the court addressed the jurors in groups of four. The court summarized the principles set forth in Rule 431(b) for each group and asked each group if they had any problems with those principles of law. The court did not ask each juror individually whether they understood and accepted each principle. Defense counsel did not object.

¶ 5 Lacey Razo testified that she was defendant's ex-wife. On October 10, 2014, Razo went to a friend's house and drank two glasses of wine. Razo and her friend then went to a bar and returned to the friend's house around 1 a.m. Razo drove home and arrived at her house in Naplate at approximately 2 a.m. Razo did not remember pulling into her driveway, but she remembered defendant pushing her from behind and falling onto the stairs that led to her deck.

¶ 6 Razo and defendant entered the house. Razo said she could not remember exactly how things happened because she had been drinking that night. Razo was also taking Xanax at that time. The next thing Razo remembered was lying on the bathroom floor with defendant on top of her. Defendant hit Razo in the face, and Razo's eye swelled shut. Defendant then stomped on Razo's stomach and chest. At one point, defendant told Razo that he entered her house by breaking the front door. Razo observed that the lock was broken.

¶ 7 After the attack, defendant and Razo went to sleep. When Razo awoke, she left the house to purchase food and alcohol. Defendant was still there when she returned. Defendant told Razo he did not want to be there anymore and left. After defendant left, Razo drank beer because she was in pain and did not know what to do.

¶ 8 On the morning of October 12, 2014, Razo went to the hospital where she was given narcotics for pain relief. Razo spoke with a police officer at the hospital. Razo told the officer everything she remembered. The officer asked Razo who caused her injuries, and she said it was her ex-husband. Razo also gave a written statement. Razo identified photographs of her injuries that were taken at the hospital. The photographs showed that one of Razo's eyes was badly swollen. Razo had cuts and bruises on her face. Razo also had significant bruising on her arms, chest, back, and stomach.

¶ 9 A couple days later, Razo called the officer she had spoken with at the hospital. She left a voicemail message saying that she did not want to press charges against defendant. Razo acknowledged that she sent a letter to defense counsel stating:

> "I'm writing you in regards to your client, [defendant]. I wasn't sure what other avenue to take as I have gotten nowhere with the State's Attorney's Office. Someone from their office called me back in October to find out what had occurred. I made it very clear to the woman that I spoke with that I did not want to pursue this any further as I didn't have much of a recollection of what had happened. I was on prescription medication, Xanax, at the time and had been drinking heavily during that entire weekend due to some personal issues I had going on, not to mention when I arrived at the hospital they gave me a narcotic pain medication. A comment was made it didn't matter because they had my written statement. I said that was fine and good, but I could never testify to anything that was in that statement because I don't remember what I put in it. I also told her I did not want to pursue this because I did not want them coming back on me later claiming I filed a false police report or something due to the fact

> that I was under the influence and do not remember. I have tried contacting them several times to find out what's going on and to make it clear to them I do not want to pursue this in any way.
>
> I had also left a message with the officer a day or two later after I found his business card in my purse letting him know I do not want to press any charges. It seemed all of this had fallen on deaf ears. I am now at the end of my rope and I feel you are my last option. I don't feel it's right for [defendant] to be sitting in jail *** or face going back to prison for something that I'm not 100 percent sure happened. Between being under the influence and people suggesting what had happened, I can't in clear conscience say for sure. I have been trying to rectify the situation since the beginning and gotten nowhere. The bottom line is I simply do not remember and I cannot get on the stand under oath and say either way that I do. Thank you for your time."

During defendant's trial, Razo testified that she wrote the letter because she was "in a different place" and just wanted to put the incident behind her. Razo added that although she could not remember specifics, she clearly remembered that defendant was the man on top of her in the bathroom.

¶ 10 Razo also testified regarding two prior incidents of domestic violence involving defendant. Razo testified that she had been arrested for retail theft in May 2015. As part of a plea agreement in that case, she agreed to testify truthfully in the instant case.

¶ 11 John Dyke, a sheriff's deputy, testified that he interviewed Razo at the hospital on the morning of October 12, 2014. Razo did not appear to be under the influence of alcohol at that time. Razo had bruising on her arms, back, and front. She also had a cut between her eyes, a

bruise on her chin, and a bruise on her left eye. He took photographs of her injuries. Later, Dyke went to Razo's residence and took photographs of her house. The photographs showed that there was blood on Razo's deck and that her front door was damaged.

¶ 12 Henry Thomas Clepper testified as a defense witness. Clepper stated that he arrived at a bar in Utica at approximately 10 p.m. on October 10, 2014, and left the bar between 2:45 and 3 a.m. Clepper saw defendant at the bar at approximately 10:30 p.m. Clepper believed defendant left the bar between 2:30 and 3 a.m., but Clepper did not know exactly what time defendant left. Clepper stated that defendant left the bar before Clepper did.

¶ 13 The jury found defendant guilty of domestic battery, and the court sentenced defendant to five years' imprisonment.

¶ 14 ANALYSIS

¶ 15 I. Violation of Rule 431(b)

¶ 16 Defendant argues that the circuit court failed to comply with Rule 431(b) when it failed to ask each potential juror individually if he or she understood and accepted the principles set forth in Rule 431(b). Defendant acknowledges that he failed to preserve this issue, but asks that we review it under the plain error doctrine. The State concedes that the court failed to comply with Rule 431(b) but argues that the plain error doctrine does not apply.

¶ 17 "The plain-error rule bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved claims of error in specific circumstances." *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

> "The plain error doctrine is applicable when: ' "(1) a clear or obvious error occurred and 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, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." ' " *People v. Clark*, 2016 IL 118845, ¶ 42 (quoting *Thompson*, 238 Ill. 2d at 613, quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)).

Here, defendant argues that the first prong of the plain error doctrine applies. In determining whether the evidence was closely balanced such that forfeiture is excused under the first prong of plain error, we "must evaluate the totality of the evidence and conduct a qualitative, commonsense assessment of it within the context of the case." *People v. Sebby*, 2017 IL 119445, ¶ 53.

¶ 18 We find that the first prong of the plain error doctrine does not apply because the evidence in the instant case was not closely balanced. Razo testified that defendant, her ex-husband, attacked her in the early morning hours of October 11, 2014. Razo stated that defendant pushed and hit her, and stomped on her chest and stomach. Razo said defendant told her he entered her house by breaking the lock on her front door. Razo's testimony is supported by the photographs of her injuries that were taken at the hospital and the photographs of the broken lock on her door.

¶ 19 We acknowledge that Razo wrote a letter to defense counsel stating that she could not remember what happened, and she had been under the influence of alcohol, Xanax, and pain medication when she talked to the officer. However, Razo testified at trial that she wrote the letter because she just wanted to be finished with the case. The letter did not say that Razo could not remember whether defendant or a different person attacked her; it just generically said she could not remember what happened. Significantly, Razo testified at the trial that she could not

remember all the details of the attack, but she was sure defendant was the one who attacked her. We note that Razo testified that defendant slept at her house after he attacked her and did not leave her house until later after Razo went out to purchase food and alcohol. The incident Razo described was not one where she only got a brief look at her attacker. Additionally, the photographs of Razo's injuries were objective evidence that she had been injured.

¶ 20 We reject defendant's reliance on *Sebby* in support of his argument that the evidence in this case was closely balanced. In *Sebby*, the court found that the evidence was closely balanced in that the case turned on the credibility of the witnesses where there was no extrinsic evidence and two different credible versions of events were presented by the State's witnesses and the defendant's witnesses. *Id.* ¶ 63. Here, unlike *Sebby*, there was extrinsic evidence corroborating Razo's version of events, namely, the photographs of her injuries. Also, unlike in *Sebby*, there were not two opposing versions of events. Razo's testimony provided the only account of the incident. Although she stated in the letter to defense counsel that she could not remember what happened, she explained at trial that she wrote the letter because she was "in a different place" and just wanted to put the incident behind her. Again, Razo testified that she clearly remembered that defendant was the man who attacked her.

¶ 21 Finally, we reject defendant's argument that Clepper's "alibi" testimony rendered the evidence closely balanced. Clepper testified that he saw defendant at a bar on the evening of the incident until 2:30 or 3 a.m., but he did not know the exact time defendant left the bar. Defendant provided no evidence concerning his whereabouts after he left the bar. We acknowledge that Razo testified that she was attacked when she arrived home at approximately 2 a.m. However, Razo testified that defendant slept at her house after the attack and did not leave until later in the morning. At best, Clepper's testimony calls into question Razo's account as to

the timing of the attack, but it does not serve to otherwise undermine the account of the attack that Razo provided.

¶ 22 II. Prosecutorial Misconduct

¶ 23 Defendant argues that he was denied his constitutional right to a fair trial because the prosecutor engaged in prosecutorial misconduct. Specifically, defendant contends that the following statements made by the prosecutor minimized the reasonable doubt standard during closing argument. Defendant found the following comments objectionable:

> "[MR. GOODE (ASSISTANT STATE'S ATTORNEY)]: Lawyers, judges go to law school. That's where it starts for them. The first day they're all trained a certain way. When the facts of your case are bad, talk about the law. And when the law is bad for your case—
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> MR. KRAMARSIC [(DEFENSE COUNSEL)]: Judge, I'm going to object to this.
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> THE COURT: Overruled. It's argument.
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> MR. GOODE: Talk about reasonable doubt as much as you can. He mentioned it in opening. He mentioned it in closing. It's the highest standard in criminal law. It's not beyond any and all doubt. It's not beyond every doubt. It's not beyond a shadow of a doubt. It's beyond a reasonable doubt. It's also a burden that is met every day in courtrooms. Jails are full of people who have been found guilty of things beyond a reasonable doubt.
>
> MR. KRAMARSIC: Judge, I clearly object to this.
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> THE COURT: Sustained. Sustained. It's irrelevant and improper argument.

> MR. GOODE: It's a standard that is met every day in courtrooms in Illinois, across the country. Beyond a reasonable doubt is met every day. We have met that burden."

¶ 24 We find that the prosecutor's comments during closing argument were improper because they diminished the reasonable doubt standard. It is improper for a prosecutor to make comments during closing argument that "lessen[] the importance of the State's burden of proof by implying that reasonable doubt is merely a *pro forma* or a minor detail." *People v. Frazier*, 107 Ill. App. 3d 1096, 1102 (1982). For example, in *Frazier*, the court held that the prosecutor's remarks that " 'there [was] nothing magical about finding someone guilty beyond a reasonable doubt' " and that it was " 'done every day in courts all over the country' " were improper. *Id*. at 1101. Similarly, in *People v. Eddington*, 129 Ill. App. 3d 745, 780 (1984), the court found that the following remarks were improper:

> " 'A reasonable doubt means just that. It doesn't mean beyond all doubt. As long as you may have some doubt as to what exactly occurred, that doesn't mean the defendant is not guilty. That presumption of innocence vanishes as soon as you take your jury votes and the defendant is convicted. That's a presumption, nothing more. Don't let reasonable doubt stop you. That's a doubt based upon reason.' "

¶ 25 Here, the prosecutor's comments are analogous to the ones in *Frazier* and *Eddington*. The context of the remarks suggests that the prosecutor's aim was to "lessen[] the importance of the State's burden of proof by implying that reasonable doubt is merely a *pro forma* or a minor detail." *Frazier*, 107 Ill. App. 3d at 1102.

¶ 26 Having found the prosecutor's remarks to be improper, we now consider whether reversal is warranted. Defendant acknowledges that although he objected to the prosecutor's remarks at trial, he failed to preserve the issue in a posttrial motion. Defendant argues, however, that this issue is not subject to forfeiture because his argument that he was denied his constitutional right to a fair trial is a constitutional issue that he properly raised at trial. See *People v. Cregan*, 2014 IL 113600, ¶ 16 ("[C]onstitutional issues that were properly raised at trial and may be raised later in a postconviction petition" are not subject to forfeiture for failing to file a posttrial motion.). Defendant alternatively argues that if the error was forfeited, his trial counsel was ineffective for failing to preserve the issue and/or the plain error doctrine applies. The State makes no argument as to whether the constitutional issue exception applies in this case. Even assuming the constitutional issue exception to forfeiture applies, we find that the prosecutor's remarks did not result in reversible error.

¶ 27 When reviewing a prosecutor's comments during closing arguments, we consider "whether or not the comments engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from them." *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007).

> "Misconduct in closing argument is substantial and warrants reversal and a new trial if the improper remarks constituted a material factor in a defendant's conviction. [Citation.] If the jury could have reached a contrary verdict had the improper remarks not been made, or the reviewing court cannot say that the prosecutor's improper remarks did not contribute to the defendant's conviction, a new trial should be granted." *Id.*

¶ 28 Here, the prosecutor's remarks were not a material factor in defendant's conviction. We reiterate that the evidence in this case was not closely balanced. The photographs of Razo's injuries showed that she had extensive bruising all over her body. Although Razo admitted that she could not remember all the details of the incident, she expressly testified that defendant was the one who attacked her. Given the strong evidence of defendant's guilt, we find the prosecutor's improper remarks did not contribute to defendant's conviction. In reaching this conclusion, we note that the courts in *Frazier* and *Eddington* did not reverse solely on the basis of the improper remarks concerning the reasonable doubt standard. See *Frazier*, 107 Ill. App. 3d at 1100 (reversing on the basis that the admission of certain improper evidence severely prejudiced the defendant); *Eddington*, 129 Ill. App. 3d at 771 (reversing on the basis of cumulative error).

¶ 29 Defendant alternatively argues that if we find that he forfeited this issue, we should review the issue under the plain error doctrine or on the basis that his trial counsel was ineffective for failing to preserve the error. Because we have found that the prosecutor's improper statements did not constitute reversible error after applying the constitutional issue exception to forfeiture, we need not address defendant's forfeiture arguments.

¶ 30 CONCLUSION

¶ 31 The judgment of the circuit court of La Salle County is affirmed.

¶ 32 Affirmed.