2012 IL App (4th) 101006-U

Filed 6/1/12

NO. 4-10-1006

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
SHAWNTEZ A. BROWNING,	)	No. 08CF1250
Defendant-Appellant.	)	
	)	Honorable
	)	Lisa Holder White,
	)	Judge Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court.
Justices Steigmann and Appleton concurred in the judgment.

¶ 1 *Held*: The probative value of defendant's statement to the police officer inquiring whether the officer "could cut him a deal" was substantially outweighed by its prejudicial effect where, at the time of the statement, defendant had been arrested for two separate, unrelated incidents, and thus the trial court erred by admitting testimony regarding the statement.

¶ 2 **ORDER**

¶ 3 In September 2008, the State charged defendant, Shawntez A. Browning, with two counts of criminal sexual assault (720 ILCS 5/12-13(a)(1) (West Supp. 2007) (text of section effective until June 1, 2008)). After a September 2010 trial, the jury found defendant guilty on only one count of criminal sexual assault. Defendant filed a posttrial motion. At a joint hearing, the Macon County circuit court denied defendant's posttrial motion and sentenced him to six years' imprisonment for one count of criminal sexual assault. Defendant then filed a motion to reconsider his sentence, which the court denied in December 2010.

¶ 4 Defendant appeals, asserting the trial court erred by (1) denying his second motion *in limine* that sought to exclude his statement to Decatur police officer Paul Vinton, and (2) failing to comply with Illinois Supreme Court Rule 431(b) (eff. May 1, 2007). We reverse and remand.

¶ 5 I. BACKGROUND

¶ 6 The State's two charges alleged that, on or around February 18, 2008, defendant, by the use of force, committed an act of sexual penetration with S.L., in that he placed his sex organ in her sex organ. Defendant pleaded not guilty and sought a jury trial. In September 2010, defendant filed his second motion *in limine,* seeking to bar any testimony about a statement defendant made to Officer Vinton, in which "Defendant asked whether the officer would 'cut him a deal' if Defendant spoke about the charges." According to the motion, when the officer indicated he did not have any authority to make the deal, defendant invoked his right to remain silent. The motion asserted defendant's statement was not an admission of guilt but a jury could put too much emphasis on the statement during deliberations. Thus, defendant asserted the probative value of defendant's statement to Officer Vinton was far outweighed by its prejudicial effect.

¶ 7 Before defendant's September 2010 trial commenced, the court heard defendant's second motion *in limine* and denied it. The court noted it found the probative value of the statement outweighed its prejudicial effect. It noted inferences could be drawn from the statement and the jury would decide what inference was appropriate. The court also stated it felt defense counsel would be able to adequately cross-examine the circumstances of the statement to address the issue with the jury.

¶ 8 After denying the second motion *in limine*, the trial court commenced *voir dire* of the prospective jurors. The court put 14 prospective jurors in the jury box for questioning, including the 5 that are at issue on appeal. The court stated the following to the 14 prospective jurors:

> "I want to go over some propositions of law with you. I need to make sure that you understand and accept these principles of law. They are as follows: The Defendant is presumed not guilty at all stages of the trial. The People of the State of Illinois have the burden of proving the Defendant's guilt beyond a reasonable doubt. The Defendant is under no obligation to prove his innocence. The defendant has an absolute right to remain silent and cannot be required to testify. If the Defendant does not testify, his silence at trial cannot be used as any evidence or inference of his guilt."

The court then had to repeat the aforementioned language because one of the jurors had difficulty hearing. The court then asked each of the 14 prospective jurors individually whether they understood and accepted the propositions, and they all responded in the affirmative.

¶ 9 The prosecutor and defense counsel were allowed to question the prospective jurors, both of which did so primarily in groups of four jurors. With the first prospective juror defense counsel questioned, the following dialogue took place:

> "Q. Okay. Do you understand that the Defendant is not required to present evidence on his own behalf?
>
> A. (No response.)

Q. Do you need me to repeat that?

A. I'm not sure I understand.

Q. Do you understand the Defendant is not required to prove his innocence?

A. Yes."

Defense counsel then asked the next four prospective jurors if they understood "that the Defendant is not required to present any evidence on his own behalf," and each juror replied in the affirmative. Defense counsel then asked the next two sets of four prospective jurors, which included the five at issue, if they understood "the Defendant is not required to prove his innocence," and they all replied in the affirmative. Defense counsel questioned the remaining prospective jurors by asking them if they understood "the Defendant is not required to present evidence to prove his innocence."

¶ 10 During defendant's jury trial, Officer Vinton testified that, on August 23, 2008, he arrested defendant and transported him to jail. Officer Vinton did not recall telling defendant what he was being arrested for and noted the police "had 2 persons wanted at the time." After they arrived at the jail, Officer Vinton read defendant his *Miranda* rights (see *Miranda v. Arizona*, 384 U.S. 436 (1966)). Thereafter, defendant stated that, "if I [Officer Vinton] could cut him a deal, he'd talk to me." Defendant had nothing to say after that, and Officer Vinton turned him over to intake staff.

¶ 11 On cross-examination, Officer Vinton testified defendant stated that, if he, Officer Vinton, could cut him a deal, he would talk about the charges. However, defendant did not say what charges. Officer Vinton did not remember if he had specifically told defendant about the

criminal-sexual-assault case and believed he said he wanted to talk to defendant about "persons wanted." Officer Vinton testified the offense could have happened in February 2008, and thus it is possible defendant was not going to talk about this case at all.

¶ 12 The prosecutor did not mention defendant's statement to Officer Vinton in her closing arguments.

¶ 13 At the conclusion of the trial, the jury found defendant not guilty of the first count of criminal sexual assault and guilty of the second count of criminal sexual assault. Defendant filed a posttrial motion, asserting, *inter alia*, the trial court erred by denying his second motion *in limine*. At a joint November 2010 hearing, the court denied defendant's posttrial motion and sentenced him to six years' imprisonment. Defendant then filed a motion to reconsider his sentence, which the court denied after a December 14, 2010, hearing.

¶ 14 On December 15, 2010, defendant filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 606 (eff. Mar. 20, 2009). Thus, this court has jurisdiction over defendant's appeal pursuant to Illinois Supreme Court Rule 603 (eff. Oct. 1, 2010).

¶ 15 II. ANALYSIS

¶ 16 A. Defendant's Second Motion *In Limine*

¶ 17 Defendant alleges the trial court erred by denying his second motion *in limine*, seeking to prohibit the introduction of his statement to Officer Vinton. Specifically, he argues (1) the statement is inadmissible under Illinois Supreme Court Rule 402(f) (eff. July 1, 1997), and (2) the statement's prejudice outweighs its probative value. Since we find reversal is warranted based on the prejudicial nature of the evidence outweighing its probative value, we

need not address whether defendant's statement was inadmissible under Rule 402(f).

¶ 18 Defendant asserts the trial court erred by admitting defendant's statement to Officer Vinton because the danger of unfair prejudice of the statement outweighs its probative value. Generally, evidence is admissible if it is relevant to an issue in dispute and its probative value does not substantially outweigh its prejudicial effect. *People v. Johnson*, 208 Ill. 2d 53, 102, 803 N.E.2d 405, 433 (2003). The trial court possesses the responsibility to determine the admissibility of evidence, and a reviewing court will not disturb the trial court's ruling on a motion *in limine* absent an abuse of discretion. *People v. Kirchner*, 194 Ill. 2d 502, 539, 743 N.E.2d 94, 113-14 (2000). "A trial court abuses its discretion where its decision is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the trial court's view." *People v. Atherton*, 406 Ill. App. 3d 598, 615, 940 N.E.2d 775, 791 (2010).

¶ 19 This court has found the prejudicial effect of certain evidence " 'means that the evidence in question will somehow cast a negative light upon the defendant for reasons that have nothing to do with the case on trial.' " *People v. Lynn*, 388 Ill. App. 3d 272, 278, 904 N.E.2d 987, 992 (2009) (quoting *People v. Dea*, 353 Ill. App. 3d 898, 903, 819 N.E.2d 1175, 1179 (2004) (Steigmann, J., specially concurring)). A defendant's commission of other crimes is a kind of evidence that possesses " 'prejudicial effects.' " *Dea*, 353 Ill. App. 3d at 903, 819 N.E.2d at 1179 (Steigmann, J., specially concurring). Thus, since defendant's statement had possible prejudicial effect, the trial court needed to conduct a balancing test. See *Dea*, 353 Ill. App. 3d at 903-04, 819 N.E.2d at 1179 (Steigmann, J., specially concurring). In conducting the balancing tests, Illinois law is very similar to Federal Rule of Evidence 403, which has been explained as follows:

" 'Once the weighing process is begun, there is no simple right or wrong answer [regarding the admissibility of relevant evidence]. The judge is open to persuasion. Everyone involved in the decision will visualize a balancing scale. That scale, however, is not evenly balanced. It starts out tipped toward admissibility because there is presumptive admissibility of probative evidence under [Federal Rule of Evidence] 403. The opponent of the evidence bears the burden of tipping the scale toward exclusion.' " *Dea*, 353 Ill. App. 3d at 904, 819 N.E.2d at 1179-80 (Steigmann, J., specially concurring) (quoting T. Mauet & W. Wolfson, Trial Evidence 5 (1997)).

¶ 20 In this case, defendant's statement indicating he would talk if he received a deal was ambiguous. When Officer Vinton took defendant into custody, it had been six months since the alleged offense in this case had occurred and defendant was wanted on an unrelated matter as well. The record does not reveal what defendant was willing to talk about and on what, if any, charged offense he was going to make a deal. With the statement, defendant does not admit guilt to any specific crime. Thus, defendant's statement to Officer Vinton has very little probative value.

¶ 21 On the other hand, it is prejudicial to defendant that he was only willing to talk to the police if he got something in return. It is also clearly prejudicial if defendant's statement was regarding another crime. Evidence that suggests the accused has committed crimes or acts of misconduct that are distinct and entirely unrelated to the one for which he is being tried is both

incompetent and prejudicial. *People v. Campos*, 227 Ill. App. 3d 434, 450, 592 N.E.2d 85, 96 (1992). Moreover, for cross-examination to show his statement was not related to the crime at issue, defense counsel would have to suggest defendant had committed other crimes or acts of misconduct for which he was willing to talk to the police about. Since cross-examination would require suggesting defendant had committed other non-related crimes or misconduct, cross-examination would not allow defendant to address the circumstances of his statement to Officer Vinton as it would require suggesting more prejudicial facts. Under these facts, the prejudicial nature of the evidence substantially outweighs its probative value. Accordingly, the trial court erred by denying defendant's second motion *in limine*.

¶ 22 The State argues that, even with the evidence of defendant's statement to Officer Vinton, defendant received a fair trial. Our supreme court has found the "improper introduction of other-crimes evidence is harmless error when a defendant is neither prejudiced nor denied a fair trial based upon its admission." *People v. Nieves*, 193 Ill. 2d 513, 530, 739 N.E.2d 1277, 1285 (2000). In this case, defendant's defense was the State's physical evidence could only show one act of penetration and the State failed to prove force and a lack of consent. Officer Vinton's testimony suggested defendant had committed other crimes or misconduct, indicating defendant was a bad person, and possibly that defendant was willing to make a deal in this case because he did commit a crime against S.L. Since the improper evidence supported the State's claim the intercourse was not consensual, the evidence prejudiced defendant. Accordingly, we find the State has failed to show the error was harmless and thus defendant is entitled to a new trial.

¶ 23 B. Rule 431(b) Instruction

¶ 24 Defendant also argues the trial court erred by failing to comply with Rule 431(b)

in conducting *voir dire*. While we find no error occurred in defendant's first trial (see *People v. Ingram*, 409 Ill. App. 3d 1, 12-13, 946 N.E.2d 1058, 1069 (2011)), we note that, on remand, the trial court should use the same language as Rule 431(b) in questioning the jurors about the four principles.

¶ 25 III. CONCLUSION

¶ 26 For the reasons stated, we reverse defendant's conviction and sentence and remand the cause to the Macon County circuit court for a new trial.

¶ 27 Reversed and remanded.