2014 IL App (4th) 130457-U

NO. 4-13-0457

FILED
December 16, 2014
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

| | | |
|---|---|---|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from |
| Plaintiff-Appellee, | ) | Circuit Court of |
| v. | ) | Adams County |
| JAMES M. ALTGILBERS, | ) | No. 13CF8 |
| Defendant-Appellant. | ) | |
| | ) | Honorable |
| | ) | Mark A. Drummond, |
| | ) | Judge Presiding. |

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Knecht and Appleton concurred in the judgment.

**ORDER**

¶ 1 *Held*: The appellate court affirmed, rejecting defendant's claim that the prosecutor's rebuttal closing argument denied him a fair trial. The appellate court also accepted the State's concession that defendant was entitled to monetary credit for his pretrial confinement and remanded the case to the trial court with directions to provide the appropriate credit due.

¶ 2 Following a March 2013 trial, a jury convicted defendant, James M. Altgilbers, of (1) participation in methamphetamine production (720 ILCS 646/15(a)(1) (West 2012)) and (2) possession of methamphetamine (5 or more grams but less than 15 grams) (720 ILCS 646/60(b)(2) (West 2012)). In May 2013, the trial court sentenced defendant to 15 years in prison for participation in methamphetamine production and vacated his remaining conviction. The court also imposed a $2,000 assessment pursuant to section 80(a)(2) of the Methamphetamine Control and Community Protection Act (Methamphetamine Control Act) (720 ILCS 646/80(a)(2) (West 2012)).

¶ 3 Defendant appeals, arguing that (1) the prosecutor's rebuttal closing argument was improper and denied him a fair trial and (2) the trial court erred by failing to provide the appropriate monetary credit against his Methamphetamine Control Act assessment. We affirm and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 A. The Evidence Presented at Defendant's Trial

¶ 6 In January 2013, the State charged defendant, in pertinent part, with (1) aggravated participation in methamphetamine production (720 ILCS 646/15(b)(1)(A) (West 2012)) (count I) and (2) possession of methamphetamine (5 or more grams but less than 15 grams) (720 ILCS 646/60(b)(2) (West 2012)) (count II). Approximately one week prior to defendant's March 2013 trial, the State amended count I of its information to remove the aggravating nature of that charge, opting instead to charge defendant with participation in methamphetamine production (720 ILCS 646/15(a)(1) (West 2012)).

¶ 7 The evidence presented at defendant's jury trial showed that in January 2013, Quincy police officers Chris Billingsly and Craig Russell traveled to a garage that had been converted into an apartment, intending to "pick [defendant] up and question him" about an unrelated matter. As they approached the only door, Billingsly smelled a chemical odor that—in his experience—was consistent with methamphetamine manufacturing. Billingsly and Russell heard the muffled sounds of two men talking in the apartment and the sound of "a liquid substance being shaken profusely." Billingsly explained that the "shake and bake" method of methamphetamine production involved combining multiple ingredients into a container and shaking it to make the drug. The officers were at the door listening for about two minutes when defendant exited. As defendant did so, a pungent white chemical cloud followed him. Billingsly suspected that the

apartment housed an active methamphetamine lab. Thereafter, Billingsly arrested defendant. (Raymond Holtshouser—the second occupant of the apartment—is not a party to this appeal.)

¶ 8 Police later executed a search warrant on the apartment and seized (1) lithium batteries that had their protective covering removed; (2) a bottle of "Coleman" fuel; (3) a hydrochloric acid generator; (4) a can of "Draino"; (5) a 26-ounce bottle of iodized salt; (6) plant fertilizer spikes; (7) tubing; (8) cold packs; and (9) coffee filters, a tin container, and bottles that all had a pink residue. Billingsly explained that the items seized were all that was required for methamphetamine production. Field testing identified the pink residue as pseudoephedrine, the main ingredient in methamphetamine.

¶ 9 Police also seized a piece of tinfoil with "a black chalky-like substance," a small piece of straw, and a coffee cup with white residue. Billingsly noted that one way to ingest methamphetamine involved placing the drug on tinfoil, applying a flame, and then using a straw to inhale the smoke produced. Subsequent tests on the coffee cup revealed that (1) the white residue was methamphetamine and (2) defendant's latent fingerprint was on the coffee cup. Defendant's then girlfriend, Marion Nicole Aragon, rented the apartment that police searched.

¶ 10 The remaining pertinent evidence showed that (1) the Illinois State Police Methamphetamine Response Team determined that the items and chemicals recovered from the apartment were indicative of an active methamphetamine lab; (2) defendant's mother and sister stated that although defendant lived with them, he was not in their home on the day at issue; (3) defendant's sister testified that defendant stayed at the apartment Aragon rented; (4) male clothing seized by police during the search of Aragon's apartment, which included a pair of underwear, belonged to defendant; (5) from August to October 2012, defendant purchased pseudoephedrine on 7 different dates; (6) in November and December 2012, defendant attempted

unsuccessfully to purchase pseudoephedrine on 6 different occasions; (7) in 2012, Aragon purchased pseudoephedrine 18 different times; and (8) in 2012, Holtshouser purchased pseudoephedrine 19 different times.

¶ 11 Defendant did not present any evidence.

¶ 12 B. The Pertinent Portions of the Parties' Closing Arguments

¶ 13 The prosecutor's closing argument consisted of his acknowledgement that the State's case was "based for the most part on circumstantial evidence" in that the State did not present direct evidence that defendant (1) participated in manufacturing methamphetamine with the intent to produce the drug or (2) knowingly possessed methamphetamine. The prosecutor analogized the case to the "Wheel of Fortune" television game show in that the jury was provided letters in the form of testimony and evidence to fill in some of the words, but the jury was going to have to make "reasonable inferences of other facts which tend to show either the guilt or innocence of defendant." The prosecutor then discussed the direct and circumstantial evidence presented to show defendant's guilt beyond a reasonable doubt.

¶ 14 In response, defendant's counsel argued that the State had not proved beyond a reasonable doubt that defendant produced or possessed methamphetamine. Specifically, defense counsel argued, as follows:

> "And I can't stress this enough. You will hear it again from [the trial court], and you will hear it again in the written instructions that you get to take back in the jury room. It is not up to [defendant] to prove his innocence. And you can't find him guilty simply because of where he was at and who he was with. And the State has failed to prove that any of the items there were procured,

obtained[,] or used by [defendant] in the manufacturing of meth[amphetamine], that day or any day before that."

¶ 15 The prosecutor, in his rebuttal argument, claimed that "nothing is wrong with circumstantial evidence." Specifically, the prosecutor noted that at the time police arrested defendant, he exited the apartment followed by a pungent chemical odor indicative of ongoing methamphetamine manufacturing. The prosecutor then described over 15 pieces of circumstantial evidence presented, which included, in part, the coffee filters, cold packs, salt, Coleman fuel, and other ingredients used in the methamphetamine-manufacturing process. Initially, the prosecutor argued that "each one of these things in and of themselves[—]maybe there is an innocent explanation." After noting each piece of circumstantial evidence separately, the prosecutor would tell the jury that "so now we have *** to find *** innocent explanations." With each mention of an additional specific piece of circumstantial evidence, the prosecutor would increase the number of "innocent explanations" required. The prosecutor concluded by asking, "Innocent explanation or circumstantial evidence that the defendant did exactly what [the State] said [defendant] did, that [defendant] was participating in making methamphetamine, that [defendant] was assisting in making methamphetamine, and that [defendant] possessed methamphetamine?"

¶ 16 C. The Pertinent Instruction Provided to the Jury

¶ 17 After the presentation of evidence, the trial court instructed the jury, in pertinent part, as follows:

"To sustain the charge of unlawful participation in methamphetamine manufacturing, the State must prove the following propositions: The first proposition, that the defendant participated in the manufacture of methamphetamine; and [the] second proposi-

tion, that he did so with the intent that methamphetamine [or] a substance containing methamphetamine be produced."

¶ 18 D. The Jury's Verdict and the Trial Court's Sentence

¶ 19 The jury found defendant guilty of (1) participation in methamphetamine production and (2) possession of methamphetamine. In May 2013, the trial court sentenced defendant to 15 years in prison for participation in methamphetamine production and vacated his remaining conviction. The court also imposed, in pertinent part, a $2,000 assessment pursuant to section 80(a)(2) of the Methamphetamine Control Act.

¶ 20 This appeal followed.

¶ 21 II. ANALYSIS

¶ 22 A. The Prosecutor's Rebuttal Closing Argument

¶ 23 Defendant argues that the prosecutor's rebuttal closing argument was improper and denied him a fair trial. Specifically, defendant contends that the prosecutor's repeated suggestion that an "innocent explanation" would defeat the incriminating inferences to be drawn from the circumstantial evidence impermissibly shifted the burden of proof from the State to him. We disagree.

¶ 24 We note that in his brief to this court, defendant acknowledges that he neither objected to the prosecutor's rebuttal closing argument nor filed a posttrial motion raising the issue.

¶ 25 "To preserve a claim for review, a defendant must both object at trial and include the alleged error in a written posttrial motion." *People v. Thompson*, 238 Ill. 2d 598, 611, 939 N.E.2d 403, 412 (2010). Failure to do so results in the forfeiture of that claim on appeal. *Thompson*, 238 Ill. 2d at 612, 939 N.E.2d at 412. A defendant can avoid the harsh consequences of forfeiture under the plain-error doctrine. *Thompson*, 238 Ill. 2d at 613, 939 N.E.2d at 413.

¶ 26 The plain-error doctrine applies 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. Piatkowski*, 225 Ill.2d 551, 565, 870 N.E.2d 403, 410-11 (2007).

¶ 27 The State posits that before this court can consider whether plain error occurred, we *must* first determine whether any error occurred at all. We disabuse the State of any notion that this court is confined under such a mandatory framework. As a matter of convention, reviewing courts *typically* undertake plain-error analysis by first determining whether error occurred at all. *People v. Sargent*, 239 Ill. 2d 166, 189, 940 N.E.2d 1045, 1059 (2010). "If error is found, the court then proceeds to consider whether either of the [aforementioned] two prongs of the plain-error doctrine have been satisfied." *Sargent*, 239 Ill. 2d at 189-90, 940 N.E.2d at 1059. However, when a record clearly shows that plain error did not occur, we can reject that contention without further analysis. *People v. Bowens*, 407 Ill. App. 3d 1094, 1108, 943 N.E.2d 1249, 1264 (2011). Nonetheless, we choose to address whether any error was committed by the prosecutor's rebuttal argument.

¶ 28 In *People v. Montgomery*, 373 Ill. App. 3d 1104, 1114, 872 N.E.2d 403, 412 (2007), this court provided the following general guidance regarding a prosecutor's closing arguments:

> "Prosecutors are afforded wide latitude in making closing remarks and may comment on the evidence and draw all legitimate inferences from the evidence, even if unfavorable to the defendant.

> [Citation.] Reviewing courts must consider the closing argument as a whole, rather than focusing on selected phrases or remarks. [Citation.] Improper closing remarks require reversal only if they substantially prejudice a defendant, taking into account (1) the content and context of the comment, (2) its relationship to the evidence, and (3) its effect on the defendant's right to a fair and impartial trial. [Citation.] In addition, our supreme court has stated that '[a] reviewing court will find reversible error only if the defendant demonstrates that the improper remarks were so prejudicial that real justice was denied or that the verdict resulted from the error.' "

¶ 29 In this case, defendant claimed during his closing argument that the State had failed to prove beyond a reasonable doubt that any of the materials the State seized were procured or utilized by defendant to manufacture methamphetamine. The State was entitled to respond—in its rebuttal closing argument—to any claims defendant made regarding the meaning of the evidence presented. See *People v. Ramos*, 396 Ill. App. 3d 869, 875, 920 N.E.2d 504, 510 (2009) (During rebuttal closing arguments, "prosecutors are entitled to respond to comments made by the defendant.").

¶ 30 Here, keeping in mind the two propositions that the State had to prove beyond a reasonable doubt to obtain a conviction for participation in methamphetamine manufacturing, the prosecutor argued that the circumstantial evidence presented showed that (1) a cloud of chemical smoke followed defendant at the time he exited the apartment and (2) the later search of the apartment showed that all the materials required to manufacture methamphetamine were located

therein. Although the prosecutor argued that "innocent explanations" may exist for the circumstances surrounding defendant at that time, the prosecutor also argued that the jury could infer from those same circumstances that defendant (1) participated in the manufacture of methamphetamine and (2) intended to manufacture methamphetamine.

¶ 31 Accordingly, we reject defendant's claim that he was denied a fair trial as a result of the prosecutor's rebuttal closing argument. In considering the closing arguments presented by both parties, the record clearly showed that the focus of the prosecutor's closing argument concerned only the reasonable inferences the jury should draw from the circumstantial evidence presented. Contrary to defendant's claim, we conclude that the prosecutor's remarks during his rebuttal closing argument did not suggest that defendant had to provide an innocent explanation.

¶ 32 Despite our conclusion, we reiterate the following suggestion we provided in *Montgomery* regarding the use of the term "explanation" during any portion of a prosecutor's closing argument:

> "[W]e nonetheless suggest that terms like 'explanation,' *** not be used in a prosecutor's closing argument. A defendant is likely to object to their use at trial, on appeal, or both, and their use could prove problematic. In the heat of argument, when a prosecutor uses such a term, he or she might well inadvertently say something that would in fact constitute an impermissible comment on a defendant's refusal to testify. See, for example, *People v. Herrett*, 137 Ill. 2d 195, 213, 561 N.E.2d 1, 9 (1990) (concluding that the prosecutor 'exceeded the bounds of fair comment when he referred to the failure of the defendant to explain his presence' at the crime

scene because that comment referred to the defendant's failure to testify)." *Montgomery*, 373 Ill. App. 3d at 1115, 872 N.E.2d at 413.

¶ 33 B. Methamphetamine Control Act Assessment

¶ 34 Defendant argues that the trial court erred by failing to provide the appropriate monetary credit against his Methamphetamine Control Act assessment. Specifically, defendant contends that he was entitled under section 110-14 of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14 (West 2012)) to a $5 per day credit for the 146 days he remained in custody prior to his sentencing. In response, the State, citing *People v. Jones*, 223 Ill. 2d 569, 587-592, 861 N.E.2d 967, 978-981 (2006), concedes that defendant is entitled to this credit. We accept the State's concession.

¶ 35 Section 80(a)(2) of the Methamphetamine Control Act, provides, as follows:

> "(a) Every person convicted of a violation of this Act ***
>
> shall be assessed for each offense a sum fixed at:
>
> ***
>
> (2) $2,000 for a Class 1 felony[.]"
>
> 720 ILCS 646/80(a)(2) (West 2012).

¶ 36 Section 110-14 of the Code provides that a defendant "against whom a *fine* is levied" shall be allowed a credit of $5 per day for each day incarcerated on a bailable offense when the defendant does not supply bail. (Emphasis added.) 725 ILCS 5/110-14 (West 2012)). "A fine is a pecuniary punishment imposed as part of a sentence on a person convicted of a criminal offense." (Internal quotation marks omitted.) *Jones*, 223 Ill. 2d at 581, 861 N.E.2d a 975.

¶ 37 In *Jones*, 223 Ill. 2d at 587-92, 861 N.E.2d at 978-81, the supreme court consid-

ered whether a $500 assessment levied pursuant to section 411.2(a) of the Illinois Controlled Substances Act (Controlled Substances Act) (720 ILCS 570/411.2(a) (West 2004)) was a fine. In concluding that it was a fine subject to presentencing credit under section 110-14 of the Code, the supreme court noted that section 411.2(f) of the Controlled Substances Act (720 ILCS 570/411.2(f) (West 2004)) referred to the assessment as a penalty, which "denotes a fine, not a fee." *Jones*, 223 Ill. 2d at 588-89, 861 N.E.2d at 979. We note that section 80(f) of the Methamphetamine Control Act is substantially similar to section 411.2(f) of the Controlled Substances Act and also refers to the assessment as a penalty.

¶ 38 Accordingly, because we conclude that the $2,000 assessment imposed by the trial court was a fine, we remand to the court with directions to determine the appropriate presentence credit defendant is entitled to receive against that fine under section 110-14 of the Code.

¶ 39 III. CONCLUSION

¶ 40 For the reasons stated, we affirm the trial court's judgment and remand with directions that the court determine the appropriate presentence credit due under section 110-14 of the Code. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 41 Affirmed, cause remanded with directions.