2022 IL App (4th) 210034-U

NO. 4-21-0034

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
May 12, 2022
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. VANESA ALMANZA, Defendant-Appellant.	) Appeal from the) Circuit Court of) Livingston County) No. 20CF52)) Honorable) Jennifer Hartmann Bauknecht,) Judge Presiding.

JUSTICE CAVANAGH delivered the judgment of the court.
Justices Harris and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: Absent a clear or obvious error in the admission of evidence that defendant committed an uncharged crime of resisting a peace officer, the doctrine of plain error does not avert the forfeiture of the asserted error, and the alternative claim of ineffective assistance fails.

¶ 2 In the circuit court of Livingston County, a jury found the defendant, Vanesa Almanza, guilty of aggravated battery (720 ILCS 5/12-3.05(d)(4)(i) (West 2020)). The court sentenced her to probation for 24 months and to 180 days in jail, with 60 days stayed. She appeals, arguing that the State compromised the fairness of her trial by presenting evidence that she committed an offense in addition to the one for which she was on trial.

¶ 3 Specifically, it emerged from the testimonies of two police officers that defendant committed not only aggravated battery but also resisting a peace officer (*id.* § 31-1(a)). Illinois Rule of Evidence 404(b) (eff. Jan. 1, 2011) provided that "[e]vidence of other crimes *** [was]

not admissible to prove the character of a person in order to show action in conformity therewith." In other words, the State was prohibited from suggesting to the jury that the defendant had committed another bad act and that, therefore, being a bad person (as evidenced by her commission of this other bad act), she also must have committed the charged offense.

¶ 4 The defense, however, never made a contemporaneous objection to propensity evidence, let alone reiterated the objection in a posttrial motion. Those two omissions in the proceedings below resulted in a procedural forfeiture of the issue. Because we find no clear or obvious violation of Rule 404(b), the doctrine of plain error does not avert the forfeiture. Absent a clear or obvious error, we reject defendant's characterization of defense counsel's performance as ineffective. Therefore, we affirm the judgment.

¶ 5 I. BACKGROUND

¶ 6 The information accused defendant of committing two offenses on February 10, 2020: count I, aggravated battery (720 ILCS 5/12-3.05(d)(4)(i) (West 2020)), and count II, resisting a peace officer (*id.* § 31-1(a)).

¶ 7 On September 21, 2020, immediately before jury selection, the State moved to dismiss count II. The circuit court granted the motion. A jury was chosen, and the trial proceeded on count I alone.

¶ 8 The State called Watson McKee, a police officer for the village of Dwight, Illinois. He testified in substance as follows. On February 10, 2020, around 7:50 p.m., he was dispatched to Palm Apartments in Dwight for the purpose of "[s]ubject removal from an apartment." He went to an apartment upstairs. He was wearing a long-sleeved police uniform, including a badge. Standing in the doorway of the apartment, he met Kristine Wahl and defendant, who were cursing at one another. Both of them appeared to be "highly intoxicated." McKee ascertained that

defendant was the one to be removed from the apartment. At his direction, defendant came out of the apartment, into the common area, or hallway. McKee requested defendant's identification. Defendant replied that he "didn't need it," and she attempted to walk back into the apartment. McKee extended his arm across the threshold of the apartment, to prevent defendant from reentering. She bumped into his outstretched arm, stepped back, and slapped him on the other arm. McKee put his pen and notepad back in his pocket and informed her that she was under arrest. When he reached for her in order to put on the handcuffs, she slapped him a second time.

¶ 9 McKee succeeded in getting the handcuffs on defendant. He described the trip from the upstairs hallway to his squad car as follows:

> "A. She was with her hands behind her back; and I had a hold of her arms trying to carry her down the stairs. She was grabbing with her hands at my belt. She, if I had stopped to ensure that we weren't just both of us falling down the stairs, she would collapse to her, sit down on the stairs.
>
> Q. Like a dead weight?
>
> A. Right. And I had to pick her up and carry her further down the stairs. Eventually we made it out the front door; and I was walking her to my squad; and she grabbed my cord for my radio and pulled my mike off my uniform. She was continuing to grab me with her hands behind her back."

¶ 10 McKee had called for backup as soon as he began putting the handcuffs on defendant, but the closest squad car was 15 minutes away. As McKee was attempting to get defendant into the squad car, an off-duty police officer, Emily Frobish, passed by.

¶ 11 On cross-examination, McKee testified that defendant was so intoxicated that she was stumbling and had difficulty walking. On redirect examination, McKee testified that as he

struggled to get defendant safely down the stairs of the apartment building, she mistook him for another Dwight police officer:

"A. She had repeated a few times, come on, Butts. She believed I was Officer Butts, another officer with Dwight.

Q. Butts is an officer with Dwight?

A. Yes.

Q. Do you look like him?

A. No."

¶ 12 The prosecutor further asked McKee on redirect examination:

"Q. Did you ask her to stop resisting or some words of that sort?

A. From the very get go.

Q. What were you saying?

A. I told her to stop resisting and that she was under arrest.

Q. Did she respond to you at all?

A. I don't recall what she had been saying. No.

* * *

Q. Can you describe her demeanor?

A. Actively resisting and pulling away and I'm sure it had a lot to do with the level of intoxication."

¶ 13 The State next called Frobish, who testified that she was a detective with the Livingston County Sheriff's Department. As she was traveling in her car with her husband and children on Mazon Avenue, she passed by Palm Apartments and "saw Officer McKee outside his squad car struggling with a female." Frobish called McKee's cell phone, but he did not answer.

Frobish had her husband circle back around, and she got out of the car and went over and asked McKee if he was all right and if any other unit was coming. The prosecutor asked Frobish:

"Q. Who was he, who was he holding onto; or what was he doing?

A. At that point in time, it was a female. She was cuffed behind the back; but she kept flailing around; and like she would fall down to the ground and get back up; and it was like she was trying to get away from him.

Q. Can you describe flailing around just what that, what those observations are? Flailing with her body?

A. Well, her arms were behind her back but just pulling away. Just actively trying to get him to let go of her at that point in time."

¶ 14 On cross-examination, defense counsel asked Frobish:

"Q. Now, did you, when you went back, did you speak with Miss Almanza?

A. No.

Q. So you wouldn't be able to comment on her level of intoxication?

A. No. I could just hear she was yelling.

Q. Did you know she was intoxicated?

A. No.

Q. When a person is intoxicated, do they typically have poor balance?

A. Yeah.

Q. Trouble walking from time to time?

A. Sure."

¶ 15 II. ANALYSIS

¶ 16 The import of testimony by McKee and Frobish was that defendant resisted McKee as he struggled to get defendant from the upstairs of the apartment building, down the stairs, across the lawn, and into his squad car. Her acts of resistance were a crime (see 720 ILCS 5/31-1(a) (West 2020))—but an uncharged crime, given that the circuit court, on the State's motion, had dismissed count II. Evidence of other bad acts is inadmissible to prove a defendant's propensity to commit the charged offense (with some exceptions that are irrelevant here). See Ill. R. Evid. 404(b) (eff. Jan. 1, 2011). In other words, the State is forbidden to use, explicitly or implicitly, the following propensity logic in a trial: the defendant committed an uncharged offense; only a bad person would commit this uncharged offense; being a bad person, the defendant must have committed the charged offense as well.

¶ 17 Defense counsel never made a propensity objection in the trial, let alone reiterated the objection in a posttrial motion. Defendant acknowledges that these omissions should normally result in a forfeiture of the issue. "Both a trial objection and a written post-trial motion raising the issue are required for alleged errors that could have been raised during trial." (Emphases omitted.) *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defendant claims, however, that the evidence in the jury trial was closely balanced and that the doctrine of plain error, therefore, should avert the forfeiture. See *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). According to defendant, the evidence was closely balanced because when hitting McKee, she might have mistook him for a civilian; she might have been unaware he was a police officer until he put the handcuffs on her. In a close case, in which the error might have made a difference in the verdict, the plain error doctrine will disregard a forfeiture. See *id.* For an alternative to her plain-error argument, defendant claims that failing to make a propensity objection was ineffective assistance of counsel. A claim of

ineffective assistance may be raised for the first time on direct appeal. See *People v. Parker*, 288 Ill. App. 3d 417, 421 (1997).

¶ 18 When addressing a claim of plain error and an alternative claim of ineffective assistance, we first should consider whether a plain or obvious error was committed, for "[a]bsent a clear or obvious error ***, neither the doctrine of plain error nor a theory of ineffective assistance affords any relief from the forfeiture." *People v. Jones*, 2020 IL App (4th) 190909, ¶ 179. If the asserted error is less than clear or obvious, the "strong presumption" is unrebutted that "counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). The question, then, is whether the resistance testimony was clearly or obviously inadmissible under Illinois Rule of Evidence 404(b) (eff. Jan. 1, 2011).

¶ 19 "Evidence of other crimes *** is not admissible to prove the character of a person in order to show action in conformity therewith," Rule 404(b) says. *Id.* In short, propensity evidence is generally inadmissible. The rule adds, however, that "[s]uch evidence may *** be admissible for other purposes, such as proof of motive ***." *Id.* "All relevant evidence is admissible, except as otherwise provided by law. Evidence which is not relevant is not admissible." Ill. R. Evid. 402 (eff. Jan. 1, 2011). " 'Relevant evidence' " is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ill. R. Evid. 401 (eff. Jan. 1, 2011).

¶ 20 A fact of consequence to the determination of the action was that defendant slapped McKee. Arguably, that defendant was extremely intoxicated has some tendency to increase the probability that she slapped McKee, because extreme intoxication commonly impairs judgment. Defendant writes in her brief, "The testimony of eyewitnesses, including Frobish, indicated that

[defendant] was deeply intoxicated when the incident took place." Also, defendant notes the "extensive evidence" that she was "drunkenly belligerent." Drunken belligerence can express itself as aggression.

¶ 21 Evidence that a person misbehaved only because the person was drunk would not necessarily be "[e]vidence of a person's character or a trait of character." Ill. R. Evid. 404(a) (Jan. 1, 2011). Such evidence would not purport to represent the person's essential character, as propensity evidence would do. The point would be that the person was drunk and, therefore, was not his or her normal self.

¶ 22 In addition to proving intoxication, the resistance testimony also tended to prove defendant's motive of making McKee's job as difficult as possible. Slapping him would have been consistent with that motive. See Ill. R. Evid. 404(b) (eff. Jan. 1, 2011).

¶ 23 Arguably, the resistance testimony also was admissible as part of the continuing narrative. "[O]ther-crimes evidence is admissible as part of a continuing narrative to explain aspects of the crime that would otherwise be implausible." *People v. Slater*, 393 Ill. App. 3d 977, 992-93 (2009). Without the evidence that defendant continued to give McKee grief from the upstairs of the apartment building to the squad car, it might have seemed less plausible to the jury that she slapped him in the first place. Without a continuing narrative, the jury might have been left with the false impression that nothing of note happened next. The jury might have had a hard time believing that defendant slapped McKee if, moments later, she meekly submitted (apparently) to his arresting her. To put the slapping in a realistic context, the jury needed the rest of the story.

¶ 24 III. CONCLUSION

¶ 25 For the reasons we have explained, we are unconvinced that it was a clear or obvious error for McKee and Frobish to recount, in their testimonies, defendant's misconduct of

resisting a peace officer. Without a clear or obvious error, there was no plain error and no ineffective assistance. Therefore, we affirm the circuit court's judgment.

¶ 26 Affirmed.