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2014 IL App (3d) 121019-U

Order filed November 18, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 10th Judicial Circuit,
)	Tazewell County, Illinois,
Plaintiff-Appellee,)	
)	Appeal No. 3-12-1019
v.)	No. 12-CF-251
)	
DANIEL W. DAWE, JR.,)	
)	Honorable
Defendant-Appellant.)	Scott A. Shore,
)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice Lytton concurred in the judgment.
Justice Wright dissented.

ORDER

- ¶ 1 *Held:* The defendant was proven guilty beyond a reasonable doubt of the charges of aggravated battery and attempted robbery and the prosecutor's comments during closing argument did not constitute reversible error.
- ¶ 2 Defendant, Daniel W. Dawe, Jr., was charged with aggravated battery (720 ILCS 5/12-3.05(c) (West 2012)) and attempted robbery (720 ILCS 5/8-4, 18-1 (West 2012)). The cause proceeded to a jury trial.

¶ 3 At trial, the alleged victim, Michelle Paul, testified that on April 19, 2012, she was visiting her father at Pekin Hospital. She parked her vehicle in the visitor's parking lot at the Women's Diagnostic Center. Around 8 p.m., she left the hospital and walked through the parking lot toward her vehicle. As she was trying to unlock her vehicle, defendant approached her, explained he was having car trouble, and asked her for money. She noticed that defendant's hands looked grease-stained but dry, as if he had been working on a car. Paul told defendant she did not have any money. She felt frightened and tightened her grip on her purse, the strap of which was wound around her hand.

¶ 4 Defendant stepped toward Paul and grabbed hold of her purse. He tugged on the purse but could not free it from Paul's grip. He let go and used both hands to shove Paul to the ground. She fell on her backside, still clutching her purse. Defendant pulled on her purse four or five more times while Paul was on the ground, but Paul did not let go. Paul started screaming, and defendant ran away without the purse. Paul went to the emergency room and reported the incident to the staff, who called the police. Police arrived and took a statement and description of defendant from Paul. A short time later, police brought a suspect—who was not defendant—to the hospital for Paul to identify, but Paul explained that the suspect was not the person who had tried to take her purse. Paul left the hospital.

¶ 5 As Paul was driving home, she saw defendant "wandering around" the parking lot of a shopping center. She called police, who came and arrested defendant. Paul testified she had "[n]o doubt" that the man she saw wandering the parking lot was the man who tried to rob her. In court, she identified defendant as that man. On cross-examination, Paul testified that she sometimes used her father's handicapped parking decal to park in handicapped spaces, although Paul was not disabled.

¶ 6 Pekin police officer Mike Eeten testified that he responded to Pekin Hospital and found that Paul was upset and shaking, and her voice was quivering. He later apprehended defendant at the shopping center parking lot. Defendant's hands were greasy but not wet with grease.

Defendant told Eeten that he did not rob Paul but merely asked her for money to get a new starter for his car.

¶ 7 Paul's former boyfriend Jeff Jolly testified for the defense that Paul's reputation for truthfulness was "not good." At the time of trial, Jolly and Paul both had orders of protection against each other.

¶ 8 Defendant testified that he asked Paul for money to buy food. When Paul refused, defendant apologized for bothering her and walked to Auto Zone to call his mother. On cross-examination, defendant testified that he had \$5 in his pocket when he asked Paul for money. He had been working earlier that day as a laborer and had been paid "[p]robably four or five hundred" dollars "[p]robably four or five days" earlier. He had asked other people for money earlier that evening and was "trying to get enough to eat, sir, until I could get a hold of my mother." Defendant testified he was not trying to get money for drugs.

¶ 9 The jury found defendant guilty on both counts. The court, considering defendant's lengthy criminal history, sentenced him to three years' incarceration.

¶ 10 Defendant appeals, arguing that the evidence was insufficient to prove him guilty of either aggravated battery or attempted robbery. As to aggravated battery, he argues that the evidence was insufficient to prove that he made physical contact of an insulting and provoking nature with Paul. As to attempted burglary, he argues there was insufficient evidence to prove that he attempted to take property from Paul by the use of force.

¶ 12 Defendant concedes that Paul's testimony established facts sufficient to meet the elements of both crimes. However, defendant argues that Paul's testimony was insufficient to prove him guilty, where no physical evidence supported her testimony and where Paul's credibility was at issue.

¶ 13 When a defendant challenges his conviction on appeal by arguing that the evidence was insufficient to prove him guilty beyond a reasonable doubt, we ask whether, considering the evidence in a light most favorable to the State, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009). It is the role of the factfinder, not the appellate court, to determine the credibility of witnesses and the weight to be assigned conflicting evidence. *People v. Kotlarz*, 193 Ill. 2d 272, 298 (2000). A reviewing court will not retry a defendant. *Siguenza-Brito*, 235 Ill. 2d at 228. The credible testimony of a single witness is sufficient to support a conviction. *Id.*

¶ 14 Defendant raises issues concerning Paul's credibility, the alleged grease on defendant's hands, and Paul's ability to withstand defendant's strength. Defendant is essentially asking this court to reweigh the evidence and retry the case on appeal, which we cannot do. Paul testified that defendant grabbed and pulled her purse and pushed her to the ground. That testimony was sufficient to satisfy the contested elements of aggravated battery and attempted robbery.

¶ 15 Defendant also argues that the State improperly commented on Paul's credibility during closing arguments. See *People v. Boling*, 2014 IL App (4th) 120634, ¶ 125. In the present case, the prosecutor said the following:

"What does the police say, what does the detective say? We didn't see any reason that we needed to do that. *We believed what she said.* That's what he testified to yesterday afternoon, Detective Hazelwood." (Emphasis added.)

The State was not expressing its opinion on the credibility of Paul's testimony. Instead, the State was explaining why the police conducted their investigation as they did, in hopes of demonstrating to the jury why there was not more physical evidence introduced at trial. Unlike in *Boling*, 2014 IL App (4th) 120634, the prosecutor here was not usurping the jury's role of determining the credibility of witnesses. The State's comments were not error.

¶ 16 For the foregoing reasons, the defendant's convictions are affirmed.

¶ 17 Affirmed.

¶ 18 JUSTICE WRIGHT, dissenting.

¶ 19 On appeal, defendant argues the prosecutor made two improper comments during closing argument. Since defendant did not object to these two statements during closing argument, defendant urges this court to apply the plain error doctrine. *People v. Howell*, 358 Ill. App. 3d 512, 521 (2005).

¶ 20 For the reader's convenience, both statements are set out below. First, the prosecutor stated, "But it's *my belief*, or I suggest that the evidence has shown that the defendant did in fact commit these crimes." (Emphasis added.) Then, the prosecutor argued in rebuttal, "What does the police say, what does the detective say? We didn't see any reason that we needed to do that. *We believed* what she said. That's what he testified to yesterday afternoon, Detective Hazelwood." (Emphasis added.)

¶ 21 It is well-established that a prosecutor may not vouch for a witness by injecting his or her personal beliefs about their credibility. *People v. Sims*, 403 Ill. App. 3d 9, 20 (2010). The two statements highlighted above violate this basic premise. Hence, I respectfully disagree with the majority and conclude that error occurred during the prosecutor's closing argument.

¶ 22 Next, I address whether the evidence in this case was closely balanced. *People v. Herron*, 215 Ill. 2d 167, 178 (2005) (this court can reach a forfeited error when the evidence is so closely balanced the jury’s guilty verdict may have resulted from the error or the error is so serious defendant was denied a substantial right). In this case, defendant and the victim agreed defendant approached the victim in a hospital parking lot and requested money. However, defendant testified he walked away after this conversation without any physical contact occurring between defendant and the victim. In contrast, the victim testified that after she refused to give defendant money, defendant pushed her to the ground and pulled on her purse.

¶ 23 In this case, the State could not offer any testimony to corroborate the victim’s version of the events because the parking lot incident was not caught on security cameras or witnessed by a neutral, independent bystander. Further, the investigating officers testified they did not observe any dirt, grime, or “smudge marks” on the victim, consistent with her version of the events. Finally, the victim’s ex-boyfriend testified that the victim’s clothing did not show any physical signs of a struggle when she arrived at his home and the victim had a reputation for untruthfulness.

¶ 24 In my view, the evidence presented by the prosecution constituted a typical “he-said, she-said” account for the jury to evaluate. Since proof beyond a reasonable doubt would be decided purely on the jury’s assessment of the victim’s credibility, I believe the evidence was closely-balanced. *People v. Boling*, 2014 IL App (4th) 120634, ¶ 131. Consequently, the prosecutorial misconduct that occurred during closing argument warrants remand for a new trial. On this basis, I respectfully dissent.