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2014 IL App (3d) 130048-U

Order filed December 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, Peoria County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-13-0048
JULIUS MUDD,)	Circuit No. 11-CM-771
Defendant-Appellant.)	Honorable David A. Brown, Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Holdridge and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The circuit court did not err by sustaining the State's objection to defendant's closing arguments; and (2) the prosecutor's comments during closing arguments did not constitute error. Alternatively, if any error occurred it was not plain error. Therefore, the issues are waived on appeal.

¶ 2 Defendant, Julius Mudd, was convicted of domestic battery (720 ILCS 5/12-3.2(a)(2) (West 2010)) following a jury trial, and defendant was sentenced to 240 days in the Peoria County jail. Defendant appeals, arguing he was deprived of a fair trial in that: (1) the trial court improperly restricted defendant's closing argument when it sustained an improper objection by

the State and then misstated the law; and (2) the prosecutor echoed the trial court's misstatement of the law to the jury, further prejudicing him. We affirm.

¶ 3

FACTS

¶ 4

Defendant was charged with domestic battery (720 ILCS 5/12-3.2(a)(2) (West 2010)) following an incident that occurred on April 9, 2011. The State alleged defendant made contact of an insulting or provoking nature with his girlfriend, Ashley Haywood. Following a jury trial, defendant was convicted of domestic battery and sentenced to 240 days in the Peoria County jail.

¶ 5

At trial, Haywood testified that on April 9, 2011, defendant was her boyfriend. They lived together in an apartment, and she was four to five months pregnant with his child. Defendant came home at approximately 5:45 a.m. and asked Haywood to perform oral sex on him. Haywood refused because she was nauseous due to her pregnancy. Defendant told Haywood that if she did not perform oral sex on him, he would get it elsewhere. They argued, and Haywood followed defendant around the apartment, attempting to talk him out of leaving.

¶ 6

Haywood testified that during the argument, defendant pushed and shoved her, put both of his hands around her neck, and slammed her against a wall and the floor. Defendant squeezed Haywood's neck hard enough to scare her, but not enough to interfere with her breathing. Haywood broke free and attempted to leave the apartment. When she opened the door, defendant tried to shut it. Haywood put her arm in the doorway as defendant shut the door, and the door slammed on her arm. Haywood eventually managed to leave the apartment, ran down the street, and called the police. Haywood vomited in the street because she was nauseous from her pregnancy. The police and an ambulance arrived on the scene. Haywood sat inside the squad car and vomited again while she explained what happened to the police officer. She was then taken to Methodist Hospital, where she told a nurse what occurred.

¶ 7 Dawn Barnes, the registered nurse who treated Haywood at the hospital, testified that Haywood reported she had been choked and assaulted by her boyfriend. When Barnes examined Haywood, she observed a small abrasion on her leg, abrasions on her left arm, and a slight redness on Haywood's neck.

¶ 8 Officer Elizabeth Blair testified that she responded to Haywood's call. When she arrived on the scene, Haywood was vomiting in the street. Haywood reported her boyfriend had choked and body slammed her. Blair noticed that there were marks on Haywood's arm, and Haywood said defendant did that to her. An ambulance arrived on the scene, and defendant came out of the apartment building. Haywood told Blair that defendant was the man with whom she had gotten into a fight. Blair placed defendant in handcuffs and took him to the police station.

¶ 9 During closing arguments, defense counsel argued that Haywood tried to prevent defendant from leaving after she refused to give him oral sex. Haywood was responsible for the injuries to her arm because she stuck it in the doorway as defendant was closing the door. Defense counsel stated Haywood reported to Barnes that she had been choked and body slammed by her boyfriend, but never mentioned him closing the door on her arm. Although Barnes noticed abrasions to Haywood's arm, she did not ask Haywood how she got those injuries. Further, defense counsel argued that Haywood told Blair that defendant choked and body slammed her, but did not mention defendant closing the door on her arm. Defense counsel stated:

"I would argue to you that that's because [Haywood] was responsible for putting those marks on her arm, not my client. [Haywood] was being an aggressor, trying to keep her boyfriend from going to get oral sex from somebody else and got in a

confrontation at the door with my client. She didn't report my client closing the door on her arm."

¶ 10 At this point, the State objected. The trial court sustained the objection and stated:

"Counsel is given a fair amount of leeway during closing arguments, but counsel should refrain or focus their arguments on the evidence that did come up during the course of the trial."

Defense counsel was permitted to continue with closing arguments. Defense counsel stated Blair did not see redness around Haywood's neck before she was taken to the hospital. Defense counsel further argued, "[Haywood] instigated a fight that night in an attempt to keep my client from leaving. And [the] only injuries that she got were injuries that she put on herself. And the only injuries that she reported that my client did[,] nobody sees except her."

¶ 11 There were no further objections by the State during defendant's closing arguments.

During rebuttal, the prosecutor argued, "The defense attorney is gonna [*sic*] make an issue about evidence that is not presented to you. We're not here to view evidence that's not presented.

We're here to deal in evidence that is presented."

¶ 12 After closing arguments, the court instructed the jury as follows:

"Closing arguments are made by the attorneys to discuss the facts and circumstances in the case and should be confined to the evidence and to reasonable inferences to be drawn from the evidence.

Neither opening statements nor closing arguments are evidence. And any statement or argument made by the attorneys which is not based on the evidence should be disregarded."

¶ 13 The jury found defendant guilty of domestic battery. The court sentenced defendant to 240 days in the Peoria County jail. Defendant filed a *pro se* motion to reconsider, which was denied. Defendant appeals.

¶ 14 ANALYSIS

¶ 15 I. Trial Court's Comments

¶ 16 On appeal, defendant argues reversible error occurred when the trial court improperly sustained the State's objection during defendant's closing arguments and improperly informed the jury they could neither consider an omission by a State witness, nor the inferences from the evidence drawn by the defense, because they were not matters in evidence. We review limits placed by the trial court on closing arguments for abuse of discretion. *People v. Millighan*, 265 Ill. App. 3d 967, 974 (1994).

¶ 17 Defendant concedes he did not preserve the alleged error in a posttrial motion. He asks that we review his claim of error under the plain error doctrine. "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). We apply the plain error doctrine when a clear or obvious error occurred and either (1) "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) the "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 (2007). The defendant has the burden of persuasion in plain error review. *Thompson*, 238 Ill. 2d at 613.

¶ 18 The first step in plain error review is to determine whether a "clear or obvious error" occurred at all. *Id.* Here, defendant claimed the trial court erred in sustaining the State's

objection to defendant's closing arguments and in admonishing counsel to focus their arguments on the evidence that was presented. Defendant argues that in doing so, the trial court prevented him from pointing out the weakness in the State's case—that Haywood did not report her arm being shut in the door to Barnes or Blair—and from making the inference that Haywood was the aggressor. However, it is clear from the record that defense counsel was permitted to argue before the objection was made that no evidence was presented that Haywood specifically told Barnes or Blair about her arm being shut in the door. The jury was permitted to consider those omissions. Additionally, after the sustained objection, defendant argued without any further objection that Haywood was the aggressor.

¶ 19 The sustained objection came after defense counsel stated, "[Haywood] didn't report my client closing the door on her arm." It is unclear whether defense counsel meant by this statement that Haywood never reported the door being shut on her arm: (1) specifically to Blair or Barnes or (2) in general, which would not have been a reasonable inference from the trial evidence since Haywood testified about the door being shut on her arm. As defense counsel had already argued the former without objection from the State, the more reasonable interpretation is that the State was objecting to the statement in general.

¶ 20 The trial court's comments that "counsel should refrain or focus their arguments on the evidence that did come up during the course of the trial" was not improper, as it was consistent with the trial court's instruction to the jury that closing arguments should be confined to the evidence and reasonable inferences drawn from the evidence and any argument not based on the evidence should be disregarded. We conclude plain error review is unnecessary because it is neither clear nor obvious that error occurred when the trial court sustained the State's objection or commented that counsel should focus their arguments on evidence presented at trial.

¶ 21 Even if we accept defendant's argument that the objection was improperly sustained or there was something improper about the trial court's comments, plain error did not occur. Defendant argues that the second prong of plain error review applies in this case. Under the second prong, reversible error occurs if an 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." *Piatkowski*, 225 Ill. 2d at 565. Such an error must be structural, that is, "a systemic error which serves to 'erode the integrity of the judicial process and undermine the fairness of the defendant's trial.'" *Thompson*, 238 Ill. 2d at 613-14 (quoting *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009), quoting *People v. Herron*, 215 Ill. 2d 167, 186 (2005)). "The Supreme Court has recognized an error as structural only in a very limited class of cases. [Citations.] Those cases include a complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction." *Thompson*, 238 Ill. 2d at 609. "[T]he right to present a closing argument at trial is of constitutional magnitude, regardless of whether the trial is before a judge or a jury." *People v. Brant*, 394 Ill. App. 3d 663, 677 (2009).

¶ 22 Here, any error resulting from the sustained objection and the trial court's statements did not rise to the level of structural error. See *Thompson*, 238 Ill. 2d at 609. Contrary to defendant's argument on appeal, defendant was not deprived of his right to present a closing argument by either the sustained objection or the trial court's comments, as defense counsel was permitted to argue her theory of the case before and after the objection. Thus, this issue is not entitled to plain error review and therefore is waived.

¶ 23

II. Prosecutor's Comments During Closing Arguments

¶ 24

Defendant further argues reversible error occurred when the prosecutor stated during his rebuttal argument, "The defense attorney is gonna [*sic*] make an issue about evidence that is not presented to you. We're not here to view evidence that's not presented. We're here to deal in evidence that is presented." Defendant argues that these comments exacerbated the prejudice to defendant that occurred when the trial court sustained the State's objection to defendant's closing arguments and told counsel to focus their arguments on evidence that was presented at trial. Defendant argues the prosecutor's statements implied that the jury could not consider the absence of evidence in the State's case. We review *de novo* the legal issue of "[w]hether statements made by a prosecutor at closing argument[s] were so egregious that they warrant a new trial." *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007).

¶ 25

Defendant concedes he did not preserve the alleged error in a posttrial motion. He asks that we review his claim of error under the second prong of plain error review. We first consider whether a clear or obvious error was committed at all. *Thompson*, 238 Ill. 2d at 613. Prosecutors have wide latitude in making closing arguments. *Wheeler*, 226 Ill. 2d at 123. However, prosecutors may not misstate the law during closing arguments. *People v. Ramsey*, 239 Ill. 2d 342, 441 (2010).

¶ 26

Here, the State's comments were consistent with the instruction given to the jury after closing arguments directing the jury to determine the facts based only on the evidence. The prosecutor did not tell the jury they could not draw reasonable inferences from the evidence. Similarly, the prosecutor's statements directed the jury to focus on the evidence that had been presented at trial. Hence, we conclude the prosecutor's remarks were proper.

¶ 27 Even if we accept defendant's argument that the prosecutor's remarks implied the jury could not consider the absence of evidence in the State's case, the comments did not fall within or rise to the level of the categories of structural error previously recognized by Illinois courts. See *Thompson*, 238 Ill. 2d at 609. Because we find no error occurred, and alternatively that any error that occurred was not structural error under the second prong of plain error review, we conclude this issue has been waived.

¶ 28 CONCLUSION

¶ 29 The judgment of the circuit court of Peoria County is affirmed.

¶ 30 Affirmed.