2016 IL App (1st) 141789-U

SECOND DIVISION
December 20, 2016

No. 1-14-1789

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 12 CR 16915
	)	
TONY HEAD,	)	Honorable
	)	Nicholas Ford,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Hyman and Justice Mason concurred in the judgment.

ORDER

¶ 1 *Held*: The trial judge's comments did not exhibit bias and were not prejudicial.

¶ 2 Following a jury trial, defendant Tony Head was convicted of first degree murder and two counts of attempt first degree murder, and was sentenced to two concurrent terms of 50 years' imprisonment consecutive to two concurrent terms of 26 years' imprisonment. On appeal, defendant argues that the trial court erred: (1) when it wished the victim's father, Earl Warner Sr., who testified as a life and death witness, "good luck" after he finished testifying; (2) in permitting the State to emphasize to the jury that Earl Sr. would observe the "duration of the

trial;" (3) in allowing the State to emphasize Earl Sr.'s loss in closing argument. Defendant also argues in the alternative, that the trial court violated the one-act, one-crime rule by entering two convictions for the first degree murder of Earl Warner, Jr. For the following reasons, we affirm the judgment of the trial court but correct the mittimus.

¶ 3 BACKGROUND

¶ 4 Defendant is not challenging the sufficiency of the evidence against him. Therefore, we will only discuss the evidence that is relevant to this appeal.

¶ 5 Defendant was charged with 43 counts of first degree murder in the shooting death of Earl Warner, Jr., two counts of attempt first degree murder of Kevin Winford and Emmanuel Warner, and two counts of aggravated discharge of a firearm all stemming from a shooting that occurred on December 31, 2011.

¶ 6 Earl Warner, Sr. testified for the State that the victim in this case was his son Earl Warner, Jr. Warner Sr. last saw Warner Jr. healthy and alive on December 24, 2011. Warner Sr. testified that he viewed his deceased son's body at the hospital on December 31, 2011. Warner Sr. testified that defendant is a first cousin and at the time Warner Jr. was murdered, he hadn't seen defendant in about two weeks. At the conclusion of Warner Sr.'s testimony, the trial court remarked, "Thank you. Sir. Good luck." The prosecutor then requested of the court "that Mr. Warner be allowed to remain in the courtroom for the duration of the trial." The court responded, "[h]e may."

¶ 7 The other evidence showed that defendant shot at Kevin Winford and Darrell Holmes as they sat in a car waiting for Emmanuel Warner, the victim's brother, to buy drugs. Emmanuel saw defendant's car approach and then saw defendant, who was his cousin, approach on foot.

Emmanuel had not seen defendant in three months because defendant was involved in a dispute with Emmanuel's brother, Earl Warner, Jr. Defendant was wearing a "black hoodie and black pants" and held a silver and black handgun that he had pointed in Emmanuel's direction. Emmanuel ran away. As he was running, he heard three shots coming from where defendant was standing and saw one of the bullets hit the building in front of him. Kevin and Darrell, who were still in the car, heard the shots and saw someone dressed in black shooting.

¶ 8 Emmanuel ran back to the location where defendant was shooting when he saw Earl Jr.'s car approaching. He observed defendant, who was wearing the same black clothes he was wearing a few minutes before, spring up from a crouched position with a silver and black handgun in his hands, which was extended out in front of him pointing towards the street where Earl Jr. was driving. Emmanuel watched as defendant fired at Earl Jr.'s driver's side window twice.

¶ 9 Kevin also observed a person in black jump up and start shooting as Earl Jr. drove by. Earl Jr. was struck in the neck and Kevin thought that he died instantly. Kevin got out of the car and started shooting back. He and the shooter looked at each other. Kevin and the shooter ran away when they heard police sirens.

¶ 10 Earl Jr. died at the scene. The cause of death was listed as a gunshot wound and the manner of death was homicide. Emmanuel later identified defendant in a photo array as the person who shot at him and his brother. Kevin also identified defendant as the shooter.

¶ 11 Defendant called Kevin to testify. Kevin stated that his entire statement to the police was false. The jury was instructed and began deliberating.

¶ 12 During deliberations, the jury asked for a copy of "Earl Senior's testimony and Kevin

Winfords' testimony. Upon agreement from the parties, the transcripts were sent back to the jury. Later, the jury returned a verdict of guilty on the first degree murder of Earl Jr., and the attempt first degree murder of Kevin and Emmanuel. Defendant was sentenced to a total of 76 years' imprisonment. He now appeals.

¶ 13 ANALYSIS

¶ 14 Here, defendant makes several arguments related to the trial court's error in permitting the State to prejudice the jury with a pattern of comments and arguments about and from Earl Warner, Sr. Specifically, defendant argues that the trial court erred when it wished the victim's father, Earl Sr., who testified as a life and death witness, "good luck" after he finished testifying, in permitting the State to emphasize to the jury that Earl Jr. would observe the "duration of the trial" and in allowing the State to emphasize Earl Sr.'s loss in closing argument. Defendant argues that the jury placed particular emphasis on Earl Sr.'s testimony as evidenced by their request for a transcript of his testimony.

¶ 15 Defendant argues that he was not required to object to the trial court's "good luck" comment because the alleged error was predicated on the trial court's actions, but acknowledges that the other issues raised were not objected to.

¶ 16 Issues not objected to at trial or raised in a posttrial motion are considered forfeited. See *People v. Herron*, 215 Ill. 2d 167, 175 (2005) (a defendant forfeits review of errors unless she makes an objection during trial and raises the issue in a posttrial motion); *People v. Enoch*, 122 Ill. 2d 176, 186 (1988); see also *People v. Thompson*, 238 Ill. 2d 598 (2010). However, there are some instances where issues predicated on the trial court's actions may be exempted from the forfeiture.

¶ 17 Our supreme court discussed forfeiture and the plain error doctrine as it relates to the actions of the trial judge. In *People v. McLaurin*, 235 Ill. 2d 478 (2009), our supreme court first noted that the application of the forfeiture rule is less rigid where the basis for the objection is the trial judge's conduct, citing to *People v. Kliner*, 185 Ill. 2d 81, 161 (1998), and *People v. Sprinkle*, 27 Ill. 2d 398 (1963). However, the *McLaurin* court noted that courts generally only relax application of the forfeiture rule in the "most compelling of situations," such as when a trial judge makes inappropriate remarks to the jury or in cases involving capital punishment because failure to raise a claim properly denies the trial court an opportunity to correct an error or grant a new trial, thus wasting time and judicial resources. *McLaurin*, 235 Ill. 2d at 488. The *McLaurin* court ultimately determined that the defendant had not presented an extraordinary or compelling reason to relax the forfeiture rule because the defendant did not claim "that the trial court overstepped its authority in the presence of the jury" or that counsel's objection to the trial court's conduct "'would have fallen on deaf ears.'" *Id*. at 488.

¶ 18 Here, as in *McLaurin*, defendant has not established that an extraordinary or compelling reason exists to relax application of the forfeiture rule. There is no evidence to support defendant's claim that the trial court wishing Earl Sr., "good luck" equates to the court making a statement that it wished defendant to be found guilty. A trial judge "must not interject opinions or comments reflecting prejudice against or favor toward any party." *People v. Williams*, 209 Ill. App. 3d 709, 718 (1991); *People v. Lopez*, 2012 IL App (1st) 101395, 57 "Improper comments include those which reflect disbelief in the testimony of defense witnesses, confidence in the credibility of the prosecution witnesses or an assumption of defendant's guilt." *Williams*, 209 Ill. App. 3d at 718.

¶ 19 Contrary to defendant's argument, we cannot see how the jury could have interpreted the court's statement as anything other than it was-a brief courteous and compassionate comment dismissing a witness who had lost his son under tragic circumstances. We decline to relax the forfeiture rule in this case but will review defendant's remaining claims for plain error.

¶ 20 The plain error doctrine allows a court of review to consider a forfeited error when "(1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." *Herron*, 215 Ill. 2d at 186-87. "In the first instance, the defendant must prove 'prejudicial error.' That is, the defendant must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him. The State, of course, can respond by arguing that the evidence was not closely balanced, but rather strongly weighted against the defendant. In the second instance, the defendant must prove there was plain error and that the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Id*. at 187. However, before considering plain error, we must first consider whether error occurred at all. *People v. Harris*, 225 Ill. 2d 1, 31 (2007).

¶ 21 We find no error with respect to the trial court's agreement to the State's request that Earl Sr. be allowed to "remain in the courtroom for the duration of the trial." We reject defendant's twisted logic that this amounted to error because "the only reason for the State to ask again was to get a chance to do so in the jury's presence, stressing to the jury that Earl Sr. would be watching 'the duration of the trial' and awaiting its verdict." The State had requested, prior to trial and with no objection from defendant, that Earl Sr. be allowed to remain in the courtroom at the conclusion of his testimony. The court granted the State's request. The State's question at

the conclusion of Earl Sr.'s testimony merely served as a reminder to the court that the State had requested that Earl Sr. be allowed to be present in the courtroom for the remainder of the trial after his testimony concluded. No error occurred here.

¶ 22 We similarly find no error with respect to the State's comments in closing argument. Defendant contends that the prosecutor placed "undue emphasis" on Earl Sr.'s loss.

¶ 23 Generally, a prosecutor is given wide latitude in closing arguments. *People v. Page*, 156 Ill. 2d 258, 276 (1993). This includes commenting on the evidence and drawing any legitimate inferences from the facts in evidence, even if they are unfavorable to the defendant. *People v. Simms*, 192 Ill. 2d 348, 396 (2000). It is improper for a prosecutor to make comments irrelevant to the question of guilt or innocence and that only serve to inflame the jury's passions against the defendant. *People v. Blue*, 189 Ill. 2d 99 (2000). Prosecutorial misconduct warrants reversal only if it caused substantial prejudice to the defendant, taking into account the content and context of the comments, its relationship to the evidence, and its effect on the defendant's right to a fair and impartial trial. *Id.* The trial court may cure any errors by giving the jury proper instructions on the law to be applied, informing the jury that arguments are not evidence or, sustaining the defendant's objections and instructing the jury to disregard the inappropriate remark. *Id.*

¶ 24 In closing argument, the prosecutor stated:

> "A young, African-American male black is found in a car with a gunshot wound to his neck. Police find him, efforts to resuscitate him prove to be unsuccessful. That line in the news could appear in any newspaper in an American city on any given day. That young African-American male had a name. On December 31, 2011, Earl Warner was

found with a gunshot wound to his neck. He had a name. He had a father. Who came in (sic) couple days ago. Sat down and told you the last time he saw him. Christmas Eve. The last time he would ever get time to spend with his son.

He will never get a chance to do that ever again. Why? Because Tony Head right there. Decided to take him completely out of this world. And why. There are many tragic things about this case.

* * *

Ladies and gentleman, on the last day of 2011, [defendant] took everything away from Earl Warner. Took everything. His life. He even took away his name. Because the following day, it wasn't Earl Warner who was being examined by Dr. Goldschmidt, it was 298 December 11.

A young man who less than a week earlier was having dinner with his father, who is not a number being examined by a doctor. Who was just doing his job.

Today is your last day of jury service, but today is Earl Warner's day for justice. Today you could give Earl Warner back his name. You can say Earl Warner, the person who was shot and killed by [defendant]. Today do what's right. Follow the evidence, whereever it leads you. Do the right thing."

¶ 25 Defendant argues that the prosecutor's comments during closing argument in this case are similar to the egregious comments made by the prosecutor in closing argument that constituted reversible error in *People v. Starks*, 116 Ill. App. 3d 384, 390 (1983). In *Starks*, the victim's girlfriend and mother testified as life and death witnesses about their last contact with the victim. The victim's mother stated that the victim was going out to get some ice and when she suggested

the victim take a car, he told her he was a "big boy" and could "take care of himself." The victim's girlfriend stated that she and the victim planned to pick up their marriage license the next day, that she spoke with him on the night of the shooting and that she next saw the victim at the funeral parlor. *Id* at 387, 389.

¶ 26 During closing arguments in *Sparks*, the State argued:

> "Marie Lipinski will never be able to forget the memory of when her son left her and his last words, "I'm a big boy, Mom. I can take care of myself." Or Ginelly Viteri, she'll remember how she was supposed to meet him and get a marriage license the next day. But the next meeting was in a funeral home. The Lipinskis will remember." *Id*. at 390.

The *Sparks* court found that the State's closing argument demonstrated that the testimony from the victim's mother and fiancée was introduced to arouse the passion and sympathy of the jury and not to cast light upon the guilt or innocence of the defendant, and therefore the defendant was prejudiced by the introduction of the testimony. *Id*. As a result, reversible error occurred.

¶ 27 Our review of the closing argument *in toto* shows that the prosecutor did not make the same kind of egregious and intentional arguments as were condemned in *Starks*. Reading the remarks in context, all references to Earl Warner in the prosecutor's closing argument were referring to the victim, Earl Warner, Jr., who happened to share the same name as his father. No portion of the argument dwelled on Earl Sr. or his testimony. The prosecutor merely mentioned that the victim had a father who had seen him several days before his death for the last time and the comments were brief and not repeated. Furthermore, there was no argument made that Earl Sr.'s testimony had any bearing on defendant's guilt or innocence. Clearly, *Starks* is easily

distinguished from this case and its holding should not be applied here where defendant suffered no prejudice as a result.

¶ 28 Finally, defendant argues that the trial court improperly entered convictions on two counts of murder for the killing of one victim. The State agrees that because defendant murdered one person and not two, the mittimus should be corrected to reflect only one conviction for first degree murder.

¶ 29 Pursuant to our authority under Illinois Supreme Court Rule 615(b)(1), and our ability to correct a mittimus without remand (see *People v. Hill*, 408 Ill. App. 3d 23, 31 (2011)), we correct defendant's mittimus to reflect one conviction for first degree murder under section 9-1(a)(1) (720 ILCS 5/9-1(a)(1)(West 2014).

¶ 30 CONCLUSION

¶ 31 Based on the foregoing, we affirm the judgment of the court but correct the mittimus.

¶ 32 Affirmed; mittimus corrected.