2016 IL App (4th) 140695-U

NO. 4-14-0695

FILED
June 2, 2016
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.	)	McLean County
HECTOR ALVAREZ,	)	No. 13CF818
Defendant-Appellant.	)	
	)	Honorable
	)	Scott D. Drazewski,
	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: The alleged error in *voir dire* was not even an error, let alone plain error.

¶ 2 A jury found defendant, Hector Alvarez, guilty of domestic battery (720 ILCS 5/12-3.2(a)(2) (West 2012)) and violation of bail bond (720 ILCS 5/32-10(b) (West 2012)). The trial court sentenced him to three and a half years' imprisonment. Defendant appeals, arguing that (1) the prosecutor used *voir dire* to indoctrinate the prospective jurors on the State's theory of the case and (2) defense counsel rendered ineffective assistance by failing to object. We are unconvinced that the prosecutor's questions during *voir dire* amounted to an indoctrination. Therefore, we affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 A. The Charges

¶ 5 The indictment consisted of five counts, but on November 12, 2013, before the prospective jurors were called in for *voir dire*, the prosecutor announced the State would be proceeding only on counts III and V.

¶ 6 Count III alleged that, on June 8, 2013, in Bloomington, Illinois, defendant committed domestic battery by striking Katie Alvarez in the face and that he previously was convicted of the same offense, domestic battery, in McLean County case No. 09-CM-1224, making the present offense a Class 4 felony (720 ILCS 5/12-3.2(a)(2) (West 2012)).

¶ 7 Count V alleged that, on June 8, 2013, in Bloomington, defendant committed the offense of violation of bail bond, a Class A misdemeanor (720 ILCS 5/32-10(b) (West 2012)), in that, "knowingly having been admitted to bail for appearance before the McLean County circuit court in case [No.] 13[-]CM[-]463[,] in which the victim [was] a family or household member, [defendant] knowingly violated a condition of that release [by having] contact with Katie Alvarez."

¶ 8 B. *Voir Dire*

¶ 9 The jury trial occurred on November 12, 2013.

¶ 10 First, the parties selected a jury. The trial court informed the venire of the charges, counts III and V, and after questioning the first panel of 14 prospective jurors, the court turned the questioning over to the prosecutor. She said:

> "MS. SCARBOROUGH: Thank you, Your Honor.
>
> The first question that I want to ask all of you is, you heard that it is a domestic battery case, and I want to know if anybody sitting in the jury box today believes that the State should stay out of domestic violence cases? Meaning that if there is a dispute between a husband and a wife, or a boyfriend or a girlfriend

that gets physical, that the State shouldn't prosecute those at all or move forward on those cases? Nobody has an issue with that?

The next question I'm going to ask, and I'm just going to start by directing this to Mr. [O'Callaghan].

PROSPECTIVE JUROR O[']CALLAGHAN: Yes.

MS. SCARBOROUGH: Expanding on that question, a dispute between a husband and wife, would you have a problem if, say, a victim in a case, particularly a domestic battery case, came in and testified for the defendant, or testified in such a manner that made it seem as though she didn't want the defendant to get in any trouble, would you have a problem then, if other evidence pointed in that direction, finding the defendant guilty?

PROSPECTIVE JUROR O[']CALLAGHAN: No.

MS. SCARBOROUGH: Everybody heard Mr. [O'Callaghan's] answer. Is there anyone who would have a problem in a similar situation?"

¶ 11 After further questioning by the prosecutor and after questioning by defense counsel, eight jurors were selected from this panel. Then another panel of 14 prospective jurors was called into the jury box. The trial court questioned this panel and then, as before, turned the questioning over to the prosecutor. She said:

"MS. SCARBOROUGH: I'm going to follow up with a question you already heard me ask.

PROSPECTIVE JUROR MCDONALD: Sure.

MS. SCARBOROUGH: If you would hear testimony from a victim who maybe did not want to cooperate with authorities, would that affect your ability to be impartial?

PROSPECTIVE JUROR MCDONALD: No.

MS. SCARBOROUGH: Anybody else in the panel, would there be a situation where, if a victim of a crime were to come in and testify, and testify on behalf of the defendant, would have you a problem finding the defendant guilty, knowing that the victim was trying to—didn't want to get in trouble? I'm going to pick on Mr. Johnson because he's not expressing anything. What are your thoughts on that?

PROSPECTIVE JUROR JOHNSON: On?

MS. SCARBOROUGH: The victim of a crime doesn't necessarily want to come forward and make accusations at the alleged offender.

PROSPECTIVE JUROR JOHNSON: Well, as far as my judgment on the case, it wouldn't affect it."

¶ 12 Defense counsel had his turn to ask questions of the panel. Then four more jurors and an alternate juror were selected.

¶ 13 C. The Trial

¶ 14 In her opening statement, the prosecutor told the jury:

"The evidence is also going to show that Ms. Alvarez does not want to be here today. She's still married to [defendant], and she's likely to not want to testify in court today. However, after you've heard all of the State's evidence, it

will show that the defendant in this case is guilty of domestic battery, and violation of [the] 'no contact' order."

¶ 15 After the prosecutor finished her opening statement, defense counsel stated he would "reserve opening until the start of [defendant's] case."

¶ 16 The State then called its witnesses. They testified substantially as follows.

¶ 17 1. *Matthew DeBoer*

¶ 18 Around 10 p.m. on June 8, 2013, Matthew DeBoer, age 22, went to Laugh Comedy Club, in Bloomington. For about 45 minutes after his arrival, he drank four or five beers and then went outside to smoke a cigarette. A couple of other men went outside with him: a standup comic, who managed the club, and another employee. The three of them were standing against the building, facing the street, when DeBoer heard a woman cry for help. The cry came from an alley, around the corner of the building.

¶ 19 DeBoer and his companions rounded the corner, and DeBoer saw a man and a woman in the alley. Bounded on either side by the walls of buildings, the alley was dark, and DeBoer was unable to make out the man's face, but in the feeble light from the street, he could see that the man was wearing a white T-shirt and that he had the woman against a wall. As the man and the woman yelled at one another, DeBoer saw the man "come down with his right hand and strike [the woman] just underneath her left eye." DeBoer and his companions yelled at the man and began running down the alley, toward them. The man in the white T-shirt ran away.

¶ 20 They made sure the woman was all right, and they telephoned the police. When a police officer arrived and shone a flashlight on the woman's face, DeBoer saw redness under her left eye. The woman was frantic and in tears.

¶ 21 2. *David Yates*

¶ 22 The evening of June 18, 2013, David Yates was working at his night job, as a standup comic at the Laugh Comedy Club. He had consumed no alcohol that night, and he did not "do drugs." Around 11 p.m., after his second show, he decided to take a break, and he went outside. While smoking a cigarette, he heard someone in the alley calling for help. When he went to look, he saw a man holding a small, thin woman by the arm. She tried to pull away, and the man punched her in the face. Yates and his companions yelled at the man, and the man ran.

¶ 23 Yates described the assailant as follows:

> "A. A little shorter than me, white T-shirt, baseball cap, flat brim, backward, black hair, goatee.
>
> Q. You said [']black hair,['] were you able to determine how long his hair—
>
> A. It was longer hair because I could see it outside the baseball cap. It was flipped backwards."

¶ 24 Yates telephoned the police and stayed with the woman until the police arrived. She seemed "nervous" and "scared," and "[s]he had a big red mark on her face," "[a]bout the shape of a fist, *** right below her left eye."

¶ 25 3. *Katie Alvarez*

¶ 26 Katie Alvarez testified that defendant was her husband on June 8, 2013, and that he was still her husband. She got along fine with him ("If it was an issue, I would have been divorced").

¶ 27 She insisted she was so intoxicated the night of June 8, 2013, that she could remember little or nothing about that night. Although she believed she was downtown that night,

she did not remember being struck in the face, she did not remember being in an alley and crying for help, and she did not remember talking with the police.

¶ 28 The prosecutor asked her:

"Q. When officers asked you what [defendant] had been wearing that night, do you recall telling them a white T-shirt and black baseball cap?

A. No.

Q. Did the prosecutor—one of the prosecutors in this case play an audio recording for you earlier today?

A. Yes.

Q. Were you able to recognize your voice on that audio recording?

A. No. I usually don't listen to my own voice on a tape, no. That could have been anybody, so I don't know.

Q. So specifically you don't remember giving an audio statement to the officer that night that he recorded?

A. No, I don't."

¶ 29 4. *Michael Luedtke*

¶ 30 Michael Luedtke had been a Bloomington police officer for over five years.

¶ 31 At 11:20 p.m. on June 8, 2013, he was dispatched to the intersection of Main and Mulberry Streets, to meet Katie Alvarez, reportedly the victim of a domestic battery. Three men, who were with her, said they had witnessed the battery. Luedtke photographed Katie Alvarez's swollen face (People's exhibit Nos. 1A and 1B).

¶ 32 Also, Katie Alvarez agreed to make an audio statement. The statement was recorded on a compact disc. Without objection, the trial court admitted the compact disc,

People's exhibit No. 2, and it was played to the jury. In the audio statement, Katie Alvarez told Luedtke that defendant had hit her in the face that night and that he was wearing a white T-shirt and a black baseball cap.

¶ 33 5. *Stipulations*

¶ 34 The parties stipulated that, on March 2, 2013, "the court ordered [defendant] to have no contact with Katie Alvarez." They also stipulated that "the no[-]contact order was a condition of [defendant's] bond until [June 11, 2013]."

¶ 35 The State rested. So did the defense.

¶ 36 6. *Closing Arguments*

¶ 37 In her closing argument, the prosecutor said:

> "There are many reasons why a victim might come to court and not be willing to testify against the person who committed a crime against that victim. In this case, Katie Alvarez. And you have to ask yourself which story do you believe, or what evidence do you believe today, and whether or not her testimony in court, in front of her husband, the defendant, the person who punched her in the face that night, sitting here in court, watching her every move, listening to her every word, and you get to decide the credibility of her testimony today, whether or not she really did remember anything and what happened. But regardless of whether or not she remembers anything, the fact of the matter is, we know that the defendant did punch her in the face on that night."

¶ 38 Defense counsel responded, in his closing argument, that neither of the bystanders whom the State called had been able to identify defendant as the assailant and that Katie Alvarez, according to her testimony, had been too intoxicated that night to know what was going on.

¶ 39 7. *The Verdicts*

¶ 40 The jury found defendant guilty of both counts, counts III and V: domestic battery and violation of bail bond.

¶ 41 D. The Sentence

¶ 42 The trial court held a sentencing hearing on May 9, 2014, in which the court sentenced defendant to three and a half years' imprisonment for count III. (It does not appear that a posttrial motion had been filed.)

¶ 43 E. The State's Motion To Dismiss the Remaining Counts

¶ 44 On May 20, 2014, the State moved to *nol pros* the remaining counts of the indictment (counts I, II, and IV). The trial court granted the motion.

¶ 45 F. The Motion To Reduce the Sentence

¶ 46 On June 9, 2014, defendant filed a motion to reduce the sentence. The trial court denied the motion on July 3, 2014.

¶ 47 Defendant filed his notice of appeal on July 31, 2014.

¶ 48 II. ANALYSIS

¶ 49 Defendant complains that the prosecutor used *voir dire* to indoctrinate prospective jurors with the State's theory of the case. He cites *People v. Rinehart*, 2012 IL 111719, ¶ 17, in which the supreme court said:

> "[*V*]*oir dire* questions, whether asked by the trial court or by the parties with the sanction of the court, must not be a means of indoctrinating a jury, or impaneling a jury with a particular predisposition. [Citation.] Rather than a bright-line rule, this is a continuum. Broad questions are generally permissible. For example, the State may ask potential jurors whether they would be disinclined to convict a

> defendant based on circumstantial evidence. [Citation.] Specific questions tailored to the facts of the case and intended to serve as preliminary final argument [citation] are generally impermissible."

¶ 50 According to defendant, the prosecutor made a preliminary final argument in *voir dire*, and indoctrinated the prospective jurors with the State's theory, when she posed a hypothetical case in which the "victim," who "maybe did not want to cooperate with authorities," "testified in such a manner that made it seem as though she didn't want to the defendant to get in trouble." By defendant's reasoning, it was *the State's theory* that Katie Alvarez "didn't want the defendant to get in trouble" and "did not want to cooperate with authorities"—as opposed to her explanation that she was suffering from alcohol-induced amnesia—and by posing a hypothetical case to prospective jurors in which the "victim" testified untruthfully for the defendant's benefit, the prosecutor effectively made a preliminary final argument during *voir dire*. See *Rinehart*, 2012 IL 111719, ¶ 17.

¶ 51 But defense counsel never objected during *voir dire*; nor did he raise the issue in a posttrial motion. These omissions, defendant concedes, normally should result in the forfeiture of the issue. See *People v. Thompson*, 238 Ill. 2d 598, 611 (2010). Defendant argues, however, that the doctrine of plain error should avert the forfeiture because "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." (Internal quotation marks omitted.) *Id.* at 613.

¶ 52 "The first step of plain-error review is determining whether any error occurred." *Id.* We find no error, because we are unable to see how postulating, in a purely hypothetical question, that the "victim" of a domestic battery "didn't want the defendant to get in any trouble"

had the effect of "impaneling a jury with a particular predisposition." *Rinehart*, 2012 IL 111719, ¶ 17. Evidently, the only predisposition the prosecutor wanted the jury to have was a predisposition to consider all the evidence, not just the testimony of Katie Alvarez.

¶ 53 Granted, that Katie Alvarez "didn't want the defendant to get in trouble" was the State's theory, an inference the State was drawing. But by stating that inference, in an incidental way, during *voir dire*, the prosecutor hardly was "indoctrinating" the prospective jurors. *Id.* The prosecutor never asked the prospective jurors to "prejudge the facts of the case." *People v. Bell*, 152 Ill. App. 3d 1007, 1017 (1987). She never asked them, during *voir dire*, to commit to any version of the facts. She just asked them if they could keep an open mind, and consider all the evidence, even if the victim "testified in such a manner that made it seem as though she didn't want the defendant to get in any trouble." That is different from asking them to actually assent, ahead of time, to the view that the victim was stonewalling.

¶ 54 III. CONCLUSION

¶ 55 For the reasons stated, we affirm the trial court's judgment. We assess $50 in costs against defendant.

¶ 56 Affirmed.