2017 IL App (4th) 140800-U

NO. 4-14-0800

FILED
May 3, 2017
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.	)	Champaign County
SHERMAN K. BRAGG,	)	No. 13CF1073
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Turner and Justice Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court did not err in sustaining the State's objection to defense counsel's assertion during his closing argument the jury heard evidence the weapon used during the robbery was a BB gun.

(2) Defendant's pretrial custody credit should have been applied against his State Police operations fine, traffic/criminal surcharge, juvenile expungement fund assessment, and drug court assessment.

¶ 2 In July 2014, defendant, Sherman K. Bragg, was convicted of armed robbery with a firearm (720 ILCS 5/18-2(a)(2) (West 2012)). The trial court sentenced defendant to 23 years in prison, with credit for 429 days in pretrial custody. Defendant appeals, arguing the court erred in sustaining the State's objection during defendant's closing argument to a statement a BB gun was used in the robbery. Defendant also makes arguments regarding assessments imposed on him and his right to pretrial custody credit. We affirm defendant's conviction but remand for

defendant's pretrial custody credit to be applied to his State Police operations fine, traffic/criminal surcharge, juvenile expungement fund assessment, and drug court assessment.

¶ 3 I. BACKGROUND

¶ 4 In July 2013, defendant was charged with armed robbery with a firearm, which is a Class X felony with an additional mandatory 15-year enhancement (720 ILCS 5/18-2(a)(2) (West 2012)). In September 2013, the State added a charge of armed robbery without a firearm (720 ILCS 5/18-2(a)(1) (West 2012)). In July 2014, a jury found defendant guilty of armed robbery with a firearm. As the appeal in this case relates only to limited issues, we do not provide an in-depth factual background.

¶ 5 During the trial, while examining Detective Andrew Good, defense counsel elicited testimony explaining one of the other individuals involved in the robbery, Devin McClendon, told the police the weapon used during the robbery was a BB gun. At the request of the State, the trial court instructed the jury to disregard Detective Good's testimony with regard to McClendon's hearsay statements. The court told defense counsel, "[t]he fact that the officer indicated they had information that may have been other than a firearm, that's fair game for closing argument."

¶ 6 During defense counsel's closing argument, the trial court allowed defendant to argue the State did not establish the weapon used during the robbery was a firearm. Defense counsel pointed out witnesses testified BB guns can look like real firearms. However, the trial court sustained the State's objection when defense counsel stated, "You have testimony that's in evidence that the object that was used in this robbery was not a firearm. It was a BB gun."

¶ 7 The jury found defendant guilty of armed robbery with a firearm. On September 4, 2014, the trial court sentenced defendant to 23 years in prison, with credit for 429 days

previously served. The trial court ordered the following assessments be imposed: (1) arrestee's medical assessment; (2) State Police operations assessment; (3) traffic/criminal surcharge; (4) juvenile expungement fund assessment; (5) drug court assessment; and (6) violent crimes victims assistance assessment.

¶ 8 This appeal followed.

¶ 9 II. ANALYSIS

¶ 10 A. Closing Argument

¶ 11 Defendant first argues the trial court erred in sustaining the State's objection to a statement his defense counsel made during closing argument with regard to evidence a BB gun had been used in the armed robbery. Relying on *People v. Stevens*, 338 Ill. App. 3d 806, 810, 790 N.E.2d 52, 55-56 (2003), defendant asks this court to apply a *de novo* standard of review, arguing neither the facts nor the credibility of witnesses is at issue.

¶ 12 However, the situation here bears little similarity to *Stevens*. In *Stevens*, the court essentially denied the defendant's right to effective assistance of counsel by interrupting the defendant's attorney on numerous occasions during closing argument. *Stevens*, 338 Ill. App. 3d at 807-09, 790 N.E.2d at 54-55. We agree a "trial court lacks discretion to deny a defendant his right to make a proper argument at closing on the evidence and applicable law in his favor." *Stevens*, 338 Ill. App. 3d at 810, 790 N.E.2d at 56. However, in this case, the trial court did not deny defendant his right to make a proper closing argument.

¶ 13 "The trial court has broad discretion with respect to limits placed on closing argument." *People v. Graves*, 2012 IL App (4th) 110536, ¶ 47, 965 N.E.2d 546. In *Graves*, the defendant contended the trial court erred because it would not allow him to argue a person's age

could affect the person's performance on field sobriety tests. *Graves*, 2012 IL App (4th) 110536, ¶ 46, 965 N.E.2d 546. This court found the trial court did not err, stating:

> "First, the record refutes defendant's contention that the court refused to permit argument about age and its affect on field sobriety testing. Specifically, during closing, defense counsel argued without objection that it was unfair to compare the performances of [a] 23-year-old *** with the middle-aged defendant. Second, while the court sustained objections to argument about what defense counsel could have done when he was 23 years old and the general physical capabilities of a 23-year-old person, such argument was not relevant to defendant's particular situation and *also concerned matters that were not in evidence*. The trial court did not abuse its *considerable* discretion." (Emphases added.) *Graves*, 2012 IL App (4th) 110536, ¶ 48, 965 N.E.2d 546.

In this case, defendant was allowed to argue a BB gun could have been used in the robbery.

¶ 14 During his closing argument, defense counsel pointed out a witness acknowledged BB guns exist which look like real guns. Counsel stated without objection, "There are BB guns that actually look like, feel like and seem like real guns." Defense counsel was also allowed to argue—over the State's objection—not all BB guns have a colored mark on the barrel indicating the weapon is in fact a BB gun. However, later in his closing argument, defense counsel stated: "You have testimony that's in evidence that the object that was used in this robbery was not a firearm. It was a BB gun." The State objected, arguing this misstated the evidence in the case. The trial court agreed and sustained the objection.

¶ 15 Defendant argues the trial court erred in sustaining this objection. He points to Detective Good's testimony, which demonstrated one of the other individuals involved in the

robbery, McClendon, claimed the weapon was a BB gun. However, during the trial, the State asked the court to strike from the record evidence of McClendon's statement because it was hearsay and to instruct the jury to disregard Detective Good's testimony with regard to McClendon's statements.

¶ 16 After hearing arguments from the parties, the trial court stated: "I'm going to tell the jury to disregard any testimony concerning statements made by Devin McClendon. The fact that the officer indicated they had information that *may have been* other than a firearm, that's fair game for closing argument." (Emphasis added.) When the jury returned, the court provided the following instruction: "Ladies and gentlemen, during the testimony of Investigator Good, there was a question asked about something that Devin McClendon said about the nature of the weapon in question. That's inadmissible hearsay and you are instructed to disregard the statements concerning what Mr. McClendon might have said."

¶ 17 As stated earlier, defense counsel was allowed to argue the weapon used could have been a BB gun. However, defense counsel's statement at issue here, "You have testimony that's in evidence that the object that was used in this robbery was not a firearm. It was a BB gun," was not correct. As a result, the trial court did not err in sustaining the State's objection because defense counsel was misstating the evidence in the case. Defense counsel's statement went beyond arguing the police had information the weapon *might* have been a BB gun, instead stating the jury heard evidence it *was* a BB gun. The court had already specifically instructed the jury to disregard this evidence.

¶ 18 B. Assessments

¶ 19 Defendant next argues he is entitled to a $55 credit against his fines for time he spent in pretrial custody pursuant to section 110-14(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14(a) (West 2012)). The State agrees. We accept the State's concession.

¶ 20 Defendant also argues the circuit clerk erred in imposing a $2 State's Attorney record automation assessment pursuant to section 4-2002.1(c) of the Counties Code (55 ILCS 5/4-2002.1(c) (West 2012)) because it is a fine and not a fee. Defendant relies on *People v. Camacho*, 2016 IL App (1st) 140604, ¶ 56, 64 N.E.3d 647, which held the State's Attorney record automation assessment is a fine because it does not compensate the State for the cost of prosecuting the defendant. The State relies on this court's decision in *People v. Warren*, 2016 IL App (4th) 120721-B, ¶ 115, 55 N.E.3d 117. We continue to follow this court's decision in *Warren*, which held the State's Attorney record automation fee was a "fee" and not a "fine."

¶ 21 III. CONCLUSION

¶ 22 We affirm defendant's conviction but remand with directions to apply defendant's presentence custody credit against his $10 State Police operations fine, $10 traffic/criminal surcharge, $30 juvenile expungement fund fine, and $5 drug court assessment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 23 Affirmed and remanded with directions.