2018 IL App (4th) 160233-U

NO. 4-16-0233

FILED
May 7, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
ANTHONY ERVIN SMITH,	)	No. 14CF1506
Defendant-Appellant.	)	
	)	Honorable
	)	Scott D. Drazewski,
	)	Judge Presiding.

JUSTICE CAVANAGH delivered the judgment of the court.
Justices Steigmann and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: Testimony that defendant hid under a bed at the approach of a police officer was relevant and admissible to show his consciousness of guilt.

¶ 2 A jury found defendant, Anthony Ervin Smith, guilty of aggravated battery (720 ILCS 5/12-3.05(a)(1) (West 2014)), and the McLean County circuit court sentenced him to imprisonment for seven years. Defendant appeals, arguing the court erred by overruling his other-crimes objection to testimony that he hid under a bed when a police officer entered his apartment to arrest him for the charged offense. Because we are unconvinced that this ruling was an abuse of discretion, we affirm the judgment.

¶ 3 I. BACKGROUND

¶ 4 In the jury trial, which was held in August 2015, defendant pleaded self-defense to the charge that he battered Jordan Kirkwood. The evidence in the trial tended to show the following.

¶ 5 Around 6:30 p.m. on December 14, 2014, Kirkwood, Jordan Somler, and Kendrick Cooley went to a convenience store in Bloomington, Illinois. Kirkwood went inside to buy cigars. Somler and Cooley did not immediately follow him into the store. Instead, they got in a fight with defendant outside, and then they came into the store and described to Kirkwood how they had "jumped" defendant. As Kirkwood headed toward the front door of the store with his box of cigars, defendant was standing in the doorway. His mouth was bloody, and he had a baseball bat. Defendant asked, " 'Why did y'all jump me?' " Kirkwood and Cooley then approached defendant in an aggressive manner (according to the testimony of a bystander, Dosha Arnold), and defendant hit Kirkwood twice with the baseball bat, fracturing his arm.

¶ 6 The incident was captured on the store's video surveillance system. Curtis Squires, a Bloomington police officer, watched the video recording and recognized defendant as the man with the baseball bat. At the trial, the State presented a still photograph of defendant, taken from the surveillance video. Squires went to the hospital and showed Kirkwood a photographic array, which included a photograph of defendant. Kirkwood identified defendant in the photographic array.

¶ 7 Squires then went to defendant's apartment and knocked on the door. Someone answered the door (the trial transcript does not specify who). Squires asked if defendant was home. He was admitted into the apartment.

¶ 8 On direct examination, the prosecutor asked Squires where in the apartment he found defendant. Trial counsel objected. After the jury left the courtroom, trial counsel stated: "I

know the State will probably argue that this is evidence of flight or something like that and, you know, possibly relevant, but I disagree. *** [It] would be used as more of a propensity argument that I think goes too far and becomes improper." After hearing the prosecutor's counterargument ("Your Honor, the righteous don't crawl under beds; the guilty do"), the trial court overruled the objection, holding that "[e]vidence of collateral crimes, wrongs, and acts may be admissible to show consciousness of guilt." The court then offered to trial counsel: "If you wish me to give a limiting instruction to the jury that the evidence is to be received solely for the purpose of consciousness of guilt, I will do so." Trial counsel answered: "Yes, please."

¶ 9 So, the jury was brought back into the courtroom, and the prosecutor repeated his question to Squires: "Where did you find [defendant]?" Squires answered: "I found [defendant] laying on the floor underneath a bed." The trial court immediately instructed the jury: "[T]hat testimony of the witness is being admitted for a limited purpose. The limited purpose would relate to what, if any, evidence it would demonstrate as to the defendant's consciousness of guilt."

¶ 10 Afterward, in his motion for a new trial, defendant alleged that the testimony about his hiding under a bed was inadmissible propensity evidence. The trial court denied the motion.

¶ 11 II. ANALYSIS

¶ 12 Defendant argues that, "[a]bsent proof of [his] knowledge that the police were looking for him in connection [with the aggravated battery], the evidence that he was under the bed was not probative of his consciousness of guilt and it only served to prejudice the jury against him" and "undermin[e] his claim of self-defense."

¶ 13 The State responds, initially, that this argument is procedurally forfeited because although defendant contemporaneously objected to Squires's testimony and although he reiterated the objection in his posttrial motion (see *People v. Enoch*, 122 Ill. 2d 176, 186 (1988)), his stated reason for objecting was that the testimony was propensity evidence (see Ill. R. Evid. 404(b) (eff. Jan. 1, 2011)), not that it was irrelevant (see *People v. Hayes*, 139 Ill. 2d 89, 132 (1990)), and "a specific objection [forfeits] all other[,] unspecified grounds" (*People v. Cuadrado*, 214 Ill. 2d 79, 89 (2005)).

¶ 14 Actually, when the prosecutor asked Squires where in the apartment he found defendant, defendant objected not only on the ground that the testimony would be propensity evidence but also on the ground that it would be irrelevant. It is true that, afterward, in his posttrial motion, defendant asserted that the testimony was inadmissible only because it was propensity evidence. Nevertheless, any objection to propensity evidence has, folded within it, a relevancy objection. "Generally, evidence of other crimes is inadmissible if relevant *merely* to establish the defendant's propensity to commit crime," but it "is admissible if it is relevant *for any purpose other* than to show the propensity to commit crime." (Emphases added.) *People v. McKibbins*, 96 Ill. 2d 176, 182 (1983). (Although *McKibbins* refers to "evidence of other crimes," the rule against propensity evidence applies equally to evidence of "wrongs" or bad "acts" that are not necessarily crimes. Ill. R. Evid. 404(b).) Therefore, an objection to Squires's testimony on the ground that it is propensity evidence should be understood as including a relevancy objection. An objection to propensity evidence is like a coin: on one side is the contention that the only relevance of the evidence is "to prove the character of a person in order to show action in conformity therewith," and on the other side is the contention that the evidence is irrelevant to any other issue, including "knowledge" or consciousness of guilt. *Id.* (Another

consideration, which a trial court must not overlook, is whether the probative value of the other-crimes evidence is substantially outweighed by the danger of unfair prejudice. *People v. Pikes*, 2013 IL 115171, ¶ 11; see also Ill. R. Evid. 403 (eff. Jan. 1, 2011).) Consequently, we find compliance with *Enoch*: defendant made a contemporaneous objection that included the ground of irrelevance, and, by necessary implication, the posttrial motion reiterated the relevancy objection by claiming that the testimony was propensity evidence. See *Enoch*, 122 Ill. 2d at 186; *People v. Mohr*, 228 Ill.2d 53, 65 (2008) (finding the phrasing of a defendant's trial objection and posttrial argument "close enough" to preserve the issue).

¶ 15 We note that, after the trial court overruled his contemporaneous objection, defendant (through trial counsel) *requested* the trial court to instruct the jury that "the evidence [was] to be received solely for the purpose of consciousness of guilt." It would be unreasonable to suppose, however, that defendant thereby acquiesced to the theory that his hiding under a bed was relevant to show a consciousness of guilt. This was a theory he expressly opposed—unsuccessfully—not a theory he injected into the trial. See *McMath v. Katholi*, 191 Ill. 2d 251, 255 (2000) ("It would be manifestly unfair to allow one party a second trial upon the basis of error which he injected into the proceedings." (Internal quotation marks omitted.)). He agreed to the limiting instruction only because the court overruled his objection and he did not want the jury to use Squires's testimony as propensity evidence. To penalize him for this good-faith effort at damage control by calling it invited error "would be like knocking out one leg and criticizing him for hopping on one foot." *People v. Wright*, 2012 IL App (1st) 073106, ¶ 97. So, we find neither a procedural forfeiture nor invited error. See *People v. Spencer*, 2014 IL App (1st) 130020, ¶¶ 26-28 (explaining the difference between the two).

¶ 16 We turn, then, to the merits of defendant's argument that his act of hiding under a bed was irrelevant to the question of whether he had a consciousness of guilt. He argues that his hiding under a bed was relevant only if (1) he was aware the police suspected him of aggravated battery and (2) "he was under a bed to avoid capture." He claims the State presented no evidence of those propositions.

¶ 17 The supreme court has indeed held "[t]he inference of guilt which may be drawn from flight depends upon the knowledge of the suspect that the offense has been committed and that he is or may be suspected." *People v. Lewis*, 165 Ill. 2d 305, 349 (1995). ("Flight" includes concealment. *People v. Herbert*, 361 Ill. 64, 73-74 (1935); *People v. Griffin*, 23 Ill. App. 3d 461, 463 (1974).) But this knowledge need not be proved by evidence that someone told defendant the police were looking for him. To make evidence of flight admissible, the State need not present *direct* proof that the defendant was aware of being a suspect (or of possibly being a suspect); *indirect* proof can suffice, that is, proof of facts from which such knowledge could be reasonably inferred. *Lewis*, 165 Ill. 2d at 350; *Griffin*, 23 Ill. App. 3d at 463. The question is whether "[t]he evidence presented *** could properly support an inference of knowledge," and the answer to that question depends heavily on the facts of the case. *Lewis*, 165 Ill. 2d at 350.

¶ 18 In the cases that defendant cites, the facts did not reasonably support an inference that the defendant knew the police suspected him of committing the charged offense and that he tried to evade arrest for *that* offense. See *Hayes*, 139 Ill. 2d at 130-32 (for two weeks, a detective attempted to locate the defendant by going to his parents' house six times, where he left his card and telephone number, and by setting up a stakeout at a currency exchange, but there was no evidence that the defendant had been informed the police were looking for him—or that he even lived at his parents' house); *People v. Harris*, 23 Ill. 2d 270, 273 (1961) (in the morning, the

defendant came to a municipal police station and voluntarily surrendered himself in connection with an unrelated charge of assault, only to escape from the jail in the evening; but no evidence showed that he knew he was suspected of a burglary that occurred four days before he surrendered himself); *People v. Wilcox*, 407 Ill. App. 3d 151, 170 (2010) (evidence that the defendant fled Illinois and obtained a fake identification card had little or no probative value as to his consciousness of guilt, considering that two weeks before the murder, he was bonded out for an unrelated criminal trespass, he testified he believed the police were after him for violating the bond, no evidence showed that he knew he was wanted for murder, and he obtained the fake identification card 4 1/2 years after the murder).

¶ 19 Bearing in mind that we review the trial court's evidentiary rulings for an abuse of discretion (see *id.* at 169)—the most deferential standard of review recognized by the law (*People v. Taylor*, 2013 IL App (1st) 110166, ¶ 12)—we conclude that *Hayes*, *Harris*, and *Wilcox* are distinguishable not only because, in the present case, defendant "fled" or concealed himself from the immediate presence of the police (which, we acknowledge, the defendants likewise did in *Harris* and *Wilcox*) but also because there was no evidence that he was wanted for an unrelated offense and, thus, there was no apparent alternative reason for his flight. A ruling is an abuse of discretion only if the ruling is "arbitrary, fanciful[,] or unreasonable or where no reasonable [person] would take the view adopted by the trial court." *Id.* A reasonable person could take the view that defendant's act of hiding at the approach of Squires suggests a consciousness of guilt and, therefore, has some tendency to make it more probable than it otherwise would be that he committed the charged offense of aggravated battery, absent evidence that he was wanted for any other, unrelated offense that might have motivated his flight. See Ill. R. Evid. 402 (eff. Jan. 1, 2011) ("All relevant evidence is admissible, except as otherwise

provided by law."); Ill. R. Evid. 401 (eff. Jan. 1, 2011) (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). Arguably, he hid under the bed because he knew he had no legal justification for approaching Kirkwood with a baseball bat and repeatedly hitting him with it.

¶ 20 Depending on the circumstances, the flight itself can be a fact from which one may infer the defendant's awareness that he or she is or might be a suspect. In *Lewis*, for example, there was no evidence that anyone had told the defendant he was suspected of murder. *Lewis*, 165 Ill. 2d at 350. The day after the murder, however, he abandoned his apartment and left Illinois, carrying only a duffel bag, and he never returned. *Id*. He had never mentioned to anyone that he intended to move. *Id.* He left behind his stereo equipment and other clothing. *Id.* The police searched extensively for him, at his prior residence and other places he was known to frequent, but could not find him. *Id.* The supreme court held "[f]rom this evidence, the jury could validly infer that [the] defendant knew that he was a suspect and that he consciously avoided the police" (*id.*)—despite the defendant's explanation (which the jury was free to believe or disbelieve) that he left Illinois with the intention to surrender to California authorities (*id.* at 351).

¶ 21 If a defendant fled the *immediate presence* of the police, the inference of a consciousness of guilt might logically be even stronger. In *Griffin*, for example, a warrant had been issued to arrest the defendant for armed robbery. *Griffin*, 23 Ill. App. 3d at 463. While the warrant was outstanding, a plainclothes police officer, who was on shoplifting detail and whom the defendant had encountered in the past while the police officer was in uniform, saw the defendant standing in the doorway of a store. *Id.* at 463. When the defendant saw him signal to

another plainclothes police officer, he took off running. *Id.* Later, in the trial on the armed-robbery charge, the trial court overruled the defendant's objection to testimony that he ran from the plainclothes police. *Id.* Much like defendant in the present case, he argued that, "to show flight from arrest[,] there [had to] be independent foundation evidence showing that he had knowledge that he was a suspect and, apparently, conclusive proof that he knew the officer to be a policeman." *Id.* The appellate court upheld the admission of the flight evidence because (1) the defendant had " 'reason to know' " (*id.* at 464) that the man in civilian clothes was a police officer and (2) "[d]irect proof" of the defendant's awareness that he was suspected of committing the armed robbery was unnecessary if "there [was] evidence in the case from which such [knowledge might] be inferred." *Id.* at 463.

¶ 22 In a comparable case, *People v. Bielecki*, 89 Ill. App. 2d 41 (1967), after the defendant took "indecent liberties" with his stepdaughter and she was taken to the hospital for a sexual-assault examination (*Bielecki*, 89 Ill. App. 2d at 43-44), he reacted to the arrival of the police by climbing out a window and onto the roof of the apartment building and hiding behind a chimney (*id.* at 45)—to escape the heat because it was a warm night, he explained to the judge in a bench trial (*id.* at 48). The appellate court held that "an unexplained flight by an accused raise[d] an inference of guilt" and if the trial court rejected the defendant's explanation and "concluded that the defendant was on the roof for the purpose of evading arrest, it could properly be considered as indicating a consciousness of guilt on the part of the defendant." *Id.* at 47-48.

¶ 23 Likewise, absent any other apparent reason why defendant would have been hiding under a bed as a police officer looked for him in the apartment, a reasonable person could infer that defendant was hiding because he knew he was subject to criminal liability for hitting

Kirkwood with a baseball bat a short while ago. Therefore, we find no abuse of discretion in the overruling of his objection to this flight evidence.

¶ 24 III. CONCLUSION

¶ 25 For the foregoing reasons, we affirm the trial court's judgment, and we award the State $50 in costs against defendant.

¶ 26 Affirmed.