DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2012

EVERTON BAKER,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D11-2593

[December 19, 2012]

ROSENBERG, ROBIN L., Associate Judge.

Everton Baker appeals his convictions for fleeing or attempting to elude a law enforcement officer, misdemeanor possession of cannabis, and driving without a valid license. He raises two issues on appeal. First, he argues that the trial court erred by refusing to instruct the jury on a permissible lesser included offense of fleeing or attempting to elude a law enforcement officer. Second, he argues that the trial court erred by permitting the state to question him about the nature of his prior arrests. We reverse because the trial court admitted evidence that Baker was previously arrested for failing to appear in court and for possession of marijuana when the defense had not opened the door to such testimony.

The charges arose from an incident that occurred after Officer Juan Pena saw Baker park his car in front of a business. Officer Pena noticed that the car's tag was expired and ran a check on it. He then ran a check on the driver's license associated with the vehicle and verified that Baker was driving the vehicle. Baker's license had been suspended, so Officer Pena decided to conduct a traffic stop. Baker returned to his car and began to drive away. Officer Pena pulled up behind him and activated his blue and white overhead lights.

Baker did not stop. He drove all the way home, jumped out of his car, and ran over to Officer Pena's vehicle. He told Officer Pena he did not stop because he did not want to be towed for driving with a suspended license. Baker was arrested and his vehicle was searched. Officers

found approximately 1.4 grams of marijuana inside the driver's door panel.

At trial, Baker testified on his own behalf and admitted that he was driving his car on the night of the arrest. He admitted that he drove to the store, bought something to drink, and got back into his car. He saw Officer Pena's vehicle as he was leaving the store, and he saw Officer Pena activate the vehicle's lights.

At this point, Baker said he did not know what to do. He was alone in a dark area and did not want to be "roughed up by the cops." He said he had no intention of fleeing or eluding the officer; he always intended to pull over when he got home. He explained that he simply did not have the money to get his car from the impound if it was towed.

On cross-examination, Baker testified that he has had bad experiences with the police. He used to get pulled over a lot, and he felt that it was because he used to have dreadlocks. He did not know how else to explain it. It simply felt like profiling to him.

The state requested a sidebar and asked the court for permission to go into detail about Baker's prior arrests. Baker had not been convicted of a felony or crime of dishonesty, but he had several arrests and license suspensions on his record. Baker argued that he had not opened the door into his previous arrests, but the court felt otherwise and allowed the state to question him regarding the exact nature of his arrests. The court allowed the state to ask Baker what he had been arrested for, but would not allow the state to present any evidence to rebut Baker's answer.

The state then asked Baker what he had been arrested for in the past. Baker responded:

> I was arrested for not showing up in court. I showed up ten minutes late in court, so they put out like a warrant for me. And it was suppose [sic] to be thrown out, but I guess it was still in the system, so I still got arrested for not showing up in court.

The state then asked if that was the only thing he had ever been arrested for. Baker admitted he had also been arrested for possession of marijuana. The state referred back to Baker's testimony during its closing argument, stating:

> [The defendant] fled on May 22, 2010, not only because his license was suspended, not only because of that, but because of the marijuana he had in his car. And the testimony showed he's been arrested in the past for marijuana.

Similar fact evidence of other crimes is only admissible when it is relevant to prove a material fact at issue. *Cartwright v. State*, 885 So. 2d 1010, 1013 (Fla. 4th DCA 2004) (citing § 90.404(2)(a), Fla. Stat. (2003)). It is not admissible when the evidence is relevant "solely to prove bad character or propensity." *Id.*

Prior arrests which do not result in convictions are not a proper subject for impeachment or cross-examination. *Fulton v. State*, 335 So. 2d 280, 283 (Fla. 1976) ("Arrest without more does not, in law any more than in reason, impeach the integrity or impair the credibility of a witness. It happens to the innocent as well as the guilty. Only a conviction, therefore, may be inquired about to undermine the trustworthiness of a witness." (quoting *Michelson v. United States*, 335 U.S. 469, 482, 69 S.Ct. 213, 222 (1948))). The state does not dispute this, but argues that the defendant opened the door regarding the nature of his prior arrests by testifying that he had bad experiences with police in the past.

An exception to the rule that a prosecutor is generally not allowed to inquire into a defendant's prior convictions occurs when the defendant "opens the door." "The concept of 'opening the door' permits admission of inadmissible evidence for the purpose of qualifying, explaining or limiting testimony previously admitted." *Sinclair v.* State, 50 So. 3d 1223, 1226 (Fla. 4th DCA 2011) (citing *Hudson v. State*, 992 So. 2d 96, 110 (Fla. 2008)). "The 'opening the door' concept is based on considerations of fairness and the truth-seeking function of a trial, where cross-examination reveals the whole story of a transaction only partly explained in direct examination." *Bozeman v.* State, 698 So. 2d 629, 631 (Fla. 4th DCA 1997). When a defendant tries to characterize his or her prior convictions in a favorable light at trial, the defendant is considered to have "opened the door" and the state is "entitled to inquire further regarding the convictions to attempt to dispel any misleading impression." *Rogers v. State*, 964 So. 2d 221, 223 (Fla. 4th DCA 2007); *see also Ross v. State*, 913 So. 2d 1184, 1187 (Fla. 4th DCA 2005).

Baker's testimony regarding his bad experiences with the police based on what he perceived to be "profiling," while perhaps truthful, did not present a complete picture of the extent of his interaction with law

enforcement. This testimony potentially portrayed Baker as a victim of police wrongdoing in the past and could have provided the jury with a reason why Baker fled. Although not strictly a defense to fleeing and eluding, Baker's story placed his conduct in a more favorable light and perhaps was designed to appeal to the mercy of the jury; such testimony would have been misleading in the absence of any other material facts that may bear on the issue. The fact that Baker's interactions with the police also included prior arrests provided the jury with a more complete, and therefore balanced, picture of Baker's experiences with the police. Because Baker suggested that his prior experiences with the police motivated his conduct in this case, the state was entitled to explore the details of the prior contacts in cross examination to test the veracity of his story.

However, while the trial court did not err in finding that Baker opened the door to cross-examination about the fact that Baker previously had been arrested, the court should not have permitted the state to delve into the nature of the particular arrests. The trial court must prevent the parties from "wandering too far afield." *Ross*, 913 So. 2d at 1187 (quoting *Lawthorne v. State*, 500 So. 2d 519, 523 (Fla. 1986)). Like *Ross,* the issue presented in this case is how wide did Baker "open the door" when he testified about his prior experience with law enforcement. Baker's testimony did not give the state latitude to delve deeper into the specific nature of Baker's prior arrests for not showing up in court and for possession of marijuana. The nature of Baker's prior arrests had nothing to do with how the police treated him during these encounters, experiences which he claimed as motivation for his actions in this case.

Furthermore, the fact that the cross-examination disclosed evidence of Baker's prior arrest for possession of marijuana, one of the same crimes for which he was charged and convicted in this case, made the testimony not only irrelevant, but highly prejudicial to Baker. We do not find that the error in admitting evidence of Baker's prior arrest for possession of marijuana was harmless, based on our review of the record, because we cannot say "that there is no reasonable possibility that the error contributed to the conviction." *State v. DiGuilo*, 491 So. 2d 1129, 1138 (Fla. 1986). The erroneous admission of collateral crimes evidence is presumptively harmful. *See Miller v. State*, 804 So. 2d 609, 612 (Fla. 3d DCA 2002) (quoting *Czubak v. State*, 570 So. 2d 925, 928 (Fla. 1990)).

Baker also appeals his conviction because the trial court refused to give an instruction informing the jury that Baker could be convicted of a lesser included offense of refusal to obey an officer's lawful order—a

misdemeanor of the second degree. The trial court's refusal to give the instruction on the permissible lesser included offense was error. *Koch v. State*, 39 So. 3d 464, 466 (Fla. 2d DCA 2010); *see also In re Standard Jury Instructions in Criminal Cases--Report 2011-01*, 73 So. 3d 136, 137-38 (Fla. 2011). In this case, the error was harmless because the jury convicted Baker of a third-degree felony after being given the option of convicting him of resisting or obstructing an officer without violence—a first-degree misdemeanor. *See State v. Abreau*, 363 So. 2d 1063, 1064 (Fla. 1978); *see also Sherrer v. State*, 898 So. 2d 260, 261 (Fla. 1st DCA 2005). On retrial, the trial court shall instruct the jury on the lesser-included offense of refusal to obey an officer's lawful order.

For the reasons stated above, we reverse Baker's conviction and remand for a new trial.

Reversed and Remanded for a new trial.

GROSS , J., concurs.
LEVINE, J, concurs specially with opinion.

LEVINE, J., concurring specially.

I agree with the majority that this court should reverse appellant's conviction and remand for a new trial. I believe, however, that the majority is incorrect in stating that the "trial court did not err in finding that Baker opened the door to cross-examination about the fact that Baker previously had been arrested." While I agree with the majority that the trial court erred in delving "into the nature of the particular arrests," I also believe that the trial court erred in allowing the state to question appellant about the fact that he had been previously arrested.

At trial, appellant tried to explain why he did not stop right away, although he stated that he had the "intention" to eventually stop his vehicle. Appellant stated he knew his car was going to be towed and that due to "financial" reasons he wanted to stop near his residence. Appellant testified on direct examination:

> Q What happens at that point, what's happening in your mind?
>
> A Well, what happened is, I don't—my heart was racing. I was—you know, I didn't know what was going to happen. You know, it's a dark area. I don't want to be roughed up by cops. I wanted to get home and I didn't want them to tow my

car. So I was pretty close. I went, stopped. I put on my indicator that I was going to pull over.

On cross-examination, appellant further testified:

Q Well, let me ask you this, though. The reason why you're suppose[d] to stop when the police have their lights on and their sirens on is because part of it is for officer's safety; correct?

A Yes, that's correct. Can I say something?

Q Go ahead.

A Yes, but when I get pulled over, I had to pull over where there's people because I've had a bad experience with the police. As you heard from them, they don't have cameras in their car. They can do anything, so.

. . . .

Q What is that?

A I don't want to say too much that ha[s] to do with the case, but I do get pulled over a lot because I used to have hair on my head.

Q You used to have what?

A Hair on my head, dreads. And I was the victim of profiling. I do get profiled a lot, so.

Q So you're saying, just so we understand, the reason why you knew your car was going to be towed is because you used to have hair on your head?

A No, I said they—I was profiled. That's what I'm saying. I told you that I've been roughed up by cops in the past. You know, I've been told things that if I said it to you—I mean, it doesn't really have nothing to do with it, but I'm just saying my experiences with the law and how they treat me—you know, I knew certain things. Like they try to take advantage of me. I don't know how to really explain it but—you know, but.

The state at this juncture sought to inquire into appellant's prior arrests, claiming that appellant had "testified that he had been arrested before." Specifically, the state argued:

> Judge, the defendant on cross examination testified that he had been arrested before. And I'd like to go into that, now that he's talked about that. He's talked about being roughed up in the past. He's talked about—he's basically done everything he could to beat around it, beat around it, not talking about his prior driving suspensions. He's talked about his prior arrests. I think it's only fair that I'm able to go into it.

The state acknowledged that appellant had never been convicted of a felony and did not know whether any of his prior misdemeanor arrests had resulted in a conviction.

Significantly, appellant never explicitly testified that he had been previously arrested. Appellant stated on direct examination that he did not want to be "roughed up" and stated on cross-examination that he had a "bad experience" with the police who used to pull him over and "profile" him because he used to have dreadlocks.

The trial court stated that by offering the defense that appellant had been previously roughed up and profiled by the police, appellant opened the door to his prior arrests. Specifically, the trial court stated:

> I feel that the defendant opened the door. I don't feel the State was prying. He was responding on cross to the State. The defendant wants to get out that he was roughed up by the police. He's been profiled for his dreads, his hair. That's what he's trying to tell the jury. I would say—I'm saying, in trying to get it out, he's opened the door by saying I've been arrested before by the police. I'll allow you to ask what have you been arrested for, and whatever he says is what he says, because there's nothing here, you know—

Although the trial court concluded appellant opened the door to inquiry into his prior arrests, once again, nowhere in the record did appellant state, directly or indirectly, as the trial court stated based on the state's representation, "I've been arrested before by the police."

In *Bozeman v. State*, 698 So. 2d 629 (Fla. 4th DCA 1997), this court found that the admission of prior bad acts was inadmissible, and that the defendant's testimony on cross-examination did not open the door to the admission of prior bad acts. In *Bozeman*, the defendant was charged with battery on a police officer and resisting an officer with violence. During trial, the defendant characterized the corrections officer as the aggressor, and the defendant claimed he acted in self-defense. The corrections officer testified that he managed a "special management" division within the jail. *Id.* at 629. Defense counsel during cross-examination asked the corrections officer if the officer was "extra apprehensive" from the moment he walked in the unit. *Id.* at 630. The trial court allowed the corrections officer to explain that he was "extra sensitive" upon entering the special management unit because it housed the "worse behaved inmates." *Id.*

This court found that the corrections officer's description of the special management unit was tantamount to admission of inadmissible prior bad acts evidence. This court also determined that the defendant did not open the door to the testimony about the unit because to open the door "the defense must first offer misleading testimony or make a specific factual assertion which the state has the right to correct so that the jury will not be misled." *Id.*

In the present case, appellant did not offer facially "misleading" testimony when he stated that he felt he was profiled by the police, when he stated that he had bad experiences with police, or when he stated he was roughed up. The state had introduced evidence that appellant had been stopped because of an expired tag. The fact that appellant was previously arrested was not relevant, and any probative value was clearly outweighed by its obvious prejudicial effect. *See Fulton v. State*, 335 So. 2d 280, 283 (Fla. 1976) (noting that arrest "happens to the innocent as well as the guilty"); *Modeste v. State*, 760 So. 2d 1078, 1082 (Fla. 5th DCA 2000) (finding that where defendant testified on direct that he did not know the meaning of the term "cannabis," he did not open the door to prior arrests for possession of cannabis because he did not "offer misleading testimony or make a specific factual assertion which the state has the right to correct"); *Gonzalez v. City of Tampa*, 776 So. 2d 290, 293 (Fla. 2d DCA 2000) (stating that where prior arrests are not relevant and the probative value is substantially outweighed by the danger of unfair prejudice, "inquiry into the number of times that a person has been arrested, even without conviction, is deemed so prejudicial as to require reversal"); § 90.610, Fla. Stat. (allowing admission, for impeachment purposes, of prior convictions for felonies and crimes of dishonesty or false statement).

Finally, it is disconcerting that appellant's mere assertion of the defense of alleged profiling would act to open the door to the inadmissible evidence that appellant was arrested. This conceivably could chill the rights of a defendant to testify, present, or even suggest a defense where that defendant's perception regarding the actions of law enforcement is one of distrust.

Based on all of the above reasons, I would not allow inquiry into appellant's prior arrests and would find that appellant's allegations of profiling did not open the door based on the facts of this case.

* * *

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Barbara McCarthy, Judge; L.T. Case No. 10-9329 CF10A.

Carey Haughwout, Public Defender and Tatjana Ostapoff, Assistant Public Defender, West Palm Beach, for appellant.

Pamela Jo Bondi, Attorney General and Katherine Y. McIntire, Assistant Attorney General, for appellee.

Not final until disposition of timely filed motion for rehearing.