Third District Court of Appeal

State of Florida

Opinion filed July 1, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-1150
Lower Tribunal No. 17-8870

Jose Palos,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Dava J. Tunis, Judge.

Carlos J. Martinez, Public Defender, and Susan S. Lerner, Assistant Public Defender, for appellant.

Ashley Moody, Attorney General, and Kseniya Smychkouskaya, Assistant Attorney General, for appellee.

Before FERNANDEZ, LINDSEY and GORDO, JJ.

GORDO, J.

Jose Palos appeals his conviction and sentence for shooting or throwing a deadly missile and aggravated assault with a firearm. Palos argues that the trial court abused its discretion in denying defense counsel's request for re-cross examination of the victim, Josue Guillen Bueso. The State contends that the issue was not properly preserved for appellate review, and that even if it was, the trial court's ruling was not an abuse of its discretion. We agree with the State and affirm Palos's conviction and sentence.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

On the night of the offenses, Palos and Guillen Bueso were at a bar. After a discussion inside the bar, Guillen Bueso left and was waiting outside for his friend, "Flaco." Palos eventually also exited the bar and continued arguing with Guillen Bueso. During the argument, Palos reached for something in his waistband. Fearing that Palos was going to pull out a knife or gun, Guillen Bueso threw a beer bottle at him.

On direct examination at trial, Guillen Bueso testified as follows:

> STATE: Can you stand up and demonstrate and show me what did he do?
> VICTIM: I don't know exactly what hand he used to make that movement, because he did pull something out. And at that point the beer that I had in my hand, I threw it at him.
> STATE: And why did you throw it at him?
> VICTIM: Okay. Because once [sic] imagination, when one does like that, it has to be that they're going to pull out a knife or pistol.
> . . .

STATE: And did you see what was in his hand?
STATE: Do you know what color was the thing he pulled out from him?
VICTIM: No.
STATE: Was it white?
VICTIM: No.
STATE: What happened after you threw the bottle at him.
VICTIM: What he had pulled out and fell down.
STATE: Did you see what fell down?
VICTIM: No.

On cross examination, Palos's counsel also questioned Guillen Bueso about Palos reaching for his waistband. Guillen Bueso's testimony remained consistent with his direct examination, as follows:

[DEFENSE] COUNSEL: And now this is when you say that he starts making gestures towards his waistband or his shirt, right?
VICTIM: Yes. Correct.
COUNSEL: And at this point you're thinking maybe he has a weapon, maybe he has a knife or a gun?
VICTIM: That happened so quickly that it doesn't give you enough time to think about anything.
COUNSEL: Right. So, that's why the next thing that happens is that you take the beer bottle that's in your hand and you throw it at Mr. Palos?
VICTIM: Yes. Correct.
COUNSEL: Okay. And you say that you saw something in his hands, but you couldn't tell what it was, right?
VICTIM: When he brought his own hand to his waist, I didn't know what it was.
COUNSEL: So, after you throw the beer bottle at Mr. Palos, that's when you start to back away, right?
VICTIM: Yes.
COUNSEL: And he's sorts of taking steps forward towards you, right?
VICTIM: Yes. Because something dropped out of his hands.

> COUNSEL: And you couldn't see what dropped out of his hand, right?
> VICTIM: No. Because that fell where the car is between the cabin and the back of the tire of the car, just right next to the car.

On redirect examination, Guillen Bueso was once more asked about this and testified, again, that he was uncertain about what had fallen to the ground when Palos reached into his waistband. He testified:

> STATE: And when the defendant reached for his waistband, you saw something that scared you?
> VICTIM: At the moment it was simply my reaction to throw the bottle after he took his hand out.
> STATE: Now. The thing that was in his waistband, did it look – did you look at it at all? Did it look like a bottle? Did it look like a gun, a knife, brown, black? Could you describe what you saw in his waistband when he went to reach for it?
> VICTIM: The thing is. In fact, it seemed like a gun, but a 100 percent, I didn't see it 100 percent like this to, like I see it, see it.

Palos's counsel then requested to conduct a re-cross examination of the victim, stating "I would ask for one question on re-cross." The trial court denied the request. Palos's counsel responded "Okay," and did not request to proffer or ask for a sidebar on the issue at that time.

Several hours later, during the cross examination of one of the detectives involved in the case, Palos's counsel, for the first time, asked to proffer what she would have asked Guillen Bueso on re-cross examination. The defense alleged it was seeking to question the testifying officer from the arrest form that documented

Guillen Bueso's alleged prior inconsistent statements, in an effort to attempt to impeach Guillen Bueso. The trial court permitted the proffer at that time. Because the defense had not laid the proper foundation during Guillen Bueso's testimony to impeach him and because the testifying officer was not the officer who heard the potentially impeachable statements, the trial court did not permit the proposed impeachment to proceed.

The jury found Palos guilty of shooting or throwing a deadly missile and aggravated assault with a firearm. The trial court imposed concurrent sentences of 24 months in prison, followed by two years reporting probation. This appeal followed.

LEGAL ANALYSIS

Florida Statutes section 90.104(1)(b) provides:

> (1) A court may predicate error, set aside or reverse a judgment, or grant a new trial on the basis of admitted or excluded evidence when a substantial right of the party is adversely affected and:
> . . .
> (b) When the ruling is one excluding evidence, **the substance of the evidence was made known to the court by offer of proof or was apparent from the context within which the questions were asked**.

(emphasis added). For this Court to consider whether a trial court erred in excluding testimony, the party seeking to introduce the evidence must timely "proffer a foundation that would have established the relevance of the excluded evidence."

Parnell v. State, 627 So. 2d 1246, 1247 (Fla. 3d DCA 1993) (citing A. McD. v. State, 422 So. 2d 336 (Fla. 3d DCA 1982)). "It is axiomatic that failure to proffer what the excluded evidence would have revealed precludes appellate consideration of the alleged error." A. McD., 422 So. 2d at 337 (citing Cason v. Smith, 365 So. 2d 1042 (Fla. 3d DCA 1978); Seaboard Air Line R.R. Co. v. Ellis, 143 So. 2d 550 (Fla. 3d DCA 1962)).

At the time Palos's counsel requested to re-cross Guillen Bueso and the trial court denied that request, she was required to contemporaneously proffer, at minimum, the proposed question she would have asked. Instead, Palos's counsel merely acquiesced to the trial court's denial. Hours after having denied the request for re-cross examination and the defense's failure to properly preserve the record, the trial court still allowed defense counsel access to the record to make the untimely proffer. The argument raised later in the trial, during the testimony of a different witness, was insufficient for proper preservation of the issue. See, e.g., Johnson v. State, 494 So. 2d 311, 313 (Fla. 1st DCA 1986) (stating that a proffer that occurred after the close of evidence "was too little, too late"). The failure to proffer the proposed question or testimony to be elicited at the time of the trial court's denial means that the defense failed to properly preserve the issue for this Court's review.

As such, the trial court's ruling may only be considered on appeal if it constitutes fundamental error. Fundamental error is "error that 'reaches down into

the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.'" Jones v. State, 271 So. 3d 109, 110 (Fla. 3d DCA 2019) (quoting Brooks v. State, 762 So. 2d 879, 899 (Fla. 2000)). In the absence of a proffer, Palos cannot establish that the trial court's denial of re-cross examination was error, much less fundamental error.[1]

Affirmed.

[1] We note that on this record, we would be unable to conclude that the trial court abused its discretion in denying re-cross examination. "A trial court's decision not to allow re-cross-examination is reviewed for abuse of discretion." Knight v. State, 919 So. 2d 628, 636 (Fla. 3d DCA 2006) (citing Hurst v. State, 825 So. 2d 517 (Fla. 4th DCA 2002); Louisy v. State, 667 So. 2d 972 (Fla. 4th DCA 1996)). The prosecutor in this case did not raise any novel issues on redirect and Guillen Bueso did not testify in a manner inconsistent with his direct and cross examinations. "Because the State did not elicit 'any new matter on re-direct, but only a detail which had been addressed in cross-examination,' we find no abuse of discretion in the trial court declining to allow re-cross examination of the victim." Castanos v. State, 240 So. 3d 881, 882 (Fla. 5th DCA 2018) (citing Hurst, 825 So. 2d at 517); see also Tennyson v. State, 254 So. 3d 510, 514 (Fla. 3d DCA 2018) (citing Hurst, 825 So. 2d at 517) ("It is not an abuse of discretion for a trial court to deny re-cross when the prosecutor does not raise any new matters during redirect."). The trial court was well within its discretion to deny Palos's request to conduct re-cross examination.