

No. 1-10-0184

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 3576
	)	
JOHN PATRICK,	)	Honorable
	)	Kevin M. Sheehan,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE LAMPKIN delivered the judgment of the court.  
Presiding Justice Robert E. Gordon and Justice Garcia concurred in the judgment.

**ORDER**

¶ 1 *Held:* (1) Defendant was not denied a fair trial by the State's rebuttal argument where the prosecutor was responding to defense counsel's closing argument and properly commenting on witness credibility and; (2) Defendant was properly sentenced as a Class X offender by background and therefore properly subject to a three-year term of mandatory supervised release.

¶ 2 After a jury trial, defendant John Patrick was convicted of residential burglary and sentenced as a Class X offender to 12 years in prison and a 3-year mandatory supervised release (MSR) term. On appeal, defendant contends he was denied a fair trial due to improper comments made by the prosecutor during the State's rebuttal closing argument and that his MSR term must be reduced to two years. We affirm.

¶ 3 The evidence at trial established that around 10 a.m. on February 5, 2009, the garden apartment of Michael Nowicki, at 1411 West Superior Street, was broken into. Defendant was arrested on the scene.

¶ 4 Michael Nowicki testified that on February 5, 2009, he left work and arrived at his apartment after receiving a phone call around 10 a.m. Since he had left his apartment that morning, the television had been moved from its stand to the middle of the floor on top of a rug and blanket, he was missing seven \$20 bills from a shelf and change from a cup in his room, and the VCR remote. The window in the rear of the apartment was broken. Defendant did not have authority to be in Nowicki's apartment.

¶ 5 Officer Andreani testified that around 10 a.m. on February 5, 2009, he and his partner, Officer Via, received a radio call about a burglary in progress at 1411 West Superior. Both officers were in plainclothes. When they arrived, Andreani investigated a broken window at the back of the building while Via went to the front of the building. As Andreani moved toward the window, he looked inside the apartment and saw defendant pushing a flat screen television toward the apartment front door. Andreani announced that he was a police officer as he was entering through the window. Defendant fled toward the front door and Andreani notified Via over the radio where defendant was going. While going through the window, Andreani cut his hand on a piece of glass and broke a shelving unit underneath the window. When he was in the apartment, Andreani observed that the front door was open and defendant was already in custody in the building hallway. A screwdriver, chisel, remote control, seven \$20 bills, and loose change were all recovered from defendant's person.

¶ 6 Officer Henry Via substantially corroborated Andreani's testimony. At the front of the building, Via observed defendant leaving the front door of the garden apartment. Via went through the building front door and immediately detained defendant. Via read defendant his

*Miranda* rights then asked how he was going to transport the television. Defendant said, "I wasn't gonna take the TV. \*\*\* [A]ll I got was some coins and some money." Defendant's car was parked behind the building.

¶ 7 Dean Barney, the evidence technician who processed the scene at 1411 West Superior, arrived around 10:30 a.m., then photographed the scene and looked for any type of items that may have been touched by the offender. Barney found no latent fingerprints at the point of entry, but recovered one fingerprint lift from the television and two lifts from the television stand.

¶ 8 The parties then stipulated that none of the three fingerprint lifts matched defendant. It was also stipulated that impressions are not always left behind when an item is touched.

¶ 9 Defendant testified that on February 5, 2009, he left his home around 8 a.m. and had to pry his car door open using a chisel and screwdriver because it was frozen shut. He went to 1411 West Superior to talk to a man named Jimmy who lived on the second floor of the building. He wanted to see Jimmy about a job, but Jimmy was not aware defendant was coming. Defendant parked behind the building because the street parking was permit-only. He walked to the front of the building, rang the top doorbell, and was buzzed in. Defendant went into the building stairway and made it about four steps up when he heard a bump on the front door. A uniformed police officer with a gun in his hand was standing outside, then a man in civilian clothes kicked the building door in and arrested defendant. The plainclothes officer took defendant into the garden apartment and searched him, taking \$140, car keys, the screwdriver and chisel. The officer asked defendant why he was trying to take the television and defendant said he had never been there. Defendant never received his *Miranda* warnings and never admitted to entering the apartment or taking anything. He never touched a remote control. When defendant arrived at the station, he spoke with Detective Servin, but did not make a

statement, only spoke to the detective for about two minutes and only told the detective he did not have knowledge of any other burglaries. Defendant has a 2004 conviction for burglary and a 2002 conviction for possession of a controlled substance.

¶ 10 Detective Dante Servin testified that he interviewed defendant around 2:25 p.m. on February 5, 2009. Before the conversation, Servin read defendant his *Miranda* warnings from a pre-printed card and defendant said he understood. Defendant told Servin he had been caught exiting the apartment with a chisel and screwdriver on his person, and that he took change from the apartment but that he did not take any bills. Defendant also said the window was broken when he arrived and it appeared that someone had already moved the television to the front door, but defendant did not move the television. Servin did not memorialize defendant's statement in writing though he took notes during the interview.

¶ 11 During closing arguments, the State argued that defendant "got caught." The State reiterated the testimony that defendant was seen inside Nowicki's apartment and coming out of that apartment's front door, and that a chisel, a screwdriver, and a remote control were recovered from defendant when he was arrested. Defense counsel's closing argument focused on the lack of physical evidence connecting defendant to the scene, challenged the credibility of the officers' testimony, and argued that defendant's testimony was credible.

¶ 12 In rebuttal, the prosecutor argued that there were plausible explanations for the lack of physical evidence, that the defense theory was not believable, and that defendant was not a credible witness.

¶ 13 The jury found defendant guilty of residential burglary, a Class 1 felony. The court sentenced defendant as a Class X offender to 12 years in prison, based on his criminal background. Defendant also received a three-year MSR term.

¶ 14 On appeal, defendant first contends that the prosecutor's remarks during rebuttal argument deprived him of a fair trial. Specifically, defendant claims the prosecutor made comments that improperly reduced the State's burden of proof, improperly disparaged defense counsel, and improperly bolstered the credibility of the police officer witnesses. Defendant concludes that the cumulative effect of the improper arguments constitutes reversible error.

¶ 15 As an initial matter, the State contends that defendant has forfeited this issue by failing to properly preserve his objection to all of the contested comments in a posttrial motion. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). Defendant claims that to the extent he may have forfeited the issues, they may be properly reviewed as plain error.

¶ 16 To overcome forfeiture, the defendant bears the burden of persuasion to establish plain error. *Hillier*, 237 Ill. 2d at 545. To obtain relief under the plain error rule, the defendant must first show that a clear and obvious error occurred. *Id.* We find that the prosecutor did not commit error in rebuttal argument.

¶ 17 The State is afforded wide latitude in making closing and rebuttal arguments. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). In addition to commenting on the evidence, a prosecutor may make any reasonable and fair inferences based on the evidence. *Id.* Comments made during rebuttal argument are not improper if they were invited by the defense and comments made during closing arguments must be viewed in the context of the entire arguments of both parties. *People v. Giraud*, 2011 IL App (1st) 091261, ¶ 43. A reviewing court will not reverse a jury's verdict based on improper closing arguments unless the comments were of such magnitude that they resulted in substantial prejudice to the defendant and constituted a material factor in his conviction. *People v. Gonzalez*, 388 Ill. App. 3d 566, 587 (2008).

¶ 18 Defendant first argues that the State improperly reduced its burden of proof during rebuttal argument when it stated, "[l]adies and gentlemen, this isn't CSI. This is real life," and

later said, "reasonable doubt is the standard, it is the burden, and we accept that burden. And it's a burden that's been met for past [sic] 200 years in courtroom [sic] across this country every day, in courtrooms in this building every day." We disagree with defendant's argument.

¶ 19 In closing argument, defense counsel pointed out the State's lack of fingerprint evidence tying defendant to the scene. The State responded:

"Ladies and gentlemen, this isn't CSI. This is real life. And as you know, that this isn't a TV show where there's going to be some incredible intricate piece of evidence that is going to solve the crime and explain everything. This is real life. As you're going to see and read in the stipulation, which is evidence, that fingerprints aren't always left on surfaces."

The record shows that the prosecutor's comments were invited by defense counsel's remarks on the lack of physical evidence. Moreover, the State's reference to CSI was not an attempt to reduce its burden but rather gave another explanation for the lack of fingerprints based on the trial evidence. See *People v. Beltran*, 2011 IL App (2d) 090856, ¶ 70-71 (the State's reference to CSI was a fair comment on a logical flaw in defense counsel's closing argument); *People v. Willis*, 409 Ill. App. 3d 804, 813 (2011) (finding a comment about CSI in rebuttal argument was "a benign reference to the jurors' common knowledge that this was not an investigatory television mystery, but rather a real-world criminal case supported by overwhelming evidence of defendant's guilt"). Furthermore, the prosecutor's statements about the reasonable doubt standard are identical to similar statements held to be within the proper bounds for argument in numerous cases. *People v. Harris*, 129 Ill. 2d 123, 161 (1998); *People v. Ligon*, 365 Ill. App. 3d 109, 125 (2006); *People v. Laugharn*, 297 Ill. App. 3d 807, 812 (1998). We find no reason to depart from

these holdings. As both comments were proper, defendant's contention that the two arguments taken together are reversible error is without merit. See *Ligon*, 365 Ill. App. 3d at 125.

¶ 20 Defendant next argues that the State improperly disparaged defense counsel during rebuttal argument.

¶ 21 During closing argument, defense counsel argued that defendant's testimony was believable. In rebuttal, the prosecutor argued:

"John Patrick gave a believable story. I'm sorry to tell you this, ladies and gentlemen, but I think Defense counsel was sitting in a different courtroom today when defendant testified. A believable story? Or maybe I'm just having a hard time figuring out what their theory of the case is. But if I have it right, I think their theory of the case is that defendant was never in that apartment because as they said in opening, the police made a big mistake and now they're saying it's a police conspiracy.

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Well, let's look at their theory of the case, ladies and gentlemen. First of all, let's look at this whole police conspiracy theory.

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Smoking [*sic*] mirrors. That's exactly what the Defense is trying to put up here to distract you and keep you away from what is so painfully obvious. He was caught red-handed in the apartment. They're trying to distract you here and there. Their arguments are bordering on insulting.

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[T]o buy the theory of the Defense, to do that you would have to disregard all the evidence you heard today. And their theory is about as believable as Santa Clause."

Viewing the comments in their full context, it is clear that the prosecutor never accused defense counsel of wrongdoing or lying. The prosecutor was responding to defense counsel's assertion that defendant's story was believable. Moreover, the prosecutor was not distracting the jury's attention away from the facts, but instead was commenting on the weaknesses in the defense theory of the case. Such comments are proper for closing and rebuttal argument. *Ligon*, 365 Ill. App. 3d at 124-25; *People v. Rodriguez*, 236 Ill. App. 3d 432, 443 (1992).

¶ 22 Finally, defendant argues that the prosecutor improperly bolstered the credibility of the police officer witnesses by arguing they had no reason to lie.

¶ 23 A prosecutor cannot argue that a witness is credible solely based on that witness's status as a police officer. *People v. Gorosteata*, 374 Ill. App. 3d 203, 219 (2007). However, witness credibility is a proper subject for closing argument " 'if it is based on the evidence or the inferences drawn from it.' " *Gorosteata*, 374 Ill. App. 3d at 223 (quoting *People v. Hudson*, 147 Ill. 2d 401, 445 (1993)).

¶ 24 During rebuttal argument, the prosecutor said, "[t]his is a case about credibility. And who are you going to believe? Are you going to leave [*sic*] the officers who have no reason to come in and lie, or are you going to believe [defendant]?" The prosecutor then referred to defendant's criminal background and told the jury that previous convictions may be considered as they effect defendant's believability. At no time did the prosecutor say that the police were believable just because they were police officers. The record shows that the prosecutor was comparing the police witnesses to defendant. While defendant had a criminal history which

went to his credibility, in contrast there was no evidence presented at trial that the officers were biased or had a reason to fabricate their testimony. Therefore the prosecutor properly commented on witness credibility based on the evidence at trial and inferences drawn from it. *Gorosteata*, 374 Ill. App. 3d at 223. Having determined that none of the comments defendant objected to were erroneous, we necessarily find that his contention that he was denied a fair trial by their cumulative effect also fails. *Ligon*, 365 Ill. App. 3d at 125.

¶ 25 Defendant next contends that his MSR term should be reduced two years. Specifically, defendant maintains that although he was sentenced as a Class X offender based on his criminal background, the MSR term should be based on his Class 1 felony conviction, not his sentence.

¶ 26 Section 5-3-8 of the Uniform Code of Corrections provides that a defendant, over the age of 21, who is convicted of a Class 1 felony must be sentenced as a Class X offender if he has prior convictions for two Class 2 or higher class felonies arising out of a different series of acts. 730 ILCS 5/5-3-8(c)(8) (West 2008). The MSR term for a Class X sentence is three years, and the MSR term for a Class 1 felony is two years. 730 ILCS 5/5-8-1(d)(1), (2) (West 2008). Defendant does not dispute his status as a Class X offender based on his criminal history.

¶ 27 This court has held that when a defendant is sentenced as a Class X offender by background, the MSR term applicable to the Class X sentence is automatically imposed. *People v. Smart*, 311 Ill. App. 3d 415, 417-18 (2000); *People v. Anderson*, 272 Ill. App. 3d 537, 541 (1995). Defendant acknowledges that *Smart* and *Anderson* rejected his claim, but argues they were wrongly decided in light of the subsequent Illinois Supreme Court decision in *People v. Pullen*, 192 Ill. 2d 36 (2000).

¶ 28 However, even in light of *Pullen*, this court has continued to reject defendant's claim. *People v. Lee*, 397 Ill. App. 3d 1067, 1073 (2010); *People v. McKinney*, 399 Ill. App. 3d 77, 81-83 (2010). We see no need to depart from the well-reasoned decisions in *Lee* and *McKinney*, and

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therefore find that defendant is properly required to serve a MSR term of three years because he was properly sentenced as a Class X offender.

¶ 29 For the foregoing reasons, the judgment of the trial court is affirmed.

¶ 30 Affirmed.