

2011 IL App (2d) 100389-U
No. 2-10-0389
Order filed October 26, 2011

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Lake County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 08-DT-1416
)	
SIMON BAGIROV,)	Honorable
)	Michael B. Betar,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

Held: Defendant did not show error or plain error in the State's alleged prosecutorial misconduct: by presenting evidence and argument on the point that the substance at issue was consistent with heroin, the State did not violate the trial court's prohibition on a definitive identification of the substance as such; there was no indication that the jury was affected by, or even heard, the prosecutor's loud speech during a sidebar; the court gave a curative instruction as to a statement in closing, which statement in any event was brief and isolated; the State commented on the uncontradicted nature of the evidence without highlighting defendant's decision not to testify.

¶ 1 Defendant, Simon Bagirov, appeals his conviction of driving under the influence of drugs (625 ILCS 5/11-501(a)(4) (West 2008)). He contends that he was denied his right to a fair trial, alleging prosecutorial misconduct. We affirm.

¶ 2 I. BACKGROUND

¶ 3 Bagirov was charged with driving under the influence of drugs after officers responded to a call and observed Bagirov driving erratically. One of the officers, Michael Bush, observed that Bagirov was pale and shaking. Bagirov's pupils were small and did not change in size when Bush shined a light in his eyes. Bush suspected that Bagirov was impaired and asked him to perform field sobriety tests, which were videotaped and later saved to DVD. Bagirov performed poorly on the tests, and Bush placed him under arrest. During a search incident to arrest, the officers found five hypodermic needles in the glove box, and a charred piece of foil and a dirty cotton swab in the center console. Bagirov refused to take Breathalyzer, blood, and urine tests. A jury trial was held.

¶ 4 Before trial, the court told the parties that they should refrain from "speaking objections." The State moved *in limine* to qualify Bush as an expert who was able to provide an opinion on whether Bagirov was under the influence of drugs. The State provided evidence of various considerations that it argued qualified Bush as an expert, such as Bush's specialized training and personal experience of living with a heroin addict. The court found that Bush could testify as an expert, and the defense expressed concern that there was no evidence that the substance at issue was heroin. The court, stating that Bush had described the substance as heroin, stood by its ruling.

¶ 5 Later, the defense asked that the State, and particularly Bush, be prohibited from specifically referring to the substance as heroin, because it would assume facts not in evidence. The State responded that it did not have a lab report and that the case was based on circumstantial evidence. The court stated that Bush could testify about his observations but noted concerns about foundation

for a statement about what the specific substance was. Thus, the court said that Bush could testify about what was found but could not state definitively that it was heroin.

¶ 6 At trial, Bush testified about his qualifications, including specialized classes that he had taken. He added that he had a roommate in college who abused a white powdery substance that was injected. Bush said that his roommate told him that the substance that he used was heroin. A hearsay objection was sustained, and the court explained hearsay to the jury and told them to disregard the testimony that the roommate told Bush that the substance he used was heroin.

¶ 7 Bush next described that heroin is prepared by placing powder into a metal foil, cup, or spoon with water that is then heated and drawn through a cigarette butt or cotton swab to filter it. Bush also testified that pale skin, shaking, and small pupils that did not respond to light were consistent with somebody who had ingested opiates. Bush was then allowed to testify over defense objection that, in his opinion, Bagirov was under the influence of opiates or narcotics at the time of his arrest, and his driving was impaired.

¶ 8 The recording of Bagirov's field sobriety tests was shown to the jury. During closing arguments, the State noted that, while there might be another explanation for Bagirov's symptoms and behavior, "we have not heard it." A defense objection to the statement was overruled. The defense also objected to the State's reference to some of the things Bagirov said on the tape as hearsay. That objection was sustained.

¶ 9 Also during closing arguments, the State described Bush's qualifications and described his testimony about his college roommate's use of heroin. The defense's objection was sustained, and the jury was told to disregard the use of the term heroin. Later in arguments, the State noted that Bagirov refused testing and it made comments to the effect that people who are using drugs should not be driving or that society would not want them to drive. The defense objected, and the court

cautioned that it did not want the State to make a “keep-all-these-people-off-the-road type of argument.”

¶ 10 There was also a sidebar conference about an objection related to a defense statement that there were no lab results. During the conference, the defense asserted that the prosecutor was speaking loudly on purpose. The court did not comment on the volume of the prosecutor’s voice, and the defense did not make any specific objection to it. The jury found Bagirov guilty, his motion for a new trial was denied, and he appeals.

¶ 11

II. ANALYSIS

¶ 12 Bagirov argues that he was denied his right to a fair trial when (1) the prosecutor repeatedly used the word “heroin” during Bush’s testimony and in closing arguments; (2) the prosecutor spoke loudly at a sidebar conference; (3) the prosecutor referenced during closing whether society wants people who use drugs to drive; and (4) the prosecutor made reference to Bush’s failure to testify. He also argues that the cumulative effect of the comments deprived him of a fair trial and constituted plain error.

¶ 13 “Every defendant is entitled to [a] fair trial free from prejudicial comments by the prosecution.” *People v. Young*, 347 Ill. App. 3d 909, 924 (2004). In assessing whether a defendant’s right to a fair trial has been infringed, a court employs the same test that it uses whenever it applies the second prong of the plain-error test. *People v. Blue*, 189 Ill. 2d 99, 138 (2000). That is, the court considers whether the defendant’s substantial right to a fair trial has been affected to such an extent that the court cannot confidently assert that the defendant’s trial was fundamentally fair. *Id.*

¶ 14 In reviewing whether a defendant was denied a fair trial, it is unclear what standard of review should apply. In cases that concern prosecutorial misconduct arising during closing argument, we

apply an abuse-of-discretion standard to the individual remarks and review *de novo* the cumulative effect that all of the remarks had on the defendant's case. *People v. Robinson*, 391 Ill. App. 3d 822, 840 (2009). However, there is no authority for what standard courts should employ when reviewing remarks made in areas of the trial other than during closing argument. Resolution of what standard applies can wait for another day, as under either a *de novo* standard or a more deferential one, we would reach the same result.

¶ 15 “In making a closing argument, a prosecutor is given a great deal of latitude.” *People v. Woods*, 2011 IL App (1st) 091959, ¶ 42. “The prosecutor ‘has [the] right to comment on the evidence and draw all legitimate inferences deducible therefrom, even if they are unfavorable to the defendant.’” *Id.* (quoting *People v. Pasch*, 152 Ill. 2d 133, 184 (1992)). “We must look at the entire argument and view any alleged erroneous comments within the context that they were made.” *Id.* Further, even if the prosecutor’s remarks sometimes exceed the bounds of proper comment, the verdict must not be disturbed unless the remarks resulted in substantial prejudice to the accused, such that absent those remarks the verdict would have been different. *Id.* A significant factor in reviewing the impact of a prosecutor’s allegedly improper comments is whether the comments were isolated and brief within the context of the length of the closing argument. *Id.*

¶ 16 In order to preserve an evidentiary issue, it is well established that a party must object below and raise the issue in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Likewise, the failure to object to allegedly improper comments during closing argument operates as a forfeiture of the objection. *Velarde v. Illinois Central R.R. Co.*, 354 Ill. App. 3d 523, 544 (2004).

¶ 17 Bagirov first contends that the State repeatedly violated court rulings that the word “heroin” was not to be used. However, in doing so, he assumes that the court ordered that the word was absolutely prohibited, which is not the case. Instead, the court held that Bush and the State could

not definitively say that the substance at issue was heroin. Thus, there could be circumstantial evidence that it was heroin or another narcotic, Bush could give his opinion that Bagirov's symptoms were consistent with drug use, and he could describe how heroin looks and how it is used, but he could not definitively testify that the substance was indeed heroin. Generally, that is how the State presented the case and, the only time the defense objected was on hearsay grounds, with the reason for sustaining the objection explained to the jury. Any complaint that there was misconduct through use of the word heroin was forfeited and, even if we were to consider the matter, there was no misconduct merely through the use of the word, either during Bush's testimony or in closing arguments.

¶ 18 Bagirov next argues that he was denied a fair trial because the prosecutor spoke loudly during a sidebar conference. But, aside from mentioning the prosecutor's speaking volume at the time, Bagirov did not specifically object. Thus, he forfeited review of the issue. Further, the record does not show that the jury heard the comments or was affected in any way.

¶ 19 Bagirov also contends that the prosecutor improperly argued that society does not want people who use drugs to drive. During closing, his objection to that comment was sustained and the court gave a curative instruction. Generally, if a timely objection is made to an improper comment, the court can correct the error by sustaining the objection and instructing the jury to disregard the comment. See *People v. Hall*, 194 Ill. 2d 305, 342 (2000). Here, the court sustained the objection and told the jury to disregard the comment. Further, we cannot say that this comment was a material factor in defendant's conviction as the comment was brief and isolated. See *Woods*, 2011 IL App (1st) 091959 ¶ 45.

¶ 20 Bagirov also argues that the State improperly commented on his decision not to testify. The State cannot comment on a defendant's failure to testify, although it can comment on the

uncontradicted nature of the State's evidence, even when the defendant is the only person who could have contradicted the State's case. *People v. Connors*, 82 Ill. App. 3d 312, 321 (1980).

¶ 21 Here, the State's comments were directed at an argument that, while there could be explanations other than drug use for Bagirov's performance during the field sobriety tests, there was nothing to suggest any. The comments were merely on the uncontradicted nature of the evidence and were not improper references to Bagirov's decision not to testify.

¶ 22 Finally, Bagirov suggests that the cumulative effect of the comments deprived him of a fair trial and that it amounted to plain error. A reviewing court may consider a forfeited error under the plain-error doctrine when the evidence in a case is so closely balanced that the guilty finding may have resulted from the error and not the evidence or when the error is so serious that the defendant was denied a substantial right. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005).

¶ 23 Here, we have generally determined that error did not occur and, to the extent that any comments could be deemed error, the evidence was not closely balanced and the comments were brief and isolated, such that the guilty finding could not have resulted because of them. Likewise, such brief and isolated comments did not amount to an error so serious as to affect the fairness of the trial. Accordingly, there was no plain error.

¶ 24 III. CONCLUSION

¶ 25 Bagirov forfeited many of his arguments. In any event, he was not denied a fair trial and there was no plain error. Accordingly, the judgment of the circuit court of Lake County is affirmed.

¶ 26 Affirmed.