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No. 3-09-0054

Order filed March 2, 2011

IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

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| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the Circuit Court |
| |) | for the 12th Judicial Circuit, |
| Plaintiff-Appellee, |) | Will County, Illinois |
| |) | |
| v. |) | No. 06-CF-1401 |
| |) | |
| EDWARD ROPER, |) | Honorable |
| |) | Richard Schoenstedt, |
| Defendant-Appellant. |) | Judge, Presiding |

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Schmidt and Holdridge concurred in the judgment.

ORDER

Held: No error occurred in the trial court's admission of other crimes evidence or in its calculation of the amount of restitution it ordered and the State's misstatements of the evidence in opening and closing arguments did not deny Roper a fair trial; plain error review was thus inappropriate and the issues were forfeited.

Defendant Edward Roper was convicted by a jury of one count of identity theft and sentenced to a term of imprisonment of seven and one-half years. He appealed. We affirm.

FACTS

Defendant Edward Roper was charged by indictment with identity theft. 720 ILCS 5/16G-15(a)(1), (d)(1)(B) (West 2006). The indictment alleged that on or about March 2 and 7, 2006,

Roper knowingly used a MasterCard credit card belonging to Cheryl Edmiston to fraudulently obtain merchandise from Wal-Mart valued at more than \$300 but not more than \$2,000.

Prior to trial, Roper filed a motion *in limine* to prohibit the State from introducing evidence of other crimes, specifically other unauthorized credit card charges and checks written to Roper on Edmiston's checking account without her permission or knowledge, conduct not alleged in the indictment. In addition, just prior to the start of trial during arguments on Roper's motion *in limine*, the State told the trial court that it wanted to introduce evidence of Roper "trespassing" in Edmiston's vehicle to support a common theme theory that Roper had taken advantage of Edmiston while she was ill and later hospitalized. The State also said that Barbara Campbell, a friend of Edmiston, would testify that she wrote a letter to Roper asking him to return Edmiston's missing car and that the car was subsequently returned. Roper objected, arguing that other people could have had access to the car, there was no evidence Roper received Campbell's letter, and he was not charged with auto theft. In response, the State reiterated that the car was returned to Edmiston's house and that the evidence was probative of Roper's state of mind. The trial court granted the State's oral motion *in limine*, holding that the evidence concerning Edmiston's missing car was admissible, and denied, in part, Roper's motion *in limine* regarding the admission of other crimes evidence.

A jury trial ensued. In its opening statement, the State referred to Campbell's note asking Roper to return Edmiston's car which she put on Edmiston's front door and said that when Campbell later returned to the house, the car was there. The following evidence was then presented.

Cheryl Edmiston testified that Roper had participated in a youth ministry she founded, from the time he was 10 years old until he was 18. She was diagnosed in 2000 with bipolar disorder,

stopped taking her medication in the winter of 2005-2006, and was suffering other physical problems. As a result, she had difficulty with daily activities, including writing and driving. In December 2005 and January 2006, Roper and his wife visited her once or twice a week. They dressed and fed her and drove her on errands and to doctor appointments. They never asked to be paid for their services and she did not pay them. She did not write or sign any of the 27 checks made out to Roper dated in January and February 2006. She did not authorize him to write checks from her account. She had a credit card from MBNA but did not give Roper permission to use the card. She did not ask Roper to open her mail or check on things for her. Her friend, Barbara Campbell, helped her in December and January. Campbell paid Edmiston's bills, writing checks at her direction. The last check Edmiston wrote and signed was in December 2005 to State Farm Insurance. Edmiston trusted only Campbell to attend to her affairs. She was hospitalized in January 2006, suffered a stroke, and was subsequently transferred to nursing homes where she lived until August 2006. She did not give Roper permission to use her car or to be in her home while she was in the hospital or the nursing homes. She gave keys to her house to only her mother and Campbell.

Barbara Campbell testified that Edmiston's mother called her in November or December 2005 and asked her to check on Edmiston because she was not doing well. During that period, Campbell took care of Edmiston, making sure she had food and was eating and taking her medications. She drove her to doctor appointments and helped her pay her bills in December 2005 and January 2006. Roper called Edmiston in December and offered to drive her on errands. Roper called Campbell and she told him about Edmiston's bipolar disorder. Edmiston was hospitalized on January 18, 2006, at which time she was incapacitated. When Edmiston was transferred to a nursing home in February 2006, Campbell went to her house to pick up some clothes. Edmiston's

car was missing, the upstairs bed had been slept in, there was a pair of large men's jeans on the floor and a trash bag filled with beer bottles in the kitchen. She wrote a note to Roper and put it on the front door asking him to return Edmiston's car and not to stay at Edmiston's house. The next time she returned to Edmiston's house, the note was still on the door but on her next return, approximately one and one-half weeks after writing the note, she noticed it was gone. She did not know who took it. The men's jeans were gone and the car was still missing. Campbell stated that the car was never returned. Opened mail addressed to Edmiston was in tubs inside the house. Campbell had not retrieved the mail from Edmiston's post office box. In March 2006, she was appointed temporary guardian of Edmiston's person.

Richard Kavanagh, the Will County public administrator and public guardian, testified that on March 15, 2006, he was appointed temporary guardian of Edmiston's estate and Campbell was appointed temporary guardian of Edmiston's person. As guardian, he collected information concerning her assets, liabilities and income. He discovered that recent charges had been made on her credit card during the time she was in the hospital and nursing homes. He did not believe she could have made the charges. He also determined that checks had been written on Edmiston's bank account during the same period. He first met Edmiston at the March 15 court appearance. She was unresponsive and did not appear to know what was happening.

Theodore Knesek testified that he was a senior fraud investigator and keeper of records for Bank of America, which purchased MBNA in 2005. MBNA had issued a credit card to Edmiston in the name of "Dr. C. Edmiston" in April 2001, and she was the only one authorized on the account. Prior to March 2006, the balance was paid in full almost every month. In March 2006, the balance due was \$10,036.17, and in April, the balance due was \$15,867.29. The account records showed

transactions at two Wal-Mart stores, in the amount of \$1,235.76 on March 2, 2006, and \$1,340.41 on March 7, 2006. The final transaction on the card occurred on March 12, 2006. The account was thereafter closed due to a fraud claim. On March 22, there were three attempts to use the card which were declined.

The parties stipulated that a DVD showed Roper using Edmiston's credit card at a Wal-Mart on March 7, 2006. The DVD was played for the jury.

Edward Roper testified for the defense. He had known Edmiston for more than 20 years and called her in December 2005 to say hello. He and his wife visited Edmiston at the end of December and found her disheveled and unkempt, with minimal motor skills and poor hygiene. Edmiston was not eating. Thereafter, he and his wife visited Edmiston at least three days a week until she was hospitalized in mid-January. His wife, a professional care assistant, helped Edmiston with her personal hygiene and eating, and did household chores. He drove Edmiston to doctor appointments and on errands. He would sometimes withdraw money from her bank account and make deposits for her. He opened her mail and paid bills at Edmiston's direction by writing checks on her bank account. Edmiston agreed to pay him and his wife each \$200 per week but did not pay them for a couple of weeks. She then gave them \$50. When he informed Edmiston that she owed them between \$1,800 and \$2,000, she gave his wife her credit card and said they could make purchases up to the amount they were owed. Edmiston gave his wife keys to her house, car and post office box. Based on conversations with his wife, he believed that he had permission to use Edmiston's credit card. He admitted he did so at Wal-Mart on March 7 as shown on the DVD. He denied making any other credit card purchases. He also believed he had permission to write checks to himself. He gave the money from the cashed checks to Edmiston or used it to pay her bills or obtain money orders for

her. He had prior convictions of aggravated unlawful restraint in 1999 and criminal damage to property in 2006.

Following Roper's testimony, the defense rested. Closing arguments ensued at which the State referenced Campbell's note about Edmiston's car and said that the car was later returned. In rebuttal closing argument, the State also referenced Roper's use of Edmiston's car.

The jury returned a verdict of guilty. Thereafter, a sentencing hearing took place. Kavanagh, the public guardian, testified in aggravation that as Edmiston's guardian, he found numerous bills had not been paid, including utilities and doctor bills, credit card statements and nursing home bills. He reported her vehicle stolen and it was later found in Chicago where it had been issued several traffic tickets, been towed to a city pound, and eventually scrapped. Several family members and friends testified in Roper's behalf in mitigation. The trial court sentenced him to an extended term of seven and one-half years' imprisonment and order him to pay, over defense objection, \$3,282.30 in restitution for credit card charges made at Wal-Mart between March 2 and March 7, 2006. Roper filed a motion to reconsider his sentence which was heard and denied. He appealed.

ANALYSIS

_____ On appeal, Roper argues that he was denied a fair trial when improper other crimes evidence of credit card transactions for which he was not charged were admitted into evidence and by improper comments made by the State in opening and closing arguments referring to evidence not presented at the trial. He further argues that the amount of restitution he was ordered to pay was excessive and not connected to the offense for which he was convicted.

The first issue we consider is whether the trial court admitted improper other crimes evidence. Roper contends that the trial court erred in allowing evidence of other credit card

purchases for which he was not charged and which the State did not connect to him. He argues that admission of the improper evidence denied him a fair trial. Roper concedes that he failed to raise this issue in his posttrial motion but asks this court to override forfeiture or review the issue as plain error. The State responds that this court is without authority to relax the forfeiture rule, and that because the other crimes evidence was properly admitted, plain error review is not applicable.

Because we review this matter under the plain error doctrine, we need not address either parties arguments regarding this court's ability to override forfeiture.

To preserve an issue for appeal, a defendant must object at trial and raise the issue in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Supreme Court Rule 615(a) allows a reviewing court to consider under the plain error rule unpreserved errors affecting substantial rights. *People v. Allen*, 222 Ill. 2d 340, 351 (2006), citing 134 Ill. 2d R. 615(a). The plain error doctrine allows a reviewing court to consider unpreserved errors in two circumstances: (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 187 (2005). Under the closely balanced prong, the defendant must prove prejudice, that is, the error threatened to tip the scales of justice against him, and under the substantial rights prong, the defendant must prove that the error was so serious that it affected the fairness of his trial and challenged the integrity of the justice system. *Herron*, 215 Ill. 2d at 187. To invoke the plain error doctrine, a defendant must first establish that an error occurred, which requires a substantive review of the issue. *Herron*, 215 Ill. 2d at 187. Under either prong of the doctrine, the defendant must also establish that the error was plain, that is, clear and obvious. *People v. Piatkowski*, 225 Ill. 2d 551, 565 n.2 (2007). The requirement that the error be plain limits a reviewing court to correct only errors that are clear or

obvious under current law. *People v. Givens*, 237 Ill. 2d 311, 329 (2010).

Other crimes evidence is not admissible for the purpose of showing the defendant's propensity to commit crimes. *People v. Illgen*, 145 Ill. 2d 353, 364 (1991). Other crimes evidence is admissible, however, for other purposes such as where relevant to prove common design or scheme, *modus operandi*, or defendant's state of mind. *People v. Kimbrough*, 138 Ill. App. 3d 481, 484-85 (1985). The trial court must weigh the probative value of the evidence against its prejudicial effect and exclude the evidence if its prejudicial effect substantially outweighs its probative value. *Illgen*, 145 Ill. 2d at 365. Other crimes evidence overpersuades the jury which could convict the defendant merely because it finds he is a bad person deserving punishment. *People v. Lindgren*, 79 Ill. 2d 129, 137 (1980). The standard for the admission of other crimes evidence is more than a mere suspicion but less than beyond a reasonable doubt. *People v. Bedoya*, 325 Ill. App. 3d 926, 938 (2001). The admission of other crimes evidence is reviewed for an abuse of discretion. *Illgen*, 145 Ill. 2d at 364.

Roper challenges the admission of other crimes evidence regarding charges made on Edmiston's credit card not alleged in the indictment, checks made out to him on her checking account, and her missing car. We find that the trial court did not abuse its discretion in admitting the other crimes evidence. As presented by the State, the other crimes evidence supported its theory of common scheme, *modus operandi*, and Roper's state of mind. The State argued throughout the trial that Roper took advantage of Edmiston, knowing that she was incapable of tending to her affairs while at home, and then was hospitalized and would be unaware of his use of her credit cards, the funds in her checking account, and her car. The other crimes evidence was used by the State to challenge Roper's defenses, presenting circumstantial proof that Roper engaged in a continuous

course of conduct to afford himself the benefit of Edmiston's finances, home and car without her permission or even knowledge. Roper conceded he conducted the March 7 transaction which was recorded on videotape at Wal-Mart, but argued that he believed he had Edmiston's consent to use her card. He denied making any of the other transactions, including one that occurred on March 2, also at Wal-Mart. He testified that the checks he wrote to himself, including those written while Edmiston was hospitalized, were cashed to pay Edmiston's bills. However, Edmiston's friend Campbell, the Bank of America fraud investigator Knesek, and the Will County public guardian Kavanagh, all testified that the bills were not paid.

Roper also denied using Edmiston's car which was ultimately towed to a Chicago auto pound and scrapped while Edmiston was hospitalized. Edmiston testified that she never gave Roper permission to use her credit card, to write checks on her account, stay at her house, or use her car. The circumstantial evidence inferring that he assumed her identity as to the use of her credit card, checking account, house and car supports the State's case that Roper was guilty of identity theft. Because the other crimes evidence was properly admitted to show Roper's common scheme, *modus operandi*, and state of mind, there was no error and Roper does not satisfy the first step in the plain error analysis. We thus hold that this issue is forfeited.

The second issue is whether the State made improper comments in opening and closing arguments that denied Roper a fair trial. He characterizes as misconduct the State's references that Edmiston's car was returned after Campbell left Roper a note asking him to return it. Roper argues that the testimony at trial established the car was never returned and that the State's improper comments on facts not in evidence prejudiced him. He acknowledges that he did not object to the comments at trial or raise the issue in a posttrial motion but he asks that this court excuse the

forfeiture or review the issue under the plain error doctrine.

We do not find that this issue is one for which we would relax the forfeiture rule. *Farmer*, 165 Ill. 2d at 200. We thus begin with a plain error analysis. The State argued at the hearing on Roper's motion *in limine* and in its opening and closing statements that Edmiston's car was missing while she was hospitalized and was returned after Campbell left a note asking him to return it. Testimony at trial established that Edmiston's car was never recovered but was destroyed after being impounded in Chicago. It is improper for a prosecutor to misstate the evidence or argue facts not in evidence. *People v. Chavez*, 327 Ill. App. 3d 18, 27 (2002). We note that Roper additionally argues that the State's misconduct also violates the advocate-witness rule. *People v. Blue*, 189 Ill. 2d 99, 136 (2000) (rule bars attorneys from acting as both advocate and witness in the same proceedings). We do not find the advocate-witness rule applicable under the instant facts. However, we do find the prosecutor's comments on facts not in evidence were error. We further determine that the error was plain, that is, clear and obvious under current law. *People v. Johnson*, 208 Ill. 2d 53, 115 (2004) (“[i]t is improper to argue assumptions or facts not based upon the evidence”).

The State has conceded that the prosecutor's comments were error but argues that plain error review is not applicable. According to the State, Roper has not proved that without the State's misstatements the verdict would have been different or that the misstatements eroded the integrity of the judicial process or undermined the fairness of Roper's trial. We agree. The evidence here was not closely balanced but rather weighed heavily against Roper. Even without the State's mischaracterization of the other crimes evidence regarding Roper's alleged use of Edmiston's car, the verdict would not have been different. Although the State's improper comments suggested that the fact that Edmiston's car was returned after Campbell left a note for Roper was indicative that he

committed the offenses against Edmiston, the jury heard several witnesses testify that Edmiston's car was not returned. Moreover, as the jury was instructed that opening and closing statements are not evidence, any prejudicial impact of the improper comments was alleviated. Roper has not sustained his burden under the substantial rights prong either. Without diminishing the State's misconduct, we cannot determine that the error here affected the fairness of Roper's trial and challenged the integrity of the judicial system. It appears that the State merely misconstrued the evidence in its opening statement. A careful review of the evidence presented at trial by the State would have prevented the improper comments in closing argument. Nevertheless, viewing the remarks within the entirety of the State's opening and closing arguments, we cannot state that the improper comments rendered the trial fundamentally unfair. Because Roper cannot satisfy either plain error prong, we find this issue forfeited.

The final issue is whether the trial court improperly determined the amount of restitution it ordered Roper to pay. Roper contends restitution ordered in the amount of \$3,282.30 was excessive in that he was charged with making credit card purchases in an amount between \$300 and \$2,000 on March 2 and March 7, 2006, and that the inclusion of charges extraneous to those alleged in the indictment was error.

Roper did not raise this issue in his post-sentence motion but argues on appeal that because his sentence is void, this court may address the issue. A sentence unauthorized by statute is void and may be challenged at any time. *People v. Elcock*, 396 Ill. App. 3d 524, 532 (2009). However, as discussed below, the amount of restitution ordered by the trial court was not unauthorized by statute. For this same reason, we conclude that because there was no error, plain error review is inapplicable. *Piatkowski*, 225 Ill. 2d at 565 (to employ plain error review, there must first be error).

Restitution shall be ordered for damages resulting from the criminal acts of the defendant. 730 ILCS 5/5-5-6 (West 2006). Under the restitution statute, the court is authorized to consider all the losses which the victim suffered that were proximately caused by the same criminal conduct for which the defendant was convicted. *People v. Hernandez*, 236 Ill. App. 3d 983, 985 (1992). The losses may include those that were not set forth in the charging instrument. *People v. Early*, 158 Ill. App. 3d 232, 239 (1987). However, a trial court may not order restitution for sums extraneous to the charges before it. *People v. Chapin*, 233 Ill. App. 3d 28, 34 (1992).

Roper argues that the amount of restitution should be reduced from \$3,282.30 to \$1,340.41, the amount of the credit card charge on March 7 at Wal-Mart. At sentencing, the State sought restitution based on the amount of charges incurred on March 2 in the amount of \$1,235.76, and March 7, as alleged in the indictment, as well as credit card charges also made at Wal-Mart between those dates. It argues that the amounts included losses proximately caused by the same criminal conduct for which Roper was convicted. The record supports the State's argument. The charges included in the restitution amount were all incurred at Wal-Mart, the same store where Roper conducted the transactions which resulted in his conviction. The additional charges were made between the dates set forth in the indictment: \$697.14 on March 5 and \$8.99 on March 6. Although the additional charges were not included in the indictment, because they were proximately caused by the criminal conduct for which Roper was convicted, we conclude that the trial court properly ordered restitution in the amount of \$3,282.30. As the trial court did not err in calculating restitution, we will not review this issue under the plain error doctrine and consider it forfeited.

For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

Affirmed.