

¶ 3

I. BACKGROUND

¶ 4 In December 2009, the State charged defendant by information with one count of residential burglary (720 ILCS 5/19-3 (West 2008)), a Class 1 felony. The information alleged defendant knowingly, and without authority, entered into the dwelling place of Michelle Shafer with the intent to commit a theft therein. Defendant pleaded not guilty, and the matter proceeded to jury trial. The evidence introduced at trial consisted of one day of testimony, which showed the following, in pertinent part.

¶ 5 Ryan Shafer testified he went home sick from school around noon to 12:30 p.m. on the day in question. While Ryan was lying on the couch in the living room watching television, he heard someone knock on the front door. The front door opened directly onto the living room. Before answering the door, Ryan looked through the peephole and saw a white male he recognized as Matthew Vogt and an unknown black male standing on the porch. Ryan did not answer the door or give any indication he was home, and the knocking continued for five to six minutes.

¶ 6 After the knocking stopped, Ryan saw the two males walk past a side window and head toward the back corner of the house. Shortly after the men passed the side window, Ryan heard them cut through the screen to the window in his mother's bedroom and heard the glass to the bedroom window break. Ryan was already on the phone with the 9-1-1 operator. Ryan then heard his mother's bed, which was positioned directly under the window, move across the wood floor, and he ran out of the house through the front door.

¶ 7 As Ryan fled the residence, he saw the black male suspect run down a nearby alley. About a minute later police arrived on the scene, and Ryan told them the suspects were

hiding in the alley. After officers apprehended the suspects, they transported Ryan to where the suspects were being detained so he could identify them. Ryan identified defendant as the black male who attempted to gain entry to the residence.

¶ 8 Michelle Shafer, Ryan's mother and the owner of the residence, testified she picked Ryan up from school around noon on the day in question because he was sick. Michelle dropped Ryan off at home and returned to work. Later, Michelle received a call at work from her mother and returned home. Upon arriving at home, Michelle saw police officers and noticed the window to her bedroom was broken. The window was more than five feet off the ground and large enough for a person to pass through. Michelle saw broken glass from the window outside the house.

¶ 9 Upon entering the house, Michelle noticed glass from the window on the floor and her bed, and she noticed her bed had been moved "quite a ways away from the window." Michelle stated her bed was heavy, and she could not move it without help. Other than the bed, Michelle did not notice anything else out of place. Michelle did not give anyone other than her family members permission to enter the house.

¶ 10 On cross-examination, Michelle stated nothing was missing from the house or appeared to be out of order. Additionally, Michelle admitted she did not see any footprints or mud in the bedroom to indicate someone had been in there.

¶ 11 Officer Ronald Coventry of the Decatur police department responded to the scene and made contact with Ryan. When Coventry arrived, he went inside the residence to make sure no other suspects were present. Coventry saw the broken window and noted the bed had been pushed away from the wall with enough room between the bed and the window for someone to

get inside through the window. After determining no suspects remained in the residence, Coventry got a description of the suspects from Ryan and disseminated it to officers on the scene. Shortly thereafter, Coventry received word officers had detained possible suspects, and he drove Ryan to the suspects' location to conduct a show up. At the show up, Ryan positively identified the suspects, including defendant, as the men he had seen on his porch. Coventry then unsuccessfully attempted to gather fingerprints from the crime scene.

¶ 12 On cross-examination, Coventry testified he did not see any footprints or snow in the bedroom to indicate someone had tracked something in from outside.

¶ 13 Officer Jason Derbort of the Decatur police department testified he located defendant hiding in a garage near the residence. After officers detained the suspects, they conducted a show up, and the suspects were arrested.

¶ 14 On cross-examination, Derbort testified the white male suspect had a small cut on one of his fingers.

¶ 15 After Derbort's testimony, the State rested. Defendant elected not to testify, and defense counsel offered no evidence. During the jury-instruction conference, defense counsel requested an instruction on the lesser-included crime of criminal trespass to a residence (720 ILCS5/19-4(a)(1) (West 2008)), and the court allowed the jury instruction. The court also allowed the State's request for an accountability jury instruction. The matter then proceeded to closing arguments.

¶ 16 During his argument, defense counsel stated:

"The State says, 'Why do you suppose they went in the house?'

Well, the whole point is, we don't know. Could it be because they

went in maybe to stop up the toilet as a practical joke on them?
Could it be because it was cold out and they wanted inside to use
the bathroom? Possibly."

¶ 17 During rebuttal, the State addressed defense counsel's statements and the following exchange took place:

"MR. SPENCE [(Assistant State's Attorney)]: Interestingly [defense] counsel suggests to you a number of alternative purposes for which they were getting prepared to set foot on the floor of that bedroom, and he says 'Well, what if they were just going in there to just use the bathroom?' If they were going in there to just use the bathroom, they're stealing the use of her facilities without her permission, and if they flushed, they're taking the water and using the sewer without her permission. That's theft. Well, maybe –

MR. RUETER [defense attorney]: Objection, Your Honor.

THE COURT: I'm going to overrule it. It's argument.

MR. SPENCE: Maybe they were going in there to get warm. They're stealing her heat. She didn't give anybody authority to be in that house to use her heat, to use her plumbing, and they weren't going in there to do her laundry."

¶ 18 The prosecutor also stated the following: "[Defense counsel's] proclamations, as he says, are not evidence. What I say is not evidence. What you are to consider is the testimony and the Court's instructions."

¶ 19 Following closing arguments, the trial court instructed the jury on the applicable law. The court also gave the following jury instruction:

"Closing arguments are made by the attorneys to discuss the facts and circumstances in the case and should be confined to the evidence and to reasonable inferences to be drawn from the evidence. Neither opening statements nor closing arguments are evidence, and any statement or argument made by the attorneys which is not based on the evidence should be disregarded."

After issuing jury instructions, the court turned the matter over to the jury to deliberate.

¶ 20 The jury found defendant guilty of residential burglary (720 ILCS 5/19-3 (West 2008)), and the trial court set the matter for sentencing. Prior to his sentencing hearing, defendant filed a motion for new trial or judgment notwithstanding the verdict, arguing (1) the State failed to introduce sufficient evidence to prove him guilty of residential burglary beyond a reasonable doubt, and (2) the court erred in denying defendant's motion to excuse a potential juror for cause. In June 2010, the court denied defendant's motion, sentenced him to 12 years' imprisonment, and assessed a \$200 DNA-analysis fee. Defendant's lawyer filed a motion to reconsider sentence, arguing the court abused its discretion in sentencing him to 12 years' imprisonment. In July 2010, the court denied defendant's motion to reconsider his sentence.

¶ 21 This appeal followed.

¶ 22 While defendant's appeal was pending, he filed a *pro se* "Late Notice Of Motion For Reduction Of Sentence" with the trial court. In August 2010, the court struck the motion, finding it had no jurisdiction over the matter as defendant's appeal was pending with this court.

¶ 23

II. ANALYSIS

¶ 24 Defendant appeals, arguing (1) the prosecutor's comments during closing argument constituted reversible error because they seriously misstated the law and the State's burden of proof, and (2) the trial court erroneously assessed the \$200 DNA-analysis fee as defendant previously submitted a DNA sample. The State concedes defendant's \$200 DNA-analysis fee should be vacated but argues the prosecutor's statements during closing arguments were properly addressed by the court.

¶ 25 A. The Prosecutor's Statements During Closing Arguments

¶ 26 Defendant points to the prosecutor's statements during rebuttal argument and claims they constitute reversible error. While defendant objected at trial, he failed to preserve the issue by including it in his posttrial motion. Generally, both a trial objection and a written posttrial motion raising the issue are required to preserve the issue for appeal. *People v. Lewis*, 223 Ill. 2d 393, 400, 860 N.E.2d 299, 303 (2006). Defendant concedes he failed to properly preserve the issue, but contends it should be reviewed for plain error under Illinois Supreme Court Rule 615(a) (eff. Jan. 1, 1967).

¶ 27 Plain-error review allows a court to rule on an issue not properly preserved, and otherwise forfeited, in either of two circumstances: (1) where it may have affected the outcome of a closely balanced case or (2) where the error was so serious it threatened the fairness of the outcome and the very integrity of the trial process. *People v. Thompson*, 238 Ill. 2d 598, 613, 939 N.E.2d 403, 413 (2010). Defendant argues the current issue falls under the second prong of plain-error review. Under the second prong of plain-error review "the defendant must prove there was plain error and that the error was so serious that it affected the fairness of the

defendant's trial and challenged the integrity of the judicial process." *People v. Herron*, 215 Ill. 2d 167, 187, 830 N.E.2d 467, 479-80 (2005).

¶ 28 The prosecutors's comments during rebuttal argument did not constitute plain error. As charged by the State, the crime of residential burglary has three elements: (1) unauthorized entry, (2) into a residence, and (3) with the intent to commit a theft therein. 720 ILCS 5/19-3 (West 2008). A person commits a theft when he knowingly "obtains or exerts unauthorized control over property of the owner" and "[i]ntends to deprive the owner permanently of the use or benefit of the property," or "[k]nowingly uses *** the property in such manner as to deprive the owner permanently of such use or benefit." 720 ILCS 5/16-1(a)(1)(A), (a)(1)(B) (West 2008). "[P]roperty' means anything of value," and includes "electricity, gas[,] and water." 720 ILCS 5/15-1 (West 2008). Given these definitions, the prosecutor correctly stated defendant committed theft if he entered the residence with the intent to consume water or electricity. Thus, the comments did not constitute plain error.

¶ 29 Moreover, absent inconsistent circumstances, "proof of unlawful breaking and entry into a building which contains personal property that could be the subject of larceny gives rise to an inference that will sustain a conviction of burglary." *People v. Johnson*, 28 Ill. 2d 441, 443, 192 N.E.2d 864, 866 (1963). The jury could reasonably have concluded defendant broke in to commit a theft but fled on realizing someone was home. Nothing suggests the jury's verdict rested on the prosecutor's remarks in response to defense counsel's argument.

¶ 30 Assuming, *arguendo*, the prosecutor's comments during rebuttal argument constituted error, they did not affect the fairness of the trial or challenge the integrity of the judicial system. "The substance and style of closing arguments are within the discretion of the

trial court and its finding will not be disturbed absent extreme error." *People v. Rushing*, 192 Ill. App. 3d 444, 454, 548 N.E.2d 788, 794 (1992). "Moreover, improper prosecutorial remarks can be cured by instruction to the jury to disregard argument not based on the evidence and to consider instead only the evidence presented." *Id.* In the present case, the trial court properly instructed the jury to ignore any arguments by the parties not based on the evidence. Any arguments made by the parties regarding whether defendant entered to use the bathroom or warm up were not based on the evidence, as neither party introduced evidence on these matters. The court properly instructed the jury to ignore the prosecutor's comments, and we assume the jury followed the court's instructions. See *People v. Taylor*, 166 Ill. 2d 414, 438, 655 N.E.2d 901, 913 (1995). In addition, the prosecutor himself, during his rebuttal argument, told the jury "what I say is not evidence."

¶ 31

B. The DNA-Analysis Fee

¶ 32 Section 5-4-3(j) of the Unified Code of Corrections (730 ILCS 5/5-4-3(j) (West 2008)) authorizes a \$200 analysis fee when an individual is required to submit a DNA sample. However, once an individual has submitted a DNA sample, requiring another sample serves no purpose. *People v. Marshall*, 242 Ill. 2d 285, 296, 950 N.E.2d 668, 676 (2011). "[S]ince the analysis fee is intended to cover the costs of the DNA analysis, and only one analysis is necessary per qualifying offender, then by extension only one analysis fee is necessary as well." *Marshall*, 242 Ill. 2d at 296-97, 950 N.E.2d at 675. Here, defendant submitted a DNA sample in 2005. Because defendant already submitted a DNA sample, requiring him to submit another sample serves no purpose, and by extension the DNA-analysis fee must be vacated.

¶ 33

III. CONCLUSION

¶ 34 For the foregoing reasons, we affirm the trial court's judgment in part, vacate in part, and remand with directions to amend defendant's sentencing judgment to reflect the vacatur of his \$200 DNA-analysis fee. As part of our judgment we grant the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 35 Affirmed in part, vacated in part, and cause remanded with directions.