

NOTICE
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2011 IL App (4th) 100625-U

Filed 12/7/11

NO. 4-10-0625

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Sangamon County
ALBERT TILLMAN,)	No. 09CF387
Defendant-Appellant.)	
)	Honorable
)	April Troemper,
)	Judge Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court.
Justices Appleton and Cook concurred in the judgment.

ORDER

¶ 1 *Held:* Where no error occurred in closing arguments, defendant's claim that the prosecutor made prejudicial remarks did not merit plain-error review.

¶ 2 Where the Children's Advocacy Center fee is a fine, defendant is entitled to credit against the fine for time spent in custody as well as a recalculation of the Violent Crimes Victims Assistance Fund fine.

¶ 3 In April 2010, a jury found defendant, Albert Tillman, guilty of retail theft. In July 2010, the trial court sentenced him to one year in prison.

¶ 4 On appeal, defendant argues (1) he was denied a fair trial and (2) he is entitled to monetary credit against his Children's Advocacy Center fine. We affirm in part, vacate in part, and remand with directions.

¶ 5 I. BACKGROUND

¶ 6 In May 2009, the State charged defendant by information with one count of retail

theft (720 ILCS 5/16A-3(a) (West 2008)), alleging he knowingly took possession of merchandise, being alcohol, from Shop 'n Save with the intention to permanently deprive the merchant of possession of the merchandise without paying full retail value. In December 2009, defendant pleaded guilty to the offense, and the trial court sentenced him to two years in prison. In February 2010, the trial court granted defendant's motion to withdraw his guilty plea.

¶ 7 In April 2010, defendant's jury trial commenced. Christopher Gyorkos, a security associate for Shop 'n Save, testified he was on duty on March 9, 2009. He stated he observed defendant "pacing back and forth" in the liquor aisle. Gyorkos saw defendant select a bottle of liquor and put it in the shopping cart. Defendant then walked down the aisle and selected a bottle of wine. Defendant "concealed" the liquor bottle inside his black leather jacket. He then "dumped the cart at the end of our express lanes with the bottle of wine still at the top of it." Defendant attempted to exit the store but Gyorkos stopped him. Defendant still had the same bottle on him that he had removed from the shelf.

¶ 8 On cross-examination, Gyorkos testified the store had points beyond the registers where a customer could select food items for purchase. Gyorkos also stated defendant had not left the store when he stopped him.

¶ 9 Defendant testified on his own behalf. He stated he went into Shop 'n Save to purchase alcohol for his caretaker. He selected some alcohol and proceeded past the cash registers to the "bread aisle" to see if the alcohol was the type his caretaker wanted. He carried the alcohol close to his coat because of his "walking condition."

¶ 10 Following closing arguments, the jury found defendant guilty of retail theft. Defendant filed a posttrial motion, which the trial court denied. In July 2010, the court sentenced

him to one year in prison. The sentence was to run consecutively with a four-year sentence in case No. 09-CF-215. The court found defendant was entitled to 252 days of credit for time spent in pretrial custody. Defendant filed a motion to reconsider sentence, which the court denied.

This appeal followed.

¶ 11

II. ANALYSIS

¶ 12

A. Closing Arguments

¶ 13

Defendant argues he was denied a fair trial because of prosecutorial misconduct, claiming the prosecutor unfairly denigrated defense counsel's closing argument and told the jury defense counsel was trying to confuse them. The State argues defendant has forfeited review of this issue by failing to object at trial and raise it in a posttrial motion. Defendant concedes the issue was not properly preserved but asks this court to review the matter under the plain-error doctrine.

¶ 14

The plain-error doctrine permits a reviewing court to consider unpreserved error under the following two scenarios:

"(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or
(2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Sargent*, 239 Ill. 2d 166, 189, 940 N.E.2d 1045, 1058 (2010).

Under both prongs of the plain-error analysis, the burden of persuasion remains with the defendant. *People v. Lewis*, 234 Ill. 2d 32, 43, 912 N.E.2d 1220, 1227 (2009). As the first step in the analysis, we must determine whether any error occurred at all. *People v. Thompson*, 238 Ill. 2d 598, 613, 939 N.E.2d 403, 413 (2010).

¶ 15 "Every defendant is entitled to [a] fair trial free from prejudicial comments by the prosecution." *People v. Young*, 347 Ill. App. 3d 909, 924, 807 N.E.2d 1125, 1137 (2004). "A prosecutor has wide latitude in making a closing argument and is permitted to comment on the evidence and any fair, reasonable inferences it yields." *People v. Glasper*, 234 Ill. 2d 173, 204, 917 N.E.2d 401, 419 (2009). A reviewing court "will find reversible error only if the defendant demonstrates that the improper remarks were so prejudicial that real justice was denied or that the verdict resulted from the error." *People v. Runge*, 234 Ill. 2d 68, 142, 917 N.E.2d 940, 982 (2009).

¶ 16 During his closing argument, the prosecutor reviewed the evidence against defendant—the surveillance video showing defendant placing the bottle in his jacket and defendant walking beyond the cash registers toward the door. Defense counsel attempted to give "reasonable explanations" for defendant's actions. He stated defendant was selecting alcohol for his caretaker and took it beyond the cash registers to determine if it was what she wanted. Moreover, defense counsel stated store security stopped defendant "prematurely" as he had not even left the store. In rebuttal, the prosecutor ended his argument as follows:

"Reasonably explained? Are you kidding me? These circumstances are that the Defendant was trying to steal a bottle of alcohol. That's it. Find him guilty because he is. Don't let the

defense talk you out of it."

¶ 17 In this case, the prosecutor's comments cannot be deemed to be "so prejudicial that real justice was denied or that the verdict resulted from the error." *Runge*, 234 Ill. 2d at 142, 917 N.E.2d at 982. The prosecutor was responding to defense counsel's purported "reasonable explanations" for defendant's behavior. Contrary to defendant's claim on appeal, the prosecutor telling the jurors not to let defense counsel talk them out of a guilty verdict cannot be seen as "trying to confuse or trick" them or "mocking" defense counsel's argument. The prosecutor was arguing defendant did not have a "reasonable explanation" for his actions, and any explanation for placing a bottle in his coat was not believable.

¶ 18 Defendant also argues the prosecutor's comments were even more prejudicial given statements made during jury selection where the prosecutor stated, in part, as follows:

"At the end of the evidence of both of your parts, I will ask that you return a verdict of guilty. I believe the evidence will show it beyond a reasonable doubt. I would not ask you otherwise."

Defense counsel objected, and the trial court sustained the objection. Defendant contends the statement implied the prosecutor could be trusted and that defendant was guilty.

¶ 19 The objection here was properly sustained. Moreover, it cannot be said that the prosecutor's statements during jury selection combined with his rebuttal argument "further entrenched in the minds of the jurors that the State's case was so strong that defense counsel had been reduced to using unfair tactics to talk the jury out of convicting" defendant. As no error occurred here, we find no basis to excuse defendant's forfeiture of the issue.

¶ 20 B. Monetary Credit

¶ 21 Defendant argues he is entitled to monetary credit against the \$5 Children's Advocacy Center fine for the time he spent in pretrial custody and also a recalculation of the \$20 Violent Crime Victims Assistance Act (VCVA) fine. We agree, and the State concedes.

¶ 22 Section 110-14(a) of the Code of Criminal Procedure of 1963 (Code) states, "[a]ny person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of \$5 for each day so incarcerated upon application of the defendant." 725 ILCS 5/110-14(a) (West 2008). The statutory right to the monetary credit is mandatory. *People v. Brown*, 406 Ill. App. 3d 1068, 1084, 952 N.E.2d 32, 45 (2011). Moreover, "[t]he issue of monetary credit against a defendant's fine cannot be waived and may be raised for the first time on appeal." *People v. Sulton*, 395 Ill. App. 3d 186, 188, 916 N.E.2d 642, 644 (2009).

¶ 23 In counties with a Children's Advocacy Center, section 5-1101(f-5) of the Counties Code (55 ILCS 5/5-1101(f-5) (West 2008)) allows the county board to "adopt a mandatory fee of between \$5 and \$30 to be paid by the defendant on a judgment of guilty or a grant of supervision under Section 5-9-1 of the Unified Code of Corrections for a felony; for a Class A, Class B, or Class C misdemeanor; for a petty offense; and for a business offense. Assessments shall be collected by the clerk of the circuit court and must be deposited into an account specifically for the operation and administration of the Children's Advocacy Center."

Notwithstanding the statutory label, "a 'fee' which is not intended to specifically reimburse the

State for costs it has incurred in prosecuting a defendant is actually a 'fine.' " *People v. Williams*, 405 Ill. App. 3d 958, 965, 940 N.E.2d 95, 101 (2010) (citing *People v. Jones*, 223 Ill. 2d 569, 581, 861 N.E.2d 967, 975 (2006)). As the Children's Advocacy Center "fee" was not designed to reimburse the State for money it expended in prosecuting defendant in this case, it constitutes a fine and defendant is entitled to credit pursuant to section 110-14(a) of the Code. *Williams*, 405 Ill. App. 3d at 965, 940 N.E.2d at 101.

¶ 24 We also note defendant was required to pay \$20 under the VCVA (725 ILCS 240/10(c)(2) (West 2008)). However, section 10(c)(2) only applies when no other fine is imposed. As the Children's Advocacy Center fine was imposed here, the \$20 VCVA fine was improperly assessed and must be vacated. Instead, the VCVA fine, which is mandatory, should have been calculated under section 10(b). 725 ILCS 240/10(b) (West 2008); see also *People v. Brown*, 388 Ill. App. 3d 104, 114, 904 N.E.2d 139, 148-49 (2009) (finding "section 10(b) of the [VCVA] is the operative provision here where other fines were imposed"). Therein, the assessment must be calculated as "\$4 for each \$40, or fraction thereof, of fine imposed." 725 ILCS 240/10(b) (West 2008). Thus, as the Children's Advocacy Center fine totaled \$5, the VCVA fine must be set at \$4. This fine is not subject to offset. 725 ILCS 240/10(b) (West 2008); *People v. Jones*, 397 Ill. App. 3d 651, 664, 921 N.E.2d 768, 778 (2009).

¶ 25 Accordingly, this cause must be remanded for an amended sentencing judgment to reflect the \$5 credit toward the Children's Advocacy Center fine, the vacatur of the \$20 VCVA fine, and the imposition of a \$4 VCVA fine pursuant to section 10(b).

¶ 26 III. CONCLUSION

¶ 27 For the reasons stated, we affirm in part, vacate in part, and remand with

directions. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 28 Affirmed in part and vacated in part; cause remanded with directions.