

2012 IL App (2d) 110371-U
No. 2-11-0371
Order filed July 17, 2012

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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-CF-4485
)	
MARDESE GILBERT,)	Honorable
)	Christopher R. Stride,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

Held: Defendant showed no reversible plain error as to the State's closing argument: as to the State's alleged references to excluded evidence, any error was minimal and was cured by the trial court's instructions, and the evidence against defendant was overwhelming; as to the State's alleged shifting of the burden of proof, the State merely commented on the uncontradicted nature of the evidence.

¶ 1 Defendant, Mardese Gilbert, appeals his conviction of residential burglary (720 ILCS 5/19-3(a) (West 2008)) after he entered a garage and remained there until the police arrived. He contends that comments made during the State's closing argument about excluded evidence violated his right to a fair trial. He also contends that the State wrongly attempted to shift the burden of proof

to him when the State commented on his failure to offer an innocent explanation to the arresting officer. We affirm.

¶ 2

I. BACKGROUND

¶ 3 This is the second time this case has been before this court. Defendant was indicted on one count of residential burglary, which alleged that, on October 23, 2008, he knowingly and without authority entered the dwelling place of Fidel Carrillo, Sr. (Carrillo), with the intent to commit theft. It is undisputed that, on that day, defendant was inside Carrillo's garage without permission, he did not have any stolen items or burglary tools, and he did not have a vehicle. The garage was attached to the Carrillo home, and a door led from the garage to a bedroom. That door had a small peephole that allowed a person to look through it into the garage.

¶ 4 Defendant was convicted, and we reversed and remanded for a new trial after determining that the trial court erred when it failed to instruct the jury on the lesser included offense of misdemeanor criminal trespass to a residence (720 ILCS 5/19-4(a)(1) (West 2008)). *People v. Gilbert*, No. 2-09-0266 (2010) (unpublished order under Supreme Court Rule 23). On February 23, 2011, the new trial was held.

¶ 5 Fidel Carrillo, Jr., who was 13 at the time of trial, testified about the events of October 23, 2008. Fidel stated that, a bit after 4 p.m., he heard a noise in the garage that sounded like the door had opened and closed. Fidel looked through the peephole in the door and saw a man wearing a hoodie and a hat looking and moving around. He said that the man looked shocked, and an objection that the State was asking the witness to describe defendant's state of mind was sustained. Fidel said that the man was very close to a TV in the garage and was moving his hands toward it, but that he never saw the man take anything. Fidel told his sister, Brenda Carrillo, about the man.

¶ 6 Brenda, who was 19 at the time of trial, testified that she was washing dishes when she heard an alarm for the outside garage door, indicating that it had been opened. Fidel then came and told her that there was a man in the garage. Brenda went to the bedroom, looked through the peephole, and saw defendant. She described him as looking surprised and nervous, and an objection was sustained. She then said that defendant was looking back and forth in a very fast manner and she illustrated how by moving her head back and forth to the right and left a few times. She said that items in the garage included a TV, lawn mowers, tools, and a refrigerator with food and drinks in it. Brenda went and got Carrillo, and the police were called.

¶ 7 Danny Van Hoogen was the arresting officer. He found defendant under a table in the garage. Defendant did not comply with a request to come out, and Van Hoogen arrested him and read him his *Miranda* rights. Van Hoogen testified that he asked defendant why he was there and, although he could not remember the exact words defendant used, defendant said that he wanted to sell things found in the garage to obtain money for alcohol. Van Hoogen testified that defendant was wearing a jacket. He did not recall whether defendant was wearing gloves or a scarf or whether it was sunny outside.

¶ 8 During closing argument, the State referred to Fidel observing defendant in a startled or shocked condition, and an objection was sustained. The State then referred to defendant moving his head back and forth within inches of the TV, there was an objection, a sidebar conference was held, and the objection was overruled. The State next argued, without objection, that the jury could infer from the evidence that defendant entered the garage with the intent to steal and then never took anything because he was startled or surprised when the alarm went off, thus he hid under the table. Later in the argument, the State mentioned Brenda's testimony that defendant was looking back and

forth in a nervous condition, and an objection was sustained. The court then told the jury that the attorneys were free to argue and draw reasonable inferences from the evidence but that the jury must rely on their own recollection of the evidence.

¶ 9 At the end of its closing argument, the State said that there was no evidence defendant was in the garage merely to warm himself, and that, if defendant was in the garage to get warm, he would have come out from under the table and said something to Van Hoogen about that. The defense objected, and the court told the jury that they were to rely on their recollection of the evidence and that the State's comment was not evidence. The State then argued that the evidence overall, especially in light of defendant's statement to Van Hoogen, was that defendant entered the garage with the intent to steal.

¶ 10 The defense argued that defendant did not intend to steal and that he entered the garage to get warm because it was cold outside. In rebuttal, without objection, the State referred to defendant looking nervous while in the garage. Before the case was submitted to the jury, the court instructed them that the closing arguments were not evidence.

¶ 11 The jury found defendant guilty of residential burglary, and he was sentenced to a term of incarceration. Defendant moved for a new trial and did not make any allegations about improper closing arguments. The motion was denied, and he appeals.

¶ 12 **II. ANALYSIS**

¶ 13 Defendant argues that he was denied a fair trial by the State's closing argument. Defendant concedes that he did not raise this issue in his motion for a new trial and that we are limited to reviewing the issue for plain error.

¶ 14 A defendant's failure to object at trial and to raise an issue in a posttrial motion operates as a forfeiture of the right to raise the issue as a ground for reversal on review. *People v. Harvey*, 211 Ill. 2d 368, 385 (2004). The plain-error rule is a narrow and limited exception and is applied to ameliorate the harshness of strict application of the forfeiture rule. *Id.* Under the plain-error rule, a reviewing court may consider a forfeited claim when: "(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. Piatkowski*, 225 Ill. 2d 551, 565 (2007). "In plain-error review, the burden of persuasion rests with the defendant." *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 15 "Whether statements made by a prosecutor in closing argument were so egregious that they warrant a new trial is a legal issue that this court reviews *de novo*." *People v. Beltran*, 2011 IL App (2d) 090856, ¶ 59. "Prosecutors are afforded wide latitude in closing argument." *Id.* at ¶ 61. (quoting *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007). Closing arguments are viewed in their entirety, and the challenged remarks must be viewed in context. *Id.* ¶ 60. "In reviewing comments made at closing arguments, this court asks whether or not the comments engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from them." *Id.* ¶ 61 (quoting *Wheeler*, 226 Ill. 2d at 123). "Misconduct in closing argument is substantial and warrants reversal and a new trial if the improper remarks constituted a material factor in a defendant's conviction." *Id.* (quoting *Wheeler*, 226 Ill. 2d at 123). "If the jury could have reached a contrary verdict had the improper remarks not been made, or the reviewing

court cannot say that the prosecutor's improper remarks did not contribute to the defendant's conviction, a new trial should be granted.' ” *Id.* (quoting *Wheeler*, 226 Ill. 2d at 123). “The act of sustaining an objection and properly admonishing a jury is generally sufficient to cure prejudice engendered by improper closing argument.” *Wheeler*, 226 Ill. 2d at 128. “In closing, the State may comment on the evidence and all inferences reasonably yielded by the evidence.” *People v. Blue*, 189 Ill. 2d 99, 127 (2000).

¶ 16 Here, defendant first notes that the State's remarks referred to defendant's state of mind in a manner that had previously been excluded. However, the State was able to properly draw an inference from the evidence that defendant hid because he was scared or startled by the alarm, and the jury was instructed as to how to view the State's argument. Even if any error occurred, it was minor and we cannot say that, had the remarks not been made, the jury could have reached a contrary result.

¶ 17 Defendant argues that plain error applies because the alleged error was egregious and the evidence was closely balanced, but this is simply not the case. Defendant cites to *People v. Mullen*, 141 Ill. 2d 394 (1990), to support his argument that the error was egregious and should be reversed under the second prong of the plain-error standard, but that case is distinguishable. There, the State referenced evidence in closing that was particularly prejudicial and was specifically excluded. Here, objections to evidence that defendant looked shocked or scared were sustained based on foundation and because the witnesses could not speak to defendant's state of mind, but the State's comments on reasonable inferences based on defendant's actions were permissible. To the extent the State referenced those inferences in a manner that was improper, it was not overtly prejudicial as was seen

in *Mullen*, and the court cured any error by instructing the jury about arguments concerning inferences drawn from the evidence.

¶ 18 In regard to the first prong of the plain-error standard, the evidence was not closely balanced. Instead, the evidence against defendant was overwhelming in light of his statement to Van Hoogen that he was seeking items to sell in order to obtain alcohol and in light of the lack of any evidence to support his contention that he was in the garage to get warm, other than that he had a jacket and hat on during an afternoon in October. Thus, the evidence was not closely balanced, and any error, if there was error at all, did not rise to the level of plain error.

¶ 19 Defendant next argues that the State wrongly shifted the burden of proof to him by referring to his failure to present evidence that he was in the garage to warm himself, and his failure to tell Van Hoogen that he was in the garage to get warm.

¶ 20 It is improper for the State to shift the burden of proof to the defendant. See *People v. Yonker*, 256 Ill. App. 3d 795, 799 (1993). However, the State may comment on the evidence, draw inferences from it, and comment on the accused's credibility. *People v. Miller*, 302 Ill. App. 3d 487, 495 (1998). In particular, the State may comment on the uncontradicted nature of the case, even where the only person who could have contradicted the State's evidence was the defendant. *People v. Skorusa*, 55 Ill. 2d 577, 584 (1973).

¶ 21 Here, the State's comment regarding the lack of evidence to support defendant's theory was proper comment on defendant's uncontradicted nature of the evidence. See *Id.* Also, the State's observation that, had defendant actually been in the garage to get warm, he would have explained that to Van Hoogen, was a proper comment on defendant's theory of the case in light of defendant's contradictory statement to Van Hoogen that he was in the garage to seek items to sell in order to

obtain alcohol. The State was entitled to draw the reasonable inference that, had defendant intended to enter the garage to get warm, he would have told Van Hoogen that when given the opportunity, instead of giving a contradictory statement.

¶ 22 Defendant relies on *Yonker* to argue that the comment was error, noting that there the court stated that to “ ‘misstate the burden of proof or standard of review, to any extent, compromises the fairness of the judicial process and shall not be tolerated.’ ” *Yonker*, 256 Ill. App. 3d at 799 (quoting *People v. Wilson*, 199 Ill. App 3d 792, 797 (1990)). But here, the State did not misstate the burden of proof or argue that defendant had a burden to present evidence. Instead, it merely drew a reasonable inference from the evidence. Accordingly, we find no error, much less plain error, in the State’s comment.

¶ 23

III. CONCLUSION

¶ 24 Comments made in the State’s closing argument were not plain error. Accordingly, the judgment of the circuit court of Lake County is affirmed.

¶ 25 Affirmed.