SECOND DIVISION
February 26, 2013
Modified upon denial of rehearing March 19, 2013

No. 1-11-0518

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
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 18772
	)	
BILLY BUSH,	)	Honorable
	)	Joseph G. Kazmierski, Jr.,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Harris, P.J., and Quinn, J., concurred in the judgment.

O R D E R

¶ 1 *Held*: Judgment on defendant's jury conviction of aggravated battery of a peace officer affirmed where defendant forfeited claim that the State's closing argument was improper.

¶ 2 Following a jury trial, defendant Billy Bush was found guilty of aggravated battery of a peace officer and sentenced to four years in prison. On appeal, defendant does not contest the sufficiency of the evidence to sustain his conviction, and solely contends that he was denied a fair trial where, during closing argument, the prosecutor made improper comments that shifted or

distorted the burden of proof. He thus requests that we reverse his conviction and remand his case for a new trial.

¶ 3 The charges filed against defendant in this case stemmed from an incident that occurred on September 16, 2009, at the senior citizen apartment complex located at 9141 South Chicago Avenue in Chicago, Illinois. During this incident, defendant and his mother, Melzina Kelley, were involved in an altercation with police officers who were conducting an investigation regarding criminal trespass to property.

¶ 4 Defendant was convicted on evidence showing that on the night of the incident he failed to comply with the visitor identification policy of the building in which his mother, Melzina Kelley, lived, thereby prompting the security guard, Leonard Jones, to call police and report a trespass. When uniformed Chicago police officers Joseph Carroll and Kelli Williams arrived at Kelley's apartment to investigate the incident, defendant became belligerent and proceeded to hit Officer Carroll in the abdomen and chest with closed fists and caused the officer to fall onto a table. Because Kelley repeatedly tried to interfere in the situation to assist her son, Officer Williams handcuffed her prior to assisting Officer Carroll, who was struggling with defendant. Defendant and Kelley were taken into custody after additional officers arrived on the scene in response to Officer Carroll's call for assistance. Kelley was found to be in possession of Officer Williams' keys to her police vehicle.

¶ 5 Kelley testified for the defense and contradicted the officers' version of events. According to Kelley, the officers were in plain clothes and barged into her apartment. Officer Carroll then pushed her cocktail table into a radiator, broke a vase and proceeded to sit on defendant and beat him in the face while Officer Williams watched him do so. Kelley testified that she has a heart condition and did not try to interfere in the situation because she "probably would have had a heart attack right then and there." When Officer Williams handcuffed her, the officer's keys fell into Kelley's hand, so she kept them until Officer Williams was outside looking for them.

¶ 6 Chicago police officer Michael Garza testified in rebuttal that he responded to Officer Carroll's call for assistance. He further testified that officers Carroll and Williams were both dressed in full uniform with their badges displayed that night.

¶ 7 Following the close of evidence, the State and defense presented closing arguments. The court then admonished the jury, in relevant part, that "[n]either 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," and, as it had done prior to *voire dire*, further admonished that the "State has the burden of proving the guilt of the defendant beyond a reasonable doubt and this burden remains on the State throughout the case. The defendant is not required to prove his innocence." Following deliberations, the jury found defendant guilty of aggravated battery of a peace officer, and the court subsequently sentenced him to four years' imprisonment. On appeal, defendant contends that the prosecutor's remarks during closing argument deprived him of a fair trial because they shifted or distorted the burden of proof.

¶ 8 Before proceeding, we observe that defendant argues that *de novo* review applies, citing *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007), but acknowledges that the standard of review for closing arguments remains unclear. In *Wheeler*, the supreme court held that *de novo* review applies to the question of whether a prosecutor's remarks are so egregious as to require a new trial. *Wheeler*, 226 Ill. 2d at 121. However, in doing so, the court cited with approval *People v. Blue*, 189 Ill. 2d 99 (2000), in which it applied an abuse of discretion standard to review a prosecutor's statements during closing arguments. *Wheeler*, 226 Ill. 2d at 121. This has led to confusion, resulting in a division among our appellate courts on this issue. *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 52.

¶ 9 We agree with the other divisions of this court which have noted the conflict but declined to determine the appropriate standard of review where they would reach the same result under either standard (see *Cosmano*, 2011 IL App (1st) 101196, ¶ 53, citing *People v. Maldonado*, 402 Ill. App. 3d 411, 422 (2010) and *People v. Anderson*, 407 Ill. App. 3d 662, 676 (2011)), and

refrained from discussing the applicable standard until the issue is resolved by our supreme court (*Cosmano*, 2011 IL App (1st) 101196, ¶ 53).

¶ 10 That said, the State maintains that defendant has failed to preserve his claim for appeal, and thus, the only review that may be undertaken is for plain error. Defendant concedes that he failed to preserve the closing argument issue for appellate review by failing to raise it both at trial and in his post-trial motion (*People v. Enoch*, 122 Ill. 2d 176, 186 (1988)), but maintains that we may consider it pursuant to the plain error doctrine.

¶ 11 The plain error doctrine is a narrow exception to the waiver rule which allows a reviewing court to consider unpreserved claims of error where defendant shows that the evidence is closely balanced, or the error is so serious that it affected the fairness of his trial and challenged the integrity of the judicial process. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008). Under both prongs, defendant bears the burden of persuasion, and he must first show that a clear or obvious error occurred. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). Accordingly, before addressing whether the plain error exception applies, we must first determine whether any error occurred. *In re Samantha V.*, 234 Ill. 2d 359, 368 (2009).

¶ 12 Prosecutors are afforded considerable latitude in delivering closing arguments and may comment on the evidence presented and reasonable inferences arising therefrom. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). On review, we consider the closing argument in its entirety, rather than focusing solely on select words or phrases. *People v. Perry*, 224 Ill. 2d 312, 347 (2007).

¶ 13 Here, defendant complains of the following remarks by the prosecutor during closing argument:

> "ASSISTANT STATE'S ATTORNEY: Thank you, your Honor. This case is all about a *conspiracy* against [defendant].
>
> ASSISTANT PUBLIC DEFENDER: Objection.
>
> THE COURT: Sustained.

> ASSISTANT STATE'S ATTORNEY: A *vendetta* that Leonard Jones had against [defendant], a *vendetta* that wouldn't allow [defendant] into the building that day, a *vendetta* that the police officers had against [defendant] to enter into that apartment without permission, to pull [defendant] off that couch and start beating him for no reason. *Is that really what this case is about? Because there was no evidence presented from that witness stand supporting that that's what the case is all about*." Emphasis added.

Defendant contends that those remarks shifted or distorted the burden of proof in that they (1) incorrectly argued that the jury must find that the State's witnesses were lying in order to acquit him, and (2) sent an unmistakable message to the jury that he had the obligation to present evidence that those witnesses conspired to lie or were pursuing a vendetta against him.

¶ 14 Our supreme court has observed that it is permissible for a prosecutor to argue that in order to believe defendant's theory, a jury would have to find that the State's witnesses were lying. *People v. Banks*, 237 Ill. 2d 154, 184-85 (2010), citing *People v. Coleman*, 158 Ill. 2d 319, 346 (1994). In making this determination, the court drew a distinction between this type of argument and a similar, yet improper argument, that in order to *acquit* a defendant, the jury would have to believe the State's witnesses were lying. *Banks*, 237 Ill. 2d at 184-85, citing *Coleman*, 158 Ill. 2d at 346. In *Coleman*, the supreme court found the prosecutor's statement that in order to believe defendant, the jury must believe that *all* the State's witnesses lied and got together to "frame" him, fit the permissible scenario, but was nevertheless improper because defendant's testimony did not contradict *all* the State's witnesses. *Coleman*, 158 Ill. 2d at 345-47.

¶ 15 Here, the prosecutor's use of the words "conspiracy" and "vendetta," convey the same meaning as the word "frame," which was at issue in *Coleman*; that the State's witnesses provided untrue testimony in a concerted effort against defendant. Accordingly, they also fall under the rubric of permissible argument which highlights that, in order to believe the defendant's theory, the jury must believe that the State's witnesses were lying. See *Coleman*, 158 Ill. 2d at 346-47.

Further, unlike *Coleman*, defendant's theory, as presented through Kelley's testimony, directly conflicted with the testimony of all the State's witnesses, and, in particular, the two other eyewitnesses to the incident.

¶ 16 Defendant further contends that the prosecutor's statement that "there was no evidence presented from that witness stand supporting that that's what the case is all about," led the jury to believe that he had the burden of presenting evidence that the State's witnesses conspired to lie or were pursuing a vendetta against him, citing *People v. Wilson*, 199 Ill. App. 3d 792 (1990), in support. In *Wilson*, which was decided prior to *Coleman,* the prosecutor asked the jurors whether they were curious that defendant would have them believe that everyone "in this case" was guilty of something aside from him. *Wilson*, 199 Ill. App. 3d at 796. Because it found that those comments conveyed a message to the jury that defendant carried a burden of proof to establish his innocence, which included showing that the State's witnesses had lied, the court reversed defendant's conviction and remanded for a new trial. *Wilson*, 199 Ill. App. 3d at 797. In doing so, the court reasoned, in part, that informing a jury that in order to believe the defense witnesses the jury must find that the State's witnesses lied, is a misstatement of law that denies defendant a fair trial. *Wilson*, 199 Ill. App. 3d at 796. As discussed above, pursuant to *Coleman*, that is not the case here.

¶ 17 We do not believe that the prosecutor's comments reflect that she intended to, or did, impose a burden on defendant. This is evident from the statements made immediately after those comments, in which she stated that the case is really about "people trying to do their jobs and what [defendant] did to prevent [them] from doing their jobs," which is a proper comment on the evidence presented and inferences derived therefrom. *Glasper*, 234 Ill. 2d at 204. Further, the record reflects that during closing argument the prosecutor also stated that "the law provides that to sustain the charge of aggravated battery, the State must prove the following propositions," and then went on to delineate the elements of the offense with which defendant was charged. No statement was made regarding any evidence defendant was required to present or any burden that

he bore in that respect. Viewing closing arguments as a whole (*Perry*, 224 Ill. 2d at 347), we find that the prosecutor's comments did not constitute error, much less plain error.

¶ 18 Moreover, contrary to defendant's contention, the evidence here was not closely balanced. Defendant appears to base his assertion on the fact that Kelley's testimony contradicted that of Officers Carroll and Williams. Officer Carroll testified that defendant repeatedly and intentionally hit him, when he was on duty investigating a complaint and after he had identified himself as an officer to defendant, which are the elements that support the offense for which defendant was convicted. 720 ILCS 5/12-4(b)(18) (West 2010). Officer Williams corroborated this testimony and offered additional testimony which called Kelley's credibility into question. It was for the jury to decide which version of events it found more credible, and defendant has not cited, nor are we aware of any authority that holds a case that turns on the credibility of witnesses dictates that a case is closely balanced.

¶ 19 We further note that prior to jury selection, the trial court informed the entire *venire*, including those subsequently chosen as jury members in this case, that the State had the burden of proof and that defendant is not required to present evidence or to prove his innocence. Prior to deliberations, the court admonished the jury that closing arguments are not evidence and the jury was instructed that any argument not supported by the evidence should be disregarded, thereby curing any potential prejudice. *People v. Graca*, 220 Ill. App. 3d 214, 221 (1991).

¶ 20 Under these circumstances, we find that defendant failed to establish an error warranting plain error review, and we thus honor his forfeiture of the issue (*Hillier*, 237 Ill. 2d at 547), and we affirm the judgment of the circuit court of Cook County.

¶ 21 Affirmed.