

FIRST DIVISION
AUGUST 12, 2013
MODIFIED UPON DENIAL OF REHEARING SEPTEMBER 30, 2013

No. 1-11-0889

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. 10 CR 1950
)	
WILLIAM DOCKERY,)	Honorable
)	Jorge Luis Alonso,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justice Rochford concurred in the judgment.
Justice Delort specially concurred in the judgment.

ORDER

- ¶ 1 **Held:** The trial court's finding that the defendant was guilty of burglary is affirmed over his challenge to the admission of allegedly prejudicial statements made by a State witness, and statements made during the State's closing argument.
- ¶ 2 Following a jury trial, defendant William Dockery was found guilty of burglary and sentenced, as a Class X offender, to 10 years' imprisonment. On appeal, the defendant contends that he was denied a fair trial because the trial court admitted evidence that he was incarcerated prior to trial; and admitted evidence that a State witness did not cooperate with the prosecution because he was frightened of the defendant. He also contends that he was denied a fair trial based on the State's rebuttal closing argument. We affirm.
- ¶ 3 The record shows that at 10 p.m. on December 19, 2009, in the area of 820 West Jackson Boulevard in Chicago, the defendant allegedly broke the window of a parked car and stole a global

positioning system (GPS). The defendant was charged with vehicular invasion and burglary.

¶ 4 At trial, Officer Nicholas Kirkiakis (Officer Kirkiakis) testified that shortly after 10 p.m. on December 19, 2009, he was outside of a restaurant at 820 West Jackson Boulevard when he heard the sound of a car window breaking. Shortly thereafter, Officer Kirkiakis saw the defendant, whom he knew from the neighborhood, walking toward him. Officer Kirkiakis asked the defendant what he had in his hand and ordered him to stop, but the defendant ran away. A chase ensued and Officer Kirkiakis saw the defendant throw a walkman and a GPS under a vehicle located in a nearby alley. The defendant was subsequently detained by other police officers who arrived on the scene after Officer Kirkiakis called for assistance. Officer Kirkiakis returned to where he initially saw the defendant, and observed a Honda minivan on Peoria Street with a broken front passenger window. Within seconds, the owner of the vehicle, Siddharth Bansal, approached Officer Kirkiakis and stated that he owned the recovered GPS.

¶ 5 Officer Balcerzak, an evidence technician, testified that he went to 251 South Peoria Street to investigate a car burglary, and observed that the passenger side window of the subject vehicle was shattered and a rock was on the driver's floor mat. Officer Balcerzak dusted for fingerprints, but could not recover any prints from the scene.

¶ 6 Carlos Mitchell, who was in custody at the time of trial, testified that at about 10 p.m. on the date in question, he was inside of his car near Halsted and Peoria Streets when an unknown individual jumped into his car. At that point, police started running toward his car and the unknown individual told Mitchell to "pull off." Police ordered Mitchell out of the car, detained him, and pulled out the individual that jumped into his car. Although Mitchell never identified the unknown individual in his car, Officer Patrick Hozian identified that person as the defendant at trial. Mitchell was not charged with a crime in this case.

¶ 7 After Mitchell indicated that he did not initially cooperate with the prosecution regarding the investigation into this case, the State elicited the following testimony from Mitchell:

"Q. Can you explain to the ladies and gentlemen of the jury why you didn't want to cooperate with us on prior dates?

A. Because I was in custody, and *** the person that you want me to testify against was in custody, too, and *** I didn't want any problems because I'm in custody.

Q. Were you kept in the same area as the defendant was being kept in -

[Defense Counsel]: Objection, your Honor, request a sidebar.

THE COURT: Objection is overruled. The answer no will stand."

On cross-examination, Mitchell testified that he could not recall whether he made prior statements indicating that he was not present at the scene of the crime and that nobody ever jumped in his car.

¶ 8 Defense counsel requested a mistrial and argued that the defendant was prejudiced by Mitchell's testimony stating that the defendant was in custody. The court denied counsel's request for a mistrial, finding that Mitchell never identified the defendant, and was talking in the abstract about the individual he was going to testify against.

¶ 9 During closing arguments, defense counsel argued that if the defendant was the offender in question, the State would have had the evidence technician test the GPS for fingerprints. In rebuttal, the State argued:

"[Assistant State's Attorney]: Counsel will say they didn't fingerprint. They didn't do this. You will see the photograph, that filthy GPS, that's dirty. You know what that is? That's dust. That's fingerprint dust.

[Defense Counsel]: Objection.

[Assistant State's Attorney]: So when counsel says they didn't

try to fingerprint it -

THE COURT: Sustained.

[Assistant State's Attorney]: - look at it. Look at the contents across his GPS."

The State also argued that Mitchell may not have initially been cooperative with the prosecution because he was afraid or did not want to be deemed a "snitch."

¶ 10 Following closing arguments, the court instructed the jury and stated the following:

"Closing arguments are made by the attorney 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."

¶ 11 Defense counsel subsequently made a motion for a mistrial based on the State's rebuttal closing argument where it stated that the GPS was tested for fingerprints where no evidence suggested that a test was ever completed. The trial court denied the motion, stating that it sustained the objection to the State's comment that the GPS was tested for fingerprints.

¶ 12 The jury found the defendant guilty of burglary and vehicular invasion. After granting the defendant's motion for judgment notwithstanding the verdict as to the vehicular invasion conviction, the trial court sentenced the defendant to 10 years' imprisonment for burglary.

¶ 13 On appeal, the defendant contends that he was denied a fair trial because the court erred in admitting evidence that the defendant was incarcerated prior to trial; and erred in admitting evidence that Mitchell did not cooperate with the State because he was frightened of the defendant, despite the lack of evidence that the defendant threatened him.

¶ 14 We initially note that the defendant preserved this claim of error for appeal by objecting to

the offending statements both at trial and in his motion for judgment notwithstanding the verdict. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (stating that in order to preserve a claim of error for appeal, a defendant must object at trial and in a written posttrial motion).

¶ 15 We generally review a trial court's evidentiary rulings for an abuse of discretion. *People v. Caffey*, 205 Ill. 2d 52, 89 (2001). An abuse of discretion occurs when no reasonable person could agree with the position taken by the trial court. *People v. Smith*, 2012 IL App (1st) 113591, ¶ 23. The defendant maintains, however, that his claims should be reviewed *de novo* where the trial court's exercise of discretion in this case was "frustrated by an erroneous rule of law." See *People v. Williams*, 188 Ill. 2d 365, 369 (1999). We disagree with defendant and apply the traditional abuse of discretion standard where the trial court's decision to admit the contested statements was not based on an erroneous rule of law.

¶ 16 In addressing the merits of the defendant's claims, we find instructive *People v. London*, 256 Ill. App. 3d 661 (1993). In *London*, the jury heard the prosecutor elicit testimony from the victim that on the day of trial he was in the hall with "some other people" and had "a problem." *Id.* at 666. The trial court sustained the defendant's objection to the questioning and instructed the jury to disregard it. *London*, 256 Ill. App. 3d at 666. On appeal, this court rejected the defendant's contention that the prosecutor insinuated that the defendant threatened the victim on the day of trial, finding that the record revealed that the prosecutor made no statement, express or implied, that the defendant threatened the victim. *Id.* In addition, this court rejected the defendant's contention that the prosecutor's questioning was groundless where the record showed that the victim did receive threats. *Id.* at 666-67; *cf. People v. Dace*, 114 Ill. App. 3d 908, 920 (1983) (stating that a prosecutor commits prejudicial error when he repeatedly asks a witness if he was afraid of testifying against the actual defendant without explaining the need for said inquiry).

¶ 17 Here, similarly to *London*, the record shows that Mitchell never explicitly stated or implied that the defendant threatened him. Mitchell testified that he initially was uncooperative with police

because, "I was in custody, and *** the person that you want me to testify against was in custody, too, and *** I didn't want any problems because I'm in custody." The defendant maintains that these statements prejudiced him because they showed that he was in custody prior to trial, and improperly suggested, without any basis in the record, that Mitchell had been threatened by the defendant. The defendant's contentions, however, are speculative and rebutted by the record. Throughout the entirety of Mitchell's testimony, he never identified the defendant as the offender in question, or the person he would be testifying against. Instead, as the trial court noted when it denied defense counsel's motion for mistrial, Mitchell was referring to potential problems he might have in prison after cooperating with the prosecution. Moreover, we find that the State had legitimate grounds to question Mitchell as to why he was initially uncooperative where Mitchell's testimony during cross-examination shows he may have made prior inconsistent statements regarding whether he was even at the scene of the crime. Therefore, the defendant was not prejudiced by Mitchell's testimony at trial, and the court did not abuse its discretion in admitting the contested statements.

¶ 18 The defendant next contends that comments made by the State during its closing argument denied him a fair trial. The defendant maintains that the State unfairly prejudiced him during rebuttal by suggesting that he threatened and intimidated Mitchell into not cooperating with the prosecution. The defendant specifically points to the State's comment that, "[w]hether it's locked up and [Mitchell] was afraid, whether he doesn't want to be deemed a snitch, God knows. He just didn't want to cooperate."

¶ 19 With regard to the above comment made by the State, we find that the defendant failed to preserve this issue for appellate review. The defendant never objected to the comment at trial, or raised it in a posttrial motion. See *People v. Macias*, 371 Ill. App. 3d 632, 643 (2007) (finding that the defendant forfeited his argument that the prosecutor made improper statements during closing arguments when he failed to raise a trial objection). We also find that even if the defendant invoked the plain error doctrine in his brief, he cannot show that plain error occurred because the State did

not err in commenting on Mitchell's testimony. See *People v. Chapman*, 194 Ill. 2d 186, 225-26 (2000) (the plain error exception only applies if an actual error occurred). Despite the defendant's contentions to the contrary, the State never argued during rebuttal that the defendant threatened Mitchell. Instead, the State merely indicated that it was possible that Mitchell was uncooperative because he was afraid to be deemed a "snitch" in prison.

¶ 20 The defendant also maintains that the State unfairly prejudiced him during rebuttal closing argument by arguing that fingerprint analysis had been conducted on the charged burglary proceeds, *i.e.*, the GPS, where that fact was not in evidence and could not be readily inferred. We note that the defendant properly preserved this claim by objecting to the offending statements at trial and in a written posttrial motion. *Enoch*, 122 Ill. 2d at 186.

¶ 21 A prosecutor has wide latitude regarding the content of closing and rebuttal arguments, and may comment on evidence and any fair and reasonable inferences the evidence may yield. *People v. Runge*, 234 Ill. 2d 68, 142 (2009). When reviewing claims of prosecutorial misconduct during closing argument, we consider the entire closing argument of both parties to place the comments in context. *People v. Maldonado*, 402 Ill. App. 3d 411, 422 (2010). While a prosecutor's remarks may sometimes exceed the bounds of proper comment, the verdict must not be disturbed unless it can be said that the remarks resulted in substantial prejudice to the defendant, such that absent those remarks the verdict would have been different. *People v. Byron*, 164 Ill. 2d 279, 295 (1995). Thus, comments constitute reversible error only when they engender substantial prejudice against the defendant such that it is impossible to say whether or not a verdict of guilt resulted from those remarks. *People v. Nieves*, 193 Ill. 2d 513, 533 (2000).

¶ 22 Due to a conflict between two supreme court cases, it is unclear whether we review this issue *de novo* or for an abuse of discretion. *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007); *People v. Blue*, 189 Ill. 2d 99, 128 (2000). However, we need not determine which is the proper standard of review because the result here is the same under either standard. *People v. Woods*, 2011 IL App (1st)

091959, ¶ 38; *People v. Raymond*, 404 Ill. App. 3d 1028, 1060 (2010); *People v. Phillips*, 392 Ill. App. 3d 243, 274-75 (2009).

¶ 23 The defendant maintains that the following comments made by the State in rebuttal were not based on the evidence: "[c]ounsel will say they didn't fingerprint. They didn't do this. You will see the photograph, that filthy GPS, that's dirty. You know what it is? That's dust. That's fingerprint dust." Counsel objected to these comments, and the objection was sustained by the court. Nevertheless, the prosecutor continued by stating, "[l]ook at the contents across the GPS."

¶ 24 Assuming that it was error for the State to make the above statements, any error was cured by the court sustaining the defendant's objection, and the court's instructions to the jury that neither opening statements nor closing arguments are evidence. See *People v. Johnson*, 208 Ill. 2d 53, 116 (2003) (stating that the prompt sustaining of an objection combined with proper jury instructions is usually sufficient to cure any prejudice arising from improper closing argument). The fact that the prosecutor made an additional comment regarding the GPS immediately following the court's decision to sustain defense counsel's objection does not change the fact that the court cured any error.

¶ 25 Moreover, the alleged error was harmless where there was ample evidence of the defendant's guilt. *People v. Chavez*, 265 Ill. App. 3d 451, 460 (1994). Officer Kirkiakis heard a loud noise that sounded like glass breaking and then saw the defendant approaching him. When Kirkiakis asked the defendant what he had in his hand and ordered him to stop, the defendant fled. During the chase that ensued, Kirkiakis saw the defendant throw a GPS under a vehicle. After the defendant was detained, Kirkiakis returned to where he heard the sound of glass breaking, located a vehicle with a broken window, and spoke with the owner of that vehicle, who identified the GPS as belonging to him. We further note that it was not significant whether the evidence technician dusted for fingerprints on the GPS because the technician made it clear at trial that although he dusted in several areas for fingerprints, none were recovered. Therefore, the jury was aware that the defendant's prints were not found at the scene, and any evidence regarding whether the GPS was

dusted for fingerprints was irrelevant.

¶ 26 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 27 Affirmed.

¶ 28 JUSTICE DELORT, specially concurring upon denial of rehearing:

¶ 29 I agree with my colleagues that the petition for rehearing should be denied. However, I believe that the opinion should remain as it was originally issued, and not be modified to remove the name of the assistant state's attorney (ASA) in question. Although the State won the appeal, the State has filed a petition for rehearing requesting us to change the opinion to remove any reference to the name of the ASA. The State suggests that naming the ASA in the order could have an effect on any potential future campaign by the ASA for election or appointment to the position of judge, and that it could encourage copycat arguments by other defendants prosecuted by the same ASA. I find neither argument convincing. To provide context for our analysis and resolve the issues presented, we found it necessary to quote directly from the transcript. The transcript itself names the ASA. Accuracy and public transparency are extremely important to the judicial and prosecutorial processes. These interests far outweigh the State's Attorney's preference to shield the identities of prosecutors whose courtroom tactics generate grounds for appeals by convicted defendants, even if those appeals turn out to be meritless.