2013 IL App (2d) 120527-U
No. 2-12-0527
Order filed September 26, 2013

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 10-CF-3038
OSBALDO HERNANDEZ,	)	Honorable Timothy Q. Sheldon,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Burke and Justice Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant showed no plain error or ineffective assistance of counsel as to the State's closing argument: although the State might have implied that defendant might have committed other crimes, those comments were brief, the State did not suggest that the jury should rely on any such crimes in deciding his guilt, the evidence was strong, and the jury was instructed that arguments are not evidence; (2) we vacated defendant's street-value fine, which lacked an evidentiary basis, and remanded for the trial court to impose a fine based on evidence; (3) defendant was entitled to a credit of $1,970 against his fines, to reflect the 394 days he spent in presentencing custody, and we remanded the cause for the application of that credit.

¶ 2 Following a jury trial, defendant, Osbaldo Hernandez, was convicted of unlawful delivery of a controlled substance (720 ILCS 570/401(a)(2)(A) (West 2010)) and sentenced to 78 months'

imprisonment. He appeals, contending that (1) he was denied a fair trial when prosecutors, in closing argument, implied that he was guilty of an uncharged drug offense; (2) the trial court imposed a street-value fine without any evidentiary basis; and (3) he is entitled to credit against his fines for time spent in pretrial custody. We affirm in part, vacate in part, and remand.

¶ 3 At trial, Aurora police investigator Paul Lindley testified that, on May 25, 2010, he was working with the Illinois state police's North Central Narcotics Task Force. On that date, he called defendant, whom he knew as "Pana," to arrange to purchase an ounce of cocaine. Defendant spoke "broken" English, and Lindley was concerned that he might not have completely understood the conversation. Thus, he had Jose Pelayo, a fellow agent who spoke Spanish, call defendant to confirm the agreement. Pelayo made the call outside of Lindley's presence.

¶ 4 The following day, May 26, Lindley called defendant, who was at his home at 711 Fulton Street in Aurora, to set up a meeting. Lindley drove to defendant's residence where defendant, who was standing near the garage, directed Lindley to a white minivan by pointing and saying, "Door, open the door." Lindley opened the front driver's side door and found, on the floorboard, a small, rectangular tinfoil package from which he could smell cocaine. Lindley paid defendant $1,000 in prerecorded money, and defendant counted it out in Lindley's presence.

¶ 5 Lindley took the packet back to the station and, with agent Dawn Churney present, weighed the packet and its contents. They packaged it into a sealed container, filled out a form on the front of the container, initialed it, and dropped it into a safe. People's exhibits 1 and 2 contained the packet that Lindley recovered from defendant's van.[1]

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[1]Apparently, an outer bag and an inner bag into which the evidence was placed were numbered separately.

¶ 6 Lindley confirmed that the only purchase he made from defendant was on May 26. Defendant was not arrested until approximately seven months after the May 26 transaction. Lindley said that the license plate number of defendant's minivan was 607 1125, although his report listed the number as 607 1155. He acknowledged that the arrest warrant issued for defendant described the suspect's race as "white." Lindley explained that there was no code for "Hispanic." On redirect, Lindley testified that he had spoken with defendant approximately two weeks before the May 25 telephone conversation.

¶ 7 State police chemist Sara Anderson testified that she processed exhibits 1 and 2 on June 10, 2010. The substance in the packet weighed 27.5 grams and tested positive for cocaine. The date of the offense as shown on the evidence bag received from the Task Force was May 26, 2010. According to Anderson, an evidence receipt is generated when evidence comes into the laboratory. The date of the offense, as reflected on the evidence receipt, was May 11, 2010. She noted that the date of the offense is not always accurate, and she was not concerned about that date. She explained that, when evidence comes in from multiple drug purchases, the date on the evidence receipt is the date of the first purchase and does not reflect any purchases after that.

¶ 8 In closing argument, the prosecutor recounted how the May 26 purchase occurred and argued that Lindley's identification of defendant as the seller was reliable. He argued that, "[w]hen you go to catch the bad guy, you have to know who the bad guy is. It's the defendant, ladies and gentlemen." He continued:

> "Inspector Lindley is talking to the person. He parks in his driveway. He looks up, and when he is being waved at by the person, he walks to that person. After he sees where that person is pointing, ladies and gentlemen, he does as he is told, and then he approaches

the guy, and then he hands him money, and he is sitting there while this money is being counted, ladies and gentlemen. And the whole time he has done this he also did it two or three weeks earlier, but it was unrebutted and uncontradicted that Officer Lindley has laid eyes on this defendant before."

¶ 9 Defense counsel argued that discrepancies concerning the van's license plate number, Lindley's limited observation of the suspect, the length of time between the drug purchase and defendant's arrest, and Lindley's testimony that one of the arrest warrant forms indicated that the offender was a white male, cast doubt upon Lindley's identification of defendant. He further argued that the discrepancy between the date on the evidence receipt and the date of the charged offense raised a question about the chain of custody of the evidence.

¶ 10 In rebuttal, co-counsel for the prosecution touched on the chain-of-custody issue, arguing as follows:

"Lindley met with the defendant approximately two weeks prior to May 26th. He talked to him at that time. He also said he didn't do any buys himself from the defendant that time. But I think the white elephant in the room, the question nobody asked is was anybody else there? Did anybody else do any buys? We don't know. We don't have evidence of that. But I would ask to also consider the date on the lab receipt that people are talking about, the date that is approximately two weeks before May 26th. I would ask you also to consider the explanation of Ms. Anderson of how different dates can make it on there if that's not the date for the specific drugs that she is testing. There are certain circumstances where multiple items of evidence are taken in on different dates, and they start with the earlier date. That happens. That happens commonly.

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There is no question after listening to the witnesses that the evidence that Inspector Lindley took on May 26th is the exact same evidence that Ms. Anderson tested at the lab."

¶ 11 After deliberating for about three hours, the jury informed the court that it was deadlocked. At around 7 p.m., the court instructed the jury pursuant to *People v. Prim*, 53 Ill. 2d 62 (1972). At 8:35 p.m., the jury returned its verdict.

¶ 12 The trial court sentenced defendant to 78 months' imprisonment. The court also imposed statutory fines and court costs, as well as a $2,800 street-value fine. Defendant timely appeals.

¶ 13 Defendant first contends that he was denied a fair trial when the prosecutors, in closing argument, implied that he had sold drugs on a prior occasion. Conceding that he did not preserve the issue for review, he urges us to review the issue as plain error. Alternatively, he argues that defense counsel was ineffective for failing to object to the prosecutors' remarks.

¶ 14 The plain-error doctrine permits a reviewing court to consider an error that has been forfeited when either " '(1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence. In the first instance, the defendant must prove 'prejudicial error.' That is, he must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him. *** In the second instance, 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. [Citation.] Prejudice to the defendant is presumed because of the importance of the right involved, "*regardless* of the strength of the evidence." (Emphasis in original.) [Citation.] In both instances, the burden of persuasion remains with the defendant.' " *People v. Adams*, 2012

IL 111168, ¶ 21 (quoting *People v. Herron*, 215 Ill. 2d 167, 187 (2005)). However, there can be no plain error absent reversible error. *People v. Naylor*, 229 Ill. 2d 584, 602 (2008).

¶ 15 A claim of ineffective assistance of counsel requires a defendant to establish that (1) his attorney's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

¶ 16 A prosecutor has wide latitude in making a closing argument and may comment on the evidence and any fair, reasonable inferences it yields. *People v. Glasper,* 234 Ill. 2d 173, 204 (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 (2009). On the other hand, evidence that a defendant committed offenses other than those for which he is on trial is inadmissible. *People v. Cruz*, 162 Ill. 2d 314, 348 (1994). It follows that a prosecutor's closing argument should not suggest the commission of such offenses where no such evidence was admitted.

¶ 17 We conclude that the prosecutors' brief, isolated remarks here did not constitute reversible error. The first complained-of remark was ambiguous at best. In that portion of his remarks, the prosecutor was making the point that Lindley's identification of defendant was reliable because Lindley observed defendant for several minutes while Lindley approached defendant, handed him the money, and watched him count it. He then argued that the identification was further strengthened by the fact that Lindley "did it" with defendant some two weeks earlier. Unfortunately, this remark could lead to an inference that Lindley bought drugs from defendant earlier. However, given Lindley's testimony—that he spoke with defendant but did *not* buy drugs from him on the earlier

date—and the prosecutor's conclusion that Lindley had merely "laid eyes on this defendant before," the more reasonable inference was that the prosecutor was referring only to Lindley's prior meeting with defendant and was not implying that another drug purchase took place at that time.

¶ 18 In the portion of co-counsel's argument containing the second complained-of remark, she was discussing the fact that the evidence receipt generated by the crime lab contained a date different from that of the drug purchase at issue. Citing Anderson's testimony that, where there are multiple purchases from the same defendant, the evidence receipt will often reflect the date of the first purchase, co-counsel implied that defendant may have sold drugs to someone other than Lindley on May 11, thus causing the evidence receipt to be generated on that date. This argument was in response to defense counsel's argument that the discrepancy in the dates raised questions about whether the correct sample was tested. Thus, co-counsel's primary point was that other explanations were possible for the discrepancy in the dates and that the jurors should not be overly concerned about it. She never directly argued that defendant had sold drugs on an earlier date, admitting that the prosecution did not "have evidence of that."

¶ 19 While both remarks could perhaps have been more artfully phrased, both were brief, and neither prosecutor suggested that the jury should rely on any earlier criminal activity by defendant in deciding his guilt of this offense. Moreover, the evidence against defendant was strong. Lindley unequivocally identified defendant as the man who sold him cocaine on May 26. Lindley was familiar with defendant from a prior contact. By contrast, the points defendant raised in suggesting that he was misidentified were relatively minor. Finally, the jury was instructed that the attorneys' arguments were not evidence. See *Adams*, 2012 IL 111168, ¶ 23 (improper remarks by prosecutor not plain error where evidence against defendant was strong and jury instructed that prosecutor's

remarks were not evidence). Accordingly, these isolated references did not constitute reversible error and thus were not plain error. Further, because the remarks did not affect the outcome, defense counsel was not ineffective for failing to object.

¶ 20 Defendant next contends that the street-value fine should be vacated. He argues that there was no evidentiary basis for the $2,800 street-value fine the court imposed. The State concedes that the evidentiary basis for the $2,800 amount is "unclear," but argues that the fine should be reduced to $1,000, the amount Lindley testified that he paid for the cocaine.

¶ 21 When a defendant is convicted of possession or delivery of a controlled substance, section 5-9-1.1 of the Unified Code of Corrections requires the court to impose a fine of "not less than the full street value" of the controlled substance. 730 ILCS 5/5-9-1.1(a) (West 2010). The statute further provides that street value "shall be determined by the court on the basis of testimony of law enforcement personnel and the defendant as to the amount seized and such testimony as may be required by the court as to the current street value of the cannabis or controlled substance seized." *Id.* Although the amount of evidence necessary to establish the street value of a given drug varies from case to case, the trial court must have a concrete, evidentiary basis for the fine imposed. *People v. Reed*, 376 Ill. App. 3d 121, 129 (2007); see also *People v. Otero*, 263 Ill. App. 3d 282, 287 (1994).

¶ 22 In *Reed*, the appellate court vacated a street-value fine where there was no evidence establishing the street value of the drugs. The court rejected the State's argument that the fine be reduced to $120, the amount the informant paid for the drugs, because the trial court had not relied on such testimony in imposing the fine.

¶ 23 The State argues that *People v. Lewis*, 234 Ill. 2d 32 (2009), requires a different result. However, the supreme court in *Lewis* stated that it agreed with the approach taken by the appellate

court, requiring some evidence of the street value of the drugs. The *Lewis* court held only that the court need not take such evidence at the sentencing hearing if the parties stipulated to the drugs' value or reliable evidence of value could be found elsewhere in the record. *Id.* at 46. The court remanded the cause for the trial court to impose a fine based on evidence of the drugs' value. *Id.* at 49.

¶ 24 Here, Lindley testified that he paid $1,000 for the cocaine, but there was no evidence that this represented its actual street value. The price could have been negotiated based on the parties' particular needs and resources. There was no direct evidence that Lindley and defendant even knew the street value of an ounce of cocaine. Moreover, the trial court apparently did not rely on the sale price in setting the amount of the fine. See *Reed*, 376 Ill. App. 3d at 129. Thus, consistent with *Lewis*, we vacate the street-value fine and remand the cause to the trial court to impose a fine based on evidence of the cocaine's street value.

¶ 25 Defendant also contends that he is entitled to credit against his fines for time spent in pretrial custody. He argues, and the State concedes, that he spent 394 days in custody before trial and that he is entitled to, but did not receive, credit of $1,970 against his fines. See 725 ILCS 5/110-14(a) (West 2010).

¶ 26 The trial court imposed a mandatory $3,000 drug assessment pursuant to section 411.2(a)(1) of the Illinois Controlled Substances Act. 720 ILCS 570/411.2(a)(1) (West 2010). The court also imposed a $100 Trauma Center Fund charge (730 ILCS 5/5-9-1.1(b) (West 2010)) and a $30 charge for the Children's Advocacy Center (55 ILCS 5/5-1101(f-5) (West 2010)). Although labeled as "fees," both the Trauma Center Fund charge (*People v. Jones*, 223 Ill. 2d 569, 594-95 (2006)), and

the Children's Advocacy Center charge (*People v. Jones*, 397 Ill. App. 3d 651, 660-61 (2009)) are in fact fines to which the credit applies.

¶ 27 Defendant further contends, however, that the record is unclear as to whether and to what extent the trial court applied the monetary credit. In the judgment order, the $3,000 for the drug assessment is crossed out and replaced with "$1,440 after credit." As defendant points out, this does not add up. If the entire $1,970 credit is deducted from the $3,000 drug assessment, the remaining amount would be $1,030. If the credit is applied to the Trauma Center Fund and Children's Advocacy fines, the remainder of the drug assessment would be $1,160. If the trial court intended to apply some other credit to the drug assessment, it is not clear what it is. As we are remanding the matter anyway, the trial court should clarify how the credit is to be applied here.

¶ 28 The judgment of the circuit court of Kane County is affirmed in part and vacated in part, and the cause is remanded.

¶ 29 Affirmed in part and vacated in part; cause remanded.