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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 Ogle County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 10-CF-111
)	
GABRIEL S. ALMARAZ,)	Honorable
)	Stephen C. Pemberton,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Defendant showed no error, and thus no plain error, in the State's closing arguments: the State properly urged the jury to credit its witnesses because of their demeanor, without misrepresenting its role or expressing its personal opinion, and the State did misstate the law of self-defense; (2) defendant was entitled to a \$55 credit against his fine, to reflect the 11 days he spent in presentencing custody.

¶ 2 Defendant, Gabriel S. Almaraz, was charged with aggravated battery (720 ILCS 5/12-4(b)(8) (West 2010)). At his jury trial, defendant relied on self-defense (720 ILCS 5/7-1(a) (West 2010)); the jury convicted him. The trial court denied defendant's two posttrial motions and sentenced him to three years' imprisonment and the payment of a \$1,000 fine and various other assessments.

Defendant appeals, contending that (1) the prosecutor made improper comments during closing argument and rebuttal closing argument; and, alternatively, (2) he is entitled to a credit of \$55, representing \$5 for each day that he was in custody before sentencing, against certain fines. We affirm as modified.

¶ 3 We summarize the evidence at trial. Rochelle police officer Brian VanVickle testified as follows. On June 25, 2010, at approximately 10:55 p.m., he responded to a call for help at 315 Irene Avenue, where he found Froylan Nambo sitting in the driveway. Nambo's face and head were covered in blood. He said that he had been in a fight. Based on what Nambo told him, VanVickle went to 323 Irene Avenue and spoke to defendant. Defendant explained that he had been in the bathroom cleaning blood off his clothing. He was cooperative and showed VanVickle his shirt, shoes, and shorts. At that point, VanVickle saw no injuries to defendant.

¶ 4 Defendant initially told VanVickle that he and Nambo had gotten into an altercation in defendant's front yard; Nambo punched him once; and he retaliated by striking Nambo. VanVickle began to walk back to confirm this account with Nambo, but, on the way, he observed a large pool of blood on the sidewalk across the street, in front of 316 Irene. Also, several vehicles parked near the sidewalk had blood on them. VanVickle returned to 323 Irene and spoke to defendant again.

¶ 5 VanVickle testified that defendant now gave the following account. The altercation did not take place in his front yard. Rather, he and Nambo crossed the street and got into a "verbal altercation," and defendant followed Nambo back across the street. On the sidewalk, defendant kept yelling at Nambo. Nambo turned around and punched him once in the face. Defendant punched Nambo once; Nambo fell to the ground. Defendant continued to punch Nambo and also kicked him.

¶ 6 Later, VanVickle photographed defendant's right hand. The photograph, introduced into evidence, showed a cut on one finger. VanVickle took two photographs, also admitted into evidence, of the blood on the sidewalk. Shown a booking photograph of defendant, VanVickle testified that he could see no swelling above the right eyebrow.

¶ 7 VanVickle testified that he arrested defendant for aggravated battery and later went to the hospital and met with Nambo. He took two photographs, admitted into evidence at trial, showing the injuries to Nambo's head and face, and two photographs of Nambo's hands, showing that they were uninjured. VanVickle explained that hand injuries can show "mutual combat."

¶ 8 Nambo testified through a translator as follows. Before the fight with defendant, he had been visiting a friend on Irene Avenue. He left to visit another friend two houses away. On leaving his first friend's house, he saw that defendant was standing in front of 323 Irene, directly across the street. The two men were acquainted. Nambo had walked about 20 steps when he heard a yell. He turned in a "half circle," and defendant punched him in the area of his right eyebrow. Nambo fell to his knees. To get up, he tried hugging defendant, who repeatedly kicked him in the head and face to make him let go. Defendant pushed Nambo, who fell onto his side. He tried to get up, but defendant kept kicking him in the rib area and in the face, more than 10 times in all. Each time defendant kicked Nambo, he said that he was going to kill him. Nambo heard a door open, and defendant ran to his house. Nambo walked away but had to lean on cars for support. Eventually, the police arrived and took him to the hospital.

¶ 9 Nambo testified that he never struck, touched, or spoke to defendant on June 25, 2010. After exiting his friend's house, he did not go back in. He did not cross the street to defendant's house.

¶ 10 The State rested. Defendant called VanVickle, who testified that, at the hospital, Nambo seemed to understand his questions (through a translator), was not evasive, and appeared very truthful. Nambo recounted that he went outside his friend's house to smoke, then went back into the house. Nambo never said that defendant spoke to him while he was hitting him.

¶ 11 Defendant testified (through a translator) on direct examination as follows. As he stood outside his house at 323 Irene Avenue late on June 25, 2010, he became worried that someone was approaching. Near his front door, he confronted Nambo (whom he did not recognize at the time) and asked him what he was looking for. They started to argue. Nambo retreated and crossed the street, and defendant followed him. They kept arguing. Defendant confronted Nambo. Nambo punched defendant. Defendant punched Nambo back. He did so to defend himself, thinking that Nambo "wanted to come into [his] house." The fight continued. Defendant knocked Nambo down at some point but let him get up. Nambo tried to hug defendant and "got [defendant] full of blood."

¶ 12 Defendant testified that he never kicked Nambo. He never told him that he was going to kill him. Shown the photograph of his injured hand, defendant conceded that he got the cut from punching Nambo. Also, Nambo hit him in the eyebrow, but it "did not swell that much."

¶ 13 Defendant testified on cross-examination as follows. He did not call the police about the incident. Asked whether he had initially told VanVickle that Nambo first punched him in his front yard, defendant said that he could not remember. Defendant testified that, as he argued with Nambo, Nambo walked away, but defendant followed him across the street because he still wanted to know why Nambo had approached his property. Defendant denied having told VanVickle that he had punched Nambo with a closed fist several times or that he had kicked Nambo several times. He admitted that he had inflicted the injuries depicted in the photographs of Nambo, but he explained

that he had hit Nambo with a closed fist only once. He conceded that the blood on the sidewalk, depicted in the photographs, had come from Nambo. Defendant rested.

¶ 14 In closing argument, the prosecutor recounted VanVickle's testimony, emphasizing the inconsistencies in defendant's stories to VanVickle; the differences in Nambo's and defendant's accounts of their confrontation; and the evidence corroborating Nambo's account. He continued:

“Ladies and gentlemen, how do we know that everything that Froylan and Officer VanVickle testified [to] here today in court, how do we know that this is actually what happened? We know because we were able to hear and see both Froylan and Officer VanVickle in court, we were able to judge their credibility, we were able to determine that they were genuine, that they told the truth.

I don't know if you folks caught it, but during the testimony of, of Froylan Nambo, he was choking up and tearing up whenever he was telling the story. That's how you know that Froylan is telling the truth, that's how you know he's genuine.

Remember when I asked you folks [during *voir dire*], what do you look for when somebody is telling the truth and probably 75 percent of you said well, you need to be genuine, you need some eye contact. I don't know if you could see much more genuine than you saw Froylan Nambo on the stand today.”

Defendant did not object to any of the foregoing comments.

¶ 15 In closing argument, defense counsel noted the differences between Nambo's testimony and what he had told VanVickle. He also contended that defendant had not told inconsistent stories to VanVickle and that defendant had cooperated with the officer. Defense counsel emphasized that the

evidence supported defendant's theory of self-defense and that, if defendant did not initially provoke the use of force, he was under no duty to retreat after Nambo threw the first punch.

¶ 16 In rebuttal closing argument, the prosecutor maintained that the severity of Nambo's injuries, defendant's failure to call the police, and his attempt to wash the blood off his clothes refuted his claim of self-defense. Further, the prosecutor noted, after Nambo retreated, defendant did not return to his house, but instead followed Nambo across the street. The prosecutor told the jury that neither of defendant's accounts to VanVickle was credible. He continued:

“Let's assume for the sake of argument that the Defendant's second story he tells Officer VanVickle, let's assume for the sake of argument that it is true. Even if his second story were true, he followed Froylan Nambo across the street. He's not justified in using force whenever he follows him across the street.”

Defendant did not object to these comments. The prosecutor added that repeatedly kicking Nambo while he lay on the ground was not self-defense; that the severity of Nambo's injuries refuted any self-defense claim; and that Nambo's uninjured hands showed that he had not attacked defendant. Also, given where the fight took place, defendant had not been defending his property.

¶ 17 The jury convicted defendant. He moved for a new trial. His motions did not contend that any of the quoted comments were improper. The trial court denied the motions, sentenced defendant to two years' imprisonment, and assessed a \$1,000 fine, among other charges. He timely appealed.

¶ 18 On appeal, defendant contends that he was denied a fair trial when the prosecutor made improper comments in closing and rebuttal closing argument. Defendant acknowledges that he has forfeited this claim of error. To preserve the issue for appellate review, defendant needed to object at trial and raise the issue in a posttrial motion. See *People v. Herron*, 215 Ill. 2d 167, 175 (2005).

He did neither. Defendant invokes the plain-error rule, under which we will consider a forfeited issue if a clear or obvious error occurred and (1) the evidence was so closely balanced that the error alone threatened to work an injustice against the defendant; or (2) the error was so serious that it affected the fairness of the trial and the integrity of the judicial process. *People v. Young*, 2013 IL App (2d) 120167, ¶ 19. Defendant contends that there was clear error and that the evidence was closely balanced because the case turned on the credibility of the witnesses.

¶ 19 The first step in a plain-error analysis is to decide whether there was error at all. *Id.* ¶ 21. If so, we ask whether either prong of the rule has been satisfied. *Id.* We hold that there was no error.

¶ 20 Defendant contends in part that the prosecutor's comments during closing argument were improper because they referred to the State and the jurors as "we," thus misrepresenting himself as one who shared the jury's role of fact finder and implying that he personally found the State's witnesses credible. Defendant relies on opinions holding that a prosecutor may not (1) refer to himself as " 'just the thirteenth juror in this case ***, nothing more' " (*People v. Vasquez*, 8 Ill. App. 3d 679, 681 (1972)); (2) tell the jury, " 'There's nobody here for the People, just you' " (*People v. Thomas*, 146 Ill. App. 3d 1087, 1089 (1986)); or (3) personally vouch for a witness's credibility, such as by telling the jury, " 'I just didn't get the feeling that he was a liar' " (*People v. Roach*, 213 Ill. App. 3d 119, 123, 124 (1991)). We disagree that these opinions control, as they are distinguishable.

¶ 21 A prosecutor may argue that a witness's demeanor while testifying shows that the witness is or is not credible. See *People v. Johnson*, 254 Ill. App. 3d 74, 82-83 (1993). Read in full, and in context, the prosecutor's comments here properly urged the jury to credit VanVickle and Nambo in part because of how they looked and sounded on the stand. Unlike the prosecutors in *Vasquez*,

Thomas, and *Roach*, the prosecutor here did not misrepresent his role or express his personal opinion on witness credibility, but focused on what the jurors could “hear and see” for themselves, *i.e.*, both what VanVickle and Nambo said and *how* they said it. In this context, the use of “we” was akin to saying “one” or “somebody” and fell short of implying that the prosecutor was a “thirteenth juror” or that the jury was an arm of the State. Of course, the prosecutor’s subsequent use of “you” instead of “we” was even less problematic. At worst, the comments were not the clear or obvious error (*Young*, 2013 IL App (2d) 120167, ¶ 19) needed to avert forfeiture.

¶ 22 We also hold that the prosecutor’s comments in rebuttal closing argument were proper and, in any event, fell far short of clear or obvious error. Defendant contends that the prosecutor misstated the law by implying that defendant’s claim of self-defense was negated by merely following Nambo after Nambo walked away and crossed the street. Of course, the prosecutor may not misstate the law (*People v. Carbajal*, 2013 IL App (2d) 111018, ¶ 29), and the applicable law allowed the jury to acquit defendant on the basis of self-defense even if he did follow Nambo into the street after Nambo retreated (see 720 ILCS 5/7-1(a) (West 2010)).

¶ 23 We agree with the State, however, that the challenged comments did not imply that, merely by following Nambo across the street, defendant lost any legal right to defend himself against Nambo if the latter attacked him without justification. Instead, the prosecutor stated only that defendant was “not justified in using force *whenever* he follow[ed] him across the street.” (Emphasis added.) That statement was literally correct. The prosecutor continued by arguing that, under the facts presented, defendant had not been justified using force, “[e]ven if his second story were true.” The prosecutor then summarized the evidence negating defendant’s claim of self-defense: Nambo’s testimony that defendant repeatedly punched and kicked him; Nambo’s serious injuries and profuse bleeding; and

the absence of any injury to Nambo's hands. The comments of which defendant complains were proper and fell far short of the clear or obvious error needed to avert forfeiture. Having found no error, we need not decide whether the evidence was closely balanced.

¶ 24 We turn to defendant's second claim of error. He asserts that he is entitled to a \$55 credit against his \$1,000 fine. The State confesses error. We agree with the parties.

¶ 25 Under section 110-14(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14(a) (West 2010)), a defendant who is incarcerated on aailable offense and does not supply bail, and against whom a fine is levied in connection with the offense, shall be allowed a credit of \$5 for each day, upon his application. Here, defendant was incarcerated for 11 days before sentencing, thus entitling him to a \$55 credit. The record shows that the trial court failed to offset defendant's \$1,000 fine by this amount. Therefore, we modify the judgment by reducing defendant's fine to \$945. In all other respects, we affirm the judgment of the circuit court of Ogle County.

¶ 26 Affirmed as modified.