

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).

2013 IL App (4th) 120163-U  
NO. 4-12-0163  
IN THE APPELLATE COURT  
OF ILLINOIS  
FOURTH DISTRICT

FILED  
March 27, 2013  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Adams County
SHANE M. FINLEY,	)	No. 11CF80
Defendant-Appellant.	)	
	)	Honorable
	)	Alesia A. McMillen,
	)	Judge Presiding.

---

JUSTICE POPE delivered the judgment of the court.  
Justices Appleton and Holder White concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* The appellate court affirmed defendant's conviction for participation in methamphetamine manufacturing, finding that prosecutor's statements during rebuttal argument were not plain error, vacated defendant's convictions for possession of methamphetamine manufacturing materials and possession of methamphetamine pursuant to the one-act, one-crime doctrine, and remanded with directions.
- ¶ 2 In June 2011, a jury convicted defendant, Shane M. Finley, of (1) unlawful participation in methamphetamine production (720 ILCS 646/15(a)(2)(A) (West 2010)) (participation in the manufacture of less than 15 grams of methamphetamine) (count I), (2) unlawful possession of methamphetamine manufacturing materials (720 ILCS 646/30(a) (West 2010)) (count II), and (3) unlawful possession of methamphetamine (720 ILCS 646/60(b)(1) (West 2010)) (possession of less than 5 grams of methamphetamine) (count III). In August 2011,

the trial court sentenced defendant to concurrent 15-year, 7-year, and 5-year sentences, respectively.

¶ 3 Defendant appeals, arguing that (1) the prosecutor's statements during closing argument impermissibly shifted the burden of proof to defendant, thus depriving him of a fair trial, and (2) defendant's convictions for possession of methamphetamine and possession of methamphetamine manufacturing materials must be vacated because they are premised on the same act as his conviction for participation in methamphetamine production. We affirm defendant's conviction on count I, vacate his convictions on counts II and III, and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 In February 2011, following the execution of a search warrant, the State charged defendant with four counts: (1) unlawful participation in methamphetamine production (720 ILCS 646/15(a)(2)(A) (West 2010)) (participation in the manufacture of less than 15 grams of methamphetamine) (count I); (2) unlawful possession of methamphetamine manufacturing materials (720 ILCS 646/30(a) (West 2010)) (count II); (3) unlawful possession of methamphetamine (720 ILCS 646/60(b)(1) (West 2010)) (possession of less than 5 grams of methamphetamine) (count III); and (4) unlawful possession of a hypodermic syringe or needle (720 ILCS 635/1 (West 2010)) (count IV). Prior to defendant's trial, the State dismissed the count IV.

¶ 6 The following facts were gleaned from the testimony of witnesses and exhibits admitted into evidence at defendant's June 2011 trial.

¶ 7 A. The State's Evidence

¶ 8 The State offered testimony from the following eight witnesses: (1) Illinois State Police Sergeant Michael Pigg; (2) Illinois State Police forensic drug chemist Hope Erwin; (3) Illinois State Police Special Agent Seth Knox; (4) Inspector Bryan Martin of the City of Quincy police department; (5) Sergeant Doug Vandermaiden of the City of Quincy police department; (6) Sergeant Joseph Lohmeyer of the Adam's County Sheriff's Office; (7) defendant's sister, Lori Burdette; and (8) defendant's nephew and Lori Burdette's son, Steven Masterson. Additionally, the State submitted into evidence (1) 35 photographs taken during the execution of the search warrant, (2) police logs showing hazardous materials seized and subsequently destroyed, (3) a "NPLeX" report showing defendant's pseudoephedrine purchases during December 2010 and January 2011, (4) defendant's financial affidavit filed on February 10, 2011, and (5) various nonhazardous physical evidence seized during the search.

¶ 9 *1. Evidence of Methamphetamine Production  
at 628 South Eighth Street*

¶ 10 On February 8, 2011, Sergeant Pigg and Inspector Martin, both members of the West Central Illinois Drug Task Force, were traveling in the same car on South Eighth Street in Quincy when they both detected a strong chemical odor they identified as being associated with the manufacturing of methamphetamine. Believing that the odor was emanating from 628 South Eighth Street, Sergeant Pigg took custody of a bag of trash lying on the sidewalk in front of that residence in order to examine its contents. After opening the bag at the Quincy police department, Pigg and Martin discovered materials associated with the production of methamphetamine, including (1) a two-liter soda bottle containing residue from methamphetamine production, (2) a 20-ounce soda bottle that had been converted into a

"bubbler" and contained chemicals associated with methamphetamine production, (3) lithium batteries that had been ripped apart, and (4) a paper towel containing a white powder that field-tested positive for methamphetamine.

¶ 11 Based on the items found in the trash bag, Pigg and Martin obtained a search warrant for 628 South Eighth Street. At approximately 10 p.m. that same day, Pigg and Martin, accompanied by 8 to 12 members of the Quincy police department's Emergency Response Team (ERT) (commonly known as SWAT), executed the search warrant.

¶ 12 Inside of the residence, officers discovered the following items in the southwest bedroom: (1) pseudoephedrine pills and empty pseudoephedrine pill packaging; (2) two cans of aerosol starting fluid that had been punctured at the bottom and emptied; (3) several instant cold-compress packs, some of which had been torn open; (4) a Ziplock bag containing ammonium nitrate, the active ingredient in instant cold-compress packs; (5) a one-pound bottle of sodium hydroxide crystals (commonly known as lye); (6) a bottle of sulfuric acid; (7) two containers of rock salt; (8) several ripped-apart lithium batteries with the lithium metal removed; (9) a pair of pliers; (10) a coffee grinder; (11) aquarium pump tubing; (12) several empty soda bottles; (13) paper towels; (14) a set of digital scales containing residue that later tested positive for methamphetamine; (15) a box of Ziplock bags; (16) a Ziplock bag containing syringes; (17) a spoon; and (18) a roll of aluminum foil. Officers also discovered items consistent with the manufacturing and ingestion of methamphetamine in the living room, the kitchen, and the basement of the home.

¶ 13 Special Agent Seth Knox of the Illinois State Police Methamphetamine Response Team gave detailed testimony explaining the production of methamphetamine using the "shake-



628 South Eighth Street with defendant, and defendant manufactured methamphetamine in the southwest bedroom of that residence a "couple times a week." Masterson and his mother would purchase pseudoephedrine pills and instant cold-compress packs to aid defendant in manufacturing methamphetamine. Masterson testified on occasion he would witness defendant start a batch of methamphetamine, but he would never stay to watch the entire process because it was too dangerous.

¶ 18 The State introduced into evidence reports generated by the National Precursor Log Exchange ("NPLEx"), a database that logs all pseudoephedrine sales in Illinois. Special Agent Knox explained due to the use of pseudoephedrine as a precursor for methamphetamine production, Illinois law limits the quantity of pseudoephedrine an individual may purchase in a 30-day period. NPLEx, a computer registry linking all pharmacies authorized to sell pseudoephedrine in Illinois, records all pseudoephedrine sales, as well as attempted purchases in which an individual is blocked from buying pseudoephedrine because he or she has exceeded their 30-day limit. The State introduced NPLEx reports indicating defendant was blocked from purchasing pseudoephedrine on December 6, 2010, and successfully purchased pseudoephedrine on December 16, 2010, January 4, 2011, and January 22, 2011.

¶ 19 B. Defendant's Evidence and the State's Rebuttal Evidence

¶ 20 Defendant offered the testimony of three witnesses: (1) his brother, Clarence Finley; (2) his brother-in-law, Danny Biesterfeld; and (3) his sister, Teresa Biesterfeld. Additionally, defendant submitted into evidence (1) rent receipts that Teresa Biesterfeld issued to him, and (2) his W-2 forms from 2010.

¶ 21 Clarence Finley testified Steve Masterson, and not defendant, was manufacturing

methamphetamine at 628 South Eighth Street. According to Finley, defendant was living in Danny and Teresa Biesterfeld's home on 1513 Maas Road in Quincy during January and February 2011.

¶ 22 Danny and Teresa Biesterfeld both testified defendant lived in their home during January and "the start of February" or "early February" 2011. Defendant offered into evidence two handwritten rent receipts for the months of January and February 2011, which Teresa testified she had issued to him while he was staying at her home. Although Teresa and Danny both testified defendant received mail at their home, defendant did not offer into evidence any mail addressed to him at Teresa and Danny's residence.

¶ 23 The State's only rebuttal evidence was defendant's financial affidavit, filed February 10, 2011, in which he listed his address as 825 North Sixth Street in Quincy.

¶ 24 C. Closing Arguments

¶ 25 In his closing argument, defense counsel conceded someone was making methamphetamine at 628 South Eighth Street:

"The State proved, I would submit to you, that in the residence of Lori Burdette and Steve Masterson \*\*\* methamphetamine was produced. A lot of methamphetamine was produced, apparently over a period of time that we are not entirely sure."

Defense counsel's argument, however, focused in large part on the State's failure to prove defendant lived at 628 South Eighth Street:

"The residence we are talking about is a tiny little place.

It's not very big. [Defendant] apparently [had] a choice of living there for three months in the squalor that was Lori Burdette's life, with her out-of-control son, Steve Masterson, or [defendant] can have reasonably chosen to live, as the testimony was presented today, in a comfortable room with [his] own bed and no methamphetamine or criminals around. It's a reasonable choice to make. That's the choice [defendant was] faced with, and I would submit to you that's the choice [defendant] made."

¶ 26 In rebuttal argument, the prosecutor made the following statement, without objection from the defense:

"You know, in all the argument that counsel makes do you once hear a reason why [defendant was] at that location of Lori Burdette's house? One even iota of evidence as to why [he was] there? You know, they don't have to produce any evidence, but when they do, it's held to the same level of scrutiny as any other testimony."

¶ 27 D. The Jury's Verdict And The Trial Court's Sentence

¶ 28 The jury found defendant guilty of (1) unlawful participation in methamphetamine production (720 ILCS 646/15(a)(2)(A) (West 2010)) (participation in the manufacture of less than 15 grams of methamphetamine), (2) unlawful possession of methamphetamine manufacturing materials (720 ILCS 646/30(a) (West 2010)), and (3) unlawful possession of methamphetamine (720 ILCS 646/60(b)(1) (West 2010)) (possession of less than 5 grams of

methamphetamine). In August 2011, the trial court sentenced defendant as stated.

¶ 29 E. Defendant's Motion for New Trial

¶ 30 In September 2011, defendant filed a motion for new trial and/or dismissal, alleging that during closing statements, the prosecutor made remarks regarding defendant's failure to present evidence to support certain contentions. Those remarks, defendant argued, impermissibly shifted the burden of proof and deprived defendant of a fair trial. In January 2012, the trial court entered an order denying defendant's motion and finding the prosecutor's comments did not shift the burden of proof to defendant.

¶ 31 This appeal followed.

¶ 32 II. ANALYSIS

¶ 33 Defendant argues (1) the prosecutor's rebuttal argument deprived him of a fair trial by impermissibly shifting the burden of proof to him, and (2) his convictions for possession of methamphetamine and possession of methamphetamine manufacturing materials must be vacated because they are premised on the same act as his conviction for participation in methamphetamine production. We address defendant's contentions in turn.

¶ 34 A. The Prosecutor's Statements During Rebuttal Argument Did Not Constitute Plain Error

¶ 35 Defendant contends the prosecutor's statements during rebuttal argument "shifted the burden of proof by intimating to the jury that [defendant] had failed to prove his innocence." Defendant further asserts, although defense counsel failed to raise an objection to the prosecutor's rebuttal argument at trial, this court should review the issue as plain error "because the case was close \*\*\* and because the error affected the integrity of the judicial process."

¶ 36 Because, as addressed in Section II(B) of this order (*infra* ¶¶ 46-49), we vacate defendant's convictions for possession of methamphetamine and possession of methamphetamine manufacturing materials, we limit our review of the prosecutor's allegedly improper statements to whether those statements deprived defendant of a fair trial as to the charge of participation in methamphetamine production.

¶ 37 1. *The Plain-Error Doctrine*

¶ 38 "It is well settled that, to preserve an issue on appeal, a defendant must object to the purported error at trial and include it in his written posttrial motion." *People v. Glasper*, 234 Ill. 2d 173, 203, 917 N.E.2d 401, 419 (2009). However, a defendant's failure to contemporaneously object will not always foreclose an issue from appellate review. Illinois Supreme Court Rule 615(a) (eff. Jan. 1, 1967) provides for appellate review of trial errors as follows:

"Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court."

As the supreme court explained in *People v. Herron*, 215 Ill. 2d 167, 186-187, 830 N.E.2d 467, 479-80 (2005),

"[T]he plain error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error 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, the defendant 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. The State, of course, can respond by arguing that the evidence was not closely balanced, but rather strongly weighted against the defendant. 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.”

¶ 39 Before applying the plain-error doctrine, however, we must determine whether there was error at all. *Glasper*, 234 Ill. 2d at 203-04, 917 N.E.2d at 419.

¶ 40 *2. The Prosecutor's Statements During Rebuttal Argument Were Not Error*

¶ 41 Defendant claims the prosecutor' following statements amounted to error:

"You know, in all the argument that counsel makes do you once hear a reason why [defendant was] at that location of Lori Burdette's house? One even iota of evidence as to why [he was]

there? You know, they don't have to produce any evidence, but when they do, it's held to the same level of scrutiny as any other testimony."

We disagree.

¶ 42 "A prosecutor has wide latitude in making a closing argument" and is permitted to "comment on the evidence and any fair, reasonable inferences it yields." *People v. Nicholas*, 218 Ill. 2d 104, 121, 842 N.E.2d 674, 685 (2005). "A reviewing court must examine the prosecutor's remarks in the context of the entire proceeding, to determine whether the challenged remarks were improper comments on the accused's failure to testify." *People v. Herrett*, 137 Ill. 2d 195, 211, 561 N.E.2d 1, 8 (1990). Statements will not be held improper if they were provoked or invited by the defense counsel's argument. See *id.*, 561 N.E.2d at 8-9. As the supreme court said in *People v. Dixon*, 91 Ill. 2d 346, 350-51, 438 N.E.2d 180, 183 (1982):

"The prosecutor may comment on the uncontradicted nature of the State's case [citations], and, where motivated by a purpose of demonstrating the absence of any evidentiary basis for defense counsel's argument rather than a purpose of calling attention to the fact that defendant had not testified, such argument is permissible [citation]. Moreover, a defendant cannot ordinarily claim error where the prosecutor's remarks are in reply to and may be said to have been invited by defense counsel's argument."

¶ 43 In *People v. Giraud*, 2011 IL App (1st) 091261, 957 N.E.2d 503, *aff'd on other grounds*, 2012 IL 113116, 980 N.E.2d 1107, the First District considered a plain-error argument

similar to the one at hand. In that case, defense counsel argued in closing that the defendant's diabetes caused him to suffer from poor vision at the time he signed a statement admitting to having sex with his minor daughter. *Id.* at ¶¶ 12, 44, 957 N.E.2d 503. During rebuttal, the prosecutor pointed out that defendant did not call his doctors to the stand to corroborate his claims regarding his medical conditions. *Id.* at ¶ 45, 957 N.E.2d 503. The prosecutor accompanied her statement with a reminder that the State bore the burden of proof, adding "[b]ut once [the defendant] puts on evidence, you can judge it just the same as you judge any other evidence in this [case].'" *Id.* In concluding that the prosecutor did not improperly shift the burden of proof to defendant, the First District noted that the prosecutor accompanied her statement with a clear acknowledgment that the burden of proof was on the State. *Id.* at ¶ 46, 957 N.E.2d 503. Additionally, the court in *Giraud* found "that the prosecutor was merely commenting on the evidence presented at trial and reasonable inferences drawn therefrom." *Id.* at ¶ 47, 957 N.E.2d 503.

¶ 44            In this case, after commenting defense counsel's argument offered no "reason" or "iota of evidence" explaining why defendant was at 628 South Eighth Street, the prosecutor immediately followed by reminding the jury defendant was not required to produce evidence. Moreover, the prosecutor's statement was a direct response to defense counsel's argument defendant did not live at 628 South Eighth Street. In so responding, the prosecutor was merely pointing out to the jury that defense counsel's argument failed to contradict the State's case defendant was at 628 South Eighth Street on more than one occasion, and while there he was participating in the manufacturing of methamphetamine.

¶ 45            Viewed in the context of the entire proceeding, and in light of defense counsel's



lesser-included offenses. [Citation.] If any of the offenses are lesser-included offenses, then, under *King*, multiple convictions are improper. [Citation.] If none of the offenses are lesser-included offenses, then multiple convictions may be entered."

¶ 49 The State concedes defendant's convictions for both participation in methamphetamine production and possession of methamphetamine manufacturing materials were based on the same act, namely defendant's possession of methamphetamine manufacturing materials such as pseudoephedrine, aerosol starting fluid, lye, sodium hydroxide crystals, lithium batteries, and so on. Additionally, the State concedes that because, as alleged, an element of participation in methamphetamine manufacturing is that defendant must have participated in the production of less than 15 grams of methamphetamine, defendant's possession of less than 5 grams of methamphetamine was the same act for purposes of the participation in methamphetamine manufacturing and possession of methamphetamine convictions. Accordingly, the State concedes we should vacate defendant's convictions for possession of methamphetamine manufacturing materials and possession of methamphetamine. Pursuant to the one-act, one-crime doctrine of *King*, 66 Ill. 2d 551, 566, 363 N.E.2d 838, 844-45, we accept the State concession and vacate defendant's convictions for possession of methamphetamine manufacturing materials and possession of methamphetamine, counts II and III.

¶ 50 III. CONCLUSION

¶ 51 We affirm defendant's conviction for participation in methamphetamine production because the prosecutor's statements during rebuttal argument did not impermissibly shift the burden of proof to defendant, and we vacate defendant's convictions on counts II and III

for possession of methamphetamine and possession of methamphetamine manufacturing materials pursuant to the one-act, one-crime doctrine. We remand for issuance of an amended written sentencing judgment. Because the State successfully defended a portion of the criminal judgment, we grant the State its \$50 statutory assessment against defendant as costs of this appeal. See *People v. Smith*, 133 Ill. App. 3d 613, 620, 479 N.E.2d 328, 333 (1985) (citing *People v. Nicholls*, 71 Ill. 2d 166, 178, 374 N.E.2d 194, 199 (1978)).

¶ 52            Affirmed in part and vacated in part; cause remanded with directions.