

NOTICE
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2013 IL App (4th) 120674-U

NO. 4-12-0674

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

November 19, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Livingston County
JOHN COLWELL,)	No. 11CF300
Defendant-Appellant.)	
)	Honorable
)	Mark A. Fellheimer,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Steigmann and Justice Turner concurred in the judgment.

ORDER

¶ 1 *Held:* Even though, in his rebuttal closing argument to the jury, the prosecutor commented on defendant's not-guilty pleas in other cases, the prosecutor never suggested the not-guilty pleas were in themselves blameworthy, and he never sought to penalize defendant for pleading not guilty; rather, he had other, legitimate reasons for referring to the not-guilty pleas. Hence, the comments were not error, let alone plain error.

¶ 2 In April 2012, a jury found defendant, John Colwell, guilty of harassing a witness (720 ILCS 5/32-4a(a)(2) (West 2010)). In June 2012, the trial court sentenced him to 2 years' probation and confinement in jail for 180 days. Defendant appeals on the ground that the prosecutor, in his rebuttal closing argument, made comments on defendant's not-guilty pleas in separate traffic cases.

¶ 3 Defendant, however, never objected during the prosecutor's rebuttal closing

argument, and defendant never filed a posttrial motion. As a result, the issue is forfeited. The doctrine of plain error does not avert the forfeiture. We find no error at all, let alone plain error. Therefore, we affirm the trial court's judgment.

¶ 4

I. BACKGROUND

¶ 5 On October 11, 2001, the State charged defendant with harassing a witness (720 ILCS 5/32-4a(a)(2) (West 2010)). The victim was Carmen Rodriguez. Allegedly, defendant harassed her from August 27 to October 11, 2001, because he foresaw she would be a witness in three traffic cases pending against him.

¶ 6 The three traffic cases were Livingston County case Nos. 11-TR-3794 (leaving the scene of an accident involving property damage), 11-TR-3795 (failure to give information after an accident), and 11-TR-3796 (failure by the driver to report an accident). All three traffic cases arose from a single incident, which occurred on August 27, 2011, at the Freedom Oil Station in Pontiac, where Rodriguez was working as a night-shift clerk and cashier. She saw defendant back his car into an ice machine, and although she screamed at him and ran after him in the parking lot, trying to persuade him to stop, he did not stop.

¶ 7 After defendant drove away, Rodriguez called the police. A police officer named Armstrong arrived, and Rodriguez told him what had happened. Armstrong saw a scrape across the front of the ice machine. Rodriguez did not know defendant's name, but she described him to Armstrong, who then used the physical description to put together a photographic array. Rodriguez selected defendant's photograph.

¶ 8 Armstrong found defendant, who admitted knowing he had backed into the ice machine—"nudged" it, as he said. Defendant insisted, however, he had done no damage to the

ice machine and that was why he had driven away. Armstrong found blue paint on the bumper of defendant's car, which appeared to match paint on the ice machine. He placed defendant under arrest and issued him the three traffic citations. Defendant posted bond.

¶ 9 Thereafter, from August 27 to October 11, 2011, defendant stopped by the Freedom Oil Station three or four times a week and harassed Rodriguez, according to her testimony. He asked her why she had done this to him. He expressed anxiety that his driver's license would be suspended. He requested her to revise her statement to the police by adding, falsely, that she had given him permission to drive away. He kept asking her what she would say on the stand if she were called to testify against him in the traffic cases. Several times he entered the gas station and just stood there and glared at her. He made loud banging noises in the bathroom. She repeatedly asked him to leave her alone. Finally, she became so scared of him that she resigned her job at the gas station.

¶ 10 In the jury trial on the charge of harassing a witness, defense counsel suggested in his opening statement that the State could not prove the offense because defendant's own admissions to police officers and the gas-station owner had made it unnecessary for the State to call Rodriguez as a witness in the traffic cases. Defense counsel told the jury:

"Then the police officers, Officer Armstrong went to the residence at which they could find my client, Mr. Colwell. That when Mr. Colwell went out, he immediately admitted, yes, I was the one that struck the ice box outside of Freedom Oil. I didn't think there was any damage, I came there, but I did it. And they issued the three tickets immediately.

So he's already confessed to a crime. As Mr. Kerrigan [(the prosecutor)] tried to stress, it is a crime. They issued three citations based on his confession right there in front of Officer Armstrong. So he got the tickets. It is basically at that point over. He has admitted to the officer the fact that he did it. What potential testimony would Ms. Rodriguez be required to come in to give after in fact he has already admitted to the officer that he did it?

* * *

I think it is interesting also the fact that the—testimony that [the prosecutor] forgot to mention, Mr. Casper, her boss, the manager of Freedom Oil this entire time, would indicate that after seeing in the report about the damage to the ice machine, that Mr. Colwell went into the store to speak with Mr. Casper to see what were the damages done to the box so that he could pay for them. Again, another admission of the fact that he was responsible for and that he did the crime. This is before any of these instances occurred that supposedly he is threatening her based on her potential testimony.

So a second confession. Why would she need to testify?"

¶ 11 Later, in his closing argument, defense counsel argued to the jury that defendant would have had no reason to try to change Rodriguez's testimony, since he already had

repeatedly admitted committing the traffic offenses. Defense counsel argued:

"I would submit that he didn't have the intent, Mr. Colwell didn't have the intent, nor does the circumstantial evidence show that he had the intent in any way to get her to change her testimony. Why would he do that? Again, no [*sic*] there is no answer to that question, because if in fact he's admitted repeatedly that he did it and if he in fact is in a situation where he can't get up in a trial and deny it because he's going to be impeached by the testimony of others that he's already admitted this, he cannot deny that fact that he did it. And if in fact he did that, why would he need to change the testimony of Ms. Rodriguez, which is the very thing that he's already admitted, that he was the one who struck the ice box and then left without leaving information. There would be no reason."

¶ 12 The prosecutor then made a rebuttal closing argument. He reminded the jury that defendant had pleaded not guilty in the three traffic cases—a fact to which the parties had stipulated in the trial—and therefore it would indeed have been necessary for the State to call Rodriguez as a witness in the traffic cases, notwithstanding defendant's out-of-court admissions. The prosecutor argued:

"Counsel indicated that his client repeatedly admitted crashing into the cooler and leaving; that if he did admit that, then there would be no reason to want her to change her testimony. But you heard

Officer Armstrong say that without a victim, there's no charge. If she changes the testimony, if she says, I never saw anything happen, nothing happened, there's no damage, then we can call Sergeant Davis, we can call Officer Baird, we can call Officer Armstrong and they can say, he confessed to it, he told me he hit the cooler; but if there's no complaint, if there's no victim, if there's no victim, if there's no Carmen saying he hit the thing, then there's no case. Somebody comes into the Pontiac Police Office and says, hey, last night I was driving and I hit a cooler and, you know, I just drove away, and there's no report of a cooler being hit, there's no report of cooler damage, that's not a case. You don't make a case on a confession alone; you need a victim. And if Carmen comes in next week and says, hey, I never saw anything, then Officer Baird and Officer Armstrong can testify, they can say, he confessed to it, and he's still not guilty, because that's not a crime when there's not a victim. Carmen's the victim. If he gets her to change her testimony, there's no way to prove his case beyond a reasonable doubt, and he gets out of his hit-and-run.

I also find it odd that the defendant has, according to counsel, admitted his guilt so many times but he hasn't pled guilty in court. You heard the stipulation that the judge read, that the defendant has had three court dates so far. He came in on an

arraignment, he came in and officially entered his not guilty plea, and he came in for a trial next Thursday. If what counsel says is correct, then he is so guilty, why would he even want somebody to change their testimony, because he's guilty, he admitted it so many times to the police, then why hasn't he come in and pled guilty in court, why hasn't he made it official? The answer is, he's still trying to get to this witness, make her change her story so that he can get out of it so he can keep his license, so he can get away with this hit-and-run without being punished."

¶ 13 After 20 minutes of deliberation, the jury found defendant guilty of harassing a witness.

¶ 14 The trial court sentenced him to 2 years' probation and confinement in jail for 180 days.

¶ 15 This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 A. The Right To Plead Guilty
Without Being Criticized at Trial for Doing So

¶ 18 Defendant does not specify the sections of the Illinois Vehicle Code he was charged with violating in the three traffic cases, but from his description of the charged traffic offenses, at least one of them appears to be a Class A misdemeanor. See 625 ILCS 5/11-404(b) (West 2010) (duty upon damaging unattended vehicle or other property). We have held that, under both the sixth amendment of the federal Constitution (U.S. Const., amend VI) and article I, section 8, of the Illinois Constitution (Ill. Const. 1970, art. I, § 8), a defendant charged with a

Class A misdemeanor has a right to a trial by jury. *People v. Oatis*, 47 Ill. App. 3d 229, 231 (1977).

¶ 19 A defendant exercises his or her constitutional right to a trial by pleading not guilty or by standing mute when asked to enter a plea (725 ILCS 5/113-4(b) (West 2012)). When addressing the jury, the prosecutor may not criticize the defendant for pleading not guilty, because such remarks penalize the exercise of a constitutional right, thereby weakening or subverting the right. *People v. Libberton*, 346 Ill. App. 3d 912, 923 (2003).

¶ 20 B. Forfeiture, Unless Averted By the Plain-Error Doctrine

¶ 21 Defendant argues that in his rebuttal closing argument, the prosecutor criticized him for pleading not guilty in the three traffic cases. Because defendant did not object during the prosecutor's rebuttal closing argument and because defendant filed no posttrial motion, this argument is forfeited (see *People v. Enoch*, 122 Ill. 2d 176, 186 (1988)) unless the doctrine of plain error averts the forfeiture (see *id.* at 189-90). Defendant argues the prosecutor's remarks were plainly erroneous in both of the alternative senses of plain error: (1) prejudicial error and (2) presumptively prejudicial error. See *People v. Nitz*, 219 Ill. 2d 400, 415 (2006).

¶ 22 C. Defendant's Comparison of His Case to *Libberton*

¶ 23 "The first step of plain-error review is determining whether any error occurred." *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). Defendant argues that under *Libberton*, the prosecutor's remarks about his not-guilty pleas in the traffic cases are cause for reversal. We disagree. This case bears little resemblance to *Libberton*.

¶ 24 In *Libberton*, the prosecutor tried to arouse the jury's anger against the defendant for exercising his constitutional right to plead not guilty to the charge of driving under the

influence. *Libberton*, 346 Ill. App. 3d at 923. The appellate court said: "The State made comments which suggest, essentially, that a decent person in defendant's position would have pleaded guilty. Negative comments about a defendant's exercise of his or her constitutional rights are improper because they penalize the defendant for the exercise of those rights." *Id.* In the present case, the prosecutor never suggested that the not-guilty pleas were blameworthy in themselves. Rather, the prosecutor suggested the not-guilty pleas were significant in two ways: (1) they made it necessary for the State to call Rodriguez to testify in the traffic cases, as defendant arguably was aware when the traffic cases were pending; and (2) the not-guilty pleas were circumstantial evidence that, despite his out-of-court admissions, defendant intended to scuttle the traffic cases by pressuring Rodriguez to recant.

¶ 25 D. Allegedly Using the Not-Guilty Pleas To Impeach Defendant

¶ 26 A not-guilty plea is not an assertion of innocence. *People v. Garcia*, 573 N.Y.S.2d 257, 259 (N.Y. App. Div. 1991). "Rather, it is merely the device by which a person accused of a crime informs the prosecutor *** that he or she intends to put the government to its proof and preserves the right to defend [citation]." *Id.* Therefore, when a prosecutor suggests to the jury that a not-guilty plea is a lie, the prosecutor commits two wrongs. First, the prosecutor misrepresents what a not-guilty plea is, *i.e.*, falsely states it is an assertion of innocence. Second, the prosecutor tries to penalize the defendant for exercising a constitutional right. See *People v. Mulero*, 176 Ill. 2d 444, 462 (1997).

¶ 27 Defendant claims the prosecutor impeached him by implying that, in light of defendant's out-of-court admissions, his not-guilty pleas in the traffic cases were dishonest. We disagree with that interpretation of the prosecutor's rebuttal closing argument. The prosecutor

never said or implied that pleading not guilty to the traffic offenses was dishonest. Instead, the prosecutor argued that the not-guilty pleas were circumstantial evidence that despite the out-of-court admissions, on which defense counsel placed so much emphasis, defendant intended all along to harass Rodriguez into a recantation.

¶ 28 E. Shifting the Burden of Proof

¶ 29 Defendant says that the prosecutor's remarks on his not-guilty pleas shifted the burden of proof—something a prosecutor is never justified in doing (*People v. Beasley*, 384 Ill. App. 3d 1039, 1048 (2008)). We do not understand, nor does defendant explain, how these remarks shifted the burden of proof. We do not see where in the record the prosecutor said that defendant had to prove anything.

¶ 30 F. Overkill

¶ 31 In both his opening statement and his closing argument, defense counsel argued that defendant had admitted hitting the ice machine with his car and that these admissions showed a lack of motive to harass Rodriguez regarding her testimony in the pending traffic cases. Defendant does not dispute the prosecutor's right to respond to that argument; but he regards the prosecutor's response as overkill. See *United States v. Young*, 470 U.S. 1, 12-13 (1985); *People v. Stanbridge*, 348 Ill. App. 3d 351, 358 (2004). According to defendant, "the prosecutor needed only to mention that Ms. Rodriguez was a witness and move on," instead of "repeating, over and over again, that [defendant] had pled not guilty in the traffic case[s] but admitted his guilt to those charges during the instant trial."

¶ 32 We conclude, on the contrary, that if defense counsel sought to negate defendant's criminal intent by arguing that his out-of-court admissions had made it unnecessary for the State

to call Rodriguez as a witness in the traffic cases or had made it superfluous for defendant to harass her with a view to influencing her testimony, the prosecutor was entitled to respond that, notwithstanding the out-of-court admissions, defendant's not-guilty pleas required the government to regard the traffic cases as fully contested and to present all its proof, including the eyewitness, the "victim," Rodriguez, without whom the government could not have presented a convincing case—as arguably defendant was aware during the period of the charged harassment.

¶ 33

III. CONCLUSION

¶ 34 In sum, we find no error, let alone plain error. Therefore, we affirm the trial court's judgment, and we award the State \$50 in costs.

¶ 35 Affirmed.