FIFTH DIVISION
March 13, 2015

No. 1-13-0934

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. 07 CR 10462
	)	
DAVID VELAZQUEZ,	)	Honorable
	)	Lawrence E. Flood,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE PALMER delivered the judgment of the court.
Justices McBride and Gordon concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's murder conviction affirmed despite his claims that plea discussions were admitted at trial in violation of Supreme Court Rule 402(f) (eff. July 1, 2012), and that the prosecutor committed misconduct during closing arguments.

¶ 2 Following a jury trial, defendant David Velazquez was convicted of first-degree murder and sentenced to 65 years' imprisonment. On appeal, he contends that the trial court violated Supreme Court Rule 402(f) (eff. July 1, 2012) by allowing the introduction of plea-related

discussions, and that the prosecutor committed misconduct by making certain statements in rebuttal closing arguments.

¶ 3 The record shows that defendant became the target of an Alcohol, Tobacco and Firearms (ATF) investigation in May 2003. Defendant's friend, Antonio Rios, cooperated with ATF authorities and wore a recording device while speaking with defendant, and during that conversation, defendant confessed to the July 21, 2001, murder of Ricardo Cruz. Chicago police later received that recording from ATF agents, and Detectives Dougherty and Rotkvich went to speak to defendant. Upon listening to the playback of his recorded conversation with Rios, defendant made a number of incriminating statements.

¶ 4 Prior to trial, defendant filed a motion to suppress those statements claiming, *inter alia*, that they were part of "plea negotiations" and barred from introduction by Illinois Supreme Court Rule 402(f). The court heard arguments and deferred ruling on the matter to review applicable case law. Before the start of trial, the court denied defendant's motion, concluding that "it was clearly not a plea bargain situation." The court observed that the police were still investigating the case, defendant had not yet been charged, and there had been no mention of specific charges.

¶ 5 At trial, the State introduced the testimony of Michelle Temple, who lived in the Trumball Park Homes in the South Deering neighborhood of Chicago. On July 21, 2001, about 9 or 9:30 p.m., Temple was sitting in front of her house at 10612 South Bensley Avenue with a group of friends. Cruz, who went by the nickname "Rico," rode up on his bicycle and they spoke briefly, he looked over to a "T-alley" across the street, and said he thought he saw someone behind him but that his mind must have been playing tricks on him. Cruz started to ride away, and Temple heard shots and saw gunfire coming from bushes in a vacant lot across the street and

"a little bit over to the right." It looked like more than one gun, and as many as 20 shots were fired. Temple ran inside the home, but looked back and saw Cruz on the ground. "The bike was in between his legs. The tires were still spinning and *** [he] kept lifting his legs up and down." Temple went back outside, and tended to Cruz until paramedics arrived.

¶ 6 William Blake testified that at the time of the incident, he was in his second-floor bedroom in his home at 10618 South Bensley. He heard gunshots, looked out of the window, and saw a man lying on the ground and two people running from the vacant lot toward 107th Street. Blake acknowledged that he had previously been convicted of aggravated criminal sexual abuse and failure to comply with the Sex Offender Registration Act (Registration Act). At the time of his testimony, Blake was in custody for failure to comply with the Registration Act, but he had not been made any promises in exchange for his testimony.

¶ 7 Chicago police officer Skip Katich testified that he responded to a call of a person shot at 106th and Bensley. When he arrived, he saw Cruz lying on the ground. Katich knew that Cruz was a member of the King Cobras gang, and that rival gangs, the Spanish Vice Lords and Latin Counts, "would be around Hoxie area[,]" so he headed east to that area to look for possible offenders. Katich saw defendant, whom he knew as a member of the Spanish Vice Lords, drinking a beer in an alley behind his house at 10805 South Hoxie Avenue, a couple blocks from the crime scene. Katich told defendant that Cruz had been shot and asked why he was outside. He did not learn anything relevant to the investigation at that time, and continued touring the area.

¶ 8 Sonia Mares Dubose testified that she and her husband, Amanus Dubose, were visiting family members in the South Deering neighborhood on July 21, 2001. Amanus dropped her off

at 106th and Bensley, and she walked to her sister-in-law's home at 2545 East 106th Street after someone told her that "something was going to go down" meaning, "[s]omeone was going to do some kind of negative activity." She went inside the home and saw Michael Haynes, then came back outside and heard gunshots. Sonia was worried about her husband, so she ran towards 106th and Bensley, where she saw Cruz on the ground.

¶ 9 Amanus testified that he dropped Sonia off at 106th and Bensley, then drove around the area. He saw defendant, who he knew as Mousey, and another person, riding bikes and heading toward the Trumball Park Homes. His attention was drawn to them because they were wearing hoodies on a hot day. Amanus then heard someone say to stay away from 106th and Bensley because there was about to be a shooting. Amanus left to look for Sonia because that was the area where he had dropped her off. As he was looking for her, he saw defendant and another man riding their bikes eastbound towards Hoxie. When he arrived at 106th and Bensley, he saw a crowd of people, emergency vehicles, and Cruz lying on the ground. Amanus found Sonia and they left the area.

¶ 10 Amanus talked to police about the incident on January 19, 2007, after he was arrested for possession of a controlled substance and domestic battery. Amanus pleaded guilty to possession of a controlled substance and was sentenced to 18 months in prison. The domestic battery charge was dismissed, and he was arrested in August 2007 on a separate possession of narcotics offense. He pleaded guilty to that offense and was sentenced to imprisonment. He did not receive any offers or promises of leniency in exchange for his testimony.

¶ 11 Matthew Sadowski testified that on the evening of July 21, 2001, he was working on his car outside 2545 East 106th Street, where he lived with a number of relatives, including his

uncle, Michael Haynes. Sadowski was a member of the Latin Counts "People" gang, which was "aligned with" the Spanish Vice Lords, and rivals with "GD [Gangster Disciples] and [C]obra" in that area. Sadowski saw defendant, who he knew as Mousey, and another man named Corey arrive on bicycles. Defendant warned Sadowski to be careful because "GD folks [were] gathering over on the corner of 106th." Defendant and Corey left, and Sadowski went inside to eat with Haynes. Shortly thereafter, Sadowski saw an ambulance heading towards 106th and Bensley. Sadowski's aunts, Sonia and Denise went to that intersection, and when they returned, they told him that many people believed that Haynes was the shooter.

¶ 12 Because of those accusations, Sadowski, Haynes, and a number of other relatives decided to leave in Sadowski's car. They were pulled over by police, who questioned them about the shooting. Sadowski testified that he had a conviction for aggravated driving under the influence, and had been arrested for contempt for failing to appear for a court date in the instant case. He received no promises of leniency in exchange for his testimony, but his understanding was that the contempt proceedings would be dismissed following his trial testimony.

¶ 13 Detective Hackett testified that he responded to a call that a man had been shot at 106th and Bensley, and, when he arrived at the scene, he saw Cruz lying on the ground. Hackett then proceeded to the rival gang area to investigate. He encountered Sadowski, Haynes, and a number of other members of the Latin Counts gang, and conducted a field interview before continuing his patrol.

¶ 14 Antonio Rios testified that he and defendant had gone to high school together and were both members of the Spanish Vice Lords gang. They were very close, "almost like best friends[.]" On May 22, 2003, he arranged to meet defendant at his home at 10805 South Hoxie.

Before that meeting, Rios met with ATF agent Daniel Mitten, and gave him permission to attach a recording device to his person. Rios then picked up defendant, and the two men were driving when defendant turned the topic of conversation to Cruz's murder. Rios identified defendant's voice in the audio recording of the conversation, which was played in court.

¶ 15 In that recording, defendant expressed concern that "they" were collecting evidence and were "still on *** that Rico shit." He said that "the f*** up thing was" that he had left his hat and the other shooter left a box of shells in the alley, and "[i]f they would have did their job right, they would have had" him. Defendant then recounted being approached by a police officer after the shooting, and pretending to be drunk while the officer told him that Cruz had been shot.

¶ 16 Defendant told Rios that they "crept up on" Cruz and defendant "shot him in the back of the head" from "right across the street[.]" During that shooting, defendant told the other shooter to "aim at the f*** with the hat on." The other shooter was "shooting just as much as [defendant]" but it was defendant's gun that "did it." Cruz "looked like he was doing the old school f*** break-dance move when crumpled down" and he and the other shooter were "laughing [their] asses off about that shit." He explained that Cruz had been "shooting at [his] crib though. He had to go, you know?" Defendant then described later seeing a picture of Cruz in the hospital where he was hooked up to a great deal of medical equipment. When defendant heard that Cruz had passed away, he joked that he could get "a year for every tube" in the picture.

¶ 17 After that conversation, Rios dropped off defendant, and met with Agent Mitten who took back the recording equipment. Rios acknowledged that he had been previously convicted of making false statements to acquire a firearm.

¶ 18 Agent Mitten testified that on May 22, 2003, he placed recording equipment on Rios, and recovered the equipment later that evening. He later provided a copy of the recording to the detectives assigned to investigate Cruz's murder.

¶ 19 Detective John Dougherty testified that he had searched the vacant lot at the crime scene, and found expended cartridge casings from semi-automatic handguns. There were some garbage cans in the back of the lot, but they were not searched.

¶ 20 At some point during the investigation, Dougherty became interested in Haynes as a suspect. He interviewed Haynes, who consented to a search of his home. Police found a small black .25-caliber handgun and ammunition at the house, which was tested and compared to the casings recovered from the murder scene. After the results of that testing, Haynes was no longer a suspect.

¶ 21 On April 21, 2005, Detectives Dougherty and Rotkvich, and an assistant State's Attorney (ASA) traveled to Pineknot, Kentucky to interview defendant. Rotkvich read defendant his *Miranda* rights, and defendant agreed to speak with the detectives. The ASA was not in the room for the interview. Dougherty asked defendant if he knew why they were there, and he responded, "That Rico stuff." Defendant claimed to not know anything about the murder, and stated that he did not commit it. Dougherty then played the audio recording of defendant's conversation with Rios. Defendant "slumped forward and started shaking his head back and forth" and said that he was "f***." Defendant told Dougherty that he had heard that Cruz was responsible for a shooting targeted at defendant the week before, and commented that the police had done their "homework in the neighborhood." Defendant asked whether the "Feds or Chicago" would prosecute his case and "if there could be a possibility that he could be charged with second degree murder."

Dougherty testified that defendant appeared upset, and, when Dougherty told him that he only had himself to blame for the situation, defendant replied "I know."

¶ 22 The State rested, and, after defendant's motion for a directed verdict was denied, the defense rested as well. In closing, the State played parts of defendant's confession, and identified similarities to the witnesses' trial testimony and evidence of the shooting. Defense counsel argued that the confession was "the only thing" that tied defendant to the shooting, and that it was "nothing but bravado." Counsel pointed to the lack of physical evidence, discrepancies in the witnesses' testimonies, and the criminal backgrounds of many of the witnesses. In rebuttal, the State argued that defendant's confession was credible, that it was made to his best friend, and that it was corroborated by the later statements he made during the interview with detectives. The State also noted that many of the witnesses with criminal backgrounds "got [their] first felony conviction[s]" after they initially talked with police. After deliberations, the jury found defendant guilty of first-degree murder beyond a reasonable doubt.

¶ 23 Defendant filed a motion for a new trial, arguing, *inter alia*, that the court erred in denying his motion *in limine*, and that the prosecutor committed misconduct during rebuttal closing arguments by referring to a confession as "the most powerful, the best evidence that any murder case can have[.]" That motion was denied, and the trial court sentenced defendant to 65 years' imprisonment. Defendant subsequently filed a notice of appeal from the judgment.

¶ 24 In this appeal, defendant first contends that the court erred in allowing evidence of the statements he made during the interview with detectives when he was confronted with his recorded confession, because they were a part of plea-discussions. Supreme Court Rule 402(f) provides, in pertinent part, that if a plea discussion does not result in a guilty plea, neither the

plea discussion or any resulting agreement, plea, or judgment shall be admissible against defendant in any criminal proceeding. Ill. S. Ct. R. 402(f) (eff. July 1, 2012).

¶ 25 In *People v. Rivera*, 2013 IL 112467, ¶ 18, our supreme court articulated a two-part test for determining whether a statement is plea-related: (1) whether defendant had a subjective expectation to negotiate a plea, and (2) whether that expectation was reasonable under the objective circumstances. The supreme court explained that not all statements made by a defendant in the hope of obtaining concessions are plea discussions, and that there is a difference between a statement made in the course of a plea discussion and an otherwise independent admission, which is not excluded by Rule 402(f). *Rivera*, 2013 IL 112467, ¶ 19. The determination is not a bright-line rule, but turns on the factual circumstances of each case. *Rivera*, 2013 IL 112467, ¶ 19. The reviewing court may consider the nature of the statements, to whom defendant made the statements, and what the parties to the conversation said. *Rivera*, 2013 IL 112467, ¶ 19. Before a discussion can be characterized as plea-related, it must contain the rudiments of the negotiation process, *i.e.*, a willingness by defendant to enter a plea of guilty in return for concessions by the State. *Rivera*, 2013 IL 112467, ¶ 19. A finding as to one statement does not necessarily reflect upon the admissibility of other statements. *Rivera*, 2013 IL 112467, ¶ 20.

¶ 26 Here, defendant maintains that his statements to the detectives that he was "f***," that police had done their "homework in the neighborhood," and that he knew it was his fault, were all plea-related. Defendant further alleges that his questions about whether his case would be prosecuted by the "Feds or Chicago" and whether he could "get second degree" were also part of plea negotiations. He maintains that the combination of these statements "showed [his] interest in

seeking reduced charges in exchange for admitting guilt." We conclude, however, that the record shows no subjective or objective expectation that the interview was a plea negotiation for purposes of Rule 402(f).

¶ 27 We first find no subjective expectation by defendant to engage in a plea negotiation. We note that defendant's first statement, that he was "f***," was made immediately after the audio recording was played, and at no time prior to or following that statement, did he exhibit willingness to plead guilty in exchange for specific concessions by the State. Defendant, however, contends that his question about whether he could "get second degree" was "a request for a 'specific concession' " that showed his subjective expectation in plea bargaining. We observe, as did the court below, that the police were still investigating the crime, and defendant had not yet been charged. Defendant's question was not, as he now attempts to characterize it, an offer to plead guilty to second-degree murder in exchange for the State's agreement to forgo a first-degree murder charge. Instead, he asked, without exhibiting any willingness to enter a guilty plea, whether it could be charged as second-degree murder. Under such circumstances, we must conclude, as the supreme court did in *Riviera*, that defendant's statements to Detective Dougherty did not indicate a subjective expectation to negotiate a plea. *See Rivera*, 2013 IL 112467, ¶ 29 (holding that defendant's statements to an ASA did not exhibit a subjective intent to enter plea negotiations where he did not offer to plead guilty or confess). Where there were no charges pending against defendant, "it is not apparent what concessions defendant hoped to receive[.]" *Rivera*, 2013 IL 112467, ¶ 26.

¶ 28 Furthermore, as in *Rivera*, even if defendant had a subjective expectation to negotiate a plea, we conclude that it would not have been reasonable under the totality of the objective

circumstances. While an ASA traveled with the detectives to Kentucky where defendant was interviewed, the ASA was not in the room while the interview was conducted, and the detectives gave defendant no reason to believe that they had authority to negotiate a plea deal. Defendant maintains, however, that his expectation to participate in plea negotiations was objectively reasonable because Detective Dougherty did not "*disclaim*[] any authority to negotiate a plea deal" (emphasis added). In support, defendant cites *Rivera*, in which the supreme court considered a detective's explicit disclaiming of authority to negotiate a plea as a factor in determining that a defendant's expectation to negotiate was objectively unreasonable. *Rivera*, 2013 IL 112467, ¶ 27. We note though, that the lack of explicit disclaiming of authority does not necessarily lead to the opposite conclusion. In the instant case, where there was no ASA present who had the authority to negotiate a plea deal, and where defendant had not yet been charged with any particular offense, we conclude that defendant's claimed expectation to engage in plea discussions was not objectively reasonable under the circumstances. In sum, we find the rudiments of the negotiation process lacking (*Rivera*, 2013 IL 112467, ¶ 19), and instead conclude that those statements were independent admissions and are not barred from introduction by Rule 402(f).

¶ 29 Defendant next contends that the prosecutor committed misconduct in closing argument "by misstating the law and exceeding the scope of rebuttal." Defendant acknowledges that he only preserved one such claim: whether the State improperly suggested that a confession is a superior form of evidence. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (holding that defendant must both object at trial and raise the matter in a written posttrial motion to preserve an issue for review). The State maintains that its argument in rebuttal was proper where it was

based on the evidence and responsive to defense counsel's closing argument. The State additionally maintains that, even if this court finds error, there is no plain error where the evidence against defendant was overwhelming.

¶ 30 We initially note that the appropriate standard of review for closing arguments is currently unclear. See *People v. Thompson*, 2013 IL App (1st) 113105, ¶¶ 76-77. However, we need not resolve the issue of the proper standard of review in the instant case, as our holding would be the same under either a *de novo* or abuse of discretion standard.

¶ 31 Prosecutors have wide latitude in making closing arguments. *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007). Reversal based on closing argument is warranted only if a prosecutor made improper remarks that engendered "substantial prejudice," that is, if the remarks constituted a material factor in the defendant's conviction. *Wheeler*, 226 Ill. 2d at 123. In closing, the State may comment on the evidence presented and draw reasonable inferences therefrom. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). The prosecution may attack a defendant's theory of defense (*People v. Doyle*, 328 Ill. App. 3d 1, 12 (2002)) and, during rebuttal, the State may respond to comments made by the defendant which invite a response (*People v. Kliner*, 185 Ill. 2d 81, 154 (1998)). However, a prosecutor may not misstate the law during closing arguments. *People v. Ramsey*, 239 Ill. 2d 342, 441 (2010). On review, we consider challenged remarks in the context of the entire record as a whole, in particular the closing arguments of both sides. *People v. Williams*, 313 Ill. App. 3d 849, 863 (2000).

¶ 32 Here, the record shows that, in closing, defense counsel stated,

> "The State's best and their only evidence that links [defendant] to the shooting *** is that audio tape. Everything else they have been trying to build

around it to corroborate it because they want you to believe that this is, in fact, a true confession. This is their only evidence[.] ***

Their case rises and falls with just that six minutes and twenty seconds.

* * *

There wasn't live testimony about fingerprint evidence, but you know that fingerprint testing was done. And, yeah, they weren't able to get any latent prints, fingerprints off those calibers. What that means though is that there is no fingerprint evidence that goes back to my client that links [defendant] to the shooting. There is no DNA evidence."

¶ 33 The State, in rebuttal, stated,

"The Defense says there's not sufficient evidence, but that's not true. There is overwhelming evidence showing the guilt of [defendant] in this case.

[Defendant] confessed to the murder of Rico Cruz on that tape. A *** six-minute-and-29-second conversation he had with one of his closest friends where he could say anything that he wanted. And he gave a detailed confession of what he did, how he did it, and why he did it.

The most powerful, the best evidence that any murder case can have *** is a statement by *** the defendant about what he did, how he did it, and why he did it. It's better than fingerprints because fingerprints can get on something and stay there forever, so you don't know when exactly they were put on. DNA can fall on anything at any time and you don't know when.

> But on May 22, 2003, [defendant] told his best friend how and why he murdered Rico Cruz *** and in detail. And they want you to believe that it is all talk.
>
> They want you to believe that he's just repeating some vague stuff he heard about the case on the street. Really?
>
> You listen to that statement, how much detail there is in there. He's not relating something he just heard about."

¶ 34 Defendant specifically objects to the State's comment, "The most powerful, the best evidence that any murder case can have *** is a statement by *** the defendant about what he did, how he did it, and why he did it." He contends that this was a misstatement of law because it implied that "murder cases involve different evidentiary standards than other cases" and because "the notion that confessions are always better than DNA or fingerprints runs contrary to precedent refusing to privilege one form of evidence over another."

¶ 35 We first note that the State's comment is substantially similar to the statement made by our supreme court in *People v. R.C.*, 108 Ill. 2d 349, 356 (1985), "clearly, a confession is the most powerful piece of evidence the State can offer[.]" As such, we do not find it to be a misstatement of law. Moreover, this comment was proper in light of defendant's closing argument which attempted to diminish the confession and draw attention to the lack of physical DNA or fingerprint evidence. When the State's comment is put in its proper context, it is clear that it was merely commenting on the strength of its case, and the credibility of defendant's confession, in response to defendant's attacks.

¶ 36 Even if we were to find error, we would find it harmless in light of the overwhelming evidence against defendant, which included an extensive recorded confession to the murder, his subsequent incriminating statements to detectives after he was confronted with that confession, and the testimony from a number of witnesses which placed him in the vicinity of the crime and substantially corroborated much of the confession.

¶ 37 We next turn to defendant's unpreserved claims of error—that the State misstated the law by "suggesti[ng]" that the prior convictions of witnesses did not matter where they "only became convicted felons after their initial statements to police" and that it "exceeded the scope of rebuttal" where it commented on his statements when confronted with the recorded confession, when defense counsel had not spoken to that evidence in closing.

¶ 38 The plain error doctrine allows consideration of an otherwise forfeited error when "(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." *People v. Herron,* 215 Ill. 2d 167, 187 (2005). Defendant does not argue that these comments are reversible under the second prong of plain error, and indeed, he could not. See *People v. Cosmano,* 2011 IL App (1st) 101196, ¶ 78 ("Error in closing argument does not fall into the type of error recognized as structural."). He contends instead, that these issues are reviewable as plain error because the evidence at trial was "closely-balanced." However, because we have already found the evidence against defendant overwhelming, we reject defendant's contention, and conclude that we need not review these unpreserved claims of error. Even if we were to determine that the statements were improper, they would provide no cause for reversal under plain error review, and we thus honor his forfeiture of the issue. *People v. Hillier,* 237 Ill. 2d 539, 547 (2010).

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

¶ 40 Affirmed.