2015 IL App (1st) 131112-U

FIFTH DIVISION
April 10, 2015

No. 1-13-1112

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. 11 CR 19158
	)	
ROBERT GAYOL,	)	Honorable
	)	Stanley Sacks,
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 was not denied a fair trial by the prosecution's rebuttal closing arguments.

¶ 2 Following a jury trial, defendant Robert Gayol was convicted of burglary and sentenced to 18 years in prison. On appeal, defendant contends he was denied a fair trial because the prosecutor twice misstated the presumption of innocence during rebuttal closing argument. For the reasons that follow, we affirm.

¶ 3 At trial, Glenn Johnson testified that about 9 a.m. on May 15, 2011, his wife, Julie, came in from taking the dogs out and told him that their attached garage had been broken into. Specifically, she had noticed the door handle was broken off and some of their belongings were missing. Glenn went to the garage and confirmed what Julie had reported. Among the items taken from the garage were tools, golf clubs, a tablet computer, tequila, a poster stand, and three bicycles. Glenn then pulled up the overnight footage from the security cameras on the interior and exterior of their garage. Glenn called the police and, after they arrived, showed them the video and gave them a copy. The video, which was shown to the jury, depicted a man entering the garage around 4:45 a.m. Glenn testified that he had not given anyone permission to take anything from his garage or the storage unit inside the garage, and that he did not know defendant.

¶ 4 Julie Johnson testified that she got up around 9 a.m. on the day in question to take the dogs out. When she left through the attached garage, she noticed that bikes were missing from the bike rack and that the garage's side door was jammed open so that it would not lock. Julie went upstairs and told Glenn about the break-in. They then watched the video footage, which showed a man entering and exiting the garage several times and taking a bicycle and other items from cabinets and storage lockers. Julie testified that she did not know defendant and had not given anyone permission to enter her garage or take her belongings from the garage.

¶ 5 Nicholas Scavone, a store manager at Play It Again Sports, a shop that buys and sells used sports equipment, testified that on the evening of October 24, 2011, defendant and a woman named LeAnn Phillips came into the store. Scavone recognized defendant from a previous

"unrelated incident" and called the police. Chicago police officer Heidi Looney testified that she arrested both defendant and Phillips at Play It Again Sports.

¶ 6 LeAnn Phillips testified that after her arrest, the police showed her some video footage of the inside and outside of a garage. At that time, she had known defendant for about a year and saw him weekly or biweekly. She saw defendant's truck each time she saw him, and they drove to Play It Again Sports in that truck. Phillips testified that the video she was shown depicted defendant looking around in the garage, removing "stuff" from the garage, and riding a bike. She also recognized defendant's truck in the video of the outside of the garage, based on the truck's distinctive rims. On cross-examination, Phillips testified that the charges against her resulting from her arrest with defendant were eventually dismissed. She also agreed that she was not at the Johnsons' garage with defendant, that the video was dark, and that she could not make out the truck's license plate, make, or model on the video. Phillips reiterated that she knew the truck was defendant's because of the rims, but admitted that she was "sure" other cars had the same kind of rims. Finally, Phillips acknowledged that in October 2011 she had a crack cocaine addiction, but stated that at the time of trial, she no longer had a substance abuse problem.

¶ 7 Chicago police officer George Pappone testified that on October 27, 2011, he went to defendant's house and received consent from defendant's wife to search the basement and garage. During an ensuing search, Officer Pappone recovered "various property" that was taken to the police station and photographed. Among the items photographed, Glenn Johnson identified his tablet computer and poster stand.

¶ 8 In closing argument, defense counsel made the following statement:

> "Now, I spoke with you this morning about presumption of innocence, about how [defendant] is cloaked in a presumption of innocence, that should be thought of as armor that we're all cloaked in, and that can only be pierced with facts, can only be pierced with things you know to be true and the State has failed to meet their burden."

¶ 9 In rebuttal, the prosecutor began by stating, "Ladies and gentlemen of the jury, you're right, the defendant is cloaked as counsel says, in the presumption of innocence until now because now you have the evidence." Toward the end of rebuttal, the prosecutor also stated, "There's only one person in that garage. Mr. Johnson says he didn't recognize that person. It's not his neighbors. 4:45 in the morning, some neighbors' friends? That makes no sense. That's grasping at straws. That's not a cloak of innocence anymore. There's no evidence of that."

¶ 10 Following arguments, the trial court instructed the jury. Among the instructions was the following regarding the presumption of innocence:

> "The defendant is presumed to be innocent of the charge against him. This presumption remains with him throughout every stage of the trial and during your deliberations on the verdict and is not overcome unless from all the evidence in this case you are convinced beyond a reasonable doubt that he is guilty.
>
> The State has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden remains on the State throughout the case. The defendant is not required to prove his innocence."

¶ 11 The jury found defendant guilty of burglary. The trial court entered judgment on the verdict and subsequently sentenced defendant, based on his criminal history, to a Class X term of 18 years in prison.

¶ 12 On appeal, defendant contends that he was denied a fair trial when, in rebuttal closing arguments, the prosecutor twice misstated the presumption of innocence. He asserts that the comments were extremely prejudicial because they effectively deprived him of one of the fundamental principles of a fair trial. Defendant acknowledges that he did not object to the prosecutor's statements at trial or include the specific comments in his posttrial motion, but nevertheless asserts that appellate review is proper under the plain error doctrine.

¶ 13 Prosecutors are given wide latitude when 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). Additionally, 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). 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).

¶ 14 The appropriate standard of review for closing arguments is currently unclear. In *Wheeler*, 226 Ill. 2d at 121, our supreme court applied a *de novo* standard of review to the issue of prosecutorial statements during closing arguments. However, the *Wheeler* court cited with

favor its decision in *People v. Blue*, 189 Ill. 2d 99, 128 (2000), which applied an abuse of discretion standard. 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 standard. See *People v. Thompson*, 2013 IL App (1st) 113105, ¶¶ 76-77 (acknowledging conflict regarding standard of review).

¶ 15 The plain error doctrine allows us to review a forfeited issue affecting substantial rights in either of two circumstances: (1) where the evidence is so closely balanced that the verdict may have resulted from the error and not the evidence; or (2) where the error is so serious that the defendant was denied a substantial right and thus a fair trial. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). However, before applying the plain error rule, it must be determined that error occurred. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 16 In the instant case, we do not find error. As noted above, during rebuttal closing, the State may respond to comments made by the defendant which invite a response. *Kliner*, 185 Ill. 2d at 154. In our view, the prosecutor's comments regarding the "cloak of innocence" were invited by defense counsel's closing argument on that very topic. Defense counsel argued that defendant was "cloaked in a presumption of innocence" that "can only be pierced with facts." In response, the prosecutor asserted that defendant was "cloaked as counsel says, in the presumption of innocence until now because now you have the evidence," and stated that defendant's suggestion that neighbors' friends may have been in the garage was "grasping at straws. That's not a cloak of innocence anymore. There's no evidence of that."

¶ 17 We cannot agree with defendant that the prosecutor's statements were misstatements of the presumption of innocence. Rather, they were statements that defendant was guilty, worded in such a way as to respond to defense counsel's own closing argument. See *People v. Cisewski*,

118 Ill. 2d 163, 178 (1987) (finding no error where the prosecutor stated, "Now is the time, Ladies and Gentlemen, to remove the cloak of innocence from this defendant"); *People v. Tomes*, 284 Ill. App. 3d 514, 522-23 (1996) (finding no misstatement regarding the presumption of innocence where, in response to defense counsel's argument that defendant was "wearing the presumption of innocence," the prosecutor stated, "It's correct that he (defendant) was presumed innocent before the trial began, he was cloaked in innocence as he sat over there. That was before you heard the evidence. The evidence is in ladies and gentlemen"). We cannot find that the prosecutor's comments were improper. Because there was no error, the plain error does not apply. Defendant's argument fails.

¶ 18 We are not persuaded by defendant's citation to *People v. Keene*, 169 Ill. 2d 1 (1995), and *People v. Brooks*, 345 Ill. App. 3d 945 (2004). In *Keene*, the prosecutor described the defendant's presumed "cloak of innocence" to have been "shredded and ripped and pulled [off]" to reveal guilt. *Keene*, 169 Ill. 2d at 24. Our supreme court found that "the theatrical description of the stripping away of [the defendant's] presumption of innocence" was a misstatement of the law. *Keene*, 169 Ill. 2d at 25-26. In the instant case, in contrast to *Keene*, the prosecutor did not simply say that the cloak of innocence was gone. Instead, the prosecutor told the jury that "because now you have the evidence," defendant was no longer cloaked in innocence. Thus, the prosecutor accurately indicated that the presumption of innocence could be overcome by the evidence.

¶ 19 In *Brooks*, this court found that the prosecution misstated the law regarding the presumption of innocence where the prosecutor stated to the jurors in opening closing, "When you go back into the jury room, the presumption of innocence which [the trial court] told you

about as you were being selected as jurors and which you will receive in you jury instructions[,] that presumption, that cloak of innocence is gone." *Brooks*, 345 Ill. App. 3d at 950-51. The *Brooks* court found it significant that the prosecutor "did not indicate that after hearing the evidence the defendant was no longer cloaked in innocence," but rather, simply told the jury that the cloak was gone. *Brooks*, 345 Ill. App. 3d at 950. Here, in contrast, the prosecutor explicitly referred to the evidence overcoming the presumption of innocence. Therefore, *Brooks* is distinguishable.

¶ 20 Moreover, neither the *Keene* nor the *Brooks* court found that prosecutors' misstatements constituted plain error so as to overcome procedural default. *Keene*, 169 Ill. 2d at 27; *Brooks*, 345 Ill. App. 3d at 953. In both cases, the courts determined that the prosecutors' misstatements of the law did not cause sufficient harm to have compromised the integrity of the entire guilt phase of the trial. *Keene*, 169 Ill. 2d at 27; *Brooks*, 345 Ill. App. 3d at 953. In addition, the *Brooks* court found that the error was harmless due to the strength of the evidence at trial, the limited nature of the error, and the proper instructions given by the trial court. *Brooks*, 345 Ill. App. 3d at 953. If, *arguendo*, we were to find error here, we would come to the same conclusion regarding plain error. First, the evidence against defendant was significant. LeAnn Phillips identified him as the man in the video of the Johnsons' garage, and the Johnsons' property was recovered from defendant's home. Second, the prosecutor's statements regarding the cloak of innocence were brief. Finally, the trial court properly instructed the jury regarding the presumption of innocence. In these circumstances, any error in the prosecutor's argument would be harmless beyond a reasonable doubt. *Brooks*, 345 Ill. App. 3d at 953.

¶ 21 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 22 Affirmed.