2015 IL App (1st) 131418-U

FIFTH DIVISION
June 12, 2015

No. 1-13-1418

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 6740
	)	
GEORGE TROUT,	)	Honorable
	)	Michele M. Simmons,
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:*** Judgment entered on defendant's conviction of armed robbery affirmed over challenge to the sufficiency of the evidence and claim that his right to a fair trial was violated.

¶ 2 Following a jury trial, defendant George Trout was found guilty of armed robbery and sentenced to 23 years in prison. On appeal, defendant contends that his conviction should be reduced to robbery because the State failed to establish that the weapon used in the offense was a firearm. In the alternative, he contends that he should be granted a new trial, because the prosecution diminished the State's burden of proof in closing arguments to the jury.

¶ 3 The charges filed against defendant in this case arose from an incident that occurred the evening of February 8, 2011, on the south side of Chicago. At trial, Rosemary Smith testified that on the day in question, she had a conversation with her daughter Stephanie Smith, about a Craigslist advertisement her daughter had found online, listing a 2002 red Ford Taurus for sale for $1500. Stephanie called the telephone number listed in the advertisement and spoke to a man about the car. Rosemary then spoke to the man about setting up a meeting place to see the car, and they agreed to meet at the J.J. Fish restaurant at 127th and Paulina Streets, between 9:15 and 9:30 that evening. Rosemary and Stephanie drove there from the northwest suburbs where they lived, and reached the parking lot of the restaurant at the pre-arranged time.

¶ 4 As they waited in their car, defendant drove a Ford Taurus into the lot and parked behind them. Defendant exited his car, and Rosemary and Stephanie walked over to inspect it. After a brief conversation, Rosemary told defendant that she was interested in purchasing the car, and offered him $1300 for it. Defendant accepted the offer, then asked Rosemary and her daughter if they wanted to test drive the car, and they agreed. Rosemary sat in the middle of the back seat, and Stephanie took the front passenger seat. Rosemary was surprised that defendant drove the car for the test drive, but did not "think too much of it" at that time.

¶ 5 Defendant drove out of the restaurant parking lot, turned left, and then right into a dark residential street that looked like an alley, and stopped the car. There, two unknown people, an African-American man and woman, approached the car. Rosemary attempted to exit from the rear door on the right passenger's side, but was prevented from doing so by the woman, who had black and gold two-toned hair, and pushed her leg back into the car. At that point, Rosemary observed that the man standing near the rear door, who was tall and dark skinned, had a gun in his hand. She described it as a "big gun, a big, black gun," approximately 12 inches long.

Rosemary testified that she had a boyfriend who owned a gun and she had looked at it and held it, and was "very familiar [with] how a gun looks." Based on her prior experience with a gun, she believed that the unknown man had a gun in his hand.

¶ 6 When Rosemary finally exited the car, the woman said, "You don't want to die over money. Hand over the money." Rosemary removed $1800 in cash from her pockets and gave it to the woman. As she was doing so, Stephanie exited the car and was standing by the front seat, when she noticed that she had dropped her purse on the floor of the car. When she reached back inside to grab it, defendant told the gunman to "grab the purse, too." Stephanie struggled with the gunman over the purse, and he eventually let go of it. The man and woman then jumped in the car with defendant and the three of them drove off, leaving Stephanie and Rosemary on the street. The women walked back to their car and called police. Rosemary testified that she eventually identified defendant in a photo array and a lineup.

¶ 7 During cross-examination, Rosemary testified that although the gunman did not cock or fire his weapon, she had seen guns before, and knew what they looked like. She testified that she had a young son for whom she bought fake guns all the time, and she could tell the difference between a fake gun and a real gun.

¶ 8 The testimony of Stephanie Smith was substantially the same as that of her mother. She related that she and her mother reached the parking lot of J.J. Fish around 9 p.m., and when defendant arrived five to 10 minutes later, they walked towards the car to examine it. Defendant stated that he was selling the car because he had financial problems, and asked the women if they wanted to go for a test drive. They agreed, and Stephanie thought she would be driving the car, but defendant entered the driver's seat. She sat in the front passenger seat, and her mother sat in the back.

¶ 9 Stephanie noticed that defendant often checked his rear view mirror while driving, and after he stopped the car, a man and woman approached the rear doors. Stephanie described the man as tall, dark-skinned, with a mask over the lower half of his face, and observed him holding a black gun close to his waist. He pointed the gun at Rosemary from outside the car, and told her to give him the money. The woman was short, heavy-set, and had a pony tail with blond streaks, and she held the other door preventing Rosemary from leaving the car. Stephanie was already out of the car when her mother handed the money to the woman, and she realized that she had left her purse on the floor of the front seat, and went back to get it. The gunman came around to the passenger side, and defendant told him to "get the purse, get the purse." The gunman grabbed it, and tried to take it from her, but he eventually let it go before he drove away with defendant and the woman in the car. Neither the gunman nor the woman threatened defendant or demanded money from him. Stephanie testified that she eventually identified defendant in a photo array and lineup.

¶ 10 During cross-examination, Stephanie testified that she did not see the gunman fire the gun or cock it, and she did not touch the gun, but stated that "It looked like a gun." When counsel asked her if "it [was] fair to say [she was] not one-hundred percent sure whether it was a real gun or not?" she responded, "[N]o."

¶ 11 Calumet Park Police detective John Shefcik testified that he was assigned to investigate this incident. On February 11, 2011, he spoke with Rosemary over the phone, then contacted Craigslist, and compiled a photo array, which included a picture of defendant. Detective Shefcik testified that both Rosemary and Stephanie identified defendant out of the photo array, and subsequently out of a lineup conducted after defendant had been taken into custody.

¶ 12 At the close of the State's case-in-chief, defendant moved for a directed finding, which the court denied. Defendant rested without introducing any direct evidence, and closing arguments were then presented by respective counsel. Defense counsel argued that the State had "a very heavy burden to find [defendant] guilty beyond a reasonable doubt" and that "what we're talking about in this case is the difference between things that are beyond a reasonable doubt and things that are possible. * * * That's [*sic*] is a big difference between [something was possible] and beyond a reasonable doubt." He further argued that "beyond a reasonable doubt is for you to decide. You will be instructed as to this. But, there are many -- use your common sense. There are many plausible explanations for things occurring here than what the state has provided."

¶ 13 In rebuttal, the State argued, "How many times did you hear the defense attorney say, reasonable doubt, ten or fifteen times. Well, reasonable doubt is the standard that is used throughout every criminal courtroom in the United States. It is a good and decent burden. It is used to convict defendants. It is not shadow of a doubt. It is not beyond all doubt. It is reasonable doubt. And it's for you to consider your common life experiences. Use your common sense to determine what that is."

¶ 14 The trial court instructed the jury, in relevant part, that neither opening or closing arguments are evidence, and any statement or argument made by the attorneys which is not based on the evidence should be disregarded. The court further instructed the jury that defendant was presumed innocent, that presumption remained with him throughout every stage of the trial and during deliberations, and it was not overcome unless from all the evidence in the case, the jury was convinced beyond a reasonable doubt that defendant was guilty. The court added that the State's burden of proving defendant guilty beyond a reasonable doubt remained on the State

throughout the case, and defendant was not required to prove his innocence. The court also instructed the jury on the lesser-included offense of robbery.

¶ 15 Following deliberations, the jury returned a verdict finding defendant guilty of armed robbery. The court denied defendant's motion for a new trial, noting specifically that the jury's verdict of guilty for armed robbery indicated that the jury believed Rosemary's testimony that she is familiar with guns and believed the gunman had a real gun. The court then sentenced defendant to eight years in prison for the armed robbery conviction, and a 15-year firearm enhancement, for a total of 23 years in prison.

¶ 16 In this appeal from that judgment, defendant first contends that his conviction for armed robbery should be reduced to robbery because there was insufficient evidence to show that a firearm was used during the offense.

¶ 17 Where, as here, defendant challenges the sufficiency of the evidence to sustain his conviction, the relevant question for the reviewing court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Jackson*, 232 Ill. 2d 246, 280 (2009). This standard recognizes the responsibility of the trier of fact to determine the credibility of the witnesses and the weight to be given their testimony, to resolve any inconsistencies and conflicts in the evidence, and to draw reasonable inferences therefrom. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). In applying this standard, we allow all reasonable inferences from the record in favor of the prosecution (*People v. Cunningham*, 212 Ill. 2d 274, 280 (2004)), and will not overturn a conviction unless the evidence is so unreasonable, improbable, or unsatisfactory that it creates a reasonable doubt of defendant's guilt (*People v. Wheeler*, 226 Ill. 2d 92, 115 (2007)).

¶ 18 In order to prove that defendant committed an armed robbery in this case, the State was required to show beyond a reasonable doubt that defendant or someone he was accountable for "knowingly [took] property * * * from the person or presence of another by the use of force or by threatening the imminent use of force" and that he or someone he was accountable for "carrie[d] on or about his person or [was] otherwise armed with a firearm." 720 ILCS 5/18-1(a), 18-2(a)(2) (West 2010).

¶ 19 Here, the evidence showed that defendant offered to sell his car to the Smiths for $1,300, then took them for a "test drive," during which he kept checking his rearview mirror. Both Stephanie and Rosemary testified consistently that he pulled into a dark residential street, where two unknown individuals, a man and a woman approached the car. The man pointed a gun at them, and the woman prevented Rosemary from exiting the back seat where she was seated and told her "You don't want to die over money. Hand over the money." She did as instructed, and tendered $1,800 in cash to the offenders.

¶ 20 Meanwhile, as Stephanie, who had exited the front passenger seat, attempted to retrieve her purse from the car, she heard defendant yell, "Get the purse. Get the purse" to the gunman. The gunman eventually let go of the purse and drove off with defendant and the woman in the car. Both women noted that the unknown individuals never threatened defendant with the gun or asked him for money, and Rosemary testified that based on her prior experience with guns, she believed the firearm was real. Viewing this evidence in the light most favorable to the prosecution, we find that a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson*, 232 Ill. 2d at 280.

¶ 21 Defendant contends, nevertheless, that the evidence was insufficient to prove that the gun used in the robbery was real, where no weapon was recovered, and there were no photographs or

visual evidence of the gun or testimony that the gun was fired. He further contends that "neither woman could say for certain that the object in the masked robber's hand was a gun." We note that contrary to defendant's contention, Rosemary unequivocally stated that the weapon in the gunman's hand was real, based on her prior experiences of seeing and feeling her ex-boyfriend's gun, and buying her son fake toy guns. Stephanie also testified that the gun was real, and when asked during cross-examination if "it [was] fair to say [she was] not one-hundred percent sure whether it was a real gun or not?" her answer, "No," is ambiguous at best.

¶ 22 Moreover, none of the matters cited by defendant preclude a finding that the gun used in the offense was real. It is settled that the testimony of a single witness is sufficient to allow the trier of fact to conclude that defendant or his accomplice was armed with a real gun during the commission of a crime. See *e.g.*, *People v. Washington*, 2012 IL 107993, ¶¶ 35-36 (testimony of a witness that gun was real was sufficient to prove that the firearm used during the offense was real, although no gun was recovered and defense counsel argued the gun was a fake); *People v. Malone*, 2012 IL App (1st) 110517, ¶¶ 51-52 (testimony of a witness and videotape of the offense which showed defendant holding a gun was sufficient to prove that defendant used a real gun in the commission of the crime where no evidence was presented that the gun was a fake). Although defendant attempts to distinguish *Washington* and *Malone* from the instant case, we find these decisions well-reasoned and persuasive here. Rosemary's testimony that she saw a black, 12-inch gun in the unknown robber's hands, and that she knew it was a real gun based on her prior experience with guns, was sufficient for the jury to find that the gun used during the robbery was real, and that he was thus guilty of armed robbery. *Id.*

¶ 23 In reaching this conclusion, we have examined *People v. Ross*, 229 Ill. 2d 255 (2008), *People v. Thorne*, 352 Ill. App. 3d 1062 (2005), *People v. Crowder*, 323 Ill. App. 3d 710 (2001),

and *People v. Jones*, 174 Ill. 2d 427 (1996), on which defendant relies, and find them inapposite to the case at bar. Here, the relevant issue is whether a single witness' testimony that a gun was used in a crime is sufficient to establish that the weapon was real. None of the cases cited by defendant examine this issue. See *Ross*, 229 Ill. 2d at 273-74 (discussing whether a pellet gun was a dangerous weapon); *Thorne*, 352 Ill. App. 3d at 1071-72 (discussing whether a BB gun was a dangerous weapon); *Crowder*, 323 Ill. App. 3d at 712-13 (discussing the proper sanction for the destruction of evidence); and *Jones*, 174 Ill. 2d at 427 (involving sufficiency of the evidence in a prosecution for illegal drugs)). None of these situations are reflected in the trial record here, and we therefore find that they do not support a contrary outcome.

¶ 24 We also decline defendant's invitation to take judicial notice of his assertion that the firearm could have been a "high-quality fake gun," as well as his citations to Amazon.com and other sources which are not part of the record. Since such evidence was not available at trial, nor is it a "well-established fact," we find this attempt to introduce new evidence on appeal improper, and strike those portions from defendant's brief. *People v. Williams*, 200 Ill. App. 3d 503, 513-14 (1990).

¶ 25 Defendant finally contends that he did not receive a fair trial because the prosecution "severely diminished the State's burden of proof in closing argument" at his trial. The parties disagree on the appropriate standard of review, and we note that the proper standard of review for closing arguments is currently unclear. In *Wheeler*, 226 Ill. 2d at 121, the supreme court applied a *de novo* standard of review to the issue, however, in *People v. Blue*, 189 Ill. 2d 99, 128 (2000), which the *Wheeler* court cited in support of its decision, the supreme court applied an abuse of discretion standard. We need not resolve this issue in the instant case because the result would be the same under either standard. *Thompson*, 2013 IL App (1st) 113105 at ¶¶ 76-77.

¶ 26 Turning to the merits, the State responds that defendant has forfeited this issue by failing to object at trial and raise it in a posttrial motion. We agree. To preserve a complaint about improper argument for review, defendant must both object at trial, and include the alleged error in a written post-trial motion (*People v. Normand*, 215 Ill. 2d 539, 543-44 (2005)), and here, defendant has done neither. He asks, however, that this court review this issue under the plain error doctrine. *People v. Naylor*, 229 Ill. 2d 584, 602 (2008).

¶ 27 The plain error doctrine permits this court to excuse a procedural default and consider unpreserved error where: (1) the evidence is closely balanced so as to preclude argument that an innocent person was wrongfully convicted; or (2) the alleged error affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *Naylor*, 229 Ill. 2d at 602-03. However, before applying the plain error rule, it must be determined whether an error occurred. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 28 Prosecutors are given wide latitude when making closing arguments, and reversal based on closing arguments is only required if a prosecutor made improper remarks that engendered "substantial prejudice," *i.e.*, if the remarks constituted a material factor in the defendant's conviction. *Wheeler*, 226 Ill. 2d at 123. In closing arguments, the State may comment on the evidence presented and draw reasonable inferences therefrom (*People v. Nicholas*, 218 Ill. 2d 104, 121 (2005)), and during rebuttal, the State may respond to comments made by defendant which invite a response (*People v. Kliner*, 185 Ill. 2d 81, 154 (1998)). On review, we consider the challenged remarks in the context of the record as a whole, in particular the closing arguments of both sides. *People v. Thompson*, 2013 IL App (1st) 113105, ¶ 80.

¶ 29 Defendant maintains that during rebuttal argument, the State reduced the reasonable doubt standard of proof, and implied that the jury need only have a reasonable belief in his guilt. We disagree.

¶ 30 The record shows that defense counsel argued that the State had "a very heavy burden to find [defendant] guilty beyond a reasonable doubt" and that "what we're talking about in this case is the difference between things that are beyond a reasonable doubt and things that are possible." He further argued that "beyond a reasonable doubt is for you to decide. You will be instructed as to this. But, there are many -- use your common sense." In response, the State argued, "Well, reasonable doubt is the standard that is used throughout every criminal courtroom in the United States. It is a good and decent burden. It is used to convict defendants. It is not shadow of a doubt. It is not beyond all doubt. It is reasonable doubt. And it's for you to consider your common life experiences. Use your common sense to determine what that is."

¶ 31 The record thus clearly shows that the State's comment was invited by, and made in direct response to, defense counsel's attempt to cast reasonable doubt as a "very heavy burden," (see *e.g.*, *People v. Hudson*, 157 Ill. 2d 401, 441 (1993); *People v. Averett,* 381 Ill. App. 3d 1001, 1008 (2008)), and therefore fell within the range of permissible argument. The same result was obtained in *People v. Carroll*, 278 Ill. App. 3d 464, 468 (1996) (finding no error where prosecutor stated, "[i]t's not beyond all doubt or any doubt, but beyond a reasonable doubt, a doubt that has reason behind it. That's not some mythical, unattainable standard that can't be met. That standard is met every day in courtrooms.") and *People v. Trass*, 136 Ill. App. 3d 455, 467 (1985) (finding no error where prosecutor stated that the standard is not "an insurmountable burden, some mystical thing."). Having found no error, there can be no plain error (*People v.*

Bannister, 232 Ill. 2d 52, 79 (2008)), and we thus conclude that defendant has forfeited his claim.

¶ 32 In reaching this conclusion, we are not persuaded by defendant's reliance on *People v. Turman*, 2011 IL App (1st) 091019, or *People v. Franklin*, 2012 IL App (3d) 100618, and find them distinguishable from the case at bar. In both cases, the trial court improperly instructed the jury on reasonable doubt by telling jurors that it was for them to collectively determine what the term meant, and thus most likely allowed the jury to use a standard that was below the threshold of a reasonable doubt standard. *Turman*, 2011 IL App (1st) 091019 at ¶ 25; *Franklin*, 2012 IL App (3d) 100618 at ¶ 28. Here, however, the State's comments regarding reasonable doubt were in direct response to defense counsel's improper arguments, and as we noted previously, the trial court properly instructed the jury on the proper burden of proof involved in the case. In contrast to the court's remarks in *Turman* and *Franklin*, the court here did not admonish the jury that it had to agree on a single definition of reasonable doubt, or, in fact, any definition of reasonable doubt. Thus, we find no error.

¶ 33 Having so found, we necessarily reject defendant's final argument that counsel was ineffective for failing object to the State's closing remarks or for failing to challenge those remarks in a posttrial motion. Since the comments fell within the range of permissible argument, any objection to them would have been unsuccessful, and counsel is not required to make futile objections (*In re Ottinger*, 333 Ill. App. 3d 114, 118 (2002)), or raise such issues in post-trial motions (*People v. Greenlee*, 44 Ill. App. 3d 536, 542 (1976)).

¶ 34 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 35 Affirmed.