2015 IL App (1st) 132536-U

THIRD DIVISION
September 9, 2015

No. 1-13-2536



IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 09 CR 11139 |
| | ) | |
| TORRANCE CATHERY, | ) | The Honorable |
| | ) | Noreen Valeria-Love, |
| Defendant-Appellant. | ) | Judge Presiding. |

JUSTICE LAVIN delivered the judgment of the court.
Justices Pucinski and Hyman concurred in the judgment.

**ORDER**

¶ 1 *Held*: Prosecutor's arguments, including the reference that defendant was caught "red handed," were all based on the evidence presented at trial and represented nothing more than reasonable inferences from that evidence. In addition, defendant's mittimus was corrected to reflect defendant's presentence custody credit.

¶ 2 Following a jury trial, defendant Torrance Cathery was convicted of armed robbery (720 ILCS 5/18-2 (a)(2) (West 2012)) and sentenced to 10 years in the Illinois Department of

Corrections, coupled with a mandatory 15-year firearm enhancement. On appeal, defendant contends that he should be granted a new trial because the prosecutor made inappropriate statements during closing arguments, depriving defendant of a fair trial. Defendant also contends that his mittimus should be corrected to reflect additional credit against his sentence for time served in presentence custody. We affirm and correct the mittimus.

¶ 3 I. BACKGROUND

¶ 4 On September 4, 2012, defendant allegedly committed armed robbery in violation of 720 ILCS 5/18-2 (a)(2) (West 2012)) when he stole a watch, neck chain, cell phone and cash from victim Jordan Moore. At trial, the evidence revealed that defendant approached Moore on the Red Line el train shortly after it left the 35th Street station. Moore, who earned tip money as a "Bucket Boy," had just completed his work at a White Sox game and was counting the handful of single-dollar bills when he looked at a mirror and noticed defendant approaching him with a handgun. Defendant demanded Moore turn over his watch, neck chain and cell phone along with the cash. Shortly thereafter, defendant fled the train when it stopped at Garfield Boulevard, just a couple miles from 35th Street.

¶ 5 As defendant walked down Wentworth, a street close to the Red Line, he made eye contact with a Chicago Police Department patrolman and then quickly ducked into a vacant lot as the police continued to pursue him in an unmarked car. During the ensuing chase, Officer Evans observed defendant toss a handgun and then jump a fence. Officer Evans scaled the same fence and radioed his activity to Officer Ephriam who was nearby. Defendant then emerged from an alley onto the sidewalk at Garfield Boulevard. This was observed by Officer Ephriam, who came out of his police car, drew his weapon and ordered defendant to the ground.

¶ 6 Unbeknownst to these officers, Moore had also been in pursuit of defendant and Moore caught up with defendant and the officers on Garfield Boulevard. A custodial search revealed 44 single-dollar bills and a cell phone. Defendant blurted out that "all I took was the phone," the identity of which was confirmed by Moore. A search of the vacant lot revealed the gun defendant had tossed along with a watch that was later identified by Moore as well.

¶ 7 After the parties rested their respective cases, the prosecutor delivered a closing argument in which she chided defendant for robbing a hardworking high school student who earned his money honestly. She contrasted the victim to defendant, who earned his money "the easy way, the coward's way." This argument, which we will analyze below, drew no objection from defense counsel. The prosecutor then turned to the identification issue, and while also discussing the relevant instruction that the trial judge was about to read, argued that a person in Moore's situation, with a gun pointed to his face, had a good opportunity to identify defendant. Defense counsel again remained mute. Finally, the prosecutor argued that the presence of 44 single-dollar bills in defendant's pocket was entirely consistent with how Moore had described he had been tipped at the baseball game.

¶ 8 In turn, defense counsel's argument focused on the fact that the victim would have had a hard time identifying anybody because he was "scared for his life" and "wasn't paying too much attention." The prosecutor's following rebuttal argument belittled the foregoing insinuations and defense counsel again failed to make any objection. The jury found defendant guilty of armed robbery (720 ILCS 5/18-2 (a)(2) (West 2012)). The trial court subsequently sentenced defendant to 10 years in the Illinois Department of Corrections, coupled with a mandatory 15-year firearm enhancement, for a total of 25 years. Defendant then filed this timely appeal.

¶ 9 II. ANALYSIS

¶ 10 On appeal, defendant's overarching contention is that the prosecutor's various statements made during closing arguments, none of which were objected to at trial, deprived him of a fair trial. For example, defendant complains that the comment that he "made a living" robbing people implied that he was involved in "an ongoing criminal operation and day-to-day routine of robbing people." To the defendant, this equates to "improperly putting other crimes before the jury." We disagree.

¶ 11 Ordinarily, "[t]o preserve claimed improper statements during closing argument for review, a defendant must object to the offending statements both at trial and in a written posttrial motion." *People v. Wheeler*, 226 Ill. 2d 92, 122 (2007). If a defendant fails to satisfy either prong of this test, his challenge is considered forfeited on appeal. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defendant acknowledges that he failed to object to any of the challenged statements during closing arguments and none were raised in his post-trial motion, but nonetheless, asks this court to review this claim as plain error.

¶ 12 We may consider unpreserved error pursuant to the plain error doctrine where the evidence was so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) the error was so serious that it affected the fairness of the defendant’s trial and challenged the integrity of the judicial process. *People v. Walker*, 232 Ill. 2d 113, 124 (2009). Before applying either prong of the plain error doctrine, however, we must first determine whether an error occurred. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010).

¶ 13 While it is axiomatic that every prosecutor should show respect and due regard for a defendant's right to a fair trial, this does not handcuff a prosecutor from making comments that are a fair inference from the evidence presented at trial. See *People v. Hudson*, 157 Ill. 2d 401, 441 (1993) ("[i]t is well settled that a prosecutor is allowed a great deal of latitude in closing

argument [citation] and has the right to comment upon the evidence presented and upon reasonable inferences arising therefrom, even if such inferences are unfavorable to the defendant"). Despite defendant's heated protestations to the contrary, there is nothing in the prosecutor's comments in closing argument that implied that defendant was guilty of any crime other than robbing this high school student on the el train. We find absolutely no prejudice in the uttering of these remarks and as a result, since we find that there was no error in the argument, we need not discuss whether the argument could amount to plain error. See *People v. Willis*, 409 Ill. App. 3d 804, 813-14 (2011) (the reviewing court determined that the prosecutor's comments during closing arguments did not prejudice the defendant and deprive him of a fair trial, where the jury would not have reached a different verdict in the absence of those comments). Simply put, there was no prosecutorial misconduct in the comparison of defendant and the crime victim here; one made his money honestly and the other stole the money in a violent and dangerous way.

¶ 14 Similarly, defendant seeks a new trial because the prosecutor "inserted her personal opinion that offenders with guns are more likely to be correctly identified" by victims and/or witnesses. As mentioned earlier, the victim here was looking right at defendant when the gun was pointed at his face. In witness examination and in argument, each side sought to persuade the jury to look at this evidence differently. To defendant, this scenario made it unlikely that the victim could properly identify the person two feet away from him, right in front of his face who was aiming a gun at his face. To the State, this meant that the victim had every opportunity to focus on the offender who was threatening his life with a loaded weapon. These different views of this evidence are nothing more than reasonable inferences that either side is entitled to draw. See *People v. Cisewski*, 118 Ill. 2d 163, 175-76 (1987) ("[i]n reviewing allegations of

prosecutorial misconduct, the closing arguments of both the State and the defendant must be examined in their entirety and the complained-of comments must be placed in their proper context"). Again, we find no error, much less plain error, here.

¶ 15 The final claimed error in argument revolves around the prosecutor's argument that Moore had $44 in single-dollar bills stolen from him and that $44 in single-dollar bills was found in defendant's possession. Here is the allegedly prejudicial argument:

> "The defendant was caught red-handed in this case. He had Jordan's phone and he had $44 in singles. And we know Jordan had $44 in singles. So no, Jordan's name wasn't written on every dollar bill that he just earned playing music, but what a coincidence that Jordan just had $44 in singles stolen, and the defendant has $44 in singles in his pocket."

To defendant, this argument is manifestly improper because there was no evidence at trial that a "specific amount of singles were stolen." While this suggestion might have a whiff of hyper-technical merit, one would have to completely ignore the rest of the State's evidence to lend it any credence. Stated succinctly, the direct and circumstantial evidence at trial was that this high school drummer was paid in single-dollar tips outside the White Sox game. He put that money in his pocket and boarded the southbound Red Line el train. He had not completed the process of counting the money when it was taken at gunpoint by a man identified by the victim as defendant. The victim testified that he followed defendant as he left the train and was still in pursuit of him when defendant was apprehended by the police. Defendant was found in possession of the wad of singles and the victim's cell phone and was seen throwing away the gun that he used to threaten the victim, whose watch was found near the gun. In essence, there is no perceivable gap in the State's evidence and the chain of custody of the money, the phone, the watch, and the gun was all covered in evidence. In other words, one could safely argue that

defendant was indeed "caught red-handed." The use of idiomatic English by the prosecutor was entirely accurate and in no way prejudicial to defendant because the phrase describes nothing more than reasonable inferences from the evidence. We find no error. See *People v. Burgess*, 2015 IL App (1st) 130657, ¶ 215 ("[i]n closing, the prosecutor may comment on the evidence and any fair, reasonable inferences it yields"); *People v. Trotter*, 2015 IL App (1st) 131096, ¶50 ("[d]uring closing argument, the prosecutor may properly comment on the evidence presented or reasonable inferences drawn from that evidence, respond to comments made by defense counsel which clearly invite response, and comment on the credibility of witnesses").

¶ 16 Finally, defendant contends, and the State agrees, that the mittimus should be corrected to reflect defendant's 321 days of presentence custody credit because defendant was arrested on September 4, 2012, and was sentenced on July 23, 2013. 730 ILCS 5/5-4.5-100(b) (West 2012). Accordingly, defendant is entitled to 321 days of presentence custody credit and we order the clerk of the circuit court to make corrections to the mittimus. See *People v. Latona*, 184 Ill. 2d 260, 278 (1998) (the reviewing court has the authority to correct the mittimus).

¶ 17 For the foregoing reasons, we affirm the trial court's judgment and correct the mittimus.

¶ 18 Affirmed; mittimus corrected.