SECOND DIVISION
December 29, 2015

No. 1-13-2790

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 5131
	)	
TOMAS VAZQUEZ,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Pierce and Justice Hyman concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Defendant was proven guilty of criminal sexual assault beyond a reasonable doubt when the evidence at trial established that he pulled the victim's hood over her head, dragged her to his vehicle and penetrated her vagina with his penis. Defendant has forfeited review of the State's comment during closing argument that consent was a defense of "last resort" because he failed to both object at trial and raise the issue in a posttrial motion.

¶ 2 Following a jury trial, defendant Tomas Vazquez was found guilty of criminal sexual assault and sentenced to eight years in prison. On appeal, defendant contends that he was not proven guilty beyond a reasonable doubt because the victim was extremely intoxicated at the

time of the offense, and "much of her account of the crime was rejected by the jury." He further contends that he was denied a fair trial by the State's statement, during its rebuttal argument, that consent is "the defense of last resort." Defendant finally contests the imposition of certain fines and fees. We affirm

¶ 3 Defendant was charged by indictment with, *inter alia,* aggravated kidnapping, aggravated criminal sexual assault, criminal sexual assault, and unlawful restraint. The matter proceeded to a jury trial on two counts of aggravated criminal sexual assault and one count of criminal sexual assault.

¶ 4 The victim, C.W., testified that on the evening of April 27, 2007, she went to the home of a friend of a friend where she played cards and drank "102 proof gin." At one point, the victim and one of her friend's friends got into a fight. The victim was struck in the face, but she characterized it as "nothing." However, she decided to walk home alone. The walk would have taken between 45 minutes to an hour. The victim was wearing a red jogging suit with a red shirt underneath and a white half-jacket with a hood. As she was walking, a man in a "maroon-like" van pulled up and asked if she would like to make $100. The victim responded by cursing the man out because he insinuated that she was a prostitute. At trial, the victim identified defendant as the man in the van.

¶ 5 After cursing defendant, the victim walked away. She was crying and upset because of the fight. About half a block later someone came up behind her, pulled her hood over her head and began to drag her. The victim screamed for help and tried to move her arms. At some point, the victim was facedown on a rug. She assumed she was in a car. Although the victim tried to get away, her jogging pants were pulled down and she was penetrated vaginally. When she was released, she saw defendant, jumped on him and began to hit him. Defendant responded by

hitting the victim repeatedly in the eye, lip and face until she "balled up into a ball." Defendant then kicked her out of the vehicle with his foot and drove away. The victim walked out of an alley and to a street where she screamed for help.

¶ 6 Later, at a hospital, the victim looked in the mirror. She had a swollen lip and eye and was missing hair. The victim was "very" intoxicated on the night of the incident but testified that the fact that she had been drinking did not affect her ability to recognize defendant or remember that she told him no when he offered her money for sex. In March 2011, the victim identified defendant in a lineup as the person who attacked her "in the streets."

¶ 7 During cross-examination, the victim acknowledged that she was extremely intoxicated and was in a fight where she was punched in the face prior to encountering defendant. She explained that the fight occurred because the other woman was intoxicated and hit her for "no reason." She did not remember exactly what she said when defendant propositioned her because she was intoxicated, but it was "a couple of foul things." She denied getting into defendant's car or having drinks with him. She did not tell him about the fight, suggest that he give her $20 in exchange for oral sex so that she could buy some weed, or have sexual intercourse with defendant in the passenger seat of his car. The victim denied telling defendant that she wanted $100 and that she would call the police if he did not give her $100.

¶ 8 Denise Thomas testified that she was stopped at a light in her vehicle when the victim ran up, began to beat on the window and yelled that she had "just got raped." Thomas pulled over because the victim would not let go of the door. The victim was crying and her eye was black, as though someone had hit her. The victim's blouse was "tore off" and her pants were down. Thomas took off her blouse and put it on the victim and pulled up the victim's pants. She then called the police.

¶ 9 Kelly Leszczynski McLaughlin, an emergency room nurse at West Suburban Medical Center, testified that the victim stated that she had been sexually assaulted prior to arriving at the hospital. Specifically, the victim stated that she was walking home from a friend's house alone when someone pulled up next to her asking to talk, then pulled her hood over her head, dragged her into a vehicle, and drove away. At one point this person stopped the car, removed the victim's clothes and "vaginally raped her." The victim was tearful and upset, had dried blood on her clothing and her socks were dirty. McLaughlin also noted "multiple injuries," on the victim including bruising and swelling to the left eye, a small cut on her upper lip and a bruising to the right side of the neck and chest. McLaughlin performed the collection for a "sexual assault evidence kit." This included, *inter alia*, swabs of the victim's mouth, fingernail scrapings and a blood draw. A doctor later performed a vaginal exam and obtained vaginal swabs.

¶ 10 During cross-examination, McLaughlin testified that she did not see any vaginal bleeding, tearing or bruising. However, the doctor performed "the more thorough exam."

¶ 11 Evidence technician Juan Arjona testified that he took photos of a certain alley and recovered a "clump of hair," a red blouse, and a scapula necklace.

¶ 12 Forensic scientist Justin Camillo testified that he processed the victim's sexual assault evidence kit. Semen was identified on the vaginal swabs. Camillo later received defendant's buccal swab. The parties stipulated that the sperm cells taken from the victim's vaginal swabs were subject to DNA analysis at Orchid Cellmark Lab, and a DNA profile originating from an "unknown male" was generated. Forensic scientist Lisa Kell testified that she compared the DNA profile generated by Orchid Cellmark Lab to the DNA profile generated from defendant's buccal swab and that the profiles matched.

¶ 13 Detective David Kupczyk, who was retired at the time of trial, testified that the victim identified defendant in a lineup, in March 2011, as the person who "sexually assaulted her."

¶ 14 Defendant testified, through an interpreter, that he was driving home when the victim made a gesture at him, so he stopped his vehicle and she got in. The victim was crying and stated that she had been in a fight. Defendant drove to a smaller street and parked. He then offered the victim an alcoholic beverage. The victim asked defendant if he smoked marijuana and after he indicated that he did not, she asked him for $20 to buy marijuana. The victim then stated that she would perform "oral sex" on defendant for $20. After the victim began, defendant asked if they "could do it the way it should be done." She agreed. Defendant did not wear a condom. Afterward, defendant gave the victim $20. She became upset and wanted $100. When defendant did not give her $100, she became "very upset," began to insult defendant and threatened to call the police. Defendant told the victim to "do it." The victim then exited the car and walked away. Defendant denied striking the victim or tearing her clothing.

¶ 15 During cross-examination, defendant testified that the victim offered, in English, to perform oral sex in exchange for $20, but that he did not recall how to "say it." After the victim performed oral sex, defendant decided that he wanted to have vaginal intercourse and stated " 'Give me the p***.' " The victim then removed her pants. The victim also removed her white shirt. Defendant did not agree to pay the victim another $20 for this additional act. Defendant testified that his encounter with the victim took place in the front passenger seat of a red Grand Am rather than a van. Defendant denied that the victim said no; rather, she "agreed all along."

¶ 16 At closing argument, the State argued that after the victim refused defendant's request for sex, defendant grabbed her, put her in his van, drove to an alley, and then removed the victim's clothes and vaginally penetrated her. When the victim tried to get away, defendant struck her

multiple times before physically kicking her out of the van. The State further argued that the contention that the victim regretted having sexual intercourse with defendant because he did not pay her was "ridiculous."

¶ 17 The defense argued that that jury could not "just" take the victim's word for what happened and that the victim's word was "really all" the jury had. The defense argued that because of the victim's intoxication, she did not know why she got into a fight or what she said, *i.e.*, she had "a conversation about sex for money" and did not know what she said. The defense concluded that if the victim could not talk about the fight, she could not tell you what happened with defendant or how she was injured. Therefore, the victim was an unreliable witness whose testimony was uncorroborated. The defense stated there was "no question" that defendant had sexual intercourse with the victim and that "[i]t's a question of consent."

¶ 18 In rebuttal, the State argued that the victim and her choices were not on trial; rather, defendant was and he should be held responsible for his choices. The State argued that because of DNA evidence, defendant has "one choice, if he takes the stand," *i.e.*, "the defense of last resort." The defense objected, and the trial court overruled the objection. The State continued, arguing that because defendant could not claim he was misidentified, he had to argue that no crime occurred and that the victim consented. The State argued that defendant did not even admit to soliciting sex; rather, the victim flagged him down and offered him a "blow job."

¶ 19 At the completion of closing argument, the trial court instructed the jury on the law, including that closing arguments are not evidence. Ultimately, the jury found defendant guilty of criminal sexual assault. The trial court then ordered that a presentence investigation report (PSI) be prepared. Defendant was sentenced to eight years in prison.

¶ 20 When reviewing a challenge to the sufficiency of the evidence, the relevant question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48. The trier of fact is responsible for evaluating the credibility of the witnesses, weighing witness testimony, and determining what inferences to draw from the evidence. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). A reviewing court will not retry the defendant (*People v. Lloyd*, 2013 IL 113510, ¶ 42), or substitute its judgment for that of the trier of fact on questions involving the weight of the evidence or the credibility of witnesses (*Brown*, 2013 IL 114196, ¶ 48). This court reverses a defendant's conviction only where the evidence is so unreasonable, improbable or unsatisfactory that a reasonable doubt of his guilt remains. *Id*.

¶ 21 To convict a defendant of criminal sexual assault, the State must prove an act of sexual penetration and the use or threat of force. See 720 ILCS 5/12-13(a)(1) (West 2006). Sexual penetration is defined as, *inter alia*, "any contact, however slight, between the sex organ * * * of one person by * * * the sex organ * * * of another person." 720 ILCS 5/12-12(f) (West 2006). In the case at bar, it was undisputed that an act of sexual penetration occurred.

¶ 22 Viewing the evidence at trial in the light most favorable to the State, as we must (*Brown*, 2013 IL 114196, ¶ 48), there was sufficient evidence to find defendant guilty beyond a reasonable doubt based upon the victim's testimony that defendant pulled her hood over her head and dragged her to a vehicle before penetrating her vagina with his penis and striking her in the face repeatedly. Although defendant testified that the encounter was consensual and initiated by the victim, the victim testified that she did not agree to have sexual intercourse with defendant. Additionally, Thomas and McLaughlin testified that the victim was upset and said that she had been "raped." The issues of consent and force or threat of force are matters of credibility, or

questions best left to the trier of fact who heard the evidence and saw the demeanor of the witnesses. *People v. Barbour*, 106 Ill. App. 3d 993, 998-99 (1982). Here, the jury found the victim credible as evidenced by its verdict; we will not substitute our judgment for that of the jury on this issue (see *Brown*, 2013 IL 114196, ¶ 48). Ultimately, this court cannot say that no rational trier of fact could have found defendant guilty of criminal sexual assault when the victim testified that defendant pulled her hood over her head and dragged her to his vehicle before placing her facedown on the floor and penetrating her vagina with his penis.

¶ 23 Defendant, however, contends that the victim was not credible because she was intoxicated at the time of the offense and the jury rejected "much of her account of the crime."

¶ 24 Initially, we note that the victim acknowledged that she was intoxicated and that she did not remember exactly how she "cursed" defendant out when he offered her money for sex, but she asserted that her intoxication did not impair either her ability to identify defendant or to refuse his proposition. The victim's intoxication was not fatal to her testimony and what effect, if any, it had upon her credibility was a question for the jury. See *Ross*, 229 Ill. 2d at 272 (the trier of fact is responsible for evaluating the credibility of a witness, weighing her testimony, and determining what inferences to draw from the evidence presented).

¶ 25 Defendant concludes that because he was found not guilty of aggravated criminal sexual assault, the jury "necessarily rejected several aspects" of the victim's account that are "bound up with the alleged rape." Specifically, defendant contends that because the jury "found reason to doubt" the victim's testimony that defendant kidnapped and beat her, there is "little reason to believe the balance of her testimony." We disagree

¶ 26 Although defendant argues that the jury did not find him guilty of aggravated criminal sexual assault because it did not find the victim credible, we decline his invitation to speculate as

to why the jury acted as it did. See *People v. Spears*, 112 Ill. 2d 396, 409 (1986) ("courts are not in the business of second-guessing a jury's 'clear intent' "). The simple fact is that we cannot divine why the jury came to the conclusion it did. To the extent that defendant argues that the jury did not find the entirety of the victim's testimony credible, a trier of fact is free to accept or reject as much or as little of a witness's testimony as it pleases (see *People v. Peoples*, 2015 IL App (1st) 121717, ¶ 67), and is not required to disregard the inferences that flow from the evidence or search out all possible explanations consistent with a defendant's innocence and raise them to a level of reasonable doubt (see *In re Jonathon C.B.*, 2011 IL 107750, ¶ 60). When faced with conflicting versions of events, the jury was not obligated to accept defendant's version (*People v. Villareal*, 198 Ill. 2d 209, 231 (2001)), and this court cannot say that the victim's testimony was "so wholly incredible or so thoroughly impeached" that it was incapable of being used as evidence against defendant. *People v. Sanders*, 2012 IL App (1st) 102040, ¶15.

¶ 27 Ultimately, this court cannot say that no rational trier of fact could have found defendant guilty when the evidence at trial established that although the victim declined defendant's offer of money in exchange for sex, defendant dragged the victim to his vehicle and penetrated her vagina with his penis. *Brown*, 2013 IL 114196, ¶ 48. This court reverses a defendant's conviction only where the evidence is so unreasonable or unsatisfactory that a reasonable doubt of his guilt remains (*id.*); this is not one of those cases. Therefore, we affirm defendant's conviction for criminal sexual assault.

¶ 28 Defendant next contends that he was denied a fair trial when, during closing argument, the State referred to defendant's assertion that his encounter with the victim was consensual as a "defense of last resort." Defendant acknowledges that this issue is not preserved for appeal because counsel did not include this claim in defendant's posttrial motion. See *People v. Naylor*,

229 Ill. 2d 584, 592 (2008) (both a trial objection and a written posttrial motion raising the issue are required to preserve an issue for appellate review). However, defendant asks this court to review this contention pursuant to the plain error doctrine.

¶ 29 The plain error doctrine permits a reviewing court to reach a forfeited error affecting substantial rights in two circumstances: (1) where the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence; and (2) where the error is so serious that the defendant was denied a substantial right and thus a fair trial. See *People v. Cosby*, 231 Ill. 2d 262, 272 (2008). The first step of plain-error review is determining whether any error occurred. *People v. Thompson,* 238 Ill. 2d 598, 613 (2010). Absent reversible error, there can be no plain error. *People v Williams*, 193 Ill. 2d 306, 349 (2000).

¶ 30 The State is given wide latitude when making closing arguments (*People v. Wheeler*, 226 Ill. 2d 92, 123 (2007)), and may comment on the evidence presented and draw reasonable inferences from that evidence (*People v. Nicholas*, 218 Ill. 2d 104, 121 (2005)). The State may attack a defendant's theory of defense and may respond to any statements by defense counsel inviting a response. *People v. Doyle*, 328 Ill. App. 3d 1, 12 (2002). "Closing arguments must be reviewed in their entirety, and the challenged remarks must be viewed in context." *People v. Caffey*, 205 Ill. 2d 52, 131 (2001). Comments made by the prosecution during closing argument will not be considered reversible error unless they result in substantial prejudice to the defendant such that it is impossible to determine whether the comments caused the jury's verdict. *People v. Emerson*, 189 Ill. 2d 436, 513 (2000); see also *Wheeler*, 226 Ill. 2d at 123 (reversal based on closing argument is warranted only if the State made improper remarks that engendered "substantial prejudice," such that the remarks constituted a material factor in defendant's conviction).

¶ 31 The appropriate standard of review for closing arguments is unclear. In *Wheeler*, our supreme court applied a *de novo* standard of review to the issue of prosecutorial statements during closing arguments. *Id*. at 121. However, in *Wheeler*, the court also cited with favor its decision in *People v. Blue*, 189 Ill. 2d 99 (2000), which applied an abuse of discretion standard. *Wheeler*, 226 Ill. 2d at 121-22. However, we need not resolve the issue of the proper standard of review in the case at bar because our holding would be the same under either standard.

¶ 32 Here, the complained-of remark, that consent was a "defense of last resort" was made during the State's rebuttal argument in response to defense counsel's argument that the jury could not "just" take the victim's word for what happened and that because there was no question that defendant and the victim engaged in sexual intercourse, the case turned on the "question of consent." The State's comment during rebuttal highlighted that defendant could not argue that he was misidentified because his DNA was a match for the DNA recovered from the victim's vagina, so defendant had "one choice," to argue that no crime occurred by advancing a consent defense.

¶ 33 Viewing the State's remark within the context of the entirety of the parties' closing arguments (*Caffey*, 205 Ill. 2d at 131), the defense argued that the jury could not take the victim's word for what happened because she was intoxicated at the time and did not remember having a conversation regarding sex for money. In other words, the victim was so drunk she did not remember agreeing to have sex with defendant in exchange for money. The State responded by attacking defendant's theory of the case, the only one he could advance without admitting to a crime. See *Doyle*, 328 Ill. App. 3d at 12. This is a reasonable inference to draw based on the evidence presented at trial and we find no error. *Wheeler*, 226 Ill. 2d at 123.

¶ 34 Even were this court to find that this comment is not within wide latitude afforded the State during closing argument, we cannot conclude that the complained-of remark engendered substantial prejudice to defendant such that reversal is warranted. See *Emerson*, 189 Ill. 2d at 513 (a comment made by the State during closing argument will not be considered reversible error unless it resulted in substantial prejudice to the defendant such that it is impossible to determine whether the comment itself caused the jury's verdict). Here, the trial court instructed the jury that closing arguments are not evidence, and the testimony of the victim, as well as that of Thomas and McLaughlin, established that victim consistently described her encounter with defendant as nonconsensual. Because we find no error, there can be no plain error and we must honor defendant's procedural default. See *Williams*, 193 Ill. 2d at 349.

¶ 35 Defendant finally contends that the $2 Public Defender Records Automation Fee (55 ILCS 5/3-4012 (West 2012)), the $2 State's Attorney Records Automation Fee (55 ILCS 5/4-2002.1(c) (West 2012)), and the $10 Probation and Court Services Operations fee (705 ILCS 105/27.3a (1.1) (West 2012)), are actually fines that should be offset by his presentence custody credit. See 725 ILCS 5/110-14(a) (West 2012) (an incarcerated person against whom a fine is levied is entitled to a credit of $5 per day for every day served in custody prior to sentencing).

¶ 36 We review the imposition of fines and fees *de novo*. *People v. Price*, 375 Ill. App. 3d 684, 697 (2007).

¶ 37 This court has previously found that the $2 Public Defender Records Automation Fee and the $2 State's Attorney Records Automation Fee are fees to which a defendant cannot apply his presentence custody credit. See *People v. Bowen*, 2015 IL App (1st) 132046 ¶ 65 ("because the statutory language of both the Public Defender and State's Attorney Records Automation fees is identical except for the name of the organization, we find no reason to distinguish between the

two statutes, and conclude both charges constitute fees"); *People v. Rogers*, 2014 IL App (4th) 121088, ¶ 30 (the State's Attorney charge is a fee because it is meant to reimburse the State's Attorney for expenses related to automated record keeping). We follow *Rogers* and *Bowen* and likewise find that the Public Defender Records Automation Fee and the State's Attorney Records Automation Fee are fees to which defendant cannot apply his presentence custody credit.

¶ 38 Defendant also contends the $10 Probation and Court Services Operations fee is a fine because it is not related to the cost of his prosecution. The State responds, citing *Rogers*, that the assessment is compensatory in this case because the trial court ordered that a PSI report be prepared, and the $10 reimbursed the State for that cost. See *Rogers*, 2014 IL App (4th) 121088, ¶¶ 36-38.

¶ 39 *Rogers* held that whether the $10 Probation and Court Services Operations fee was a fine or a fee depended on the circumstances of each individual case. *Id.* ¶¶ 37-38. In those cases where the trial court orders the probation office to complete a PSI, the assessment is deemed compensatory in nature, and is therefore a fee. *Id*. ¶ 37. Here, the record shows that defendant participated in a presentence investigation, and a PSI was filed. Therefore, in this case, the $10 Probation and Court Services Operations fee is a fee (*id*.) that is not subject to offset by defendant's presentence custody credit.

¶ 40 Accordingly, we affirm the judgment of the circuit court of Cook County in all respects.

¶ 41 Affirmed.