2015 IL App (2d) 130791-U
No. 2-13-0791
Order filed September 17, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of De Kalb County.
Plaintiff-Appellant,	)	
v.	)	No. 06-CF-656
MARK EASLEY,	)	Honorable Robbin J. Stuckert,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: While the State's comments regarding defendant's failure to produce a witness were not error *per se* in that witness was under defendant's control, the State's unsubstantiated assertion regarding what the the witness would have testified to exceeded the bounds of propriety; as the evidence is closely balanced, error is plain and a new trial is warranted.

¶ 2 I. INTRODUCTION

¶ 3 Defendant, Mark Easley, was convicted of attempted first-degree murder (720 ILCS 5/8--4(c)(1)(C) (West 2006)) and sentenced to 26-years' imprisonment. In an earlier appeal, we found the evidence sufficient to sustain defendant's conviction, but, in accordance with the State's confession of error, we remanded for a hearing pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984). We declined to address several additional issues. On remand, the trial court rejected

defendant's claims of ineffective assistance of counsel. He now appeals, and, for the reasons that follow, we reverse and remand.

¶ 4 In this appeal, defendant raises three issues. First, he argues that the trial court failed to comply with Supreme Court Rule 431(b) (eff. May 1, 2007). Defendant argues that the trial court's asking prospective jurors whether they had any "difficulties" with the propositions set forth in Rule 431(b) did not encompass whether they both understood and accepted the principles set forth in the rule. Second, he argues he was denied a fair trial because the State unfairly shifted the burden of proof to him to produce a witness and its closing argument was improper. Third, defendant claims, and the State again agrees, that defendant is entitled to an additional day of credit for time served in a Kentucky jail pursuant to an Illinois warrant. We have previously discussed the facts of this case in detail. See *People v. Easley*, No. 2-09-0145 (2010) (unpublished order under Supreme Court Rule 23 (eff. July 1, 2011)). We will not, therefore, repeat them here. As we find the second argument dispositive, we will focus upon it.

¶ 5 II. ANALYSIS

¶ 6 Defendant argues that the State shifted the burden of proof to him by arguing that the jury should consider his failure to produce an eyewitness to the shooting (Stub) and by questioning him about this during its cross-examination. The State also claimed that defendant did not call Stub because Stub's testimony would have corroborated Pitts' testimony. It is axiomatic that the State bears the burden of proving a defendant's guilt in a criminal trial. *E.g.*, *People v. Perea*, 347 Ill. App. 3d 26, 43 (2004). The burden of proof never shifts to a defendant. *People v. Weinstein*, 35 Ill. 2d 467, 470 (1966). It is improper for the State to imply that a defendant has to "provide a theory of innocence." *People v. Tyson*, 137 Ill. App. 3d 912, 921 (1985). Defendant also argues that the State further diminished its burden of proof by informing "the jury that Stub

would have corroborated Armand Pitts' testimony," which defendant contends was "a wholly fanciful speculation not based on any fact because neither the State nor the police ever spoke with Stub." Prosecutorial misconduct requires a new trial where it constitutes a material factor in a conviction. *People v. Linscott*, 142 Ill. 2d 22, 28 (1991). Defendant again asks that we review his contention as plain error, as it is not preserved.

¶ 7 In, *People v. Adams*, 109 Ill. 2d 102, 120-21 (1985) (quoting *People v. Williams*, 40 Ill. 2d 522, 528 (1968)), our supreme court held:

> " '[I]f it is developed in a trial that a witness exists, presumably under the control of a defendant, who can throw light upon a vital matter, and he is not produced, certainly a jury may fairly consider that fact, and, likewise, counsel would have a legitimate right to comment thereon.' "

Such comment is improper if the witness is equally accessible to both parties, "however, when locating witnesses is under the defendant's control or within his knowledge, comments on the failure to produce witnesses are not improper." *People v. Doe*, 175 Ill. App. 3d 371, 377 (1988).

¶ 8 The State argues that defendant had greater access to Stub. The State points out that defendant provided neither an address nor a telephone number for Stub. Defendant also did not provide Stub's real name. Moreover, defendant had Stub's telephone number programmed into his cell phone, even if his mother was unable to figure out how to charge the cell phone. The State argues that before defendant was incarcerated, contacting Stub was a "very simple thing." Thus, afterwards, defendant's claim that it was now near impossible rings hollow. Defendant counters that he told the police all the information he had about Stub (including where Stub frequented in Chicago and a description of him). He continues that simply because he did not have the information necessary to produce Stub does not mean that he willfully withheld it.

¶ 9 Under these circumstances, defendant arguably had greater access to Stub such that comment by the State was not inappropriate. The cell phone with Stub's number was in defendant's mothers' possession. While it is true she did not know how to charge it, defendant could have asked her to provide the cell phone to him or to his attorney. The State, on the other hand, was unaware of the cell phone's existence until trial.

¶ 10 Nevertheless, the State's lesser access to Stub notwithstanding, it departed from the bounds of acceptable argument when it purported to put words in Stub's absent mouth. It is improper for the State to mischaracterize evidence and argue facts that are not in evidence. *People v. Chavez*, 327 Ill. App. 3d 18, 27 (2002). In *People v. Lopez*, 152 Ill. App. 3d 667, 679 (1987), the First District held as follows:

> "Under these facts, we find the State's remarks *constituted more than comments that defendant had not presented evidence* to support his 'suggested' alibi. Naming the 11 witnesses *not only suggested that they would have testified unfavorably against defendant*, but the State's further remark, 'Where are those people that can clear the defendant,' shifted the burden of proof to defendant. We believe these statements were so substantially prejudicial that the taint of their prejudicial effect to defendant could not be cured by the sustaining of defendant's objections or by an instruction on the burden of proof." (Emphasis added.)

As in *Lopez*, the State's remarks in this case went beyond commenting on defendant's failure to call Stub. Indeed, the State told the jury that Stub would testify favorably to it.

¶ 11 Specifically, the State argued:

> "Then you have this Stub character, an eyewitness to the crime, and this is the guy that would have seen everything. Stub might be the person that the defendant handed the

gun off to after he got away—after he shot Pitts and separated, but where is Stub? Well, it's impossible for the police to find Stub because all [defendant] would give them was a location in Chicago. They asked all the questions they could think of. 'How do you get ahold of this guy? What's his number?' 'Well, I don't know. We just see each other on the street,' and now [defendant] tells you, 'Oh, I've got his number in my phone.' I asked him, where is Stub?'

He's had well over a year to find him. Bring him forward. He would have seen with this version that his defense attorney based on no evidence[,] gave you that the defendant was actually being shot at and missed while the bullets that were going toward him went into Pitts' body. Well, where is Stub? Well, he still can't figure out where he is.

Well ladies and gentlemen, even in this modern age while we may not memorize our phone numbers, we may not write them in a book, phone numbers are very accessible. The defendant's got all kinds of excuses. It came to the point of being ridiculous. 'Well, my phone battery was dead.' Well, why can't you find a new battery? 'Well, my mother had the phone and she didn't know how to work it.' You couldn't call and have somebody else show your mom how to work it? "Well, the battery didn't work.' You couldn't get a new battery for the phone? Couldn't tell your defense attorney about that? 'Oh, now the charge has something my mother can't figure out.'

The reason we don't have the name of Stub is because *Stub was a witness to this and Stub isn't going to help defendant, because if Stub was to come in and testify, he would testify what Pitts testified to is to testify truthfully*." (Emphasis added.)

Like the *Lopez* court, we hold that the State's assertion that Stub would testify favorably to it and corroborate Pitts' testimony was error. *Lopez*, 152 Ill. App. 3d at 679. Moreover, it was error irrespective of whether defendant had greater access to Stubs. See also *People v. Eddington*, 129 Ill. App. 3d 745, 776-81 (1984).

¶ 12 Having determined that error occurred, we now must consider whether that error was plain error. Plain error occurs in two circumstances: "(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). In this case, defendant argues that the evidence is closely balanced. When an error occurs in a close case, a reviewing court will "err on the side of fairness, so as not to convict an innocent person." *Id*. at 193. Whether evidence is closely balanced presents a separate question from whether it is sufficient to sustain a conviction. *People v. Piatkowski*, 225 Ill. 2d 551, 566 (2007).

¶ 13 Here, the State presented no physical evidence linking defendant to the crime (outside of the rather tangential evidence that defendant's mother had purchased a gun, which was of the same caliber as the gun used in the shooting, and the box from the gun was in defendant's possession, though there was testimony from defendant and and a former girlfriend that the box was not used to store a gun). We previously characterized this testimony as "weak" during defendant's first appeal; even the State acknowledges that it is "not overwhelming." *People v. Easley*, No. 2-09-0145 (2010) (unpublished order under Supreme Court Rule 23 (eff. July 1, 2011)). The strongest item of evidence was Pitts' identification of defendant. However, we previously determined that only two of the four factors set forth in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972) , favored the State and two were inconclusive. Moreover, Pitts initially declined to identify defendant to the police, though he later stated that this was because he was afraid of

defendant. One eyewitness, Melissa Maloney, was unable to identify defendant in a photographic line up. She stated that the angle from which she observed the shooting made it hard to observe defendant's face. Prior to the line up, she described defendant as was a "tall and lanky" black man with "short black hair." Jennifer Johnson, another eyewitness, testified that the shooter had a "thicker normal build," by which she meant that he "wasn't skinny, wasn't lanky or anything like that." Johnson was unable to identify defendant in a photographic line up as well. When shown candid photographs from the club defendant had been at earlier on the night of the shooting, both witnesses stated defendant was most similar to the shooter based on his build and attire. Defendant was wearing a black cap in the candid photographs; nevertheless, Johnson initially reported that defendant had "dark-colored hair, possibly buzzed." Neither mentioned a hat in their initial descriptions of the shooter.

¶ 14 The State points to defendant's furtive behavior as evidence of guilt. It first notes that defendant fled and was found hiding in a nearby alley. While this provides *some* support for the State, as defendant points out, he was subsequently cooperative with the police. Moreover, we do not find it surprising that a person would flee from the site of a shooting for safety concerns. Maloney and Johnson testified that they did exactly that. Defendant did initially drop his sweatshirt and cap when instructed by the police to leave the place where he had been hiding; defendant explained that he did not want to be holding something in his hand when stepping out of a concealed location in front of the police after being instructed to come out with his hands up. He subsequently walked away after setting the items on a squad car. Given that by this point, defendant had provided the police with identification and knew the police were aware that the items were his, this provides only limited additional support for the State's case. Furthermore,

defendant asked to be allowed to sit inside a squad car while the police were in the process of identifying him, which suggests no desire to flee.

¶ 15 While we held that the evidence was sufficient to sustain defendant's conviction in the first appeal (*People v. Easley*, No. 2-09-0145 (2010) (unpublished order under Supreme Court Rule 23 (eff. July 1, 2011))), as noted above, whether evidence is closely balanced presents a different issue from whether it is sufficient to sustain a conviction (*Piatkowski*, 225 Ill. 2d at 566). In this appeal, given Pitts' initial refusal to identify defendant, two eyewitnesses inability to pick out defendant in a photographic line up, and the lack of physical evidence (including the fact that no weapon was found on defendant or in the area where defendant was found), we cannot say that the evidence is anything but closely balanced. Moreover, the error in this case concerned the State alluding to non-existent evidence that Stub would corroborate Pitts. Pitts provided the only direct identification of defendant. While this identification could be undermined by Pitts' initial refusal to identify defendant, the State's improper argument unfairly bolstered and enhanced Pitts' credibility. As such, the error went to the very heart of this case.

¶ 16 In *Piatkowski*, 225 Ill. 2d at 567, our supreme court found closely-balanced evidence and plain error where: "The only evidence linking defendant to the crime was the testimony of the two eyewitnesses [and the] erroneous instruction in this case related to how the jury would assess the reliability of that eyewitness testimony." Similarly, in this case, the most significant evidence linking defendant to the crime was Pitts' identification and the erroneous argument as to what Stub would have testified to served to improperly enhance Pitts' credibility. As such, a new trial is necessary.

¶ 17 Having concluded that the second issue raised by defendant requires reversal, we need not address his argument based on the trial court's purported failure to comply with Supreme

Court Rule 431(b) (eff. May 1, 2007). However, we do advise the trial court that the better practice would be to question prospective jurors in the language of the rule. The trial court should also ensure that, in the event he is convicted again, defendant receives the proper credit for time served in Kentucky. As we have previously determined the evidence is sufficient to sustain defendant's conviction, double jeopardy does not bar a new trial, should the State elect to seek one. See *People v. Gashi*, 2015 IL App (3d) 130064, ¶ 29. The judgment of the trial court is reversed, and this cause is remanded, with directions.

¶ 18 Reversed and remanded with directions.