2016 IL App (1st) 133699-U

SECOND DIVISION
JUNE 7, 2016

No. 1-13-3699

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. 09 CR 3158
	)	
ISMAEL ZUNO,	)	Honorable
	)	Paula M. Daleo,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Justices Neville and Hyman concurred in the judgment.

O R D E R

¶ 1 Held: We affirm the judgment of the circuit court where it did not abuse its discretion in admitting a witness's prior inconsistent statements describing the shooter, and where the prosecutor did not make improper statements during closing and rebuttal arguments.

¶ 2 Following a jury trial, defendant Ismael Zuno was convicted of first degree murder and sentenced to 65 years' imprisonment, which included a 25-year enhancement for personally discharging a firearm. On appeal, defendant contends that the trial court erred by allowing the State to use a key witness's prior statements concerning the shooter's hair and clothing. He also

contends that he was denied a fair trial based on the State's closing and rebuttal arguments. We affirm.

¶ 3 Defendant was charged with multiple counts of first degree murder and personally discharging a weapon that proximately caused the death of the victim, Antonio Fierro. The charges arose from an incident outside a Melrose Park bar during the early morning hours of January 14, 2009. Several people were beating the victim outside the bar, culminating in the victim being shot to death.

¶ 4 Lazaros Kitsis testified that he was working at a pool hall at 1945 North Mannheim Road in Melrose Park during the evening of January 13 and into the early morning hours of January 14, 2009. Kitsis saw defendant, who was wearing a baggy white T-shirt, jeans, and had his hair pulled back in a ponytail, playing pool with a few people, including Miguel Barajas. At approximately 1:15 a.m., Kitsis saw a man named Forrest banging on the window of the pool hall and signaling to defendant and his group. When Kitsis looked outside, he saw about 10 people fighting in front of a nearby bar. Several people exited the pool hall, including Kitsis, who went outside to smoke. As he walked outside, he noticed nobody was at the table where defendant and his group were playing pool.

¶ 5 While he was outside, Kitsis saw a man with a white short-sleeved T-shirt and hair pulled back in a ponytail running with a gun in his hand. The man fired four times and the people at the scene scattered. Kitsis returned to the pool hall and called 9-1-1. He looked outside and saw the victim on the ground. A dark-colored Chevrolet Impala pulled up and a heavyset person with bushy hair wearing no shirt got out of the car and kicked the victim in the head and upper part of

the body several times. Kitsis saw Andrew Garcia trying to assist the victim and went outside to help. Garcia was talking to the victim, who had a bullet wound to his back, and was yelling at the man who was kicking the victim.

¶ 6 Kitsis was at the scene when the police and paramedics arrived. He gave the police the surveillance footage taken from inside the pool hall. Kitsis viewed the footage and identified Forrest waving his hands and banging on the front window, and defendant running outside at 1:20 a.m. The footage further showed Kitsis going outside, and then returning to the hall to call 9-1-1 while Forrest and Barajas ran past him. Finally, the footage showed Kitsis returning outside while Garcia tried to help the victim. Kitsis viewed a lineup and identified defendant as a customer at the pool hall, but did not identify him as the shooter. He similarly identified defendant in court as a customer.

¶ 7 Miguel Barajas testified that he was at the pool hall with several people including defendant, who was wearing a white shirt underneath a white jacket, blue jeans, and had his hair pulled back in a ponytail. He had seen defendant a dozen times before. At about 1:20 a.m., Barajas saw Forrest outside banging on the front window. Barajas exited the pool hall and saw several men beating one man outside of a nearby bar. Barajas then saw defendant, who was about 12 feet away from him, pointing a gun at the man who was being beaten. Barjas heard three gunshots and returned to the pool hall to look for two women he was playing pool with, but could not find them. He took a pile of coats, hoping to find his jacket and keys. As he was walking out of the front door, he ran into defendant who grabbed his coat from the pile. Defendant then walked towards a Chevy Impala parked in front of the pool hall. A small pickup

truck sped by and Barajas heard a noise and thought the truck had hit the Impala. When Barajas turned to see what happened, he observed defendant picking himself up off the ground and getting into the Impala. Barajas left the scene, but was later arrested by police. He identified defendant as the shooter from a photo array and a lineup. The six-man photo array police showed Barajas in connection with the shooting included a picture of Barajas himself. Barajas identified defendant in court as the shooter.

¶ 8 Raymond Soch testified that he was at the pool hall with friends, including Andrew Garcia. Soch went outside after 1 a.m. to smoke and saw a fight involving about 10 people. Soch returned to the pool hall and brought Garcia outside to see the fight. Soch observed a man who looked Hispanic and was wearing white running. He then heard four or five gunshots. Soch again returned to the pool hall and the man in white went towards the parking lot.

¶ 9 Andrew Garcia testified that, after Soch directed him outside, he saw several people fighting. One of the attackers had his shirt off revealing several tattoos and was yelling "represent." During the fight, Garcia saw someone shoot the victim. The shooter was 10 feet away from Garcia. Garcia stated that he did not remember what the shooter was wearing. However, when the State presented Garcia with a handwritten statement he made at the police station on January 14, 2009, Garcia acknowledged that he stated a man ran past him wearing a white baggy shirt. The State also asked Garcia, over defense counsel's objection, if he testified before the grand jury on January 15, 2009, that the man running away from the fight was wearing a white baggy T-shirt, but no response to this question is in the record. Garcia further testified that he thought the man running by him was wearing his hair in a ponytail, but did not

remember what the man was saying. The State asked Garcia if he remembered stating in his January 14 statement that the man was shouting "f*** you" at the man who was being beaten. Garcia responded positively. On redirect examination, Garcia affirmatively stated that he saw the man with the white baggy T-shirt and black ponytail shooting the gun.

¶ 10 After the shots were fired, Garcia was returning to the pool hall and noticed the victim staggering up the sidewalk before falling onto the ground. Garcia tried to talk to him, but the victim could not speak. At that point, the man who was not wearing a shirt and who had been beating the victim earlier approached the victim and kicked him in the head. A car approached them, which Garcia could not describe. However, when the State asked Garcia if he remembered telling an assistant State's attorney (ASA) and a detective on January 14 that the car was beige, Garcia responded positively. Garcia then saw the shooter, who was wearing the same baggy white T-shirt and ponytail, get out of the car. A truck came by, which Garcia acknowledged was a red pickup truck only after the State asked him if that was what his January 14 statement indicated, and hit the beige car. The shooter, who was out of the car, appeared to fall to the ground and then get back up.

¶ 11 Garcia viewed a lineup on January 15, 2009, and picked out "Number 3" as the person with the ponytail wearing a white baggy shirt. Detective Jeff Juan testified that "Number 3" in the line-up was defendant.

¶ 12 ASA Sean O'Callaghan testified that he took a written statement from Garcia on January 14, 2009. Before O'Callaghan testified to the contents of this statement, defense counsel requested a sidebar. During the sidebar, defense counsel objected to the State eliciting any

testimony from O'Callaghan regarding Garcia's written statement. Counsel argued that the State was attempting to introduce inadmissible hearsay as the written statement was a prior statement consistent with Garcia's testimony. The court overruled the objection, stating that Garcia's written statement could be used only on matters where Garcia testified that he did not remember or did not answer. The State acknowledged it would only elicit testimony regarding Garcia's written statement to clarify what Garcia indicated the shooter said before firing the gun, his description of the shooter's clothing and hair, and his description of the car that approached while the victim was on the ground. The State also noted that its next witness, ASA Peter O'Mara, would testify that Garcia made similar statements to the grand jury. Defense counsel objected to O'Mara's testimony as well, and the court similarly overruled that objection.

¶ 13 Following the side bar, O'Callaghan testified that Garcia said the shooter was wearing a white, baggy shirt, the shooter's hair was in a ponytail, and the car that pulled up in front of the pool hall after the shooting was beige or cream-colored. After using the written statement to refresh his memory, O'Callaghan recalled that Garcia stated the shooter was yelling "f*** you" at the victim who was being beaten.

¶ 14 ASA Peter O'Mara testified that Garcia testified before the grand jury that the shooter was wearing a white, baggy T-shirt, had his hair pulled back in a ponytail, and that the car that pulled up in front of the pool hall following the shooting was a cream-colored Impala.

¶ 15 Detective Robert Anzaldi Jr. testified that when he arrested defendant on January 15, 2009, defendant told him to be careful because he had been hit by a car.

¶ 16 Following closing arguments, the jury found defendant guilty of first degree murder and personally discharging a weapon that proximately caused the victim's death. Defendant filed a motion for a new trial challenging, in part, the court's ruling that Garcia's prior statements were admissible. The court denied the motion.

¶ 17 On appeal, defendant first contends that the trial court abused its discretion by allowing the State to introduce Garcia's prior handwritten statement and grand jury testimony concerning the shooter's hair and clothing. He asserts that Garcia's prior statements were consistent with his trial testimony, and thus inadmissible hearsay. However, the State maintains that the trial court exercised appropriate discretion in admitting these statements as prior inconsistent statements pursuant to section 115-10.1 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10.1 (West 2008)).

¶ 18 Hearsay, which is as an out of court statement offered to establish the truth of the matter asserted, is generally inadmissible at trial. *People v. Donegan*, 2012 IL App (1st) 102325, ¶ 33. Additionally, a prior consistent statement is typically considered inadmissible hearsay, which may not be used to bolster a witness's testimony. *People v. House*, 377 Ill. App. 3d 9, 19 (2007). However, an exception to the hearsay rule exists to allow prior *inconsistent* statements of a testifying witness to be admitted to impeach his credibility. *People v. McLaurin*, 2015 IL App (1st) 131362, ¶ 42. Section 115-10.1 of the Code permits the admission as substantive evidence of prior inconsistent statements made by a witness as long as he is subject to cross-examination about the statement and the statement (1) was made under oath at a trial, hearing, or other proceeding, or (2) explains or describes an event which the witness had personal knowledge, and

the statement was signed by the witness or acknowledged by witness under oath at a trial or other proceeding. 725 ILCS 5/115-10.1 (West 2008); *McLaurin*, 2015 IL App (1st) 131362, ¶ 42.

¶ 19 We have consistently held that prior testimony need not directly contradict trial testimony to be considered inconsistent, but also includes evasive answers, silence, or changes in position. *People v. Martinez*, 348 Ill. App. 3d 521, 532 (2004). The determination of whether a witness's prior testimony is inconsistent with his present testimony is left to the discretion of the trial court (*People v. Flores*, 128 Ill. 2d 66, 87-88 (1989)), and an abuse of that discretion is only found where the trial court's decision is arbitrary, fanciful, or unreasonable (*People v. Donoho*, 204 Ill. 2d 159, 182 (2003)).

¶ 20 In describing the shooter on direct examination, Garcia testified as follows:

> "ASA: Did you notice what that person wearing?
>
> DEFENDANT: At the time. I don't specifically remember now.
>
> ASA: Well, sir, you did give a handwritten statement in this matter didn't you?
>
> DEFENDANT: Yes.
>
> ASA: And that was back on January 14, of 2009? Do you remember that?
>
> DEFENDANT: (Nodding head).
>
> ASA: Is that a yes for the record?
>
> DEFENDANT: Yes.
>
> ASA: Yes. And that was at the Melrose Park Police Department?
>
> DEFENDANT: Yes, I made a statement, yeah.
>
> ASA: Would that be correct?

DEFENDANT: Yes.

ASA: And you gave a statement to Detective Juan and [ASA] Sean O'Callaghan; is that right?

DEFENDANT: It was a State's Attorney. I'm not sure what his name was.

ASA: Okay. And isn't it true that you told the detective and the [ASA] that the guy was wearing a white baggy shirt that ran by you; is that right?

DEFENDANT: Probably, yeah. If that's what I said.

ASA: And do you remember how he—what his hair looked like?

DEFENDANT: I think he had a ponytail.

ASA: And how was the hair in a ponytail? Was it pulled back in the ponytail? Was it on top of his head? How was it?

DEFENDANT: Ponytail (indicating).

ASA: Was his hair light or dark?

DEFENDANT: Darker.

ASA: And how close did he get to you?

DEFENDANT: Maybe like 10 feet.

ASA: And was he saying anything?

DEFENDANT: No, not that I remember. I mean, like I said, there was a bunch of yelling and everything was going on.

ASA: Well, isn't it true that on January 14th of 2009 you gave a statement to the Detective Juan and [ASA] O'Callaghan? You told them that the guy was shouting fuck you towards the guy getting beat up? Do you remember that?

DEFENDANT: If that's what I said at the time, then—

ASA: Yes?

DEFENDANT: Yes. If that's what I said at the time.

ASA: So that's true, *** that's what happened?

DEFENDANT: Yes, if it's in the statement."

When defendant was asked if he testified in front of the grand jury that the shooter was wearing a "white baggy T-shirt with black lettering," defense counsel objected, but was overruled. Nevertheless, the transcript does not show that Garcia answered this question.

¶ 21 Subsequently, ASA O'Callaghan testified that Garcia agreed to provide a signed, handwritten statement and that Garcia told him that the shooter was wearing a white, baggy shirt and had his hair in a ponytail. ASA O'Mara testified that Garcia testified in front of the grand jury that the shooter was wearing a white, baggy T-shirt with some kind of black lettering on it and had his hair in a ponytail.

¶ 22 The above testimony shows that Garcia's trial testimony was inconsistent with his prior handwritten statement and grand jury testimony. In his written statement and grand jury testimony, Garcia described the shooter as wearing a white, baggy shirt and had his hair in a ponytail. At trial, however, he attempted to evade the State's question as to how the shooter's hair appeared. When Garcia was initially asked to describe the shooter's hair he stated "I think he had

a ponytail," showing his hesitation to describe the shooter as having his hair pulled back in a ponytail. Similarly, when Garcia was asked to describe what the shooter was wearing he responded, "At the time, I don't specifically remember now." That response was clearly a change in position from the description he provided in his handwritten statement and during the grand jury proceedings, *i.e.*, the shooter was wearing a white baggy t-shirt.

¶ 23 We acknowledge, as defendant points out in his reply brief, that the State on redirect examination elicited a positive affirmation from Garcia that the shooter was wearing a white baggy T-shirt and had a black ponytail. However, at most, this testimony showed that defendant had changed his position from his evasive initial responses on direct examination. Therefore, the trial court's decision to admit Garcia's previous statements was not an abuse of discretion where they were inconsistent with his trial testimony.

¶ 24 Nevertheless, even assuming *arguendo* that the trial court erred in admitting the prior statements, any error was harmless based on the overwhelming evidence of defendant's guilt. The admission of hearsay evidence is harmless error if there is no reasonable probability the verdict would have been different had the hearsay been excluded. *People v. Sample*, 326 Ill. App. 3d 914, 924-25 (2001). "When deciding whether error is harmless, a reviewing court may (1) focus on the error to determine whether it might have contributed to the conviction; (2) examine the other properly admitted evidence to determine whether it overwhelmingly supports the conviction; or (3) determine whether the improperly admitted evidence is merely cumulative or duplicates properly admitted evidence." *In re Rolandis G.*, 232 Ill. 2d 13, 43 (2008).

¶ 25 The evidence here was overwhelming and the inclusion of the alleged hearsay evidence therefore did not lead to a different result. Even without Garcia's testimony, Kitsis identified defendant as a customer in the pool hall and described him as wearing a baggy white T-shirt, jeans, and that he had his hair pulled back in a ponytail. After viewing the surveillance footage, Kitsis identified defendant as one of the men exiting the pool hall just before the murder. He also described the shooter as a man with a white short-sleeved T-shirt and hair pulled back in a ponytail. Soch observed a man who looked Hispanic wearing white running outside, and then heard gunshots. Barajas described defendant's appearance similarly to Kitsis' description. Significantly, Barajas, who had seen defendant a dozen times before, identified defendant at trial and in a line-up as the shooter.

¶ 26 Barajas also stated that, shortly after the shooting, defendant returned to the pool hall and retrieved his coat and exited the pool hall again. A small pickup truck sped by and Barajas thought he heard it strike a vehicle that defendant was approaching. He then saw defendant picking himself up from the ground. When defendant was arrested, he told the police to be careful as he recently had been hit by a car, leading to the inference that defendant was indeed the man Barajas saw shoot the victim. In addition to the testimony of these witnesses, the surveillance footage corroborated defendant's presence and appearance on the day of the murder. Based on this overwhelming evidence, the inclusion of Garcia's previous handwritten statement and grand jury testimony did not contribute to defendant's conviction. As a result, any error in the admission of this evidence was harmless.

¶ 27 Defendant suggests, however, that Garcia's testimony was critical to the State's case because the testimony of the other witnesses was "fraught with problems." Defendant highlights that Barajas had "run-ins" with defendant in the past and that his picture was included in the photo array from which Barajas identified defendant as the shooter, claiming this shows Barajas' bias against defendant. However, no explanation of Barajas' "run-ins" with defendant was elicited at trial and we do not see how Barajas' inclusion in the photo array tainted his identification of defendant.

¶ 28 Defendant also claims that Kitsis' testimony is suspect, as he was 100 feet away from the shooting and did not identify defendant as the shooter. Nevertheless, Kitsis described defendant as having his hair in a ponytail and wearing a white shirt, which was consistent with his description of the shooter and corroborated Barajas' testimony. Defendant lastly maintains that Soch's testimony "was of no help to the jury," but overlooks the fact that Soch's testimony was also consistent with the other witnesses' descriptions of the shooter. On this record, the other witnesses' testimony is not so weak that the outcome of defendant's trial would have been different had the jury not heard Garcia's testimony.

¶ 29 Defendant next contends that he was deprived of his right to a fair trial when the State made improper arguments during closing and rebuttal arguments.

¶ 30 Defendant concedes that he did not preserve this issue for appeal, but urges his forfeiture be excused under both prongs of the plain error doctrine. A reviewing court considers an unpreserved error under the plain error doctrine when either:

> "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

In determining whether the plain error doctrine applies, we must first ascertain whether any error occurred. *Id*. Absent any error, there is no plain error. *People v. Thompson*, 2015 IL App (1st) 122265, ¶ 34. As discussed below, we find the challenged comments did not constitute a clear or obvious error.

¶ 31 In delivering closing arguments, a prosecutor is given wide latitude and is allowed to comment on the evidence and any reasonable inferences that can be drawn therefrom. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). Comments made during closing argument must be reviewed in context and in their entirety, and those invited or provoked by defense counsel's argument will not be held improper. *Id*. Unless the defendant can show that the challenged remarks were so prejudicial that he was denied real justice or that the verdict would have been different absent the remarks, his conviction will not be disturbed. *People v. Runge*, 234 Ill. 2d 68, 142 (2009).

¶ 32 Defendant maintains that the applicable standard of review is *de novo*, relying on *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007). However, *Wheeler* relied on *People v. Blue*, 189 Ill. 2d 99, 128 (2000), in which the court reviewed the prosecutor's remarks under the abuse of

discretion standard. This apparent conflict regarding the standard of review has not yet been addressed by our supreme court. We need not resolve this issue as the result here would be the same under either standard. See *People v. Moody*, 2015 IL App (1st) 130071, ¶ 59 (refusing to take a position on the standard of review in regard to remarks made during closing argument as the defendant's claim failed under either standard).

¶ 33 Defendant contends that the State improperly bolstered the credibility of Kitsis when it argued:

> "Now this is the lineup that Lazaros Kitsis took a look at. So even on the same day, with some different clothing here, the defendant is No. 4, and you can see he has his hair like halfway pulled back in this photograph. And Mr. Kitsis told you that I picked this person out as being a customer in my bar that night. He told you—*he was candid and truthful beyond* because he told you he remembered the person shooting. He was looking at the gun. He was looking at his white baggy shirt. He was looking at his hair being in a ponytail. He even described to you how—he kind of did a forward motion, and that's specifically where he saw the ponytail bounce up. That's what he remembers. *But he was so blatantly honest with you that he wouldn't go the next step.* He didn't tell you that his customer was the shooter. He can just tell you the things that he saw."

¶ 34 Defendant asserts that the above comments demonstrate that the prosecutor was improperly attempting to assert her opinion as to Kitsis' credibility. See *People v. Sims*, 403 Ill. App. 3d 9, 20 (2010) (stating that a prosecutor may not personally vouch for or express a personal opinion about a witness's credibility). In support, defendant cites to *People v. Williams*,

2015 IL App (1st) 122745, ¶ 20, which urged a court of review to take a common sense approach in evaluating whether a prosecutor vouched for a witness. The *Williams* court stated that a prosecutorial comment is improper if it conveys to a reasonable juror that the prosecutor's personal knowledge or some other evidence not before it supports the witness's credibility, or that the testimony carries with it the government's approval, and is thus reliable. *Id*. Defendant maintains that the prosecutor's comments that Kitsis was "candid and truthful" and "blatantly honest" conveyed to the jury that Kitsis was reliable because he carried with him the government's approval. We disagree. The prosecutor neither asserted nor inferred that her remarks had the authority of the State's Attorney's Office behind them or that she knew something regarding Kitsis' credibility that was not before the jury. Instead, her argument was based on the evidence that was presented at trial and merely consisted of a statement that Kitsis did not overstate what he saw on the evening in question. A prosecutor may properly comment on the evidence presented or reasonable inferences drawn therefrom, comment on the credibility of witnesses and respond to comments made by defense counsel. *Sims*, 403 Ill. App. 3d at 20. The ASA's argument here was not improper.

¶ 35 Defendant also contends that the prosecutor erred during rebuttal when she directed the jurors to convict him for the sake of the victim. The prosecutor specifically argued:

> "I want you to remember too that today is about the victim. It's about the victim Antonio Fierro. And you're going to have the opportunity to write the last chapter of Antonio's story, and with your verdict you will be able to title that chapter Justice."

Defendant asserts that the above argument was improper because the prosecutor argued that the only way the jurors could fulfill their obligations was to convict, and the comments shifted the jury's focus from the evidence to sympathy for the victim.

¶ 36 We have repeatedly rejected claims that it is improper for the prosecutor to ask for justice for the victim. See *e.g.*, *People v. Trotter*, 2015 IL App (1st) 131096, ¶ 54 (finding it was not improper for the State to conclude its closing argument with comments to the jurors that they "hold in [their] hands the sword of justice"); *People v. Goins*, 2013 IL App (1st) 113201, ¶¶ 92-93 (determining that it was proper for the prosecution to "denounce the activities of the defendant and urge that justice be administered"); *People v. Jones*, 2011 IL App (1st) 092529, ¶¶ 41-42 (finding it proper for the prosecution to ask the jury for justice for the victim and his family where the prosecutor was merely reminding the jurors that the real victim was the deceased and urging them to hold the defendant accountable for his actions); *People v. Jackson*, 399 Ill. App. 3d 314, 318 (2010) (finding prosecutor's statement in closing argument that the victim was "screaming out for justice," was not reversible error). Similarly, here, we find that the prosecutor was permitted to ask the jury for justice on behalf of the victim and the challenged comments did not improperly arouse the passions of the jury. Nowhere in the State's closing argument or rebuttal did it exhort the jury to base its decision on sympathy for the victim rather than on the evidence that was presented at trial. We therefore find no error in the prosecutor's remarks. Having concluded that there was no error, there can be no plain error.

¶ 37 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 38 Affirmed.