2016 IL App (1st) 133811-U

FIRST DIVISION
March 14, 2016

No. 1-13-3811

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 21278
	)	
MARK SMITH,	)	Honorable
	)	Thomas V. Gainer, Jr.,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's conviction for armed robbery affirmed where all but one of his challenges to comments made by the prosecution in closing arguments were forfeited and not reviewable under the plain error doctrine, and the one comment preserved for appeal was not erroneous.

¶ 2 Following a jury trial, defendant Mark Smith was convicted of armed robbery while armed with a firearm and sentenced to 25 years' imprisonment. On appeal, defendant contends that the prosecution made several improper comments during its closing and rebuttal arguments

which deprived him of his right to a fair trial. Defendant acknowledges that he failed to properly preserve all but one of the comments for appeal, but urges this court to review his contention under the second prong of the plain error doctrine.

¶ 3 At trial, Brian Lovejoy testified that about 5 p.m. on May 22, 2011, he was standing at the bus stop at Central Avenue and Washington Boulevard, wearing his work uniform with the Jewel logo on his shirt, and listening to music on his phone. Defendant and another man were sitting on a bench a few feet in front of him. Defendant approached Lovejoy and asked if he knew him, and Lovejoy replied "no." Defendant returned to the bench, but less than a minute later, approached Lovejoy again, pointed a gun in his face, and said "give me your phone." Lovejoy opened his hands to offer defendant the phone, but defendant said "no, not right here," and told him to turn around and walk to the alley.

¶ 4 When Lovejoy turned around, the other man who had been sitting on the bench grabbed him by the waist and walked him to the alley about 10 to 12 feet away. When they reached the alley, the second man went through Lovejoy's pockets, threw his debit card on the ground, and took his house key, bus card, state identification card, cell phone and Bluetooth headset. Defendant told Lovejoy to run his "bitch ass" back to Central Avenue, and Lovejoy picked up his debit card and walked away as fast as he could while defendant and the other man walked to the opposite end of the alley. Lovejoy then walked 30 to 40 minutes to the police station at Grand and Central Avenues and reported the robbery.

¶ 5 Lovejoy testified that defendant had two tattoos on his face – a five-point star with the number five inside of it on one cheek, and the letters "CW" on his other cheek. Five months after the robbery, Lovejoy identified defendant in a photo array. Several weeks later, he viewed a lineup, but was unable to identify any of the men as one of the robbers. Lovejoy explained that,

unlike the men who robbed him, all of the men in the lineup had bandages on their faces and were wearing baseball hats, and therefore, he did not recognize anyone. Lovejoy, however, positively identified defendant in court. Lovejoy acknowledged that he did not tell police that defendant had tattoos on his neck and hands or above his eye.

¶ 6 Chicago police detective Eric Oswald testified that Lovejoy gave police a description of the offenders, and specifically noted that one of the men had a large tattoo of the letters "CW" on one cheek, and a five-point star with the number five inside of it on his other cheek. In October 2011, Lovejoy identified defendant in a photo array, but in December 2011, he was unable to identify defendant in a lineup. Detective Oswald explained that, due to defendant's braided hair and the large tattoos on his face, in order to make the lineup fair and not suggestive, all of the participants had bandages on their faces and wore baseball hats. He acknowledged that Lovejoy never described the offenders as wearing bandages or baseball hats. He further acknowledged that Lovejoy did not mention the other tattoos on defendant's hands, neck and face.

¶ 7 Detective Oswald testified that, following the lineup, he and his partner, Detective Ralph Benavides, conducted a reverse lineup by showing defendant a photograph of Lovejoy and asking if he knew him. Defendant asked the detectives if Lovejoy was "the guy from Jewel," said that he had been wearing a Jewel shirt, and admitted that he robbed him. Defendant also told the detectives that one of the items taken from Lovejoy was an MP3 player, and that he chose Lovejoy as his victim because he appeared to be "lame" or easy to rob.

¶ 8 Detective Oswald acknowledged that he informed defendant of some of the facts of the case, including the location of the robbery and the fact that the offender had tattoos on his face that were identical to defendant's, but denied telling him all of the details of the robbery, and testified that defendant already knew the details. Detective Oswald also acknowledged that the

items taken from Lovejoy were never recovered, no fingerprints, DNA evidence or video surveillance were recovered, and the second assailant, known only as "EJ," was never identified or located.

¶ 9 Assistant State's Attorney Joell Zahr testified that on December 5, 2011, she met with Lovejoy at the Area 5 police department, then met with defendant and Detective Benavides. After being advised of his *Miranda* warnings, defendant agreed to have Zahr type his statement recounting the facts of the armed robbery of Lovejoy, which was published to the jury.

¶ 10 In his statement, defendant said that he was sitting at the bus stop at Central and Washington with his friend EJ waiting for "a lick," meaning someone to rob, when Lovejoy arrived. While EJ spoke with Lovejoy, defendant pulled a loaded black 9-millimeter handgun from his waistband, told Lovejoy to walk towards the alley, and escorted him there. In the alley, EJ went through Lovejoy's pockets and took his cell phone and MP3 player while defendant pointed the gun at the ground. After taking Lovejoy's property, they told him to walk away, and they walked in the opposite direction. EJ took the MP3 player, and defendant sold Lovejoy's cell phone at a store on Cicero Avenue and Madison Street for $40 or $50. Defendant also signed a photograph of Lovejoy and identified him as the man he had robbed.

¶ 11 In closing argument, the prosecutor argued that Lovejoy was a man who worked for his money, and in contrast, when defendant needed money, he robbed Lovejoy. The prosecutor further argued that the evidence showed that Lovejoy described defendant to police and identified him based on his unique tattoos, and that defendant confessed to the armed robbery. The prosecutor then discussed the jury instructions for accountability and armed robbery, and explained how the facts in the case satisfied the elements of the offense. He then stated "he's also

been charged with robbery. I'm not going to go over robbery with you, because this isn't a robbery. This is an armed robbery."

¶ 12 Defense counsel argued that Lovejoy's identification of defendant was unreliable because he did not mention the other tattoos on defendant's neck, face and hands. Counsel pointed out the differences between Lovejoy's testimony and defendant's statement, and argued that defendant lied in his statement when he said he committed the crime because he was "a wannabe thug in the neighborhood" who exaggerated about his acts, similar to the way people exaggerate on their resumes. Counsel also argued that defendant knew the details of the crime because they were told to him by the police. Counsel noted that neither the gun, nor any of the items taken from Lovejoy, was recovered, and that there was no scientific evidence that the crime occurred. Counsel also read the jury instruction which states that the State has the burden of proving defendant guilty beyond a reasonable doubt, that the burden remains on the State throughout the case, and that defendant is not required to prove his innocence.

¶ 13 In rebuttal, the prosecutor read the jury instruction that states that closing arguments are not evidence and that any argument not based on the evidence should be disregarded, then told the jury that it should disregard defense counsel's argument because it was not based on the facts. The prosecutor argued that while defendant pointed the gun at Lovejoy, he did not turn and "display his body of tattoos," but conducted the business he needed to do. She then argued "[t]hat's how this defendant works. That's how he robs people." Defense counsel objected to this comment, and the trial court overruled the objection. The prosecutor then continued her argument stating "[h]e gets what he needs and he gets out of there." The prosecutor also reviewed Lovejoy's testimony in detail and argued that Lovejoy told them the truth. The prosecutor further pointed out that defendant's statement contained details about the offense and

his personal life that only defendant would know, and argued that such information showed that the police did not feed him the details of the offense, and that Zahr and the police "weren't in on some conspiracy."

¶ 14 Following 25 minutes of deliberations, the jury found defendant guilty beyond a reasonable doubt of armed robbery. The trial court subsequently sentenced defendant to 25 years' imprisonment.

¶ 15 On appeal, defendant contends that the prosecution made several improper comments during its closing and rebuttal arguments which deprived him of his right to a fair trial. He first claims that the prosecution inferred that he committed other robberies by arguing that he robbed people for a living, and erroneously telling the jury that he was charged with an additional robbery offense. Defendant then argues that the State shifted its burden of proof to him when it argued in rebuttal that his theory of defense was that there was a conspiracy against him, but that was not his defense, and thus, the State misled the jury into believing that it had to find a conspiracy in order to acquit him.

¶ 16 Defendant acknowledges that he failed to object to all but one of the prosecutor’s comments and did not include the conspiracy argument in his posttrial motion, and thus, did not fully preserve the issue for appeal. Nevertheless, he asserts that this court should review his contention under the second prong of the plain error doctrine because the comments affected his right to a fair trial.

¶ 17 The State responds that defendant forfeited the issue because he failed to object to all but one of the comments during trial and failed to specify any arguments that were improper in his posttrial motion. The State further argues that the comments cannot be reviewed under the plain error doctrine because no error occurred where the prosecutor's remarks were properly based on

the evidence and reasonable inferences drawn therefrom, and were permissible comments on defendant's theory and his characterization of the evidence. Alternatively, the State argues that any error was cured when the trial court instructed the jury that closing arguments are not evidence and that the State has the burden of proving defendant guilty beyond a reasonable doubt, and further, that any alleged error did not substantially prejudice defendant or constitute structural error.

¶ 18 As a threshold matter, the parties disagree as to the proper standard of review. Defendant asserts that the proper standard is *de novo*, relying on *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007), where the supreme court held that the determination of whether a prosecutor's remarks were so egregious that a new trial is required is a question of law subject to *de novo* review. Defendant acknowledges, however, that the appropriate standard of review is unclear as the supreme court has applied both the *de novo* and abuse of discretion standards for issues of prosecutorial error in closing arguments. See *People v. Blue*, 189 Ill. 2d 99, 128 (2000) (applying the abuse of discretion standard). The State also acknowledges the conflicting standards of review, but asserts that the abuse of discretion standard should be applied here. The parties agree, however, that regardless of which standard is applied, the result in this case will be the same.

¶ 19 This court has previously pointed out that the *Wheeler* court also cited *Blue* with approval, and we have repeatedly declined to determine the appropriate standard of review where, as here, the result would be the same regardless of whether a *de novo* or abuse of discretion standard was applied. *People v. Cosmano*, 2011 IL App (1st) 101196, ¶¶ 52-53; *People v. Anderson*, 407 Ill. App. 3d 662, 675-76 (2011); *People v. Maldonado*, 402 Ill. App. 3d 411, 421-22 (2010). We therefore continue to adhere to our decision to refrain from discussing

the applicable standard until the conflict is resolved by the supreme court. *Cosmano*, 2011 IL App (1st) 101196, ¶ 53.

¶ 20 Initially, the parties agree that defendant failed to object to all but one of the prosecutor's comments during closing arguments and failed to raise the full issue in his posttrial motion. The record shows that in defendant's posttrial motion, his allegation that the prosecution made prejudicial comments expressly stated that those comments were objected to and overruled by the trial court. We therefore find that defendant properly preserved only one comment for appeal and forfeited review of all of the remaining comments. *People v. Ceja*, 204 Ill. 2d 332, 356 (2003). Consequently, we consider defendant's contention that his claim should be reviewed under the second prong of the plain error doctrine. Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999).

¶ 21 The plain error doctrine is a limited and narrow exception to the forfeiture rule that exists to protect defendant's rights, and the reputation and integrity of the judicial process. *People v. Herron*, 215 Ill. 2d 167, 177 (2005). To obtain plain error relief, defendant must show either that the evidence at trial was so closely balanced that the guilty verdict may have resulted from the error, or that the error was so substantial that it deprived him of a fair trial. *People v. McLaurin*, 235 Ill. 2d 478, 489 (2009). When asserting plain error, defendant must first demonstrate that a clear or obvious error occurred. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). The burden of persuasion is on defendant, and if he fails to meet his burden, his procedural default will be honored. *Id*.

¶ 22 A prosecutor is given considerable latitude in closing argument and is allowed to comment on the evidence and any fair, 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 consideration of the entire closing argument of both the State and

defendant, and those invited or provoked by defense counsel's argument will not be held improper. *Glasper*, 234 Ill. 2d at 204. Defendant's conviction will not be disturbed unless he demonstrates that the challenged remarks were so prejudicial that he was denied real justice or that the verdict would have been different absent the remarks. *People v. Runge*, 234 Ill. 2d 68, 142 (2009).

¶ 23 Defendant first contends that the prosecution made several improper comments which inferred that he committed other robberies and was a robber by profession. Specifically, defendant challenges the following statements made at the very outset of the prosecutor's closing argument:

> "Brian Lovejoy, he is what one calls a working man. He punches the clock at Jewel day in and day out. He takes the bus home and the el home and another el home from work.
>
> He uses the money he earns to buy his bus ticket, to buy a headset so he can listen to music, his ID, his wallet.
>
> The defendant? He's no Brian Lovejoy. When the defendant needed money, he planned a lick, he planned a robbery.
>
> When the defendant needed money, he got ahold [sic] of a loaded gun, a loaded nine millimeter gun.
>
> When the defendant needed money, he made plans with his buddy, EJ.
>
> When the defendant needed money, he decided to hold up Brian Lovejoy because he thought he was lame. Standing, waiting for the bus to go home after a day of work."

Defendant claims that these opening remarks by the prosecutor suggested to the jury that he made a living by robbing people. He argues that this suggestion is clear when considered in conjunction with the prosecutor's later remarks that he was also "charged with robbery. I'm not going to go over robbery with you, because this isn't a robbery. This is an armed robbery." Defendant asserts that the jury could have only believed that the prosecutor was referring to a different robbery because he was only tried on one count of armed robbery in this case.

¶ 24 Defendant also challenges the following statement by the prosecutor:

> "As I said in the beginning, Brian Lovejoy is a working man. Mark Smith's work is utterly different. But in the State of Illinois, we have a name for Mark Smith's work. It's called armed robbery."

Defendant claims that this statement again insinuated that he robbed people for a living. He argues that this insinuation carried over into the rebuttal argument when the prosecutor stated "[t]hat's how this defendant works. That's how he robs people." This final remark is the only one defendant objected to during the arguments.

¶ 25 When reviewing these comments in context and in consideration of the entire closing argument of the State and defendant, the record shows that the prosecutor did not argue that defendant committed other robberies or made a living robbing people, but instead, relied on the facts in this case while specifically arguing that defendant robbed Lovejoy. In his opening remarks, the prosecutor used defendant’s language from his statement to argue that defendant planned a “lick,” or robbery, with his friend EJ, was armed with a loaded 9-millimeter gun, and chose Lovejoy as his victim because he thought he was “lame,” or an easy target, as he stood at the bus stop. The prosecutor compared defendant to Lovejoy, who worked for a living, but made no argument or suggestion that defendant robbed other people for a living. We make the same

finding as to the prosecutor's later remark "we have a name for Mark Smith's work. It's called armed robbery." Again, the record shows that the prosecutor was specifically referring to the robbery of Lovejoy in this case, and did not suggest that defendant committed any other robberies.

¶ 26 Similarly, the record shows that when the prosecutor stated that defendant was "also charged with robbery," he was not referring to another offense, but was discussing the elements of the offense in this case. The prosecutor was reviewing the instructions for accountability and armed robbery with the jury, and explained how the specific facts in this case satisfied the elements of the offense. The prosecutor expressly stated "this isn't a robbery. This is an armed robbery," referring to the offense in this case, and made no comments suggesting that there was a separate robbery in addition to the robbery of Lovejoy.

¶ 27 We further find no improper insinuation in the State's rebuttal argument when the prosecutor stated "[t]hat's how this defendant works. That's how he robs people." This is the one comment that defendant objected to and properly preserved for appeal. However, when reviewed in context, the record shows that the prosecutor was responding to defense counsel's argument that Lovejoy's identification of defendant was unreliable because he did not mention the other tattoos on defendant's neck, face and hands. The prosecutor argued that while defendant pointed the gun at Lovejoy, he did not turn and "display his body of tattoos" to him, but instead, quickly conducted the robbery. After the above comment, the trial court overruled defense counsel's objection, and the prosecutor immediately continued with her argument stating "[h]e gets what he needs and he gets out of there." Thus, the prosecutor was not referring to any other robberies, but instead, was explaining to the jury why Lovejoy did not notice or mention the other tattoos on defendant's body.

¶ 28 Based on this record, we conclude that the challenged comments did not infer or suggest that defendant committed other robberies or robbed people for a living. Accordingly, these comments were not erroneous. As to the remarks that were not preserved, the plain error doctrine does not apply.

¶ 29 In addition to the above comments, defendant argues that the State shifted its burden of proof to him when it argued in rebuttal that his theory of defense was that there was a conspiracy against him, but that was not his defense, and thus, the State misled the jury into believing that it had to find a conspiracy in order to acquit him. Defendant challenges a series of remarks made by the State during its rebuttal argument wherein the prosecutor used the word "conspiracy." Again, defendant did not object to any of these comments at trial, nor did he raise the issue in his posttrial motion.

¶ 30 Specifically, defendant challenges the following statements by the prosecution:

> "The defendant tells ASA Joell Zahr details about his life that if you were to believe some type of weird conspiracy, that the police got together to feed him the information, how would anyone know this? How would Joell Zahr know this to put it in the statement?
>
> * * *
>
> Those are little details that tell you that Joell and the police weren't in on some conspiracy. Only the defendant would know this."

Defendant further challenges the following statements:

> "Another reason there's no conspiracy here is because there is no way this group of people would have gotten together to get all of this right. There's no way right away the victim would have said the details of the tattoos on this defendant's

face, the details of what actually happened. There's no way that the detective then would have the defendant confess to a minimized kind of version of it with little details differently.

And those little details of no MP3 player, no IDs, no keys in his handwritten statement tell you again that it's the truth, because if it was some kind of conspiracy it would be exactly the way the victim said it. The detectives would have had it set up way better than they did.

Wouldn't they have him, Brian Lovejoy, identify the defendant in a lineup if this was a conspiracy? That's how you know it's not. This is how it really works. This is how it really happens."

¶ 31 When reviewed in context and in consideration of the entire closing arguments of the State and defendant, we find that the prosecutor's comments were made in response to defense counsel's argument that defendant lied in his written statement and that he only knew the details of the crime because they were fed to him by the detectives. The prosecutor pointed out that defendant's statement, typed by Zahr, contained details about the offense and his personal life that only defendant would know, and thus, that information showed that the detectives did not feed him the details of the offense, and that Zahr and the police "weren't in on some conspiracy."

¶ 32 The record further reveals that the State never shifted the burden of proof to defendant, and that the State's burden was clearly conveyed to the jury. During his closing argument, defense counsel read the instruction to the jury which stated that the State had the burden of proving defendant guilty beyond a reasonable doubt, that the burden remained on the State throughout the case, and that defendant was not required to prove his innocence. In rebuttal, the

prosecutor responded "we do have to prove this case beyond a reasonable doubt. *** And we welcome that burden, and we've proven this case."

¶ 33 Moreover, the record shows that following closing arguments, the trial court properly instructed the jury that closing arguments are not evidence, and that any statement or argument made by the attorneys that was not based on the evidence should be disregarded. The court further instructed the jury that "[t]he State has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden remains on the state throughout the case. The defendant is not required to prove his innocence."

¶ 34 Accordingly, because there was no error in this case, the plain error doctrine cannot be applied and we honor defendant's procedural default of the issue. *Hillier*, 237 Ill. 2d at 545. Also, as incorporated in the argument above, the one comment which was properly preserved for appeal was not erroneous, and thus, defendant's argument is without merit.

¶ 35 For these reasons, we affirm the judgment of the circuit court of Cook County.

¶ 36 Affirmed.