

No. 1-14-0027

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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. 13 CR 9359
)	
PHILLIP SMITH,)	Honorable
)	Evelyn B. Clay,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Liu and Justice Harris concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant's conviction of delivery of a controlled substance affirmed over his challenge to statements made during the State's rebuttal closing argument.

¶ 2 Following a jury trial, defendant Phillip Smith was convicted of delivery of a controlled substance and sentenced, as a Class X offender, to seven years' imprisonment. On appeal, defendant contends that he was denied a fair trial where the prosecutor referred to facts not in and contrary to the evidence during rebuttal closing argument. We affirm.

¶ 3 At trial, Officer Steven Leveille testified that he was working undercover in the vicinity of 1145 South Francisco Avenue in Chicago at about 6 p.m. on April 17, 2013. As Leveille was walking, he was approached by codefendant Felicia Lipscomb, not a party to this appeal, who asked him if he wanted to buy crack cocaine. Leveille replied affirmatively, and they walked across the street to meet with defendant. Lipscomb had a short conversation with defendant and then defendant walked inside of a nearby garage. Defendant returned to where Leveille and Lipscomb were standing and Lipscomb told Leveille to give her \$50. Leveille gave Lipscomb \$50 of prerecorded funds and she passed that money to defendant. In return, defendant gave Lipscomb four clear plastic bags containing suspect crack cocaine, two of which Lipscomb gave to Leveille. Leveille walked away from the area, signaled surveillance officers via radio transmission that a drug transaction had occurred, and provided the surveillance officers with descriptions of defendant, Lipscomb, and the location of the transaction. After Lipscomb and defendant were detained, Leveille identified defendant as one of the offenders involved in selling him crack cocaine. On cross-examination, Officer Leveille acknowledged that his case report indicated he was asked for money before anyone went to the garage.

¶ 4 Officer Legenza, a surveillance officer at the scene, testified similarly to Officer Leveille. He also testified that following the transaction, the parties separated and Legenza radioed to enforcement officers that Leveille had signaled that a positive narcotics transaction had occurred. Legenza also provided the enforcement officers with a physical description of defendant.

¶ 5 On cross-examination, Officer Legenza testified that after the transaction, defendant entered a convenience store. Legenza observed police enter the same store, and, about five seconds later, the officers came out with defendant. About 20 seconds had elapsed between the end of the transaction and defendant's exit from the store.

¶ 6 Officer Mark Eldridge testified that he was an enforcement officer and that Officer Leveille stated via radio transmission that he made a narcotics purchase. Eldridge was provided a description of the offenders and the direction they were traveling. While in pursuit in his unmarked squad car, he noticed defendant exit a store at 2850 West Roosevelt Road. Eldridge stopped his vehicle and detained defendant. After defendant was positively identified by Leveille and arrested, Eldridge entered the same garage defendant entered before the transaction occurred, as well as the store defendant exited before his arrest. Eldridge did not find drugs or money on defendant's person, inside the store, or inside the garage. In particular, Eldridge searched the cashier counter of the store to see if defendant might have stuffed money in potato chip boxes, threw it on the floor, or placed it in the garbage.

¶ 7 On cross-examination, Eldridge described his search of the convenience store as "decently thorough." He was inside the store for about a minute, used an "eyeball" search, and might have asked the cashier where defendant went while he was inside the store. Eldridge did not see the inside of the register and made no inquiry whether or not the store had video surveillance.

¶ 8 Jaime Hess, a forensic scientist, testified that after performing tests on the recovered substances, her expert opinion within a reasonable degree of scientific certainty was that the tested items were positive for the presence of cocaine and weighed .2 gram.

¶ 9 During closing arguments, defense counsel argued that the reason police never recovered the prerecorded funds or remaining bags of drugs was because they mistakenly arrested defendant after erroneously identifying him as the drug dealer in question. In rebuttal, the State responded that drug dealing was a sophisticated business, drug dealers do not have drugs on them, and defendant had enough time to get rid of the money, which was probably in the store he

was seen entering and exiting. Following closing arguments, the jury found defendant guilty of delivery of a controlled substance.

¶ 10 On appeal, defendant contends that the State committed prosecutorial misconduct during rebuttal closing argument when it improperly referenced facts not in evidence, *i.e.*, drug dealing was a sophisticated enterprise and drug dealers do not personally possess drugs. He further maintained that the prosecutor told the jury during rebuttal closing argument that the prerecorded funds were probably in the store, which was contrary to the evidence presented at trial.

¶ 11 Defendant concedes this issue was not fully preserved where he failed to specify in his posttrial motion the particular complained of remarks he was challenging (*People v. Sutton*, 316 Ill. App. 3d 874, 894 (2000)), and did not object to the State's assertion that drug dealers do not have drugs on them (*People v. Enoch*, 122 Ill. 2d 176, 186 (1988)). To the extent that defendant has waived this claim, he invokes the doctrine of plain error, arguing that the evidence was closely balanced and the prosecutor's remarks undermined the integrity of the judicial proceedings. See *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (stating that under the plain error doctrine, a reviewing court may consider an issue that was not preserved when the evidence was closely balanced, or the error was so serious it affected the fairness of the proceedings). We will review defendant's claims of prosecutorial misconduct to determine first whether any error occurred, because if there is no error, there can be no plain error. See *People v. Hudson*, 228 Ill. 2d 181, 199 (2008).

¶ 12 The appropriate standard of review for closing arguments is unclear. *People v. Thompson*, 2013 IL App (1st) 113105, ¶¶ 75-77 (stating that it is unsettled whether a *de novo* or abuse of discretion standard applies). In *Thompson*, this court declined to resolve the issue of the appropriate standard of review because its holding would be the same under either standard. *Id.*,

¶ 78. The same is true here because our holding would be the same under either standard.

¶ 13 As a general rule, the State is afforded "wide latitude" in delivering closing and rebuttal arguments and may "comment on the evidence and any fair, reasonable inferences it yields." *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). We will consider the entire closing argument of both parties to place the challenged comments in context. *Id.* A reviewing court will not reverse a jury's verdict based on improper closing arguments unless the comments were of such magnitude that they resulted in substantial prejudice to defendant and constituted a material factor in his conviction. *People v. Gonzalez*, 388 Ill. App. 3d 566, 587 (2008).

¶ 14 Defendant contends that the prosecutor made three separate comments during rebuttal that amounted to prosecutorial error. He first maintains that the prosecutor argued improperly by stating "drug dealing is a sophisticated enterprise," and secondly that drug dealers "don't have drugs on them" because said comments were not in evidence. Third, defendant asserts that the State offered no evidence to support its argument "that the money was probably in that store." We find that these challenged comments in rebuttal, taken in context, were in direct response to defendant's closing arguments. *People v. Hudson*, 157 Ill. 2d 401, 441 (1993) (stating that the prosecutor may respond to comments by defense counsel which clearly invite a response).

¶ 15 Defendant's closing arguments were premised on his position that "there is no proof that [he] is a drug dealer." To support this premise, defendant argued, in relevant part, that no prerecorded funds and no other drugs were recovered. In turn, the absence of the money and drugs demonstrated that he was not involved in drug deals. Defendant specifically questioned "Where's the money?" and "Where's the drugs?" Defendant also challenged the idea that he hid the money by asking "How did he get rid of this money? What time would he have had to have gotten rid of this money? Where is the money? Did anybody look for it? Did anybody find it? Is

there \$50 lying around somewhere they can prove [defendant] was? He's inside of a convenience store." In addition, defendant questioned why the money would be hidden by arguing "why would a drug dealer hide the money? Right? He doesn't know the police are on to him."

Defendant's closing arguments were replete with such questions.

¶ 16 In rebuttal to defendant's questions and arguments in closing, the State argued as follows:

"Now it's true the surveillance officer loss [sic] visual contact with the defendant for a short period of time, yes, and that's plenty of time to get rid of the money that he had. Because I'm going to tell you, ladies and gentleman, drug dealing is a sophisticated enterprise. People who do it know. They're [sic] undercover officers out there. There are people out there who seek to ---

Defense counsel: Objection, that's not in evidence.

The Court: It's commentary on the funds that were exchanged in this case.

Overruled.

Assistant State's Attorney: And they know that there are people who are out to rob them, so how do they solve that problem? How do drug dealers solve that? Well for one, they don't have the drugs on them. As you heard, the defendant went to another location to get them and he came back with them. And it follows that you wouldn't walk around with all your drug money on you. Maybe he gave it to Ms. Lipscomb. Maybe he gave it to someone else who he got drugs from because he went to that garage he didn't know who was in that garage or if there was someone in there. So the fact that the money was not on him, it's not damaging. It's how it works. The officers told you sometimes they don't get those *** funds. They're one piece of evidence to identify the drug dealer. We don't have that here, but what we do have is identification by two officers ***.

* * *

"It happened with enough time for the officer to remember and recognize the defendant five minutes later, and it was also enough time for the defendant to get rid of that money because that's what drug dealers do. They try not to get caught. They try to get rid of stuff. And you know what, I would put to you, that money was probably in that store, but the officers told you---

Defense counsel: Objection.

The Court: Overruled.

Assistant State's Attorney: The officer told you he did an eyeball search quickly. That's what he said. And he didn't find it. But you know what, it doesn't matter because the man the defendant sold drugs to identified him. He recognized him as the man who actually sold him the drugs along with Felicia Lipscomb."

¶ 17 All these challenged arguments in rebuttal were in direct response to defendant's comments and questions in closing. In particular, the State's argument that the prerecorded funds were in the convenience store was a reasonable inference based on the evidence at trial and was thus proper. Defendant had prerecorded funds on his person immediately following his sale of cocaine to Officer Leveille. Defendant then went into a convenience store, was detained, and identified within minutes of the cocaine delivery. Officer Eldridge did a brief, superficial search of the area and did not find any money. As the State's arguments were invited comment and reasonable inferences based on the elicited evidence, there was no error and defendant's forfeiture cannot be forgiven. *People v. Bannister*, 232 Ill. 2d 52, 79 (2008).

¶ 18 Alternatively, defendant argues his trial counsel was ineffective for failing to preserve the above issue for appellate review. However, because we have found no error with respect to the

prosecutor's statements during rebuttal closing argument, we cannot hold that trial counsel was ineffective for failing to object and include said comments in a posttrial motion, as without error there was no prejudice. If a reviewing court finds that a defendant claiming ineffective assistance of counsel did not suffer prejudice, it need not decide whether counsel's performance was constitutionally deficient. *People v. Bull*, 185 Ill. 2d 179, 203 (1998).

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

¶ 20 Affirmed.