FIFTH DIVISION
December 16, 2016

No. 1-14-2935

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 1486
	)	
CALVIN LINDSEY,	)	Honorable
	)	William G. Lacy,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Gordon and Justice Lampkin concurred in the judgment.

O R D E R

¶ 1 *Held*: Remark in State closing argument about absence of certain witnesses from trial improperly shifted the burden of proof to defendant and was not invited by defendant's argument, but did not substantially prejudice defendant's right to a fair trial.

¶ 2 Following a jury trial, defendant Calvin Lindsey was convicted of aggravated robbery and sentenced as a mandatory Class X offender to 16 years' imprisonment. On appeal, defendant contends that a remark in the State's closing arguments about the absence of certain witnesses improperly shifted the burden of proof to defendant. For the reasons stated below, we affirm.

¶ 3 Defendant was charged in relevant part with aggravated criminal sexual assault, aggravated kidnapping, and aggravated robbery, all allegedly committed against S.W. on or about January 1, 2011.

¶ 4 At the 2014 trial, S.W. testified that she drove to a convenience store at about 8 p.m. to bring home a bottle of wine. The parking lot was "quite crowded from people hanging out." When S.W. lowered her window to ask a group of people to move so she could park, defendant entered the car. She had never seen him before. He grabbed her jacket, thrust a shiny object in his coat pocket into her side, and told her to keep driving. Believing the object was a gun, she complied. Telling S.W. to stay quiet, defendant gave her driving directions until he told her to park. When she did, he searched her purse and removed a cellphone, bank cards, a $20 bill, coins, and a pack of cigarettes. He then told her to drive to an automated teller (ATM), and she returned to the store where he entered the car. As they walked into the store, he walked closely behind her and kept hold of her waist, and he told her that he would shoot her if she screamed. The store's ATM was out-of-order, so he told her to drive to another and marched her back to her car. When they drove to another ATM, he told her to withdraw all the funds in her account. She withdrew $80 in $20 bills, which he took. He then gave her directions, ending in an alley where he told her to park. He pulled her from the car into a nearby unoccupied apartment building. In an empty room, he told her to remove her pants, and she heard a zipper followed by condom being removed from its wrapper. Defendant then had sexual intercourse with her. As she put her pants back on, she saw him pick up something from the floor. He ordered her back to her car, where he returned her car keys but told her "if you say anything, I'll come back for you." As she drove away, she yelled to him that she would call the police, and he ran after her car.

¶ 5 S.W. returned to the convenience store, where she reported to the security guard that a man robbed and sexually assaulted her. The guard called the police, and S.W. described her attacker to the police. He was wearing a blue puffy coat, a "hoodie" underneath, dark jeans, and boots. She was able to see defendant's face while they were in the store for the ATM, when an employee asked defendant to lower his hood, and noticed that he had light spots on his face around his nose and mouth. A few minutes after giving her description, officers brought defendant to her, and she identified him as her attacker. An officer returned S.W.'s cellphone, $100 in $20 bills, coin purse, and cigarettes. Officers then accompanied her in searching the area for the unoccupied building where defendant took her. When she recognized it, she identified the building to the officers. She then was taken to a hospital where she was examined and a sexual assault kit was administered. A few hours later, she viewed a lineup at the police station and identified defendant as her attacker.

¶ 6 On cross-examination, S.W. admitted that she first told the responding officers about the robbery only, then gave a more detailed account including the sexual assault. When asked about certain details she did not mention in her early accounts (such as her lowering her car window, defendant shoving an object into her side, and hearing him unwrap a condom), she explained that she had only answered questions and was not asked about those details. She denied telling a nurse at the hospital that, when defendant brought her back to the store to take out money from the ATM, she told everyone "Happy New Year" to draw attention to herself.

¶ 7 Charles Garrett, the store's security guard on the night in question, testified that he saw a woman and man enter the store. The woman looked frightened, and the man followed closely behind her. He was wearing a hood and had his hands in his pockets, so Garrett told him to lower

his hood. He did so using both hands. Garrett did not see a gun. At trial, Garrett identified defendant as that man. Defendant and the woman went to the ATM and then left the store. About a half-hour later, the woman returned, weeping and saying that she had been raped and robbed. The store owner called the police, who interviewed Garrett, who later viewed a lineup from which he identified defendant as the man who entered with the woman and went to the ATM. On cross-examination, Garrett could not recall saying in an interview that the woman did not seem particularly distressed when she first entered the store.

¶ 8 Police officer Todd Jaros testified that he went to the liquor or convenience store where he met and interviewed S.W. She was tearful and upset as she reported having been robbed by a man she did not know, a black man in his 30s wearing a blue puffy coat with a "hoodie" underneath and tan boots, who took $80 cash and a telephone. Officer Jaros relayed S.W.'s description by police radio and, after some time, other officers brought defendant to the store. When S.W. saw defendant, she identified him. Officer Jaros brought S.W. to the police station, where she seemed even more upset than at the store. She then told him that defendant had raped as well as robbed her. Other officers took her to find the scene of the sexual assault, and Officer Jaros then took her to the hospital.

¶ 9 Officer Guy Habiak testified that he responded to the radio report of a robbery and detained defendant as he matched the robber's description. A pat-down found no weapons. He brought defendant to S.W., who identified defendant. He searched defendant and found a cellphone, pack of cigarettes, coin purse and five $20 bills. When Officer Habiak showed these items to S.W., she identified them. As he brought defendant to the police station, defendant remarked (without being asked a question) that he did not rob S.W.; Officer Habiak had not told

him that he was being investigated for robbery. Defendant's home was about a block from the liquor store. Officer Habiak and other officers accompanied S.W. as she searched for the scene of the sexual assault.

¶ 10 Nurse Dara Karlov testified to examining S.W. at the hospital, including administering a sexual assault kit (the kit) to her. S.W. was tearful and upset when Karlov met her. S.W. gave Karlov an account of events generally consistent with her trial testimony, except she told Karlov that she yelled "Happy New Year" to everyone in the store to draw attention to herself.

¶ 11 The parties stipulated that a chain of custody was maintained for the kit and S.W.'s clothing taken at the hospital. Forensic scientists testified that S.W.'s swabs from the kit and clothing tested negative for semen, no male DNA was found in S.W.'s fingernail scrapings from the kit, and defendant's hair did not match hairs from the kit. The parties also stipulated that the useable fingerprint found at the scene of the sexual assault did not match defendant.

¶ 12 The court denied defendant's motion for a directed verdict.

¶ 13 Officer Guy Habiak and Detective Aaron Chatman testified that, in separate interviews, S.W. told them that the robber kept his hand in his pocket as if he had a gun there, and did not say that he jabbed a gun into her side. To Officer Habiak, she did not say that he held her waist as they were in the liquor store, nor that she saw him bend over and pick something up after the sexual assault. Detective Chatman could not recall her making such statements.

¶ 14 Dr. Daniel Philipsbor testified to examining S.W. at the hospital. He found no external injuries and no injuries to her vaginal or anal areas. However, she was visibly upset, had a flat affect, and was very withdrawn. She slouched over and was not making eye contact. On cross-examination, Dr. Philipsbor added that S.W. did not claim any injuries, and she had some blood

in her vagina. He prescribed her the anti-anxiety medication Ativan, explaining that prescribing it is not routine for sexual assault patients but S.W. was particularly upset. He testified that blood in the vagina could be caused by sexual assault but does not necessarily indicate sexual assault and could come from other causes.

¶ 15 Evidence technician Juan Aguirre testified that he examined the apartment that had been identified by S.W. as the sexual assault scene and found only the aforementioned fingerprints.

¶ 16 Defendant testified that, in January 2011, he and a few others sold marijuana daily in the parking lot of the liquor store near his home. S.W. was a customer who bought marijuana at least weekly. At about 8 p.m. on the day in question, he was in the parking lot when a car pulled up and its horn sounded. The driver, whose face was somewhat concealed, asked for marijuana. Defendant told her that he kept it "around the corner." She told him to get into her car and she would drive him to the marijuana, as she was "in a hurry." He did so, gave her directions to the cache, and retrieved some marijuana from the cache. When he returned, he saw a $20 bill on the car seat, so he took it and handed her the marijuana, then closed the car door. When the driver turned on a light inside the car, defendant recognized her as S.W. Defendant pulled back his hood, and S.W. became "hysterical" upon recognizing him. Defendant reminded her that she owed him $100 from a sale on credit about three weeks earlier. She replied that she had no cash but noted that she had a bank card and asked where there was an ATM. They returned to the liquor store, where he stayed near the door while she went to the ATM. The store security guard asked him to lower his hood, and he did. S.W. returned upon realizing the ATM was out-of-order. They drove to another ATM, where she withdrew $80 because her balance was less than $100. She gave him the $80 and drove away with him still in the car. When he asked for the

remaining $20, she reached into her purse and offered him her cellphone. Defendant then left her car with the $80 and her cellphone.

¶ 17 Defendant was walking home from where S.W. left him when police officers approached with guns drawn, demanding to see his hands and asking where "the gun" was. As he was detained, defendant asked what the problem was. An officer answered that they were investigating a report of shots fired and would release him if he had no warrants against him. After briefly searching the area where they detained defendant, they took him to the liquor store. On the way, he saw the police computer screen mentioning an armed robbery. At the liquor store, officers briefly shone a light on him and remarked that they had a positive identification. At trial, defendant denied robbing or having sexual contact with S.W. on the day in question. He admitted to multiple convictions for burglary and residential burglary from 2005 to 2008.

¶ 18 On cross-examination, defendant denied demanding that S.W. pay him the $100, testifying that "it really didn't matter" if she paid him, and also denied telling Detective Chatman that he made such a demand. However, he re-entered S.W.'s car as she sought an ATM. When she paid him $80 rather than $100, he neither left her car nor told her that she could pay the balance later. He had S.W.'s cigarettes and coin purse as well as her cellphone when he was detained, but maintained that she gave them to him. Because he was detained on his way home, he never made it home. He denied telling Detective Chatman that he went home after meeting S.W. and was detained when he left home again, or saying that he had only her cellphone.

¶ 19 Detective Chatman testified in rebuttal that he interviewed defendant after his arrest and waiver of his *Miranda* rights. In relevant part, defendant said that he went home after meeting

S.W. and was detained when he went out again, and that he demanded S.W. pay her debt. He mentioned having S.W.'s cellphone but not her coin purse or cigarettes.

¶ 20 In its closing argument, the State argued that S.W. gave a credible account of being kidnapped, robbed, and sexually assaulted by defendant. The State argued that security guard Garrett corroborated that S.W. seemed nervous when she was in the liquor store with defendant. Officer Jaros established that she described defendant, and Officer Habiak established that defendant was found near the scene, matched her description, and had her stolen property. Dr. Philipsbor and nurse Karlov described S.W. as tearful and withdrawn after the incident. The State argued in detail that S.W.'s testimony established the elements of each of the charges against defendant. The State argued that defendant was a kidnapper, rapist and robber rather than a mere drug dealer to whom S.W. simply gave money and property for drugs.

¶ 21 In defendant's closing argument, counsel argued that various discrepancies in S.W.'s testimony cast doubt on her account. In relevant part, counsel argued "She says that when she pulls into the parking lot and this person gets in the car, there's people standing right there that she's trying to tell to get away. So, you know, that's when someone gets [in] the car, right there when there are people, witnesses standing right there, that doesn't make a whole lot of sense." Counsel also argued that defendant's testimony was credible and explained various discrepancies in his account. Lastly, counsel argued that the evidence from the physician and nurse did not establish sexual assault but merely that S.W. was upset for some reason. Counsel summarized that, by applying common sense, the jury would conclude that defendant's testimony was credible, S.W.'s testimony was not, and the evidence did not establish defendant's guilt beyond a reasonable doubt.

¶ 22 In rebuttal, the State argued at length that defendant's account was not credible. The State argued in part: "If you're going to get into somebody's car and kidnap them, what better place than a liquor store [where] there's lots of people, there probably were lots of people in the parking lot, there's testimony to it. Where are all those people that saw him do nothing that day, where are all those witnesses?" A defense objection that this shifted the burden was overruled. The State explained discrepancies in S.W.'s testimony argued by the defense and argued that various discrepancies in defendant's testimony rendered it incredible.

¶ 23 The court instructed the jury that closing arguments are not evidence and any statement or argument by counsel not based upon evidence should be disregarded. The jury was instructed that the "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." Following deliberations, the jury found defendant guilty of aggravated robbery and not guilty of aggravated criminal sexual assault and aggravated kidnapping.

¶ 24 Defendant's post trial motion claimed in relevant part that the State improperly shifted the burden to defendant by remarking "Where are all those people who saw him do nothing that day, where are all those witnesses?" At the motion hearing, the State argued that the remark was invited by a defense argument. The court denied the post trial motion and sentenced defendant, as a mandatory Class X offender,[1] to 16 years' imprisonment.

[1] Defendant's convictions include robbery in 2004, residential burglary in 2008, and burglary in 1998, 2004, 2005, and 2006. At sentencing in the instant case, defendant pled guilty to robbery and residential burglary in case 11 CR 15827, receiving six years' imprisonment concurrent to the instant sentence. The court found him a mandatory Class X offender in both cases.

¶ 25 On appeal, defendant contends that remarks by the State in its closing arguments about the absence of trial eyewitnesses from the liquor store parking lot improperly shifted the burden of proof to defendant.

¶ 26 A prosecutor has wide latitude in making a closing argument; she may comment on the evidence and any reasonable inferences it yields, though she may not argue assumptions or facts not contained in the record. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). We must view a closing argument in its entirety and challenged remarks in their context. *Id*. Statements will not be held improper if they were provoked or invited by defense counsel's argument. *Id*. A prosecutor may not suggest that defense counsel fabricated a defense theory, used trickery or deception, or suborned perjury, but it is not error for a prosecutor to challenge the credibility of a defendant or his theory of defense when evidence exists to support the challenge. *Id*. at 207. Thus, it is proper for a prosecutor to note when an argument made by defense counsel is unsupported by evidence. *Id*. at 212; *People v. Echols*, 382 Ill. App. 3d 309, 318-19 (2008).

¶ 27 It is generally improper for a prosecutor to comment on a defendant's failure to call witnesses who are equally accessible to both parties, as such comments tend to improperly shift the burden of proof to the defendant. *People v. McGee*, 2015 IL App (1st) 130367, ¶ 69. However, when a defendant argues that the State failed to call witnesses available to both parties, a prosecutor may properly comment on the defendant's failure to call those witnesses. *People v. Legore*, 2013 IL App (2d) 111038, ¶ 57. A witness who has a familial relationship with the defendant is not considered equally accessible by the State, and a prosecutor may properly comment on the absence of such a witness who could shed light on the defense theory of the case. *People v. Davis*, 344 Ill. App. 3d 400, 412 (2003). There is also an exception for alibi

witnesses: when a defendant asserts an alibi defense and names persons who would support it, a prosecutor may properly comment on the failure to call those persons because the defendant interjected them into the case. *People v. Jackson*, 299 Ill. App. 3d 104, 111-12 (1998).

¶ 28 Regarding the standard of review for prosecutorial remarks during closing argument, the parties here argue a split of authority we have previously recognized. See *McGee*, ¶ 55; *Legore*, ¶ 48. Our supreme court has applied *de novo* review because the significance of a prosecutor's transcribed remarks is a legal issue. *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007). However, our supreme court has also applied an abuse of discretion standard because the supervision of closing argument is within the trial court's discretion. *People v. Blue*, 189 Ill. 2d 99, 128 (2000). We need not resolve the issue of the applicable standard of review because our decision would be the same under either a *de novo* or abuse of discretion standard.

¶ 29 Here, there is no evidence that the parking lot witnesses were not equally available to the State and defendant, and there is no evidence that S.W. knew who those witnesses were. Defense counsel did not argue in closing that the State failed to produce the parking lot witnesses, but merely argued the implausibility of defendant entering S.W.'s car in the parking lot with others present. We find that the parking lot witnesses are not alibi witnesses, as defendant did not interject their existence into the case – S.W. testified to their presence in the parking lot – nor did he present an alibi defense. Under such circumstances, we find that this case falls under the general rule that a State comment upon a defendant's failure to call witnesses constitutes improper argument.

¶ 30 The State contends that the remark in question was a proper response to defense argument. However, while it was made in response to a defense argument, it was not invited by

that argument in the sense contemplated in *Glasper* and *Echols*. "In both of those cases, the prosecutors' comments responded to the absence of evidence supporting the arguments defense counsels actually made in their closings. [Citations.] Here, we face a factually different case." *Smith* at 548. Here, defense counsel argued that it was implausible that defendant would enter a car without permission while there were multiple potential onlookers in the parking lot. In its rebuttal, the State remarked "Where are all those people who saw him do nothing that day, where are all those witnesses?" However, the State was not arguing that the defense argument was unsupported by evidence. Indeed, the State expressly acknowledged in its argument that there was evidence of other people in the parking lot. It is eminently reasonable to interpret the remark as directing the jury's attention to the fact that defendant did not present witnesses from the parking lot to corroborate his account, which is improper.

¶ 31 Defendant notes that this court has stated that to "misstate the burden of proof or standard of review, to any extent, compromises the fairness of the judicial process and shall not be tolerated." *People v. Yonker*, 256 Ill. App. 3d 795, 799 (1993). However, we have also stated that our comment in *Yonker* does not create an exception for improper burden-shifting to the general rule that improper argument may be harmless beyond a reasonable doubt if it does not result in substantial prejudice to a defendant's right to a fair trial. *People v. Euell*, 2012 IL App (2d) 101130, ¶¶ 21-22. See also *McGee*, ¶ 72; *People v. Smith*, 402 Ill. App. 3d 538, 544 (2010) ("Although the prosecutor *** shifted the burden of proof, the prosecutor's improper closing remarks do not warrant reversal unless they could have affected the jury's verdict").

¶ 32 Here, we find the remark in question was a relatively brief and isolated point in the State's overall argument. While it was not invited by the defense, it was a response to a particular

point of argument rather than a general attack upon the burden of proof or presumption of innocence. Moreover, we do not find that defendant was prejudiced by the remark in light of the evidence. We do not find the evidence closely balanced, as defendant contends, merely because the jury found defendant not guilty of aggravated criminal sexual assault and aggravated kidnapping. The jury found him guilty of aggravated robbery when it was instructed on the lesser-included offense of robbery, and thus found an element – that he indicated he had a firearm – resting entirely upon S.W.'s credibility rather than only believing her on well-corroborated points. After reviewing the trial evidence, we cannot conclude that the jury's verdict and defendant's conviction was the result of the remark in question rather than the evidence. The remark thus did not deprive him of a fair trial.

¶ 33 Accordingly, the judgment of the circuit court is affirmed.

¶ 34 Affirmed.