2017 IL App (2d) 150112-U
No. 2-15-0112
Order filed March 30, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 12-CF-2065
SALVATORE DIBENEDETTO,	)	Honorable Kathryn E. Creswell,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices McLaren and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's convictions of theft and wire fraud were affirmed where defendant did not demonstrate that the State made improper comments in its closing argument amounting to plain error. Defendant's one-act, one-crime argument was barred by the invited-error doctrine.

¶ 2 Following a jury trial, defendant, Salvatore DiBenedetto, was convicted of five counts of theft (720 ILCS 5/16-1(a)(1), (a)(2) (West 2010)) and one count of wire fraud (720 ILCS 5/17-24(a) (West 2010)). Pursuant to an agreement with the State, he was then sentenced to 12 years' imprisonment on one of the theft counts (a class X felony due to the value of the property exceeding $1 million), to be served concurrently with a 5-year term of imprisonment on the wire fraud count. Defendant appeals. For the reasons that follow, we affirm and modify the mittimus.

¶ 3 I. BACKGROUND

¶ 4 On October 18, 2012, defendant was charged by indictment with five counts of theft and one count of wire fraud. The matter proceeded to a jury trial in September 2014. Because defendant does not challenge the sufficiency of the evidence, but instead focuses his arguments on certain statements that the prosecutor made during closing argument, we need not recite the evidence in detail. Instead, it will suffice to provide a very brief overview of the testimony so as to provide context for defendant's specific arguments.

¶ 5 The State presented evidence that Rita Fox, David Luman, and Paul Pankiewicz formed a company known as "RDP" in 2006. RDP bought property in Downers Grove, Illinois, with the intention of developing townhomes, and the project was known as "The New 922." Amidst the economic downturn in 2008, potential buyers could no longer get the loans that they needed to purchase these townhomes. At the same time, RDP was facing financial pressures from its own lender. Fox, Luman, and Pankiewicz met defendant in 2009, and he represented himself as someone who could help them market and sell the townhomes. All appeared to be going well when defendant presented them with certain real estate contracts and loan commitments in late 2009. Fox, through various entities that she either controlled or borrowed money from, transferred money to various other entities upon defendant's direction on six occasions: (1) a check in the amount of $36,900 in November 2009; (2) a check in the amount of $18,000 in November 2009; (3) a wire transfer in the amount of $113,500 in November 2009; (4) a check in the amount of $170,200 in December 2009; (5) a check in the amount of $700,000 in January 2010; and (6) a check in the amount of $200,000 in January 2010. As it turns out, both the real estate contracts and the loan commitments were forged. Moreover, the State introduced evidence that, instead of using the transferred money for the purposes that Fox expected,

defendant used it for his own unrelated personal and business expenses. Defendant did not present any witnesses of his own, and the jury found him guilty on all counts.

¶ 6 Defendant's counsel was ill on the day that was initially scheduled for sentencing. The prosecutor informed the court that defendant was set to plead guilty in federal court to certain other criminal charges. The prosecutor added that, in light of the sentences that defendant faced on the state and federal charges, the parties had "come to an agreed disposition to present to the Court" in connection with the state charges. The court then continued the matter.

¶ 7 At the next court date, defense counsel asserted that the parties had "an agreement on the sentence," specifically: "12 years Illinois Department of Corrections [*sic*], credit for 149 days." The court inquired: "Is that on Count One [the Class X theft] or what have you done in terms of wire fraud?" The prosecutor replied:

> "Judge, I believe the theft he would be sentenced on just the theft count and the wire fraud count. So the one theft count would be the count one of the indictment and then the wire fraud is count six. So it would be 12 years on the theft count. It would be max five years on the wire fraud to run concurrent to the 12."

At that point, the court confirmed with the prosecutor that counts II through V of the indictment (the remaining theft counts) would merge with count I. The prosecutor also explained that defendant had reached a plea agreement with respect to his federal charges, and the forthcoming sentences on those charges would run concurrent with his sentences in state court. The court asked defendant whether he agreed with everything that was just stated, and he responded in the affirmative. Defendant acknowledged his understanding that he had a right to a sentencing hearing if he did not want to accept the State's offer. After confirming with defendant that the agreement was voluntary, the court indicated that it "concur[ed] in the plea agreement [*sic*]."

The court informed defendant that if he wished to withdraw the agreement or challenge it, he would have to file a written motion within 30 days to vacate the sentence.

¶ 8 Defendant did not file a motion to vacate his sentence, but he did file a timely notice of appeal.

¶ 9 II. ANALYSIS

¶ 10 On appeal, defendant argues: (1) the prosecutor made improper remarks in closing argument; (2) the wire fraud conviction should merge with the class X theft conviction pursuant to the one-act, one-crime doctrine; and (3) he is entitled to four additional days of sentencing credit.

¶ 11 (A) Closing Arguments

¶ 12 Defendant first argues that the prosecutor made numerous improper comments in closing argument. Defendant acknowledges that he forfeited this issue, but he contends that the alleged improprieties implicated both prongs of the plain-error doctrine. "[T]he plain-error doctrine allows a reviewing court to consider unpreserved error when (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). Accordingly, we must first determine whether a clear or obvious error occurred. *Piatkowski*, 225 Ill. 2d at 565.

¶ 13 A prosecutor is given great latitude in making a closing argument. *People v. Woods*, 2011 IL App (1st) 091959, ¶ 42. The State is entitled to comment on and draw legitimate inferences from the evidence, even if they are unfavorable to the defendant. *Woods*, 2011 IL

App (1st) 091959, ¶ 42. We must review the State's closing argument in its entirety and consider any allegedly improper remarks in context. *Woods*, 2011 IL App (1st) 091959, ¶ 42.

¶ 14 "The prosecutor, as the representative of the State, stands in a special relation to the jury," and "must choose his words carefully so that he does not place the authority of his office behind the credibility of his witnesses." *People v. Bailey*, 249 Ill. App. 3d 79, 83 (1993). Accordingly, it is improper to vouch for witnesses, state personal opinions regarding the veracity of their testimony, or opine on judgments that are within the province of the jury. *Bailey*, 249 Ill. App. 3d at 83.

¶ 15 Here, defendant proposes that the prosecutor made the following statements reflecting his personal opinions about the case:

> (1) "And Ms. Fox her testimony is absolutely credible. Ms. Fox is a kind, decent, honest person, and she sat up there and she told the truth and she was on the stand for a long time and the one thing that I think took away [*sic*] and I think becomes clearly obvious is that this woman is a fundamentally decent and honest person. And when she says she gave the money to the defendant to further the 922 project, when she said she gave him the money, the majority of that to specifically to be [*sic*] held in escrow for loan closings and to provide escrow for further additional loans to show that they had the funds to complete this project, she is telling the truth."
>
> (2) "What did Paul Pankiewicz testify to? I think it's key that Mr. Pankiewicz he set up and put together Rita Fox and he put together Dave Luman and they were working together. They were friends, Rita, Paul, and Dave. They were again decent people looking to get involved in a venture, honest people, and they were in a tough situation in 2008 and then 2009."

(3) "I think it's also instructed [*sic*] that he never asked Rita for money in front of Paul or Dave."

(4) "The defendant's ex-wife testified, and I think her testimony is also particularly instructive."

Defendant analogizes these comments to the remarks that were found to be improper in *People v. Roach*, 213 Ill. App. 3d 119 (1991), *People v. Lee*, 229 Ill. App. 3d 254 (1992), and *People v. Boling*, 2014 IL App (4th) 120634.

¶ 16 In *Roach*, the court held that a prosecutor "clearly and repeatedly stated his personal feelings about the witnesses' credibility," and that most of the opinions were not based upon the record. *Roach*, 213 Ill. App. 3d at 124. Examples of the problematic comments included: " 'I just got a feeling that [a witness] was sincere' "; " 'I didn't get the feeling when [a witness] was on the witness stand that he was a liar' "; and " 'I got this feeling in my stomach that I just—I can't buy anything [a witness] says when he tells me *** that he lied to [a detective] once before.' " *Roach*, 213 Ill. App. 3d at 123.

¶ 17 In *Lee*, the court held that a prosecutor improperly expressed a personal opinion regarding the arresting officer's testimony with the following comment:

" 'Policemen aren't stupid. However, this one happened to be extremely honest in my humble opinion [defense objection overruled] *** [The officer] looked around [the courtroom] and said, I can't pick him out. That is honesty. That is not somebody who gets up and tells you a lie. He is telling you the truth. [defense objection overruled] *** The fact of the matter is the man was candid and honest.' " *Lee*, 229 Ill. App. 3d at 259.

The error was compounded when the trial court overruled the defense counsel's objections and told the jury that " 'it is appropriate argument.' " *Lee*, 229 Ill. App. 3d at 260.

¶ 18 In *Boling*, the defendant argued that the prosecutor improperly commented on the complaining witness's credibility with the following two statements:

> (1) " 'We can believe [the victim] when she says that [the defendant] put his privates on her [privates]. We can believe her when she says that [the defendant] put his privates on her bottom, as in Count II. And we can believe her when she says that he put his mouth on her [privates.]' "
>
> (2) " 'So, I do think [the victim's] statements are credible. They are believable. They are honest.' " *Boling*, 2014 IL App (4th) 120634, ¶ 125.

The court concluded that the first comment was proper, because "the prosecutor's use of the term 'we' [was] no more expressive of his personal opinion than had he used the term 'you' when speaking to the jury." *Boling*, 2014 IL App (4th) 120634, ¶ 127. However, the second remark was improper, because "in terms of whether the prosecutor invoked his own personal beliefs or opinions, 'we can' is a far cry from 'I do.' " *Boling*, 2014 IL App (4th) 120634, ¶ 127.

¶ 19 The comments here are distinguishable from *Roach* and *Lee*, where the prosecutors explicitly offered their personal "feelings" and "humble opinions" about the credibility of the witnesses. To the extent that certain comments here could be compared to the one found to be improper in *Boling*, it bears noting that other courts have found similar comments to be proper. See *Bailey*, 249 Ill. App. 3d at 83 (no error where the prosecutor repeatedly made statements such as " 'I don't think that if you look at Doug Bailey *** that he looks like the kind of person that could drink 18 beers in four hours and still drive home' "); *People v. Wright*, 246 Ill. App. 3d 761, 774 (1992) (no error where the prosecutor asserted: " 'Now I don't want to believe that is a warning shot as the defendant alleges. *** I am going to preface what I am going to say by telling you that [a witness] has no motivation to come in here and lie to you.' ").

¶ 20 Even though the prosecutor here used the words "I think" on multiple occasions, it is apparent that he was not personally vouching for his witnesses, but rather was attempting to persuade the jury that those witnesses were credible. See *People v. Rivera*, 262 Ill. App. 3d 16, 27 (1994) (it is proper for prosecutors to assert that their witnesses testified truthfully). Nor does it seem likely that the jury would have interpreted the prosecutor's comments as reflecting his personal opinions. Although "the better practice is to refrain from using sentences beginning with 'I,' " "[e]rror cannot be presumed simply because the prosecutor begins a sentence with such language." *Bailey*, 249 Ill. App. 3d at 82. Based on the foregoing, we do not deem the comments improper, and it follows that defendant has not demonstrated plain error. See *People v. Desantiago*, 365 Ill. App. 3d 855, 863 (2006) (unless there is error, there can be no plain error).

¶ 21 Defendant next complains of the following statement from the State's closing argument, which was made in the context of describing how defendant typically spent money shortly after procuring it from Fox: "And, finally, shortly thereafter we get this $900,000.00 payment on January 15th and he immediately begins spending that, too. If lawyers hadn't gotten involved, I would submit that that money would have been gone shortly thereafter." According to defendant, with this comment, the prosecutor improperly implied that "he knew something about the case that the jury did not." We disagree that the statement was objectionable on that particular basis. However, we note that the trial court sustained defense counsel's general objection to this remark and instructed the jury multiple times during the course of the trial that closing arguments were not evidence. We believe that this sufficed to cure any possible prejudice to defendant. See *Desantiago*, 365 Ill. App. 3d at 866 (sustaining an objection from the defense generally suffices to cure prejudice).

¶ 22 Defendant further submits that the prosecutor improperly called him an "animal," even though the prosecutor never used that specific word. Defendant mentions the following two remarks:

> (1) "[Rita, Paul, and Dave] were in a tough situation because of the economy. And this defendant prayed [*sic*] on them like a wolf because he knew that Rita Fox had money and he wanted to get at that money."
>
> (2) "[Defendant] prayed [*sic*] on Rita Fox to help himself to defraud her, to cheat her, to steal her money for his own purposes to keep his open [*sic*] various business ventures afloat."

The comment that defendant preyed on the members of RDP, and Fox in particular, was justified by the evidence. See *People v. Sims*, 403 Ill. App. 3d 9, 21 (2010) (isolated remark that defendant " 'was laying [*sic*] in [wait] looking and looking at an [*sic*] animal waiting for his prey' " was within the bounds of fair commentary on the evidence). Indeed, the State's theory of the case was that defendant concocted a scheme to defraud Rita at a time when she was desperate to keep her real estate venture from failing. Although the prosecutor should have refrained from comparing defendant's conduct to that of a wolf, unlike the cases that defendant cites, the prosecutor did not repeatedly use language that was unconnected to the evidence or which served only to dehumanize him and inflame the jury's passions.

¶ 23 Finally, defendant argues that the prosecutor misstated the law regarding theft with the following statement:

> "The phrase [']permanently deprive['] is part of what we have to prove here with regards to each one of these theft counts. Now, the intent to permanently deprive means just that. When you take the money, you intended [*sic*] to keep that money. Any kind of

> idea that you intended to some day pay it back or even though I said I was going to use it for this purpose, I'm going to use it for another purpose and then when I get the money, I'm going to give it back. That doesn't fly. Otherwise, any Ponzi scheme wouldn't be considered theft. And quite frankly, as the evidence with regards to this case shows, this is a scheme. This is a running fraud. Why did the defendant take this money? Because he had a bunch of business deals. He had a bunch of irons in the fire. He didn't have any other money and he needed Rita Fox's money to keep his business interests going. So when he took that money through lies, he intended to tell those lies. He intended to keep that money. Under the law, a vague interest in some day paying the money back doesn't excuse your crime. When you commit a theft, the crime is complete. There is no unringing that bell."

Defendant notes that the prosecutor similarly asserted in rebuttal argument that "[u]nder the law, the second [defendant] takes that money, the theft is completed." When defense counsel objected to that particular remark on the basis that it misstated the law, the court informed the jury that it would provide instructions as to the law that applied.

¶ 24 Defendant now argues that "[w]hile the prosecutor paid lip service to the permanent deprivation element [of theft], he immediately sought to evade that element by saying that an intent to repay the money was irrelevant." Defendant submits that although it may be "technically correct" that the theft was complete when the money was taken, "the prosecutor failed to mention that the taking must be accompanied by an intent to permanently deprive the owner of the property." He further contends that the prosecutor inflamed the jury's passion against him by using a Ponzi scheme as an example.

¶ 25 We find no error. From reviewing the entirety of the closing argument, there is no indication that the prosecutor misled the jury as to the State's obligation to prove that defendant intended to permanently deprive Fox of her property. Indeed, the prosecutor specifically told the jury that "permanently deprive" means that "[w]hen you take the money, you intended [*sic*] to keep that money." Furthermore, when defendant objected to the State's characterization of the law during rebuttal closing argument, the court informed the jury that it would instruct them as to the law. The jury was later instructed regarding the definition of "permanently deprive," and defendant does not contend that the instruction was improper or misleading. Additionally, the prosecutor's isolated remark about Ponzi schemes served merely to illustrate the State's point that defendant intended to permanently deprive Fox of her property. It was not intended to incite the jury's passions against defendant, and we do not believe that it would have had the effect of doing so.

¶ 26 To the extent that any of the prosecutor's remarks were improper, defendant has not met his burden to demonstrate plain error. We note that defendant does not actually argue that the evidence was closely balanced, which is the proper standard under the first prong of the plain-error doctrine. Instead, he submits that "the evidence regarding Fox's credibility was closely balanced." To that end, he offers numerous reasons why the jury could have refused to believe Fox, whom he contends "was the key to the entire trial." Having closely reviewed the entire record, we hold that defendant has not demonstrated plain error under either prong. Neither the closeness of the evidence nor the seriousness of any purported errors justify invoking the plain-error doctrine.

¶ 27 Defendant alternatively submits that his trial counsel was ineffective for failing to object to the aforementioned comments. For the same reasons detailed above, defendant's ineffective-

assistance-of-counsel claim fails. See *Sims*, 403 Ill. App. 3d at 22-23 (where the prosecutor's remarks did not amount to plain error, the defendant's related ineffective-assistance-of-counsel argument likewise failed).

¶ 28 (B) One-Act, One-Crime

¶ 29 Defendant next argues that his wire fraud conviction must be vacated because the State used the wire transaction that formed the basis of that count as one of the transactions in the class X theft count. While defendant acknowledges that he did not raise this issue in the trial court, he asserts that we may review the matter for second-prong plain error. The State responds that defendant's argument is barred by the invited-error doctrine and by basic contract principles. The State also submits that there was no one-act, one-crime violation.

¶ 30 As to the State's first argument, we note that some of the cases that the State cites involved defendants who pleaded guilty to criminal charges and then attempted to challenge their sentences on appeal without complying with Illinois Supreme Court Rule 604(d) (eff. Mar. 8, 2016). However, even if, as defendant contends, the cases involving Rule 604(d) are procedurally distinguishable, we agree with the State's argument that defendant cannot be heard to complain of an error that he actively invited. A defendant may not request the trial court to proceed in one manner and then argue on appeal that such course of action was erroneous. *People v. Harvey*, 211 Ill. 2d 368, 385 (2004). "To permit a defendant to use the exact ruling or action procured in the trial court as a vehicle for reversal on appeal would offend all notions of fair play *** and encourage defendants to become duplicitous." (Internal quotations and citations omitted.) *Harvey*, 211 Ill. 2d at 385. Where a defendant invites the alleged error, he is estopped from challenging the procedure, and he forfeits even plain-error review of his argument. *People v. Harding*, 2012 IL App (2d) 101011, ¶ 17.

¶ 31 In *People v. Williams*, 384 Ill. App. 3d 415, 416 (2008), following a bench trial with stipulated evidence, the defendant was found guilty of unlawful possession of cannabis with intent to deliver. The parties subsequently presented the trial court with an agreement that the defendant would receive "24 months' probation, 60 days in Douglas County jail, with no days' presentence credit." *Williams*, 384 Ill. App. 3d at 416. Defense counsel also explicitly acknowledged in court that there would be " 'no credit for previous time in custody.' " *Williams*, 384 Ill. App. 3d at 416. The defendant nevertheless argued on appeal that he was entitled to credit for time that he served prior to sentencing. *Williams*, 384 Ill. App. 3d at 416. The court held that the defendant was precluded by the invited-error doctrine from receiving the sentencing credit, emphasizing that he got the benefit of his bargain. *Williams*, 384 Ill. App. 3d at 417.

¶ 32 The circumstances here are similar. Defendant was convicted of all charges, and he faced up to a 30-year sentence of imprisonment on count I alone. Around the same time, defendant was also scheduled to be sentenced in federal court for other crimes. Faced with these circumstances, defendant agreed to concurrent sentences of imprisonment of 12 years on count I and 5 years on count VI, and he agreed that the remaining convictions would merge into count I. Significantly, this is not a situation where the record supports an inference that there was a mistake in the sentencing agreement. See, *e.g.*, *People v. Johnson*, 401 Ill. App. 3d 678, 683-84 (2010) (distinguishing *Williams* where it appeared that "there was simply a miscalculation" of sentencing credit). Instead, the parties here acknowledged and agreed in open court which counts would merge and which counts would not. Furthermore, defendant got the benefit of his bargain, as he received less than half of the prison time that he might have had he proceeded to a sentencing hearing.

¶ 33 Defendant attempts to distinguish *Williams* by arguing: "The defendant in *Williams* sought to lower his sentence based on sentencing credit he had specifically agreed to forego in the trial court. *** Conversely, vacating Count VI would not decrease the amount of time Mr. DiBenedetto will spend in prison, but would merely remove an excess conviction." Defendant's attempt to distinguish *Williams* is unavailing. By seeking to "remove an excess conviction," defendant is inherently seeking to eliminate the 5-year prison sentence that he received on count VI. Additionally, like in *Williams*, defendant is complaining of a sentencing scheme to which he explicitly agreed.

¶ 34 Defendant submits that *People v. Morgan*, 385 Ill. App. 3d 771 (2008), supports that "it would be unfair to bar him from invoking the second prong of the plain error rule in this appeal." Defendant's reliance on *Morgan* is misplaced, because that case did not involve the invited-error doctrine. The case is also factually distinguishable. Against the backdrop of established precedent that a person may only be convicted of one count of home invasion for a single entry into a residence, the court in *Morgan* determined that there was no indication in the record that the defendant had "voluntarily and knowingly pled guilty to improper excess convictions." *Morgan*, 385 Ill. App. 3d at 773, 776. The court further determined that the State's negotiation process, which resulted in legally impermissible multiple convictions, arguably "violated contract principles of good faith and fair dealing." *Morgan*, 385 Ill. App. 3d at 777. Unlike in *Morgan*, where the plea agreement was silent as to the one-act, one-crime implications of the plea, the parties in the present case specifically agreed which counts would merge and which would not. Additionally, defendant does not appear to dispute that his conduct could have constituted multiple "acts" within the meaning of the one-act, one-crime doctrine. Instead, his argument is that, in the trial court, the State did not consistently treat his conduct as constituting

multiple acts. Unlike in *Morgan*, this is not a situation where we have concerns as to whether the State negotiated with defendant in good faith or whether there was a lack of fair dealing.

¶ 35 Under these circumstances, we hold that defendant's one-act, one-crime challenge is foreclosed by the invited-error doctrine.

¶ 36 (C) Sentencing Credit

¶ 37 Defendant's final argument is that he is entitled to four additional days of credit against his sentence for time spent in custody before sentencing. The State concedes that defendant is entitled to the credit. In light of the position that the State has taken, we modify the mittimus to provide that defendant is entitled to four additional days of presentence credit.

¶ 38 In doing so, we clarify one point. As explained above, in *Williams*, 384 Ill. App. 3d at 416-17, the court held that a defendant invited any error related to his failure to receive sentencing credit by agreeing to a sentence that specifically included no credit for time served. In *Johnson*, 401 Ill. App. 3d at 683-84, we reached a contrary result where the defendant's sentencing credit may have simply been miscalculated in the parties' agreement. As part of the sentencing agreement in the present case, the parties explicitly addressed the issue of which counts would merge and which would not, foreclosing defendant's one-act, one-crime challenge. However, with respect to the issue of presentence credit, the circumstances are more similar to *Johnson* than *Williams*, because it appears that the credit was simply miscalculated due to an error in the presentence report. Accordingly, we accept the State's concession that defendant is entitled to the additional credit.

¶ 39 III. CONCLUSION

¶ 40 For the reasons stated, we affirm the judgment of the circuit court of Du Page County and modify the mittimus to provide that defendant is entitled to four additional days of presentence credit.

¶ 41 Affirmed; mittimus modified.