2018 IL App (1st) 152244-U

No. 1-15-2244

Order filed March 1, 2018

Fourth Division

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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 11719
	)	
ALTON SMITH,	)	Honorable
	)	Alfredo Maldonado,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices McBride and Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm defendant's conviction for aggravated fleeing or attempting to elude a peace officer where he failed to show the State shifted the burden of proof during cross-examination and rebuttal closing argument. Defense counsel's assertion of her own ineffectiveness in a posttrial motion did not amount to a *per se* conflict of interest.

¶ 2 Following a jury trial, defendant Alton Smith was convicted of aggravated fleeing and attempting to elude a peace officer involving disobedience of two or more traffic control devices (625 ILCS 5/11-204.1(a)(4) (West 2010)), and sentenced to 18 months' probation. On appeal,

defendant contends that the State improperly shifted the burden of proof during its cross-examination and rebuttal closing arguments, and his trial counsel created a *per se* conflict of interest by asserting her own ineffectiveness in a posttrial motion for new trial. For the following reasons, we affirm.

¶ 3 Because defendant does not challenge the sufficiency of the evidence, we recite only those facts necessary to our disposition. At trial, prior to opening statements, the court gave general instructions to the jury, including that the State had the burden of proof, and defendant had no burden and was not required to put on any evidence. During opening statements, defense counsel stated that the case was about "a bad street cop" and a "massive coverup [*sic*] for a police officer's misconduct." Counsel further stated that there was no police pursuit. Rather, the evidence would show defendant was sitting in his car with his friend, Karriem Walker, outside of his relatives' home when a police officer approached his window, broke it with his baton, and knocked him unconscious.

¶ 4 Chicago police officer Daniel Skupien testified that around 7:45 p.m. on April 1, 2011, he was in uniform in a black vest with his partner, Officer Casey Ciner, driving an unmarked squad car conducting a routine patrol on 87th Street near Wood Street. While driving, he observed a Pontiac Grand Am and another vehicle honking at each other and slamming on their brakes, engaged in an altercation. The vehicles were approximately one to two car lengths away from the squad car, and both turned left from 87th onto Hermitage Avenue. Skupien followed the vehicles onto Hermitage and activated his emergency lights to curb the vehicles. The second car pulled over, but the Pontiac "took off at a high rate of speed."

¶ 5 Skupien continued to follow the Pontiac, which drove through a stop sign at 86th Street and then turned down a "t-alley." In the alley, the Pontiac attempted to make a left turn, but had to back up in order to make the turn. The squad car still had its lights and sirens activated and was one to two car lengths away from the Pontiac. The Pontiac thereafter made a right onto 86th and drove at a high rate of speed, putting more distance between itself and the police car.

¶ 6 The Pontiac drove through stop signs at Wood Street, Honore Street, Wolcott Street, and Winchester Avenue without slowing or stopping. At Winchester, there was a 20 mile per hour speed limit, and Skupien was driving approximately 50 miles per hour following the Pontiac. On Winchester, the Pontiac pulled over and Skupien parked behind the vehicle.

¶ 7 There were two people in the Pontiac so Skupien approached the driver's side and Ciner approached the passenger side. The driver, later identified as defendant, was slumped over the wheel with both hands at his sides. Skupien yelled, "Let me see your hands. Let me see your hands," and knocked on the window, but defendant was unresponsive. After approximately 10 seconds, Skupien used his asp, a metal baton that expands to approximately 16 inches, to shatter the driver's side window. He opened the door and defendant, who was not wearing a seat belt, fell to the ground. Skupien did not throw or pull defendant out of the vehicle. After defendant fell to the ground, he had some blood on his face from where he landed on top of the glass. Defendant started screaming so Skupien ordered an ambulance for him. Skupien attempted to help defendant stand up because he had difficulty standing. Defendant had bloodshot eyes and smelled strongly of alcohol. His speech was slurred, and he was combative and yelling. While Skupien was dealing with defendant, Ciner had been on the passenger side with the vehicle's passenger.

¶ 8 Skupien never lost sight of the Pontiac during the chase. He acknowledged that at the preliminary hearing in this matter he testified that the vehicles turned onto Marshfield Avenue instead of Hermitage. Skupien got the streets confused and mistakenly said Marshfield at the preliminary hearing.

¶ 9 On cross-examination, Skupien testified that he was a tactical team officer and generally worked in an unmarked car and plain clothes, but still conducted traffic stops. He identified an "event query" document from the day in question, which showed that around 7 p.m., he assisted with a traffic stop at 80th and Bishop Streets. The event ended at 7:47 p.m. He identified another document, a unit query, which showed that the instant case was labeled a street stop at 7:47 p.m. Skupien testified that although the event at 80th and Bishop was "cleared" at 7:47 p.m., he did not clear it. The Office of Emergency Management and Communications (OEMC) can clear events, and would have cleared the event automatically after he moved on to a different event that day.

¶ 10 Skupien prepared several reports in the instant case, including an arrest report. He identified another document, which contained an abbreviated narrative of the incident because he could not fit the entire narrative into the space provided in that report. That particular report was for driving under the influence (DUI) violations, and therefore did not contain details related to aggravated fleeing and eluding. He acknowledged that there were speed bumps in the alley that defendant drove through.

¶ 11 Skupien acknowledged that at the preliminary hearing he answered "yes" when asked whether he attempted to curb a vehicle for a minor traffic stop. Ciner radioed in the event at some point, but it was not called in as a street stop. After refreshing his memory with the event

query, he acknowledged that the query indicated the instant event was a street stop and that it was involved in an automobile accident. However, he did not write up a crash report or a tactical pursuit report, which was required for any type of pursuit. He further acknowledged that unmarked vehicles are prohibited from pursuing vehicles that are engaged only in traffic offenses. He and Ciner attempted to radio for backup, but they were in a busy zone and could not get through when someone else was on the radio.

¶ 12 In the event log, Skupien gave the license plate number, a description of the vehicle, and that information was called in while the chase was ongoing. However, he acknowledged that reports did not state that he called in the pursuit. He did not cite defendant for failing to stop at the stop signs located at 86th and Wood, 86th and Wolcott, and 86th and Winchester.

¶ 13 On redirect, Skupien testified that less than two minutes elapsed between activating his lights and sirens and the Pontiac pulling over. He created an arrest report, which had more space than the DUI report, and mentioned each stop sign and other details left out of the DUI report.

¶ 14 Chicago police officer Casey Ciner corroborated Skupien's testimony of the pursuit. When the Pontiac pulled over, Ciner approached the passenger side to speak with the passenger. Ciner heard glass breaking, and Skupien later told him he used his asp to break the window. He did not see Skupien break the window. When Ciner came into proximity with defendant, he detected an odor of alcohol on defendant's breath. Defendant had bloodshot eyes, was loud, and "kind of" slurred his speech. The entire chase took two minutes or less.

¶ 15 On cross-examination, Ciner testified that the passenger complied with his orders to display his hands. Ciner conducted a field interview with the passenger, who was released, and he believed that a contact card was created, but he was uncertain. At some point, either Ciner or

Skupien radioed regarding the incident. Ciner made several attempts to radio the incident throughout the chase but the radio zone was busy. Ciner acknowledged that unmarked police cars were not supposed to start a pursuit when the only offense was a minor traffic violation, but there were "stipulations" to that rule.

¶ 16 For the defense, Chief Deputy Eric Carter testified that on August 25, 2012, he was a commander with the Chicago Police Department and received a documentation request relating to this case. In response to the request, Carter sent a letter which stated there was no pursuit package initiated for the case. When confronted with the letter he sent, he acknowledged that it stated there was "no pursuit initiated," but clarified that he mistakenly omitted the word "package" in the letter. Thus, he testified he should have read that there was "no pursuit package initiated." He noted that the officers clearly documented the pursuit in their arrest report, but acknowledged that they should have initiated a pursuit package.

¶ 17 While Carter acknowledged that it was the first time he had mentioned the omission in his letter, he testified that was because it was the first time anyone had asked him to clarify his response to the request for documentation, and he had not spoken to defendant's counsel until he testified. The letter was presented to him for the first time at trial so he did not realize there was an omission until trial. Carter testified that unmarked police vehicles could initiate pursuits, but marked vehicles should take over.

¶ 18 Stephen Grabowski, a paramedic for the Chicago Fire Department, testified that on April 1, 2011, around 7:51 p.m., he responded to a call regarding defendant's injury. After refreshing his memory with a "run sheet" report, he testified that the report indicated the type of case was a "battery victim," and defendant was the patient. Defendant had a bloody nose and an injury to his

ear, which was bandaged. The report did not indicate that defendant had a strong odor of alcohol, and indicated that his eyes and motor skills were normal. Grabowski believed defendant's speech was within the normal range.

¶ 19 On cross-examination, Grabowski acknowledged that he did not recall this case independently from any other case. The purpose of his assessment was for medical purposes, and he did not conduct a DUI assessment or make the types of observations a police officer would.

¶ 20 On redirect, Grabowski testified he did not recall whether he was close enough to smell defendant's breath, but later stated that he did not smell alcohol on defendant's breath. He transported defendant to a nearby hospital.

¶ 21 Juan Morado testified that he was retired, but was previously employed as a captain of police with the Chicago Police Department. Morado gave final approval on defendant's arrest report and charges. After reviewing the arrest report, he testified that there was only one stop for failure to stop at a stop sign. He indicated that the remainder of the failure to stop offenses were covered under the "reckless driving" citation that defendant received.

¶ 22 On cross-examination, Morado testified that the arrest report contains a summary of what occurred and his duty was to determine whether there was sufficient probable cause for the charges. The summary in the report discussed the pursuit and failure to stop at multiple stop signs.

¶ 23 Laura Espinosa testified that she was employed at OEMC as a 911 dispatcher. She did not recall whether she worked on April 1, 2011. Espinosa was trained on how to handle a pursuit as a dispatcher, and after reviewing an event query from April 1, 2011, she acknowledged that her dispatch number was listed. However, she did not recall working that day and stated

someone could have used her number. She testified the incident was radioed in as a street stop but did not recall what type of stop it was and was only reading the document.

¶ 24 On cross-examination, Espinosa acknowledged that the event query detailed a series of steps before defendant was arrested, the license plate, and that defendant had cuts to his face, and emergency services were requested.

¶ 25 Chicago police inspector Ruth Wedster testified that she was a watch commander on April 1, 2011. When a call of a pursuit comes in, as watch commander, she was supposed to take a notification and sign a piece of paper. She did not recall whether she was informed of a pursuit on the day in question, and did not know why she received a subpoena for the instant case because she was "not a part of the incident whatsoever" and no one spoke with her about it prior to trial.

¶ 26 Defendant testified that on April 1, 2011, around 7:47 p.m., he was in the driver's seat parked in front of his relatives' home on Winchester. Prior to stopping, he had dropped off a friend that was going to the Red Line. He was parked for approximately 10 to 15 seconds before an unmarked car "came speeding down Winchester" with its lights on and parked directly behind him. Officers commanded him and his passenger to show their hands, and they both complied. Defendant attempted to open his door and "before [he] knew it, [he] was out." Defendant had been knocked unconscious and later found out that Officer Skupien knocked him unconscious by "bust[ing]" his window with a baton.

¶ 27 When defendant regained consciousness, he was handcuffed and bleeding from his nose and ear. The officers were wearing vests, but were not dressed in uniform. Ciner pulled him to

his feet, and Skupien looked through his wallet. The officers had already searched him and were searching the vehicle. He did not give them permission to search him or the vehicle.

¶ 28 Defendant denied driving the route that the officers testified to or being involved in an altercation with another car. Rather, he testified he drove on 87th to Wolcott and then drove to 86th before turning onto Winchester. He denied driving through the intersections at 86th and Honore, 86th and Wood, and Hermitage and 86th. He further denied driving through an alley on Hermitage. He denied seeing the police behind him until he was parked on Winchester. He denied hearing a siren or seeing flashing lights indicating that he should pull over, and testified that he stopped at various stop signs and drove within the speed limits on all streets. During the drive, he was talking to the passenger in his vehicle. Defendant identified several photographs of the alley and various intersections where the police testified the pursuit took place.

¶ 29 The officers asked him about his gun card, but never told him why he was in custody. Defendant was sitting on the curb when the paramedics arrived, and subsequently transported him to a hospital with two uniformed officers. Defendant repeatedly asked what he was charged with but no one would speak to him. The police asked him for his personal possessions. After sitting in the hospital for two to three hours, defendant was transported to the police station.

¶ 30 On cross-examination, defendant testified that he refused treatment at the hospital. He was in the car with Karriem Walker. Following the testimony about Walker, the following colloquy ensued.

> **"**[STATE]: Is Karriem Walker here today?
>
> [THE DEFENDANT]: No.
>
> [STATE]: He was in the car when the police came and busted your window out, right?

[THE DEFENDANT]: Yes.

[STATE]: Where does Karriem Walker live?

[DEFENSE COUNSEL]: Objection, Judge, relevance.

[THE COURT]: Sidebar.

(outside the presence of jury)

[THE COURT]: What's the relevance?

[STATE]: That he has a witness in the case, he has the ability to find that witness.

[THE COURT]: Well, well, [defendant] has the right to put on a case, he has no obligation to put that witness on.

[STATE]: I know, I know.

[THE COURT]: He has elected to call witnesses right now, but I'm not going to let you go down this road.

[STATE]: I'll move, on Judge.

[THE COURT]: Okay."

¶ 31 Defendant testified that prior to driving on 87th, he had been driving for approximately 20 minutes, and had dropped off another friend. The following colloquy ensued.

"[STATE]: What was that friend's name?

[DEFENSE COUNSEL]: Objection.

[THE COURT]: Overruled.

[THE DEFENDANT]: The friend's name that I just came from?

[STATE]: That you just dropped off, yes.

[THE DEFENDANT]: Marcus.

[STATE]: Martin what?

[THE DEFENDANT]: Martin Hamilton.

[STATE]: Is Martin Hamilton here today?

[THE DEFENDANT]: No.

[DEFENSE COUNSEL]: Objection.

[THE COURT]: Overruled."

¶ 32 Prior to dropping off Hamilton, defendant was at a study group at Hamilton's house. Walker was with him the entire time. He denied having any alcohol that day. On the scene he was angry and obtained cuts and was bleeding, but he denied yelling. He acknowledged that his property aside from his cell phone had been returned to him by the police department. But defendant did not file a complaint about his missing phone. Defendant acknowledged that, as a result of this incident, he filed a federal lawsuit against Skupien, Ciner, and the Chicago Police Department. The lawsuit was pending.

¶ 33 On redirect, defense counsel noted that the State asked why Walker was not present at trial, and asked defendant whether "this issue [had] been set for trial previously?" Defendant responded "Yes," and the following ensued in a sidebar outside the jury's presence.

[THE COURT]: "I had previously sustained the defense objection on this line of question because I didn't want to go down the road of burden shifting. You are not opening that door. You opened this door, I am going to allow [the State] recross.

[DEFENSE COUNSEL]: Okay. But I just wanted -- I'm just going to state on the record that Mr. Walker had been here.

[THE COURT]: I'm telling you that door was closed, he was not allowed inquiry into this.

[DEFENSE COUNSEL]: Right. Well, okay, are you saying now that he hasn't questioned -- because he answered it.

[THE COURT]: I'm telling you right now, you ask this question –

[DEFENSE COUNSEL]: If I ask?

[THE COURT]: If you ask this question, if you open this door, because I previously sustained your objection. If you ask this question, then [the State] will get recross and I will allow him to ask the questions that he was not previously allowed to ask because now you have opened the door. Do you understand me?

[DEFENSE COUNSEL]: Well, what you're saying if I ask the question.

[THE COURT]: Yes.

[DEFENSE COUNSEL]: So right now the door is still closed?

[THE COURT]: Yes."

¶ 34 Defense counsel subsequently requested for all exhibits to be admitted into evidence. The court admitted several photographs of the scene into evidence, but denied defense counsel's request as to the event and unit query logs and arrest report.

¶ 35 During closing arguments, defense counsel argued that the pursuit did not occur and the officers' testimonies were unbelievable and inconsistent with the event query logs. Defense counsel further argued,

"The other things that brings [*sic*] in some questionability about this whole transaction is once the stop did occur, there was the passenger Karriem Walker, that was there. They had every opportunity to get a statement from Karriem Walker to find out if they really believed there was some honking of the horn that had taken place or what was

> going on to get a statement about why did he accelerate. How come? You have a passenger here, he wasn't knocked out, you know, there is a person that was there that could say, how were you traveling to get that statement, and they chose not to."

¶ 36 In rebuttal closing argument, in relevant part, the State argued, "Counsel asked you about Karriem Walker. Interesting. Why didn't the police go and ask for a statement from him? Well, I ask you this: Why didn't Karriem Walker come in here today and testify?" Defense counsel objected, and the court sustained the objection.

¶ 37 Following arguments, the court instructed the jury to disregard questions that had been sustained. Further, the court instructed the jury that closing arguments were not evidence, and that the State had the burden of proof, the burden remained with the State throughout the entire trial, and defendant was not required to prove his innocence. The court informed the jury that police reports were not admissible as evidence.

¶ 38 The jury subsequently found defendant guilty of (1) aggravated fleeing or attempting to elude a peace officer by driving 21 miles per hour over the legal speed limit, and (2) aggravated fleeing or attempting to elude a peace officer by disobeying two or more traffic devices. At a hearing on posttrial motions, defense counsel argued, *inter alia*, that she was ineffective for failing to seek to introduce into evidence the police event and unit queries under the business records exception to the rule against hearsay. The court denied the motion, merged the counts, and sentenced defendant to 18 months' probation. This appeal followed.

¶ 39 On appeal, defendant claims that the State engaged in a pattern of improper burden-shifting. He asserts that the alleged improper comments, individually or cumulatively, denied

him a fair trial. He first argues that the State shifted the burden by asking defendant on cross-examination whether Walker was present in court.

¶ 40 As an initial matter, the State argues that defendant failed to object to this question at trial, and therefore, failed to preserve the claim. The State points out that defendant also did not argue on appeal that this issue should be reviewed under the plain error doctrine. In his reply brief, defendant acknowledges that he failed to preserve the claim, but argues that that the objections to the other alleged burden-shifting comments were sufficient to overcome the State's forfeiture argument. He alternatively asks us to review the claim under both prongs of the plain error doctrine.

¶ 41 A " 'defendant must both specifically object at trial and raise the specific issue again in a posttrial motion to preserve an alleged error for review.' " *People v. Johnson*, 385 Ill. App. 3d 585, 595-96 (2008) (quoting *People v. Woods*, 214 Ill. 2d 455, 470 (2005)); see also *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007). Generally, we will honor the defendant's procedural default in the absence of a plain-error argument by defendant. *People v. Ramsey*, 239 Ill. 2d 342, 412 (2010). However, where, as here, defendant has argued plain error in his reply brief, we may review the issue for plain error. *Id.*

¶ 42 The plain-error doctrine permits a reviewing court to consider unpreserved errors when " '(1) the evidence in a criminal case is closely balanced or (2) where the error is so fundamental and of such magnitude that the accused was denied a right to a fair trial.' " *People v. Harvey*, 211 Ill. 2d 368, 387 (2004) (quoting *People v. Byron*, 164 Ill. 2d 279, 293 (1995)). Prior to addressing plain error, we typically must first determine whether a clear or obvious error occurred. *People v. Anaya*, 2017 IL App (1st) 150074 ¶ 58. However, under these particular

facts, we need not determine whether a clear or obvious error occurred, because we do not find that defendant can meet his burden under either prong of the plain error doctrine.

¶ 43 The latitude allowed on cross-examination is within the discretion of the trial court. *People v. Robinson*, 199 Ill. App. 3d 24, 34 (1989). A reviewing court will not reverse the trial court's decision concerning the scope of cross-examination unless there is a clear abuse of that discretion resulting in manifest prejudice to the defendant. *People v. Campbell*, 2012 IL App (1st) 101249, ¶ 56; *Robinson*, 199 Ill. App. 3d at 34.

¶ 44 "It is axiomatic that an accused is presumed innocent and that the burden of proof as to his guilt lies, at all times, with the State." *People v. McGee,* 2015 IL App (1st) 130367, ¶ 69. Consequently, the defendant's failure to "call, as witnesses, persons who may be aware of facts material to the question of his guilt or innocence cannot be commented upon by the State." *Id.* (citing *People v. Beller*, 54 Ill. App. 3d 1053, 1058 (1977)). Generally, it is improper for the State to comment on a defendant's failure to present witnesses when such witnesses are equally accessible to both parties. *Id.*

¶ 45 In the case at bar, defendant testified on direct examination that he was sitting in the car with his friend after having dropped off a different friend. According to defendant, they were sitting in front of his relatives' house and the police sped up to his car and ordered the two of them out of his car before knocking defendant unconscious and pulling him to the ground. On cross-examination, the prosecutor asked the name of defendant's friend and whether he was present at trial that day. After defendant answered that his friend was Walker and was not present, the prosecutor asked where Walker lived. Defense counsel objected and the court

immediately held a side bar to caution the State that defendant was not required to call witnesses and that the court would not allow the State to shift the burden.

¶ 46 Under the first prong of plain error, defendant was required to show that "the alleged error alone would tip the scales of justice against him, *i.e.*, that the verdict 'may have resulted from the error and not the evidence' properly adduced at trial." *People v. White*, 2011 IL 109689, ¶ 133 (quoting *People v. Herron*, 215 Ill. 2d 167, 178 (2005)). Here, Officers Skupien and Ciner testified that defendant was involved in an altercation with another vehicle and fled at a high rate of speed when they activated their sirens. Each officer testified that defendant continued driving, despite their attempts to pull him over, and failed to stop at numerous stop signs. Eventually, the defendant pulled over and was initially nonresponsive, and later, combative and loud. While defense counsel attempted to find inconsistencies in the officers' testimonies, the several defense witnesses (other than defendant) testified more or less that they could not recall the event and could do little more than read what was written in various event queries. Ruth Wedster, the watch commander, testified that she had "nothing whatsoever" to do with incident. Although defendant makes much of the fact that the paramedic Grabowski testified he did not smell alcohol on defendant's breath, he also testified that he had no independent recollection of the event and his testimony was based entirely on reviewing his report from the date of the incident. Given these circumstances, we cannot say that the State's question regarding whether Walker was present at trial, and not the evidence adduced at trial, was responsible for the verdict. See *White*, 2011 IL 109689, ¶ 133.

¶ 47 Under the second prong, defendant was required to show that the error was so serious that he was denied a fair trial. *Herron*, 215 Ill. 2d at 179. In addition to the evidence detailed above,

evidence that Walker was present during the incident was disclosed by defense counsel in opening statement, both Officers Skupien's and Ciner's testimony, and defendant's direct examination. Thus, the jury was aware of Walker's identity prior to defendant's cross-examination. Given the evidence against defendant, and because the trial court prevented further questions regarding Walker's absence, we cannot say the State's question constituted an error "so fundamental and of such magnitude that the accused was denied a right to a fair trial.' " *Harvey*, 211 Ill. 2d at 387 (quoting *Byron*, 164 Ill. 2d at 293). Accordingly, we find defendant failed to establish plain error.

¶ 48 Defendant next challenges the prosecutor's questions on cross-examination regarding where Walker lived and whether Hamilton was present at trial. He alleges these comments similarly were an attempt by the State to shift the burden of proof to defendant.

¶ 49 Given the latitude afforded to the trial court in matters concerning cross-examination, we do not find that there was a clear abuse of that discretion resulting in manifest prejudice to the defendant. *Campbell*, 2012 IL App (1st) 101249, ¶ 56; *Robinson*, 199 Ill. App. 3d at 34. As detailed above, defense counsel objected to the State's question about where Walker lived, and the court, outside the presence of the jury, instructed the State it would not allow any burden shifting. The prosecutor agreed to move on, and subsequently continued cross-examining defendant without further comment on Walker. With regard to Hamilton, defendant testified on direct examination that he had dropped a friend off prior to driving with Walker. On cross-examination, the State asked the friend's name and whether he was present at trial. The court overruled defense counsel's objections. However, the State did not delve further into Hamilton's whereabouts. Nor did the State explicitly comment on the absence of testimony from either

Walker or Hamilton. In light of the circumstances, we do not find that the State shifted the burden.

¶ 50 We further note that, even if the comments could be perceived to be improper, the jury was instructed both at the beginning and end of trial that the State bore the burden of proving defendant guilty beyond a reasonable doubt and that the defendant had no obligation to present evidence. Thus, we do not find that the State's questions affected the outcome of defendant's trial, as the court provided sufficient instructions as to the State's burden of proof and to preempt consideration of potentially improper comments as evidence. See *People v. Taylor,* 166 Ill. 2d 414, 438 (1995) ("The jury is presumed to follow the instructions that the court gives it.").

¶ 51 We next address defendant's contention that the State shifted the burden during rebuttal closing arguments when it stated, "Counsel asked you about Karriem Walker. Interesting. Why didn't the police go and ask for a statement from him? Well, I ask you this: Why didn't Karriem Walker come in here today and testify?"

¶ 52 As a preliminary matter, we note that it is unclear whether the proper standard for reviewing claims of prosecutorial misconduct during closing argument is *de novo* or abuse of discretion. *People v. Phillips*, 392 Ill. App. 3d 243, 275 (2009) (comparing *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007) ("Whether statements made by a prosecutor at closing argument were so egregious that they warrant a new trial is a legal issue this court reviews *de novo*."), with *People v. Blue*, 189 Ill. 2d 99, 132 (2000) ("[W]e conclude that the trial court abused its discretion" by allowing various prosecutorial remarks during closing argument)). Regardless, we need not resolve this issue at this time because the outcome is the same under either standard. *Phillips*, 392 Ill. App. 3d at 275.

¶ 53 When reviewing a prosecutor's statements during closing arguments, we consider the entire closing arguments of both the prosecutor and defense counsel, in order to place the remarks in context. *Anaya*, 2017 IL App (1st) 150074, ¶ 62 (citing *Wheeler*, 226 Ill. 2d at 122-23). A prosecutor has wide latitude during closing argument. *Wheeler*, 226 Ill. 2d at 123; *Blue*, 189 Ill. 2d at 127. "Argument and statements that are based upon the facts in evidence, or upon reasonable inferences drawn therefrom, are within the scope of closing argument." *People v. Burgess*, 2015 IL App (1st) 130657, ¶ 158 (citing *People v. Crawford*, 343 Ill. App. 3d 1050, 1058-59 (2003)).

¶ 54 Here, in the context of the entirety of closing arguments, we find that the State's comment regarding Walker's absence did not improperly shift the burden to defendant. In closing, defense counsel argued that Walker was present, and the police had "every opportunity" to obtain his statement, yet they chose not to. Thus, the prosecutor's statement was in response to defense counsel's closing argument and did not shift the burden to defendant. *McGee*, 2015 IL App (1st) 130367, ¶ 56 (during closing argument, a prosecutor may properly respond to comments made by defense counsel which clearly invite a response); see also *People v. Redd*, 173 Ill. 2d 1, 31 (1996) (holding that the burden of proof was not shifted when the prosecutor, in closing argument, referred to the defendant's right to " 'subpoena each and every witness he may want to and put anybody at all on the witness stand' "); *People v. Brown*, 172 Ill. 2d 1, 42 (1996) (holding that the jury would not interpret the prosecutor's comment as shifting the burden of proof to the defendant where the prosecutor argued that " '[i]f there was anybody in the world that could describe the relationship * * *, you can be sure the defense would have had the people up on the stand' ").

¶ 55 Moreover, the trial court sustained defense counsel's objection to the comment and later instructed the jury to disregard questions that were sustained and that closing arguments were not evidence. See *People v. Bannister*, 232 Ill. 2d 52, 91 (2008) ("any improper inferences from the prosecutor's comments were cured by the trial court sustaining defense counsel's objections and the court's instructions to the jury to disregard comments to which objections were sustained"); *People v. Harris*, 225 Ill. 2d 1, 33 (2007) (in considering the possibility of prejudice, the court noted that "defense counsel's objection to the comments was sustained and the jury was properly instructed that the arguments of counsel were not evidence that it could consider"). Additionally, the jury was instructed multiple times that the State, not defendant, had the burden of proof. Accordingly, when viewed in context of the entirety of closing arguments, we do not find that the State improperly shifted the burden to defendant.

¶ 56 Defendant claims that, even if each individual act of alleged prosecutorial misconduct did not warrant a new trial, the cumulative effect of errors warranted one. However, where, as here, "the alleged errors do not amount to reversible error on any individual issue, there generally is no cumulative error." *People v. Moore*, 358 Ill. App. 3d 683, 695 (2005). A careful review of the entire record does not disclose prosecutorial misconduct warranting a new trial.

¶ 57 Finally, defendant argues that defense counsel placed herself in a *per se* conflict of interest by asserting her own ineffectiveness in her posttrial motion.

¶ 58 Our supreme court has identified three situations causing a *per se* conflict: (i) defense counsel has a prior or contemporaneous relationship with the victim, prosecution, or entity assisting the prosecution; (ii) defense counsel contemporaneously represents a prosecution witness; and (iii) defense counsel was a former prosecutor who had been personally involved in

the defendant's prosecution. *People v. Taylor*, 237 Ill. 2d 356, 374 (2010). Defendant asks that we add a fourth situation: when defense counsel asserts her own ineffectiveness. Defendant acknowledges that this court has previously declined to delineate a fourth category of *per se* conflict in *People v. Perkins*, 408 Ill. App. 3d 752 (2011), but asks that we reconsider this position in light of contrary holdings in other districts. See, *e.g.*, *People v. Keener*, 275 Ill. App. 3d 1, 5, (1995) ("A *per se* conflict of interest arises when attorneys argue motions in which they allege their own ineffectiveness.").

¶ 59 In *Perkins*, a division of this court noted,

> "In cases where the defendant raised the ineffective assistance claim in the trial court, this court has refused to hold a *per se* conflict of interest exists any time an attorney raises his own ineffectiveness or that appointment of new counsel is required, particularly when not requested by the defendant. See, *e.g.*, *People v. Jones*, 219 Ill. App. 3d 301, 304 (1991) (and cases cited therein). A *per se* conflict of interest does not exist merely because a defense attorney's competence is questioned by his client during posttrial proceedings; rather, the underlying allegations of incompetence determine whether an actual conflict of interest exists. *People v. Davis*, 151 Ill. App. 3d 435, 443 (1986) (and cases cited therein)." *Perkins*, 408 Ill. App. 3d at 762.

¶ 60 Here, as was the case in *Perkins*, defendant did not make a *pro se* complaint against trial counsel. Instead, his trial counsel voluntarily asserted the claim on defendant's behalf. We previously concluded that this situation did not constitute a fourth situation causing a *per se* conflict, and we decline defendant's invitation to depart from our prior holding.

¶ 61 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 62 Affirmed.