FIRST DIVISION
December 17, 2012

No. 1-10-1823

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. 08 CR 11567
	)	
HAROLD BUTLER,	)	Honorable
	)	Arthur Hill,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

O R D E R

¶ 1 *Held:* Where the record shows that the prosecutor's remark in rebuttal argument was invited by defense counsel's closing argument, and defendant withdrew his *pro se* motion to reduce his sentence which included allegations of ineffective assistance of trial counsel, defendant's convictions for attempted first degree murder of a peace officer and aggravated unlawful use of a weapon are affirmed.

¶ 2 Following a jury trial, defendant Harold Butler was convicted of attempted first degree murder of a peace officer, aggravated assault and aggravated unlawful use of a weapon (UUW). The trial court merged the aggravated assault conviction with the attempted murder conviction and sentenced defendant to concurrent prison terms of 28 years for the attempted murder and 3 years for aggravated UUW. On appeal, defendant contends that he was denied his right to a fair trial because

the prosecutor made improper remarks during her rebuttal argument. Defendant also contends that the trial court failed to conduct the required inquiry into his *pro se* posttrial allegations that trial counsel rendered ineffective assistance. We affirm.

¶ 3 At trial, Chicago police officer Kevin Gleeson testified that about 11 p.m. on May 17, 2008, he was riding in an undercover police car driven by his partner, Officer George Georgopoulos, when he saw a gold Nissan Maxima drive past them with a burned out headlight. The officers pulled over the Maxima. When it stopped, defendant, who was in the passenger's seat, fled from the car and Officer Gleeson ran after him. Initially, the officer was 15 feet behind defendant, but as they ran, that distance decreased. Officer Gleeson saw defendant reach toward the front of his waistband. Defendant then turned sideways while running, pointed a small, black handgun at the officer, and Officer Gleeson heard a click. Officer Gleeson recognized the click as the sound made when someone tries to fire an empty gun. Defendant ran into an alley where Officer Gleeson tackled him and held him on the ground. As defendant lay on his back, he refused to release the gun. Officer Gleeson slammed defendant's hand on the ground a few times, forcing him to drop the gun, and pushed it out of reach. Officer Georgopoulos then arrived in the alley and helped handcuff defendant.

¶ 4 Officer Gleeson retrieved the gun and saw a bullet jammed inside the portal. He was unable to dislodge the bullet, but Sergeant Hiller arrived at the scene and safely cleared the gun. The jammed bullet had a strike mark on it, and there were four additional bullets in the gun's magazine. After defendant was transported to the police station, Officers Gleeson and Georgopoulos returned to the location where they stopped the Maxima, but the car was gone. Officer Gleeson then brought the gun to the police station where it was inventoried. On cross-examination, Officer Gleeson acknowledged that defendant never stopped running and did not fully turn around to face him. Defendant did not "square up," bend his knees, extend his arms, line up the barrel of the gun, or

focus on the officer. As defendant ran, he turned sideways and pointed the gun at Officer Gleeson, who was directly behind him. The officer further acknowledged that he did not draw his own weapon or take cover, and he did not personally call for help, though Officer Georgopoulos radioed for assistance.

¶ 5 Chicago police officer George Georgopoulos testified substantially the same as Officer Gleeson regarding the stop of the Maxima and Officer Gleeson's pursuit of defendant. Officer Georgopoulos lost sight of the men, then found them struggling on the ground in an alley. He radioed for assistance, then helped Officer Gleeson handcuff defendant. Officer Georgopoulos also testified substantially the same as Officer Gleeson regarding the recovery and clearing of the gun. He acknowledged that he did not see defendant point the gun at Officer Gleeson.

¶ 6 Chicago police sergeant Randall Hiller testified that when he arrived in the alley, Officer Gleeson handed him the gun and asked him to clear it and make it safe. The top slide that places the bullet inside the barrel of the gun was stuck in a halfway position, and a bullet was lodged at an angle inside the barrel. Sergeant Hiller removed the clip from the gun and moved the slide backwards to dislodge the bullet. The bullet's cartridge had an indentation on the left side where it had been struck by the gun's hammer which fires the round from the gun.

¶ 7 Chicago police officer Thomas Lieber testified that he and his partner, Officer Jacinta O'Driscoll, transported defendant to the police station. While walking to the squad car, defendant said he "couldn't believe the gun misfired." Officer Lieber then retrieved his police handbook from the squad car and read defendant his *Miranda* rights. After they were seated in the car, Officer Lieber asked defendant what happened. Defendant replied that he had a gun on him, and when the police pulled him over, he ran from the car. While running, he sensed the officer getting closer to him. Defendant explained that he did not want to go to jail, and he was getting tired and panicked.

Defendant said he pointed the gun at the officer and pulled the trigger, but the gun misfired. Defendant also said he had previously fired that gun, and it had never before misfired.

¶ 8 Chicago police officer Jacinta O'Driscoll testified substantially the same as Officer Lieber, adding that defendant repeatedly stated "I can't believe it misfired" at least six times while shaking his head as they stood outside the squad car while Officer Lieber retrieved his police handbook. Officer O'Driscoll's testimony regarding defendant's inculpatory statement describing his actions was also substantially the same as Officer Lieber's testimony.

¶ 9 Illinois State Police forensic scientist Kurt Zielinski testified that following an examination and testing of the gun recovered from defendant, he concluded that the firearm was in operating condition. He also found that the firing pin impression on the bullet that had been lodged inside the barrel of the gun was made by that gun. Zielinski testified that there were several possible reasons the bullet did not fire from the gun, including defective ammunition, improper seating of the bullet in the chamber, and incorrect positioning of the slide.

¶ 10 The jury found defendant guilty of attempted first degree murder of a peace officer, aggravated assault and aggravated UUW. The trial court merged the aggravated assault charge with the attempted murder charge, then sentenced defendant to concurrent prison terms of 28 years for the attempted murder and 3 years for the aggravated UUW.

¶ 11 Defense counsel filed a notice of appeal the day after sentencing. Three weeks later, defendant filed a timely *pro se* "Motion for Reduction of Sentence" in which he challenged the evidence, argued that he never pointed a gun at the officer, and asked that his conviction be vacated or reduced, noting that he had no adult criminal history. Defendant also stated that his trial counsel did not fight for him, was "[n]o good," and committed "misrepresentation." Defendant stated that he and counsel were "never on the same page," defendant had no "say so," counsel filed a motion defendant did not want filed, and when defendant wanted to do something, counsel told him to

represent himself and walked away. He also claimed that counsel hung up on him on the telephone. Defendant asked that his "appeal be granted" with a retrial.

¶ 12 Initially, the trial court found that it lacked jurisdiction to consider defendant's motion because a notice of appeal had already been filed, and it placed the case off call. The following month, however, the court found it was mistaken because defendant's *pro se* motion was timely filed, and it placed the case back on call. The court expressly stated that the allegations in defendant's *pro se* motion were actually challenging the evidence, but because it was entitled as a motion to reconsider the sentence, the court would "deal with it in that vein." On the next court date, trial counsel appeared representing defendant and informed the court that he had filed and argued a motion to reconsider the sentence on the same day defendant was sentenced. On June 1, 2010, trial counsel presented the court with a copy of his motion to reconsider sentence which was incorrectly stamped as being filed December 10, 2010. Defendant was sentenced on December 10, 2009. Counsel said that the court heard the motion on December 11, 2009, but there was no record of that hearing with the clerk's office or court reporter's office.

¶ 13 On June 4, 2010, the trial court held a hearing on defendant's motion to reduce sentence. The court noted that counsel had previously filed a motion, but there was no record of the ruling on that motion. Counsel informed the court that he was resting on his original written motion. The court stated that because defendant also filed a *pro se* motion, its intent was to ask defendant if he had anything he wanted to say. The court asked trial counsel for his opinion about that. Counsel noted that he had been reappointed to represent defendant regarding the motion, and said that if defendant chose to proceed with his *pro se* motion, it would be against counsel's advice because counsel believed his motion encapsulated the issues. Counsel informed the court that defendant said he was unaware of counsel's efforts on his behalf, which is why defendant filed a "duplicative" *pro se* motion. Counsel stated that defendant wanted to withdraw his *pro se* motion and rest on counsel's

motion to reconsider sentence. The court then asked defendant if he agreed with what counsel said. Defendant said he did not know counsel had filed a motion, and he confirmed that he was withdrawing his *pro se* motion. The court noted that defendant had "officially withdrawn his pro se motion for reduction of sentence" further noting "[t]hat's the title of it as it is here in the Court file." The court denied counsel's motion to reconsider the sentence.

¶ 14 On appeal, defendant first contends that he was denied his right to a fair trial because the prosecutor made improper remarks during her rebuttal argument. Defendant claims that the prosecutor's comment that people were getting shot "every day" by shooters who did not "square up" or line up their shots suggested to the jury that, contrary to his defense, it could find defendant had the specific intent to kill even though he did not stop, "square up," or aim his gun at Officer Gleeson before pulling the trigger. Defendant argues that the remark lacked an evidentiary basis because it was not based on the evidence in this case, but instead, was "a notion concocted by the prosecutor out of thin air." He further claims the comment signaled to the jury that it could consider the details of shootings in other cases to determine his guilt.

¶ 15 The State argues that the prosecutor's comment was proper because it was invited by defense counsel's closing argument. The State further argues that defendant was not prejudiced by the comment because it did not affect the outcome of the trial where the evidence supporting defendant's conviction was overwhelming.

¶ 16 As a threshold matter, the parties note that this court has previously recognized a conflict regarding the appropriate standard of review for issues related to closing arguments. See *People v. Cosmano*, 2011 IL App (1st) 101196, ¶¶ 52-53. In *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007), our supreme court held that the determination of whether a prosecutor's remarks were so egregious that a new trial is required is a question of law subject to *de novo* review. This court pointed out that the *Wheeler* court also cited with approval *People v. Blue*, 189 Ill. 2d 99 (2000), where the

prosecutor's closing remarks were reviewed under the abuse of discretion standard. *Cosmano*, 2011 IL App (1st) 101196, ¶ 52. In this case, defendant urges us to apply the *de novo* standard of review, but argues that the result would be the same under either standard.

¶ 17 As we explained in *Cosmano*, this division of this district has declined to determine the appropriate standard of review where the result would be the same regardless of which standard was applied. *Cosmano*, 2011 IL App (1st) 101196, ¶ 53. In this case, we would reach the same result under either standard of review. We, therefore, continue to adhere to our decision to refrain from discussing the applicable standard of review until the conflict is resolved by our supreme court. *Cosmano*, 2011 IL App (1st) 101196, ¶ 53.

¶ 18 A prosecutor is given considerable latitude in making a closing argument and is allowed to comment on the evidence and any reasonable inferences that can be drawn therefrom. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). Comments made during closing argument must be reviewed in context and in consideration of the entire closing argument of both the State and defendant. *People v. Ceja*, 204 Ill. 2d 332, 357 (2003). Comments that are invited or provoked by defense counsel's argument are not improper. *Glasper*, 234 Ill. 2d at 204. Defendant's conviction will not be disturbed unless he demonstrates that the challenged remarks were so prejudicial that he was denied real justice or that the verdict would have been different absent the remarks. *People v. Runge*, 234 Ill. 2d 68, 142 (2009). Although a prosecutor cannot argue assumptions or facts that are not contained in the record (*Glasper*, 234 Ill. 2d at 204), she may discuss subjects of common sense or common experience (*Runge*, 234 Ill. 2d at 146). Our supreme court has acknowledged that because jurors do not forgo their common sense when they serve on the jury, it seems proper for prosecutors to present arguments in such terms and make appeals thereto. *Runge*, 234 Ill. 2d at 146.

¶ 19 Here, we find that the prosecutor's comment that people are "getting shot every day" by shooters who do not "square off" or point their weapons was not improper. When considering the

challenged remark in context, and in light of the entire arguments of the State and defendant, we find that it was a direct response to defense counsel's argument. The record shows that in his closing argument, defense counsel quoted Officer Gleeson's testimony on cross-examination as follows:

" 'He didn't stop?'

'He didn't stop.'

'He didn't square up?'

'He did not square up.'

'He didn't bend his knees?'

'No.'

'He didn't extend his arms?'

'No.'

'He didn't line up the barrel of the gun?'

'No.'

'He didn't focus?'

'No.'

* * *

'Did you ever see him turn full and square up and try to shoot at you?'

'No.' "

Defense counsel then argued that the circumstantial evidence the State wanted the jury to rely on did not coincide with Officer Gleeson's testimony that defendant "never turned, he never squared up." Based on this testimony, counsel argued that the evidence did not show that defendant had an intent to kill the officer.

¶ 20 In rebuttal, the prosecutor argued that Officer Gleeson's testimony that defendant drew a weapon, turned, pointed it at him and fired established all the elements of attempted murder. The prosecutor asserted that a gunman does not have to "square off." She then remarked:

> "I'm sure you guys see the news every day, people getting shot every day. Are they squaring off?
>
> * * *
>
> Are they pointing? No.
>
> Use your common sense. This guy was trying to get away from Officer Gleeson, and he was going to get away from him by shooting him."

¶ 21 The record thus reveals that the prosecutor's remark was not concocted "out of thin air." The comment was invited by defense counsel's lengthy quotation of Officer Gleeson's testimony and counsel's argument that the fact that defendant did not set himself in a stable position and take a focused aim at the officer showed he had no intent to kill. Furthermore, we reject defendant's claim that the comment suggested to the jury that it could consider the details of shootings in other cases to decide his guilt. The prosecutor did not discuss any other cases, and no such suggestion was made. Instead, the prosecutor expressly urged the jury to rely on its common sense and knowledge that, in general, gunmen do not position themselves and take aim at their victims. The prosecutor asked the jury to rely on its common sense to find that defendant intentionally fired his gun at Officer Gleeson in an attempt to flee. As acknowledged by our supreme court in *Runge*, such arguments are proper.

¶ 22 Defendant next contends that the trial court failed to conduct the required inquiry into his *pro se* posttrial allegations, raised in his motion to reduce his sentence, that trial counsel rendered ineffective assistance. Defendant argues that the trial court and defense counsel convinced him to

withdraw his *pro se* motion without explaining that by doing so, he was surrendering his right to have the court conduct an inquiry into his claims against counsel. Defendant acknowledges that he withdrew his motion, and that under some circumstances, such action would render his claims waived. He asserts, however, that *pro se* posttrial claims of ineffective assistance of counsel can never be waived, and that his withdrawal of his motion was not voluntary or knowing. Defendant asks this court to remand his case for an inquiry into his claims of ineffective assistance of counsel.

¶ 23 The State argues that defendant waived his claims against counsel when the trial court attempted to conduct the proper inquiry, but defendant then withdrew his motion. The State asserts that it was defendant who stopped the inquiry from occurring, and therefore, under the doctrine of invited error, defendant cannot now claim that the trial court erred by not conducting an inquiry. The State also argues that there is no indication in the record that either the trial court or defense counsel persuaded or coerced defendant to withdraw his motion.

¶ 24 Where defendant raises a *pro se* posttrial claim that trial counsel rendered ineffective assistance, the trial court should examine the factual basis of the claim to determine if it has any merit. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). The court can evaluate defendant's *pro se* claim by either discussing the allegations with defendant and asking for more specific details, questioning trial counsel regarding the facts and circumstances surrounding defendant's allegations, or relying on its own knowledge of counsel's performance at trial and determining whether the allegations are facially insufficient. *Id.* at 78-79. If the court finds that the claims reveal possible neglect of the case, then it should appoint new counsel to represent defendant at a hearing on his *pro se* motion. *Id.* at 78. However, if the trial court finds that defendant's allegations are without merit or pertain only to matters of trial strategy, new counsel should not be appointed and the court may deny the *pro se* motion. *Id.* On review, the appellate court determines whether the trial court's inquiry into defendant's *pro se* claim was adequate. *Id.*

¶ 25 Although the pleading requirements for raising a *pro se* posttrial claim of ineffective assistance of counsel are relaxed, defendant is still required to meet the minimum requirements necessary to trigger a preliminary inquiry by the trial court. *People v. Bobo*, 375 Ill. App. 3d 966, 985 (2007). To initiate the trial court's inquiry, defendant must raise a specific claim supported by facts, and bald allegations that counsel rendered ineffective assistance are not sufficient. *People v. Radford*, 359 Ill. App. 3d 411, 418 (2005). The trial court does not have to inquire into any claims that are conclusory, misleading, legally immaterial, or fail to raise a colorable claim of ineffective assistance of counsel. *Bobo*, 375 Ill. App. 3d at 985, citing *People v. Johnson*, 159 Ill. 2d 97, 126 (1994).

¶ 26 Under the unique circumstances in this case, we find that the trial court did not err when it did not conduct an inquiry into defendant's *pro se* claims that trial counsel rendered ineffective assistance. At the hearing on the motion to reconsider the sentence, defendant withdrew his *pro se* motion, which contained his allegations against counsel. Once defendant withdrew his *pro se* motion, his claims of ineffective assistance of counsel were no longer before the court. Therefore, the court had no obligation to make an inquiry into those claims.

¶ 27 Defendant's arguments that the trial court and defense counsel convinced him to withdraw his *pro se* motion, and that his withdrawal was not done voluntarily or knowingly, are belied by the record. At the motion hearing, the following exchange occurred:

> "[DEFENSE COUNSEL]: Judge, the Defendant represents that he was unaware of our efforts on his behalf. That's the reason for the duplicative nature of the motion that he has filed. He would like to withdraw that, is my understanding, Judge, and rest on the Public Defender's filed motion to reconsider. * * *

> THE COURT: Mr. Butler, is that correct, you filed something on your own, a pro se motion for reduction of sentence? I think that was the title of it. Are you at this point, because you didn't know [defense counsel] --
>
> THE DEFENDANT: He had filed it.
>
> THE COURT: Based on what [defense counsel] has done here, are you withdrawing now your pro se motion for reduction of sentence?
>
> THE DEFENDANT: Yes."

There is no indication in the record that defense counsel or the trial court coerced, persuaded or encouraged defendant to withdraw his *pro se* motion. Defendant confirmed for the trial court that he was unaware that counsel had filed a motion to reconsider the sentence, and based on counsel's filing, he was withdrawing his *pro se* motion. The record thus shows that defendant's decision to withdraw his *pro se* motion was voluntary. Similarly, the record shows that defendant was aware that by withdrawing his *pro se* motion, the court would proceed on defense counsel's motion to reconsider the sentence. Defendant therefore knew that the numerous allegations raised in his *pro se* motion, including his claims of ineffective assistance of counsel, would not be addressed by the court. Consequently, we find that defendant's decision to withdraw his *pro se* motion was also knowingly made.

¶ 28 Finally, we agree with the State that, under the doctrine of invited error, defendant cannot now claim that the trial court erred when it failed to inquire into his claims against counsel after defendant withdrew those allegations by withdrawing his *pro se* motion. Our supreme court has stated that a defendant's agreement to a procedure that he later challenges on appeal "goes beyond mere waiver" and is sometimes referred to as estoppel. *People v. Harvey*, 211 Ill. 2d 368, 385

(2004), citing *People v. Villarreal*, 198 Ill. 2d 209, 227 (2001). It is well settled that " 'under the doctrine of invited error, an accused may not request to proceed in one manner and then later contend on appeal that the course of action was in error.' " *Id.*, citing *People v. Carter*, 208 Ill. 2d 309, 319 (2003). "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' (*Villarreal*, 198 Ill. 2d at 227), and 'encourage defendants to become duplicitous' ([*People v.*] *Sparks*, 314 Ill. App. 3d [268,] 272 [2000])." *Harvey*, 211 Ill. 2d at 385. In this case, it was defendant who voluntarily withdrew his *pro se* motion to reduce his sentence, which included his allegations of ineffective assistance of counsel. The trial court granted defendant's request and allowed him to withdraw his *pro se* motion and proceed on defense counsel's motion. Accordingly, defendant cannot now contend the court erred because it did not address his withdrawn claims.

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

¶ 30 Affirmed.