2012 IL App (1st) 102536-U

THIRD DIVISION
Order filed September 12, 2012
Modified upon denial of rehearing October 24, 2012

No. 1-10-2536

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	OF COOK COUNTY
	)	
	)	
v.	)	No. 06 CR 1635
	)	
LAMONT BROWN,	)	
	)	HONORABLE
Defendant-Appellant.	)	THOMAS JOSEPH HENNELLY,
	)	JUDGE PRESIDING.

JUSTICE STEELE delivered the judgment of the court.
Presiding Justice Salone and Justice Neville concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant was not prejudiced by statements made during the State's closing argument at trial. The trial court properly instructed the jury that the State had the right to argue the evidence during closing. Finally, the mittimus should be corrected to include an additional day of sentencing credit. The circuit court's judgment is affirmed and the mittimus is amended.

¶ 2 Defendant, Lamont Brown (Brown), was tried by a jury which found him guilty of the first degree murder of Melody Hoskins (Hoskins) and personally discharging a firearm that

proximately caused death. The circuit court sentenced Brown to 81 years' imprisonment: 56 years for first degree murder and 25 additional years for a firearm enhancement.

¶ 3 BACKGROUND

¶ 4 On December 17, 2005, Hoskins went to Rodney's Lounge located at 71st and Michigan Avenue in Chicago around 11 p.m. She left the lounge with a friend and proceeded to her car, which was parked across the street. At that time, witnesses Camillah Eagles (Eagles) and Russha Harris (Harris) left a restaurant in the vicinity of the lounge. Eagles and Harris watched Brown get out of a red Honda Accord across the street from the lounge and walk towards Hoskins. According to Eagles and Harris, Brown then shot Hoskins multiple times. After the shooting, Brown calmly walked back to his car and told Eagles, "I suggest you get the fuck away from here." Eagles responded, "Okay, don't shoot me." She then called 911. Sergeant Rodney Hill (Hill) responded to the 911 call and found Hoskins lying on her back in the street, struggling to breathe. Hoskins told Hill, "Lamont shot me. Why did Lamont shoot me?" Hill asked Hoskins for clarification and she said, "Lamont Brown." The paramedics arrived and placed her in an ambulance. Hoskins ultimately succumbed to her injuries and died at the hospital that night.

¶ 5 Eagles testified that she saw Brown shoot Hoskins as Hoskins crossed the street coming from Rodney's. Brown continued to shoot her as she fell to the ground. Eagles testified that Brown was wearing dark clothing, specifically an outer coat with a hoody, and that she saw Brown's face as he walked away from Hoskins. Eagles further testified that Brown told her she "should get the fuck away from here." Eagles identified Brown in a photo array and later in a line-up.

¶ 6 Harris testified that on December 17, 2005, she accompanied Eagles to Baba's Restaurant on 71st and Michigan Avenue in Chicago. After leaving the restaurant, she saw Brown exit a 1988 red Honda Accord, wearing a black hoody and overcoat. She testified that they exchanged words about the location of a cab stand, and then Brown walked diagonally across the street as Hoskins and her friend came out of Rodney's Lounge. Harris testified Brown revealed a silver gun and shot Hoskins, and then walked back to his car. As he walked back to his car, he passed Russha and said "I suggest you get the F out of here." She observed Brown drive off, but she was unable to read his license plate number, as there was a cover over the plate. Harris did not identify anyone from a photo array she was presented with; however, she did identify Brown in a line-up and again in court.

¶ 7 During closing argument, the prosecutor reviewed the testimony of witnesses Eagles and Harris. The prosecutor stated:

> "THE STATE [Assistant State's Attorney]: Russha told you that she identified the defendant Lamont Brown in a lineup and it was the defendant who performed the acts which caused the death. Sure enough, that's who she identified, Lamont Brown, both in the lineup and in court.
>
> How else do we know it was Lamont Brown who performed the acts which caused the death of Melody Hoskins? Look at Eagles. Again, she identified that same red Honda, the defendant's car. She identified that same location, the streetlight, she said how well lit it was and she had gotten food from Baba's.
>
> She saw where the young lady was trying to go around her car in order to open up

the side, the driver's side, and she told you what direction Melody's car was parked. Sure enough, this photograph which is physical evidence supports what Eagles told you.

She also told you that she heard anywhere from three to five shots, and when you look at this photograph, you can notice the markings that the evidence technicians made with respect to the fired cartridge casings and one for the fired bullet, again, supporting what Eagles told you.

Eagles looked at the diagram and on that diagram she described where Baba's was, where Rodney's was, and how she was able to see and how calmly the defendant walked after he had shot and killed Melody Hoskins and how calmly he walked back to the car and how calmly he told her, you better get out.

And Eagles, less than a week later, viewed a photo array and identified Lamont Brown as the person who shot and killed Melody Hoskins. She viewed a lineup identifying Lamont Brown. And in court, Lamont Brown as the shooter of Melody Hoskins on December 17th of 2005.

Again, the red Honda found in front of the defendant's house. Do you recall what the detectives said with respect to the identification of Lamont Brown? What address was on his identification? 5548 South Princeton, the exact address which was across the street from where this car came from. When the detectives went to that house to get the car keys, the girlfriend didn't know where they were and didn't really look. It's because it was the defendant's car.

Also, we know that this is the car he was driving because of the fingerprints,

because of that fingerprint on the rear driver's side mirror which came back to Lamont Brown. That blacked hooded sweatshirt, identified by Eagles, identified by Russha-

MR. MOFFETT [defense attorney]: Objection.

THE COURT: Again, ladies and gentlemen, you're been instructed what the lawyers say are not evidence. You may rely on your collective memory of the evidence. Counsel may argue.

THE STATE: -and found in the defendant's house. Not only just found and recovered in the defendant's house, ladies and gentlemen, but positive for gunshot residue. That whoever was wearing this sweatshirt was in the environment of a discharged firearm. Well, there's no question of whoever was wearing this hooded sweatshirt. This is the sweatshirt, the dark hooded sweatshirt that both Eagles and Russha saw Lamont Brown wearing. And that's supported by the fact that it was, in fact positive for gunshot residue.***"

¶ 8 The jury found Brown guilty of the first degree murder of Hoskins with personally discharging a firearm that caused her death. On July 22, 2010, Brown was sentenced to 56 years' imprisonment, with an additional 25 years' imprisonment as a firearm enhancement. The court denied Brown's motion to reconsider the sentence on August 19, 2010. This timely appeal was filed on August 20, 2010.

¶ 9 DISCUSSION

¶ 10 First, Brown asserts that the prosecutor misstated the evidence in the closing argument, and as a result, he was substantially prejudiced. " 'A criminal defendant, whether guilty or

innocent, is entitled to a fair, orderly, and impartial trial***.' " *People v. Blue*, 189 Ill. 2d 99, 138 (2000) (quoting *People v. Bull*, 185 Ill. 2d 179, 214 (1998)). The State counters that the comments in the closing argument were properly based on the evidence. We agree.

¶ 11 A State's closing remarks will lead to reversal only if the prosecutor's remarks created "substantial prejudice." *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007); *People v. Johnson*, 208 Ill. 2d 53, 64 (2003); *People v. Easley*, 148 Ill. 2d 281, 332 (1992). Substantial prejudice occurs "if the improper remarks constituted a material factor in a defendant's conviction." *Wheeler*, 226 Ill. 2d at 123. When reviewing claims of prosecutorial misconduct in closing argument, a reviewing court will consider the entire closing arguments of both the prosecutor and the defense attorney, in order to place the remarks in context. *Wheeler*, 226 Ill. 2d at 122; *Johnson*, 208 Ill. 2d at 113. A prosecutor has wide latitude during closing argument. *Wheeler*, 226 Ill. 2d at 123; *Blue*, 189 Ill. 2d at 127. "In closing, the prosecutor may comment on the evidence and any fair, reasonable inferences it yields ***." *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). Statements will not be held improper if they were provoked or invited by the defense counsel's argument." *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). For example, in *Glasper*, the defendant argued that the prosecutor had "shifted the burden of proof to defendant" when, in response to defendant's claim of a coerced confession, the prosecutor had stated in rebuttal, " 'Where's the evidence of that?' " *Glasper*, 234 Ill. 2d at 212. Our supreme court held that the comment did not shift the burden of proof to defendant, but that it merely "pointed out that no evidence existed in this case to support defendant's theory" and that it was "invited by defense counsel's argument." *Glasper*, 234 Ill. 2d at 212.

¶ 12 It is not clear whether the appropriate standard of review for this issue is *de novo* or abuse of discretion, based upon an apparent conflict between *Wheeler* and *Blue*. See *People v. Land*, 2011 IL App (1st) 101048, ¶¶ 148-49 (and cases cited therein). We need not address the conflict in detail, as Brown's objections fail under either standard.

¶ 13 Here, the State's remarks (as recited in ¶ 7 herein) did not constitute a material factor in Brown's conviction. Even if they did, the comments were based on the evidence presented at trial. Brown argues that the State fabricated testimony to link the gun-residue laced sweatshirt to Brown. We do not find Brown's contention that the prosecution fabricated testimony to be accurate. A review of the State's closing argument in its entirety reveals the prosecutor properly argued the evidence. The trial court correctly stated such while overruling Brown's objection.

¶ 14 Specifically, Brown first argues that during the closing argument, the prosecutor erroneously claimed that witnesses Eagles and Harris identified a sweatshirt found in Brown's girlfriend's apartment, without actually having asked Eagles and Harris to identify the sweatshirt. The State contends that the prosecutor properly argued the evidence and drew reasonable inferences that Eagles and Harris identified the sweatshirt. The State did not have Eagles or Harris make an in-court identification of the sweatshirt. However, the record reveals both witnesses described the sweatshirt during the trial. Eagles testified Brown appeared to be wearing "dark clothing, *** an outer coat with a hoody." Harris testified about Brown wearing a dark coat with a hood. Further, both Eagles and Harris identified Lamont Brown as the person whom they saw shoot Melody Hoskins, while wearing dark clothing with a hood. The police recovered a black hoody with gunshot residue from Brown's apartment. The State was free to

utilize this information in its closing argument. During closing arguments, a prosecutor may comment n the evidence and any fair, reasonable inferences it yields. *People v. Jackson*, 2012 IL App (1st) 102035, ¶ 18. It was within the State's discretion to argue that the outer coat with a hoody Eagles referred to was the same "dark clothing with a hood" Harris testified about, and still the same hoody recovered from Brown's home. The State was not required to conduct an in-court identification of the sweatshirt, as Brown implies.

¶ 15 In *Blue,* the supreme court found a new trial was necessary when "the trial court allowed the guilty verdict to rest on considerations other than the evidence alone." *Blue*, 189 Ill. 2d at 140 (and discussion therein). Here, the guilty verdict does not rest on considerations other than the evidence. After the defense's objection, the trial court correctly instructed the jury that the statements were not evidence:

> "Jury understands what counsel says is not evidence. They are to rely on their collective memory form the evidence. Counsel may argue. *** Again, ladies and gentlemen, you've been instructed what the lawyers say are not evidence. You may rely on your collective memory of the evidence."

Indeed, the court instructed the jury of this on more than one occasion.

¶ 16 Assuming *arguendo* the State's closing argument contained an improper misstatement of the evidence, we find that those comments are not likely to have influenced the outcome of the trial given the totality of the record before us, and especially when viewed in the context of both the State's and Brown's closing arguments. As such, we find that the comments complained of were not a material factor in Brown's conviction.

¶ 17 Second, Brown argues that the prosecutor inferred during the state's rebuttal that other inadmissible evidence of guilt existed that the jury did not hear. The State counters that reasonable inferences were properly drawn from comments based on the evidence presented at trial. However, Brown did not preserve the issue for appeal when he failed to object at trial and failed to raise this point in his posttrial motion. The absence of both a trial objection and a posttrial motion constitutes forfeiture. Therefore, this court cannot review the issue. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988).

¶ 18 In a petition for rehearing, which we have denied, Brown again argues that this court should review his claim for plain error. The plain-error doctrine provides a limited exception to the sanction of forfeiture. *People v. Herron*, 215 Ill. 2d 167, 176-77 (2005). The plain-error doctrine allows this court to consider unpreserved errors where (1) the evidence is close, regardless of the seriousness of the error, or (2) where the error is so fundamental that the accused was denied a fair trial. *Id*. at 186-87. In order for this court to review Brown's forfeited claim under the plain-error analysis, there must first be an error. *People v. Sargent*, 239 Ill. 2d 166, 189-90 (2010). In its closing argument, the State argued:

> "What you don't know and counsel alluded to is what was going on in the past years with this defendant. You know she had a relationship with this defendant. That's the one mistake you know about. But other than that, you don't know much. And you don't know what happened between the two of them."

Here, we find that the State did not infer there was evidence of guilt that the jury did not hear. The State informed the jury not to speculate as to what could have occurred between the victim

and Brown. In finding no error, we cannot conduct a plain-error analysis, as there must be an error to analyze. For similar reasons, we do not find that defense counsel was ineffective for not objecting to a non-error, as without error there was no prejudice. If a reviewing court finds that the defendant claiming ineffective assistance of counsel did not suffer prejudice, it need not decide whether counsel's performance was constitutionally deficient. *People v. Buss*, 187 Ill. 2d 144, 213 (1999).

¶ 19 Third, both Brown and the State agree that the mittimus should be amended to reflect 1,672 days of incarceration instead of 1,671 days, which did not include the date of sentencing. See *People v. Williams*, 239 Ill. 2d 503, 508-10 (2011). We agree.

¶ 20 CONCLUSION

¶ 21 In sum, we find that the trial court properly instructed the jury that the State may argue the evidence during its closing argument. In considering the State's closing argument as a whole, the manner in which the evidence was argued during the State's closing argument did not constitute a material factor in Brown's conviction. Also, we find that the State was merely drawing permissible inferences from the evidence presented at trial. Lastly, we agree that the mittimus should be amended to reflect the date of sentencing, bringing the sum to 1,672 days for the purpose of sentencing credit.

¶ 22 For the reasons stated herein, we affirm the judgment of the circuit court of Cook County and revise the mittimus to reflect 1,672 days of incarceration.

¶ 23 Affirmed; mittimus amended.