FIFTH DIVISION
JUNE 14, 2013

No. 1-11-1258

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. 10 CR 396
	)	
RICHARD CHOYCE,	)	Honorable
	)	Jorge Luis Alonso.
Defendant-Appellant.	)	Judge Presiding.

JUSTICE TAYLOR delivered the judgment of the court.
Presiding Justice McBride and Justice Howse concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Defendant's claim that State engaged in prosecutorial misconduct during closing and rebuttal arguments rejected; forfeiture upheld; judgment on convictions for aggravated battery and resisting or obstructing a police officer affirmed.

¶ 2 Following a jury trial, defendant Richard Choyce was convicted of aggravated battery of a peace officer and felony resisting or obstructing a police officer, then sentenced to concurrent

terms of 18 months' probation. On appeal, defendant contends that he was denied his right to a fair trial based on prosecutorial misconduct during closing and rebuttal arguments.

¶ 3 Defendant was charged with one count of felony resisting or obstructing a peace officer in that he knowingly resisted or obstructed the performance of Chicago police officer Kevin Prendkowski on November 25, 2009, and proximately caused an injury to the officer. He was also charged with two counts of aggravated battery of the police officer, one predicated on causing bodily harm and the other on making physical contact of an insulting or provoking nature.

¶ 4 At trial, Chicago police officer Prendkowski testified that at 11 a.m. on November 25, 2009, he was in uniform and patrolling in a marked squad car in the area of 6101 South Nashville Avenue in Chicago. There, he observed defendant, who was driving a Chevy vehicle, ignore a stop sign. Officer Prendkowski followed defendant and saw him fail to honor two more stop signs. The officer ran the license plate of the car defendant was driving and learned that it was assigned to a Jeep in the far suburbs, and had been reported missing or lost. After observing the third traffic violation, Officer Prendkowski activated his emergency lights and siren. Defendant then ran a fourth stop sign, stopped his vehicle in the middle of the street, and the officer pulled alongside him. The officer told defendant, through a partly open window, to stop the vehicle, but as the officer began to exit his vehicle, defendant reversed into a driveway.

¶ 5 Officer Prendkowski moved his vehicle to block defendant in the driveway, then exited his car and asked defendant for his driver's license and proof of insurance. When defendant responded that he did not have them, and was trying to get home, Officer Prendkowski asked defendant to exit his vehicle and told him he was going to place him under arrest. Defendant again told him that he wanted to go home and tried to drive away, but he could not do so because the officer's car was blocking the driveway. Defendant then put his car in reverse, and the officer

grabbed defendant's arm and tried to open the car door, but it would not open. As defendant pushed the officer's arm away, the officer kept holding onto defendant and was eventually able to unlock the door, but it still would not open.

¶ 6 During this struggle, Officer Prendkowski repeatedly told defendant to exit the car. Defendant, however, turned his vehicle to the left, and drove forward, hitting the officer, who fell down while still holding onto defendant's arm. Defendant continued to drive as the officer held onto him, dragging the officer 50 feet to the front of his home. At this point, Officer Prendkowski was able to stand up, and struck defendant with a closed fist. He then reached inside the car, placed it in park, and pulled out the ignition key. He also handcuffed defendant's left arm, and when he asked for his other arm, defendant twisted his arm away. The officer eventually managed to handcuff defendant's other arm, and tried to open the driver's side door. Defendant told him that it did not open, so he told defendant to exit through the passenger door.

¶ 7 As defendant moved toward the passenger side of the car, the officer began to go around to that door, but defendant locked the door, went back to the driver's side, and tried to roll up the window. Officer Prendkowski reached inside the car to stop defendant, and ordered him to move to the passenger side of the car. Defendant then unlocked the door, and the officer took him into custody. The officer issued defendant tickets for failing to produce a driver's license and insurance, and one for disobeying a stop sign.

¶ 8 Officer Prendkowski further testified that after the incident, he was transported to the hospital for soreness to his upper arms and left leg and foot. A couple of days later, he had bruises on his arms, and a couple of bumps and bruises on his left leg. He was also in pain explaining that his left hand was stiff and sore from trying to hold onto defendant's left arm.

¶ 9 Chicago police officer Glen Oskvarek testified that he was a sniper on the SWAT team, but was on leave of absence due to a 2005 vehicle accident. At 11 a.m. on November 25, 2009,

he was on that leave of absence and driving to his home when he observed, from a distance of 70 feet, Officer Prendkowski running around to the passenger side of a parked vehicle, and defendant in that vehicle, "scurrying across to the passenger's side." He continued to drive towards defendant's vehicle until he was right behind it. He then saw the officer and defendant "struggling" with defendant's hand "flailing, striking the officer," and the officer trying to get defendant under control. Officer Oskvarek parked his vehicle, and when he exited, he observed defendant on the ground and handcuffed.

¶ 10 The State admitted, without objection, defendant's certified driving abstract from the Secretary of State, which showed that defendant did not have a valid driver's license on November 25, 2009. The parties, however, agreed to exclude the portion which showed defendant's prior suspensions.

¶ 11 Gerard Rowan testified that he has known defendant for 10 years, and lives in Michigan. On the day in question, he came to visit defendant at his home unannounced, and observed him being followed by a police car 20 feet away from him. Rowan observed defendant make a complete stop at a stop sign at 62nd Street and Rutherford Avenue, and turn left. The officer then activated his emergency lights, and defendant reversed into a driveway. The officer parked about 15 feet away from him on the street, exited his vehicle, walked up to defendant's car, and knocked on the window. They spoke, but Rowan could not hear what was being said, and it "looked like [the officer] waved to let him to go." Rowan thought the officer was telling defendant to move his car, and he saw defendant pull out of the driveway and park near defendant's house. Rowan did not observe the officer put his hand in defendant's car, or see defendant drag the officer, nor see the officer fall. Rowan did see the officer remove defendant from his vehicle and handcuff him without a struggle.

¶ 12 At the close of evidence, the court informed the jury that the parties were going to present closing arguments. The court cautioned that these arguments are not evidence and should not be considered as such, and that they should rely on their own memory of the evidence. The court also told the jury that it should disregard any argument made that is not based on the evidence or reasonable inferences that can be drawn from the evidence. Following closing arguments, the jury was provided instructions to reflect these admonitions and advised that they are the only judges of the believability of the witnesses and the weight to be given to their testimony.

¶ 13 The jury found defendant not guilty of aggravated battery of a peace officer based on bodily harm, but guilty of aggravated battery based on physical contact of an insulting or provoking nature, and resisting or obstructing a peace officer. He was then sentenced to concurrent terms of probation.

¶ 14 In this appeal from that judgment, defendant contends that he was denied his right to a fair trial based on prosecutorial misconduct during closing and rebuttal arguments. The State initially responds that defendant has forfeited this issue due to his failure to object at trial and raise it in his post-trial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defendant acknowledges that he failed to properly preserve this issue for review, but maintains that there was plain error, and that we should consider his claim as such.

¶ 15 The plain error doctrine is a narrow and limited exception to the general waiver rule allowing a reviewing court to consider a forfeited error where the evidence was closely balanced or where the error was so egregious that defendant was deprived of a substantial right and thus a fair trial. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). To obtain relief, defendant must first show that there was a clear or obvious error. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). The burden of persuasion remains with defendant, and the first step in plain error review is to determine whether any error occurred. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009).

¶ 16 We observe that a prosecutor is accorded wide latitude regarding the content of closing and rebuttal arguments, and may comment on evidence and any fair and reasonable inferences the evidence may yield. *People v. Runge*, 234 Ill. 2d 68, 142 (2009). When reviewing claims of prosecutorial misconduct during closing argument, we consider the entire closing argument of both parties to place the comments in context. *People v. Maldonado*, 402 Ill. App. 3d 411, 422 (2010).

¶ 17 Defendant first maintains that the State misstated the evidence when it asserted during closing argument that:

> "Jesse White, the Secretary of State, does not believe that this man should be driving on the streets and that's why he doesn't have a driver's license, and that's why Officer Prendkowski was going to do his duty and remove him from those streets."

He maintains that, by agreement of the court and the parties, the jury was only told that he did not have a valid driver's license, and that the prosecutor's statement conveyed to the jury that his license was revoked or suspended for unsafe driving.

¶ 18 As noted by the State, defendant has selectively plucked out portions of the argument to make his claim. When read in context (*Maldonado*, 402 Ill. App. 3d at 422), the record shows that the prosecutor was merely discussing the facts known to the officer at the time and what he did in performing his duties. It is clear that the State did not tell the jury that defendant's license was revoked or suspended, but only that he did not have one, and that the Secretary of State did not believe that he should. We find this comment permissible as a reasonable inference drawn from the evidence presented at trial, even if it reflects negatively on defendant *(People v. Nicholas*, 218 Ill. 2d 104, 121 (2005)), and thus no error in its presentation.

¶ 19 Defendant also maintains that the prosecutor misstated the law to the jury when he informed the jury that there were four instances of resisting or obstructing an officer and that it could convict defendant if any of them had occurred. He asserts that this would have permitted the jury to convict him of misdemeanor resisting or obstructing a peace officer when he was charged with the felony offense which requires the additional element that the violation proximately caused an injury to the peace officer. He maintains that since these four acts did not all result in injury, the prosecutor misinformed the jury of the law pertaining to the charged offense, and had he not misinformed them, the jurors may not have found the act of resisting or obstructing caused the officer's injuries.

¶ 20 The State disagrees, noting first that defendant has not challenged the sufficiency of the evidence of either conviction. In addition, as in the prior claim, defendant has extracted the complained-of comments out of the context in which they were made.

¶ 21 The record shows that the prosecutor clearly set forth each of the elements of felony resisting or obstructing a peace officer, and did not, contrary to defendant's contention, instruct the jury on the misdemeanor offense. After discussing the four acts that satisfied the element of resisting or obstructing, the State then explained to the jury the fourth element, proximate cause of injury, stating that "[the] Fourth proposition, [is] that defendant proximately caused an injury" to the officer. The State did not, by any means, suggest that proof of felony resisting or obstructing a peace officer did not require proof of the cause of injury element when it set forth the four "propositions" it was required to prove. Accordingly, we find no error.

¶ 22 Defendant further maintains that the State improperly bolstered the testimony of its witnesses by emphasizing that they were credible based on their status as police officers. Defendant points to the State's comments that Oskvarek was an off-duty police officer, who was a former SWAT team sniper. Defendant also takes issue with the following comment, "[t]wo

officers told you what happened," and the State's rebuttal that there was no "police conspiracy against poor [defendant]."

¶ 23 Although a prosecutor may not argue that a witness is more credible because of his status as an officer, the credibility of a witness is a proper subject for closing arguments if it is based on the evidence or inferences therefrom. *People v. Gorosteata*, 374 Ill. App. 3d 203, 219, 223 (2007). In addition, where the complained-of remarks are in response to defense counsel's own statements contradicting the credibility of a witness, there is no prejudicial error. *People v. Love*, 377 Ill. App. 3d 306, 313 (2007).

¶ 24 In this case, the prosecutor's comment regarding the two police officers was a proper observation on the evidence introduced at trial, and did not indicate that the officers were more credible because of their status as such. *People v. Woods*, 2011 IL App (1st) 091959, ¶¶42-43. The record further shows that defendant invited the rebuttal comment that there was no conspiracy (*Love*, 377 Ill. App. 3d at 313-14) where he asserted in closing argument that "[i]f [defendant] did nothing wrong, if he didn't drag these officers, then these officers came in here and lied -- and then Officer Prendkowski came in here and lied." Accordingly, we find no error in the response made by the prosecutor.

¶ 25 Defendant also claims that the prosecutor's statement in rebuttal: "[w]hy would [the officer] put his career on the line to frame defendant," was improper. We observe that such a comment has been construed as error. In *People v. Adams*, 2012 IL 111168, ¶16, for example, the State informed the jury during its opening and rebuttal arguments that if it believed defendant's testimony then it also has to believe that the officers are risking their jobs. The supreme court found that these comments were improper where there was no evidence introduced at trial from which it could be inferred that the testifying officers would risk their careers if they testified falsely. *Adams*, ¶20. Here, however, unlike *Adams*, the comment

regarding the officer risking his career was made in rebuttal to defendant's argument that the police lied. *People v. Giraud*, 2011 IL App (1s) 091261, ¶43. Furthermore, even if the comment was improper, it clearly did not affect the verdict in this case and was no more than harmless error. *People v. Ward*, 154 Ill. 2d 272, 319 (1992).

¶ 26 Taking a "commonsense assessment" of the evidence within the context of this case (*Adams*, ¶22), the only defense evidence was from Rowan, a friend of defendant, who claimed he had known defendant for 10 years, that he had come in from Michigan unannounced, and just happened to be present on the street at the time of the incident. Further, Rowan's testimony that the officer stopped defendant for no apparent reason, then waved him on, and handcuffed him strained credulity. The evidence from the State, on the other hand, included testimony from Officer Prendkowski that he stopped defendant after seeing him disregard a number of stop signs, and that defendant resisted and attempted to thwart his attempts to arrest him when he failed to provide a valid driver's license and insurance. The State also presented testimony from Officer Oskvarek, a police officer, who was on a leave of absence and did not know defendant, regarding his observations of Officer Prendkowski's struggle with defendant. Thus, the evidence in this case was not closely balanced (*People v. Raya*, 250 Ill. App. 3d 795, 802 (1993)), and the prosecutor's comment was not so inflammatory as to deny defendant a fair trial (*People v. Burman*, 2013 IL App (2d) 110807, ¶45), nor did it lead to his convictions for aggravated battery to a peace officer and resisting or obstructing an officer (*People v. Luna*, 2013 IL App (1st) 072253, ¶140).

¶ 27 In reaching this conclusion, we find this case distinguishable from *People v. Naylor*, 229 Ill. 2d 584, 602-08 (2008), cited by defendant in support of his claim that this case was closely balanced. In *Naylor*, the supreme court found that the improper admission of defendant's prior conviction, which was more than 10 years old, and used by the State to impeach defendant's

testimony was reversible error because the evidence in that case was closely balanced and the record showed that the trier of fact considered that prior conviction. The supreme court found that the evidence in that case was closely balanced where the State's evidence consisted of testimony from two officers that defendant sold them heroin and the defense evidence consisted of defendant's testimony, which was consistent with the officers' testimony and the circumstances of his arrest, but also showed that he happened to be in the area picking up his son and was swept up in the drug raid occurring there. *Naylor*, 229 Ill. 2d at 606-08. Here, defendant did not testify, and relied on testimony from his long-term friend Rowan (*People v. Young*, 269 Ill. App. 3d 120, 123-24 (1994)), which was inconsistent with the officer's testimony regarding the circumstances of the arrest, and the events that proceeded it. Further, unlike *Naylor*, the State presented testimony from a disinterested witness, Oskvarke, who corroborated the testimony of the officer's struggle with and eventual arrest of defendant.

¶ 28 Defendant, nonetheless, argues that the jury's finding that he was not guilty of aggravated battery predicated on causing bodily harm "necessarily means" that the jury did not completely believe Officer Prendkowski's story, and that the State's arguments were a material factor in his conviction. We decline defendant's invitation to find the case closely balanced based on rote speculation about what occurred in the minds of the jurors in reaching a certain verdict. *People v. Johnson*, 408 Ill. App. 3d 157, 172-73 (2010). Moreover, a jury may believe portions of each party's case, and where, as here, the State's evidence supports the jury's verdict, we will not speculate that the jury did not believe the entirety of the officer's testimony. *People v. Reed*, 80 Ill. App. 3d 771 (1980).

¶ 29 Finally, we note that the jury was instructed that the prosecutor's arguments were not evidence and that they were the judges of the witnesses' credibility to cure any prejudicial impact of any improper remark. *Luna*, ¶139. Under these circumstances, we find that the complained-of

comments were not of the sort likely to inflame the passions of the jury, nor severely threatened to tip the scales of justice against defendant so as to satisfy the closely balanced prong of plain error review. *Adams*, ¶23.

¶ 30 Defendant further maintains that the State improperly used guilt to threaten the jury into convicting him. He specifically points to the following comments by the State in its rebuttal argument:

> "[I]t's up to you. If you want to let him go, if you want-- if you want to let him go, then you give him a recipe on how to avoid responsibility in cases like this."

Counsel objected at this point, but was overruled, and the prosecutor further stated:

> "[B]ut if you want to hold him responsible for his actions, for what he did, then go back in the jury room and find him guilty of the offenses he's charged with, go back in the jury room. The officers did their job that day. Do your job. Find the defendant guilty [of the offenses charged]."

¶ 31 Although a prosecutor may argue that the evidence presented at trial supports a conviction, it is improper for the prosecutor to argue that the jury is obligated by its oath to return a particular verdict. *People v. Nelson*, 193 Ill. 2d 216, 227-28 (2000); *People v. Castaneda*, 299 Ill. App. 3d 779, 783-90 (1998) (remarks that "your oath requires you to find the Defendant guilty" and you are not "doing your duty" if you acquit defendant were found to be reversible error where evidence was closely balanced). In this case, the complained-of remark did not refer to any obligation of the jury to convict defendant out of a sense of duty, and was not of such a magnitude to deny defendant a fair trial, where, as explained, the evidence was not closely

balanced (*Raya*, 250 Ill. App. 3d at 802), and the comment was brief and isolated and made in the course of a lengthy argument (*Luna*, ¶140).

¶ 32 Defendant, nonetheless, maintains that the cumulative effect of the State's improper comments denied him the right to a fair trial and left the jury with little choice but to convict him. We have not found the complained-of comments to rise to that level or inflame the passions of the jury. *Adams*, ¶23. Moreover, as noted, the jury was properly instructed as to the nature of argument, and their role as judges of the witnesses' credibility and we have found that the evidence was not closely balanced nor was defendant denied a fair trial by the complained-of comments of the prosecutor *(Raya*, 250 Ill. App. 3d at 802).

¶ 33 In reaching this conclusion, we also find this case factually inapposite to *People v. Rogers*, 172 Ill. App. 3d 471 (1988), cited by defendant, where the reviewing court addressed the issue of whether defense counsel was ineffective for failing to object to comments made by the State during closing argument. In *Rogers*, the prosecutor personally vouched for the credibility of the officers who testified, argued evidence that was not presented at trial, including that defendant attempted to hide from police, further argued that if defendant's testimony was believed it would imply that all of the State's witnesses were lying when, in fact, defendant's testimony was only inconsistent with four of the seven State's witnesses on one issue, and presented defendant's prior conviction as substantive evidence that defendant was familiar with the legal system. *Rogers*, 172 Ill. App. 3d at 476 -79. The reviewing court found that the cumulative effect of counsel's repeated failures to object created a reasonable probability that, but for counsel's failure to object, the result would have been different, and that counsel's failure denied him a fair trial. *Rogers*, 172 Ill. App. 3d at 478-79. Here, defendant has not raised an ineffective assistance of trial counsel issue nor asserted that evidence argued was not presented.

Rather, unlike *Rogers*, the comments complained of were brief, and not a material factor in defendant's convictions.

¶ 34 In sum, we find no error to excuse defendant's procedural default of this issue, and, in light of the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 35 Affirmed.