2014 IL App (1st) 121080-U

SECOND DIVISION
September 9, 2014

No. 1-12-1080

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 20522
	)	
JONOL MORROW,	)	Honorable
	)	Dennis J. Porter,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Harris and Justice Liu concurred in the judgment.

O R D E R

¶ 1 *Held*: Judgment entered on defendant's theft conviction affirmed over claims that he was deprived of a fair trial due to improper comments made by the prosecutor during closing argument.

¶ 2 Following a jury trial, defendant Jonol Morrow was found guilty of theft and sentenced to a term of 30 months' probation. On appeal, defendant solely contends that he was denied a fair trial where, during closing argument, the prosecutor made improper comments which (1) related to facts that were not in evidence and which fostered an us-versus-them attitude, (2) shifted the

burden of proof onto him, and (3) improperly vouched for the credibility of a testifying officer. He thus requests that we reverse his conviction and remand his case for a new trial.

¶ 3 The charges filed against defendant stemmed from an incident that occurred on the evening of November 4, 2010, near 4600 West Armitage Avenue in Chicago, Illinois. During this incident, police found metal landscaping grates that resembled grates belonging to the city of Chicago in the bed of the truck defendant was driving.

¶ 4 Defendant was convicted on evidence showing that on the night of the incident, two Chicago police officers who were responding to a radio call stopped him in the vicinity of 4600 West Armitage Avenue. The bed of the white pickup truck defendant was driving contained numerous large metal grates, and defendant was the sole occupant of the truck. Officer Artiga advised defendant of his *Miranda* rights and asked him about the metal grates. Defendant responded that he got them from "down the block," and that he would "just take you to them." Defendant, who was seated in the back seat of the squad car, directed Officer Artiga to 4535 West Armitage Avenue, and stated "it's on your left by the factory." Officer Artiga approached the trees that were in that area and saw that several landscaping grates were missing, and that the grates that remained were similar to the ones that were in the back of defendant's truck.

¶ 5 John Kirchner, a city of Chicago employee with the Department of Streets and Sanitation, Bureau of Forestry, provided expert testimony on the valuation of trees and their amenities, and testified that the grates at issue were 5-to-10 years old, and had a replacement value of $2,000. Kirchner was involved in the development of the installation project for landscaping grates in areas that included 4535 West Armitage, and when shown photographs of the grates that were found in defendant's truck, he testified that they were typical of the kind that the City of Chicago

uses. Kirchner is in charge of issuing permits for the removal of tree grates, and he did not issue any permits for the removal of grates from 4535 West Armitage.

¶ 6 Defendant rested his case without presenting any testimony or evidence. Following the close of evidence, the State and defendant presented closing arguments. During closing argument, the prosecutor argued, *inter alia*, that the dilapidated condition of the neighborhood where the incident took place indicated that people such as defendant did not respect their communities, and that Officer Artiga was a good officer, was only doing his job on the night of the incident, and had no motive to testify untruthfully at trial. Defendant did not object to any of these remarks.

¶ 7 The court then admonished the jury, in relevant part, that "[n]either opening statements nor closing arguments are evidence, and any statement or argument made by the attorneys which is not based on the evidence should be disregarded," and further admonished that "[t]he State has the burden of proving the guilt of the defendant beyond a reasonable doubt and this burden remains on the State throughout the case. This defendant is not required to prove his innocence."

¶ 8 Following deliberations, the jury found defendant guilty of theft of property exceeding $300 in value, and the trial court subsequently sentenced him to 30 months' probation. On appeal, defendant contends that the prosecutor's remarks during closing argument deprived him of a fair trial.

¶ 9 Before proceeding, we observe that defendant argues that *de novo* review applies. However, the standard of review for closing arguments remains unclear, and we agree with other divisions of this court which have noted the conflict but declined to determine the appropriate standard of review where they would reach the same result under either a *de novo* or abuse of

discretion standard. See *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 53, citing *People v. Maldonado*, 402 Ill. App. 3d 411, 422 (2010) and *People v. Anderson*, 407 Ill. App. 3d 662, 676 (2011).

¶ 10 That said, defendant concedes that he has failed to preserve his argument for appellate review by failing to raise it both at trial and in his post-trial motion (*People v. Enoch*, 122 Ill. 2d 176, 186 (1988)), but maintains that we may consider it pursuant to the plain error doctrine. The State responds that he has forfeited his claims and that he cannot establish plain error.

¶ 11 The plain error doctrine is a narrow exception to the waiver rule which allows a reviewing court to consider unpreserved claims of error where defendant shows that the evidence is closely balanced, or the error is so serious that it affected the fairness of his trial and challenged the integrity of the judicial process. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008). Under both prongs, defendant bears the burden of persuasion, and he must first show that a clear or obvious error occurred. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). Accordingly, before addressing whether the plain error exception applies, we must first determine whether any error occurred. *In re Samantha V.*, 234 Ill. 2d 359, 368 (2009).

¶ 12 Prosecutors are afforded considerable latitude in delivering closing arguments and may comment on the evidence presented and reasonable inferences arising therefrom. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). On review, we consider the closing argument in its entirety, rather than focusing solely on select words or phrases. *People v. Perry*, 224 Ill. 2d 312, 347 (2007).

¶ 13 We address first defendant's challenge to the following remarks by the prosecutor during closing argument:

"Now some of you may think Officer Artiga was on a tour or something like that in this case, but, ladies and gentlemen, you have to understand that as a member of the Chicago police department, Officer Artiga in our city, with all of its violence and all of its crime on the west side of Chicago, really had much better things to do than to make up a story about what Jonol Morrow did concerning tree grates.

Think about it, what motive does Officer Artiga have, ladies and gentlemen, to tell you what he told you unless it was the absolute truth.

Jonol Morrow is [] not here on a violent crime. We concede that. It isn't a crime against a person. He didn't do anything against a person. It's a property crime, and if we're going to disbelieve Officer Artiga in any way, shape, or form about what he did out there that night, don't you think that if there was any motive at all to be untruthful in this courtroom that he would have made up a story that would have been a bit more in line with the violence that he see[s] on the streets of Chicago. We're going to put a case on Jonol Morrow, don't you think that in the city of Chicago it would be a case concerning a crime [of] violence.

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Officer Artiga is a good officer. He was only doing his job that night when he did this vehicle stop and he saw in plain and obvious view these tree grates in the back of that truck."

¶ 14 Defendant contends that through these statements, the prosecutor improperly vouched for the credibility of Officer Artiga. The supreme court has observed that the credibility of a witness is a proper subject for closing argument, so long as it is based on the evidence presented or

inferences drawn therefrom. *People v. Hickey*, 178 Ill. 2d 256, 291 (1997). A prosecutor may not, however, vouch for a witness by injecting his or her personal beliefs about their credibility. *People v. Sims*, 403 Ill. App. 3d 9, 20 (2010). For a prosecutor's closing argument to be deemed improper vouching, he must explicitly state that he is offering his personal views on a witness's credibility; no improper bolstering has occurred if the jury has to infer that the prosecutor is asserting a personal opinion. *People v. Pope*, 284 Ill. App. 3d 695, 707 (1996).

¶ 15 Here, the prosecutor referred to officer Artiga as a "good" officer who was "doing his job." In doing so, he did not use the word "vouch," or otherwise indicate that he was referring to his own personal beliefs. Because the jury would have to infer that the prosecutor was asserting his personal beliefs, the prosecutor here did not engage in improper bolstering. *Pope*, 248 Ill. App. 3d at 707. Further, we find that the prosecutor's statement that Officer Artiga was a good officer who was just doing his job was merely a reference to the professional work that Officer Artiga did in investigating this case, and was not an argument that Officer Artiga was more truthful simply by virtue of his profession.

¶ 16 Defendant also maintains that through these statements, the prosecutor distorted the burden of proof and shifted it onto him by incorrectly arguing that the jury must find the State witnesses were lying in order to acquit him.

¶ 17 Our supreme court has observed that it is permissible for a prosecutor to argue that in order to believe defendant's theory, a jury would have to find that the State's witnesses were lying. *People v. Banks*, 237 Ill. 2d 154, 184-85 (2010), citing *People v. Coleman*, 158 Ill. 2d 319, 346 (1994). In making this determination, the court drew a distinction between this type of argument and a similar, yet improper argument, that in order to *acquit* a defendant, the jury

would have to believe the State's witnesses were lying. *Banks*, 237 Ill. 2d at 184-85, citing *Coleman*, 158 Ill. 2d at 346.

¶ 18 Here, although defendant did not present any witnesses on his behalf, the record shows that during opening statements, defense counsel argued that the State would be unable to sustain its burden of proof because it would not be able to show that defendant exerted any control over the grates that were found in the truck he was driving because, *inter alia*, "he did not know what was in the back of that truck when he was driving." At trial, Officer Artiga testified that defendant told him that he had obtained the grates "down the block," then directed him to the exact location. Accordingly, we find that the prosecutor's statements merely conveyed the permissible argument that in order to believe defendant's version of events, the jury would have to believe that Officer Artiga lied.

¶ 19 In reaching this conclusion, we have considered *People v. Wilson*, 199 Ill. App. 3d 792 (1990), upon which defendant relies. In *Wilson*, which was decided prior to *Coleman*, the prosecutor asked the jurors whether they were curious that defendant would have them believe that everyone "in this case" was guilty of something aside from him. *Wilson*, 199 Ill. App. 3d at 796. Because it was found that those comments conveyed a message to the jury that defendant carried a burden of proof to establish his innocence, which included showing that the State's witnesses had lied, the court reversed defendant's conviction and remanded for a new trial. *Wilson*, 199 Ill. App. 3d at 797. In doing so, the court reasoned, in part, that informing the jury that in order to believe the defense witnesses the jury must find that the State's witnesses lied, is a misstatement of law that denies defendant a fair trial. *Wilson*, 199 Ill. App. 3d at 796. As discussed above, pursuant to *Coleman*, that is not the case here.

¶ 20 We do not believe that the prosecutor's comments reflect that he intended, or did, impose a burden upon defendant in the case at bar. Further, the record reflects that during closing argument, the prosecutor also stated that "to sustain the charge[] of theft of property exceeding $300 in value, the State must prove the following propositions beyond a reasonable doubt," and then went on to delineate the elements of the offense with which defendant was charged. No statement was made regarding any evidence defendant was required to present or any burden that he bore in that respect. We further note that prior to jury selection, the trial court informed the entire venire, including those subsequently chosen as jury members in this case, that the State had the burden of proof and that defendant is not required to present evidence or to prove his innocence. Prior to deliberations, the court admonished the jury that closing arguments are not evidence and the jury was instructed that any argument nor supported by the evidence should be disregarded, thereby curing any potential prejudice. *People v. Graca,* 220 Ill. App. 3d 214, 221 (1991). We thus find that defendant failed to establish an error warranting plain error review based on these comments, and find he has forfeited the issue (*Hillier*, 237 Ill. 2d at 547).

¶ 21 Defendant also complains of the following remarks by the prosecutor during closing argument:

> "Ladies and gentlemen, when you go [to] downtown Chicago and go over by the lakefront, the museum campus, McCormick Place, Lincoln Park, that whole area, when you look around you see a very different environment than what was reflected in this case. Streets are clean. Tree grates were all there. You have a pristine environment because people downtown, whether residents or visitors respect their communities.
>
> Go on the west side of Chicago, taking a trip down Armitage Avenue and you

look around to your left and to your right, you will see evidence to the contrary. There are people who don't respect their communities. You will see it in the graffiti on the buildings and the trash on the street. The dilapidated buildings that nobody cares to fix and as you heard in this case, missing tree grates.

You see ladies and gentlemen, people like this defendant, Jonol Morrow, don't respect his community. He doesn't respect the neighborhood. He doesn't respect property. Perhaps he sees it all around him. Maybe that's the environment that he grew up in. Maybe he lives in a world where his peers all do the same thing and perhaps he thinks it's okay to contribute to that in some way. Maybe that was the thought process in this case."

¶ 22 Defendant contends that the prosecutor's comments regarding the condition of the neighborhood in which the incident took place, and defendant's lack of respect for his community, were erroneous in that they fostered an "us-versus-them" attitude and implied that the jury should infer his guilt therefrom. He also contends that the comments were not based on the evidence presented.

¶ 23 Closing arguments must serve a purpose beyond inflaming the emotions of the jury, and it is improper for a prosecutor to use closing arguments to forge an "us-versus-them" mentality that is inconsistent with the criminal trial principle that a jury fulfills a non-partisan role. *People v. Wheeler*, 226 Ill. 2d 92, 128-29 (2007). Statements that have been found to foster an "us-versus-them" attitude include, "[t]here's nobody here for the People, just you," (*People v. Thomas*, 146 Ill. App. 3d 1087, 1089 (1986)), and "we as a people can stand together" (*People v. Johnson*, 208 Ill. 2d 53, 79-80 (2003)).

¶ 24 Unlike the comments in *Johnson* and *Thomas*, the prosecutor here did not encourage the jury to "stand together," to be "[t]here" for the People, or otherwise illustrate this case as one in which the jury was aligned or united against the defendant, which would be inconsistent with the jury's traditional non-partisan role. Rather, here, the prosecutor engaged in inane speculation as to the motivation behind defendant's actions and argued that the neighborhood in which the incident took place had dilapidated buildings, trash and graffiti. Although we find that these comments did not foster an "us-versus-them" attitude, we do agree with defendant's contention that they were nevertheless improper because they were not based on any evidence presented at trial. The record shows that no evidence was presented regarding the condition of that neighborhood in general, or regarding the presence of graffiti, trash or dilapidated buildings specifically. The question remains whether this isolated error rose to the level of plain error.

¶ 25 In determining whether the closely balanced prong of the plain error doctrine has been met, we undertake a "commonsense assessment" of the evidence presented (*People v. Adams*, 2012 IL 111168, ¶22), and here we find that the evidence was not closely balanced. The evidence showed that defendant was driving a truck containing landscaping grates, that he told officers that he obtained those grates from "down the block," then led the officers to the exact location where several of the landscaping grates surrounding a group of trees were missing, that the grates in defendant's truck were similar to the ones that remained at that address, that no one was given permission to remove those grates, and that the replacement value of the missing grates was $2,000. This evidence supports the elements of the offense for which defendant was convicted. 720 ILCS 5/16-1(a)(1)(A) (West 2010). Given that defendant led police to city property and stated that was where he obtained the landscaping grates in his truck, we reject

defendant's contention that the evidence was closely balanced because the jury could have had doubts as to whether he had actual knowledge that the grates were stolen.

¶ 26 We also reject defendant's contention that the prosecutor's comments are reviewable under the second prong of plain error review because they were part of a pattern of intentional and pervasive prosecutorial misconduct that undermined the integrity of the judicial proceedings. In so arguing, he cites *People v. Johnson*, 208 Ill. 2d 53, 64 (2003) and *People v. Abadia*, 328 Ill. App. 3d 669, 684 (2001) in support.

¶ 27 In *Johnson*, the supreme court reversed the defendants' convictions based upon the cumulative effect of numerous improper comments the prosecutor made during closing argument, including (1) appealing to the jury to send a message of support to law enforcement and to society, (2) likening the defendants to animals, (3) casting the prosecution in terms of good versus evil, (4) mischaracterizing the evidence and the applicable law, and (5) suggesting that the defense engaged in deceptive tactics. *Johnson*, 208 Ill. 2d at 79-80. The court found that these comments were indicative of a pervasive pattern of unfair prejudice which denied defendants a fair trial and warranted a new trial. *Johnson*, 208 Ill. 2d at 84, 87.

¶ 28 In turn, in *Abadia*, during rebuttal closing argument, the prosecutor made 22 separate statements arguing that defense counsel was misstating and fabricating evidence presented at trial. *Abadia*, 328 Ill. App. 3d at 681-83. On appeal, this court found that those comments were improper because the prosecution had no basis from which to make those arguments. *Abadia*, 328 Ill. App. 3d at 683. We found that because the prosecutor's rebuttal argument strayed so often from proper line of argument, its cumulative effect was to deprive defendant of a fair trial. *Abadia*, 328 Ill. App. 3d at 684. This court concluded that the prosecutor engaged in a pattern of

improper conduct that warranted reversal, particularly where, during rebuttal argument, the prosecutor also made false allegations of witness abuse and intimidation by the defense. *Abadia*, 328 Ill. App. 3d at 685.

¶ 29 Here, unlike *Johnson* and *Abadia*, the prosecutor briefly employed improper comment; arguing facts not in evidence pertaining to the condition of the neighborhood in which the incident took place. Although defendant argues that additional comments the prosecutor made during closing argument were improper and should be considered as part a pattern of prosecutorial misconduct, we find that they cannot be considered to be "pervasive" misconduct, or part of a "pattern." "The whole can be no greater than the sum of its parts," and here the evidence against defendant was substantial and the error committed by the prosecutor did not render the trial unfair. *Glasper*, 234 Ill. 2d at 215, citing *People v. Wood*, 341 Ill. App. 3d 599, 615 (2003); see also *People v. Young*, 2013 IL App (2d) 120167, ¶ 42.

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

¶ 31 Affirmed.