2014 IL App (1st) 123156-U

SECOND DIVISION
November 25, 2014

No. 1-12-3156

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 12 CR 4304
	)	
KENNETH JONES,	)	
	)	Honorable Thaddeus L. Wilson,
Defendant-Appellant.	)	Judge Presiding

PRESIDING JUSTICE SIMON delivered the judgment of the court.
Justices Pierce and Liu concurred in the judgment.

O R D E R

Held: Testimony by police officers for the prosecution on the general profile and practices of drug dealers did not constitute plain error. Prosecutor's comments on defendant's testimony and credibility in closing argument were based on the evidence at trial and did not constitute plain error. The mittimus must be corrected to correctly reflect the proper offense for which defendant was convicted.

¶ 1 Following a jury trial, defendant Kenneth Jones was convicted of possession of a controlled substance with intent to deliver (720 ILCS 570/401(c)(1) (West 2012)). The trial judge sentenced defendant to eight years' imprisonment. Defendant appeals his conviction and,

alternatively, seeks correction of the mittimus to reflect the proper offense of which defendant was convicted.

¶ 2 Defendant argues that his conviction must be reversed and the matter remanded for a new trial because his right to a fair and impartial trial was violated by the introduction of testimony from the arresting officers concerning general behavior of drug dealers and prosecutorial misconduct during closing arguments for improperly disparaging defendant and defense arguments. Defendant also asserts that the mittimus improperly reflects a conviction for "MFG/DEL" (manufacturing and delivery of narcotics), when he was convicted of possession of a controlled substance with intent to deliver. For the following reasons, we affirm the judgment of the circuit court and order the mittimus be corrected to reflect the proper conviction for possession of a controlled substance with intent to deliver.

¶ 3 I. BACKGROUND

¶ 4 At trial, officer Grandville testified that at approximately 9:30 p.m. on January 31, 2012, he was on a violence suppression patrol with several other police officers in the 11th District, specifically the area of the 3900 block of West Jackson Boulevard. Grandville testified that the area was mostly residential with several three flat multi-family residential buildings as well as numerous vacant lots in the area. Grandville testified that he had been a police officer for the Chicago police department for six years and that he had patrolled the area many times and made several narcotic arrests, roughly a dozen of the over one hundred arrest he had made in his career.

¶ 5 Grandville testified that about half of his narcotics arrests involved heroin. Grandville explained that heroin is often referred to as "blow" and that it is packaged by dealers into small Ziploc bags that are packaged together in groups of 12 to 14 by dealers in a larger clear plastic bag

that is called a "jab." The packets of heroin are typically sold in open market on the streets with sellers frequently yelling out something similar to "blows, blows, blows" and completing hand to hand transactions with buyers. Grandville testified that sometimes the person delivering narcotics will not take money, but give them away for free, a "pass out," that is completed as a way to create customers.

¶ 6 On the night of January 31, 2012, Grandville and officers Edwards and Mielcarz were all dressed in plain clothes and broke off from the group of officers to patrol ahead of the other uniformed officers. Grandville testified that the area was illuminated by streetlights, and when the officers turned the corner from South Springfield Avenue and headed westbound on West Jackson Boulevard, Grandville saw defendant and another man from approximately 30 to 50 feet away. As the officers approached, defendant, who was facing toward the officers, yelled "yo,yo, who want the blows." When the officers were roughly 10 to 15 feet away, Grandville saw defendant remove a clear plastic bag from his waistband while the other man's back remained toward the officers. When defendant saw the officers, he began to flee, running northwest and into West Jackson Boulevard.

¶ 7 Grandville testified that defendant threw the plastic bag into the middle of the street as he fled. The three officers quickly apprehended defendant within a few feet and placed him into custody while officer Edwards retrieved the bag from the street. After searching defendant's person, the officers did not recover anything else, including any money. Grandville also testified that he never saw defendant complete any transaction with the other man or any other person. Grandville testified that he did not lose sight of the bag and that Edwards took the bag and contents to the police station. The bag and 14 smaller bags containing a white powder within were

inventoried and sent to the police lab for testing. The officers did not request that the bag be tested for fingerprints.

¶ 8 Officer Edwards testified that he was a six and half year veteran of the Chicago police department and was a part of the violence suppression patrol with Grandville and the other officers and testified similarly to Grandville. Edwards also testified that he heard defendant state "yo, yo, who want the blows," and saw him pull the plastic bag from his waistband, and then throw the plastic bag into the street as he fled and before the three officers apprehended him. Edwards testified that he saw defendant throw the bag into the street as he fled and he did not lose sight of the bag before he went and picked up the plastic bag from the street, observed it to be suspect narcotics, and put the bag in his pocket. Edwards testified that he had made hundreds of narcotics arrests as a police officer and that the narcotics in the instant matter were packaged similarly to his prior cases and that he also followed protocol by placing the bag in his pocket to bring to the station for testing. At the police station, Edwards inventoried the bag and sent it to the crime lab for testing.

¶ 9 The parties stipulated that the chain of custody for the recovered plastic bag was proper and that a chemist for the Illinois State Police completed testing on the suspect narcotics. The plastic bag contained 14 small Ziploc bags containing a white powder. The contents of six of the bags were weighed at 1.1 grams and tested. The powder was determined be a substance containing heroin and the estimated weight of the remaining eight bags was 1.5 grams.

¶ 10 Following denial of defendant's motion for directed verdict, defendant testified in his own defense. Defendant testified that at around 9:30 p.m. on January 21, 1012, he was walking out of an apartment building at 3931 West Jackson Boulevard. Defendant explained that the building had

a gated courtyard and he was following his friend Brian. Defendant testified that he saw Brian exit the courtyard gate and close the gate as six black males ran past him in a westbound direction. Defendant stated that Brian looked scared at this time, dropped a bag of drugs, and then started running westbound.

¶ 11 Defendant testified that he had heard gunfire that morning and was scared, but he exited the gate because he did not want to get caught in the courtyard and it would take too long to re-open the door to the apartment building. He walked out and headed west to see what was happening. At this time, defendant was tackled by the police and arrested. Defendant denied possessing the bag of drugs or yelling "yo, yo, who wants the blows."

¶ 12 Following closing arguments, the jury was instructed and deliberated. The jury sent the trial judge two notes during deliberations, the first inquiring whether it was normal procedure to request fingerprints from evidence being inventoried and the second stating that the jury was deadlocked with a 10 to 2 split. Both notes were reviewed by the court and parties and returned with notes asking the jury to please continue to deliberate. Shortly after the second note was returned, the jury returned a guilty verdict against defendant on possession of a controlled substance with intent to deliver one gram or more but less than fifteen grams of heroin. The parties presented evidence in aggravation and mitigation and the trial court reviewed the presentence investigation report of defendant. The trial court sentenced defendant to eight years' imprisonment.

¶ 13 II. ANALYSIS

¶ 14 On appeal, defendant argues that: (1) the trial court erred in allowing officers Grandville and Edwards to testify generally about the drug trade; (2) his right to a fair and impartial trial was violated by prosecutorial misconduct during closing argument; and (3) the mittimus must be

corrected to reflect the proper conviction in this case. The State agrees with defendant that his mittimus must be corrected; however it contends that defendant failed to preserve the first two issues by failing to advance objections during trial and asserts those issues are forfeited. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defendant acknowledges that trial counsel did not object to all of the allegedly objectionable testimony or to the State's comments during closing argument, but asserts that these issues were raised in his posttrial motion and should be considered under the plain-error doctrine.

¶ 15 The plain-error doctrine allows a reviewing court to review an unpreserved error when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). Under the first prong, the defendant must show that the evidence at trial was so closely balanced that the error alone "threatened to tip the scales of justice against him." *Id.* at 187. For the second prong, the defendant must prove that the error was so serious that it affected the fairness of the trial and questions the integrity of the judicial process. *Id.*

¶ 16 There can be no plain error if there is no error. *Id.* at 184. Therefore, the first step in conducting plain-error review is to determine whether error occurred at all. *People v. Walker*, 232 Ill. 2d 113, 124 (2009). We consider each of defendant's arguments in turn below, concluding that no clear and obvious error occurred warranting plain error review or reversal.

¶ 17 A. Police Officer Testimony on General Behavior of Drug Dealers

¶ 18 Defendant asserts that the trial court erred in allowing officers Grandville and Edwards to testify generally about drug dealing and common practices of drug dealers. Defense counsel objected to some, but not all, instances of this allegedly improper testimony. Counsel objected on

relevance grounds, but the trial court denied the objections. Defendant contends that the testimony of Grandville and Edwards went too far into profile testimony that was not in any way connected to defendant and should have been excluded.

¶ 19 Defendant concedes that police officers with narcotics experience may be qualified as experts and present profile testimony that is relevant, but when that testimony describes common practices, habits, or characteristics not connected to the defendant, it must be excluded. *People v. Robinson*, 391 Ill. App. 3d 822, 837 (2009). Defendant notes that this type of testimony "must be seriously scrutinized and handled with care" because it has such a potentially prejudicial effect against a defendant. *People v. Holloman*, 304 Ill. App. 3d 177, 184 (1999). Defendant argues that the officers' testimony improperly bolstered the State's case and left the jury no choice but to compare defendant's behavior with the profile presented by the officers of an average drug dealer.

¶ 20 We agree with the State that there was no error in this case by allowing Grandville and Edwards to testify. We do not agree with defendant that the officers testified at length and in detail about how drug dealers commonly operate such that their testimony was prejudicial. The officers testified to their years of experience and to the general process of drug dealers. As defendant admits, under *Holloman*, this is proper where relevant, particularly if the case involves the question of whether drugs possessed were for a defendant's personal use as opposed to his possession for delivery. The officers' testimony was relevant in explaining why defendant's actions led to his being a suspected dealer, his arrest, and his being charged with possession with intent to deliver. The testimony was clearly connected to the facts of this case and the officers' testimony concerning the events that led to defendant's apprehension and arrest. Accordingly, admission of this testimony did not constitute plain error.

¶ 21 B. Prosecutorial Misconduct

¶ 22 Defendant next argues that his right to a fair and impartial trial was violated by prosecutorial misconduct. It is well-settled that prosecutors enjoy wide latitude in closing arguments and that the scope of permissible argument rests within the sound discretion of the trial court. Absent a clear abuse of discretion, the court's determination of the propriety of the argument will stand. *People v. Williams*, 192 Ill. 2d 548, 573 (2000). Any improper comments or remarks made by a prosecutor in closing argument are not reversible error unless they are a material factor in the conviction or cause substantial prejudice to the accused. *People v. Sutton*, 316 Ill. App. 3d 874, 893 (2000). In reviewing allegations of prosecutorial misconduct, the court must consider the arguments of both the prosecutor and the defense in their entirety and place the allegations of improper comments in context. *People v. Evans*, 209 Ill. 2d 194, 225-26 (2004).

¶ 23 The prosecution has the right to comment on the evidence presented at trial and draw all reasonable inferences deducible therefrom. *People v. Simms*, 192 Ill. 2d 348, 396 (2000). The prosecution may also respond to comments made by defense counsel. *People v. Abadia*, 328 Ill. App. 3d 669, 678-79 (2001). Regulation of remarks by counsel is best left to the trial court's discretion, which may cure such errors by giving proper jury instructions on the law, informing the jury that counsel's arguments are not evidence and are to be disregarded if not supported by the evidence at trial, or by granting an objection and admonishing the jury to disregard comments. *Simms*, 192 Ill. 2d at 396.

¶ 24 Defendant contends that the State's prejudicial comments during closing constitute plain error because they were calculated to arouse the prejudice of the jury and improperly disparaged defendant by alleging that he fabricated his defense. In closing, the State argued that defendant

articulately testified during his direct testimony, but his testimony on cross examination was revealing, arguing:

> "It doesn't make sense, and you know what type of answer that is? That's a fill in answer because it's not the truth. He's sitting there and I'm asking him a question and he's got to answer it, right? So he'll answer it with a response, with a response that you're going to weigh, it doesn't make any sense… Everybody in the world is running to the west, right. He doesn't even look to his right, to the east, doesn't even look, that makes no sense. You know what that is a signpost of? Falsity, that's a signpost of somebody scrambling in their brain to say an answer, but it's not the truth, so it doesn't make sense."

The State also argued that, unlike defendant's testimony, the testimony of officers Grandville and Edwards did not exhibit these signs but was consistent and credible. Comparing the evidence with defendant's testimony, the State concluded that defendant's testimony "doesn't make sense because it's not true, it's embellished, he's trying to give you an alternative event of what happened, and it's not reasonable, it makes no sense, and the totality of the evidence, the circumstances surrounding the events of his story don't make sense."

¶ 25 The State points out that this case came down to the credibility of the witnesses in this case and both parties argued the credibility of witnesses during closing, which is permissible provided it is based upon facts in the record or reasonable inferences drawn therefrom. *People v. Ramey*, 151 Ill. 2d 498, 534 (1992). Furthermore, it is not reversible error or improper to call a defendant a "liar" if the evidence provides for such an assertion, but it is impermissible to assert the defense is engaging in trickery or active misrepresentation. *People v. Starks*, 116 Ill. App. 3d 384, 394

(1983). In this case, the State pointed to the consistent testimony of its witnesses and defendant's contrary testimony and then analyzed the testimony of the witnesses to make its case that defendant's presentation on cross examination provided signs that he was not telling the truth. The evidence allowed for such inferences and the State did not cross the line into allegations of trickery or misrepresentation, but, rather, commented on the evidence and credibility of the witnesses. Accordingly, we cannot say that, under the plain error analysis, the alleged prosecutorial misconduct was so serious that it affected the fairness of the trial and brought into question the integrity of the judicial process.

¶ 26 B. Correction of the Mittimus

¶ 27 Defendant also argues that the mittimus must be corrected to properly reflect a single conviction for possession of a controlled substance with intent to deliver (720 ILCS 570/401(c)(1) (2012)). The mittimus reflects a conviction that indicates the correct statutory citation but describes the offense as "MFG/DEL 1<15 GR HEROIN/ANALOG," referring to the manufacturing and delivery of narcotics, for which defendant was not convicted. The State has no objection to amending the mittimus to reflect the correct conviction and we order that the mittimus be corrected.

¶ 28 CONCLUSION

¶ 29 Accordingly, we affirm the judgment of the Circuit Court of Cook County and order the mittimus be corrected to indicate the correct conviction.

¶ 30 Affirmed; mittimus corrected.