2016 IL App (1st) 140649-U
No. 1-14-0649
Order filed March 8, 2016

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ANTHONY NANCE, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County. No. 10 CR 11194 The Honorable Stanley Sacks, Judge, presiding.

JUSTICE HYMAN delivered the judgment of the court.
Justices Neville and Simon concurred in the judgment.

Order

¶ 1 *Held*: The trial court did not commit plain error in allowing the State's opening and closing arguments. Admission of a prior consistent statement of identification was proper and any error was harmless. The clerk of court must correct the mittimus to reflect Nance's credit for pretrial custody and the proper offense classification.

¶ 2 In 2010, Joshua Evans and Daniel Crockett, Jr., were shot in front of their home in Chicago by two men who drove up in a black Audi. Evans survived, but Daniel Crockett, Jr., did

not. Crockett's brother Ryheam Crockett eventually informed police (through his father, Daniel Crockett, Sr.) that he recognized the two shooters as "Brian" (codefendant Brian Thompson) and "Ant" (defendant Nance), whom he knew from the neighborhood. Ryheam, Evans, and Ryheam's mother Colleen Crockett eventually identified both Thompson and Nance as the shooters. The two men were tried simultaneously by separate juries; both were convicted of first degree murder and attempted first degree murder. Nance was sentenced to a total of 60 years of imprisonment.

¶ 3 Nance alleges that the trial court committed plain error in allowing the State to make improper opening and closing arguments. We hold that, though some of the State's arguments were improper, they do not rise to the level of clear and obvious error.

¶ 4 Nance also alleges that the trial court erred in admitting Ryheam's prior consistent statement to his father identifying Thompson and Nance as the shooters. We hold that the statement was admissible when testified to by Ryheam as a statement of identification. A police officer's testimony regarding the statement, however, was not admissible, but we hold any error in this regard as harmless.

¶ 5 Finally, Nance alleges that he should receive an additional three days of credit towards his sentence based on his time in pretrial custody, and that the mittimus should be corrected to reflect the appropriate offense classification. The State agrees, and we direct the clerk of the court to correct the mittimus.

¶ 6 BACKGROUND

¶ 7 Opening Statement

¶ 8 What follows largely repeats the "Background" section in *People v. Thompson*, 2016 IL App (1st) 133648, which has been issued as an opinion. The State began its opening statement by

focusing on Colleen's experience of the crime: how she would "never forget the sound of those bullets" and "the voice of her 15 year old nephew. Auntie, I've been hit." The State asked, "what could be worse than witnessing your 15 year old nephew being shot, racing him to the hospital pray all the way that he doesn't die?" The State then answered that question with, "her own son had been shot by that spray of bullets. Her nephew would be lucky enough to live to tell about that bloody day. Her son wouldn't be so lucky."

¶ 9 The State described the defendants' actions and the charges against them, then returned to focusing on Colleen, describing her activities on the day of the murder. "And the next moments would change Colleen's life forever and the next moments would end her son's." The State then described what Colleen witnessed, and ended with a description of her son's death at the hospital: "[W]hile she was there with her nephew, the emergency personnel brought in her son. The doctors began to work on him and in a little while Colleen would be taken to that little room to hear the words every parent dreads; your son didn't make it." The State described the physical evidence and the police investigation, including the eyewitness identifications of the codefendants.

¶ 10 Trial Testimony

¶ 11 Colleen Crockett testified that on March 26, 2010, she was living at 1927 South St. Louis in Chicago with her husband, Daniel Crockett, Sr., her sons, Daniel Crockett, Jr. and Ryheam Crockett, and her nephew Joshua Evans. Colleen had parked on the street next to the home, talking to Joshua and Ryheam, who were outside her car. A number of other people from the neighborhood were also outside, including several friends of Joshua and Ryheam. A black Audi automobile pulled up next to Colleen's car and two men emerged. She saw the men's faces and heard gunshots. Colleen did not know these men and had never seen them before. She heard her

nephew Joshua yell that he'd been shot, and Colleen saw one of the men shooting. The two men got back into the Audi and drove off. Colleen and her husband put Joshua into her car and drove toward the hospital. On the way, she passed an ambulance heading towards her home and stopped; the ambulance personnel told her that another victim had been shot, so Daniel Sr. returned to the house while Colleen went to the hospital with Joshua. Daniel Jr. was brought to the same hospital.

¶ 12 On April 9, 2010, Colleen viewed a photo array and identified one photo. On April 12, she viewed a physical lineup and identified Brian Thompson as the driver of the Audi and one of the shooters; she identified Anthony Nance as the other shooter, who emerged from the passenger seat of the Audi, at another lineup. After the shooting, Colleen and her family received money from the state to move out of the neighborhood.

¶ 13 On cross-examination, Colleen admitted that the entire incident happened quickly and unexpectedly, and did not remember whether the Audi's windows were tinted or whether its tires screeched when it pulled up. Colleen had described the shooters to police as black males between 20 and 30 years old, but was unable to describe their heights, facial hair, or clothing.

¶ 14 Joshua Evans testified that in 2010 he was 16 years old. On the day of the shooting, he was outside the house talking to his aunt Colleen, and his cousin Ryheam was nearby on the sidewalk. Evans heard tires screech from an alley three houses away, and saw a black Audi pull up in front of Colleen's car. There were three people in the car; Thompson emerged from the driver's side; Nance got out of the passenger's side. Evans recognized them from the neighborhood, and knew Nance's brother, but did not know their full names. Nance aimed a gun at Evans and started shooting. Thompson, meanwhile, began shooting the opposite way, but Evans did not see who Thompson was shooting at. Evans heard gunshots that sounded like they

had come from different weapons. Evans saw his cousin Daniel Jr. running away, and Evans ran, too, towards his house, until he realized he had been shot and called for help.

¶ 15 Evans had been shot in the leg and spent a few days in the hospital. He testified that he was "kind of" afraid of the shooters. On April 12, he viewed a lineup and identified Thompson as the man who emerged from the driver's side of the Audi and fired a weapon. On April 28, he identified a photograph of Nance. On May 20, he viewed another lineup and identified Nance as the person who had fired a weapon towards him.

¶ 16 On cross-examination, Evans testified that he had never seen the Audi before the shooting and there was nothing unusual about it. The shooting happened quickly. Nance was wearing a red jacket during the shooting, but Evans did not remember telling police that detail. When he was at the hospital, he asked police officers whether his cousin Daniel was all right, and the officer responded that he did not care, which offended and he refused to talk to police while he was in the hospital. After the shooting, he continued to live with the Crocketts, but did not discuss the shooting with Colleen or Ryheam.

¶ 17 Ryheam Crockett testified that on March 26, 2010, he was talking to Colleen as she sat in her car outside their home. When the black Audi pulled out of the alley and parked by Colleen's car, Ryheam recognized Nance in the Audi's passenger seat, and Thompson in the driver's seat. In 2010, Ryheam had known Nance and Thompson for several years as "Ant" and "Brian," respectively, and did not get along with them. Nance started firing a gun towards the alley, while Thompson shot towards the front of the house. The shots sounded like they came from two different guns. Ryheam ran away when the shooting started, then circled back to the house in time to see Colleen and Daniel Sr. putting Joshua Evans into the car. Ryheam then saw Daniel Jr. lying on the ground by the alley.

¶ 18 Ryheam testified that he did not tell police that he knew the shooters on the day of the event. He was then asked about a telephone conversation he had with his father, Daniel Sr., on March 28 or 29. When Ryheam began to describe the conversation, defense counsel objected on the ground that the conversation was hearsay. The trial court overruled the objection. Ryheam then testified that Daniel Sr. had wanted him to cooperate with the police and identify the shooters, so Ryheam told Daniel Sr. that "Brian" and "Ant" were the shooters and the name of their neighborhood.

¶ 19 On April 9, Ryheam identified Thompson and Nance in a photo array as the shooters; he did not tell police this information earlier because he was nervous and scared of the defendants, since Ryheam and his family were still living in the same house. The Crocketts moved out on April 12, the same day that Ryheam identified Thompson in a lineup. He identified Nance in a lineup on May 20.

¶ 20 On cross-examination, Ryheam was impeached with his multiple convictions for narcotics possession and sales. He admitted the shooting happened quickly and was unable to state the color of the shooters' guns. After the shooting, he had discussed it with his family and told them what he saw.

¶ 21 Police detective Roberto Garcia testified that on March 29, he met with Daniel Crockett, Sr., and asked him to contact Ryheam on the telephone, to encourage Ryheam to cooperate with the investigation. Defense counsel objected to the testimony about the conversation between Daniel Sr. and Ryheam. The trial court overruled the objection. Detective Garcia then testified that based on the information Daniel Sr. gave him, he made a photo array containing Thompson and Nance; he was only given the names "Brian" and "Ant," and their neighborhood.

¶ 22 Abshalom Timms testified that at 7 p.m. on March 26, he was in a nearby park when he saw three cars, including a black Audi, drive the wrong way down an alley and park. Two men poured gasoline inside the Audi and then lit the car on fire. Timms spoke to police a few days later, but he could not identify anyone involved. The police found a burnt temporary license plate on the Audi, but the plate actually belonged to a different vehicle and seemed to have been stolen.

¶ 23 Lamar Booth, who lived across the street from the Crocketts, described hearing the gunfire and seeing a black Audi parked near the Crockett house and two men standing near the Audi, facing the Crockett house. Booth did not see their faces. Booth testified that he had been in the United States Marine Corps between 1984 and 1989, and had been stationed at Camp Pendleton, Camp LeJeune, and on Okinawa.

¶ 24 Police technicians found two different types of cartridge casings in the street outside the house. Analysis showed that at least two guns were used during the shooting.

¶ 25 Closing Argument

¶ 26 The prosecution began closing arguments by describing the crime as Colleen Crockett's "worst nightmare." The prosecutor reviewed the eyewitness testimony and the police investigation, and then discussed the applicable law. Nance's counsel argued that the eyewitness identifications were not reliable and no other evidence implicated Nance. He also stated that Ryheam Crockett had a number of felony convictions for narcotics.

¶ 27 In rebuttal, the State mentioned Colleen losing her son and almost losing her nephew, adding that "there isn't one heart in this courtroom that shouldn't break for Colleen Crockett and her family. Well, maybe there is two. But I'm not asking you to convict this defendant because you feel bad for the Crockett family. I'm asking you to convict this defendant because the law

and the evidence demand it of you and it is the only just verdict in this case." The State also tried to rehabilitate Ryheam: "Do you think lady justice peeks out from behind that blindfold and says, justice for all, [except] you Ryheam, except you, because you don't matter, because you had some felony convictions[?]" The State discussed Lamar Booth's testimony, describing him as serving in Iraq and Japan, who had to face "the sound of gunfire in front of his own home." Finally, the State characterized Nance as "a cold-blooded killer," adding that "it may send a chill up your spine."

¶ 28 The jury began to deliberate at 3 p.m.; at 4:31 p.m., Nance's jury sent out two notes asking about reasonable doubt and some of the physical evidence. The judge instructed them to continue deliberating, and at 7:08 p.m. the jury reached a guilty verdict. The jury found Nance guilty of first degree murder and attempted first degree murder, and the trial court sentenced Nance to a total of 60 years of imprisonment, with a total of 1,263 days of credit for presentence custody. The mittimus characterized the attempted murder conviction as a class "M" felony under 720 ILCS 5/9-1(a)(1) (statute listing elements of first-degree murder).

¶ 29 In his posttrial motion, Nance argued that Detective Garcia should not have been permitted to testify regarding Ryheam's conversation with Daniel Sr. identifying Thompson and Nance as the shooters. The trial court denied the motion, and Nance filed a timely notice of appeal.

¶ 30 ANALYSIS

¶ 31 The State's Opening Statement and Closing Argument

¶ 32 Nance argues that the prosecutor made several improper statements during the opening as well as in closing arguments. Defense counsel did not object to these statements, nor include the argument in a posttrial motion. The State argues, and Nance acknowledges, that the issue is

reviewable only for plain error. To meet the plain error standard, defendant has the burden to show that a clear or obvious error occurred, and either (1) the evidence is so closely balanced that the error, standing alone, threatened to tip the scales against defendant regardless of the seriousness of the error, or (2) the error was so serious that it affected the trial's fairness and challenged the integrity of the judicial process. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 33 A prosecutor's opening statement or closing argument must be viewed in its entirety, and any challenged remarks viewed in context. *People v. Nicholas*, 218 Ill. 2d 104, 122 (2005). Prosecutors have wide latitude in framing their closing arguments, and may comment on the evidence and any fair, reasonable inferences from the evidence. *People v. Willis*, 2013 IL App (1st) 110233, ¶ 101. Though some of the prosecutor's statements in the opening and in closing argument were questionable, viewing the opening statement and closing argument as a whole, the statements do not rise to the level of plain error under either prong.

¶ 34 Closing argument must serve a purpose beyond inflaming the jury's emotions. *People v. Wheeler*, 226 Ill. 2d 92, 128 (2007). Nance alleges that the prosecution's repeated references to Colleen's emotions and loss of her son violated this rule. Although the prosecutor certainly returned to this theme again and again, it does not rise to the level of a clear or obvious error. See *People v. Emerson*, 189 Ill. 2d 436, 513-14 (2000) (closing argument containing emotional appeal to victim's hopes and dreams was improper, but did not impact verdict). This is not a case like *People v. Blue*, where the prosecution combined reminders to the jury of the pain endured by the victim's family with a wealth of extraneous, nonprobative evidence that served "only one purpose, namely, to highlight the poignancy of the [victim's] family's loss and to suggest to the jury that the family's pain could be alleviated by a guilty verdict." 189 Ill. 2d 99, 129-32 (2000).

¶ 35 The prosecutor also referred to Nance as "cold-blooded," and suggested that he might cause a chill to run up the jurors' spines. Though a prosecutor may not characterize a defendant as "evil," he or she may characterize the defendant's actions as a permissible comment on the evidence. *Nicholas*, 218 Ill. 2d at 121-22. Given that Nance was convicted of firing a gun into a crowd of unsuspecting people, we find that the "cold-blooded" comment did not rise to the level of clear or obvious error.

¶ 36 Next, the prosecutor referred to a prosecution witness, Lamar Booth, as a veteran of the Iraq War who had to hear gunfire on his own street. Though Booth testified that he served in the Marine Corps for several years, he did not testify that he ever went to Iraq, or indeed served in any conflict. It was improper for the prosecution to imply that the jury should credit Booth's testimony because of risks he faced in the military. *People v. Gray*, 406 Ill. App. 3d 466, 475-76 (2010). But, in the context of the entire remarks, we do not believe that the prosecution's passing mentions of Booth (who was not an important witness) rise to the level of clear or obvious error. Nance also argues that these comments were the equivalent of the prosecution calling the streets a "war zone" or "Chiraq," but the prosecution never actually used those terms, and in any event, the case turned on witness credibility, not an assessment of the dangerousness of the neighborhood. *Donahue*, 2014 IL App (1st) 120163, ¶¶ 116-17.

¶ 37 Finally, the prosecution discussed Ryheam's past convictions, suggesting that Ryheam was entitled to justice despite that criminal history, in response to Nance's counsel's argument that Ryheam was not credible. A prosecutor may attempt to repair the credibility of a prime witness after the witness has been attacked by the defendant. *People v. Figueroa*, 381 Ill. App. 3d 828, 850-51 (2008). The prosecution's comments did not rise to the level of clear or obvious error.

¶ 38 The prosecution made several questionable statements, including harping on Colleen's emotional state as a mother who had lost her child, and attempting to link Lamar Booth to the Iraq War. The opening and the closing comprise nearly 40 pages of transcript, and we do not believe that, taken as a whole, these statements so tainted the entire argument as to rise to the level of plain error. We need not consider whether the argument further meets the stringent plain error standard.

¶ 39 Admission of Ryheam Crockett's Prior Consistent Statement

¶ 40 Nance challenges admission of testimony regarding Ryheam Crockett's prior consistent statement to his father (which was then relayed to Detective Garcia) identifying Thompson and Nance as the shooters. In his posttrial motion, Nance argued that the trial court should not have allowed Detective Garcia to testify about this identification, but did not challenge Ryheam's testimony about the same conversation. The State argues that this second argument is barred by plain error. Nance argues that the omission of this argument from the posttrial motion was due to ineffective assistance of counsel and urges us to overlook his forfeiture. Because we hold that Ryheam's testimony about the conversation was admissible, there was no error at all and we need not address it further.

¶ 41 Ryheam's testimony that he told his father that Thompson and Nance were the shooters was not hearsay; it was admissible as a prior identification. See 725 ILCS 5/115-12 (West 2008) (statement not rendered inadmissible if declarant testifies and is subject to cross-examination, and statement is one identifying person "made after perceiving him"); Ill. R. Evid. 801(d)(1)(B) (eff. Jan. 1, 2011) (codifying section 115-12). Nance suggests that the statute does not apply because Ryheam did not identify him until a few days after the shooting. But the statute does not require immediate identification, and we will not read into the statute any provision that the plain

language of the statute does not contain. *People v. Lewis*, 223 Ill. 2d 393, 402 (2006). Similarly, the statute does not specify that Ryheam's statement must have been made after "perceiving" Nance in any formal identification procedure, such as a lineup. Rather, we have interpreted this rule to include any "identification evidence," including a witness's statements to police describing the offender. *People v. Newbill*, 374 Ill. App. 3d 847, 851-53 (2007).

¶ 42 We draw, however, a different conclusion as to Detective Garcia's testimony that Daniel Crockett Sr. told him that Ryheam had told Daniel Sr. about Thompson and Nance. If Ryheam had told this information to Detective Garcia directly, it would be admissible as a statement of identification. *Id.* at 853. But, the reliability of the information is attenuated because Daniel Sr. was the intermediary between Ryheam and Detective Garcia; Daniel Sr. never testified. There must be some limit on the number of people in the chain of communication who can testify to the original statement of identification, or trial becomes a game of "Telephone." Ryheam's statement to Daniel Sr. was admissible nonhearsay under section 115-12, but Daniel Sr.'s statement to Detective Garcia is not admissible under that provision.

¶ 43 The State suggests that Daniel Sr.'s statement to Detective Garcia is admissible to explain the course of Detective Garcia's investigation. See *People v. Banks*, 237 Ill. 2d 154, 181 (2010) (hearsay statement admissible to explain investigatory procedure following statement). But Detective Garcia testified not only to what he did as a result of his conversation with Daniel Sr. (compiling photo array), but also to the substantive information Daniel Sr. gave him (names and location of Thompson and Nance). This is not admissible. See *People v. Gacho*, 122 Ill. 2d 221, 248 (1988) (testimony regarding course of investigation admissible, but substance of conversation identifying defendant is inadmissible).

¶ 44 Nevertheless, we hold that the error in admitting Detective Garcia's testimony as to the substance of the information was harmless. As explained, Ryheam's prior statement of identification was properly admitted nonhearsay during Ryheam's testimony, so the substance of the information was already before the jury without Detective Garcia's repetition.

¶ 45 Correction of Mittimus

¶ 46 Finally, the parties agree that Nance is entitled to an additional three days of credit for time spent in presentence custody, for a total of 1,266 days (instead of 1,263 days). The parties also agree that attempted first degree murder is a class X offense, not class M. This Court has the authority to order the clerk to correct the mittimus without remand. *See, e.g., People v. Burton*, 2015 IL App (1st) 131600, ¶ 40. We direct the clerk of the court to correct the mittimus to reflect that Nance served 1,266 days of presentence custody and that he was convicted of a class X offense, under 720 ILCS 5/8-4(a).

¶ 47 Affirmed.