2016 IL App (1st) 141752-U

SIXTH DIVISION
DATE: October 21, 2016

No. 1-14-1752

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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. 13 CR 2609
	)	
ROMMY COE,	)	Honorable
	)	Lawrence Flood,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Rochford and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm the defendant's conviction for delivery of a controlled substance over his contention there was insufficient evidence to convict him of the offense. Prosecutor's comments during rebuttal closing argument did not amount to plain error.

¶ 2 Following a jury trial, the defendant, Rommy Coe, was found guilty of delivery of a controlled substance (heroin) (720 ILCS 570/401(d) (West 2012)) and sentenced to five years' imprisonment. On appeal, the defendant contends that: (1) the State failed to present sufficient evidence of his guilt because the State's witnesses were inconsistent, contradictory and unbelievable; and (2) he was denied his right to a fair trial due to various errors committed by the

prosecutor during rebuttal closing argument, including argument that the police officers involved in his case would not risk their careers by lying about his delivery of a small amount of narcotics. For the reasons that follow, we affirm.

¶ 3 Chicago police officer Darrell Smith testified that, at approximately 1:45 p.m. on January 10, 2013, he was undercover and working with a team of other officers attempting to conduct controlled narcotics purchases. Smith originally approached a housing complex looking to buy narcotics, but was unsuccessful. Afterward, he walked to the 1100 block of South Throop Street and observed two men and one woman on the passenger side of a parked white minivan appear to "engage in hand-to-hand transactions" with the driver, whom Smith identified at trial as the defendant. After the three individuals walked away from the minivan, Smith approached the vehicle's front passenger side and asked the defendant for "blows," which he explained at trial was a street term for heroin. The defendant, who was alone inside the minivan, told Smith to come inside, and Smith complied. Smith then handed the defendant a pre-recorded $20 bill, but did not ask him for a specific amount of heroin. The defendant reached toward his waistband and gave Smith a clear plastic bag containing a white powdery substance, which Smith believed was suspect heroin. Smith left the vehicle, walked a short distance away and relayed via radio that he had just purchased suspect narcotics from an individual inside a white minivan. While Smith was walking away from the minivan, he observed it drive away. Smith subsequently "relocated" to his vehicle. After the defendant was stopped by the police, Smith identified him as the person who sold him the suspect narcotics.

¶ 4 When Smith returned to the police station later that day, he received a $20 bill that had been recovered from the defendant. Smith compared it to a pre-recorded police funds sheet and

determined that it was the same $20 bill that he had given the defendant. Smith did not place the $20 bill into an evidence bag, but instead kept the bill for future police use. At trial, he acknowledged that neither he nor the other officers took a photograph of or photocopied the $20 bill. He also admitted that there were no photographs or video of him inside the defendant's van, or fingerprint or DNA testing performed on any of the evidence.

¶ 5 Chicago police officer David Bridges, a surveillance officer, testified that he watched Smith's movements that day and provided a similar narrative of events. Bridges observed three individuals appear to conduct narcotics transactions with the defendant from the minivan. These individuals eventually left. As Smith approached the minivan, Bridges was parked in a covert vehicle on the same side of the street 50 to 60 feet behind the minivan. From there, he observed Smith enter the minivan, "[the] defendant reach over to Officer Smith" and also Smith "reach over to the defendant." After the transaction was complete and the defendant's minivan drove away, Bridges picked up Smith and drove him to his vehicle. The defendant was subsequently stopped by other officers and Bridges identified him as the person who was inside the minivan with Smith.

¶ 6 Chicago police officer Andre Reyes, also a surveillance officer that day, testified that he had been directed to the 1100 block of South Throop Street and instructed to watch a white minivan. He parked his vehicle behind Bridges' vehicle, followed the minivan after it drove away and eventually observed other officers stop the minivan on the 1000 block of South Loomis Street. Reyes never lost sight of the minivan as he followed it from its original location to where the officers stopped it. During that time, no one entered or exited the minivan.

¶ 7 Chicago police officer Raymond Rau testified that he recovered a $20 bill from the defendant, which he later gave to Smith, and an additional $21. He acknowledged that he did not put the latter recovery in his arrest report. No narcotics were recovered from the defendant or the minivan.

¶ 8 A forensic scientist testified that he tested the substance found in the plastic bag that the defendant gave Smith. He determined that it tested positive for heroin and weighed 0.2 grams.

¶ 9 The defendant's longtime friend, Inez McReynolds, testified for the defense. She acknowledged a previous felony conviction for possession of narcotics. Sometime during the afternoon of January 10, 2013, she saw the defendant sitting in his white minivan near the intersection of West Roosevelt Road and South Throop Street, though she acknowledged she was not wearing a watch and did not know the exact time. McReynolds needed change for a $20 bill, so she decided to ask the defendant. As she approached him, he was giving a woman cigarettes. McReynolds then asked the defendant for change, and he gave her a $5 bill, 14 $1 bills and 4 quarters. About two or three minutes after McReynolds arrived, a woman named Jackie also came up to the defendant. A short time later, McReynolds left the area. At trial, she denied observing the defendant sell any narcotics, though she acknowledged that she did not know what the defendant did either before or after she was in the area.

¶ 10 Jacqueline Brown, who acknowledged a misdemeanor retail theft conviction from 2001, had been friends with the defendant for two years. At around 1 p.m. on January 10, 2013, she was walking to a nearby Jewel when she saw the defendant, who was with three or four other people, including McReynolds. Brown got inside the defendant's minivan and began talking with him. She observed the defendant give McReynolds a $5 bill, 14 $1 bills and 4 quarters.

McReynolds eventually left the minivan. Brown stayed with the defendant for 10 more minutes and then left. At trial, Brown denied observing the defendant sell any narcotics, though she acknowledged that he sold loose cigarettes to people, including her. She also could not recall additional retail theft convictions from 2010 or 2009.

¶ 11 In rebuttal, the State admitted certified copies of convictions for Brown, showing convictions for retail theft in 2010 and 2009.

¶ 12 The jury found the defendant guilty of delivery of a controlled substance. The defendant filed a motion for new trial, but did not argue that the prosecutor committed error during rebuttal closing argument. The trial court denied the motion and subsequently sentenced the defendant to five years' imprisonment. This appeal followed.

¶ 13 The defendant first contends that the State failed to present sufficient evidence of his guilt for delivery of a controlled substance because the police officers testifying for the State were inconsistent, contradictory and unbelievable.

¶ 14 When a defendant challenges his conviction based upon the sufficiency of the evidence presented against him, we must ask whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could find all the elements of the crime proven beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48 (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). All reasonable inferences must be allowed in favor of the State. *People v. Lloyd*, 2013 IL 113510, ¶ 42. While we must carefully examine the evidence before us, we must give proper deference to the trier of fact who observed the witnesses testify (*Brown*, 2013 IL 114196, ¶ 48), because it was in the "superior position to assess the credibility of witnesses, resolve inconsistencies, determine the weight to assign the testimony, and draw

reasonable inferences therefrom." *People v. Vaughn*, 2011 IL App (1st) 092834, ¶ 24. Despite this highly deferential standard, we will overturn a conviction if the evidence is "so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt." *Brown*, 2013 IL 114196, ¶ 48.

¶ 15 To sustain a conviction for delivery of a controlled substance, the State had to "prove that [the] defendant knowingly delivered a controlled substance." *People v. Brown*, 388 Ill. App. 3d 104, 108 (2009); see 720 ILCS 570/401 (West 2012). Delivery, in relevant part, is defined as "the actual *** transfer of possession of a controlled substance, with or without consideration, whether or not there is an agency relationship." 720 ILCS 570/102(h) (West 2012).

¶ 16 In the present case, there was sufficient evidence to prove that the defendant delivered a controlled substance. When Officer Smith initially observed the defendant, he appeared to be engaging in hand-to-hand narcotics transactions with three individuals from his minivan. Smith approached the minivan, asked the defendant for "blows" and was invited inside. Smith then gave the defendant a $20 pre-recorded funds bill, and in return, the defendant gave him a bag containing a white powdery substance that later tested positive for heroin. Bridges, from his surveillance location, observed the defendant and Smith engage in the transaction. See *Brown*, 388 Ill. App. 3d at 105-06, 108 (sufficient evidence to prove the defendant delivered a controlled substance where an undercover officer testified that he purchased a white powdery substance from the defendant which tested positive for heroin and the undercover officer's testimony was corroborated by a surveillance officer who observed the transaction). Furthermore, after the defendant's arrest, the pre-recorded funds bill was recovered from him. Given this evidence, and when viewing it in the light most favorable to the State with all reasonable inferences in its favor,

a rational trier of fact could have found that the defendant actually transferred possession of a controlled substance from himself to Smith and, therefore, delivered a controlled substance.

¶ 17 Nevertheless, the defendant raises several arguments as to why there was insufficient evidence against him, including that Officer Smith's testimony about buying narcotics from him was "implausible and contrary to human experience." The defendant asserts that "it simply makes no sense" that he would ask Smith to come inside his minivan because, during his alleged narcotics transactions with the three people before Smith, the defendant conducted the transactions with them standing outside of the minivan. Additionally, the defendant highlights that, when Smith entered the vehicle, he gave the defendant $20, yet did not ask for a specific amount of narcotics or discuss a price for the narcotics. The defendant further argues that it is "inexplicable" how Officer Bridges could have seen the narcotics transaction occurring between Smith and the defendant because, based on Bridges' testimony, he would have had to see "through the [minivan's] back window into the *front seat*," and he never mentioned using binoculars or another visual aid.

¶ 18 These arguments, among several others raised in the defendant's brief, essentially amount to requests for us to reject the jury's credibility determinations. As previously noted, credibility determinations are reserved for the trier of fact (see *Brown*, 2013 IL 114196, ¶ 48), and by finding the defendant guilty, the jury implicitly believed the officers' testimony. While we must give proper deference to the trier of fact on issues of witness credibility, those determinations are not completely conclusive or binding. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 59. We will reject a trier of fact's credibility findings if the witnesses were "so wholly incredible or so thoroughly impeached that [their testimony] is incapable of being used as evidence against [the]

defendant." *People v. Sanders*, 2012 IL App (1st) 102040, ¶ 15. We do not find that any of the testimony of the State's witnesses was so wholly incredible or thoroughly impeached. Therefore, we cannot reject the jury's credibility determinations in favor of the State's witnesses.

¶ 19 The defendant also points to alleged contradictions and inconsistencies in the evidence, such as Smith's and Bridges' testimony that he had engaged in a narcotics transaction with three people before Smith but he only had $21 on him, in addition to the $20 bill Smith allegedly used to buy narcotics. The defendant asserts that "it is difficult to understand how any combination of bills totaling $21 could be the fruits of three separate transactions when a single tiny bag of heroin cost $20." Additionally, he highlights the fact that Smith testified that he had a surveillance officer a "few feet" away from him; whereas, according to defendant, Bridges testified that there were no surveillance officers near Smith. As with credibility determinations, the resolution of contradictions and inconsistencies in the evidence are also reserved for the trier of fact. See *Brown*, 2013 IL 114196, ¶ 48; *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). We will not simply reweigh the evidence in the defendant's case and substitute our judgment for that of the jury. See *People v. Tenney*, 205 Ill. 2d 411, 428 (2002).

¶ 20 Lastly, the defendant argues that, "[d]espite the [pre-recorded funds] bill's apparent importance to the State's case," the officers failed to photocopy or photograph the bill. The State, however, was not required to prove that the defendant exchanged money for the narcotics in order to establish his delivery of a controlled substance. See 720 ILCS 570/102(h) (West 2012); see also *People v. Trotter*, 293 Ill. App. 3d 617, 619 (1997) ("[T]here is no requirement that pre-recorded or marked funds used in a narcotics transaction be recovered for a conviction to

stand."). The pre-recorded funds, therefore, were not material to whether the defendant delivered a controlled substance.

¶ 21 In sum, based on our review, we cannot find the evidence, as a whole, "so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt" of the defendant's guilt. *Brown*, 2013 IL 114196, ¶ 48.

¶ 22 The defendant next contends that he was denied his right to a fair trial when, during rebuttal closing argument, the prosecutor impermissibly vouched for the credibility of the police officers, shifted the burden of proof from the State to him and argued that the officers would not risk their careers by lying about his delivery of a small amount of narcotics.

¶ 23 The defendant acknowledges that he failed to preserve these claims of error for review by both objecting to the allegedly improper comments and including them in a post-trial motion. See *People v. McLaurin*, 235 Ill. 2d 478, 485 (2009). However, he argues that we should bypass the general forfeiture rule and review the claims of error under the first prong of the plain-error doctrine. Under this prong, we may consider an unpreserved error if "a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant." *People v. Taylor*, 2011 IL 110067, ¶ 30. Before determining whether an error is plain, we must determine whether an error actually occurred. *Id.*

¶ 24 The appropriate standard of review for closing arguments is currently uncertain. In *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007), our supreme court applied a *de novo* standard of review; conversely, in *People v. Blue*, 189 Ill. 2d 99, 128 (2000), which *Wheeler* cited with approval, our supreme court applied an abuse of discretion standard. See *People v. Ealy*, 2015

IL App (2d) 131106, ¶ 76 (acknowledging conflict regarding standard of review). However, we need not resolve this conflict, as our holding would be the same under either standard.

¶ 25 Prosecutors are given wide latitude during closing arguments. *Wheeler*, 226 Ill. 2d at 123. In closing arguments, a prosecutor may comment on the evidence presented and draw reasonable or fair inferences from that evidence. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). The prosecutor may also respond to the arguments from defense counsel that clearly provoke a response. *People v. Hudson*, 157 Ill. 2d 401, 441 (1993). However, a prosecutor may not argue assumptions or facts that are not supported by the record. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). When viewing the challenged comments, we must consider them in their full context and view the closing arguments in their totality. *Nicholas*, 218 Ill. 2d at 122.

¶ 26 The defendant first argues that the prosecutor impermissibly vouched for the credibility of the officers by stating "[w]ith more than 50 years of experience, they stood up there and they told the truth." Generally, a prosecutor may not vouch for the credibility of a State witness. *People v. Emerson*, 122 Ill. 2d 411, 434 (1987). "In order for a prosecutor's comments regarding a witness's credibility to be improper, 'he must *explicitly* state that he is asserting his personal views.' " (Emphasis in original.) *People v. Deramus*, 2014 IL App (1st) 130995, ¶ 51 (quoting *People v. Pope*, 284 Ill. App. 3d 695, 707 (1996)).

¶ 27 In the present case, the prosecutor did not personally vouch for the credibility of the officers as she did not expressly state that it was her opinion that the officers' testimony was credible. See *People v. Jackson*, 391 Ill. App. 3d 11, 43 (2009) ("Appellate courts are unwilling to infer that a prosecutor is injecting his personal opinion into an argument where the record does not unambiguously say so."). Therefore, the prosecutor did not commit error here.

¶ 28 The defendant next argues that the prosecutor shifted the burden of proof to him when she stated: "But wait, what, this is a vast conspiracy against the defendant, against poor Rommy Coe? A vast conspiracy?" The defendant asserts that this comment implied to the jury that he was responsible for proving that the State's witnesses had conspired to frame him. Throughout the trial, the defendant had the presumption of innocence, and State had the burden to prove him guilty. *People v. McGee*, 2015 IL App (1st) 130367, ¶ 69. It would, therefore, be improper for the prosecutor to make comments that shifted the burden of proof from the State and onto the defendant. See *Glasper*, 234 Ill. 2d at 212.

¶ 29 In the present case, the prosecutor did not shift the burden of proof from the State onto the defendant, as this line of rebuttal argument was fairly and directly responsive to defense counsel's attack on the credibility of the officers. See *People v. Fountain*, 2016 IL App (1st) 131474, ¶¶ 87-92 (prosecutor's comments about a conspiracy against the defendant did not shift the burden of proof to him because the prosecutor responded to defense counsel's argument which asserted the State's witnesses "could not and should not be believed"). Furthermore, the prosecutor never argued to the jury that the defendant had a burden to prove the State's witnesses had lied in order to prove his innocence or approached any other argument asserting that the defendant had something to prove. Rather, the argument was merely a rhetorical question responding to defense counsel's attack on the credibility of the officers. Therefore, the prosecutor's comment was not improper.

¶ 30 The defendant lastly asserts that the prosecutor improperly argued that the police officers would not risk their careers by lying about his delivery of a small amount of narcotics where there was no evidence in the record concerning the potential consequences the officers could face

if they lied to the jury. The State responds, arguing that the prosecutor's comments were proper as they were directly responsive to defense counsel's closing argument, in which she accused the police officers of lying.

¶ 31 In rebuttal closing argument, the prosecutor argued:

> "But wait, what, this is a vast conspiracy against the defendant, against poor Rommy Coe? A vast conspiracy? You have officers of the Chicago Police Department with more than 50 years combined experience, and they're going to put all of that on the line for the defendant? For his 0.2 grams of heroin? They're going to risk it all?"

Later, the prosecutor asked the jury: "[w]hy not make the case just a little bit better? Why only 0.2 grams? Make it a bigger case. If you're going to risk it all, you might as well go big or go home." Lastly, when telling the jury to use its commonsense during deliberations, the prosecutor stated, "common sense should tell you that those officers would not put it all on the line for 0.2 grams of heroin. With more than 50 years of experience, they stood up there and they told the truth."

¶ 32 In *People v. Adams*, 2012 IL 111168, our supreme court held that it was improper for a prosecutor to argue, during closing arguments or rebuttal, that police officers should be believed because they would not risk their careers or freedom by testifying falsely when no evidence was presented at trial on the subject. *Id.* ¶¶ 16, 20. The court explained that, because no evidence had been presented, the argument was "impermissible speculation." *Id.* ¶ 20. The court further found that such comments violated the principle that prosecutors may not argue that a police officer, due to his or her profession, is more credible as a witness. *Id.*

¶ 33 Although *Adams* found such comments improper, the court did not discuss whether a prosecutor could make such an argument when responding to a defense counsel's allegation that the officers had lied. In *People v. Young*, 2013 IL App (2d) 120167, however, this court found that a prosecutor's comments that police officers would not "risk their career[s]" and "risk everything" by testifying falsely was improper under *Adams* despite the prosecutor responding "to an argument that the officers lied." *Id.* ¶¶ 14, 40.

¶ 34 Turning to the present case, the State did not present any evidence that the officers would be at risk of losing their jobs if they lied on the witness stand. While the prosecutor's comments were not as overt in this detail as the ones deemed improper in *Adams*, the insinuation of "risk[ing] it all" or "put[ting] it all on the line" juxtaposed with stating the officers' combined years of experience is no different than explicitly arguing that the officers would not risk their careers by lying. As the prosecutor referenced unidentified but presumed consequences if the officers testified falsely, this also implied that they had a superior reason to provide truthful testimony than other witnesses. *Adams*, 2012 IL 111168, ¶ 20. This line of argument, therefore, violated the principle that a prosecutor may not assert that police officers are more credible merely because of their status as law enforcement. *Id.* Therefore, the prosecutor committed error.

¶ 35 However, even though we have found an error occurred, we cannot find that the error amounts to first-prong plain error. Under this prong, the evidence at trial must be "so closely balanced that the error alone threatened to tip the scales of justice against the defendant." *Taylor*, 2011 IL 110067, ¶ 30. We must make a "qualitative *** commonsense assessment of the evidence." *People v. White*, 2011 IL 109689, ¶ 139.

¶ 36 In doing so, we find the evidence against the defendant was overwhelming. The State presented unrebutted testimony from four officers that the defendant sold an undercover officer heroin. Officer Smith, who bought the heroin from the defendant, testified to the transaction. Officer Bridges corroborated much of Smith's testimony. Officer Reyes followed the defendant's minivan from after the transaction until other officers stopped it and arrested him. Officer Rau testified to recovering money from the defendant, including the $20 bill Smith gave the defendant during the transaction. In light of these circumstances, we cannot conclude that the evidence was "so closely balanced that the error alone threatened to tip the scales of justice against" the defendant. *Taylor*, 2011 IL 110067, ¶ 30. Therefore, no plain error occurred.

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

¶ 38 Affirmed.