2014 IL App (2d) 130194-U
No. 2-13-0194
Order filed August 4, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 11-CF-744
CHRISTOPHER D. McGILL,	)	Honorable David R. Akemann,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices Hutchinson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly denied defendant's motion to quash arrest and suppress evidence, and the State's comments during its rebuttal closing did not amount to reversible error or plain error; affirmed.

¶ 2 Following a jury trial, defendant, Christopher McGill, was convicted of armed habitual criminal (720 ILCS 5/24-1.7 (West 2010)) and sentenced to seven and a half years' imprisonment. Defendant appeals the order denying his posttrial motion to set aside the jury verdict. Defendant raises two issues: (1) whether the investigatory stop and seizure of defendant was justified where the police did not observe a criminal violation or sufficiently corroborate the

confidential informant's tip, and (2) whether the prosecution denied defendant a fair jury trial by making prejudicial comments during closing rebuttal. For the foregoing reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Officer Maguire of the Aurora Police Special Operations Group (SOG) testified at the hearing on defendant's motion to suppress evidence and quash arrest. Maguire received a call on his cell phone at approximately 6:20 p.m. on April 10, 2011, from a confidential informant. Maguire recognized the voice on the other end as that of a confidential source with whom he had had prior contact. The informant had previously given Maguire information regarding crimes, including information regarding narcotics and a firearm which recently had led to a seizure and arrest. The informant told Maguire that he had personally seen a man with a handgun standing in a parking area in front of 1376 Monomoy Street, Aurora, Illinois. He described the man as a black male with short black hair, in his mid-20s, approximately 5 feet, 11 inches tall and approximately 170 pounds, wearing dark pants and a striped shirt. Maguire testified that he knew the area in question had a high level of gang, drug, and criminal activity. He and a fellow investigator drove to the area to confirm the tip, and he saw a suspect matching the description and standing in the area as reported by the informant. Maguire recognized the suspect as defendant, with whom he had had prior contact. Maguire knew of information that defendant previously had both possessed and used a gun.

¶ 5 Maguire and other officers from the Aurora Police SOG convened to create a plan to approach defendant. Officers Hahn and Grabowski were the first to approach defendant, while the other officers observed from nearby in case they were needed. Hahn testified that he told defendant they had a warrant for his arrest, at which point the defendant looked startled, turned, and began to walk away. A struggle ensued and the other officers ran to assist. During the

struggle, Maguire saw defendant reach for a gun in his waistband. Maguire grabbed the gun's handle and it fell to the ground. Maguire kicked the gun away from defendant and another officer picked it up. Defendant was arrested and charged with armed habitual criminal, two counts of aggravated unlawful use of a weapon by a felon, unlawful use of a weapon by a gang member, unlawful use of a weapon by a felon, and resisting a peace officer. The State dismissed all the charges but armed habitual criminal. See 720 ILCS 5/24-1.7 (West 2010).

¶ 6 The jury found defendant guilty. Defendant filed a posttrial motion for a new trial, which was denied. Following the sentencing hearing, the trial court sentenced defendant to seven and a half years' imprisonment. Defendant timely appeals.

¶ 7 II. ANALYSIS

¶ 8 A. Motion to Quash and Suppress

¶ 9 We first address defendant's contention that the trial court erroneously denied his motion to quash arrest and suppress evidence. Specifically, defendant claims that the information known to the police at the time he was first approached and detained did not provide a reasonable articulable suspicion that he was committing a crime, and therefore, was insufficient to support his detention under *Terry v . Ohio*, 392 U.S. 1 (1968).

¶ 10 When we review a ruling on a motion to suppress, we apply a two-part standard of review: we will reverse the court's findings based on facts only if they are against the manifest weight of the evidence; while the trial court's ultimate legal ruling on whether suppression was warranted is reviewed *de novo*. *People v. Payne*, 393 Ill. App. 3d 175, 179-180 (2009). Additionally, the trier of fact has the duty to determine the credibility of witnesses and the weight to be given to their testimony, resolve conflicts in the evidence, and draw reasonable conclusions from the evidence. *People v. Salinas*, 347 Ill. App. 3d 867, 880 2004). It is not the

function of this court to substitute its judgment for that of the trier of fact. *People v. Clarke*, 391 Ill. App. 3d 596, 610 (2009).

¶ 11 Under *Terry*, a police officer is authorized to effect a limited investigatory stop where there exists a reasonable suspicion, based on specific and articulable facts, that the person detained has committed or is about to commit a crime. *People v.* Walter, 374 Ill. App. 3d 763, 766 (2007) (citing *Terry*, 392 U.S. at 21-22). During a *Terry* stop, an officer may frisk a person for weapons where the officer reasonably believes that he is dealing with an armed and dangerous individual; this reasonable belief is met if a reasonably prudent person, when faced with the circumstances that the police confronted, would have believed that his safety or the safety of others was in danger. *People v. Linley*, 388 Ill. App. 3d 747, 749 (2009). This is an objective standard that is satisfied if, in light of the totality of the circumstances, a reasonably prudent person in that situation would believe that his or her safety or the safety of others is in danger. *People v. Davis*, 352 Ill. App. 3d 576, 580 (2004).

¶ 12 Thus, in order for this stop to be found reasonable, we must consider the totality of the circumstances, including what led the officers to make the stop in the first place. Here, a tip from an anonymous informant led to the stop of defendant. In order for an informant's tip to justify a *Terry* stop, it must bear some indicia of reliability. *Linley*, 388 Ill. App. 3d at 750. This court has held that the factors to be considered when determining the reliability of an informant's tip include (1) the informant's veracity and basis of knowledge; (2) independent corroboration through police investigation; (3) the level of detail in the tip; and (4) whether the informant had provided reliable information in the past. *People v. Davis*, 398 Ill. App. 3d 940, 958 (2010). A significant factor in judging the reliability of a tip from a member of the public is whether, prior

to conducting a *Terry* stop, the police are aware of facts tending to corroborate the tip. *Linley*, 388 Ill. App. 3d at 751.

¶ 13 Defendant argues that, in applying the *Davis* factors to this case, there was not sufficient reliability in the undisclosed informant's tip to support a reasonable suspicion that defendant was committing an offense and to justify a *Terry* investigatory stop. We disagree. An application of the law to the facts supports the ruling of the trial court.

¶ 14 At the time defendant was detained, the police were aware of several interrelated and substantiated facts that gave them reason to perform an investigatory stop. The police were given a detailed description of the subject and that he was carrying a gun. The informant also told the police where the subject was located at that time. The police were aware that the area in question had a high degree of criminal activity. The tip came from a person the police had known and with whom they had dealt. Additionally, the informant had provided at least one accurate tip leading to a drug and weapons arrest within the last year. The tip was also verified when the police discovered that the subject of the tip was a person with whom they had previous contact and with whom they had known had carried a gun and was a suspect in a prior shooting. Furthermore, defendant looked shocked and began to walk away from the police as they approached.

¶ 15 Given the totality of the circumstances, the State sufficiently established that the officers had a reasonable, articulate suspicion to make the initial investigatory stop.

¶ 16 B. Closing Rebuttal Comments

¶ 17 Defendant next contends that the State made two improper statements during its closing rebuttal argument that amounted to reversible error. Whether statements made by a prosecutor during closing argument were so egregious that they warrant a new trial is a legal issue which we

review *de novo*. *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007). Improper remarks warrant reversal only where they result in substantial prejudice to the defendant, considering the content and context of the language, its relationship to the evidence, and its effect on the defendant's right to a fair and impartial trial. *People v. Rebecca*, 2012 IL App (2d) 091259, ¶¶ 82, 86. The test for determining if a comment resulted in substantial prejudice is whether the remark was a material fact in the conviction or whether the jury would reach a different verdict absent the remark. *People v. Figueroa*, 381 Ill. App. 3d 828, 849 (2008).

¶ 18 1. Propensity

¶ 19 Defendant first asserts that the prosecutor committed reversible error when, during the State's closing rebuttal, he stated:

> "It is unfortunate that [defendant] is sitting here before you. It's not unfortunate for you, it's not unfortunate for the community at large, it's only unfortunate for [defendant] because he's in trouble. He got caught with a gun. He's done it before and he did it again. So, yes, it is unfortunate."

¶ 20 Defendant claims that the prosecutor's comment was a misstatement of law that asked the jury to convict defendant based on his propensity to commit crimes; *i.e.* because defendant was previously convicted of unlawful use of a weapon by a felon, he also must have possessed a firearm in this case, and thus, was guilty of the current offense of armed habitual criminal. This brief, isolated comment did not amount to reversible error where the objection was sustained and the trial court instructed the jury on the proper use of the prior convictions. Moreover, defense counsel specifically told the jurors that, while they could use defendant's prior convictions to determine defendant's credibility and whether he had the necessary criminal history, the jury could not use the prior convictions to determine propensity. See *People v. Legore*, 2013 IL App

(2d) 111038, ¶ 59 (act of sustaining objection to argument is generally considered to cure any prejudicial error).

¶ 21 2. Shifting the Burden of Proof

¶ 22 Defendant last claims that the prosecutor committed plain error when he allegedly shifted the burden of proof by arguing that "in order to find [defendant] not guilty, you basically have to come to the conclusion that every one of those Aurora police officers who got on the stand were not telling the truth, were lying, made up a case to convict him." Defendant alleges that the prosecutor improperly shifted the burden of proof by suggesting that in order for the jury to find defendant not guilty, they would have to find that the State's witnesses are lying.

¶ 23 Defendant acknowledges that he did not object to this comment at trial or in a written posttrial motion, and therefore we must examine whether it falls within the plain-error doctrine. *People v. Euell*, 2012 IL App (2d) 101130, ¶ 15. Under the plain-error doctrine, a forfeited issue may be reviewed when either (1) the evidence in the case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence, or (2) the error is so serious that defendant was denied a substantial right, and therefore a fair trial. *Id.* Defendant bears the burden of persuasion under both prongs. *People v. Herron*, 215 Ill. 2d 167, 187 (2005).

¶ 24 Defendant does not argue that the first prong of the plain-error doctrine applies, which is reasonable as our review of the evidence shows that it is not closely balanced. The State admits that the prosecutor's comment which referred to finding defendant not guilty was "essentially similar to using the term "acquit" but does not constitute plain error. We agree that the comment was improper. Nevertheless, we must examine whether the comment is reversible as plain error.

¶ 25 In disagreeing with *People v. Wilson*, 199 Ill. App. 3d 792 (1990), a case cited by defendant, we stressed that to establish plain error, defendant must show that the " '[i]mproper

comment is *** either so inflammatory that the defendant could not have received a fair trial or so flagrant as to threaten a deterioration of the judicial process.' " *Euell*, 2012 IL App (2d) 101130, ¶ 21 (quoting *People v. Yonker*, 256 Ill. App. 3d 795, 798 (1993)). This is not the case here. The comment was not so inflammatory or flagrant as to deny defendant a fair trial. The comment was an isolated one made in the context of evaluating the credibility of the witnesses based on the evidence. The comment was a response to defendant's argument regarding his credibility and the lack of the State's witnesses' credibility, and it was not expanded upon. Furthermore, the jury was properly instructed that the arguments of counsel were not evidence. Accordingly, we do not find the comment was either so inflammatory that defendant could not have received a fair trial or so flagrant as to threaten a deterioration of the judicial process. While the comment made here did not amount to reversible error, we caution the prosecutors that our decision in no way condones the use of such improper arguments.

¶ 26 Taken individually or together, neither comment constitutes reversible error. A conviction will not be reversed due to the cumulative effect of trial error unless it appears that real justice has been denied or that the verdict may have resulted from such error. *People v. Ballard*, 65 Ill. App. 3d 831, 842 (1978). The prosecutor's two isolated comments could not have affected the verdict in light of the overwhelming evidence against defendant.

¶ 27 III. CONCLUSION

¶ 28 For the reasons stated, the judgment of the circuit court of Kane County is affirmed.

¶ 29 Affirmed.