2017 IL App (2d) 141218-U
No. 2-14-1218
Order filed April 18, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ROBERT McMANUS, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 13-CM-1733 Honorable Robert J. Morrow, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Jorgensen and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The State's closing argument did not improperly direct the jury's attention to defendant's refusal to testify, as the State merely argued, in response to defendant's argument that the State's case was weak, that the State's crucial evidence was uncontradicted.

¶ 2 Defendant, Robert McManus, appeals from his conviction of one count of domestic battery (contact of an insulting or provoking nature) (720 ILCS 5/12-3.2(a)(2) (West 2012)). He asserts that the court improperly permitted the State in its closing to highlight his failure to testify. The State responds that defendant has forfeited the issue. We address the merits, concluding that no improper highlighting occurred. We thus affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant had a jury trial on the single count of domestic battery of which he now stands convicted. That count stemmed from a May 8, 2013, altercation between defendant and M.M., who was his wife.

¶ 5 Anthony Mader, who had been a Pingree Grove police officer on May 8, 2013, was the State's first witness. He testified that in the morning of May 8, he, Pingree Grove Deputy Chief Shawn Beane, and two Kane County sheriff's deputies responded to a report of domestic violence. He and a deputy were the first two law enforcement officers on the scene, with the deputy arriving a few seconds before Mader. They arrived at a single-family house and found defendant and M.M. both present. The deputy separated defendant and M.M., but the two continued to shout at each other.

¶ 6 Mader spoke to both M.M. and defendant. He observed that M.M. had a red mark on and around her left ear, which he photographed. When he spoke to defendant, defendant pointed out that he had a bump on his head; this too was photographed. Mader identified the photographs but said that they were partially inaccurate in that they failed to show as much reddening as he had observed when examining defendant and M.M. directly. Under cross-examination, Mader stated that he did not notice any signs that defendant was intoxicated, but explained that he was not looking for such signs in the way that he might when, for instance, conducting a traffic stop.

¶ 7 Beane followed Mader in the witness box. He testified that, on the morning of May 8, Mader was the only patrol officer on duty, so Beane left the police department to provide backup for Mader. Beane spoke to M.M., whom he described as "excited." He noticed that she had a red mark that extended from her mouth to her left ear. He also spoke to defendant, who also appeared to be "excited" and "emotional." Beane also saw the bump on defendant's head. He

did not notice that defendant was particularly dirty or disheveled, but did notice some dirt on his face. Nothing he had noticed had made him think that defendant was intoxicated.

¶ 8 M.M. was the State's last witness. She testified that, at the time of the incident, she lived with defendant in a single-family house. She had not seen defendant for "two or three days." She was the only one at home when defendant came back. She and defendant immediately started arguing over his absence. During the argument, defendant asked her for money. When she refused to give him any, he tried to take her purse from her. He grabbed it with one hand, but she held on with both hands. He hit her on the left side of her face with his right hand, striking her face and ear. The blow hurt and made her feel "horrible." She told defendant that she was going to call the police. In response, he threatened to call the police and say that she had hit him; she responded that he could do whatever he wanted. He then went into a bathroom and she walked outside. She called the police, who arrived within minutes. The State asked M.M. whether she had struck or scratched defendant. She said that she had not.

¶ 9 On cross-examination, M.M. stated that she had lived with defendant since 2004 and had married him in 2007. Their relationship had continued off-and-on for 20 years. The two had arguments and, if an argument "got physical," defendant would sometimes leave for a few days. This time, though, defendant had simply disappeared, an action that M.M. said was part of "a pattern of his." Asked whether she was angry with defendant, M.M. said that she was neither particularly angry nor particularly upset, but her "feelings were hurt," and she had wanted defendant to explain why he had been gone. Defendant was "messed up" when he returned; M.M. was sure that he was intoxicated. This was based "on how many times [she had] been with him, how many times [she] paid for rehab, and a time he OD'd and he was in the hospital." This was "[j]ust [her] pure knowledge of [her] husband and what he does." M.M. further explained

that defendant, who was left handed, had used his left hand to grab her purse. Her cell phone was in her purse. She took it outside to call the police and then, immediately afterward, her mother. She was outside when the police arrived, but she went inside to get a cigarette as soon as they came.

¶ 10 The State rested after defendant's cross-examination of M.M. Defendant moved for a directed verdict, but the court denied the motion. Defendant then rested as well.

¶ 11 The closing argument for the defense focused on discrediting the witnesses. Counsel argued that M.M. was not a credible witness based on, among other things, the implausibility of her claim that she was not angry or upset. He also argued at length that differences between Mader's and Beane's observations meant that neither was reliable. Counsel's concluding comments emphasized the lack of "independent" witnesses:

> "There was no independent corroborating witness. There's no outside neighbors who heard or witnessed the disturbance. Nothing. You have her word. With all of the holes in this case, all of the different things that have been said that don't match up, this is another major thing that doesn't match up with what happened here.
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> The government hasn't done their job. By not doing their job, providing you with a reason to take away that presumption, they have not met their burden. They have not overcome [defendant's] presumption of innocence on these charges; and as such, members of the jury, it is your duty under the law to find [defendant] not guilty of a domestic battery in this case."

¶ 12 The State's rebuttal was structured largely as a point-by-point discussion of the defense closing. Thus, its final remarks were addressed to defendant's final remarks:

> "[Defendant has] been saying, well, this is missing, this is missing, this is missing; but if

> you really think back, what was missing? [The officers] testified to what they observed. ***
>
> *** Here's what the evidence was, and that is *the uncontradicted testimony* of [M.M.] She told you exactly what happened. *So we know it's uncontradicted*, but why should you believe [M.M.]? Because that's what this case comes down to.
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> * * *
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> *** I would submit this to you: Her testimony makes sense. *** It makes sense that he came home. She hadn't seen him in a while; she was upset. There was an argument. He had enough and struck her in the face. So it makes sense, it's corroborated by this photo and by what the police observed on the scene; *and, finally, it's uncontradicted*. She's the one that told you what happened. That's why you should find the defendant guilty.
>
> [Defense Counsel:] Judge, I'm going to object. That's a burden shift." (Emphases added.)

The court overruled the objection, and the State immediately concluded its rebuttal:

> "So in conclusion, does her testimony make sense? It's corroborated and it's uncontradicted, and that's why you should find the defendant guilty of domestic battery."

¶ 13 The jury found defendant guilty. Defense counsel then immediately told the court that, given defendant's "current situation"—that he was in federal custody—he wanted to have his sentencing that same day. The court responded, "If we do that, there would not be the filing of post-trial motions. Has that been discussed with your client?" Defendant and the State then had a discussion in the courtroom and came back before the court with an agreed sentence of 180 days' incarceration. The court accepted the sentence. Defendant received leave from this court

to file a late notice of appeal.

¶ 14 II. ANALYSIS

¶ 15 On appeal, defendant argues that the State's rebuttal comments, by highlighting the fact that M.M.'s testimony was uncontradicted, improperly drew attention to the absence of defendant's testimony, thus impermissibly shifting the burden of proof to him. He concedes that he did not file a posttrial motion, so that forfeiture is at issue, but asserts that applying the forfeiture doctrine is inappropriate here because the court incorrectly told him that having his sentencing the same day as the verdict precluded his filing of a posttrial motion.

¶ 16 The State responds that defendant forfeited the issue twice over. It argues that, not only did he fail to raise the matter in a posttrial motion, but he also failed to object to *all* of the State's comments concerning the lack of any contradiction of M.M.'s testimony. Defendant, in reply, concedes that he did not object to every such comment by the State, but asserts that his argument is based only on those comments to which he objected.

¶ 17 We reach the merits of defendant's claim despite the State's arguments for forfeiture. Generally, to preserve a claim of trial error for review, a party must raise it both contemporaneously and in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 190 (1988). This is a matter of fairness to the appellee, but also of judicial economy. *People v. Hughes*, 2015 IL 117242, ¶ 38. That said, this rule of forfeiture is binding only on the parties. A reviewing court may relax the rule and address the merits of an otherwise forfeited issue where fairness so requires. *People v. Hughes*, 343 Ill. App. 3d 506, 510 (2003). Here, we see justice in defendant's argument that the court's telling him that he could not both file a posttrial motion and be sentenced that day resulted in his being unfairly deprived of his right to file a posttrial motion. No procedural rule bars filing a posttrial motion after sentencing, as long as the motion

is timely. Defendant thus was improperly and unfairly discouraged from filing a posttrial motion. In any event, judicial economy is served by our reaching the merits of this straightforward issue.

¶ 18 We determine that the court did not err in permitting the State to argue that M.M.'s testimony was uncontradicted.

> "The appropriate test for determining whether a defendant's right to remain silent has been violated [by the prosecution's argument] is whether the reference [was] intended or calculated to direct the attention of the jury to the defendant's neglect to avail himself of his legal right to testify. [Citations.] The prosecutor may comment on the uncontradicted nature of the State's case [citation] and, where motivated by a purpose of demonstrating the absence of any evidentiary basis for defense counsel's argument rather than a purpose of calling attention to the fact that defendant had not testified, such argument is permissible [citation]. Moreover, a defendant cannot ordinarily claim error where the prosecutor's remarks are in reply to and may be said to have been invited by defense counsel's argument." (Internal quotation marks omitted.) *People v. Dixon*, 91 Ill. 2d 346, 350-51 (1982).

The supreme court arguably has applied both *de novo* and abuse-of-discretion review to claims of prosecutorial misconduct in closing argument. See *People v. Smith*, 402 Ill. App. 3d 538, 542 (2010) (reviewing cases). We give defendant the benefit of *de novo* review.

¶ 19 Here, we see nothing in the State's comments suggesting intent to draw the jury's attention to defendant's silence. Rather, the point that came across in the State's argument was that—despite defendant's effort to suggest that flaws in the State's evidence made that evidence unpersuasive—the clarity of M.M.'s testimony made the case straightforward. Further, even if

we were to agree that the comments drew attention to defendant's failure to testify, we would deem that defense counsel's argument invited those comments. Defendant's argument highlighted small differences between Mader's and Beane's testimony; thus, the State could properly highlight that nothing contradicted the core of its case: M.M.'s testimony.

¶ 20 In so holding, we distinguish two cases relied on by defendant, *People v. Herrett*, 137 Ill. 2d 195 (1990), and *Smith*. We consider each in turn.

¶ 21 In *Herrett*, the "prosecutor remarked several times that there was no testimony or explanation" for the defendant's presence at a location and time that tended to incriminate him. *Herrett*, 137 Ill. 2d at 202. The *Herrett* court, relying on a case that had similarly turned on a prosecutor's suggestion that the defendant had not explained why he had been found in incriminating circumstances, "conclude[d] that the prosecutor *** exceeded the bounds of fair comment when he referred to the failure of the defendant to explain his [incriminating] presence." *Herrett*, 137 Ill. 2d at 213. Here, by contrast, the State was not suggesting that defendant, had he been innocent, would have provided exculpatory evidence. Instead, it was commenting on the overall weight of the evidence and pointing out why the minor contradictions in the police officers' testimony were unimportant.

¶ 22 The *Smith* court reversed a conviction based on the trial court's overruling of defense objections to a closing argument drawing attention to evidence that the defendant had failed to present. For instance, the State had argued to the jury that the defendant had failed to present any evidence that he had not had the relevant *mens rea*. *Smith*, 402 Ill. App. 3d at 542. The *Smith* court held that, by overruling the defendant's objections to these remarks, "the trial court in effect permitted the jury to infer defendant's guilt from his failure to present evidence in [*sic*] his own behalf." *Smith*, 402 Ill. App. 3d at 544. Those rulings were " 'in effect sanctioning an

erroneous burden of proof before the eyes of the jury.' " *Smith*, 402 Ill. App. 3d at 544 (quoting *People v. Beasley*, 384 Ill. App. 3d 1039, 1048 (2008)). Here again we can distinguish the case on the basis that the State was commenting on the weight of the evidence, not drawing attention to any "missing" evidence.

¶ 23 III. CONCLUSION

¶ 24 For the reasons stated, we affirm defendant's conviction. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 25 Affirmed.