2017 IL App (2d) 150614-U
No. 2-15-0614
Order filed September 20, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. THOMAS T. STANFORD, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 13-CF-2121 Honorable T. Clint Hull, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Presiding Justice Hudson and Justice Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant showed no plain error in the State's closing argument: although the State mischaracterized a witness's testimony, defendant was not denied a fair trial, as he immediately pointed out the misstatement and the trial court provided a curative instruction.

¶ 2 Defendant, Thomas T. Stanford, appeals his conviction of resisting a peace officer (720 ILCS 5/31-1(a-7) (West 2012)). He contends that comments made by the State during closing argument misstated the facts and were plain error. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged in connection with a police call to his home in November 2013, and, in March 2015, a jury trial was held. Defendant's girlfriend, Tiffany Dixon, called the police for assistance in retrieving her car keys in order to go to her mother's house. Officer Jonathon Rustay was dispatched to the home, and defendant let him come inside. Defendant sat on a couch while Dixon gathered her belongings. According to Rustay, Dixon's car keys were located behind him, and defendant stood up from the couch, approached Rustay, and used his arm to push past him. Rustay told defendant that he was under arrest and attempted to gain control of defendant's right arm. A struggle ensued within a confined area, and Rustay pushed defendant against a wall. In attempting to gain control, Rustay delivered a knee strike to defendant and both men fell to the ground. Throughout the struggle, Rustay repeatedly told defendant to stop resisting and that he was under arrest. Rustay testified that defendant continued to resist after he was handcuffed. Rustay was later treated at the hospital for pain in his shoulder and hand related to the incident.

¶ 5 Dixon testified for defendant and told a different story. According to Dixon, Rustay told her to take defendant's keys and she saw defendant get up from the couch and grab the keys. She said that defendant did not make any physical contact with Rustay and that she saw Rustay slam defendant to the ground and put handcuffs on him. She did not observe defendant struggle with Rustay. On cross-examination, the following colloquy occurred:

"[State's Attorney]: And did you talk to any of the other police there about what you had seen?

[Dixon]: No.

[State's Attorney]: Did you ever go to the Elgin Police Department to talk to, for example, a supervisor there about what you had seen?

[Dixon]: No.

[State's Attorney]: Did you ever come to the state's attorney's office and tell them what you had seen?

[Dixon]: No.

[State's Attorney]: Did you ever come into court and talk to any of the lawyers or the judge here in court?

[Dixon]: No.

[State's Attorney]: So this is the first time—

* * *

[State's Attorney]: This is the first time you told anyone about what happened to Mr. Stanford?

[Dixon]: No.

[State's Attorney]: This is the first time you told anyone involved with law enforcement what happened to Mr. Stanford?

[Dixon]: Besides lawyers. I am not 100 percent sure lawyers and law enforcement are different."

¶ 6 Dixon stated that she spoke to both defense counsel and an assistant State's Attorney. Defendant testified and denied making physical contact with Rustay. He said that Rustay tackled him.

¶ 7 During closing argument, defense counsel made the following statements:

"There is a big deal made out of the fact of Tiffany Dixon talking and making statements and what she said to the officers and what she didn't say to the officers. Well,

whose responsibility is it to investigate crimes? Is it Tiffany Dixon's responsibility to investigate crimes and present that?

* * *

Was there any testimony that any other officer came into that house and asked Ms. Dixon questions after this to determine whether or not this officer's statement as to what occurred inside that residence was accurate?

And then they will have you say, well, she just came into this court—she told you that she spoke with attorneys prior. She spoke with my office. She spoke with the state's attorney's office. And there is an instruction that you will get and that is something. Everybody has a right to interview a witness. They have the right to talk to a witness.

Obviously they knew who she was. This isn't someone who came out of the woodwork and just happened to say, oh, by the way, I was there. She was there that day. They took her to the scene. The officer knew.

So for the state to argue or make it seem like she is just coming into court now and telling this version that was their right to do. They have the burden of proof. They are the ones that have to have this evidence. And lo and behold they want to call out the fact of her—what she told the police officers, what she didn't tell the police officers. However, there was no police officer who came in here and said we attempted to ever obtain a statement from her."

¶ 8 During the State's rebuttal, the following exchange occurred:

"[State's Attorney]: Furthermore I want to talk about what would have to happen for the defendant's story to be true. You'd have to believe that Officer Rustay told a lie, that [another officer] went along with it and, once again, that Tiffany Dixon did not tell

anyone about what happened to her now-over-18-month boyfriend living in the house. It is unreasonable to believe that a girlfriend who sought police help is going to sit at some wall in this living room, watch her boyfriend be manhandled by the police in the living room, watch him be manhandled in the hallway, and watch him be manhandled in the front lawn and not tell anyone.

[Defense Counsel]: Judge, misstates her testimony regarding that she spoke to the state's attorney's office.

THE COURT: Okay. Again I'm going to go ahead and admonish the jury that any arguments not based upon the facts that have been introduced into evidence should be disregarded. You will be the ones that will decide what the facts are.

You can continue.

[State's Attorney]: Ms. Dixon testified that she told—talked to [defense counsel], talked to someone at the state's attorney's office. Didn't say what they talked about, who it was, how long it was or when it was, but she unequivocally told you that today was the very first time she told anyone what she was testifying to. Unequivocally, no ands, ifs or buts about it, his girlfriend said that."

There was no further objection by defendant. Before deliberations, the jury was instructed that closing arguments were not evidence.

¶ 9 The jury found defendant guilty. Defendant moved for a new trial but did not make any arguments related to the State's comments during closing argument. The motion was denied, and defendant was sentenced to a term of probation. He appeals.

¶ 10 II. ANALYSIS

¶ 11 Defendant contends that the State's comments during closing argument that Dixon did not tell anyone what happened were misstatements of fact that, under a plain-error analysis, deprived him of a fair trial.

¶ 12 There is a conflict in our supreme court's rulings regarding the proper standard of review for claims based upon allegedly improper closing arguments. In *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007), our supreme court applied the *de novo* standard of review. But in *People v. Blue*, 189 Ill. 2d 99, 128 (2000), the court applied the abuse-of-discretion standard. We need not resolve this issue, as our conclusion is the same under either standard. See *People v. Crawford*, 2013 IL App (1st) 100310, ¶ 139; *People v. Hayes*, 409 Ill. App. 3d 612, 624 (2011).

¶ 13 Defendant concedes that he failed to raise the matter in his posttrial motion, but argues that it may be reviewed for plain error. To preserve an issue for appeal, the defendant must both object at trial and raise the issue in a posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). "However, where the prosecutor misstated the evidence in closing argument, a reviewing court may review the issue under plain error." *People v. Jackson*, 2012 IL App (1st) 102035, ¶ 16. "The plain error doctrine allows reviewing courts to address forfeited errors if '(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.' " *Id.* (quoting *People v. Herron*, 215 Ill. 2d 167, 187 (2005)).

¶ 14 "Prosecutors are afforded wide latitude in closing argument." *Wheeler*, 226 Ill. 2d at 123. In reviewing comments made in closing argument, we ask whether the comments engendered substantial prejudice against the defendant such that it is impossible to say whether a verdict of guilt resulted from them. *Id.* "Misconduct in closing argument is substantial and warrants reversal and a new trial if the improper remarks constituted a material factor in a defendant's

conviction." *Id.* "If the jury could have reached a contrary verdict had the improper remarks not been made, or the reviewing court cannot say that the prosecutor's improper remarks did not contribute to the defendant's conviction, a new trial should be granted." *Id*.

¶ 15 Improper comment is plain error only when it 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. *People v. Burman*, 2013 IL App (2d) 110807, ¶ 45. "[T]he closing arguments of both the State and the defendant must be examined in their entirety and the comments complained of must be placed in their proper context." *People v. Rush*, 294 Ill. App. 3d 334, 340 (1998). The prosecutor has a right to comment upon the evidence presented and make any reasonable inferences arising from it, even if those inferences are unfavorable to defendant. *Id*. at 340-41. A prosecutor may also respond to comments that invite a response. *People v. Hall*, 194 Ill. 2d 305, 346 (2000). Further, "if the trial court instructs the jury that closing arguments are not evidence, any error resulting from the prosecutor's remarks is considered cured." *Rush*, 294 Ill. App. 3d at 341.

¶ 16 Here, while the State's comments that Dixon told no one what happened were not factually correct, when viewed in context, the comments were not so inflammatory that defendant could not have received a fair trial or so flagrant as to threaten a deterioration of the judicial process. During Dixon's testimony, she specifically stated that she had not spoken to the police about what she saw. She also initially stated that she had not told the State's Attorney's office, any of the lawyers, or the judge what had happened. But she then also stated that she had talked to lawyers about it. During closing, defense counsel argued that she did not have a responsibility to investigate and that there was no evidence that the police ever sought to obtain a statement from her about the matter. On rebuttal, the State then responded that it was

unreasonable to believe that she would watch defendant get manhandled by the police and not tell anyone. The State was free to comment on the matter, as the defense invited a response during its closing, and Dixon's testimony made clear that she did not tell the police what happened.

¶ 17 While the State did not limit its argument to Dixon's failure to go to the police, any error in its use of the broad language that Dixon did not talk to "anyone" was immediately cured. Right after the statement, defense counsel objected, and the jury was specifically instructed that arguments not based on facts introduced into evidence should be disregarded. The State then restated the argument, noting that Dixon did talk to defense counsel and the State's Attorney's office but did not say what they talked about. The State finished with the argument that trial was the first time she told anyone what she would testify to. Defendant argues that, with this last statement, the State "doubled down" on the error by repeating it. But, given that the State just one sentence before had acknowledged that defendant spoke to attorneys, and given that the court had just instructed the jury to disregard arguments based on facts not in evidence, the remarks did not result in substantial prejudice to defendant's right to a fair trial. The context as a whole shows that the State's argument was focused on Dixon's failure to promptly speak up about the matter, especially to the police. Her testimony, when coupled with defense counsel's argument, the objection, and the court's instructions, made clear that she did speak to attorneys about the case at some point. Further, the State did not make inaccurate comments during its primary closing argument, and its arguments as a whole properly focused on the evidence. Thus, the remarks at issue did not result in substantial prejudice to defendant's right to a fair trial. See *Hall*, 194 Ill. 2d at 350 (when State's argument as a whole properly focused on the evidence and court gave a curative instruction, any error in misstating that certain records were made was not

of such magnitude to deny the defendant a fair trial). Because there was no denial a fair trial, there was no plain error.

¶ 18 III. CONCLUSION

¶ 19 Misstatements by the State during closing argument were not plain error. Accordingly, the judgment of the circuit court of Kane County is affirmed. 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 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 20 Affirmed.