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No. 3–09–0450

Order filed May 5, 2011

IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	for the 13th Judicial Circuit,
Plaintiff-Appellee,	)	LaSalle County, Illinois
	)	
v.	)	No. 08-CF–676
	)	
ALTERIDA PHILLIPS,	)	Honorable
	)	Cynthia Raccuglia,
Defendant-Appellant.	)	Judge, Presiding

JUSTICE O'BRIEN delivered the judgment of the court.

Justice McDade concurred in the judgment.

Justice Schmidt specially concurred in the judgment.

ORDER

Held: Jurisdiction was proper based on Phillips' timely filed notice of appeal. Under plain error review, Phillips was denied a fair trial due to the State's improper questions and comments. Her conviction is reversed and the cause remanded.

Defendant Alterida Phillips was convicted by a jury of unlawful delivery of a controlled substance and sentenced to six-year term of imprisonment. We find that trial errors deprived her of a fair trial, and reverse and remand.

FACTS

Defendant Alterida Phillips was charged with unlawful delivery of a controlled substance.

720 ILCS 570/401(d)(I) (West 2008). A jury trial took place. Eric Gwaltney testified for the State that he was a member of the Illinois State Police Drug Task Force (task force) and observed Phillips engage in a hand-to-hand exchange with task force inspector Eric Sorenson outside a Streator bar. He was unable to see what was exchanged in the transaction. Sorenson later gave him the cocaine he had bought from Phillips. He interviewed Phillips after her subsequent arrest and she denied any drug transaction occurred although she admitted meeting Sorenson at the bar. Sorenson testified for the State that he was an inspector with the task force. He met Phillips at a tavern and asked her if she could “hook him up” with cocaine. They met again outside the tavern where Phillips gave him crack cocaine in exchange for \$100. Jason Spradling, also a task force inspector, participated in the surveillance of the transaction at issue and identified Phillips as standing outside the tavern with Sorenson. A forensic scientist from the Illinois State Police laboratory testified that the “rock” purchased by Sorenson contained cocaine.

Phillips testified in her own behalf that she had drinks with Sorenson at the bar, that he followed her outside, and he gave her his phone number because he was interested in having sexual relations with her and her girlfriend. She denied selling Sorenson cocaine and that he gave her \$100. On cross-examination, the following colloquy occurred.

“Q: So when Mr. – Inspector Gwaltney was testifying here today then, he lied about that? Is that what you are saying?

A: Lying about what?

Q: About not – about what you told him then. Correct?

A: Yeah. He didn’t state the facts because he didn’t state them.

* * *

Q: So it's your testimony that Eric Sorenson is lying when he went up and asked you if you could hook him up?

A: Yes, he is.

Q: He is lying that you didn't tell him when he said you could hook him up with white or soft?

A: Yes, he is.

Q: He just made that up?

A: Yes, he did.

Q: And he made up the fact that you couldn't find any drugs right away and that everybody had hard as opposed to soft?

A: I hadn't even talked to him.

Q: You are telling us that the officer was up here lying the whole time then?

A: Yes, he was. They lie, too.

* * *

Q: And it's your testimony that you never gave – that Eric Sorenson is lying then about you giving him crack cocaine?

A: Yes, he is.

Q: And Eric Sorenson is lying that he paid you \$100. Correct?

A: Yes, he is. Yes.

A: And it's Eric Gwaltney – Inspector Gwaltney who was doing surveillance was lying when he said he observed a hand-to-hand transaction between the two of you down at the corner of the bar?

A: Yes, he is.

Q: So they are both lying then?

A: Yeah.

* * *

Q: And this whole testimony that these officers gave this morning was a complete lie?

A: Yeah.”

In closing arguments, the State called Phillips' version of the events with Sorenson unbelievable and said, “[a]nd because her story isn't believable, the only story that is believable is the officers[']”. In rebuttal closing argument, the following exchange occurred.

“[STATE]: Lies and misconception. That is the defense's argument that this defendant is not guilty. Ladies and gentlemen, he – [defense counsel] said himself that the Judge will tell you that you get to use your common sense. And common sense I ask you don't leave at the door either because why would the police lie and mislead you? Because if they were going to lie about the defendant, they would have said – they would have planted much more than this little

rock of cocaine –

[DEFENSE COUNSEL]: I am going to object to that, your Honor.

THE COURT: Sustained.

[STATE]: If they were going to mislead you, why do we only have a little rock of cocaine?

[DEFENSE COUNSEL]: Your Honor, same objection.

THE COURT: Sustained.

* * *

[STATE]: And [Gwaltney] was honest with you because his job is a police officer. It is to protect and serve.

[DEFENSE COUNSEL]: Objection.

[SIDEBAR]

[STATE]: Why would he get up on the stand and lie when he has to worry about his career? Because if he is found to be a liar, his whole credibility is shot, not just for this trial, but for the rest of his career as a police officer. Therefore, his responsibility is to be straightforward and he was straightforward with you on that day.

* * *

And this case really comes down to credibility. Who are you going to believe? The police officers ***.

* * *

It comes down to credibility. And these officers had no reason to lie or make it up. But the defendant did. She had to get on the stand –

[DEFENSE COUNSEL]: I'm going to object again, your Honor. I don't believe that is proper.

[STATE]: I will rephrase.

THE COURT: Overruled, but rephrase it.

[STATE]: The defendant got on the stand and lied to you. And she lied because she had no other option because she sold drugs to an undercover police officer. She had no - she had no other out except to get on the – excuse me - to lie to you.

[DEFENSE COUNSEL]: Just note my continuing objection, your Honor, just for the record. I didn't mean to interrupt.

* * *

[STATE]: Ladies and gentlemen, the defendant's motive – the defendant had to lie to you. However, the officers, they didn't have to lie to you. They were here to tell you the truth of what happened.”

After the jury began its deliberations and outside its presence, the trial court admonished the State that the defendant had options and that her option was not to testify. The trial court cautioned “to be careful when you say there are no other options, she had to lie, etcetera.”

The jury found Phillips guilty and judgment on the verdict was entered on January 28, 2009.

Phillips filed a motion for a new trial or, in the alternative, a judgment notwithstanding the verdict, arguing, in part, that the trial court erred in failing to sustain Phillips' objections to comments in the State's closing rebuttal argument which improperly shifted the burden of proof to Phillips. Phillips' motion was heard and denied. The trial court noted that it had sustained most of defense counsel's objections and advised the State before the jury that it was not the defendant's burden to prove anything. A sentencing hearing took place on March 12, 2009, and the trial court sentenced Phillips to a six-year term of imprisonment and a two-year term of mandatory supervised release.

On March 20, 2009, Phillips filed a motion to reconsider her sentence. The motion was heard and denied on March 23, 2009. Phillips was admonished regarding her appeal rights and indicated that she wished to appeal. The trial court stated it would complete the notice of appeal and appointed appellate counsel. Also on March 23, 2009, defense counsel sent Phillips a letter stating that she must be "writ" back for an additional court date "to perfect [her] appeal as to the sentence," due to counsel's failure to file an Illinois Supreme Court Rule 604(d) certificate. On March 27, 2009, the trial court issued an order instructing the clerk to hold Phillips' notice of appeal and the appointment of appellate counsel in abeyance "until defendant is writted back and 604(d) certificate is filed." Counsel's Rule 604(d) certificate was filed on June 4, 2009. At a hearing on that date, defense counsel stated that argument had been heard on Phillips' motion to reconsider her sentence. The trial court found "that nothing has changed" and that Phillips had perfected her appeal right and could appeal since the Rule 604(d) certificate had been filed. Phillips filed a notice of appeal on June 8, 2009, appealing the March 12, 2009, sentencing order.

ANALYSIS

On appeal, Phillips argues that she was denied a fair trial by the State's numerous instances

of misconduct. She contends that she was improperly asked during cross-examination to comment on the credibility of the State's witnesses, and that in closing argument, the State impermissibly shifted the burden of proof, bolstered the credibility of its witnesses, and continued with a line of argument that was ruled objectionable.

We first address the State's contention that this court lacks jurisdiction to consider the appeal because Phillips' notice of appeal was not timely filed. An appeal is perfected by the filing of a notice of appeal. Ill. S. Ct. R. 606(a) (eff. Mar. 20, 2009). Once a defendant indicates that she wishes to appeal, the trial court is charged with filing the notice of appeal. *People v. Sanders*, 40 Ill. 2d 458, 461 (1968). Filing the notice of appeal is the only jurisdictional step required to perfect the appeal. *People v. Jackson*, 239 Ill. App. 3d 165, 166 (1992). Here, Phillips twice indicated her desire to appeal. At the first occurrence, on March 23, 2009, after the trial court denied Phillips' motion to reconsider her sentence, the trial court indicated it would file the notice of appeal. The trial court then ordered the notice of appeal held in abeyance until defense counsel filed his Rule 604(d) certificate on June 4, 2009. Ill. S. Ct. R. 604(d) (eff. July 1, 2006). Defense counsel and the trial court were apparently both under the mistaken impression that filing of the Rule 604(d) certificate was required. Ill. S. Ct. R. 604(d) (eff. July 1, 2006) (certificate required when defendant seeks to appeal judgment entered on guilty plea). On June 4, 2009, the trial court found that Phillips had perfected her appeal right, and Phillips filed a notice of appeal on June 8, 2009. We find that her notice of appeal was timely filed. Ill. S. Ct. R. 606(b) (eff. Mar. 20, 2009) (notice of appeal must be filed within 30 days following the entry of order disposing of all timely postjudgment motions). We have jurisdiction to hear the appeal.

Turning to Phillips' argument on appeal, she asserts that she was denied a fair trial by the

State's misconduct, specifically when it asked her to comment on the credibility of its witnesses during cross-examination, and during closing arguments when it impermissibly shifted the burden of proof, bolstered the credibility of the police officers who testified for the State, and continued with an improper line of questioning after defense counsel's objections were sustained. Phillips asks this Court to review any issues that were not properly preserved for appeal under the plain error doctrine. Phillips admits that the issue of whether the State improperly asked her to comment on the credibility of the State's witness was not properly preserved and must, therefore, be analyzed under the plain error doctrine.

To preserve an issue for review, the defendant must object at trial and raise the issue in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Failure to preserve an issue results in its forfeiture. *People v. Bannister*, 232 Ill. 2d 52, 65 (2008). An exception to procedural forfeiture, plain error review is appropriate where the evidence is closely balanced or the error affects a substantial right. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). A plain error analysis begins with the determination of whether error occurred. *Herron*, 215 Ill. 2d at 184.

We examine Phillips' allegations to decide if error occurred. Phillips complains that the State engaged in numerous instances of prosecutorial misconduct. When prosecutorial misconduct constitutes a material factor in a conviction or substantially prejudices a defendant, a new trial is required. *People v. Linscott*, 142 Ill. 2d 22, 28 (1991). A pattern of intentional prosecutorial misconduct may support reversal under the plain error doctrine because it may seriously undermine the integrity of the judicial proceedings. *People v. Johnson*, 208 Ill. 2d 53, 64 (2004). Cumulatively, the errors may create a pervasive pattern of unfair prejudice to the defendant. *People v. Blue*, 189 Ill. 2d 99, 139 (2000) (when combined, trial "errors assumed a synergistic effect").

We begin with Phillips’ challenge to the State’s questions during its cross-examination of her when it repeatedly asked if the police officer witnesses were lying. It is improper to ask a defendant her opinion regarding the veracity of other witnesses. *People v. Young*, 347 Ill. App. 3d 909, 926 (2004) (listing cases condemning practice). Such questions intrude on the jury’s function to determine witness credibility and also demean and ridicule the defendant. *Young*, 347 Ill. App. 3d at 926. However, reversal based on improper questioning is mandated only where substantial prejudice results. *People v. Martin*, 271 Ill. App. 3d 346, 356 (1995). Whether substantial prejudice resulted depends on the extent of the improper questioning and its relationship to substantive issues. *People v. Nwadiiei*, 207 Ill. App. 3d 869, 876-77 (1990). We review the latitude permitted during cross-examination for an abuse of discretion. *People v. Harris*, 231 Ill. 2d 582, 588 (2008).

Similar to the cross-examination of the defendant in *Nwadiiei*, Phillips was questioned at length as to whether the State’s witnesses were lying. *Nwadiiei*, 207 Ill. App. 3d at 876. As in *Nwadiiei*, the improper questions were directed at substantive elements of the State’s case. *Nwadiiei*, 207 Ill. App. 3d at 876-77. The State questioned Phillips about the veracity of each of the officers involved in the undercover operation, and her arrest and interrogation. The police officers provided the only testimony that Phillips sold cocaine to the undercover officer and their testimony was used to establish the substantive elements of the offense. In closing argument, the State reiterated that the determination of guilt “comes down to credibility. And these officers had no reason to lie or make it up. But the defendant did.” The extensive improper questioning “evinced the intent to undermine [Phillips’] credibility and prejudice the jury against [her].” See *Nwadiiei*, 207 Ill. App. 3d at 878. We find that the State improperly questioned Phillips concerning the veracity of its witnesses.

We next consider whether Phillips was denied a fair trial by the State's closing argument. Phillips claims that the State improperly shifted the burden of proof to her, impermissibly bolstered the credibility of its police witnesses, and inappropriately continued after her objections were sustained. The State is afforded wide latitude in its closing argument. *People v. Cisewski*, 118 Ill. 2d 163, 175 (1987). Improper comments are evaluated based on the context of the language used, how it relates to the evidence, and its effects on the defendant's fair trial rights. *Young*, 347 Ill. App. 3d at 925, quoting *People v. Billups*, 318 Ill. App. 3d 948, 958-59 (2001). Where there are multiple improper prosecutorial remarks, the reviewing court may consider their cumulative impact rather than assessing each error individually. *People v. Abadia*, 328 Ill. App. 3d 669, 684 (2001), quoting *People v. Brown*, 113 Ill. App. 3d 625, 630 (1983). We review the propriety of remarks in closing statement for an abuse of discretion. *Blue*, 189 Ill. 2d at 128, quoting *People v. Byron*, 164 Ill. 2d 279, 295 (1995).

Phillips submits that the State improperly shifted the burden of proof to her when it argued that the jury should convict her because her testimony was not believable, and because her testimony was unbelievable, the jury had to believe the testimony of the police officers. In closing argument, the State asserted that Phillips had to lie because she had no other defense. The State's comments were improper. The State has the burden of proving beyond a reasonable doubt all of the material elements of a crime. *People v. Weinstein*, 35 Ill. 2d 467, 470 (1966). The burden remains with the State for the entire trial. *Weinstein*, 35 Ill. 2d at 470. Here, the State intimated that it was Phillips' burden to establish believable testimony to avoid a conviction and that lying to the jury was her only defense. Phillips was not required to offer a defense; the State maintains the burden of proof. We find that the State improperly shifted the burden of proof to Phillips. Because Phillips properly

preserved this issue for appeal, the State urges us to consider this error as harmless. We find the error was not harmless. *People v. Schuning*, 106 Ill. 2d 41, 48-49 (1985) (State’s improper comments not harmless error where credibility was critical in guilt determination).

Phillips next complains that the State impermissibly bolstered the credibility of its police witnesses. We agree. The testimony of a police officer is to be evaluated in the same manner as any other witness. *People v. Ford*, 113 Ill. App. 3d 659, 662 (1983). The State may not argue that a police officer is a more credible witness because of his status as an officer. *People v. Fields*, 258 Ill. App. 3d 912, 921 (1994). The State argued that its police witnesses were believable because of their positions as officers. It also argued that as police officers, they had too much to lose to lie about Phillips’ conduct. *People v. Gorosteata*, 374 Ill. App. 3d 203, 220 (2007) (State’s comments about risks to officers’ careers and reputations infer that “they were incapable, as a result of their chosen profession, from lying”). We find that such argument was improper.

Phillips’ final contention is that the State inappropriately continued its line of argument after her objections were sustained during closing argument. She points to the following colloquy as error.

[STATE]: “Lies and misconception. That is the defense’s argument that this defendant is not guilty. Ladies and gentlemen, he – [defense counsel] said himself that the Judge will tell you that you get to use your common sense. And common sense I ask you don’t leave at the door either because why would the police lie and mislead you? Because if they were going to lie about the defendant, they would have said – they would have planted much more than this little

rock of cocaine –

[DEFENSE COUNSEL]: I am going to object to that, your Honor.

THE COURT: Sustained.

[STATE]: If they were going to mislead you, why do we only have a little rock of cocaine?

[DEFENSE COUNSEL]: Your Honor, same objection.

THE COURT: Sustained.”

The continued repetition of comments ruled objectionable by the trial court has been condemned as “ ‘reprehensible.’ ” *People v. Weinger*, 101 Ill. App. 3d 857, 871(1981), quoting *People v. Hovanec*, 40 Ill. App. 3d 15, 18 (1976). The State’s persistence in improper argument after the trial court ruled adversely to it may prejudice a defendant. *Weinstein*, 35 Ill. 2d at 471 (noting “such persistence eliminates the salutary effect of the court’s ruling in sustaining objections to the argument”).

This exchange prejudiced Phillips in two ways. First, the State continued with the same line of improper questions after the trial court sustained defense counsel’s objection. Repeating the line of questioning after the defense’s objection was sustained suggests that Phillips was trying to avoid the questions because she had no reasonable response. *Weinger*, 101 Ill. App. 3d at 871 (continuing to ask questions ruled objectionable “evidently calculated to cast defense counsel in the role of obstructionists who were trying to keep damaging evidence from the jury”). In addition, the State’s improper comments also served to bolster the credibility of the officers. *People v. Adams*, 403 Ill. App. 3d 995, 1004 (2010) (State’s comments suggesting officers would face substantial

repercussions from lying impermissibly bolster their credibility).

Having determined that plain errors occurred, we must consider the next steps in the plain error analysis: whether the evidence was closely balanced or whether the error affected a substantial right. *Herron*, 215 Ill. 2d at 186-87. Phillips submits error occurred under both prongs. Under the closely balanced prong, we consider whether the verdict may have resulted from the error and not from the evidence. *Herron*, 215 Ill. 2d at 178. Here, the State's improprieties bolstered the credibility of its witnesses. The testimony of the officers was the only evidence establishing that Phillips was the individual who sold cocaine to the undercover officer Sorenson. Phillips denied engaging in any drug transaction. We find that the evidence was closely balanced. *People v. Naylor*, 229 Ill.2d 584, 607-8 (2008) (evidence closely balanced where it consisted of testimony of two police officers and defendant). Because resolution of the case turned on the jury's assessment of witness credibility, the State's improper questions and comments prejudiced Phillips and warrant reversal of her conviction.

Plain error review is also appropriate under the second, or substantial rights, prong. Under the substantial rights prong, we consider a forfeited error "where the error is so serious that the defendant was denied a substantial right, and thus a fair trial". *Herron*, 215 Ill. 2d at 179. Under this prong, prejudice to the defendant is presumed " 'regardless of the strength of the evidence' " because of the importance of the right involved. (Emphasis in original.) *Herron*, 215 Ill. 2d at 187, quoting *Blue*, 189 Ill. 2d at 138. A pattern of prosecutorial misconduct may undermine the integrity of the judicial process so seriously that reversal is required under the substantial rights prong. *Johnson*, 208 Ill. 2d at 64.

The State's misconduct began during its cross-examination of Phillips when it introduced

a theme that continued throughout closing argument. By its improper questions and comments, the State intimated that the version of events to which its police officer witnesses testified was the truthful version because their status as police officers conferred greater credibility to their testimony. The State's comments in closing and rebuttal arguments implied that Phillips bore the burden of proving her innocence and that she was unable to counter the State's case. We find the State's pattern of misconduct affects the integrity of the judicial process and also requires reversal.

We cannot say with a reasonable degree of certainty that the State's errors did not contribute to Phillips' guilty verdict. We find that the individual errors substantially prejudiced Phillips in their own right, and that considered together, we find that the cumulative effect of the State's errors also substantially prejudiced Phillips and deprived her of a fair trial. We reverse and remand.

For the foregoing reasons, the judgment of the circuit court of LaSalle County is reversed and the cause remanded.

Reversed and remanded.

JUSTICE SCHMIDT, specially concurring:

I concur in the judgment. I do so based on the repeated improper behavior of the prosecutor as outlined by the majority. However, I write separately because I do not agree with the majority with respect to the holding that the State improperly shifted the burden of proof to the defendant when it commented on her credibility in closing argument. Slip op. at 11. The defendant elected to testify. There were two versions of what occurred: that of the defendant and that of the police officers. Nothing is unreasonable about arguing that version A was unbelievable, and that left them with only version B. That argument did not shift the burden of proof to the defendant. In the context

of what occurred in this case, the State's argument that "defendant had to lie," was not improper.