2012 IL App (3d) 100554-U

Order filed February 8, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-10-0554
v.	)	Circuit No. 09-CF-1544
	)	
NASSIR DAOUD,	)	Honorable Daniel J. Rozak,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Presiding Justice Schmidt and Lytton concurred in the judgment.

ORDER

¶ 1 *Held:* The prosecutors' comments during closing arguments did not amount to reversible error. In addition, the trial court did not consider improper aggravating factors at sentencing. Finally, the mittimus is amended to reflect the proper amount of presentence credit, and the defendant's $200 DNA analysis fee is vacated.

¶ 2 After a jury trial, the defendant, Nassir Daoud, was convicted of harassment by telephone (720 ILCS 135/1-1(2); 2(b)(5) (West 2008)), and was sentenced to five years' imprisonment. On appeal, the defendant argues that: (1) the prosecutors made improper remarks during closing

arguments; (2) the trial court considered improper factors at sentencing; (3) the mittimus should be amended to reflect two additional days of presentence credit; and (4) his $200 deoxyribonucleic acid (DNA) analysis fee should be vacated. We order that the mittimus be amended and vacate the DNA analysis fee, but otherwise affirm.

¶ 3 FACTS

¶ 4 The evidence at trial established that around midnight on July 8, 2009, Officer Andrew Lanagan arrived at the home of the defendant's brother, Nasser Daoud, in response to a domestic disturbance call. After responding to the call, Lanagan was worried about the safety of the complainant, Anthony Daoud (the defendant's nephew), and took Anthony to his grandmother's house, where the defendant also lived. When Lanagan arrived, the defendant approached the car and began yelling. Lanagan did not let Anthony out of the car because he did not feel that Anthony was safe due to the defendant's "aggressive stance." The defendant asked Lanagan what Nasser was being charged with. Lanagan responded that he could not provide that information. The defendant then asked for the telephone number of the police department because he wanted to find out what his brother's bond information was, and Lanagan gave him the nonemergency number for the police department.

¶ 5 Donna Strubel testified that she worked at Lincoln Way Public Safety and Communications Center as a 911 dispatcher, and she had worked as a dispatcher for about four years. She stated that on the night of the incident she was working from 11 p.m. to 7 a.m. Strubel explained that the center handled emergency and nonemergency calls for five different departments, and that police stations would forward their nonemergency telephone calls to the call center at night. Then, in the morning, the nonemergency calls would be transferred back to

the police stations for the administrative staff to answer.

¶ 6 Strubel stated that she began receiving unusual calls at approximately 2:30 a.m. She stated that at first the caller was "very upset" and wanted information about his brother. Strubel explained that she could not give that information out over the telephone. Strubel learned during the night that the defendant's brother was being transported to Will County, and she asked the sergeant if she could give the defendant that information so he would stop calling. However, the defendant continued to call. At one point she had the sergeant call the defendant, and "that's when he got more irate and called back again."

¶ 7 Strubel also testified that during some of the telephone calls, the defendant did not mention his brother. She stated that the defendant would make obscene comments like "how many licks does it take to get to a Tootsie Pop? Do you want to try on my Tootsie Pop?" He also said he would like her to "come and suck [his] dick." She explained that she had been trained in how to deal with difficult situations, and that she still had "to treat them, no matter what situation, with as much professionalism."

¶ 8 Adella Formentini worked from 7 a.m. to 3 p.m. as the shift supervisor at the dispatch center. She stated that she had worked as a 911 operator in Will County for 25 years. After Formentini arrived for her day shift, she learned that the call center was receiving repeated telephone calls from an individual. She stated that she received a call and "[t]here was a male on the other side that said, hey, bitch." Formentini asked what she could do for the caller, and "he told me to suck his dick." A recording of some of the telephone calls was played for the jury. During one of the telephone calls, the defendant stated that he was going to call all night long.

¶ 9 The defendant testified in his own defense. The defendant stated that his mother was

very upset about Nasser's arrest, and that he had to get his arrest information for her because she did not speak English very well. The defendant called and asked for information about his brother; however, the Mokena police refused to give him any information.

¶ 10 After listening to the recordings, the defendant stated that some of the calls were not from him, but he could not remember which calls he did make. He stated that the sergeant called him a "faggot[,]" and so he responded by saying the sergeant could "suck dick and talk at the same time." In rebuttal, the State recalled Lanagan, who testified that the defendant's mother did not have any problem speaking English.

¶ 11 During closing arguments, the first prosecutor stated that the State had "to prove three things" in order to obtain a conviction for telephone harassment. Furthermore, he elaborated that, "[a]ll three of those have been proven well beyond a reasonable doubt by the State during this trial." He also argued that there was "no motive to lie for these 911 operators or these police officers. They're only doing their job." In response to the defendant's testimony that the dispatchers had become hostile with him initially, the prosecutor commented "[r]eally? Do we believe that? Do we really believe that a 911 operator who's been doing this for four or five these [sic] and another one who's been doing it for 25, has gotten hostile and belligerent with this man on the phone?"

¶ 12 Defense counsel argued that the defendant was angered by a conversation with a sergeant that the jury did not get to hear. He also argued that the defendant did not intend to harass anyone, and the defendant was the one who felt harassed. Defense counsel also focused on the burden of proof, and stated that it was "the highest burden of proof we have in our country, in court."

¶ 13 In rebuttal, the second prosecutor described the defendant's testimony as "lame" and "a child's excuse." He told jurors that they would have to transport themselves to an "alternate universe" to believe the defendant's testimony, and argued that the defendant did not "get a gold star because he chose to get up there and testify."

¶ 14 The prosecutor also called the defendant's argument that the telephone calls were not harassing as "ridiculous." He further questioned, "[h]ow can [the defense attorney] honestly, honestly stand there with a straight face *** and argue to you that these calls aren't harassing at all?" The defendant's attorney objected to that comment, and the trial court sustained the objection.

¶ 15 The second prosecutor also asked the jurors:

> "If any single one of you got even one of those phone calls at your house, at your job, wouldn't you feel harassed? If you were at home and you answer the phone, hello? And somebody is talking about a lollipop and asking you for a blow job, don't you think that's harassment?
>
> [Defense attorney]: Objection
>
> The Court: Sustained."

¶ 16 Finally, the prosecutor said:

> "Don't kid yourselves into thinking that there's any genuine issue whatsoever as to this defendant's guilt in this matter. You're sitting there, you have a right to a trial. We're giving him his trial, that's fine. But the issues are done."

¶ 17 The jury was instructed before deliberations began that any statement or argument made by the attorneys which was not based on the evidence should be disregarded. The jury ultimately

returned a guilty verdict, and the defendant's sentencing hearing was held on June 10, 2010. The defendant did not file a motion for a new trial. At sentencing, the defendant's brother testified that the defendant had been in a bad motor vehicle collision and suffered ongoing medical problems from the accident. The defendant apologized for his behavior on the night and question, and counsel noted that the defendant was willing to pay restitution for any damage he had caused. The defendant stated that he had a cocaine addiction, and that he needed treatment for drug abuse and anger management.

¶ 18 On June 17, 2010, the court sentenced the defendant to five years' imprisonment on the telephone harassment charge. In evaluating whether the criminal conduct caused or threatened serious physical harm, the court found that the case did not involve any direct threat of harm to anybody; however:

> "indirectly, especially I think with the phone calls that tied up an emergency services operator, other people could have been harmed by that, could have caused somebody else's death to be quite honest about it[.]"

¶ 19 The trial court also considered whether the sentence was necessary to deter others from committing the same crime. The court commented:

> "I seem to hear more and more about people making ridiculous phone calls to 911 operators. I see it on TV. I hear it on the radio. It's occurred in cases that I have coming before me; so I think it's time to put a stop to that and some DOC time would certainly be a deterrent, in my opinion."

¶ 20 The defendant also received presentence credit from July 8 through July 24, 2009, and again from March 3 through July 16, 2010. In addition, he was assessed a $200 DNA analysis

fee.

¶ 21 In a motion to reconsider, the defendant argued that he did not cause or threaten serious physical harm and that there was no evidence to the contrary, and that his sentence would not serve as a deterrent where there had not been any publicity surrounding the case. The trial court denied the motion. The defendant appealed.

¶ 22 ANALYSIS

¶ 23 I. Closing Arguments

¶ 24 The defendant's first argument on appeal is that his right to a fair trial was violated when the prosecutor made several improper comments during closing argument. Because the defendant did not file a motion for a new trial, he concedes that plain error review is appropriate. *People v. Allen*, 222 Ill. 2d 340 (2006). Under the plain error doctrine, a reviewing court may consider a forfeited error when either: "(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." *People v. Herron*, 215 Ill. 2d 167, 187 (2005). "To obtain relief under this rule, a defendant must first show that a clear or obvious error occurred." *People v. Hillier*, 237 Ill. 2d 539, 545 (2010).

¶ 25 Generally, a prosecutor is given wide latitude in the content of a closing argument. *People v. Wheeler*, 226 Ill. 2d 92 (2007). The State is permitted to make arguments based on the evidence and any reasonable inferences that may be drawn from it, even if the inferences are unfavorable to the defendant. *People v. Dixon*, 378 Ill. App. 3d 535 (2007).

¶ 26 The defendant first argues that the State improperly minimized its burden of proof when the second prosecutor told jurors not to "kid [themselves] into thinking that there's any genuine issue whatsoever as to this defendant's guilt in this matter." According to the defendant, this

comment essentially informed the jurors that the State did not have a burden of proof because there was no issue as to the defendant's guilt. However, the first prosecutor made clear during his closing argument that the State had "to prove three things" in order to obtain a conviction for telephone harassment. Furthermore, he elaborated that, "[a]ll three of those have been proven well beyond a reasonable doubt by the State during this trial." The prosecutors in this case acknowledged that they had a burden to prove the defendant guilty beyond a reasonable doubt, and argued that they established the defendant's guilt by that standard. *People v. Malone*, 211 Ill. App. 3d 628 (1991). We "do not read the comment[] complained of by defendant as suggesting otherwise." *Id.* at 637. In addition, it is worth noting that the defense attorney characterized the State's burden as "the highest burden of proof we have in our country, in court" during his closing argument. We find that the jury was well aware that the State was required to prove the defendant guilty beyond a reasonable doubt, and thus no error occurred.

¶ 27 The defendant also claims that the State acted improperly by commenting on the defendant's exercise of his constitutional right to a jury trial. Specifically, the prosecutor told the jurors that the defendant had "a right to a trial. We're giving him his trial, that's fine. But the issues are done."

¶ 28 In support of his argument, the defendant relies on *People v. Libberton*, 346 Ill. App. 3d 912 (2003) and *People v. Herrero*, 324 Ill. App. 3d 876 (2001), both of which are distinguishable from the instant case. In *Libberton*, the State made comments which suggested that "a decent person in defendant's position would have pleaded guilty." *Libberton*, 346 Ill. App. 3d at 923. The court concluded that "[t]his argument by the State is nothing if not an attempt to anger the jury at defendant for his choice to have a trial." *Id.* Similarly, in *Herrero*, 324 Ill. App. 3d 876,

the prosecutor invited jurors to speculate as to why the defendant wanted a jury trial, and suggested as an answer that criminals like the defendant were trying to "sucker[] in" or dupe the jurors. *Id.* at 888. While the *Herrero* court found that the prosecutor's comments were "outrageous," the court ultimately concluded that the error was harmless because the evidence of guilt was overwhelming. *Id.* at 887.

¶ 29 In this case, the prosecutor's comment was not an error because we find that there was no negative implication in the comment. As opposed to the prosecutor in *Libberton*, the State's comment in this case that the defendant had a right to a trial was not made for the purpose of angering the jury, but was part of a larger statement on the strength of the evidence. In addition, unlike the prosecutor in *Herrero*, the comment did not propose that the defendant wanted a jury trial to try and "sucker[] in" one of the jurors. Because the comment was not negatively directed toward the defendant's decision to exercise his right to a jury trial, we find no error.

¶ 30 The defendant next argues that the prosecutor improperly bolstered the credibility of its witnesses by stating there was "no motive to lie for these 911 operators or these police officers. They're only doing their job." Furthermore, in responding to the defendant's testimony that Strubel had become hostile with him first, the prosecutor asked "Do we really believe that a 911 operator who's been doing this for four or five these [sic] and another one who's been doing it for 25, has gotten hostile and belligerent with this man on the phone?"

¶ 31 In general, "it is improper for a prosecutor to vouch for the credibility of a witness or to express a personal opinion on a case." *People v. Adams*, 403 Ill. App. 3d 995, 1001 (2010), *overruled on other grounds by People v. Adams*, 2012 IL 111168 (2012). However, counsel "may comment on the credibility of witnesses if the comments are based on the evidence or

inferences drawn from the evidence." *Id.* at 1002. In *Adams*, this court described the differences in case law "over whether statements concerning an officer's status and the possible repercussions of an officer's alleged lie are permissible." *Id.* at 1003. Upon analyzing the cases, we found that there was an important distinction between those comments that were based on the evidence of inferences drawn from the evidence, and those cases that attempted to bolster the credibility of the police officers due solely to their status as police officers. As a result, we concluded in *Adams* that it was improper for the prosecutor to refer to the veteran status of the police officers when discussing the strength of the State's case and the jury's job to assess the credibility of the witnesses. *Id.* In addition, it was improper for the prosecutor to comment that the officers "risked their jobs, their freedom and their reputations over 0.8 grams of cocaine." *Id.* at 1004.

¶ 32 We find that when the prosecutor argued there was no motive to lie for the 911 operators, that was a fair comment based on the evidence. As opposed to the prosecutor in *Adams*, the prosecutor in this case did not state or imply that there would be repercussions if the witnesses lied. Instead, the comment only referred to the fact that there appeared to be no incentive for the witnesses to lie. That comment did not attempt to bolster the credibility of the witnesses based solely on the fact that they worked in law enforcement.

¶ 33 Similarly, the prosecutor's argument that it was more likely that the defendant had become hostile with Strubel and Formentini because they had been in the profession for a number of years was a proper comment based on the evidence. Specifically, Strubel testified that she had received training on how to deal with difficult callers, and that she had been taught to be professional no matter what the situation. The prosecutor is allowed to make an inference based on that evidence that, due to their experience, it was unlikely that the 911 operators became

belligerent. Accordingly, we find that both comments were reasonable inferences based upon the evidence.

¶ 34 The defendant also argues that the prosecution made remarks which served no purpose other than to denigrate him and defense counsel. He contends that it was improper for the prosecutor to call the defendant's testimony "lame" and "a child's excuse," and he told jurors that they would have to transport themselves to an "alternate universe" to believe the defendant's testimony. In addition, the prosecutor erred by saying that the defendant did not "get a gold star because he chose to get up there and testify."

¶ 35 We note that all of the above remarks relate to the defendant's testimony, and they are fair comments on the evidence. For example, in *People v. Trask*, 167 Ill. App. 3d 694, 712 (1988), the prosecutor was allowed to call the defendant's defense a "sham" because it was a comment upon the believability of the defendant's testimony. Moreover in *People v. Starks*, 116 Ill. App. 3d 384, 394 (1983), the court stated that "[i]t is not improper comment to call the defendant or a witness a 'liar' if conflicts in evidence make such an assertion a fair inference." Therefore, we find that the prosecutor's comments were generally directed toward the believability of the defendant's testimony.

¶ 36 However, it was improper for the prosecutor to remark "[h]ow can [defense counsel] honestly, honestly stand there with a straight face *** and argue to you that these calls aren't harassing at all?" See *People v. Fields*, 322 Ill. App. 3d 1029 (2001) (holding that it was improper for the prosecutor to argue that defense counsel was insulting the jurors' intelligence). The comment suggested to the jurors that defense counsel was somehow acting improperly in arguing on the defendant's behalf.

¶ 37 Similarly, it was error for the prosecutor to suggest that the jurors would have felt harassed if they had received the telephone calls in question. The State is not free to "invite the jurors to enter into some sort of empathetic identification with" the victim. *People v. Spreitzer*, 123 Ill. 2d 1, 38 (1988). Accordingly, we find that these two comments by the prosecutor were improper, and proceed to the plain error test.

¶ 38 Regarding the first prong of the plain error test, we do not find that the evidence was closely balanced. Contrary to the defendant's assertion that the evidence regarding the defendant's intent was close, instead we find that the evidence was overwhelming. The defendant admitted to making several of the recorded telephone calls. Some of the telephone calls are sexually explicit, and many of them contain vulgarities. Although the defendant claimed that he called to obtain information about his brother, and then became belligerent after he did not get any of the information, Strubel testified that during several of the telephone calls the defendant did not ask about his brother. Finally, at one point, the defendant demonstrated his intent to harass by stating that he was going to call the 911 operators all night long.

¶ 39 In addition, we conclude that the two improper comments by the prosecutor during closing arguments did not amount to structural error under the second prong of the plain error test. In both of these instances, the defense attorney objected to the comments and the objections were sustained. The jury was also instructed before deliberations began that any statement or argument made by the attorneys which was not based on the evidence should be disregarded. This instruction has been held to cure any prejudice to the defendant because of the prosecutor's improper remarks. *People v. Campbell*, 332 Ill. App. 3d 721 (2002). If the jury was not prejudiced by the comment, there is no reversible error. *Fields*, 322 Ill. App. 3d 1029. Although

the defendant argues that the cumulative errors showed a pattern of prosecutorial misconduct, we find that the two comments were brief and isolated in the context of a larger closing argument. See *People v. Johnson*, 208 Ill. 2d 53 (2003). Consequently, the defendant did not experience substantial prejudice necessary for the second prong of the plain error test, and he was not denied the right to a fair trial.

¶ 40 II. Sentencing

¶ 41 The defendant's second argument on appeal is that the trial court considered several improper factors at sentencing. Specifically, he claims that the trial court improperly considered as a factor in aggravation that his calls to the 911 operators posed an indirect threat of harm. Additionally, he argues that it was improper for the trial court to consider whether a higher sentence served as a deterrent to others when such considerations were based on the misconduct of others.

¶ 42 The State contends that the defendant forfeited this argument because he failed to object to the errors at the time of sentencing, and he did not raise the issue of whether the trial court considered an improper sentencing factor in his postsentencing motion. *Hillier*, 237 Ill. 2d 539. However, because the trial court stated the allegedly improper factors while announcing its sentencing decision, the defendant was not required to object. *People v. Atwood*, 193 Ill. App. 3d 580, 593 (1990) ("defense is not required to object to the inclusion of improper factors being taken into consideration while the court is pronouncing sentence"). In addition, we find that the defendant's motion to reconsider sentence properly raised the arguments that the defendant did not threaten or cause serious harm, and that there would be no deterrent effect. Therefore, we find that these issues are preserved.

¶ 43 The defendant first argues that the trial court improperly speculated that the defendant's conduct posed an indirect threat of harm because his calls tied up an emergency services operator. In general, the trial court has broad discretion when imposing a sentence, and the court's sentencing decision is entitled to great deference. *People v. Stacey*, 193 Ill. 2d 203 (2000). A trial court abuses its discretion when it considers an improper factor in aggravation at sentencing, but remand is not necessary if the improper factor did not lead to a more severe sentence. *People v. Cotton*, 393 Ill. App. 3d 237 (2009). An offense can include varying degrees of harm or threatened harm, which the court can consider in aggravation at sentencing. *People v. Cagle*, 277 Ill. App. 3d 29 (1996).

¶ 44 In this case, we note that the trial court specifically found that the defendant's conduct did not involve a direct threat of harm, but, because of the nature of the defendant's actions, others could potentially have been harmed as a result of those actions. See *People v. McCain*, 248 Ill. App. 3d 844, 852 (1993) (holding that, while it was not an error for the trial court to consider societal harm at sentencing, courts should "segregate such general commentary from the balancing of sentencing factors"). It appears from this comment that the court was considering the defendant's offense to be more serious because it involved the harassment of several 911 operators. Moreover, the record shows that the trial court considered each of the applicable factors at sentencing, leading us to conclude that, even if the comment was improper, it did not lead to a more severe sentence. *People v. Sims*, 403 Ill. App. 3d 9, 24 (2010) ("a reviewing court should not focus on a few words or statements made by the trial court, but must consider the record as a whole").

¶ 45 Second, the defendant argues that the trial court improperly considered the conduct of

others when determining whether imprisonment would serve as a deterrent. Specifically, the court commented that, "I seem to hear more and more about people making ridiculous phone calls to 911 operators *** It's occurred in cases that I have coming before me; so I think it's time to put a stop to that and some DOC time would certainly be a deterrent, in my opinion."

¶ 46 However, the defendant's argument is premised on *People v. McPhee*, 256 Ill. App. 3d 102 (1993) and *People v. Barber*, 20 Ill. App. 3d 977 (1974), where the trial court improperly punished the defendant for the misconduct of others. In contrast, in this case, the trial court did not punish the defendant for others' misconduct, but instead simply noted the misconduct of others when determining whether imprisonment would serve as a deterrent. Accordingly, we find that the trial court did not improperly consider the conduct of others when imposing the defendant's sentence.

¶ 47 III. Presentence Credit

¶ 48 Presently, the Illinois Department of Corrections Inmate Status website shows the defendant having a custody date of February 16, 2010. The defendant argues that he is being deprived of two days of presentence credit because he should have a custody date of February 14, 2010.

¶ 49 A defendant held in custody for any part of a day should be given credit against his sentence for that day. *People v. Johnson*, 396 Ill. App. 3d 1028 (2009). However, a defendant does not receive credit for the day the mittimus is issued, because that day is considered a day of sentence. *People v. Williams*, 239 Ill. 2d 503 (2011).

¶ 50 In this case, the defendant was given credit for time spent in custody from July 8 through July 24, 2009, and from March 3 through July 16, 2010, the date the judgment order was issued.

Properly calculated, the defendant is entitled to 152 days of presentence credit. Subtracting 152 days from July 16, 2010, gives the defendant a custody date of February 14, 2010. Therefore, we order the issuance of an amended mittimus to reflect the correct amount of presentence credit, and the defendant's proper custody date.

¶ 51 IV. DNA Analysis Fee

¶ 52 The defendant's final argument on appeal is that this court should vacate the defendant's $200 DNA assessment fee because he provided a DNA sample following a previous conviction. *People v. Marshall*, 242 Ill. 2d 285 (2011). We further note that the defendant has submitted documentation indicating that his DNA profile is currently on file. The State agrees and confesses error. We therefore vacate the defendant's DNA analysis fee, and order that if the defendant has already paid this fee that the money be refunded to him.

¶ 53 CONCLUSION

¶ 54 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed as modified.

¶ 55 Affirmed as modified.