2011 IL App (4th) 100170-U

Filed 10/17/11

NO. 4-10-0170

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
TREMAINE GRIFFIN,	)	No. 09CF564
Defendant-Appellant.	)	
	)	Honorable
	)	Robert L. Freitag,
	)	Judge Presiding.

JUSTICE COOK delivered the judgment of the court.
Presiding Justice Knecht and Justice Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* The State presented sufficient evidence to convict defendant of unlawful delivery of a controlled substance. The trial court did not abuse its discretion in admitting photographs of the scene of the incident. Defendant forfeited the issue of whether the prosecutor made improper comments during closing argument.

¶ 2 A jury found defendant, Tremaine Griffin, guilty of two counts of unlawful delivery of a controlled substance (720 ILCS 570/401(d)(1) (West 2008)). The trial court sentenced defendant to concurrent terms of eight years' imprisonment. On appeal, defendant argues (1) his conviction must be reversed because the State did not present sufficient evidence on each element necessary for conviction; (2) the court erred by (a) admitting the photographs of the exterior of the Salem Road apartment building and (b) overruling his objection to improper comments made by the prosecutor during closing argument. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged with two counts of unlawful delivery of a controlled substance (720 ILCS 570/401(d)(1) (West 2008)). A jury found defendant guilty of both counts. The trial court sentenced defendant to concurrent terms of eight years' imprisonment.

¶ 5 On July 2, 2009, Sharon Epley, an informant for the Bloomington police department, called defendant and arranged to meet him at an apartment building located at 1701 Salem Road in Bloomington, Illinois, to purchase crack cocaine. Approximately a month before, Epley meet defendant for the first time when she was trying to buy drugs for someone else. At that first meeting, defendant gave Epley his phone number. Epley then gave defendant's phone number to Detective Michael Gray, an agent for the Bloomington police department with whom she mainly worked.

¶ 6 Before Epley left for the Salem Road apartment building, Gray searched her body and car for contraband and money. At trial, Gray testified that he did not find any contraband or money on Epley's person or in her car. Gray also gave Epley $50 to purchase crack cocaine from defendant. The police photocopied each individual bill to be used in the buy. Epley and Gray drove separately to the apartment building. Defendant met Epley outside of the apartment building and then the two entered the building to exchange the money for crack cocaine. Officer Todd McClusky, who was conducting surveillance from a car parked across the street from the apartment building, testified that he witnessed the meeting outside of the building. However, McClusky also testified that his view of the events was blocked by some shrubs. After the buy was completed, Epley gave Gray the drugs she purchased from defendant. Then Gray searched Epley’s body and car for a second time.

¶ 7 Later that same day, Epley purchased more crack cocaine from defendant. Gray gave Epley a $50 bill to make the second purchase. Epley and Gray followed the same procedure for the second buy as in the first. This time Epley and defendant met inside the apartment building. The parties stipulated to a lab report indicating that cocaine was detected in the substances Epley gave to Gray.

¶ 8 Defendant was arrested when he attempted to leave the apartment building. Officer Kevin Raisbeck searched defendant and found a $50 bill with a serial number that matched the bill Gray gave Epley to purchase drugs for the second buy. At the police station, Gray searched defendant and found the money used in the first buy. During a taped interview, defendant explained to Gray that the money came from gambling on X-box games. At trial, Nicole Runyon, defendant's girlfriend, testified that defendant did not play any video games on July 2.

¶ 9 The trial court sentenced defendant as stated.

¶ 10 This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 On appeal, the defendant argues that (1) the State did not present sufficient evidence on each element necessary for conviction and (2) the trial court erred by admitting the photographs of the Salem Road apartment building and overruling his objection to improper comments made by the prosecutor during closing argument.

¶ 13 A. Sufficiency of the Evidence

¶ 14 In a criminal case, the standard for reviewing the sufficiency of the evidence "is whether, when viewing the evidence in the light most favorable to the prosecution, any rational

trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *People v. Singleton*, 367 Ill. App. 3d 182, 187, 854 N.E.2d 326, 331 (2006). The trier of fact has the responsibility to (1) determine the credibility of witnesses and the weight given to their testimony, (2) resolve conflicts in the evidence, and (3) draw reasonable inferences from that evidence. *People v. Lee*, 213 Ill. 2d 218, 225, 821 N.E.2d 307, 311 (2004). A reviewing court will not set aside a criminal conviction on grounds of insufficient evidence unless the proof is so improbable or unsatisfactory that there exists a reasonable doubt of defendant's guilt. *People v. Maggette*, 195 Ill. 2d 336, 353, 747 N.E.2d 339, 349 (2001).

¶ 15 Defendant argues the State did not present sufficient evidence to sustain his convictions for unlawful delivery of a controlled substance, because the State's primary witness, Epley, was unworthy of belief. In support of his argument, defendant points to Epley's history of drug use**.** At trial, Epley testified that she used drugs for almost 20 years before quitting in September 2008. Defendant points to Epley's unauthorized purchase of drugs for others as further undermining her credibility. Epley first met defendant while purchasing drugs for a friend. Defendant also argues that the State did not present sufficient evidence, since Epley's purchase of the drugs was not controlled. He claims, before and after the two buys, Gray failed to perform a thorough search of Epley's person for contraband and money, because of the restrictions placed on a male officer who is searching a female.

¶ 16 After reviewing the evidence in the light most favorable to the prosecutor, we find that the evidence supports the guilty verdict. Based on the State's evidence, the jury could have found the essential elements of unlawful delivery of a controlled substance beyond a reasonable doubt. The jury could have reasonably found Epley to be a credible witness. Epley's account of

the two buys was supported by the testimony of Gray and McClusky. The two substances Epley purchased from defendant were tested and found to contain cocaine. The serial numbers of the money found on defendant, at the time of his arrest, matched the serial numbers of the money the police gave to Epley for the two buys**.** Contrary to defendant's assertions, the buys were also controlled. Gray was present when Epley contacted defendant regarding the purchase of cocaine. Before and after each buy, Gray searched Epley's person and car for money and contraband. Except for when Epley was inside the apartment building, she was under police surveillance. Last, during a taped interview at the police station, defendant told Gray that the money recovered by the police came from gambling on X-box games. However, defendant's girlfriend testified that defendant did not play video games on July 2.

¶ 17 B. Admission of the Photographs

¶ 18 The primary requirements for the admission of a photograph are relevancy and accuracy. *People v. Donaldson*, 24 Ill. 2d 315, 318, 181 N.E.2d 131, 133 (1962). A photograph should be identified by a witness as a portrayal of certain facts relevant to the issue, and verified by the witness on personal knowledge as a correct representation of those facts. *Donaldson,* 24 Ill. 2d at 318, 181 N.E.2d at 133. A decision to admit photographic evidence will not be reversed absent an abuse of discretion. *People v. Brown,* 319 Ill. App. 3d 89, 97, 745 N.E.2d 173, 181 (2001) . In this case, the photographs at issue are of the front of the Salem Road apartment building. The photographs were taken in November 2009, by McClusky.

¶ 19 Defendant argues the trial court abused its discretion in admitting the photographs, because the photographs did not accurately depict the scene at the time of the alleged offense. In contrast to the scene in July, the photographs are devoid of foliage.

Defendant argues that an accurate depiction of the foliage is crucial to showing what McClusky would have been capable of seeing on July 2, especially since McClusky testified that his view of the apartment building was blocked by some shrubs. Relying on *People v. Rolon*, 71 Ill. App. 3d 746, 751, 390 N.E.2d 107, 111 (1979), defendant also claims that the lack of foliage is sufficient to confuse or mislead a jury as to McClusky's view on the events that transpired on July 2. Last, defendant asserts that the admission of the photographs prejudiced the defense, because the prosecutor relied on the photographs to rehabilitate Epley's testimony.

¶ 20 In *Rolon*, the appellate court found that photographs of the apartment of two witnesses to a shooting would have confused and misled the jury concerning the witnesses' ability to see the crime at issue, because none of the photographs were taken from the witnesses' vantage point. *Rolon*, 71 Ill. App. 3d at 751, 390 N.E.2d at 111. In making its determination, the court also pointed to the increased amount of foliage near the apartment's windows and the inconsistency as to the time of day in which the photographs were taken. *Rolon*, 71 Ill. App. 3d at 751, 390 N.E.2d at 111. Unlike in *Rolon*, McClusky testified that the photographs of the Salem Road apartment building were taken from his vantage point on July 2, 2009, and accurately reflected his view of the events that transpired. He also testified that the area of the photographs that the foliage would have blocked was not relevant to the observations he made. The change in foliage from July to November was not sufficient to make the photographs of the apartment building confusing to the jury. The trial court did not abuse its discretion in admitting the photographs, because the photographs were verified by McClusky as an accurate depiction of his vantage point of the apartment building.

¶ 21 C. Prosecutor's Closing Argument

¶ 22 Prosecutors are afforded wide latitude in closing argument, and improper remarks will not merit reversal unless they result in substantial prejudice to defendant considering the context of the language used, its relationship to the evidence, and its effect on defendant's right to a fair and impartial trial. Absent an abuse of discretion, the determination of the trial court as to the propriety of the argument should be followed. *People v. Thompkins*, 121 Ill. 2d 401, 445-46, 521 N.E.2d 38, 57 (1988). Improper prosecutorial remarks can be cured by instruction to the jury to disregard argument not based on the evidence and to consider instead only the evidence presented. *People v. Rushing*, 192 Ill. App. 3d 444, 454, 548 N.E.2d 788, 794 (1989).

¶ 23 To preserve improper statements made during closing argument for review, a defendant must object to the offending statements at trial and in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988). A failure to object results in a forfeiture of that issue on appeal. *Enoch*, 122 Ill. 2d. at 186, 522 N.E.2d at 1130.

¶ 24 Defendant argues the prosecutor made improper statements during closing arguments, because the prosecutor speculated that another person, Kent VanHook, intended to purchase cocaine from the defendant on July 2. During the police's interrogation of defendant, Gray asked defendant about a "tall white guy" who was outside the apartment building at the time of defendant's arrest. Defendant responded that the man was an "associate" who "knows where to get the good weed." Defendant also stated that he had purchased "weed" from the man earlier in the day and the man was going to take him to purchase some more. At trial, the defense, referring to the interrogation, asked Gray about the man outside the apartment building and whether he was a middleman or drug dealer. Gray testified that the man was a drug dealer.

On redirect, Gray identified the man as Kent VanHook. During his closing argument, the prosecutor discussed VanHook's presence at defendant's apartment:

> "MR. GHRIST [(Assistant State's Attorney)]: [B]efore the warrant was served, another individual showed up, and we've presented this in testimony to tie up a loose end here. Kent VanHook, I'm sure Mr. Tusek [(defense attorney)] will mention him, an individual that showed up just before the warrant was being served. You'd heard the defendant refer to him in the interview. Detective Gray told you he knew Kent VanHook, that he's a cocaine user and a cocaine addict, and he showed up right before this warrant was being served. He didn't have any drugs on him.
>
> The defendant referred to him, he obviously knows Kent. I submit to you that Kent wasn't and in no way can be linked to the source of this money but instead was an individual that was going there for the same reason the Bloomington Police Department was, the same reason–."

Defendant timely objected to the prosecutor's statements, but he failed to include this issue in his posttrial motion. Defendant concedes that by failing to include the issue in his posttrial motion, he has forfeited the issue on appeal. However, defendant urges us to review the issue under the plain-error doctrine.

¶ 25 "Plain errors or defects affecting substantial rights may be noticed although they

were not brought to the attention of the trial court." Ill. S.C. R. 615(a) (eff. Jan. 1, 1967). In *People v. Herron*, 215 Ill. 2d 167, 186-87, 830 N.E.2d 467, 479-80 (2005), the supreme court held that the plain-error doctrine:

> "allows a reviewing court to consider unpreserved 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. In the first instance, the defendant must prove 'rejudicial error.' That is, the defendant must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him. *** In the second instance, the defendant must prove there was plain error and that the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process."

This case does not meet the requirements for application of the plain-error doctrine. In regard to the first prong of the plain-error doctrine, the evidence was not so close that the alleged error alone severely threatened to tip the scales of justice against defendant. The State presented a strong case against defendant. Through the testimony of Gray, McClusky, and Rossbach, the State showed the controlled nature of the buys. Before and after each buy, Epley was searched by Gray for both contraband and money. Except for when Epley was inside the apartment building, she was under police surveillance. The police recovered from defendant's person the money Gray photocopied and then gave to Epley to purchase cocaine. Cocaine was detected in

the substances Epley received from defendant and gave to the police.

¶ 26 The prosecutor's comments also do not meet the requirements of the second prong of the plain-error doctrine. When viewed in the context of the parties' arguments as a whole, the prosecutor's comments concerning VanHook did not affect the fairness of defendant's trial or challenge the integrity of the judicial process. During Gray's cross-examination, the defense opened the door for discussion of VanHook by asking Gray a series of questions concerning a "tall white guy," VanHook, who was present at the apartment building on July 2, 2009. After establishing that VanHook was outside the apartment building, the defense proceeded to ask Gray questions about middlemen in drug distribution chains. Last, the fairness of the defendant's trial was not challenged by the prosecutor's comments, because the trial court instructed the jury that closing arguments are not evidence and arguments not based on the evidence are to be disregarded. *People v. Hillsman*, 362 Ill. App. 3d 623, 638, 839 N.E.2d 1116, 1130 (2005). We will not address defendant's arguments under the plain-error doctrine.

¶ 27 III. CONCLUSION

¶ 28 For the foregoing reasons, we affirm the trial court's judgment.

¶ 29 As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 30 Affirmed.