

NOTICE
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2013 IL App (4th) 110561-U

NO. 4-11-0561

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
January 17, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
CORVELL ASHVIN LEE CALDWELL,)	No. 09CF823
Defendant-Appellant.)	
)	Honorable
)	Robert L. Freitag,
)	Judge Presiding.

PRESIDING JUSTICE STEIGMANN delivered the judgment of the court.
Justices Pope and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed in part and vacated in part, concluding that (1) statements the prosecutor made during closing arguments did not constitute plain error, and (2) the \$5 "State Police OP Assistance Fee" was a fine imposed in violation of the prohibition against *ex post facto* laws.

¶ 2 Following an October 2010 trial, a jury convicted defendant, Corvell Ashvin Lee Caldwell, of criminal sexual assault (720 ILCS 5/12-13(a)(2) (West 2010)). In December 2010, the trial court sentenced defendant to 14 years in prison, ordering him to pay fines and fees including a \$5 "State Police OP Assistance Fee" (705 ILCS 105/27.3a(1.5), (5) (West 2010)).

¶ 3 Defendant appeals, arguing that (1) the State deprived him of a fair trial by improperly shifting the burden of proof to him during closing argument, and (2) the "State Police OP Assistance" assessment must be vacated. We affirm defendant's conviction and vacate the \$5 "State Police OP Assistance" assessment.

¶ 4

I. BACKGROUND

¶ 5 In September 2009, a grand jury indicted defendant on two counts of criminal sexual assault (720 ILCS 5/12-13(a)(2) (West 2010)), alleging that defendant placed his mouth on the penises of Timothy K. and Brian S. when they were unable to give knowing consent. In February 2010, defendant filed a motion to sever the two offenses, which the trial court later allowed.

¶ 6 At an October 2010 jury trial, the parties presented the following evidence pertinent to the charges involving Brian S.

¶ 7 In August 2009, Brian S., a student at Illinois State University, accompanied his friends to local bars in downtown Bloomington. Before doing so, Brian had consumed approximately 6 to 8 bottles of beer over a 2 1/2 hour period. While at the bars, Brian drank three "Jack and cokes," another bottle of beer, and a shot of whiskey.

¶ 8 Later that night, Brian became separated from his friends and decided to walk home. About 5 or 10 minutes into Brian's walk, defendant stopped and offered Brian a ride back to campus. After Brian got into the vehicle, defendant started "talking about wanting to go" to a strip club, and asked Brian if he "had ever had a threesome before with anyone." Defendant then drove to Kappa, ignoring Brian's requests to take him home. Although Brian had a cellular phone, he testified that he "just didn't feel safe" trying to call anyone and "figured [he] would wait until [they] got to wherever" defendant was taking them and "try to go from there."

¶ 9 After arriving at the strip club 30 minutes later, defendant convinced Brian to go inside the club. Defendant told Brian he would take him home if Brian had one drink. Brian "reluctantly" agreed. As Brian sat at the table, defendant went to the bar. Brian's back was

facing the bar so he could not see the bartender or what defendant was doing.

¶ 10 Defendant returned and, after Brian consumed the shot of whiskey, the two men left the club. After getting into defendant's car, Brian testified that he "went unconscious." When he awoke, he and defendant were in an abandoned parking lot. Defendant was outside of the vehicle performing oral sex on Brian, who was still buckled into the passenger seat. Brian told defendant "no" and pushed him away. Brian testified he did not run because he felt "groggy" and "disoriented" and did not know where he was.

¶ 11 According to Brian, defendant guided him out of the car and to a nearby bush, suggesting to Brian he should urinate. Defendant then led Brian back into his vehicle and "started to drive off." As they approached a bridge, Brian jumped out of defendant's car, which was traveling approximately 5 to 10 miles an hour.

¶ 12 Brian proceeded to call 9-1-1. Police officers took Brian to the hospital, where hospital employees conducted a sexual assault kit and drug screen and took a swab of Brian's penis.

¶ 13 Over defense counsel's objection, the trial court allowed the State to admit evidence of the alleged sexual offense defendant committed against Timothy K., another student at Illinois State University.

¶ 14 Timothy K. testified that two weeks prior to Brian's experience, he and some friends went to a bar in downtown Bloomington. There, he consumed three shots of whiskey and four beers. Afterward, Timothy went to a restaurant to get pizza. While in line he began talking to defendant, who knew one of Timothy's friends. Defendant was "very cordial" and invited Timothy to go to a party. While he and defendant were eating, Timothy got up to use the

restroom and left his food and drink with defendant. When he returned, he finished his meal, left the restaurant, and got into defendant's car.

¶ 15 About a minute after getting into the car, Timothy, who was sitting in the passenger seat, lost consciousness. When he awoke, he observed defendant's head near his groin, "making sucking and slurping noises." Defendant was standing outside of the passenger door. Timothy's shorts were unzipped and his underwear were "opened." He testified that he could not feel anything.

¶ 16 Timothy told defendant to stop, but defendant did not. Thereafter, Timothy pushed defendant off, "jumped out of the car and ran down the street." He waited on a bench at the nearest intersection until a police car passed, at which point he flagged the officer down. The officer, Erik Yamada, testified that Timothy was intoxicated, nervous, and upset, with slurred speech and glassy and bloodshot eyes.

¶ 17 Detective Jared Roth testified he later interviewed defendant concerning the alleged sexual assaults on both Timothy and Brian. The trial court admitted into evidence the video and associated written transcript of Roth's interview with defendant. The court also allowed the State to play portions of the interview for the jury. During the interview, defendant did not tell Roth that Brian jumped out of his car or that he drove Brian to a strip club until Roth confronted him with those facts.

¶ 18 Defendant testified that he first met Brian in August 2009 outside a bar in downtown Bloomington. According to defendant, Brian "was looking for a ride home." Defendant told Brian he was going to a strip club, and Brian asked if he could come with defendant. After they arrived defendant bought Brian a drink because Brian said he did not have

any money. A half hour later, they left the club. On the way back to Bloomington, Brian "grabbed [defendant's] hand and put it over into his private area and asked [defendant] to perform hand pleasures for him." According to defendant, Brian pulled his own pants down. Defendant continued to drive home and looked for a secluded spot to park. During the drive, Brian fell asleep.

¶ 19 After finding a place to park the vehicle, defendant exited the driver's side and walked around to open Brian's door. Defendant said he "didn't do nothing" except try to wake up Brian. Defendant denied ever placing his mouth on Brian's penis. When Brian awoke, he indicated he had to use the restroom, and defendant requested he do so in a nearby bush.

¶ 20 When Brian got back into the car, defendant began driving toward the university's campus. As they got "back down by downtown Bloomington," Brian grabbed defendant's gearshift, put the car in neutral, and exited the vehicle.

¶ 21 On cross-examination, the State asked defendant why, in his videotaped interview, defendant did not initially tell Roth that he took Brian to a strip club, to which defendant responded "I don't know." The State also asked defendant why he did not tell the detective that Brian jumped out of his car that night, to which defendant again replied, "I don't know."

¶ 22 Defendant's trial then proceeded to closing arguments. The State, referencing parts of defendant's videotaped interview with Roth, stated as follows:

"Those are just some of the highlights of his interview where his story changes. Then you also have the defendant's testimony yesterday, where he couldn't explain why, knowing that

he's under investigation for criminal sexual assault, he just come [sic] in and tell the story he told in his testimony. In fact, if you remember, he couldn't explain a lot of what happened. There were a lot of ["I don't know why he did something,[" ["I don't know, I don't know.[" Ladies and gentlemen, each revision of his story, each lie of his story reveals to you his guilt. It's a big guilty sign hanging right off his neck."

¶ 23 During defense counsel's closing argument, counsel made the following statement:

"And you know, while [Brian] was at the ER that a sex assault kit was done on him. You heard from [Brian] that penile swabs were taken from him. You know from the tape that the swabs were taken from [defendant], but, again, under circumstantial evidence or inferences, you heard no results from all that—all the taking of all the evidence or all those items. *** You've heard no one officially come in and confirm that that is, in fact, what was found on those penile swabs."

¶ 24 Counsel also stated as follows:

"So, again, you understand and [Brian] is telling you that sex took place. It wasn't by force. That lack of consent here wasn't a forced act through violence or threat of violence. No, the lack of consent has to come from an inability, unable to consent. And,

again you have [Brian] telling you that alcohol cannot do this so it must have been drugged, and as I said, you heard from his own words that he was tested that way and, as I said, we have no results. You can speculate as to why."

¶ 25 During the State's rebuttal argument, the State asserted as follows:

"[Defense counsel] also brought up the fact that there was no laboratory work or scientific evidence or CSI evidence brought up during the trial. Why not? If the evidence certainly incriminated the defendant, why wouldn't I bring that in, wouldn't the State bring that up? And if that lab work actually exonerated the defendant, showed beyond a reasonable doubt, beyond any doubt that he's not guilty, wouldn't Mr. Welch present that evidence? Given the evidence standing against this defendant, maybe there is a third reason, perhaps, maybe, perhaps, test results were inconclusive, that they didn't help exonerate the defendant and that they don't help incriminate the defendant. Maybe that's it. Perhaps."

¶ 26 Later, the State also made the following remarks:

"If you remember, when I asked him why he was out at that secluded area *** by himself when everything is closed, what was his answer? He didn't have one, ladies and gentlemen. He didn't have an answer of why he's out there *** supposedly by himself

offering [Timothy] a ride or see if he's sick."

¶ 27 On this evidence, the jury found defendant guilty of criminal sexual assault.

¶ 28 Later that month, defendant filed a posttrial motion pursuant to section 116-1 of the Code of Criminal Procedure of 1963 (Criminal Procedure Code) (725 ILCS 5/116-1 (West 2010)), alleging that the State failed to prove him guilty beyond a reasonable doubt. Defendant's motion also alleged the trial court erred by (1) denying his motion to declare section 115-7.3 of the Criminal Procedure Code (725 ILCS 5/115-7.3 (West 2010)) unconstitutional, (2) allowing the State to introduce other-crimes evidence pursuant to section 115-7.3 of the Criminal Procedure Code, and (3) allowing, over defense counsel's objection, certain jury instructions. The motion further alleged that defendant was denied the right to a fair trial and due process of law when the court "allowed the State to introduce evidence of other-crimes after previously granting Defendant's motion to sever Counts 1 and 2 in this cause."

¶ 29 At a December 2010 hearing, the trial court denied defendant's posttrial motion. Thereafter, the court sentenced defendant to 14 years in prison and ordered him to pay the "mandatory court costs and fees." Defendant's December 3, 2010, supplemental sentencing order, signed by the trial judge, and restitution addendum list the following fines, fees, and assessments: (1) \$778 in court costs, (2) a \$240 statutory surcharge, (3) a \$200 deoxyribonucleic acid (DNA) fee, (4) a \$10 drug court fee, (5) a \$15 child advocacy center fee, (6) a \$200 sexual assault fine, (7) a \$500 sex offender fine, and (8) \$2,348 in total restitution costs. A December 6, 2010, "Notice to Party" lists additional fines and fees, including a \$5 "State Police OP Assistance Fee" (705 ILCS 105/27.3a (West 2010)).

¶ 30 Later that month, defendant filed a motion to reconsider sentence, which the trial

court denied.

¶ 31 This appeal followed.

¶ 32 II. ANALYSIS

¶ 33 Defendant argues that (1) the State deprived him of a fair trial by improperly shifting the burden of proof to him during closing argument, and (2) the "State Police OP Assistance" assessment must be vacated. We address defendant's contentions in turn.

¶ 34 A. Whether the State Improperly Shifted the Burden of Proof In Closing Argument

¶ 35 Defendant contends the State's commentary during closing argument improperly shifted the burden of proof to him, thereby depriving him of a fair trial. Defendant acknowledges that he has forfeited review of the allegedly improper arguments by failing to (1) object at trial and (2) include the arguments in his posttrial motions. See *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988) (concluding that the presence of both a trial objection and a written posttrial motion raising the issue are necessary to preserve an issue for appeal). Thus, defendant urges this court to review the arguments for plain error.

¶ 36 The plain-error doctrine allows a reviewing court to consider unpreserved claims of error when a clear or obvious error occurred and (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, or (2) the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Thompson*, 238 Ill. 2d 598, 613, 939 N.E.2d 403, 413 (2010).

Generally, the first step of plain-error review is to determine whether any error occurred. *Id.*

¶ 37 A prosecutor is free to "comment on the evidence and any fair, reasonable inferences it yields" but may not argue assumptions of facts not contained in the record. *People*

v. Glasper, 234 Ill. 2d 173, 204, 917 N.E.2d 401, 419 (2009). Prosecutors also may not attempt to shift the burden of proof to the defense. *People v. Beasley*, 384 Ill. App. 3d 1039, 1047-48, 893 N.E.2d 1032, 1039 (2008). Comments made in closing argument must be considered in the proper context by examining the entire closing arguments of both the State and defense counsel. *People v. Kliner*, 185 Ill. 2d 81, 154-55, 705 N.E.2d 850, 887 (1998). Statements that are invited or provoked by defense counsel's argument will not be deemed improper. *Glasper*, 234 Ill. 2d at 204, 917 N.E.2d at 420.

¶ 38 Here, defendant contends the State's closing arguments improperly shifted the burden of proof to defendant, implying he was guilty because he did not present certain evidence. Defendant also claims the State's arguments pertaining to the lab test results "contained a reference to facts never placed in evidence and facts which could not be reasonably inferred." We are not persuaded.

¶ 39 First, we reject defendant's assertion that the State's commentary on defendant's videotaped interview and testimony at trial improperly implied that if defendant were not guilty, he would have presented an explanation for the accusations levied against him. Rather, we construe the State's argument as highlighting the inconsistencies and weaknesses in defendant's testimony. Such argument is proper. *People v. Campbell*, 332 Ill. App. 3d 721, 727, 773 N.E.2d 776, 781 (2002) (Fourth District).

¶ 40 With respect to the State's rebuttal argument about lab results, we note that during defense counsel's closing, defense counsel questioned why the State did not submit the lab results into evidence, specifically stating to the jury, "[Y]ou heard from [defendant's] own words that he was tested that way and, as I said, we have no results. You can speculate as to why." By inviting

the jury to "speculate as to why" the State did not provide lab results, defense counsel provoked the State's response that "perhaps, [the] tests were inconclusive, that they didn't help exonerate the defendant and that they don't help incriminate the defendant." See *Beasley*, 384 Ill. App. 3d at 1048, 893 N.E.2d at 1040 (the "defendant may have invited the State to explain why it chose not to submit certain items for fingerprinting" when the defendant, during closing argument, noted that the State did not have several items checked for fingerprints). Accordingly, we find no error (see *Kliner*, 185 Ill. 2d at 154-55, 705 N.E.2d at 887 (concluding the State did not act improperly by pointing out on rebuttal that defendant could have called an officer to testify after defense counsel, during closing, questioned why the State had not called the officer to testify)), and, thus, deem defendant's arguments forfeited.

¶ 41 B. Whether the \$5 State Police OP Assistance Assessment Must Be Vacated

¶ 42 Defendant next contends the \$5 "State Police OP Assistance Fee" must be vacated because the charge is a fine that was improperly imposed in violation of the prohibition against *ex post facto* punishment. The State responds that the "State Police OP Assistance Fee" is a fee, not a fine, and therefore does not violate *ex post facto* principles.

¶ 43 Section 27.3a(1.5) of the Clerks of Courts Act (705 ILCS 105/27.3a(1.5) (West 2010)), which went into effect on July 13, 2010 (Pub. Act 96-1029, § 6 (eff. July 13, 2010) (2010 Ill. Laws 3878, 3879)), provides as follows:

"Starting on the effective date of this amendatory Act of the 96th General Assembly, a clerk of the circuit court in any county that imposes a fee pursuant to subsection 1 of this Section, shall charge and collect an additional fee in an amount equal to the

amount of the fee imposed pursuant to subsection 1 of this Section.

This additional fee shall be paid by the defendant in any felony, traffic, misdemeanor, local ordinance, or conservation case upon a judgment of guilty or grant of supervision."

¶ 44 The imposition of a fine that does not become effective until after a defendant commits an offense violates *ex post facto* principles. *People v. Devine*, 2012 IL App (4th) 101028, ¶ 10, 976 N.E.2d 624. Here, section 27.3a(5) became effective nearly a year after defendant committed his August 2009 criminal sexual assault. In addition, this court recently concluded that although it is labeled a "fee," the "State Police OP Assistance Fee" is, in fact, a fine, because it does not reimburse the State for costs incurred in defendant's prosecution. *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 31, 2011 WL 6028865, *5. Therefore, the imposition of the "State Police OP Assistance Fee" violated *ex post facto* principles.

¶ 45 III. CONCLUSION

¶ 46 For the reasons stated, we affirm the trial court's judgment but vacate the \$5 "State Police OP Assistance" assessment. As part of our judgment we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 47 Affirmed in part and vacated in part.