2022 IL App (4th) 190233-U

NO. 4-19-0233

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
February 23, 2022
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
VAUGHN W. HENRY,	)	No. 16CF617
Defendant-Appellant.	)	
	)	Honorable
	)	Rudolph M. Braud Jr.,
	)	Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Presiding Justice Knecht and Justice Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed in part and vacated in part, holding neither the State nor the trial court shifted the burden of proof to the defense; however, the trial court erred by not merging defendant's convictions pursuant to the one-act, one-crime rule.

¶ 2 In a January 2019 trial, a jury found defendant, Vaughn W. Henry, guilty of theft of property in excess of $100,000 (720 ILCS 5/16-1(a)(1)(A) (West 2012)), a Class 1 felony, and financial exploitation of the elderly (720 ILCS 5/17-56(a) (West 2012)), a Class 1 felony. Defendant afterwards moved for a new trial, arguing the State failed to prove him guilty beyond a reasonable doubt and alleging several errors by the trial court. In an April 2019 hearing, the trial court denied defendant's motion and sentenced him to 7½ years' incarceration in the Illinois Department of Corrections (DOC) for each offense, to be served concurrently, followed by two years' mandatory supervised release. Defendant filed a motion to reconsider the sentence, and the court denied it.

¶ 3 On appeal, defendant challenges his convictions on two grounds: (1) the trial court and the State improperly shifted the burden of proof to defendant and (2) his convictions for theft and financial exploitation of an elderly person should have been merged pursuant to the one-act, one-crime rule. We disagree with defendant on the first argument and agree with him on the second.

¶ 4 I. BACKGROUND

¶ 5 Defendant is a former college professor of animal science and agriculture turned financial consultant. Defendant had known siblings Sharon and James Masterson for decades and had assisted them with financial planning matters over the years when they introduced defendant to their aunt, Salome Mosteika, in 2009. Defendant began assisting Mosteika in financial matters and estate planning, including consolidating several certificates of deposit (CDs). In January 2013, defendant went to Sharon and Mosteika's home to discuss investing the money Mosteika had in the consolidated CD. According to Sharon, Mosteika wanted to invest conservatively to benefit her family upon her death. Mosteika eventually wrote two checks, totaling $150,000, payable to Prairie Agriculture (defendant's business), for defendant to invest in her name and for her benefit. Defendant deposited the money in Prairie Agriculture's bank account, which he opened after Mosteika gave him the first check, but then transferred the money to his personal bank account and his personal Vanguard account. He also withdrew $15,000 of the money Mosteika entrusted to him and placed it in a lockbox in his home. Contrary to their written agreement, defendant took a 10% fee rather than the contracted 5% fee and he did not invest any of the money for Mosteika. When asked about the investment, defendant would show Sharon statements he created purporting to show a Vanguard account, but those statements did not identify the accountholder. Mosteika died in October 2014, at age 99, and James and Sharon, as

Mosteika's heirs, inquired about the investment and when they might receive the money. When defendant delayed and repeatedly gave evasive answers, James and Sharon sought legal advice and contacted the police.

¶ 6 In June 2016, by way of grand jury indictment, the State charged defendant with one count of theft (720 ILCS 5/16-1(a)(1)(A) (West 2012)), a Class 1 felony; one count of financial exploitation of the elderly person (720 ILCS 5/17-56(a) (West 2012)), a Class 1 felony; one count of money laundering (720 ILCS 5/29B-1(a)(1)(A) (West 2012)), a Class 1 felony; and one count of wire fraud (720 ILCS 5/17-24(b) (West 2012)), a Class 3 felony, alleging the offenses arose from his dealings with Salome Mosteika between December 7, 2012, and September 1, 2014. The State dismissed the money laundering and wire fraud counts and proceeded to trial on the remaining counts in January 2019.

¶ 7 During *voir dire*, the trial court admonished the jury pursuant to Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). After informing the jury of the presumption of innocence, the burden of proof, and that the defendant does not have to prove his innocence, for the fourth legal principle, the trial court stated: "[I]f the Defendant chooses not to testify, you cannot hold the Defendant's failure to testify against him." When asked if they understood and accepted these principles, every prospective juror answered "yes."

¶ 8 The State's case-in-chief included dozens of exhibits and testimony from seven witnesses: Officer Robert Zander (Springfield Police Department); Jim and Sharon Masterson (Mosteika's heirs); Jenny Sommers (former branch supervisor at Prairie State Bank & Trust); Hugh Drake (attorney who drafted a will for Mosteika in November 2012, per referral from defendant); Detective Jeremy Oldham (Springfield Police Department); and Cheryl Martin (certified public accountant and certified fraud examiner).

¶ 9 The defense's case consisted of the testimony of defendant, along with several additional documents as exhibits. Defendant acknowledged he was sloppy in handling and documenting Mosteika's $150,000 investment. However, defendant maintained the money became his when he and Mosteika entered into a handshake agreement whereby she would purchase defendant's 1% share in a slaughterhouse in Abidjan, Ivory Coast, Africa. Defendant testified he never presented Mosteika with proof of his slaughterhouse stock, but according to him, he was able to explain the entire international slaughterhouse enterprise, along with how it was backed by government bonds, to the elderly, hard-of-hearing Mosteika in less than five minutes in her living room after Sharon stepped out of the room. According to defendant, he had to briefly and clandestinely discuss the matter with Mosteika without Sharon present because Mosteika intended to disinherit Sharon. Defendant stated he believed the $150,000 belonged to him following the handshake agreement. He explained his attempts to repay the money to James and Sharon Masterson after Mosteika died arose from a moral, not a legal, obligation.

¶ 10 In closing arguments, the State asked the jury to "follow the money and count the lies," arguing the evidence showed defendant did not invest Mosteika's money but rather spent it on his personal expenses. The State explained how the evidence satisfied the elements of each offense (theft and financial exploitation of the elderly). The State then pointed out inconsistencies and contradictions in defendant's testimony. It also highlighted inconsistencies between the evidence and defendant's theory he sold his stock in an African slaughterhouse to Mosteika for $150,000. The State argued:

> "Now moving along to this new secret agreement that we all learned about this week, the Defendant testified to all of you that he was—had an experienced background in financial consulting, in

agriculture, in other kinds of consulting; he did this domestically; he did this internationally. He told you that he was a professional at what he did, and here we sit today without an ounce of documentation as to this new secret agreement ***. There's not a single shred of evidence that this ever happened. And let's just look at what this alleged agreement actually was. This alleged agreement occurred in a five-minute conversation, less than five minutes, excuse me, less than five-minute conversation, in secret, in Salome Mosteika's house, who is hard of hearing, mind you, but had to keep it a secret because Sharon was somewhere in the house once again, but we had to keep it secret from her. Five minutes to explain all of those details that he testified to, to explain what her one hundred and fifty thousand dollars was going to. And she agreed. *** [A]nd the Defendant would have you believe that [this] child of the Great Depression, who was 99 years old, living in Springfield, Illinois, wanted to buy his 1 percent share in a slaughterhouse in Abidjan, Ivory Coast, Africa, for one hundred and fifty thousand dollars, in a country with no infrastructure, and that had just gotten out of a religious-based civil war. *** It is entirely inconsistent to sit here and say that. It is inconsistent with what Sharon and Jim testified to. It's inconsistent with what Cheryl Martin said normal practices were for that kind of agreement. It's inconsistent, and it is very easy to attribute statements to a woman

> who passed away four and a half years ago who is not here to testify about them today. What's easy to do is to say it. It's an entirely [other] thing to actually believe that."

The State ultimately asked for guilty verdicts.

¶ 11 Defense counsel began his closing argument by highlighting how the State bore the burden of proof and reminding the jury that defendant did not have to testify, nor did he have to present any evidence at all. Counsel then argued the State did not meet its burden of proving defendant guilty beyond a reasonable doubt because defendant never intended to permanently deprive Mosteika of her property. Counsel conceded defendant was sloppy in executing his agreement to sell his stock to Mosteika. Counsel said:

> "I understand the proof issues in terms of the stock, and it would be a lot easier for me to swallow if the company was here in the states or somewhere locally. We're talking about trying to produce stock certificates from a company in Africa at a time when there was turmoil there between Vaughn and the CEO. So they're saying, ['']well gosh, you know, where's the stock certificates, where are they.['] We expect him to be able to produce stock certificates during a time from especially in 2015, 2016."

Counsel explained defendant's difficulties obtaining the stock certificates. He elaborated:

> "Even if he would have gone there [(Africa)], there's no chance he was going to get those. You're talking about producing documents in a foreign country with this questionable—now we think questionable Century Group Corporation, and we're going to hold

> that against him, because what we're saying is, prove your innocence, Vaughn, prove your innocence, prove to us, prove your innocence and prove to us there that there were those stock certificates and there was this exchange. Well wait a minute, wait a minute. The burden of proof is on the State. The burden of proof is on the prosecution to prove this case beyond a reasonable doubt. What efforts did they make? It's their burden. It's their burden. What efforts did they make to even question the validity of whether Vaughn was involved with this company, what his role was. Did they contact anybody from the Century Group? Did they contact the CEO? Did they contact anyone to say, ['hey are there valid stock certificates ***[']. Did they try to verify that? No, no, they're putting the burden on him, make him do it."

Counsel asked the jury to find defendant not guilty.

¶ 12 The State responded by reiterating the jury would have to evaluate the evidence and judge witness credibility, especially defendant's credibility. The State again attacked as incredible defendant's testimony that he and Mosteika entered into a legitimate stock sale in less than five minutes. In response to defense counsel's burden-shifting argument, the State noted:

> "Counsel says we're asking Mr. Henry to prove his own innocence, prove that you own that stock, why didn't you go to Africa. Well you're entitled to the facts to assess his credibility, and if he tells you a story that he owned a 1 percent interest that he sold to Mrs. Mosteika, as Cheryl Martin told you, it was significant

> to her, as a Certified Fraud Examiner, that there was no proof that he ever owned it, that there wasn't an appraisal; there wasn't anything that she would normally look for to determine whether a transaction like that had ever occurred. He's not required to prove his own innocence, but it certainly is relevant [to] the consistency and the plausibility of the story that he told. Why didn't we go to Africa to obtain these documents? Well I submit to you it's because they don't exist, but it's hard to investigate and go to Africa to look for these things when you hear the story for the first time from the stand. It's a distraction folks. It's an attempt to distract you from the clear path of this money and that he took it for his own purposes from Mrs. Mosteika."

The State again asked the jury to find defendant guilty.

¶ 13 Upon receiving its instructions, the jury deliberated for less than one hour before finding defendant guilty on both counts. The trial court ordered a presentence investigation report (PSI) and set the matter for sentencing. Meanwhile, defendant moved for a new trial, asserting the State failed to prove him guilty beyond a reasonable doubt and alleging the trial court committed numerous errors.

¶ 14 At the April 2019 sentencing hearing, the trial court took up defendant's posttrial motion first and denied it. It then turned its attention to sentencing. Besides submitting victim impact statements from the Mastersons, the State offered no additional evidence in aggravation. Citing the gravity of stealing $150,000 from an elderly woman, the State asked the trial court to impose a 10-year sentence. As evidence in mitigation, the defense submitted numerous letters on

defendant's behalf and called three witnesses who testified to defendant's good, beneficent character. Noting defendant's lack of criminal history, his reputation as a charitable person, his capability to help the community, his deteriorating health, and the time he had already served in jail, defense counsel asked the trial court to impose a term of probation. The trial court noted it considered all the evidence from trial, the PSI, and the statutory factors in aggravation and mitigation. It sentenced defendant to 7½ years in DOC on each count, to be served concurrently, noting day-for-day credit applied and defendant would receive credit for 369 days. The trial court also ordered defendant to pay restitution to the Mosteika's estate.

¶ 15 Defendant immediately filed a motion to reconsider his sentence, which the trial court denied in April 2019.

¶ 16 This appealed followed.

¶ 17 II. ANALYSIS

¶ 18 Defendant challenges his convictions on two grounds: (1) the trial court and the State denied defendant a fair trial by shifting the burden of proof to the defense and (2) the trial court erred in entering convictions on both theft over $100,000 and financial exploitation of an elderly person because the counts should have been merged pursuant to the one-act, one-crime rule. The State contests the first issue and concedes the second. We address each issue in turn.

¶ 19 A. Burden Shifting

¶ 20 Defendant contends the trial court shifted the burden of proof to defendant when, during the *Zehr* admonishments (see *People v. Zehr*, 103 Ill. 2d 472, 469 N.E.2d 1062 (1984)), it said: "[Y]ou cannot hold the Defendant's failure to testify against him." He contends the State also improperly shifted the burden of proof when, during closing arguments, it said defendant

failed to present evidence (*i.e.*, the stock certificates) to support his defense that he properly sold stock to Mosteika in exchange for $150,000. We disagree.

¶ 21 As a threshold matter, we note defendant did not object to the trial court's *Zehr* admonishments, including its use of the phrase "failure to testify," nor did he object during the State's closing arguments. Likewise, defendant did not raise this burden-shifting issue in his posttrial motions. Defendant, therefore, forfeited this issue, but he asks that we review the issue for plain error. See *People v. Hestand*, 362 Ill. App. 3d 272, 279, 838 N.E.2d 318, 324 (2005). "The plain-error rule bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved claims of error." *People v. Thompson*, 238 Ill. 2d 598, 613, 939 N.E.2d 403, 413 (2010). Defendants can invoke the plain-error doctrine when they make one of two showings:

> " '(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.' " *Thompson*, 238 Ill. 2d at 613 (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007)).

Under either prong, "[t]he first step of plain-error review is determining whether any error occurred." *Thompson*, 238 Ill. 2d at 613. We find no error in either the trial court's *Zehr* admonishments or the State's comments during closing arguments.

¶ 22 "Constitutional due process rights require that the burden of proving all of the elements of the offense charged beyond a reasonable doubt rests on the State," and this "burden of proof *never* shifts to the accused." (Emphasis added.) *People v. Howery*, 178 Ill. 2d 1, 32, 687 N.E.2d 836, 851 (1997). Naturally, neither the trial court nor the State may shift the burden of proof to a defendant.

¶ 23 1. *The Trial Court*

¶ 24 Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) codifies our supreme court's decision in *Zehr* and requires the trial court to ensure potential jurors understand the presumption of innocence, the burden of proof, and who bears that burden. Relevant to this appeal, the third and fourth principles provide: "(3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that if a defendant does not testify it cannot be held against him or her." Ill. S. Ct. R. 431(b) (eff. July 1, 2012). Under the prior version of Rule 431(b), the fourth principle read: "that the defendant's failure to testify cannot be held against him or her." Ill. S. Ct. R. 431(b) (eff. May 1, 2007). It appears the trial court used the 2007 version of Rule 431(b) when giving the *Zehr* admonishments because it informed potential jurors, "you cannot hold the Defendant's failure to testify against him." Defendant argues this language shifted the burden of proof to him, even though the trial court properly admonished potential jurors that the State must prove defendant guilty beyond a reasonable doubt and defendant need not produce any evidence. Specifically, he argues, "a reasonable juror could have interpreted ["failure to testify"] as a statement that the defendant bore the burden of negating guilt, even if guilt could not be inferred from the failure to testify." We disagree.

¶ 25 Defendant directs our attention to *People v. Pomykala*, 203 Ill. 2d 198, 784 N.E.2d 784 (2003), labeling it "instructive here." There, our supreme court considered the

following jury instruction: " 'If you find from your consideration of all the evidence that the defendant was under the influence of alcohol at the time of the alleged violation, such evidence shall be presumed to be evidence of a reckless act unless disproved by evidence to the contrary.' " *Pomykala*, 203 Ill. 2d at 202. This non-Illinois Pattern Instruction was taken from section 9-3 of the Criminal Code (720 ILCS 5/9-3 (West 2002)). In evaluating the jury instruction, the supreme court applied the reasonable-juror standard, *i.e.*, reading it "from the perspective of a reasonable juror, not with the legal expertise of judges and lawyers." *Pomykala*, 203 Ill. 2d at 208. The court explained, "[w]hether a defendant has been denied due process by a jury instruction depends upon the way in which a reasonable juror could have interpreted the instruction." *Pomykala*, 203 Ill. 2d at 208-09. Rejecting an "overly technical reading of the statute" and instruction, the supreme court determined "[a] reasonable juror would assume from a reading of the instruction that, once the State established that the defendant was intoxicated, it had proved recklessness, unless the defendant produced sufficient evidence to disprove it." *Pomykala*, 203 Ill. 2d at 208. Accordingly, the court held the "the instruction to the jury *** violated defendant's due process rights" because the mandatory presumption shifted the burden of proof to the defense. *Pomykala*, 203 Ill. 2d at 209.

¶ 26 While we do find the reasonable-juror standard instructive, we do not see *Pomykala* as comparable, let alone dispositive, to the case before us. Here, we have a trial court using an old version of Rule 431(b) when giving *Zehr* admonishments early in *voir dire*. Notably, the trial court correctly stated the preceding principles, saying:

> "In every criminal case, a person accused of a crime is presumed to be innocent of the charge against him; that before a Defendant can be convicted, the State must prove the Defendant's guilt beyond a

> reasonable doubt; the Defendant does not have to prove his innocence; the Defendant does not have to present any evidence on his own behalf, and if the Defendant chooses not to testify, you cannot hold the Defendant's *failure to testify* against him." (Emphasis added.)

Though he did not object at the time, defendant now asserts these three words "failure to testify" undermined the entirety of what the trial court just said about the presumption of innocence, the burden of proof, and defendant's right to stand silent. We do not see how a reasonable juror, even without legal expertise, would come to the same conclusion. And it does not appear any juror did come to that conclusion, because when the trial court asked the potential jurors if they understood and accepted those principles, they all responded with, "yes."

¶ 27 But *voir dire* does not present the whole picture for how a reasonable juror would interpret "failure to testify." The actual instruction read to the jury and sent back with the jurors during deliberations correctly stated the *Zehr* and Rule 431(b) principles, stating:

> "The defendant is presumed to be innocent of the charges against him. This presumption remains with him throughout every stage of the trial and during your deliberations on the verdict and is not overcome unless from all the evidence in this case you are convinced beyond a reasonable doubt that he is guilty.
>
> The State has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden remains on the State throughout the case. The defendant is not required to prove his innocence."

Because defendant did testify, the trial court did not issue Illinois Pattern Jury Instructions, Criminal, No. 2.04 (approved Dec. 8, 2011) (still titled, ironically, "Failure Of Defendant To Testify"), which informs jurors "[t]he fact that the defendant did not testify must not be considered by you in any way in arriving at your verdict." In addition, the trial court properly informed the jurors in writing, and presumably orally when reading the instructions to them, that the burden of proof as to each element of each charged offense rests with the State throughout the trial.

¶ 28 Considering the trial court's instructions as a whole, including the *Zehr* admonishments during *voir dire*, we see no error here. To conclude the trial court's mistaken use of "failure to testify" somehow shifted the burden of proof to defendant would require us to believe reasonable jurors discarded everything they heard (and confirmed they understood and accepted) during *voir dire* and ignored (or misunderstood) what they received in the formal jury instructions. Such a conclusion stretches the bounds of reason and credulity. Since we find it is not reasonable to conclude any reasonable juror would interpret "failure to testify" as shifting the burden of proof to defendant, there is no error here, let alone a clear and obvious error. See *People v. Hood*, 2016 IL 118581, ¶ 18, 67 N.E.3d 213 (" '[W]ithout error, there can be no plain error.' "). Consequently, we will not proceed to a plain-error analysis.

¶ 29 2. *The State's Closing Argument*

¶ 30 Defendant next argues, "[t]he State also improperly shifted the burden of proof at trial to [him] when it argued in closing that he failed to present evidence to support his theory of the case." Defendant directs our attention to comments contained in 3 of the 22 pages of transcript constituting the State's closing argument. Although he fails to identify any specific statements, he characterizes them as, "he [defendant] did not provide documentation of the

second agreement." This, he says, shifted the burden of proof. Looking at the entirety of closing arguments, we see defendant mischaracterizes the State's argument, mistaking proper attempts to question defendant's credibility as improper burden shifting.

¶ 31 "[C]omments made in closing argument must be considered in the proper context by examining the entire closing arguments of both the State and the defendant." *People v. Kliner*, 185 Ill. 2d 81, 154, 705 N.E.2d 850, 887 (1998). "Prosecutors are afforded wide latitude during closing argument and may properly comment on the evidence presented and reasonable inferences drawn from that evidence, respond to comments made by defense counsel that invite a response, and comment on the credibility of a witness." *People v. Marzonie*, 2018 IL App (4th) 160107, ¶ 47, 115 N.E.3d 270. "[R]eversal based on improper prosecutorial remarks is only necessary when there has been 'substantial prejudice' to the defendant 'such that the result would have been different absent the complained-of remark.' " *People v. Long*, 2018 IL App (4th) 150919, ¶ 96, 115 N.E.3d 295 (quoting *People v. Cloutier*, 156 Ill. 2d 483, 507, 622 N.E.2d 774 (1993)).

¶ 32 Viewing the closing arguments in their entirety, we conclude the State's argument did not cross the line of shifting the burden of proof to defendant. The State was commenting on the evidence generally, whether the evidence supported defendant's theory, and defendant's credibility. "[A] prosecutor's closing remarks may reflect upon the credibility of a witness where the remarks are based on the evidence or inferences fairly drawn therefrom." *Long*, 2018 IL App (4th) 150919, ¶ 95 (citing *People v. Shum*, 117 Ill. 2d 317, 348, 512 N.E.2d 1183, 1194 (1987)). Defendant professed to being a professional in the financial field and had documented much of his and Mosteika's initial agreement through something he called a "Purchasing Agency Agreement." He had even provided a copy to the detective in the case. However, although he

testified each of the copies were identical, the State noted the copy defendant used for his slide show presentation during his testimony did not match the one he provided. This was nothing more than a comment on actual evidence tendered by the defense, not a comment suggesting he was obligated to do so. Furthermore, defense counsel's closing argument invited the prosecution's rebuttal comments on the evidence and defendant's credibility. See *Marzonie*, 2018 IL App (4th) 160107, ¶ 47 (stating that depending on the context, a prosecutor may "respond to comments made by defense counsel that invite a response, and comment on the credibility of a witness").

¶ 33 The State's closing argument asked the jury to "follow the money and count the lies." It recounted the evidence showing that defendant deposited Mosteika's $150,000 into a newly opened Prairie Agriculture bank account, transferred the money to his own personal accounts, spent the money on his personal expenses, and lied to the Mastersons about what happened to the money. The State then took aim at defendant's credibility, particularly his testimony about his clandestine sale of the slaughterhouse stock to Mosteika for $150,000. It reminded the jury that defendant's story was totally inconsistent with the other evidence presented, including the testimony from the Mastersons, Cheryl Martin (a certified fraud examiner), and even his own testimony about his experience and expertise. Notably, the State's argument did not comment on what defendant specifically might have presented or failed to present to the jury to support his testimony, but rather, the State commented on what defendant asked the jury to believe *vis-à-vis* all the evidence before it.

¶ 34 It was defense counsel who broached the topic of the burden of proof during closing arguments and what was not presented, saying:

> "I understand the proof issues in terms of the stock, and it would be a lot easier for me to swallow if the company was here in the states or somewhere locally. We're talking about trying to produce stock certificates from a company in Africa at a time when there was turmoil there between Vaughn and the CEO. So they're saying, ['']well gosh, you know, where's the stock certificates, where are they.['] We expect him to be able to produce stock certificates during a time especially in 2015, 2016."

Defense counsel went on to describe the difficulties in obtaining the stock certificates, and he maintained the State was "hold[ing] that against [defendant]." Defense counsel argued the State was "saying *** prove your innocence, Vaughn, prove your innocence, prove to us, prove your innocence and prove to us there were those stock certificates and there was this exchange." He reminded the jury that the State bore the burden of proof here and questioned why the State never inquired about the stock certificates, concluding: "[T]hey're putting the burden on [defendant], make him do it."

¶ 35 The State addressed defense counsel's burden-shifting claims during its rebuttal argument. It reminded the jury it would have to review the evidence and judge witness credibility, including defendant's credibility. The State said:

> "Counsel says we're asking Mr. Henry to prove his own innocence, prove that you own that stock, why didn't you go to Africa. Well you're entitled to the facts to assess his credibility, and if he tells you a story that he owned a 1 percent interest that he sold to Mrs. Mosteika, as Cheryl Martin told you, it was significant

> to her, as a Certified Fraud Examiner, that there was no proof that he ever owned it, that there wasn't an appraisal; there wasn't anything that she would normally look for to determine whether a transaction like that had ever occurred. He's not required to prove his own innocence, but it certainly is relevant [to] the consistency and the plausibility of the story that he told. Why didn't we go to Africa to obtain these documents? Well I submit to you it's because they don't exist, but it's hard to investigate and go to Africa to look for these things when you hear the story for the first time from the stand."

¶ 36 The prosecution does not shift the burden of proof when it "respond[s] to comments by defense counsel that clearly invite a response." *People v. Curry*, 2013 IL App (4th) 120724, ¶ 80, 990 N.E.2d 1269. We do not see these or any comments from the State as shifting the burden of proof to defendant. The prosecutor's initial comments during closing arguments highlighted for the jury that defendant's testimony, and the reasonable inferences therefrom, proved inconsistent with the other evidence before the jury. See *Marzonie*, 2018 IL App (4th) 160107, ¶ 47 (stating prosecutors may properly comment on the evidence presented and the reasonable inferences drawn therefrom). The State asked the jury to judge defendant's credibility in light of all the other evidence, namely testimony from the Mastersons and Martin. See *Marzonie*, 2018 IL App (4th) 160107, ¶ 47 (stating prosecutors may "comment on the credibility of a witness"). The State did not broach the burden of proof or what potential evidence defendant did not present until *after* defense counsel argued the State was asking defendant to prove his innocence and produce the stock certificates. See *Marzonie*, 2018 IL App (4th) 160107, ¶ 47

(stating prosecutors may "respond to comments made by defense counsel that invite a response"). And even then, the State repeated that defendant did not have to prove his innocence. At no point did the State claim defendant "failed to present evidence to support his theory of the case," as his appellant's brief asserts. Finally, the record shows the State's comments on the burden of proof and the stock certificates during rebuttal were invited by the defense and clearly required a response. See *Kliner*, 185 Ill. 2d at 154 ("[T]he prosecutor may respond to comments by defense counsel which clearly invite a response."). Consequently, we find no error here. See *People v. Glasper*, 234 Ill. 2d 173, 204-05, 917 N.E.2d 401, 420-21 (2009).

¶ 37 Because we find no improper burden shifting—neither the trial court's use of "failure to testify" during Rule 431(b) admonishments nor the prosecutor's comments during closing arguments improperly shifted the burden of proof to defendant—we need not address defendant's remaining plain-error argument. Similarly, since we found no error or improper burden shifting, we need not address defendant's cumulative error argument or argument that his trial counsel provided ineffective assistance when he did not object to the trial court's use of "failure to testify" during the *Zehr* admonishments or during the State's closing argument.

¶ 38 B. One-Act, One-Crime Rule

¶ 39 Defendant next argues his convictions for theft of property in excess of $100,000 and financial exploitation of the elderly violate the one-act, one-crime rule, and the trial court erred by not merging the convictions. Specifically, he maintains theft, as the lesser-included offense, should be vacated. See *People v. Bailey*, 409 Ill. App. 3d 574, 597, 948 N.E.2d 690, 712-13 (2011). The State agrees and concedes this issue, noting it alleged one time period (December 2012 to September 2014) for both offenses and it "did not apportion the various transfers from accounts to defendant's personal account." Accepting defendant's argument and

the State's concession, we vacate defendant's theft conviction and order the mittimus to be corrected. *Bailey*, 409 Ill. App. 3d at 597.

¶ 40 III. CONCLUSION

¶ 41 For the reasons stated, while the trial court's judgment is affirmed, defendant's theft conviction is vacated, and the sentence shall remain unchanged.

¶ 42 Affirmed in part and vacated in part.