

2019 IL App (1st) 163305-U

No. 1-16-3305

Order filed August 28, 2019

Third Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 16 CR 1283
)	
JONATHAN HARDY,)	Honorable
)	Erica L. Reddick,
Defendant-Appellant.)	Judge, presiding.

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Ellis concurred in the judgment.

ORDER

¶ 1 *Held:* The State did not vouch for or improperly bolster the credibility of a key witness during closing arguments. The cause is remanded to the circuit court to allow defendant the opportunity to file a motion challenging his fines and fees and/or to correct the mittimus.

¶ 2 Following a jury trial, defendant Jonathan Hardy was found guilty of armed habitual criminal and reckless discharge of a firearm, and sentenced to six years in prison. He appeals, arguing that (1) he was denied a fair trial when the State made improper comments during

closing arguments, and (2) his fines and fees order and mittimus should be corrected in various ways. We affirm defendant's conviction, but remand as to the fines and fees order and mittimus.

¶ 3 Defendant was charged by indictment with armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2016)) (count I), unlawful use of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2016)) (counts II and III), aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1), (a)(3)(A-5) (West 2016) (counts IV and V), and reckless discharge of a firearm (720 ILCS 5/24-1.5 (a) (West 2016)) (count VI). The State subsequently dismissed counts II through V, and proceeded on counts I and VI.

¶ 4 At trial, Chicago police officer John Sandoval testified that, just after midnight on January 1, 2016, he was patrolling in an unmarked vehicle with Officer Michael Fietko and Lieutenant Joseph Brennan. Upon hearing gunshots in the area, Sandoval curbed the vehicle and investigated on foot with Fietko. Sandoval heard additional gunshots, and tracked the noise to a nearby apartment building in the 1200 block of South St. Louis Avenue. Once there, he and Fietko split up and approached the building from different sides. As Sandoval was about 20 feet away, he saw defendant, whom he identified in court, with an unknown woman in the gangway next to the building. The gangway was "well-lit" by the street lights on St. Louis and in a nearby alley. Defendant was holding a nickel-plated firearm above his head with his right hand and a cell phone with his left. He wore a gray skull cap with a black jacket and blue jeans.

¶ 5 Before announcing himself, Sandoval heard another gunshot and observed a muzzle flash from defendant's weapon. Sandoval shined his flashlight into the gangway and stated "Chicago Police. Drop the Gun." Defendant looked at Sandoval, pushed the woman through the open doorway to the apartment building, and ran inside. Sandoval pursued, and defeated defendant's

attempt to force the door shut. He followed defendant up a flight of stairs and observed him drop the firearm onto the first-floor landing. Sandoval described the “very distinct” and “unforgettable” clinking sound made by the metallic parts of the weapon hitting the ground. After dropping the firearm, defendant took two more steps and sat on the stairs. Sandoval immediately reached down and recovered the weapon. Defendant raised his hands and said, “I’m sorry. I’m dumb. There’s the gun. I’m not resisting.” Sandoval handcuffed defendant and walked him downstairs to Fietko, who had arrived at the gangway. Several people exited their apartments in the building, “screaming” and inquiring about what was happening. Because of the crowd, Sandoval and Fietko escorted defendant to the street in front of the building.

¶ 6 As the officers walked defendant to the street, he stated, “ ‘I was just shooting in the air. I wasn’t shooting it at anyone.’ ” Sandoval placed defendant into their police vehicle and read him the *Miranda* rights in Fietko’s presence. After stating that he understood his rights, defendant reiterated that he was “ ‘just shooting in the air’ ” and was not trying to harm anyone.

¶ 7 The officers took defendant to the police station. There, Sandoval “cleared” defendant’s firearm by removing a bullet from the chamber, ensuring that there was nothing in the barrel, and extracting the magazine, which contained two additional bullets. The weapon—a nickel-plated, .22-caliber Phoenix Arms HP22—was the same one defendant was holding in the gangway. Sandoval gave the firearm and bullets to Fietko, and Fietko inventoried them. Sandoval identified the firearm and ammunition in court, and showed the jury which parts on the weapon made the distinctive clinking sound when dropped.

¶ 8 On cross-examination, Sandoval testified that the gangway was illuminated by light “protruding” from the alley and street, but acknowledged that there were no light fixtures in the

gangway itself. He explained that he did not immediately announce his office upon seeing defendant with the firearm because he needed “[a] few seconds” to “assess the situation.” There were no lights on inside the stairwell except for Sandoval’s flashlight. Sandoval did not return to the building in search of additional evidence after escorting defendant to the street. He did not recover any shell casings from the gangway, attempt to locate the woman with defendant, or interview any of the residents of the apartment building.

¶ 9 Sandoval further explained that his vehicle was not equipped with a camera, and that none of defendant’s statements to him were recorded. The police station where he took defendant also did not have video equipment. Sandoval did not ask defendant to give a handwritten statement because “detectives take handwritten statements, officers do not.” He did not submit the firearm for fingerprint or DNA analysis, and he did not test defendant’s hands for gunshot residue. He did not wear gloves when he recovered the firearm or when he handled it afterwards.

¶ 10 On redirect examination, Sandoval explained that the officers did not search the scene for physical evidence because of the “hostile” crowd in the area. He recovered the firearm without gloves in order to secure it immediately, and did not submit it for forensic testing because he had already “contaminated” it with his own fingerprints and DNA. Sandoval also testified that he memorialized defendant’s statements in his police reports of the incident. On recross-examination, Sandoval acknowledged that his reports did not mention that he was afraid of a “hostile crowd.”

¶ 11 Fietko testified that, once he and Sandoval exited their vehicle, he heard gunshots coming from behind an apartment building on St. Louis. The officers split up and approached the building from different angles. As Fietko was about 20 feet from a side entrance off the

gangway, he saw the light from Sandoval's flashlight and a "commotion" in the doorway. Fietko approached, but lost sight of Sandoval because Sandoval entered the building. When Fietko arrived at the entrance, defendant was in handcuffs and Sandoval was walking him down the stairs.

¶ 12 As the officers escorted defendant to the front of the building, defendant stated that "he wasn't shooting at anybody, he was just shooting in the air." "[S]everal individuals" exited the building and approached the officers. Fietko and Sandoval placed defendant into their vehicle, and Sandoval read him the *Miranda* rights. Defendant reiterated that he was "just shooting in the air," not "trying to hurt anybody." Defendant was then transported to the police station.

¶ 13 At the police station, Sandoval handed Fietko a nickel-colored, .22-caliber Phoenix Arms handgun and three bullets that were recovered from defendant. It was the first time Fietko saw the firearm and ammunition, which he inventoried and identified in court.

¶ 14 On cross-examination, Fietko explained that the officers exited the vehicle after hearing the first gunshots because they were trained that proceeding on foot makes it easier to find cover and move without restrictions. He acknowledged that he did not write down or record any of defendant's statements. He did not have a body camera, and their vehicle did not have recording equipment. Fietko also testified that he did not create a report for the incident, but reviewed Sandoval's report and did not make any changes to it.

¶ 15 Detective Jeffrey Santos testified that he spoke to Sandoval and Fietko at the police station in the hours after the incident. At around 2:45 a.m., Santos interviewed defendant after reading him the *Miranda* rights. Defendant told Santos that he purchased the handgun for \$50 from a man named "Quids" for protection. On New Year's Eve, defendant drank a half pint of

vodka during a party at his apartment. At midnight, he went outside and fired the handgun into the air to celebrate the new year. Santos testified that he memorialized defendant's statements in his case report, but that the interview was not recorded and defendant did not sign a written statement. He explained that police protocol only required interviews to be recorded in certain types of cases, including murder, criminal sexual assault, aggravated battery with a firearm, and armed robbery, but not firearm possession.

¶ 16 On cross-examination, Santos testified that he had never recorded an interview or obtained a handwritten statement in a case not involving one of the offenses mandated by protocol. He explained that, as the police station he was at did not have video equipment, he would have had to transport defendant to another station to conduct a recorded interview. Santos did not attempt to gather any physical evidence or locate the unknown woman who was with defendant in the gangway.

¶ 17 The State entered a stipulation that defendant had been previously convicted of two predicate felonies for purposes of the armed habitual criminal charge. The defense rested without presenting evidence.

¶ 18 Prior to closing, the trial court instructed the jury that the arguments it was about to hear were "not evidence" and "should not be considered by you as evidence."

¶ 19 In the State's closing argument, the prosecutor contended, in relevant part, that Sandoval "took the witness stand and he swore to tell the truth. And as he testified, you had the chance to watch his face, listen to the answers he gave to questions, to judge his demeanor, and to decide whether or not you believe him.

He's a credible witness. He told you exactly what happened that night."

¶ 20 The State then extensively reviewed Sandoval's testimony, particularly his description of the noise made by the dropped firearm, and argued that "[h]e explained all that on the stand in great detail because he knows what he's talking about and he's a credible witness." The State further asserted that Sandoval was "telling the truth" because

"[h]e didn't trip up his answers, his answers didn't seem hazy, he didn't seem to not remember things, he didn't sound confused. It sounds like he knew what he was talking about, because he does know what he's talking about.

He's a veteran officer, a smart police officer, a credible police officer, he's just exactly the kind of officer you want on your street on New Year's Eve, someone running toward gunfire to make sure no one is shooting up at your porch."

¶ 21 In response, the defense emphasized the lack of forensic evidence tying defendant to the firearm and argued that the officers' testimony, though consistent, "just doesn't make sense" because Sandoval (1) did not see people celebrating in the streets while on patrol, (2) exited his vehicle after hearing gunshots, (3) approached the apartment building alone, (4) waited to announce himself upon seeing defendant with a firearm, (5) handled the firearm without gloves, (6) did not recover shell casings or defendant's cell phone, (7) did not interview the residents of defendant's apartment building, (8) did not record defendant's statements, and (9) did not submit the firearm for forensic testing. Thus, the defense maintained that Sandoval and the other officers conducted a subpar investigation because they "clearly operate in a realm where no one questions what they do and *** how they do it."

¶ 22 After arguments, the court admonished the jury that, *inter alia*, "[o]nly you are the judges of the believability of the witnesses and of the weight to be given to the testimony of each of

them,” “[n]either opening statements nor closing argument are evidence,” and any statement or argument made by the attorneys that is not based on the evidence should be disregarded.

¶ 23 The jury found defendant guilty of armed habitual criminal and reckless discharge of a firearm. The defense filed an amended motion for a new trial, arguing, in pertinent part, that the State made “impermissible comments during closing arguments that unfairly bolstered the testimony of Officer Sandoval.” The court denied the motion. After a sentencing hearing, the trial court merged the charges and imposed a six-year sentence for armed habitual criminal.

¶ 24 Defendant now appeals, arguing that he was denied a fair trial because the prosecutor made improper remarks during closing argument. In particular, he contends that the prosecutor (1) improperly bolstered Sandoval’s credibility by “personally vouching for his abilities as an officer [and] his intelligence,” and (2) created an “ ‘us-versus-them’ theme” by telling the jurors that Sandoval was the kind of officer they would want to protect them against people like defendant.

¶ 25 Initially, we note that defendant has forfeited the issue by failing to object to the prosecutor’s remarks in the trial court. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010) (both a contemporaneous objection and a posttrial motion raising the matter are required to preserve an issue for appeal). Defendant acknowledges the forfeiture, but argues that we may nevertheless review the issue under either prong of the plain error doctrine. The plain error doctrine provides a “narrow and limited exception” to the general forfeiture rule that allows a reviewing court to consider an unpreserved error when either (1) the evidence was closely balanced, or (2) the error was so egregious as to deny the defendant a fair trial. *Id.* at 545. However, the plain error doctrine is not a “general savings clause,” and is intended only to ensure that a defendant

receives a fair trial, not a perfect trial. *People v. Johnson*, 238 Ill. 2d 478, 484 (2010). Accordingly, defendant bears the burden of persuasion, and must first show that a “clear or obvious error” occurred. *Hillier*, 237 Ill. 2d at 545.

¶ 26 We also note that the parties disagree about the proper standard of review. Defendant, citing our supreme court’s decision in *People v. Wheeler*, 226 Ill. 2d 92 (2007), contends that the standard of review is *de novo*. The State acknowledges *Wheeler*, but notes its apparent conflict with *People v. Blue*, 189 Ill. 2d 99, 128 (2000), wherein our supreme court held that a trial court’s ruling on the propriety of a closing argument should be upheld absent an abuse of discretion. Recently, a different division of this court analyzed the “seemingly contradictory” pronouncements from *Blue* and *Wheeler*, and concluded that abuse of discretion is the proper standard. *People v. Phagan*, 2019 IL App (1st) 153031, ¶¶ 47-54. In contrast, other cases have applied a bifurcated standard whereby (1) a trial court’s decision to allow particular remarks is reviewed for abuse of discretion, and (2) whether the improper remarks, if any, were egregious enough to warrant a new trial is reviewed *de novo*. See *People v. Davis*, 2018 IL App (1st) 152413, ¶ 68; *People v. Cook*, 2018 IL App (1st) 142134, ¶ 64. However, we need not resolve the issue in this case because we would reach the same result under any standard of review. See *People v. Green*, 2017 IL App (1st) 152513, ¶ 81.

¶ 27 A defendant faces a “substantial burden” when seeking to obtain a reversal of his conviction based on an allegedly improper closing argument. *People v. Meeks*, 382 Ill. App. 3d. 81, 84 (2008). The State is afforded “wide latitude” in closing arguments, and is permitted to comment on the evidence and any reasonable inferences that flow from it. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). “It is well established that the State may discuss the witnesses and

their credibility during closing argument, and that it may assume the truth of the State's evidence." *Green*, 2017 IL App (1st) 152513, ¶ 77. The State is also free to respond to the defense's theories in relation to the evidence. *Glasper*, 234 Ill. 2d at 207. A closing argument must be considered as a whole, and the challenged remarks must be viewed in context. *Id.* at 204. Comments made during closing arguments constitute reversible error "only when they engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from those comments." *People v. Nieves*, 193 Ill. 2d 513, 533 (2000). Moreover, a trial court may cure errant remarks from the State by informing the jury that closing arguments are not evidence and should be disregarded if not supported by the evidence. *People v. Simms*, 192 Ill. 2d 348, 396 (2000).

¶ 28 Here, the record shows that the State's closing argument as a whole focused on the evidence and reasonable inferences drawn therefrom. It was not improper for the State to assert that Sandoval testified truthfully and credibly, especially where the defense's theory relied on attacking his testimony and questioning why he took certain actions. See *People v. Gonzalez*, 388 Ill. App. 3d 566, 593 (2008) (challenged remarks not improper where the prosecutor was responding to attacks on a witness's credibility and arguing that the jury should find the witness credible based on facts in evidence).

¶ 29 Defendant nevertheless argues that the prosecutor improperly vouched for Sandoval's credibility and offered her personal opinion by commenting that Sandoval was "credible," "smart," and a "veteran" police officer. While, as noted, a witness's credibility is a proper subject for closing argument, a prosecutor may not vouch for or express her personal opinion about a witness's credibility. *People v. Sims*, 403 Ill. App. 3d 9, 20 (2010). This rule prevents a

prosecutor from implying that she has inside knowledge of matters not in evidence and from using the general imprimatur of her position as a government official to win the jury's trust. *United States v. Young*, 470 U.S. 1, 18-19 (1985); *People v. Williams*, 2015 IL App (1st) 122745, ¶ 13. However, a prosecutor improperly interjects her personal opinion into closing argument only where she “*explicitly state[s] that [s]he is asserting h[er] personal views, stating for example, ‘this is my personal view.’*” (Emphasis in original.) *People v. Pope*, 284 Ill. App. 3d 695, 707 (1996); see also *People v. Deramus*, 2014 IL App (1st) 130995, ¶ 51.

¶ 30 Here, the prosecutor did not explicitly state her opinion of Sandoval's credibility, and in no way implied that her assertions were supported by evidence outside of the trial record. Instead, the remarks were clearly couched in relation to the evidence and made in response to defense counsel's implicit criticisms of the police work in this case. See *Glasper*, 234 Ill. 2d at 204 (comments made in response the defense's arguments are not improper). The record shows that the defense's trial strategy involved, for example, repeatedly questioning why Sandoval (1) exited his vehicle in response to gunshots, (2) waited several seconds before announcing himself to defendant in the gangway, (3) handled the firearm without gloves, (4) did not search for physical evidence or the unknown woman at the scene, (5) did not record defendant's statements, and (6) did not submit the firearm for forensic testing. Sandoval and the other officers explained their actions in light of their police training, and the State's closing argument merely asserted that Sandoval behaved reasonably. Moreover, rather than personally vouching for Sandoval, the prosecutor explicitly urged the jury to consider Sandoval's demeanor while testifying and decide for themselves “whether or not you believe him.” The trial court's instruction reinforced this notion, as it admonished the jurors that they were to be the sole judges of Sandoval's credibility

and were to ignore the prosecutor's arguments to the extent they were not supported by the evidence. Thus, the record shows that the prosecutor did not vouch for Sandoval or offer her personal opinion of his credibility.

¶ 31 Defendant also contends that the prosecutor created an improper “ ‘us-versus-them’ theme” by asserting that Sandoval was “exactly the kind of officer you want on your street on New Year’s Eve, someone running toward gunfire to make sure no one is shooting up at your porch.”

¶ 32 The State may not seek to engender an “ ‘us-versus-them’ mentality” through its closing argument, as such a sentiment perverts the “inherent principles of the criminal trial process,” such as the presumption of innocence and the impartiality of the jury. *People v. Johnson*, 208 Ill. 2d 53, 80 (2003). A prosecutor improperly fosters an us-versus-them mentality when she pits the jury against the defendant or creates “a situation where jurors might feel compelled to side with the State and its witnesses in order to ensure their own safety.” *Wheeler*, 226 Ill. 2d at 129. Thus, in *Johnson*, our supreme court found a prosecutor’s comments that “[w]e as a society do not have to live in [the defendants’] twisted world that they attempt to drag us into,” that “[w]e do not have to accept their values,” and that “[w]e as a people can stand together” were improper. *Id.* at 79. Similarly, in *Deramus*, this court found that the State’s closing argument, though ultimately harmless, improperly created an us-versus-them mentality where the prosecutor asserted that the “most important[]” aspect of the case was “what [the defendant] is doing to us.” *Deramus*, 2014 IL App (1st) 130995, ¶ 59.

¶ 33 Here, in contrast, the prosecutor’s isolated comment did not mention defendant or refer to the State or the jury as part of a “we” or “us.” When viewed in context, the comment did not

suggest that defendant threatened the jury or society in general, but rather responded to defense counsel's criticism of Sandoval's police work. Thus, the State's remarks did not "align[] the jury with the prosecution against defendant" and did not create an "us-versus-them" theme. See *id.* ¶ 59. Additionally, the trial court mitigated any ill effects of the comment by admonishing the jury not to consider closing arguments as evidence. See *People v. Desantiago*, 365 Ill. App. 3d 855, 865 (2006) (prosecutor's statements such as "[w]e're not gonna stand for this" and "let [the defendant] know that our community is not going to stand for that" did not deprive the defendant of a fair trial, especially in light of the trial court's curative admonishments). Thus, we cannot say that defendant was deprived of a fair trial.

¶ 34 In short, the prosecutor did not vouch for or improperly bolster Sandoval's credibility during closing arguments, nor did she foster an "us-versus-them" mentality in the jury. As there was no error, there can be no plain error, and defendant's argument is without merit. See *People v. Bannister*, 232 Ill. 2d 52, 79 (2008).

¶ 35 As a final matter, defendant contends that his fines and fees order and mittimus should be corrected in several respects. In particular, defendant contends that two of his fines should be vacated, that one of his fees is actually a fine that should offset by his *per diem* credit, and that the remainder of his fines should likewise be offset by his *per diem* credit. Defendant also maintains that the mittimus should be corrected to reflect that he was not convicted on count II of the indictment (unlawful use of a weapon by a felon), which was dismissed prior to trial, and that he is entitled to 334 days of presentence incarceration credit, rather than 306 days.

¶ 36 On February 26, 2019, while this appeal was pending, our supreme court adopted new Illinois Supreme Court Rule 472, which sets forth the procedure for correcting errors in the

imposition of fines and fees, the application of *per diem* credit against fines, the calculation of presentence custody credit, and clerical errors in the mittimus that create a discrepancy between the record and the actual judgment of the court. Ill. S. Ct. R. 472(a)(1-4) (eff. Mar. 1, 2019). On May 17, 2019, Rule 472 was amended to provide that “[i]n all criminal cases pending on appeal as of March 1, 2019, *** the reviewing court shall remand to the circuit court to allow the party to file a motion pursuant to this rule.” Ill. S. Ct. R. 472(e). “No appeal may be taken” based on an error enumerated in the rule unless the alleged error “has first been raised in the circuit court.” Ill. S. Ct. R. 472(c) (eff. May 17, 2019). Therefore, pursuant to Rule 472, we “remand to the circuit court to allow [defendant] to file a motion pursuant to this rule,” raising the alleged errors regarding his fines and fees, *per diem* credit, presentence custody credit, and mittimus. Ill. S. Ct. R. 472(e) (eff. May 17, 2019).

¶ 37 For the foregoing reasons, we affirm defendant’s conviction, but remand as to the fines and fees order and mittimus.

¶ 38 Affirmed in part; remanded in part.