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2013 IL App (3d) 110766-U

Order filed November 7, 2013

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
Plaintiff-Appellee,	)	Whiteside County, Illinois,
	)	
v.	)	Appeal No. 3-11-0766
	)	Circuit No. 10-CF-215
JACOB D. MEKEEL,	)	
	)	Honorable
Defendant-Appellant.	)	Stanley B. Steines,
	)	Judge, Presiding.

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JUSTICE SCHMIDT delivered the judgment of the court.  
Justices McDade and O'Brien concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* (1) The prosecutor's comments during closing arguments did not amount to reversible error. (2) The trial court erred when it imposed an extended-term sentence on the lesser charge.
- ¶ 2 Following a jury trial, defendant, Jacob D. Mekeel, was found guilty of two counts of aggravated battery (720 ILCS 5/12-4(b)(8) (West 2010)) and one count of mob action (720 ILCS 5/25-1(a)(1) (West 2010)). He was sentenced to three concurrent terms of five years' imprisonment. Defendant appeals, arguing that: (1) he was denied a fair trial due to improper

remarks made by the State during closing arguments; and (2) his extended-term sentence for mob action should be reduced to the maximum nonextended-term sentence. We affirm in part and modify in part.

¶ 3

### FACTS

¶ 4 On July 13, 2010, defendant was charged by information with four counts of aggravated battery, with one count against each of the following victims: Jason Matthews (720 ILCS 5/12-4(a) (West 2010)), Julia Younger (720 ILCS 5/12-4(b)(8) (West 2010)), Ronald Bushnell (720 ILCS 5/12-4(b)(8) (West 2010)), and Anthony Bushnell (720 ILCS 5/12-4(b)(8) (West 2010)). Defendant was also charged with one count of mob action. 720 ILCS 5/25-1(a)(1) (West 2010). The charges related to an incident on May 15, 2010, where defendant and his father, Michael Mekeel, were involved in a fight outside of a bar. Defendant's case was joined with his father's case for trial. The jury trial began on October 12, 2010.

¶ 5 The State presented the testimony of Ashley Harris, who was the bartender on the night in question. The State also presented the testimony of Ronald, Younger, Matthews, and Deputy Sheriff George Depuy. The State's evidence indicated that on May 15, 2010, defendant went into a bar near closing time. He was accompanied by Michael, Donna Cox, Kaitlin Harbron, and Kayla Goodell. Matthews and Younger were sitting outside while the group went in. Matthews followed the group into the bar.

¶ 6 When the group sat down, Harris refused them service because Cox had been banned from the bar after an incident in February 2010. In that incident, Michael and Matthews had gotten into an argument, but stopped before they actually fought.

¶ 7 A few minutes after the group exited the bar, Matthews went outside. As Matthews

exited, he was first punched by defendant and then by Michael. Matthews was knocked to the ground, where he was battered by defendant, Michael, Cox, Harbron, and Goodell. Shortly thereafter, Ronald and Anthony went outside to assist Matthews. Michael punched Ronald, who was knocked out from the punch. Younger also went outside to assist Matthews, but was attacked by Cox, Harbron, and Goodell. Younger hit one of the women, and defendant punched Younger in the face, which knocked her to the ground. When Younger got up, she went to the vehicle where Cox was sitting and punched her through the window a few times.

¶ 8 Following the incident, Depuy arrived at the scene. After speaking with the witnesses, Depuy located the vehicle that the group arrived in at Michael's house. In response to questioning by the defense, Depuy stated that he did not attempt to knock on the door or interview defendant or Michael. Ten days after the incident, Michael was arrested. Prior to his arrest, Michael was not interviewed to get his version of the incident. However, if Michael wanted to make a statement at any time prior to trial, Depuy would have taken it.

¶ 9 Following the State's presentation of evidence, both defendant and Michael made a motion for directed verdict, which the trial court denied. The defense then presented the testimony of Michael and defendant.

¶ 10 The defense's evidence indicated that after Cox was refused service upon entering the bar, the group decided to leave. As they were walking toward the door, Matthews threatened Michael. Michael believed it was related to their prior argument in February 2010. Matthews grabbed Michael and pinned him against the wall. Defendant stepped in between the two men to protect Michael. Matthews then let go of Michael and tackled defendant onto the pavement outside. Matthews landed on top of defendant. Defendant wrestled Matthews and punched him

as he got out from underneath him.

¶ 11 Ronald, Anthony, and Younger then came outside the bar. Ronald immediately pushed Michael to the ground. Defendant attempted to help Michael, but he was immediately kicked by Anthony in the chest. Defendant tripped Anthony, who then fell to the ground. At that point, Harbron and Goodell were fighting with Younger. Michael pulled the women off Younger, but when he turned around, Ronald was coming toward him with his fist drawn. Michael hit Ronald once, and he fell to the ground. Michael denied ever touching Matthews or Anthony.

¶ 12 Younger then attacked Harbron and Cox near the vehicle. Defendant pushed Younger away, and she fell to the ground. The group got into the vehicle and drove away. They drove to Michael's house, and did not contact the police.

¶ 13 The trial court then instructed the jury that what the attorneys say during closing arguments was not evidence, noting that the attorneys were permitted to draw conclusions and reasonable inferences. During closing arguments, the State argued that the case involved a "big lie" and that it was for the jury to determine which witnesses were untruthful. The State told the jury that if it believed defendant and Michael's story, Matthews' version of events did not occur. It then explained that it was for the jury to determine if Matthews was lying. In making this determination, the jury should consider which version of events had more corroborating witnesses. Additionally, if the jury believed defendant and Michael, it would mean that Harris also lied, noting that Harris had no motivation to perjure herself. The State went on to state that the jury would also have to believe that Younger committed perjury.

¶ 14 Defendant's counsel objected to this statement, arguing that it was inappropriate to argue that in order to believe the defense, the jury would have to believe the State's witnesses

committed perjury. The trial court sustained the objection and instructed the jury to disregard the State's reference to perjury in the closing argument.

¶ 15 The State continued by arguing that Ronald, an independent witness, had no motivation to lie. The State then emphasized that it was difficult for four people to have identical stories. However, it was not as difficult for two people to make sure their stories were almost identical. The State instructed the jury that they were the judges of the witnesses' credibility and must determine who was telling the truth. The State then summarized that there were two conflicting versions of events presented and the jury would have to decide which version took place. The State then outlined the elements to prove defendant guilty of aggravated battery and mob action and claimed the State had met their burden of proof beyond a reasonable doubt.

¶ 16 Defense counsel for Michael argued that this case involved a typical bar fight. However, the police never contacted defendant or Michael to get their side of the story, despite knowing where Michael lived since the night of the incident. Counsel went on to state that the trial was defendant and Michael's first opportunity to tell their story because they were arrested prior to being able to do so. Counsel suggested that defendant and Michael's story was more plausible, noting that Matthews was getting back at Michael for the February incident, and defendant was merely protecting his father. Counsel also emphasized that there were inconsistencies in the State's evidence, noting Harris had incentive to lie because she was a friend of Matthews.

¶ 17 Defendant's counsel noted that a witness to the incident, Matthew McKenna, was unbiased and yet the State did not present his testimony. Counsel then outlined the inconsistencies between witnesses for the State and the defense. Counsel emphasized that the police, despite going to Michael's house on the night of the incident, failed to fully investigate the

offense when they did not try to speak with defendant or Michael before arresting them.

¶ 18 In rebuttal, the State emphasized that defendant and Michael were free to give a statement to the police at any time, but they failed to give a statement or contact the police after the incident. The State also claimed that the defense failed to call Harbron or Goodell to the stand to corroborate their testimony.

¶ 19 Following closing arguments, the jury received instructions that closing arguments were not evidence and any argument not based on the evidence should be disregarded. Illinois Pattern Jury Instructions, Criminal, No. 1.03 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 1.03). The jury was also instructed that the State had the burden of proving defendant's and Michael's guilt beyond a reasonable doubt, and that defendant was not required to prove his innocence. IPI Criminal 4th No. 2.03. The jury returned verdicts of guilty for aggravated battery to Anthony and Younger and mob action, but not guilty for aggravated battery to Matthews and Ronald.

¶ 20 On November 23, 2010, defendant filed a motion for judgment notwithstanding the verdict. On July 1, 2011, defendant filed a third amended motion for new trial, arguing, in part, that the prosecutor erred by arguing in closing arguments that defendant could have come forward at any time prior to trial to tell his side of the story because it was defendant's constitutional right not to make any statement prior to trial. Defendant also argued that the State shifted the burden of proof to the defense by arguing that defendant and Michael concocted their defense and that the jury had to either believe the defense's or the State's witnesses.

¶ 21 On July 1, 2011, the court denied both of defendant's motions. The court then sentenced defendant to three concurrent terms of five years' imprisonment. Defendant appeals.

¶ 22

## ANALYSIS

¶ 23

## I. Closing Argument

¶ 24 Defendant first argues that he was denied a fair trial because of improper comments made by the State during closing arguments. Specifically, defendant claims that the State improperly shifted the burden of proof when it: (1) characterized the case as involving a big lie because either the defense's or the State's witnesses were lying; and (2) argued that defendant failed to give a statement to police prior to trial and could have called additional witnesses to corroborate the defense.

¶ 25 Defendant acknowledges that he failed to preserve this issue for review, but asks that we review the issue under the plain-error doctrine. Under the plain-error rule, a reviewing court may consider errors when either: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against defendant; or (2) the error is so serious that it denied defendant a fair trial and challenged the integrity of the judicial process. *People v. Thompson*, 238 Ill. 2d 598 (2010). However, before addressing whether defendant's claim satisfies the plain-error doctrine, we must first determine whether a clear or obvious error occurred. *Id.*

¶ 26 Generally, the State is given wide latitude in the content of its closing arguments. *People v. Wheeler*, 226 Ill. 2d 92 (2007). The State is permitted to make arguments based on the evidence and any reasonable inferences that may be drawn from it, even if the inferences are unfavorable to defendant. *People v. Dixon*, 378 Ill. App. 3d 535 (2007). On review, improper comments will not merit reversal unless they result in substantial prejudice to defendant, considering the content and context of the comment, their relationship to the evidence, and their effect on the defendant's right to a fair trial. *People v. Johnson*, 208 Ill. 2d 53 (2003).

Furthermore, a reviewing court must consider the allegedly improper comments in the context of

the parties' closing argument as a whole. *Wheeler*, 226 Ill. 2d 92.

¶ 27 After reviewing the record in this case and considering the context of the closing arguments as a whole, we cannot say that the complained of remarks during closing argument substantially prejudiced defendant. Defendant argues that the State improperly shifted the burden of proof when it told the jury that it had to find the State's witnesses were lying if it wanted to accept the defense testimony. Defendant contends that the State's comments were similar to comments the courts have found reversible. See *People v. Ridley*, 199 Ill. App. 3d 487 (1990); *People v. Wilson*, 199 Ill. App. 3d 792 (1990); *People v. Crossno*, 93 Ill. App. 3d 808 (1981). In these cases, the court found that the State improperly shifted the burden of proof by arguing that in order to acquit defendant, the jury must believe that the State's witnesses were lying. See *Ridley*, 199 Ill. App. 3d 487; *Crossno*, 93 Ill. App. 3d 808; see also *Wilson*, 199 Ill. App. 3d 792 (finding reversible error when the State argued that defendant had the burden to prove his innocence).

¶ 28 However, there is a distinction between a prosecutor permissibly arguing that a jury would have to believe the State's witnesses were lying in order to believe defendant's version of events, as opposed to improperly arguing that the jury would have to believe the State's witnesses were lying in order to acquit defendant. *People v. Coleman*, 158 Ill. 2d 319 (1994). In the instant case, the evidence at trial comprised two conflicting versions of events; therefore, this case turned on the credibility of the witnesses to determine defendant's guilt. In light of this, the State's reference to the jury having to believe the State's or the defenses's witnesses did not prejudice defendant, but instead informed the jury that they had to weigh the credibility of the witnesses to determine which version of events took place. See *People v. Banks*, 237 Ill. 2d 154

(2010) (finding the State's comment regarding whether witnesses had lied was not improper since it was in response to defendant's attack on the credibility of its witnesses). Moreover, the State informed the jury throughout its closing and rebuttal argument that it had the burden to prove defendant guilty beyond a reasonable doubt.

¶ 29 Additionally, the State's comments about defendant's failure to provide a statement to the police or present additional witnesses to corroborate his version of events were not so prejudicial that they contributed to defendant's conviction. The State's comments were made in response to defense counsels' cross-examination of Depuy and comments in closing argument that the police improperly investigated the case and that the State failed to provide an additional independent witness at trial. See *People v. Watkins*, 220 Ill. App. 3d 201 (1991) (finding comments that would otherwise constitute an inappropriate shifting of burden are not improper when the comments are an invited response to insinuations by defense counsel).

¶ 30 Furthermore, before closing arguments, the trial court told the jury that closing arguments were not to be considered as evidence. After closing arguments, the court again instructed the jury regarding closing arguments and told them it was the State's burden to prove defendant guilty beyond a reasonable doubt. Thus, we find any prejudice stemming from the allegedly improper remarks was minimal. See *People v. Simms*, 192 Ill. 2d 348 (2000). Therefore, we hold the State's comments during closing arguments did not contribute to defendant's conviction or deprive him of a fair trial. As such, the plain-error exception does not apply, and we must therefore honor defendant's procedural default. See *Thompson*, 238 Ill. 2d 598.

¶ 31 II. Extended-Term Sentence

¶ 32 Defendant next argues that the trial court erred by imposing an extended-term sentence

for his mob action conviction. Specifically, defendant contends that an extended-term sentence should be imposed only for the class of the most serious offense, and thus his sentence for mob action should be vacated and a nonextended-term sentence imposed in its place. The State agrees.

¶ 33 Section 5-8-2 of the Unified Code of Corrections provides that the court may sentence an offender to an extended-term sentence for the class of the most serious conviction. 730 ILCS 5/5-8-2(a) (West 2010). Our supreme court has explained that when a defendant is convicted of multiple offenses of differing classes, the court may impose an extended-term sentence only on the offense of the highest class. *People v. Thompson*, 209 Ill. 2d 19 (2004).

¶ 34 In this case, defendant was convicted of two counts of aggravated battery, a Class 3 felony (720 ILCS 5/12-4(b)(8), (e)(1) (West 2010)), and one count of mob action, a Class 4 felony (720 ILCS 5/25-1(a)(1), (b) (West 2010)). Defendant should have received an extended-term sentence only on the aggravated battery counts, the convictions of the most serious class. Thus, we modify the extended-term portion of defendant's sentence for mob action to the maximum nonextended-term of three years' imprisonment, to run concurrently with the five-years sentences for aggravated battery. See 730 ILCS 5/5-4.5-45(a) (West 2010).

¶ 35 CONCLUSION

¶ 36 For the foregoing reasons, we modify defendant's extended-term sentence and otherwise affirm the judgment of the circuit court of Whiteside County.

¶ 37 Affirmed as modified.