

No. 1-11-3438

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 JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 07 C6 60068
)	
DONTA TUCKER,)	Honorable
)	Michele M. Simmons,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court.
Justices Pierce and Liu concurred in the judgment.

O R D E R

¶ 1 **Held:** Defendant was not denied a fair trial by the prosecution's closing and rebuttal arguments.

¶ 2 Following a jury trial, defendant Donta Tucker was convicted of first degree murder and two counts of aggravated battery with a firearm. He was sentenced to a 50-year term of imprisonment for the first degree murder conviction and two 10-year terms of imprisonment for the aggravated battery with a firearm counts, running concurrently to each other and

consecutively to the murder count, for an aggregate term of 60 years' imprisonment. On appeal, defendant contends that he was denied a fair trial when, in closing arguments, the State misstated the evidence and the law and made prejudicial and inflammatory remarks.

¶ 3 Defendant's conviction arose from an early morning shooting outside a Dolton, Illinois, night club called the "Bi-Level" on November 12, 2006. Cortez McGuire was killed during the shooting, and Donilla Dismukes and Ronald Lloyd, Sr., were injured.

¶ 4 At trial, Takesha Wallace testified that about 11:30 p.m. on the night in question, she went to the Bi-Level with her friends, Dewisha Dismukes, Donilla Dismukes, and Randy Allen. Over the course of the evening, she had about two mixed drinks. Around 2 or 2:30 a.m., Wallace and Donilla left the Bi-Level to go to another club. While they were driving, Wallace and Donilla received a phone call from Dewisha, telling them to come back to the Bi-Level because there was an altercation.

¶ 5 When Wallace arrived back at the Bi-Level, she could see the altercation near the front door. There were light fixtures around the club in the parking lot. Wallace approached the club, but Donilla grabbed her and told her to stop because someone had a gun. Wallace testified that she did not initially see the gun, but saw the man Donilla described. According to Wallace, the man was wearing a red jacket and blue pants. Wallace also saw Dewisha holding Cortez McGuire's arms and a man named Tyrone trying to break up the altercation and calm everything down. A man hit McGuire, who swung back. As the men were swinging punches at each other, "the guy" pulled out a pistol and shot McGuire in the head.

¶ 6 Wallace testified that after she saw McGuire get shot, she ran toward her car to duck. Donilla, who had also run and was lying beside the car holding her side, reported that she had

been shot. Wallace heard more gunshots and could see the feet of people running. About 10 or 15 minutes later, an ambulance arrived and took Donilla away.

¶ 7 A few days later, Wallace went to the police station. She told them what had happened and described the shooter. The police showed her a photo array with six pictures, from which she identified defendant as the shooter. At trial, when she was asked whether she saw the shooter in court, Wallace answered, "I am not quite sure. It was a long time ago, but yeah." Wallace indicated that she thought she saw the shooter in court, when she was asked to describe what he was wearing, she said, "White suit, I guess, shirt. I don't know." When asked whether she was sure when she made the photo identification, she stated, "Then I was positive, now I am not positive at all," and, "I was positive about the photo that I chose back then, but now it's been a long time, I am not quite sure."

¶ 8 Dewisha Dismukes testified that about 11:30 p.m. on the night in question, she went to the Bi-Level with her sister, Donilla Dismukes, as well as Takesha Wallace and Randy Allen. While at the club, she drank two Long Island iced teas. Around 2:30 a.m., Dewisha left the Bi-Level with Cortez McGuire, Ronald Lloyd, Jr., who was known to her as Twig, and Kenneth Simmons, who was known to her as Tattoo. There were lights around the club. Dewisha was in McGuire's car in the parking lot when a man with braids accused McGuire of bumping into his car. After McGuire got out of the car, the man with braids hit him. McGuire struck back and Simmons "jumped in." Dewisha testified that during the fight, a man wearing a red jacket and a red hat came over and shot McGuire in the head. Dewisha and Simmons lay on the ground and watched the man continue shooting into the crowd in the parking lot. She estimated that he shot seven or eight times. When the shooting stopped, Dewisha and Simmons went to McGuire, who was dead. He had a bullet wound in his head that was gushing blood. Eventually, the police and

an ambulance arrived. Dewisha testified that she walked across the street to another parking lot, where Wallace and Randy were screaming. She looked in the ambulance and saw her sister, Donilla, inside, with paramedics working on her.

¶ 9 Dewisha testified that the police took her to the station. She told them what she had witnessed and gave a description of the shooter. The next day, she went back to the station, where she viewed a photo array of six men and identified defendant as the shooter. Dewisha also identified defendant in court.

¶ 10 Donilla Dismukes testified that on the night in question, she, Dewisha, Wallace, and Randy Allen arrived at the Bi-Level around 11:30 p.m. She did not have any drinks. About 2:30 a.m., she and Wallace left to go to another club. While Wallace was driving, they got a phone call, telling them to come back to the Bi-Level because there was an argument. When they got back, they got out of the car and approached the entrance, where there was a group of people arguing. Donilla testified that she saw a man wearing a red jacket among the group. The man walked around a car, headed toward the alley, and then came back with a gun. Donilla grabbed Wallace and told her that the man had a gun. With regard to what happened next, Donilla stated, "He came back around the car, shot the gun once. He shot Cortez [McGuire] and then we took off running." As Donilla ran with Wallace, she felt "heat" on her left side. Donilla lay on the ground next to Wallace's car until an ambulance came and took her to the hospital. She underwent surgery for a gunshot wound.

¶ 11 Donilla testified that the police came to the hospital a few days after the shooting. She told the police what had happened and described the shooter as wearing a red jacket and red ball cap. The police then showed her a photo array of six men, and Donilla identified defendant as the shooter. She also identified defendant in court.

¶ 12 Ronald Lloyd, Sr., testified that after receiving a call from his son in the early morning hours of November 12, 2006, he drove to the Bi-Level and pulled into the parking lot, where he saw a "whole lot of people." Lloyd Sr. saw his son, Ronald Lloyd, Jr., in a physical altercation with some men, but was able to pull him away. Lloyd Sr. then saw a man wearing a red jacket pointing a gun and shooting. Lloyd Sr. was shot near his left hip. He lay down on the ground and heard more shooting.

¶ 13 Ronald Lloyd, Jr., testified that his nickname was Twig. On the night in question, he was at the Bi-Level for two or three hours and had six or seven drinks. He agreed that he was intoxicated. Around 3 a.m., he left the Bi-Level with Cortez McGuire and Kenneth Simmons. The group got into McGuire's car to go to another club down the street. As they were leaving the parking lot, a man crossed in front of the car and McGuire drove "a little bit close" to him. When the man started talking aggressively to McGuire, they got out of the car and a physical fight started. Lloyd Jr. testified that his father, who had not been at the Bi-Level earlier, pulled him out of the scuffle. In the ensuing chaos, during which people were running around, Lloyd Jr. heard gunshots. He turned toward the sound and saw defendant, whom he identified in court, pointing a gun in his direction. As the gunshots continued, Lloyd Jr. and his father ran, but then Lloyd Jr. fell down. His father said he had been struck by a bullet, and Lloyd Jr. noticed blood on his father's abdominal area. Eventually an ambulance arrived and Lloyd Sr. received medical treatment.

¶ 14 Lloyd Jr. testified that he met with the police later that day, told them what had happened, and described the shooter. The next day he spoke with the police and an Assistant State's Attorney. At that time, he viewed a photo array and identified defendant as the shooter.

¶ 15 An Illinois State Police investigator testified that he processed the crime scene and recovered 17 shell casings from the parking lot at the Bi-Level. The forensic scientist who examined the casings testified that 15 of them were fired from a single firearm. While the remaining casings could not be identified or eliminated as being fired from the same firearm, the forensic scientist did determine that they had been chambered in the same firearm as the other cartridge cases.

¶ 16 Chicago police detective Jim Sherlock, a member of the United States Marshals Fugitive Apprehension Team, testified that on December 20, 2006, he had a warrant for defendant's arrest. He and other members of his team arrived at a particular address, set up a short surveillance, and observed defendant. They then knocked on the door and gained entry. Defendant identified himself and was arrested. Detective Sherlock testified that defendant was arrested without incident.

¶ 17 The parties stipulated that if the forensic pathologist who performed the postmortem examination of Cortez McGuire were to testify, she would state her expert opinion that the cause of death was a gunshot wound to the head and the manner of death was homicide. There was no evidence of close range firing.

¶ 18 In closing argument, the prosecutor reviewed the evidence presented at trial. In the course of doing so, the prosecutor made the following comment, and defense counsel made the following objection:

"It was bright enough for the witnesses to identify the same person, over and over again. Clearly the lighting wasn't a problem. Nor was the fact that they were leaving the bar because seeing someone

getting shot in the head is a sobering event. Donilla didn't drink but those that did, none of them claim to have been drunk.

[DEFENSE COUNSEL]: Objection, Judge; that's not the evidence.

THE COURT: Sustained. The jury has heard the evidence."

¶ 19 Defense counsel also reviewed the evidence in closing. Among other things, counsel noted that Takesha Wallace had had two drinks, Dewisha Dismukes had had two Long Island ice teas, and Ronald Lloyd, Jr., had had five to seven drinks and was intoxicated. Counsel also highlighted that when defendant was arrested, "the arrest took place without incident meaning no running, no fighting, no indicia of guilt[] when he's arrested."

¶ 20 In rebuttal closing argument, the prosecutor made several comments to which defense counsel objected, including the following:

"We call it the crime scene because the criminal controls it. The criminal takes the -- picks the time, the place and the manner of the crime. He chooses what he brings and he chooses what he leaves behind. He took the gun with him. He couldn't take his identification by the witnesses but he tried when he fired 16 times into that crowd and make no mistake, if walking up to somebody and shooting them in the head definitely sends a clear message to the people in that parking lot, you do not want to testify against me, but you fire 16 times in scattering a crowd, wounding two people, you are communicating do not testify. Were you surprised

when the police came by that there was not a line of people saying, 'pick me, pick me; I'd like to be a witness in his murder trial.'

[DEFENSE COUNSEL]: Objection, judge.

THE COURT: Objection's overruled."

The prosecutor also made the following statements:

"He was arrested without incident? Well, I mean I'm not sure that he gets points for not shooting it out with the U.S. marshals --

[DEFENSE COUNSEL]: Objection, Judge. Objection.

THE COURT: Objection's overruled.

[ASSISTANT STATE'S ATTORNEY]: That's what he's asking. He went quietly -- when they placed him under surveillance and they caught him? Good for him. He didn't compound the tragedy that they're already dealing with."

Finally, the prosecutor concluded as follows:

"Find the defendant guilty of what he is responsible for. It's proof beyond a reasonable doubt. Of course the defendant wants it to be any doubt.

[DEFENSE COUNSEL]: Objection, judge.

THE COURT: Sustained in regards to the last comment.

[ASSISTANT STATE'S ATTORNEY]: That's not the standard. You got the standard from the Court in the jury

instructions. Hold the defendant responsible. Stop the defendant's [f]light."

¶ 21 Following deliberations, the jury found defendant guilty of first degree murder and two counts of aggravated battery with a firearm. The trial court entered judgment on the verdict and subsequently sentenced defendant to a 50-year term of imprisonment for the first degree murder conviction and two 10-year terms of imprisonment for the aggravated battery with a firearm counts, running concurrently to each other and consecutively to the murder count, for an aggregate term of 60 years' imprisonment.

¶ 22 On appeal, defendant contends that he was denied a fair trial when, in closing arguments, the State misstated the evidence and the law and made prejudicial and inflammatory remarks. Defendant takes issue with four particular remarks made by the prosecutors, detailed below. Defendant asserts that because the cumulative impact of the prosecutors' misconduct likely contributed to the jury's finding of guilt, his conviction should be reversed and this court should remand for a new trial.

¶ 23 Prosecutors are given wide latitude when making closing arguments. *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007). Reversal based on closing argument is warranted only if a prosecutor made improper remarks that engendered "substantial prejudice," that is, if the remarks constituted a material factor in the defendant's conviction. *Wheeler*, 226 Ill. 2d at 123. In closing, the State may comment on the evidence presented and draw reasonable inferences therefrom. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). Additionally, during rebuttal, the State may respond to comments made by the defendant which invite a response. *People v. Klinier*, 185 Ill. 2d 81, 154 (1998). On review, we consider challenged remarks in the context of

the entire record as a whole, in particular the closing arguments of both sides. *People v. Williams*, 313 Ill. App. 3d 849, 863 (2000).

¶ 24 The appropriate standard of review for closing arguments is currently unclear. In *Wheeler*, 226 Ill. 2d at 121, our supreme court applied a *de novo* standard of review to the issue of prosecutorial statements during closing arguments. However, the *Wheeler* court cited with favor its decision in *People v. Blue*, 189 Ill. 2d 99, 128 (2000), which applied an abuse of discretion standard. We need not resolve the issue of the proper standard of review in the instant case, as our holding would be the same under either standard. See *People v. Thompson*, 2013 IL App (1st) 113105, ¶¶ 76-77 (acknowledging conflict regarding standard of review).

¶ 25 We turn to the merits of defendant's arguments, addressing the alleged improper statements in turn.

¶ 26 Defendant first argues that the prosecutor committed misconduct in stating that "seeing someone getting shot in the head is a sobering event" and asserting that "none of [the State's witnesses] claim to have been drunk." Defendant argues that there was no evidence presented at trial that seeing a traumatic event occur has a sobering effect, as no such evidence exists. In addition, defendant notes that in contrast to the prosecutor's statement, Ronald Lloyd, Jr., testified that he was intoxicated when he left the Bi-Level. Defendant acknowledges that he did not object to these comments in his posttrial motion, but argues that the issue should be reviewed for plain error.

¶ 27 The plain error doctrine allows us to review a forfeited issue affecting substantial rights in either of two circumstances: (1) where the evidence is so closely balanced that the verdict may have resulted from the error and not the evidence; or (2) where the error is so serious that the

defendant was denied a substantial right and thus a fair trial. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005).

¶ 28 We agree with defendant that the prosecutor did not accurately relate the evidence presented at trial when she stated that none of the eyewitnesses were drunk. In addition, it is unclear whether her comment characterizing the shooting as a "sobering event" was, as defendant argues, an improper assertion that witnessing a trauma lessens the effects of alcohol intoxication, or, as the State argues, simply another way of arguing to the jury that the shooting was shocking. Either way, we cannot agree that the prosecutor's statements rise to the level of plain error. "Generally, the prompt sustaining of an objection by a trial judge is sufficient to cure any error in a question or answer before the jury." *People v. Alvine*, 173 Ill. 2d 273, 295 (1996). Here, the trial court promptly cured any prejudicial impact caused by the prosecutor's remarks by sustaining defendant's objection. Further, the trial court admonished the jury prior to closing arguments that what the lawyers say is not evidence and should not be considered as such. Then, during jury instructions, the trial court instructed the jury that closing arguments are not evidence, admonished them to disregard questions to which objections were sustained, and directed them to disregard any statement or argument made by an attorney which was not based on the evidence. Accordingly, any error in the prosecutor's remarks was cured by the trial court's actions and defendant suffered no prejudice. See *People v. Willis*, 409 Ill. App. 3d 804, 814 (2011) (admonishments cured error in complained-of comments).

¶ 29 Moreover, any error the prosecutor's remarks was harmless in light of the overwhelming identification evidence presented at trial. Takesha Wallace, Dewisha Dismukes, Donilla Dismukes, and Ronald Lloyd, Sr., all testified that the shooter was a man wearing a red jacket. Wallace, both Dismukes sisters, and Ronald Lloyd, Jr., identified defendant in a photo array, and

both Dismukes sisters and Lloyd Jr. identified defendant in court. In these circumstances, we cannot say that the jury's verdict resulted from the prosecutor's statement and not the evidence, or that the misstatement of the evidence was so serious that defendant was denied a fair trial. See *Herron*, 215 Ill. 2d at 178-79. Thus, the plain error doctrine does not apply, and the argument remains forfeited.

¶ 30 Defendant's second claim of error involves the following statement made by the prosecutor in rebuttal closing argument:

"He took the gun with him. He couldn't take his identification by the witnesses but he tried when he fired 16 times into that crowd and make no mistake, if walking up to somebody and shooting them in the head definitely sends a clear message to the people in that parking lot, you do not want to testify against me, but you fire 16 times in scattering a crowd, wounding two people, you are communicating do not testify. Were you surprised when the police came by that there was not a line of people saying, 'pick me, pick me; I'd like to be a witness in his murder trial.' "

Defendant asserts that there was no evidence presented that the shooter fired into the crowd to send a message to witnesses not to testify against him later at trial. He argues that the prosecutor's statement was highly prejudicial because it conveyed to the jury that the State could have presented more witnesses but for being intimidated and that the jury should punish defendant on grounds of witness intimidation.

¶ 31 As noted above, during rebuttal closing, the State may respond to comments made by the defendant which invite a response. *Kliner*, 185 Ill. 2d at 154. In our view, the prosecutor's

comments regarding the lack of additional witnesses were invited by defense counsel's closing argument, during which he made the following statements:

"Look at what we don't have in this case. Look at what we don't have. No scientific evidence which links him to this crime; no fingerprints, no gun, no DNA, no blood, no photos of the actual incident, no video of the actual incident and where is Tattoo? Where is Tattoo? Right in the car. Right in the midst of everything. What does that tell you about the strength of the State's case."

In making these comments, defense counsel highlighted to the jury that Tattoo, a/k/a Kenneth Simmons, did not testify at trial and asserted that his absence weakened the State's case. In light of these comments, we find that it was reasonable for the State to offer a theory as to why it did not present more eyewitnesses to the shooting.

¶ 32 Moreover, while defendant is correct that, in the absence of supporting evidence in the record, a prosecutor may not make comments that suggest witnesses were afraid to testify because the defendant had threatened or intimidated them (see *People v. Mullen*, 141 Ill. 2d 394, 405 (1990)), such is not the case here. In the instant case, numerous witnesses testified that defendant shot repeatedly into the crowd, a police investigator testified that he recovered 17 shell casings from the Bi-Level's parking lot, and a forensic scientist determined that all those casings had been chambered in the same firearm. Thus, there was testimonial and physical evidence in the record to support the prosecutor's statement that defendant fired multiple times into the group milling about the parking lot. We cannot find that it was an unreasonable inference for the prosecutor to argue that such a spray of bullets would be intimidating to potential eyewitnesses.

See *Nicholas*, 218 Ill. 2d at 121 (the prosecutor may comment on the evidence presented and draw reasonable inferences therefrom).

¶ 33 Defendant's third claim with regard to closing arguments is that it was improper for the prosecutor to state in rebuttal, "He was arrested without incident? Well, I mean I'm not sure that he gets points for not shooting it out with the U.S. marshals[.] *** That's what he's asking. He went quietly -- when they placed him under surveillance and they caught him? Good for him. He didn't compound the tragedy that they're already dealing with." Defendant argues that the prosecutor's comments were unfounded and purely prejudicial. He asserts that there was no evidence defendant intended to kill the police officers that arrested him, and that the prosecutor's argument was an improper instruction to the jury to find defendant guilty in part because he could have killed the arresting officers or that defendant should not get "credit" by way of an acquittal for not killing the officers.

¶ 34 Again, we find that the prosecutor's statement was a fair response to comments made by defense counsel in his closing. *Kliner*, 185 Ill. 2d at 154. In closing, defense counsel pointed out various "holes" in the State's case, including that when defendant was arrested, "the arrest took place without incident meaning no running, no fighting, no indicia of guilt[] when he's arrested." This comment invited the State's response that defendant should not get "points" for not resisting arrest. We disagree with defendant that the prosecutor's comment rose to the level of an improper instruction to the jury to find defendant guilty because he could have killed the arresting officers. Defendant's argument fails.

¶ 35 Fourth, defendant asserts that in rebuttal argument, the prosecutor improperly made statements that "It's proof beyond a reasonable doubt. Of course the defendant wants it to be any doubt," and "That's not the standard. You got the standard from the Court in the jury

instructions. Hold the defendant responsible. Stop the defendant's [f]light." Defendant argues that the prosecutor's statements were unfounded in the evidence, as defense counsel had never urged the jury to acquit on a lesser standard than reasonable doubt. In addition, defendant argues that the prosecutor was incorrect that the jury would receive a definition of reasonable doubt in the jury instructions. He asserts that the prosecutor's arguments inappropriately minimized the State's burden.

¶ 36 Defendant is correct that neither the court nor the attorneys should attempt to define the reasonable doubt standard for the jury. *People v. Thompson*, 2013 IL App (1st) 113105, ¶ 87. However, the attorneys are entitled to discuss reasonable doubt, present their views of the evidence, and suggest whether that evidence supports reasonable doubt. *Id.* In addition, a prosecutor " 'may argue that the State does not have the burden of proving the guilt of the defendant beyond *any* doubt, that the doubt must be a reasonable one. Such an argument does no more than discuss the grammatical fact that the word "reasonable" modifies the word "doubt." ' " (Emphasis in original.) *Id.*, quoting *People v. Carroll*, 278 Ill. App. 3d 464, 467 (1996).

¶ 37 In our view, the prosecutor's comment focused on the fact that the word "doubt" is modified by "reasonable," as opposed to "any." We cannot find that this is improper. Moreover, when the prosecutor stated that "any doubt" was what the defendant wanted the standard of proof to be, defense counsel objected and the objection was sustained. Then, during jury instructions, the trial court instructed the jury that the State had the burden of proving defendant's guilt beyond a reasonable doubt. Thus, any prejudice arising from the portion of the comment referencing what defendant may have wanted the standard to be was cured. *Thompson*, 2013 IL App (1st) 113105, ¶ 92 (the prompt sustaining of an objection combined with a proper jury instruction usually cures any prejudice arising from improper closing argument).

¶ 38 Finally, we reject defendant's argument that the cumulative impact of the prosecutors' alleged misconduct likely contributed to the jury's finding of guilt. As outlined above, any errors that occurred in closing or rebuttal argument were cured by the trial court's sustaining of objections, giving of instructions, or both, and, in light of the overwhelming evidence of defendant's guilt, any error was harmless.

¶ 39 For the reasons explained above, we affirm the judgment of the circuit court of Cook County.

¶ 40 Affirmed.