SIXTH DIVISION
August 19, 2016

No. 1-12-0939

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. 11 CR 10725
	)	
GARY HILL,	)	Honorable
	)	Michael Brown,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Rochford and Justice Hoffman concurred in the judgment.

ORDER

¶ 1 ***Held:*** The State's argument at trial that a witness's prior inconsistent statement was "the truth" did not constitute plain error. Trial counsel did not provide ineffective assistance by failing to object to that argument.

¶ 2 After a jury trial, defendant Gary Hill was convicted of unlawful possession of a weapon by a felon and sentenced to six years' imprisonment. On appeal, he contends that the State made an improper closing argument by asking the jury to consider a trial witness's prior inconsistent statement as substantive evidence when it was not admissible as substantive evidence. For the reasons stated below, we affirm.

¶ 3 Defendant was charged with unlawful possession of a weapon by a felon for knowingly possessing a firearm on or about June 23, 2011, when he had been previously convicted of delivery of a controlled substance.

¶ 4 At trial, police officer Bradley Ruzak testified that he and Officer Everardo Bracamontes stopped a van on the evening of June 23, 2011, because it had been reported as stolen. As the officers walked up to the van from behind, the front passenger door opened and Officer Ruzak saw a right hand dropping a gun. Almost immediately thereafter, the rear passenger-side door opened and Anthony Flowers exited and walked away quickly. Officer Ruzak detained Flowers and then picked up the gun near the front passenger door of the van, discovering that it was loaded. He picked up the gun with an ungloved hand as he did not have time in the unfolding situation to don gloves or use a pen or handkerchief. He saw that defendant was seated in the front passenger seat. Byron Auterberry was the van's driver, and another passenger was in the rear driver's-side seat. An investigation later found that the van had not been stolen, but was owned by Auterberry's father. To the best of Officer Ruzak's knowledge, the gun was not tested for fingerprints or DNA.

¶ 5 Police sergeant David Harris testified that he assisted in stopping the van and parked in front of it. As he approached the van from the front, he saw the driver and front passenger – defendant – through the windshield. He could also see that there were rear-seat passengers, and he did not see any of them making a movement towards the front of the van. He saw defendant open the front passenger door, followed by a gun dropping to the ground. He then saw Flowers exit the van from the rear passenger-side door. Officer Ruzak detained Flowers and picked up the gun, and Officer Harris detained defendant.

¶ 6 The State introduced a certified copy of defendant's 2001 conviction for delivery of a controlled substance. The trial court denied defendant's motion for a directed verdict.

¶ 7 Byron Auterberry testified that he knew defendant all his life. Auterberry was using his father's van on the day in question to help defendant move a refrigerator for a friend of defendant. They had finished this errand when they picked up Flowers and another man. Auterberry was driving the van, defendant was the front-seat passenger, and Flowers was behind defendant. After the police signaled to stop the van but before Auterberry stopped, a gun "came flying to the front and I picked it up and threw it back to the back." Flowers had thrown the gun. Auterberry had not seen the gun before then, nor had anyone in the van mentioned a gun. After Auterberry was detained, he saw the gun on the ground by the back door of the van. Auterberry did not tell the police about Flowers tossing the gun forward because he did not want to be a "stool pigeon." Auterberry admitted that he was then in jail on an unrelated residential burglary charge, and that he had prior convictions for aggravated robbery in 1998, and theft or retail theft in 2003, 2005, 2007, 2008, and 2010.

¶ 8 Officer Everardo Bracamontes testified in rebuttal that, after Auterberry was arrested and informed of his *Miranda* rights, he told Officers Bracamontes and Ruzak that the gun was not his but defendant's, and that defendant had thrown it from the van. Auterberry never gave a written statement to this effect.

¶ 9 In its closing argument, the State summarized the charge and the officers' testimony regarding the stopping of the van and the recovery of the gun. As to Auterberry, the State argued various inconsistencies in his testimony, that he was "a six-time convicted felon," and that

> "what he told the police when his friend wasn't sitting there like he was yesterday, what he told the police on the day that this

> happened was that the gun wasn't his because it was the truth. That the gun was the defendant's because it was the truth. That it was this defendant who threw the gun out of the door. The truth he didn't want to own up to yesterday when his friend is sitting there."

Defendant made no objection to the State's argument.

¶ 10 Defendant argued that events following the stopping of the van occurred quickly and that the officers' testimony from their vantage points did not prove that defendant dropped the gun from the van. Defendant also noted Flowers's exit from the van and argued that the gun was not tested for fingerprints or DNA because Officer Ruzak picked it up bare-handed. Defendant acknowledged Auterberry's criminal record and the discrepancies in his testimony but argued that his account of Flowers throwing the gun is not inherently incredible and establishes that defendant did not have exclusive control over the gun and thus did not possess it. Defendant argued that there was no evidence beyond Officer Bracamonte's testimony that Auterberry implicated defendant and that the jury should disregard Officer Bracamonte's account.

¶ 11 In rebuttal, the State argued that attributing the gun to Flowers was "convenient" and contrary to the officers' credible testimony. The State argued that Officer Ruzak explained why he picked up the gun bare-handed, and noted that fingerprints are not needed to determine who committed a crime when witnesses saw who committed it. The State argued that, if the police were going to "frame" anyone for possessing the gun, it would have been Auterberry as he was the driver of the van, his family owned it, and he had a lengthy criminal history. The State argued at length that Auterberry lied in his testimony and that:

> "he told you he lied to the police, and he actually came in and lied to you. He didn't want to be a stool pigeon or a trick on his very good friend, [defendant]. But that's exactly what he did, because that night he told the police officers that the defendant was the one who had the gun, and he was telling the truth. But he didn't want to admit that yesterday in front of his friend."

Defendant made no objection to the State's rebuttal argument.

¶ 12 The jury was instructed that "[a]ny evidence that was received for a limited purpose should not be considered by you for any other purpose," and that "[n]either opening statements nor closing arguments are evidence, and any statement or argument made by the attorneys which is not based on the evidence should be disregarded." The jury was also instructed that:

> "The believability of a witness may be challenged by evidence that on some former occasion he made a statement that was not consistent with his testimony in this case. Evidence of this kind may be considered by you only for the limited purpose of deciding the weight to be given the testimony you heard from the witness in this courtroom. It is for you to determine whether the witness made the earlier statement, and, if so what weight should be given to that statement. In determining the weight to be given to an earlier statement, you should consider all of the circumstances under which it was made." Illinois Pattern Jury Instructions, Criminal, No. 3.11 (4th ed. 2000) ("IPI 3.11").

¶ 13 Following deliberations, the jury found defendant guilty of unlawful possession of a weapon by a felon. Defendant filed a motion for a new trial but did not challenge the State's closing arguments therein. After denying defendant's motion, the court sentenced defendant to six years' imprisonment. This appeal followed.

¶ 14 On appeal, defendant contends that the State argued improperly in closing argument that the jury should consider Auterberry's prior inconsistent statement as substantive evidence when it was not admissible for that purpose. Defendant acknowledges that he did not object to these arguments either at trial or in his post-trial motion. He therefore argues that we should consider this claim as plain error. The plain error doctrine allows this court to consider an unpreserved, but clear or obvious, error when either (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, or (2) the error is so serious that it affected the fairness of the defendant's trial and the integrity of the judicial process. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 70. Defendant also contends that his trial counsel rendered ineffective assistance by not objecting to the State's arguments in question.

¶ 15 We must presume, absent a showing to the contrary, that the jury followed the trial judge's instructions in reaching a verdict. *People v. Simms*, 192 Ill. 2d 348, 373 (2000). Even if a prosecutor's closing remarks are improper, "they do not constitute reversible error unless they result in substantial prejudice to the defendant such that absent those remarks the verdict would have been different." *People v. Hudson*, 157 Ill. 2d 401, 441 (1993). Due to an apparent conflict between two supreme court cases, it is unclear what the proper standard of review is when reviewing improper closing arguments. Compare *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007) (*de novo*), with *People v. Blue*, 189 Ill. 2d 99, 128 (2000) (abuse of discretion). We need not resolve this apparent conflict, as defendant's claim fails under either standard.

¶ 16 First and foremost, we must reject defendant's core premise: that the State's arguments that the jury consider Auterberry's prior inconsistent statement "the truth" constituted an improper appeal to consider the statement as substantive evidence. See *Jonathon C.B.*, 2011 IL 107750, ¶ 70 (the first consideration in plain error analysis is whether error occurred at all). As the jury was properly instructed with IPI 3.11, its task when faced with Auterberry's prior inconsistent statement was to weigh his trial testimony and prior statement in light of all of the circumstances. As Auterberry's testimony and statement were not merely inconsistent but mutually exclusive, arguing that his prior out-of-court statement was "the truth" was consistent with the statement being used to impeach his contrary trial testimony. The nature of impeachment is that a trier of fact weighs the conflicting statements and determines that a witness's prior inconsistent statement is more credible than his testimony and thus does not credit the testimony. "It is the province of the trier of fact to determine the effect of a prior inconsistent statement upon the credibility of a witness, since an inconsistent extrajudicial statement does not, *per se*, destroy the probative value of that witness's testimony; the trier of fact may accept the credibility of the witness notwithstanding the impeaching inconsistent statement." *People v. Young*, 133 Ill. App. 3d 886, 892 (1985). Accordingly, we find no impropriety in the State's argument.

¶ 17 Moreover, we do not find the evidence against defendant to be closely balanced. It is undisputed that defendant was the front-seat passenger of the van. Two police officers with different perspectives testified to seeing the gun drop from the front passenger door of the van, with Officer Ruzak also seeing a right hand dropping the gun. This court is not required to find their testimony incredible or implausible merely because defendant argues it is. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 60. The jury had ample grounds to discount Auterberry's testimony,

including his lengthy criminal record and lifelong acquaintance with defendant. We conclude that, even if the argument was somehow error, it did not rise to the level of plain error.

¶ 18 The defendant's ineffective assistance claim similarly fails. A defendant proves ineffective assistance of counsel when he shows that both (1) counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that the result of the proceeding would have been different absent counsel's errors. *People v. Simpson*, 2015 IL 116512, ¶ 35. Because we find that the argument itself did not amount to error and the evidence was not closely balanced, counsel's failure to object to it, or raise it in a post-trial motion, did not constitute ineffective assistance. *People v. Ward*, 371 Ill. App. 3d 382, 436 (2007) (holding that if an argument is proper, counsel cannot provide objectively unreasonable representation by failing to object to it).

¶ 19 Accordingly, the judgment of the circuit court is affirmed.

¶ 20 Affirmed.