2016 IL App (1st) 140652-U

FOURTH DIVISION
June 23, 2016

No. 1-14-0652

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. 12 CR 2794
	)	
JOSE SANCHEZ,	)	Honorable
	)	William G. Lacy,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice McBride and Justice Cobbs concurred in the judgment.

O R D E R

¶ 1 *Held:* (1) The evidence was sufficient to establish that defendant did not act in self-defense, and (2) the State's closing argument was not improper and did not mischaracterize the evidence.

¶ 2 Following a jury trial, defendant Jose Sanchez was convicted of aggravated battery with a deadly weapon and sentenced to two years' imprisonment. On appeal, defendant contends that (1) the State failed to prove beyond a reasonable doubt that he did not act in self-defense where evidence showed that he struck the victim with a bottle after the victim cut defendant with a knife; and (2) the State's closing argument was improper where the prosecutor claimed that the knife produced at trial was "manufactured" by defense counsel, and also mischaracterized forensic evidence recovered from the knife. We affirm.

¶ 3 At trial, Donovan Lezama, the victim, testified that he was dancing with his brother at a club in Chicago during the early hours of November 12, 2011. Defendant entered the club with his girlfriend and three other individuals, and called Lezama a "puto." At the time, Lezama was dating defendant's ex-wife and had previously encountered defendant at a baptism party for her son, where defendant had “battered” Lezama and threatened to "fuck [him] up." At approximately 3:15 a.m., Lezama and defendant left the club and agreed to a fistfight in an alley across the street. Lezama denied having a knife.

¶ 4 During the fight, defendant knocked Lezama down, got on top of him, and told defendant's girlfriend, later identified as Janet Gonzalez, to "pass me what you have in your purse." She gave defendant a beer bottle, which he broke on the ground. As Lezama tried to cover himself, defendant used the bottle to cut Lezama's face, neck, hand, and arm. Then, defendant's friends arrived and kicked Lezama. Lezama's brother, Juan, told them not to get involved because Lezama and defendant had agreed to fight "one on one." One of defendant's friends swung a knife at Juan and also cut the hand of a security guard. Lezama testified that he

did not know the name of the security guard, and that Juan was in Mexico at the time of trial because their father had died.

¶ 5 As a result of the fight, Lezama's "skin fell down" and he was bleeding "a lot." He "dropped to the ground" and people threw clothes at him because he was "in a puddle of blood." An ambulance took him to the hospital, and Lezama was told that he might have died had the ambulance arrived "two minutes later." Lezama described his condition as "very grave" and "severe[ly] injured." He was released to his mother's care for 24-hour supervision, and reported the incident to police on November 13, 2011. Photographs of Lezama's injuries were published and entered into evidence.

¶ 6 Officer Vargas testified that the Chicago Police Department's fugitive apprehension unit was tasked with apprehending defendant approximately one week after the incident was reported. Vargas spoke with defendant's mother and later arrested defendant while conducting surveillance at his address on January 23, 2012.

¶ 7 The trial court denied defendant's motion for acquittal.

¶ 8 Defendant testified that Lezama followed him out of the club at approximately 3 a.m. on the day of the incident and said that he wanted to fight "one on one, not with weapons." According to defendant, Lezama had been "talking" with defendant's ex-girlfriend, who was also the mother of defendant’s children, and had started a fight at the baptism party 15 days earlier. Defendant, Gonzalez, and Lezama went to an alley across the street, where defendant gave his jacket to Gonzalez and fought with Lezama. Initially, neither defendant nor Lezama had weapons. During the fight, however, Lezama punched defendant with "something he had in his

hand" and cut defendant's face with a knife. Defendant told Lezama to drop the knife, and tried to scare him by yelling. Then, believing that his and Gonzalez's lives were in danger, defendant told Gonzalez to pass him a bottle that was in his jacket. Defendant used his hand and knee to pin Lezama's hand that held the knife, and tried to strike defendant with the bottle, but it dropped and broke. Lezama cut himself on the glass. He kept trying to stab defendant until defendant's friend, Noe Prado, arrived and kicked the knife away. Afterwards, Lezama "lift[ed] up his hand and said "I don't have a knife."

¶ 9 Later, in defendant's vehicle, Prado gave defendant the knife and he handed it to Gonzalez, who placed it in a bag. Defendant kept the knife at his house as “evidence.” Additionally, Gonzalez and a cousin took pictures of injuries to defendant's eye, lip, and hand, which defendant kept as “evidence” in case Lezama "would go to the police station and make a report." Defendant learned that the police were looking for him two or three days after the fight, but he did not surrender because he was traveling for work. Instead, he instructed his attorney to tell the detective that he "was not running." He was arrested two months later and told Gonzalez to give the knife to his attorney. Defendant identified the knife at trial and it was entered into evidence, along with the photographs of his injuries. He denied that any of the wounds were self-inflicted.

¶ 10 Gonzalez testified that she and defendant left the club at approximately 2 or 3 a.m. on the day of the incident, accompanied by another couple and "two guys." A man (Lezama) approached defendant and wanted to fight, so defendant, Lezama, and Gonzalez walked to an alley across the street. Lezama "dropped" defendant, but defendant got on top of Lezama. He

told Gonzalez that Lezama had a "blade," and asked her to pass an empty bottle that was in defendant's coat. She gave defendant the bottle, and saw that he had a cut on his lip and that Lezama was holding a knife. Defendant told Lezama to "drop the knife," and when Lezama resisted, defendant cut his face with the bottle. Prado arrived and kicked Lezama, who dropped the knife. Prado grabbed the knife, and defendant said that "he didn't have nothing."

¶ 11 After the fight, Gonzalez walked to defendant's vehicle with defendant, Prado, and the other couple. Prado gave the knife to defendant, who gave it to Gonzalez. Defendant kept the knife in a zip-lock bag in his house. According to Gonzalez, defendant did not leave Chicago for work between the date of the fight and his arrest. Approximately two days after defendant was arrested, Gonzalez visited him in jail, retrieved the knife from his house, and eventually gave it to the police. She identified the knife at trial.

¶ 12 On cross-examination, Gonzalez testified that she was dating defendant at the time of the incident, knew him for a total of five years, and was friends with him at the time of trial. She also testified that defendant's cousin photographed defendant's injuries, and that she was not present when the photographs were taken. She did not talk to police about the incident or the knife until April 3, 2012.

¶ 13 Maria Garcia testified that she left the club at approximately 3:30 a.m. on the day of the incident and saw defendant being "intimidated" and "provoke[ed]" by "three or five guys" across the street. Defendant and one of the men (Lezama) started fighting. Lezama held "something" in his hand and used it to hit defendant, who fell to the ground. Then, while Garcia was "about four steps away," Lezama got on top of defendant and cut his lip with a knife. Defendant told

Gonzalez to give him a bottle, and she "tossed" it to defendant but it "hit the ground and it broke," cutting Lezama. Prado kicked Lezama and he dropped the knife, which Prado retrieved. Garcia stated that the knife produced at trial was "the size of the knife" that she saw during the fight.

¶ 14 On cross-examination, Garcia testified that she knew defendant for eight years at the time of trial and considered him an “acquaintance.” Following the fight, she did not call the police and did not tell anyone about the incident until an investigator from the State's Attorney's office visited her house.

¶ 15 Prado testified that he was with defendant at the club on the day of the incident. When Prado left the club at approximately 4 a.m., he saw defendant fighting with another man (Lezama) across the street. Prado approached and saw Lezama on top of defendant, using a knife to cut defendant's lip. Defendant told Gonzalez to give him a bottle, and he used it to hit Lezama on the head. Defendant told Lezama to drop the knife, which Prado recovered and put in his pocket. Prado gave defendant the knife while they were in defendant's vehicle, and identified the knife at trial.

¶ 16 On cross-examination, Prado testified that he had known defendant for 10 years at the time of trial and considered him a friend. Prado had discussed the fight with defendant on a previous court date, and defendant drove Prado to court on the day of trial.

¶ 17 The defense entered a stipulation between the parties that if called to testify, Pauline Gordon, a forensic scientist with the Illinois State Police, would testify that she conducted DNA analysis on buccal swabs taken from defendant and Lezama. She also conducted DNA analysis

on blood stains indicated on the blade and handle of the knife, and found a mixture of DNA consistent with having originated from two people. A “major” DNA profile identified in both stains matched defendant and did not match Lezama. Lezama could not be excluded from contributing another, “partial minor” DNA profile that was also identified in both stains. Additionally, Gordon would testify that "there is no way to determine" whether the DNA on the knife originated from "two blood donors or from one blood donor and another source of DNA like skin cells," and that "it cannot be determined who is actually holding the knife at the time the blood is being deposited."

¶ 18 The defense entered an additional stipulation between the parties that if called to testify, Lisa Gilbert, a forensic scientist with the Illinois State Police, would testify that the knife "revealed no latent fingerprint impressions suitable for comparison."

¶ 19 Following closing arguments, the court instructed the jury as to the affirmative defense of self-defense. The jury found defendant guilty of aggravated battery with a deadly weapon. The court denied defendant's motion for judgment notwithstanding the verdict, and sentenced him to two years' imprisonment.

¶ 20 Defendant raises two issues on appeal. First, he contends that the evidence established the affirmative defense of self-defense, which the State failed to disprove beyond a reasonable doubt because Lezama's testimony that he did not have a knife was unbelievable and uncorroborated. According to defendant, it is "contrary to human experience" that he would strike Lezama with a bottle, having already pinned him to the ground, unless Lezama was armed. Had Lezama been unarmed when defendant was on top of him, defendant submits that there would be no reason for

his friends to kick Lezama. Additionally, defendant argues that Lezama's brother would not have bothered to tell defendant's friends not to interfere in the fight after defendant struck Lezama with the bottle, unless Lezama was also armed at that time.

¶ 21 The State responds that the evidence showed that Lezama was not armed with a knife, and therefore, defendant was not acting in self-defense when he struck Lezama with the bottle.

¶ 22 The standard of review on a challenge to the sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Belknap*, 2014 IL 117094, ¶ 67. The reviewing court will not retry the defendant or substitute its judgment for that of the trier of fact on questions involving conflicts in the testimony, the credibility of witnesses, or the weight of the evidence. *People v. Brown*, 2013 IL 114196, ¶ 48. To sustain a conviction, "[i]t is sufficient if all of the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt." *People v. Hall*, 194 Ill. 2d 305, 330 (2000). The trier of fact "is not required to disregard inferences which flow normally from the evidence before it, nor need it search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt." *People v. Jackson*, 232 Ill. 2d 246, 281 (2009). A defendant's conviction will be reversed only if the evidence is so improbable or unsatisfactory that there remains a reasonable doubt of the defendant's guilt. *Id*.

¶ 23 A person commits aggravated battery with a deadly weapon when he, in committing a battery, uses a deadly weapon other than by discharge of a firearm. 720 ILCS 5/12-3.05(f)(1)

(West 2010). In this case, defendant does not challenge the elements of the offense but contends that he acted in self-defense when he struck Lezama with the bottle.

¶ 24 Generally, a person is justified in using force against another "when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force." 720 ILCS 5/7-1(a) (West 2010). However, a person is justified in using force which is intended or likely to cause death or great bodily harm "only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony." *Id.* A person acts in self-defense where (1) unlawful force is threatened against that person; (2) the person threatened is not the aggressor; (3) the danger of harm is imminent; (4) the use of force is necessary; (5) the person threatened actually and subjectively believes a danger exists that requires the use of the force applied; and (6) the beliefs of the person threatened are objectively reasonable. *People v. Lee*, 213 Ill. 2d 218, 225 (2004). Self-defense is an affirmative defense (720 ILCS 5/7-14 (West 2010)), and once defendant raises it and provides some evidence of it, "the State has the burden of proving beyond a reasonable doubt that defendant did not act in self-defense, in addition to the elements of the charged offense." *People v. Lewis*, 2012 IL App (1st) 102089, ¶ 17 (citing *People v. Jeffries*, 164 Ill. 2d 104, 127 (1995)). In considering a defendant's claim of self-defense, the trier of fact may consider the probability or improbability of the defendant's account, the circumstances surrounding the crime, and the relevant testimony of other witnesses. *People v. Young*, 347 Ill. App. 3d 909, 920 (2004). If the State negates any of the elements of self-defense, defendant's claim fails. *Jeffries*, 164 Ill. 2d at 127-28.

¶ 25 Viewing the evidence in the light most favorable to the State, we find the evidence was sufficient to establish that defendant was not acting in self-defense when he struck Lezama with the bottle. Lezama denied that he had a knife, and the DNA evidence found on the knife produced at trial did not establish that he had handled it. His account of the fight was not improbable or unsatisfactory, and although his testimony was contradicted by the defense witnesses, the jury had the "prerogative" to resolve conflicting evidence on the issue of self-defense. *People v. Williams*, 2015 IL App (1st) 130097, ¶ 29. In this case, although four defense witnesses testified that the victim had a knife, Gonzalez, Garcia, and Prado were acquaintances of defendant, and none of the defense witnesses reported the fight or the existence of the knife until after defendant was arrested. *People v. Luckett*, 339 Ill. App. 3d 93, 103 (2003) (defendant's credibility, like that of any witness, is question for trier of fact); see also *People v. Hernandez*, 278 Ill. App. 3d 545, 552 (1996) (trier of fact "was not unreasonable in finding the defense witnesses less believable than those of the State based upon their demeanor when testifying and possible bias in not wanting defendant to be convicted"). Consequently, a rational jury could find that Lezama did not have a knife, and therefore, that defendant did not act in self-defense when he struck Lezama with the bottle. *Young*, 347 Ill. App. 3d at 920 (jury not required to accept defendant's claim of self-defense in view of the evidence at trial).

¶ 26 Defendant argues, however, that a negative inference should be drawn from the fact that the State did not call Lezama's brother or the security guard to "confirm [Lezama's] account of the fight." Generally, "if a potential witness is available and appears to have special information relevant to the case, so that his testimony would not merely be cumulative, and the witness's

relationship with the State is such that he would ordinarily be expected to favor it, the State's failure to call the witness may give rise to a permissible inference that, if the witness were called, the witness's testimony would have been unfavorable to the State's case." *People v. Doll*, 371 Ill. App. 3d 1131, 1137 (2007). A negative inference is permissible only under certain circumstances, such as where the State fails to call a witness who possesses unique knowledge of a crucial, disputed issue of fact, and no negative inference is raised when the witness is also known and available to the defense yet is not called by it. *Id*. Here, defendant has not shown that either Lezama's brother or the security guard possessed unique knowledge of the case or was unavailable to him, and therefore, we will not draw a negative inference from the State's failure to call either witness at trial.

¶ 27 Defendant next contends that he was prejudiced by comments made by the prosecutor during closing argument. According to defendant, the State's closing argument was improper where the prosecutor claimed that the knife produced at trial was "manufactured" by defense counsel, and also mischaracterized forensic evidence recovered from the knife. As an initial matter, the State alleges, and defendant correctly concedes, that he forfeited review of this issue by failing to object to the State's comments at trial or in a posttrial motion. *People v. Wheeler*, 226 Ill. 2d 92, 122 (2007) ("To preserve claimed improper statements during closing argument for review, a defendant must object to the offending statements both at trial and in a written posttrial motion."). Defendant submits that this court may consider the issue as a matter of plain error or ineffective assistance of counsel. However, the first inquiry before determining whether there was a plain error is to determine whether there was a clear and obvious error. *People v.*

Eppinger, 2013 IL 114121, ¶ 19. Absent an error, there can be no plain error and defendant's forfeiture will be honored. *Id.* For the following reasons, no error occurred.

¶ 28 The standard of review for remarks made by the State during closing argument is unsettled. In *Wheeler*, 226 Ill. 2d at 121, our supreme court suggested that we review this issue *de novo*. Nonetheless, we note that *Wheeler* cited with approval *People v. Caffey*, 205 Ill. 2d 52, 128 (2001), which suggested that the standard of review is abuse of discretion. *Id*. at 123. Since *Wheeler*, appellate courts have been divided regarding the appropriate standard of review. *People v. Alvidrez*, 2014 IL App (1st) 121740, ¶ 26 (noting that the issue remains divided). In the present case, regardless of the standard of review, the result would be the same.

¶ 29 A prosecutor has "wide latitude" in making a closing argument and may comment on the evidence and any fair, reasonable inferences it yields (*People v. Glasper*, 234 Ill. 2d 173, 204 (2009)), even if the suggested inference reflects negatively on the defendant (*People v. Nicholas*, 218 Ill. 2d 104, 121 (2005)). Additionally, the State "may challenge a defendant's credibility and the credibility of his theory of defense in closing argument when there is evidence to support such a challenge." *People v. Kirchner*, 194 Ill. 2d 502, 549 (2000). Reviewing courts will consider the closing argument as a whole, rather than focusing on selected phrases or remarks, and will find reversible error only if the defendant demonstrates that the improper remarks "were so prejudicial that real justice was denied or that the verdict resulted from the error." *People v. Perry*, 224 Ill. 2d 312, 347 (2007).

¶ 30 Turning to defendant's first claim of error, defendant claims that the prosecutor, in arguing that the knife produced at trial was "manufactured," improperly suggested that "defense

counsel had knowingly presented a false and fabricated defense of self-defense." According to defendant, because all four defense witnesses testified to having seen Lezama with the knife during the fight, the State's attack on the knife's authenticity amounted to an allegation that defense counsel had fabricated the knife and "orchestrated" a "conspiracy" among the witnesses.

¶ 31 During the State's closing argument, the prosecutor stated:

> "The only evidence that you saw that was credible was that it was the victim who was injured severely with a weapon. There is no evidence at all that the victim was using a knife against the defendant. There is no evidence at all that the victim had a knife against the defendant. So there is no justification then for him to use the kind of force that he used against [Lezama].
>
> ***
>
> The stories, and that's what they are, stories, that you heard from the witnesses who want to say that there was a knife, it is all concocted. There is the girlfriend who comes in five months after this incident and decides to talk to the police. Then there is the eight-year-long acquaintance who comes in now three years after the fact to tell you her story, and then the best friend who comes in ten years—I am sorry—three years after the fact to tell his story.
>
> ***
>
> These stories were manufactured by the Defense witnesses."

¶ 32 During rebuttal closing argument, the prosecutor further remarked:

> "This knife, folks, has no credibility whatsoever with you, and you should regard it as such. That knife is evidence manufactured by him. It has got his blood on it, what a surprise, and it comes out *** after he is charged in this case. *** Four to six months later. Where is it from? His house? ***
>
> * * *
>
> *** [L]ook at the circumstances in which this evidence that they put out in their case, how is it secured, where did it come from and who are the people that told you the significance of it. They are all his friends, folks."

¶ 33 Reviewing the challenged comments in context, it is apparent that the prosecutor did not allege that defense counsel had fabricated the knife or conspired with the witnesses to proffer false testimony. Rather, the prosecutor argued that the defense's theory of the case, namely, that Lezama had a knife when defendant struck him with the bottle, reflected "stories manufactured by the [d]efense witnesses," and that the knife itself was "evidence manufactured by [defendant]." See *People v. Hudson,* 157 Ill. 2d 401, 442-43 (1993) (State properly argued that defense theory was "concocted," as the remarks, in context, challenged the credibility of defendant and not defense counsel). The evidence showed that defendant did not produce the knife until his arrest two months after the fight, although he knew that police were looking for him two to three days after the incident. Additionally, the defense witnesses were acquaintances of defendant, and two of the witnesses, Gonzalez and Prado, had discussed the case with defendant prior to trial. In view of the foregoing, we find that the prosecutor's remarks did not

improperly accuse defense counsel of fabricating evidence, but rather, challenged the credibility of defendant and his theory of the case based on the evidence at trial. *Kirchner*, 194 Ill. 2d at 549

¶ 34 Defendant further argues that the prosecutor mischaracterized the forensic evidence by telling the jury that "only [defendant's] blood" was found on the knife, when in fact, the parties had stipulated that the knife bore a mixture of DNA consistent with having originated from two people and Lezama could not be excluded from having contributed one of the two DNA profiles. According to defendant, he was prejudiced by the State's attempt to "distance" Lezama from the knife, which "undermined" defendant's claim that he had struck Lezama with the bottle after being stabbed. In response, the State contends that the prosecutor's remarks were "directly responsive" to defense counsel's argument that Lezama's blood could have been the source of the unidentified DNA profile.

¶ 35 During closing argument, defense counsel stated:

> "Yesterday we read into the record stipulations as to the blood analysis. No fingerprints were taken, but the blood analysis is consistent with the majority part of that blood on that knife blade was from the defendant, Mr. Sanchez.
>
> There was a secondary blood in there. It was inconclusive, but it could not rule out [Lezama]. That's consistent with [Lezama] holding the knife, having stabbed [defendant]. If any blood had fallen on that knife, it would have been from the residual of the cutting next to the hand where [defendant] had his knee on that knife holding him."

During rebuttal closing argument, the prosecutor stated:

> "*** There [are] no fingerprints on that knife, folks. Only [defendant's] blood, blood that was on the knife that was kept at his house while he was in jail waiting on this case, and dutifully [Gonzalez] procured it."

¶ 36 Construed in context, the State's remark was not improper. Defense counsel, in his closing argument, had stated that both DNA profiles found on the knife derived from blood, and submitted that the presence of Lezama's blood on the knife would be "consistent" with defendant's account of the fight. In rebuttal, the State correctly noted that only defendant's blood had been identified on the knife. *People v. Willis*, 2013 IL App (1st) 110233, ¶ 110 ("the prosecution may fairly comment on defense counsel's characterizations of the evidence and may respond in rebuttal to statements of defense counsel that noticeably invite a response"). This statement accorded with the stipulation between the parties, which stated that one of the DNA profiles found on the blood stains matched defendant, and that although Lezama could not be excluded as the source of the second DNA profile, there was "no way to determine" whether both profiles derived from "two blood donors or from one blood donor and another source of DNA like skin cells." Although defendant argues in reply that the jury "had no reason to believe that DNA evidence taken from blood stains would come from anywhere other than blood," the stipulation expressly stated that this possibility could not be proven or disproven. Consequently, we reject defendant's claim of error.

¶ 37 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 38 Affirmed.