

No. 1-14-0905

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 7584
	)	
TYREECE DAVIS,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE PUCINSKI delivered the judgment of the court.  
Presiding Justice Fitzgerald Smith and Justice Lavin concurred in the judgment.

**O R D E R**

¶ 1 *Held:* Trial counsel was not ineffective for not challenging various remarks in the State's closing arguments, as none of the remarks were improper.

¶ 2 Following a jury trial, defendant Tyreece Davis was convicted of robbery and sentenced as a mandatory Class X offender to 12 years' imprisonment. On appeal, defendant contends that

trial counsel was ineffective for not challenging certain remarks by the State in its closing arguments. For the reasons stated below, we affirm.

¶ 3 Defendant was charged with robbery for, on or about April 3, 2013, allegedly taking currency from Yazan Kittaneh by force or threat of force.

¶ 4 At the October 2013 trial, Yazan Kittaneh testified that he was walking to catch a bus home from work at about 8:45 p.m. on the day in question when he saw defendant. When asked if he could identify defendant in court, Kittaneh replied that "it's been six months. I'm not sure if that person right there," before pointing twice to defendant. On cross-examination, he reiterated that it had been "six months, he looks changed, you know, appearance." Defendant walked past Kittaneh but then turned around, grabbed him from behind, pushed him into an alley, and shoved him against a wall. Defendant was wearing "the jacket and the pants that I described," and a red knit cap. Kittaneh grappled with defendant in an unsuccessful effort to stop defendant from punching him. While the alley was not well-lit, defendant was standing face-to-face with Kittaneh when he demanded money, and Kittaneh could see his face clearly. Kittaneh gave him a \$10 bill. Kittaneh tried to escape, and passers-by approached defendant and Kittaneh. Defendant then reached into one of Kittaneh's pockets and took more money: a \$5 bill and five \$1 bills. (Kittaneh had \$20 in another pocket that defendant did not find.) Defendant ran away, and Kittaneh called 911. Police officers arrived a short time later and took Kittaneh to an alley about three blocks away where they had detained a man. Kittaneh recognized him as the man who robbed him but the detained man was not wearing a red cap. Kittaneh "wanted to make sure" and asked the officers about the red cap. At trial, Kittaneh identified a red cap as the cap in question. Kittaneh gave an officer his account of events, and the police returned his money. Kittaneh

admitted to being in methadone treatment for heroin use but testified that he was "clean" since February 2013 and was no longer using heroin at the time of the robbery.

¶ 5 Police officer Jeffrey Kirschner testified that he and another officer were on patrol when they received a report of a robbery by a man wearing a blue jacket, blue jeans, and a red hat. The description did not include the robber's height, weight, or any facial features. Near the robbery scene, the officers found defendant, who matched the description, and detained him. A red hat and currency – a \$10 bill, \$5 bill and five \$1 bills – were removed from defendant's jacket pockets. Kittaneh was brought to Officer Kirschner's location and asked if defendant was the man who robbed him. Kittaneh replied without hesitation that defendant was. Officer Kirschner did not recall Kittaneh asking him about the red hat before he made his identification. Officer Kirschner brought the red hat back to the police station where it was inventoried. On cross-examination, Officer Kirschner testified that Kittaneh did not state the denominations of money taken from him until after Officer Kirschner returned the money from defendant's pocket. However, on redirect examination, Officer Kirschner testified that Kittaneh gave his account at the police station before his money was returned.

¶ 6 The court denied defendant's motion for a directed verdict, finding the circumstantial evidence – defendant wearing a blue jacket and pants near the robbery scene, and the red cap and money in the same denominations as taken from Kittaneh found in his pockets – sufficient to convict even absent a positive identification by Kittaneh at trial.

¶ 7 In its closing argument, the State summarized Kittaneh's testimony and described the elements of robbery. The State argued that Kittaneh identified defendant without hesitation shortly after the robbery and "also identified him in court," noting that "he did tell you he looks different" but also noting that defendant wore a suit and tie for trial rather than what he wore on

the day in question. The State argued that circumstantial evidence also established defendant's guilt. "Kittaneh said [the robber] was wearing \*\*\* blue jeans, blue shirt [sic] and a red hat." Officers "find this defendant blocks away within moments [,] wearing the same pants, the same shirt" and a red hat was found in the pocket of defendant's "blue outfit." The State acknowledged that such a blue outfit is common but argued that the red hat was distinctive and that defendant's effort to conceal the hat was evidence of his guilt. The State argued that the money in defendant's pockets being in the same denominations as those taken from Kittaneh also supported his guilt.

¶ 8 In defendant's closing argument, counsel argued that he had to prove nothing but the State had to prove its case beyond a reasonable doubt. Counsel argued various discrepancies and issues with Kittaneh's identification and surrounding testimony, including an argument that the red knit cap was not distinctive. Counsel concluded that the jury using its common sense would conclude that Kittaneh's testimony was inconsistent and incredible and that the evidence did not establish defendant's guilt beyond a reasonable doubt.

¶ 9 In rebuttal, the State argued that defendant would have "to be the unluckiest man on earth" to be wearing blue pants and a blue jacket, and carrying a red cap and a \$10, \$5, and five \$1 bills within a few blocks and a few minutes of the robbery by a man wearing a blue jacket and jeans and a red cap who took \$10, \$5, and five \$1 bills. The State argued that the jury, not defendant or his counsel, would decide whether the State's burden of proof was met. "We invite it. \*\*\* It's not an insurmountable burden. \*\*\* It's met in courtrooms like this across this country every single day." Noting that counsel argued the uncertainty of Kittaneh's in-court identification, the State argued that the circumstances of that identification differed from the circumstances around the time of the offense: six months passed, a courtroom is very different from an alley, and defendant was dressed in a suit for court unlike the day in question.

¶ 10 The court instructed the jury, including that closing arguments are not evidence and any statement or argument by counsel not based upon evidence should be disregarded. The jury was instructed that the "State has the burden of proving the guilt of the defendant beyond a reasonable doubt. This burden [is] on the State throughout the case."

¶ 11 During deliberations, the jury sent a note asking "(1) Can we get a copy of the police report? (2) Did the defendant have anything else on him? (3) Did the victim tell the officers which denominations the guy took before the money was counted?" Without objection, the court replied to the jury: "You have received all the evidence, all the exhibits, and the instructions. Please continue to deliberate." About an hour later, the jury sent a note asking "what happens if we cannot come to a unanimous conclusion?" Without objection, the court replied with the same answer as to the first note. Following deliberations, the jury found defendant guilty of robbery.

¶ 12 Defendant's post-trial motion was denied and he was sentenced, as a mandatory Class X offender, to 12 years' imprisonment.

¶ 13 On appeal, defendant contends that trial counsel was ineffective for not challenging improper closing arguments by the State: (1) asserting that Kittaneh identified defendant in court when he had not, (2) using hearsay evidence regarding the description of the robber's clothing as substantive evidence, and (3) asserting that the State normally satisfies its burden of proof.

¶ 14 A claim not preserved in the trial court by timely objection and inclusion in the post-trial motion is forfeited, but forfeiture is relaxed when it arises from counsel's ineffectiveness. *People v. English*, 2013 IL 112890, ¶ 22; *People v. Glasper*, 234 Ill. 2d 173, 203 (2009).

¶ 15 Ineffective assistance is shown when counsel's performance was both objectively unreasonable and prejudicial; that is, there is a reasonable probability of a different outcome absent counsel's errors. *People v. Cherry*, 2016 IL 118728, ¶ 24. Counsel's decision whether to

object is a matter of trial strategy to which we are highly deferential, and we make every effort to evaluate counsel's performance from his perspective at the time rather than imposing hindsight. *People v. Perry*, 224 Ill. 2d 312, 344 (2007). Where there was sufficient evidentiary support for the State's characterizations of the evidence, it is a matter of reasonable trial strategy for counsel to address the State's comments by argument rather than objection. *Id.* at 348.

¶ 16 A prosecutor has wide latitude in making a closing argument; she may comment on the evidence and any reasonable inferences it yields, though she may not argue assumptions or facts not contained in the record. *Glasper* at 204. We must view a closing argument in its entirety and challenged remarks in their context. *Id.* Statements will not be held improper if they were provoked or invited by defense counsel's argument. *Id.*

¶ 17 Here, we find that the State's arguments at issue were not improper or misleading, so that counsel was not ineffective for not objecting to them. First, we find that the State did not mis-speak as to Kittaneh's trial identification of defendant. At trial, Kittaneh pointed twice to defendant when asked if the man who robbed him was in court. While Kittaneh expressed uncertainty over this identification, the State did not argue that Kittaneh's in-court identification was positive or certain. Immediately after mentioning the identification, the State acknowledged Kittaneh's testimony that defendant looked different and posited an explanation for the difference in appearance. The State's rebuttal argument was similar.

¶ 18 The State's argument that its burden of proof beyond a reasonable doubt is "met in courtrooms like this across this country every single day" has been repeatedly upheld as a proper argument. "We do not agree that the prosecutor's characterization of the State's burden as one which is 'not unreasonable' and 'met each and every day in courts' reduced that burden." *People*

*v. Bryant*, 94 Ill. 2d 514, 523 (1983). See also *People v. Averett*, 381 Ill. App. 3d 1001, 1007-1009 (2008), *aff'd*, 237 Ill. 2d 1 (2010); *People v. Ward*, 371 Ill. App. 3d 382, 422-23 (2007).

¶ 19 Lastly, defendant argues that the State improperly used hearsay evidence regarding Kittaneh's description as substantive evidence against defendant, by arguing that he was found in "the same pants, the same shirt" as Kittaneh described. While Kittaneh's testimony did not expressly mention a blue jacket or blue jeans, he testified that he called 911 to report the robbery and his description of the robber included a jacket and pants "that I described" at the time. Officer Kirschner testified that the description of the robber relayed to him included a blue jacket and blue jeans, and that he stopped defendant near the time and scene of the robbery because his clothing fit the description. It is an eminently reasonable inference from this evidence that Kittaneh's description included a blue jacket and jeans. Moreover, we see no ineffectiveness in counsel not objecting to the reference to "the same pants, the same shirt" when the State acknowledged that a blue jacket and jeans are common clothing and based its circumstantial argument for guilt on the red knit cap from defendant's pocket that was identified by Kittaneh at trial. Counsel chose to challenge the State's red cap argument in his own argument.

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

¶ 21 Affirmed.