2016 IL App (1st) 141007-U

FOURTH DIVISION
September 29, 2016

No. 1-14-1007

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. 10 CR 13136 (03)
	)	
TED GRIFFIN,	)	Honorable
	)	Clayton J. Crane,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant was not denied a fair trial because the alleged acts of prosecutorial misconduct did not constitute reversible error.

¶ 2 Following a December 2013 jury trial, defendant Ted Griffin was found guilty of possession of a controlled substance with intent to deliver and unlawful use of a weapon by a felon, and subsequently sentenced to a 10-year prison term. Defendant appeals, arguing that he was denied a fair trial due to repeated acts of prosecutorial misconduct, which included eliciting improper gang-related testimony, vouching for the credibility of the State's witnesses, and arguing facts not presented at trial.

¶ 3 Defendant was arrested on June 23, 2010, after Chicago police served a search warrant on his home. The police recovered a .22-caliber Derringer handgun, 38 .22-caliber bullets, over 23 grams of cocaine, a digital scale, and small bags commonly used in the packaging of controlled substances. Defendant was subsequently charged with possession of a controlled substance of more than 15 but less than 100 grams of cocaine, unlawful use of a weapon by a felon for the handgun, and unlawful use of a weapon by a felon for possession of the ammunition. The following evidence was presented at defendant's jury trial.

¶ 4 Several officers with the Chicago police department testified about their assigned role in executing the search warrant. Sergeant Godfrey Cronin was the assigned supervisor in executing the search warrant on 343 West 115th Street in Chicago. The officers arrived at the house shortly after 6 a.m. on June 23, 2010. When the officers knocked on the door and announced their position, there was no response from within the house. The officers then forced entry into the house.

¶ 5 Officer James Vins testified that he was employed by the Chicago police department in the bureau of organized crime, gang investigation division. On June 23, 2010, he was assigned as part of a team to execute a search warrant. Officer Vins did not secure the occupants of the house, but observed two adults in the home. He identified defendant as one of the adults present in the home. Officer Vins was assigned to search the front room of the home. During his search, Officer Vins found one plastic bag containing a large rock-like substance and another plastic bag containing four smaller plastic bags containing a rock-like substance under a cushion of the couch. The substance was suspected crack cocaine. After he found the items, he notified the assigned evidence officer, Sergeant Andre Thompson, of his discovery. Sergeant Thompson recovered the items in Officer Vins's presence.

¶ 6 Officer Leo Cromwell testified that he was employed as an officer with Chicago police department in the fifth district. On June 23, 2010, he was a patrol officer and was assigned to assist the gang team with a search warrant. He observed one man, one woman, and children in the home. He identified defendant as the man present in the home. His role was to search the front room and the kitchen. Officer Cromwell stated that he found .22-caliber bullets in a kitchen cabinet. He informed Sergeant Thompson, who then recovered the bullets as evidence. Officer Cromwell continued searching the front room and found a .22-caliber Derringer handgun inside a vase. Sergeant Thompson recovered the firearm. During cross-examination, Officer Cromwell stated that the gang team went in the house first and he went in behind them.

¶ 7 After Officer Cromwell's testimony, defense counsel moved for a mistrial because both officers had made gang-related references to the execution of the search warrant. Specifically, Officer Vins stated that he was assigned to the gang investigation unit and Officer Cromwell stated that on the day the search warrant was executed, he was assigned to assist the gang team. Also, Officer Cromwell referenced the gang team in the order of entry into the house. Defense counsel argued that this testimony was so prejudicial that a mistrial was necessary. The trial court denied the motion for a mistrial, but advised the prosecution to instruct its witnesses not to mention the gang unit. No further references were made during the trial.

¶ 8 Sergeant Andre Thompson testified that he was employed as a sergeant in the second district, but in June 2010, he was not a sergeant. On June 23, 2010, he was assigned as part of a team to execute the search warrant. His assignment was as the evidence officer, which is "the officer who recovers any evidence that is found upon the premises that we are executing" the search warrant. Specifically, Sergeant Thompson stated that, "any evidence that is found on a search warrant, then the evidence officer is summoned to that area, wherever the evidence is

located." The evidence officer then records the evidence on the evidence log, including where the evidence was found and who found the evidence. The evidence is then placed in an evidence bag or envelope. He testified that he recovered the suspected cocaine as well as the firearm and bullets found by Officers Vins and Cromwell, respectively. He also collected items found by Sergeant Cronin, a gas bill addressed to defendant at 343 West 115th Street as proof of residency and a digital scale and a bag of small Ziploc bags. Sergeant Thompson said that based on his training, he believed the scale was used for weighing narcotics and the small bags are used for packaging narcotics. Officer Michael Fleming testified that he later took the evidence recovered by Sergeant Thompson and inventoried all items.

¶ 9 Sergeant Cronin testified that he supervised the search of 343 West 115th Street. During the search, he found a digital scale and a bag containing small Ziploc bags inside a curio cabinet in the dining room. He had Sergeant Thompson recover these items. Based on his experience, he stated that digital scales, like the one recovered, were used to weigh narcotics when they were broken down into smaller amounts for resale. The Ziploc bags were used to package the narcotics after they were broken down. Sergeant Cronin also found a piece of mail on the coffee table in the front room. He stated that it was a gas bill addressed to defendant at 343 West 115th Street. He also had Sergeant Thompson recover this item.

¶ 10 When the search was finished, Sergeant Cronin took defendant to the Homan Square police station. Sergeant Cronin interviewed defendant later in the afternoon. Sergeant Cronin testified that during the interview, defendant admitted that the .22-caliber firearm recovered that morning belonged to him. Defendant told Sergeant Cronin that his wife told him about an altercation outside their house which spilled over onto their porch and the people tried to enter the house. Defendant said he purchased the firearm for $50 from a guy named "Pookie who he

knew as Johnny." Defendant said that the gun was inoperable when he purchased it, but he cleaned it and made it functional. Defendant told the sergeant that he would move the gun around the home and hide it in different places from time to time. Defendant identified the firearm in a photograph, and signed and dated the photograph.

¶ 11 Sergeant Cronin also testified that defendant admitted that the narcotics belonged to him. Defendant told him that he usually bought narcotics from an individual called Kadafi. Defendant would pay $300 for half an ounce, and then resell it for $400. Defendant stated that he could probably make more money if he sold the drugs on the street corner, but he wanted to limit his exposure and sold in smaller amounts. Defendant said he sometimes had his wife transport the drugs because he thought the police would be less suspicious of a woman.

¶ 12 Assistant State's Attorney (ASA) Daniel Griffin testified that he was employed with the Cook County State's Attorney's office. On June 23, 2010, he received an assignment to interview individuals at the Homan Square police station. He interviewed defendant in the presence of Sergeant Cronin and another officer. ASA Griffin stated that he informed defendant of his *Miranda* rights and defendant acknowledged that he understood his rights.

¶ 13 ASA Griffin showed defendant the photograph of the recovered handgun. Defendant acknowledged his signature on the photograph and admitted the handgun belonged to him. Defendant told the ASA that he bought the gun for "$50 off the street from an individual by the name of either Johnny or Pookie." Defendant said the gun was rusty, but he cleaned it. Defendant stated that he bought the gun for protection after a fight and that he moved it around the house.

¶ 14 Defendant also admitted to ASA Griffin that the narcotics recovered from the house belonged to him. ASA Griffin's testimony recounting defendant's statements about the narcotics

was consistent with the testimony of Sergeant Cronin. After the conversation, ASA Griffin asked defendant if he was willing to memorialize his statement. Defendant declined and requested an attorney, the interview then terminated.

¶ 15 Thomas Halloran testified that he was a forensic chemist with the Illinois State Police. He stated that he analyzed the narcotics recovered in the search. After performing his tests, Halloran concluded that the contents of the bags were positive for cocaine. He also testified that one bag contained 10.3 grams of cocaine and the four small bags contained a total of 13.2 grams of cocaine.

¶ 16 The parties then entered a stipulation that defendant previously had been convicted of a felony. The State then rested. Defendant moved for a directed verdict, which the trial court denied. The defense then rested without presenting any additional evidence.

¶ 17 Following deliberations, the jury found defendant guilty of possession of a controlled substance with intent to deliver more than 15 grams, but less than 100 grams, and two counts of unlawful use of a weapon by felon for possession of the firearm and the ammunition. The trial court subsequently sentenced defendant to 10 years in prison.

¶ 18 This appeal followed.

¶ 19 On appeal, defendant argues that repeated acts of prosecutorial misconduct deprived him of a fair trial. Specifically, defendant contends that: (1) the prosecutors elicited improper and highly prejudicial gang-related testimony; (2) the prosecutors improperly bolstered the credibility of the testifying police officers and ASA; and (3) the prosecutors misled the jury by arguing several alleged facts that were never presented at trial. Further, defendant asserts that the prosecutors' pervasive misconduct constituted plain error and requires reversal. In the

alternative, defense counsel's failure to object to the misconduct constituted ineffective assistance of counsel.

¶ 20 Defendant first argues that the prosecutors elicited improper and highly prejudicial gang-related testimony which "likely led the jurors to assume that [defendant] was a gang member and that the drugs and gun were connected to gang activities, all of which had a distorting effect on the verdict." Defendant appears to contend that the trial court erred in denying his motion for a mistrial after the elicitation of the prejudicial gang-related testimony. "A mistrial should be granted where an error of such gravity has occurred that the defendant has been denied fundamental fairness such that continuation of the proceedings would defeat the ends of justice. The trial court's denial of a mistrial will not be disturbed on review absent a clear abuse of discretion." *People v. Nelson*, 235 Ill. 2d 386, 435 (2009).

¶ 21 The complained-of testimony came from Officers Vins and Cromwell. At the start of Officer Vins's testimony, the prosecutor asked the officer where he worked, Officer Vins responded that he was "employed by the Chicago police department, currently assigned to the Bureau of Organized Crime, Gang Investigations Division." Later, the prosecutor asked Officer Cromwell what his assignment was on June 23, 2010. The officer answered, "To assist the gang team with a search warrant." Later on cross-examination, defense counsel asked Officer Cromwell if defendant was in custody when the officer entered, before he entered or after he entered, the officer answered, "The search warrant, the gang team went in first. I went in behind. When I got in there, they were placing him in custody."

¶ 22 After Officer Cromwell's testimony, defense counsel moved for a mistrial based on these references to the gang unit. The trial court denied the motion, but instructed the State to instruct its witnesses not to reference the gang unit. No further references to the gang unit were made

during the trial. No instructions were given to the jury regarding the gang references in the officers' testimony.

¶ 23 The supreme court has held that "evidence indicating a defendant is a member of a gang or is involved in gang-related activity is admissible only where there is sufficient proof that membership or activity in the gang is related to the crime charged." *People v. Strain*, 194 Ill. 2d 467, 477 (2000). " 'Trial courts should exercise great care in exercising their discretion to admit gang-related testimony.' " *People v. Weston*, 2011 IL App (1st) 092432, ¶ 22 (quoting *People v. Davenport*, 301 Ill. App. 3d 143, 152 (1998)).

¶ 24 Defendant cites the decision in *People v. Roman*, 2013 IL App (1st) 110882, to support his argument that the minor references were prejudicial. According to defendant, the reviewing court in *Roman* found the State's courtroom cart with a sticker reading, "Gang Unit," to have an "unfairly prejudicial effect." *Id.* ¶ 38. Defendant asserts that similarly in the instant case the references to gangs was "limited," but the "prejudicial effect cannot be overstated where jurors are likely [to] harbor deep negative feelings toward gangs." We find defendant's reliance on *Roman* to be misplaced. As the State points out, defendant's reference in his opening brief belies the extensive gang evidence presented in *Roman*. Defendant acknowledges in his reply brief that there was additional gang-related evidence involved in the case and that the court did not base its ruling solely on the presence of a "Gang Unit" sticker on a courtroom cart. But defendant maintains that, like the minor concern of the sticker, the testimony in this case had the potential to negatively impact defendant, given the strong prejudice against gangs.

¶ 25 In *Roman*, the State presented evidence that the defendant was a member of the Latin Kings, the defendant and his codefendants were seen flashing gang symbols in the neighborhood, testimony about the significance of the defendant's gang tattoo, as well as the display of Latin

Kings gang sign and slogan in court. *Id.* ¶ 37. The *Roman* court held that it could not say beyond a reasonable doubt that this gang-related evidence did not contribute to the jury's verdict and the admission was reversible error. *Id.* The court found the gang-related evidence unnecessary to explain the motive for the homicide or explain the defendant's identification, but was used to inflame the jury's passions. *Id.*

¶ 26 After finding reversible error, the court noted that, while minor in comparison to the previously considered gang-related evidence, the defendant had requested that the "Gang Unit" label be removed from the courtroom cart, but the trial court refused. The reviewing court found the trial court's denial of this request to be "unreasonable." *Id.* ¶ 38. "Whether the case involves gang affiliation or not, fairness dictates the cart be identified with a sticker that does not transmit a potentially prejudicial message, especially when an innocuous alternative is so easy. Just as gang-related symbols and regalia are prohibited in court, so should the 'Gang Unit' sticker." *Id.*

¶ 27 We find *Roman* distinguishable on its facts. The holding in that case related to the extensive testimony about the defendant's affiliation in a gang. The single paragraph about the sticker on the courtroom cart was not considered in finding reversible error, but was dicta, noting that the removal of the sticker was an "innocuous alternative."

¶ 28 Here, the three mentions of a gang unit were harmless. "[W]hen deciding whether error is harmless, a reviewing court may (1) focus on the error to determine whether it might have contributed to the conviction; (2) examine the other properly admitted evidence to determine whether it overwhelmingly supports the conviction; or (3) determine whether the improperly admitted evidence is merely cumulative or duplicates properly admitted evidence." *People v. Becker*, 239 Ill. 2d 215, 240 (2010). The first two references were in responses to standard questions regarding the officers' employment and assignment on the date of the arrest. We point

out that the third reference was elicited by defense counsel. No testimony was elicited that defendant was a member of a gang or engaged in gang-related activity. The evidence at trial established that a firearm and bullets as well as over 23 grams of cocaine were found in defendant's house during the execution of a search warrant. Testimony from both Sergeant Cronin and ASA Griffin showed that defendant admitted to possessing both the firearm and the narcotics. Defendant told both individuals how he sold the cocaine for a profit. The brief references to the gang unit had no bearing on the significant evidence presented of defendant's guilt. Defendant has not shown how these minor references at the start of the trial prejudiced him in light of this evidence. He has cited no authority finding that references such as these at issue were significant enough to prejudice defendant such that he was entitled to a new trial. Accordingly, we find that an error in these references to be harmless.

¶ 29 Defendant also contends that the trial court failed to cure the State's error by not instructing the jury to disregard the references to a gang unit. However, at trial, defense counsel informed the court that she requested a sidebar to discuss the testimony because an objection would give the testimony "undue significance to the jury." The trial court advised the prosecutors to warn its future witnesses not to mention the gang unit, which was adhered to by the prosecutors. Defense counsel explicitly sought to limit the impact of the references by not drawing the jury's attention to the statements. Defendant cannot proceed in one manner during the trial and assert error on appeal. See *People v. Carter*, 208 Ill. 2d 309, 319 (2003) ("Under the doctrine of invited error, an accused may not request to proceed in one manner and then later contend on appeal that the course of action was in error"). Therefore, we find that the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

¶ 30 Next, we consider defendant's claims of prosecutorial misconduct. We note that there is a question of the correct standard of review for prosecutorial misconduct. In *Wheeler*, our supreme court suggested we review this issue *de novo*. *Wheeler*, 226 Ill. 2d at 121. However, *Wheeler* cited with approval *People v. Caffey*, 205 Ill. 2d 52 (2001), which suggested the standard of review is abuse of discretion (*Caffey*, 205 Ill. 2d at 128). *Wheeler*, 226 Ill. 2d at 122-23. 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). Nevertheless, we need not resolve the issue of the proper standard in this case because our review is under the plain error rule.

¶ 31 Defendant admits that he did not object at trial to all of these instances of misconduct or raise the majority of them in a posttrial motion, but asks this court to review the issue under the plain error rule. To preserve an issue for review, defendant must object both at trial and in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Failure to do so operates as a forfeiture as to that issue on appeal. *People v. Ward*, 154 Ill. 2d 272, 293 (1992). Supreme Court Rule 615(a) provides that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). The plain error rule "allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)

(citing *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005)). However, the plain error rule "is not 'a general saving clause preserving for review all errors affecting substantial rights whether or not they have been brought to the attention of the trial court.' " *Herron*, 215 Ill. 2d at 177 (quoting *People v. Precup*, 73 Ill. 2d 7, 16 (1978)). Rather, the plain error rule is a narrow and limited exception to the general rules of forfeiture. *Id*.

¶ 32 Defendant carries the burden of persuasion under both prongs of the plain error rule. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). Defendant asserts that this first alleged error would qualify as a plain error under both prongs. However, "[t]he first step of plain-error review is to determine whether any error occurred." *Lewis*, 234 Ill. 2d at 43.

¶ 33 Defendant contends that the prosecutors improperly bolstered the credibility of the testifying police officers and ASA. Specifically, defendant asserts that the prosecutors improperly "urged the jury to believe that an acquittal would require a finding that the testifying officers and [ASA] were all lying," and vouched for the credibility of the State's witnesses. The State responds that the prosecutors' opening and rebuttal closing arguments properly discussed the law, asked the jurors to draw reasonable inferences from the evidence, and were a response to defendant's closing argument.

¶ 34 Generally, a prosecutor is given wide latitude in closing arguments, although his or her comments must be based on the facts in evidence or upon reasonable inferences drawn therefrom. *People v. Page*, 156 Ill. 2d 258, 276 (1993). "The prosecutor has the right to comment on the evidence and to draw all legitimate inferences deducible therefrom, even if they are unfavorable to the defendant." *People v. Simms*, 192 Ill. 2d 348, 396 (2000). "Whether a prosecutor's comments or arguments constitute prejudicial error is evaluated according to the language used, its relation to the evidence, and the effect of the argument on the defendant's right

to a fair and impartial trial." *Id*. "In reviewing comments made at closing arguments, this court asks whether or not the comments engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from them." *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007). Stated another way, "[p]rosecutorial misconduct warrants reversal only if it 'caused substantial prejudice to the defendant, taking into account the content and context of the comment[s], its relationship to the evidence, and its effect on the defendant's right to a fair and impartial trial.' " *People v. Love*, 377 Ill. App. 3d 306, 313 (2007) (quoting *People v. Johnson*, 208 Ill. 2d 53, 115 (2004)). "If the jury could have reached a contrary verdict had the improper remarks not been made, or the reviewing court cannot say that the prosecutor's improper remarks did not contribute to the defendant's conviction, a new trial should be granted." *Wheeler*, 226 Ill. 2d at 123. "The trial court may cure errors by giving the jury proper instructions on the law to be applied; informing the jury that arguments are not themselves evidence and must be disregarded if not supported by the evidence at trial; or sustaining the defendant's objections and instructing the jury to disregard the inappropriate remark." *Simms*, 192 Ill. 2d at 396-97.

¶ 35 Defendant first argues that the prosecutors improperly told the jury that a finding of not guilty would require a finding that the State's witnesses lied about defendant's statements. Defendant points to the following comments made by the prosecutor in the rebuttal argument.

> "Why would Dan Griffin, the state's attorney, or Sergeant Cronin make that story up? They are going to make up a crazy story for no reason whatsoever? Or did defendant tell them that?

> Which one is it? That Dan Griffin is going to lie and make up a story, or did he just tell you what the defendant told him in that interview room that day? Which makes more sense?"

¶ 36 However, the State responds that these statements were in response to arguments made by defense counsel. "[D]uring rebuttal, prosecutors are entitled to respond to comments made by the defendant 'which clearly invite a response.' " *People v. Ramos,* 396 Ill. App. 3d 869, 875 (2009) (quoting *People v. Kliner*, 185 Ill. 2d 81, 154 (1998)). " '[W]here the complained-of remarks are in response to opposing counsel's own statements contradicting the credibility of a witness, there is no prejudicial error.' " *People v. Love*, 377 Ill. App. 3d 306, 313 (2007) (quoting *People v. Carson*, 238 Ill. App. 3d 457, 468 (1992)). Rebuttal argument must be considered in context of the entire closing argument of both the State and the defendant. *Kliner*, 185 Ill. 2d at 154.

¶ 37 During closing argument, defense counsel argued:

> "You get to use everything you know, all your experiences in life, all your ability to decide is someone telling the truth, are they telling me the whole truth, are they making things up now, are they trying to make it better? Those are all questions that you get to ask about who are these people, does this make sense.
>
> It really doesn't. Their whole case rests on this statement that was supposedly made by Ted Griffin. This is not recorded. It is not videotaped, and Officer Cronin testified that they can certainly do that. They actually moved rooms because there is

electronic things. [*Sic*.] He made the choice to start an interview and not start taping anything.

No proof that you can hold in your hands or look at or listen to to say the statement even got made. But they have every incentive in the world to tell you that that statement got made because the other evidence is simply not good enough. There is no fingerprints. [*Sic*.]

There is nothing on there that says on Ted Griffin's gun – they want to make that he is a drug dealer and this is where he does his business. Ted Griffin's name is not put on a label on that scale. None of this physical evidence sitting here on this table ties itself to Ted Griffin. So the cops have to tell you that he made the statements because otherwise it doesn't fit.

I think if you listen to what they say the statement is, it doesn't make that much sense. They say that he said that he gets a half ounce and sells a half ounce. It doesn't say he used any of this packaging material.

***

Simple and straightforward; no, ladies and gentlemen. This evidence does not add up. It doesn't make it true just because they said it. They can say he is a drug dealer and these are drug dealer things. But what they have to prove is that on June 23, 2010, Ted Griffin was in possession of the drugs and the firearm. On that

day, that specific day, that those were his, and there is no proof that he even knew it was there."

¶ 38 In rebuttal, the prosecutor made the following response to defense counsel's argument.

"They interview Ted Griffin and ask him about the weapon. What did he say? Yes, that's my gun, that's my Derringer. He gives them a story about – he tells them why he has the gun. That he got it for protection, that it's his, and that he moves it around the house to different locations.

Why would Dan Griffin, the state's attorney, or Sergeant Cronin make that story up? They are going to make up a crazy story for no reason whatsoever? Or did defendant tell them that?

Which one is it? That Dan Griffin is going to lie and make up a story, or did he just tell you what the defendant told him in that interview room that day? Which makes more sense?

Defense said we have no idea whose gun that is. Really? The defendant signed a picture of his gun and told the state's attorney that's my gun. I bought it for $50 from someone named Pookie or Johnny, and it was for protection.

Is Dan Griffin going to make up these names, Pookie and Johnny, no. That's how you know he is telling the truth. Because it is in the details.

The defendant gave very specific details about the ownership of the gun, where it came from, and why he had it, and

> he told it consistently twice. To Sergeant Cronin and told it again to Assistant State's Attorney Dan Griffin.
>
> Same thing about the narcotics. Well whose are these? How do we know whose these are? Well, the guy who is home who lives at this residence when these are recovered told them whose narcotics they were. They are his.
>
> And he explained the process. Where he got them, from a guy named Kadafi. How much he bought them for, how he resells them to make money, that he tries to limit his liability the manner he goes about selling them even though it probable costs him some money. Again, he tells that exact story not once but twice to two different people, and that is how you know it is true."

¶ 39 After viewing the complained-of comments in context of both the State's and defendant's closing arguments, we find no error. The Illinois Supreme Court has drawn "a distinction between situations where a prosecutor permissibly argues that a jury would have to believe the State's witnesses were lying in order *to believe* the defendant's version of events and where a prosecutor improperly argues that a jury would have to believe the State's witnesses were lying in order *to acquit* defendant." (Emphasis in original.) *People v. Banks*, 237 Ill. 2d 154, 185 (2010) (citing *People v. Coleman*, 158 Ill. 2d 319, 346 (1994)); see also *People v. Temple*, 2014 IL App (1st) 111653, ¶ 71. However, the comments in the case do not fall into either category.

¶ 40 Defense counsel's argument asserted that there was no physical evidence and no proof that defendant made the statements to Sergeant Cronin and ASA Griffin. Counsel argued that the police and ASA had an "incentive" to testify that defendant made the statements because the

evidence did not "fit" otherwise. The prosecutor was entitled to respond to these comments suggesting that Sergeant Cronin and ASA Griffin lied in their testimony about defendant's statements. The prosecutor argued in rebuttal about the evidence found at defendant's house and the details in the statements given by defendant to support its burden of proof in the case.

¶ 41 Further, we are not persuaded by defendant's focus on the phrase, "Which one is it?" as an argument that the jury had to find the State's witnesses were lying in order to acquit defendant. When the comments are viewed in context, it is clear the prosecutor did not argue that the jury had to find that the State's witnesses were lying in order to find defendant not guilty. The prosecutor was responding to defense counsel's argument by asking the jury to consider which alternative made more sense, that ASA Griffin falsely testified that defendant made the statements about the firearm and the narcotics, or that defendant admitted possession to ASA Griffin. The prosecutor was not framing the case in such a way as to imply to the jurors that they had to find the State's witnesses were lying in order to find defendant not guilty. We find these comments were a proper response to defense counsel's argument, and there was no error.

¶ 42 Defendant also argues that the prosecutor improperly vouched for the credibility of the officers and the ASA. Specifically, defendant points to comments in rebuttal: (1) "Officer Cromwell testified credibly. He testified credibly bullets recovered [*sic*] in the cabinet;" (2) "all the officers testified credibly and consistently;" and (3) "That's how you know [ASA Griffin] is telling the truth."

¶ 43 "It 'is well established that a prosecutor may not argue that a witness is more credible because of his status as a police officer.' " *People v. Gorosteata,* 374 Ill. App. 3d 203, 219 (2007) (quoting *People v. Fields,* 258 Ill. App. 3d 912, 921 (1994)). However, the credibility of

a witness is a proper subject for closing arguments if it is based on the evidence or inferences therefrom. *Gorosteata*, 374 Ill. App. 3d at 223.

¶ 44 We find no error in the comments regarding the witnesses' credibility. It was proper for the prosecutor to argue that the State's witnesses were credible. These comments did not ask the jury to find them credible based on their position as police officers or an ASA. Rather, the prosecutor tied the comments about credibility into the evidence presented in the case, such as, the recovery of the bullets in the kitchen cabinet and Officer Cromwell's testimony, and ASA Griffin's testimony regarding the details of defendant's statements to him. The prosecutor properly discussed the credibility of the witnesses in light of the evidence that supports their respective testimony. Moreover, the trial court instructed the jury that credibility determinations were for the jury to decide as well as the weight to be given to the testimony. We conclude the statements were fair comments on the evidence at trial.

¶ 45 Next, defendant asserts that the prosecutors misled the jury by arguing several alleged facts that were never presented at trial. "During closing argument, the prosecutor may properly comment on the evidence presented or reasonable inferences drawn from that evidence, respond to comments made by defense counsel which clearly invite response, and comment on the credibility of witnesses." *People v. McGee*, 2015 IL App (1st) 130367, ¶ 56. "However, it is improper for a prosecutor to argue inferences or facts not based upon the evidence in the record." *Id.* (citing *People v. Johnson*, 208 Ill. 2d 53, 115 (2003)).

¶ 46 Defendant first contends that the prosecutor improperly argued that defendant was discovered sleeping in the front room. During the initial closing argument, the prosecutor stated,

> "The real question is how do you know that that's his stuff? Well, it is easy. He was there sleeping in the front room when the police got there."

¶ 47 Defendant argues that this comment has no basis in the testimony presented at trial and implied to the jury that defendant had been sleeping on the couch, directly on top of the drugs recovered there. Defendant also claims that this statement led the jury to believe that defendant lived at the house and exercised control over the front room.

¶ 48 Sergeant Cronin testified at trial that when he initially entered the house he located two individuals in the front room and secured those individuals. He identified defendant as one of those individuals. While Sergeant Cronin did not state that defendant was asleep in the front room, his testimony placed defendant in the front room at the time of the officers' entry into the house. The officers executed the search warrant shortly after 6 a.m. The prosecutor may have inferred that defendant was sleeping at that early hour and testimony placed defendant in the front room. We find any misstatement that defendant was sleeping in the front room to be harmless under these circumstances.

¶ 49 Further, we reject defendant's contention that this comment improperly suggested that he lived at the house and had control over it. It is undisputed that defendant was found inside the house at the time the search warrant was executed. Sergeant Cronin testified that he observed a gas bill addressed to defendant at that location, which was recovered and presented at trial as evidence of defendant's residence.

¶ 50 Defendant also claims that the prosecutor improperly argued that he was the father of the children found in the house, but no evidence was presented to support this inference. In rebuttal, the prosecutor made the following statement.

> "What is the defense, that Ted Griffin doesn't live there? He just happens to be in a house that has mail addressed to him at that location with his wife and children, but he doesn't live there, and someone else is controlling these items? That is ridiculous, completely ridiculous."

¶ 51 We find no error in this comment. There was evidence presented that seven children were sleeping in bedrooms in the house at the time the search warrant was executed. The only adults present were defendant and his wife. It is a reasonable inference that the children sleeping the home were the children of defendant and his wife. Moreover, the comment does not explicitly discuss the parentage of the children, such as whether they were defendant's biological children. The comment observed that at the time of the search defendant was in a home with his wife and children. Defendant's relationship with the children had no relevance to the charges pending against defendant at trial.

¶ 52 Defendant finally contends the prosecutor "falsely indicated to the jury that they should treat the State's witnesses' testimony about [defendant's] alleged statements as if such testimony were no different from an in-court admission from [defendant] given under oath." The complained-of comments were in initial closing argument.

> "The evidence is that while he didn't have it in his hand, he absolutely possessed it. He exercised control over it. In fact, not only did he personally exercise control over it, especially the gun which he told you he moved from place to place and the narcotics which he told you whom he purchased it [*sic*] and whom he sold it

> to, he exercised control of it through another by having his wife deliver the narcotics for him."

¶ 53 Defendant focuses on the use of the phrase "he told you" twice during these statements because defendant did not testify, nor did he memorialize his statement. According to defendant, the prosecutor's claim that defendant "told" the jury "any such thing was blatantly false." Defendant also asserts that this comment was a misstatement of law because its effect was to tell the jury that defendant's statements to Sergeant Cronin and ASA Griffin should be treated the same as in-court testimony.

¶ 54 In response, the State details the repeated references in the initial and rebuttal closing argument to defendant's statements to Sergeant Cronin and ASA Griffin. The State argues that the entirety of the closing arguments shows that the prosecutor never equated defendant's statements to in-court testimony. Further, the State points out that the trial court properly instructed the jury on the law.

¶ 55 We agree with the State. When we consider these comments in the context of the entire closing arguments, we find no error. These comments did not suggest to the jury that defendant's statements to Sergeant Cronin and ASA Griffin was to be considered with the same weight as in-court testimony. The prosecutors consistently referred to defendant's admissions as statements given first to Sergeant Cronin, and later to ASA Griffin.

¶ 56 Further, even if the prosecutor erred in stating "he told you," any such error was cured by the trial court's instructions. As we previously observed, "[t]he trial court may cure errors by giving the jury proper instructions on the law to be applied; informing the jury that arguments are not themselves evidence and must be disregarded if not supported by the evidence at trial; or sustaining the defendant's objections and instructing the jury to disregard the inappropriate

remark." *Simms*, 192 Ill. 2d at 396-97. Here, the trial court gave the following instructions to the jury.

> "The evidence which you should consider consists only of the testimony of the witnesses and the exhibits which the Court has received. You should consider all the evidence in the light of your own observations and the experiences in life.
>
> ***
>
> Only you are the judges of the believability of the witnesses and of the weight to be given to the testimony of each of them. In considering the testimony of any witness, you may take into account his ability and opportunity to observe; his memory; his manner while testifying; any interest, bias, or prejudice he may have; and the reasonableness of his testimony considered in the light of all the evidence in the case.
>
> Opening statements are made by the attorneys to acquaint you with the facts they expect to prove. Closing arguments are made by the attorneys to discuss the facts and the circumstances in the case and should be confined to the evidence and to the reasonable inferences to be drawn from the evidence.
>
> Neither opening statements nor closing arguments are evidence. Any statement or argument made by the attorneys which is not based upon the evidence should be disregarded.
>
> ***

> You have before you evidence that the defendant made statements relating to the offenses charged in the indictment. It is for you to determine whether the defendant made the statements and if so, what weight should be given to the statements. In determining the weight to be given to the statement, you should consider all the circumstances under which it was made."

¶ 57 These instructions sufficiently cured any suggestion that the prosecutor's use of the phrase "he told you" was to imply that defendant's statements could be considered the same as in-court testimony. These instructions informed the jury that closing arguments were not evidence and any argument not supported by evidence should be disregarded, as well as its job to determine whether defendant made the statements to Sergeant Cronin and ASA Griffin. Accordingly, any error was remedied by the trial court's instructions to the jury.

¶ 58 Defendant argues that the "pervasive" misconduct constituted plain error and requires reversal. We disagree that there was pervasive misconduct in this case. In addition, we have found no errors in any of the unpreserved comments. Because there is no error, there can be no plain error. See *Lewis*, 234 Ill. 2d at 43.

¶ 59 In the alternative, defendant contends that his trial counsel was ineffective for failing to object to the prosecutors' improper closing arguments. Claims of ineffective assistance of counsel are resolved under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court delineated a two-part test to use when evaluating whether a defendant was denied the effective assistance of counsel in violation of the sixth amendment. Under *Strickland*, a defendant must demonstrate that counsel's performance was deficient and that such deficient performance substantially prejudiced defendant. *Strickland*, 466

U.S. at 687. To demonstrate performance deficiency, a defendant must establish that counsel's performance fell below an objective standard of reasonableness. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). In evaluating sufficient prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. If a case may be disposed of on the ground of lack of sufficient prejudice, that course should be taken, and the court need not ever consider the quality of the attorney's performance. *Strickland*, 466 U.S. at 697.

¶ 60 Defendant's claim of ineffective assistance of trial counsel must fail. Because we have already concluded that no errors occurred, defendant cannot show that there is a reasonable probability that the result of the proceeding would have been different. Therefore, defendant cannot establish the requisite prejudice under *Strickland* to sustain a claim of ineffective assistance.

¶ 61 Based on the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 62 Affirmed.