

No. 1-14-1386

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 13 CR 17218
)	
RICHARD COLLINS,)	Honorable
)	Michael McHale,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Pierce and Justice Simon concurred in the judgment.

O R D E R

¶ 1 *Held:* We affirm defendant's conviction for possession of heroin with intent to deliver where the prosecutor's remarks during closing argument and rebuttal argument were not improper. *Mittimus* corrected.

¶ 2 Following a jury trial, defendant Richard Collins was convicted of possession of heroin with intent to deliver and sentenced to five years' imprisonment. On appeal, Collins contends that he was denied a fair trial where no evidence supported the prosecutor's remarks during closing argument and rebuttal argument that Collins hid proceeds from a drug sale because he

knew that police were watching him. Alternatively, Collins requests that his mittimus be corrected to reflect the offense of which he was convicted. We affirm Collins's conviction and modify the mittimus to reflect a conviction of possession of heroin with intent to deliver. The prosecutor's remarks during closing argument and rebuttal argument were fair comment on the evidence at trial and defense counsel's arguments.

¶ 3 Background

¶ 4 Collins was charged with one count of possession with intent to deliver "1 gram or more but less than 15 grams, and more than 3 grams" of heroin. At trial, Officer Gallagher testified that at about midnight on August 14, 2013, he went to an "elevated position" on the 4100 block of West Wilcox, Chicago. Using binoculars, with nothing obscuring his view, Gallagher saw Collins near a streetlight some 150 feet away. Collins wore a gray sweatshirt with the word "Nike" across the chest in black writing, dark blue jeans, and white gym shoes. Although it was dark, Gallagher could see Collins's face "clearly" and identified him at trial. On two occasions, three or four minutes apart, Gallagher observed two men separately speak with Collins and give him money. Both times, Collins put the money in his left jeans pocket and jogged to a vacant lot five houses away. Each time Collins entered the lot, he retrieved a thumbnail-sized item from beneath a brick, and gave the items to the men, who walked away. Gallagher did not confront either man or request other units to apprehend them.

¶ 5 Gallagher radioed his partner, Officer Urbanski, then left the point of surveillance, and "lost sight" of Collins. Gallagher and Urbanski met two to three minutes later and circled the block in an unmarked squad car. Within a minute, they encountered Collins at 4140 West Wilcox and placed him in handcuffs. Gallagher did not see Collins drop or throw anything. Gallagher

went to the vacant lot and recovered from beneath the brick, eight purple tinted mini Ziploc bags wrapped in a black rubber band, each containing white powder. At the police station, Urbanski inventoried the items and performed a custodial search of Collins. Gallagher was not present for the search, and was not informed of any money, drugs, or weapons recovered.

¶ 6 Officer Urbanski testified that he left Gallagher on the 4100 block of Adams at around midnight on August 14, 2013. Ten to fifteen minutes later, Gallagher radioed Urbanski regarding a “person selling suspect narcotics,” wearing a gray sweatshirt with a black Nike logo and blue jeans. Urbanski met Gallagher one or two minutes later. They drove to the 4100 block of Wilcox and Urbanski saw Collins, who matched the description given by Gallagher. Urbanski identified Collins in court. The officers handcuffed Collins and Urbanski patted him down, but did not see him throw or drop anything. Urbanski did not see Collins reach into his pockets during the drive. At the station, Urbanski inventoried the suspect narcotics and performed a custodial search of Collins, but did not find money, drugs, or a weapon on his person, and did not find money or drugs in the police car.

¶ 7 The State entered a stipulation between the parties that if called to testify, Jaime Hess, a forensic chemist at the Illinois State Police Crime Lab, would testify that the white powder in the eight baggies tested positive for heroin, and that the total weight of the items was 3.8 grams.

¶ 8 The State rested and the court denied Collins’s motion for directed finding. The defense also rested. Afterwards, the court instructed the jury that closing arguments are “not evidence,” and that statements “not based on the evidence or a reasonable inference to be drawn from the evidence” should be disregarded.

¶ 9 During the State’s closing argument, the prosecutor reviewed Gallagher and Urbanski’s testimony and argued the evidence showed that Collins was selling drugs on the morning he was arrested. The prosecutor stated:

“[Defendant] put the money in his pocket, but that money isn’t stored in a cash register like at Target. The defendant puts it in his pocket but he knows if the police are coming, I don’t want the drugs on me. I don’t want the money on me.”

Defense counsel objected to this remark, but the court overruled the objection.

¶ 10 During the defense’s closing argument, defense counsel noted that Gallagher testified to seeing a man place money in his pocket, but did not see him reach into the pocket to take anything out. According to defense counsel, there was nowhere to hide the money where other people on the street would not have taken it, and therefore, the money must have remained “on the person that’s selling the drugs.” As the police officers did not find Collins with money on his person, counsel submitted that the officers “grabbed the wrong guy.”

¶ 11 During rebuttal argument, the prosecutor stated:

“Counsel is talking about the money, show me the money, show me the money. I showed you the drugs. That’s the important part here. The defendant wants to limit his exposure, might be the best term. I’m going to put something over here so they don’t see me with it; and then after my deals, I’m going to put something over here because now I’m just milling about in the middle of the street, just hanging out, looking to talk to people, wants to limit his exposure.”

¶ 12 After closing arguments, the court again instructed the jury that arguments are not evidence and that “any statement or argument made by the attorneys which is not based on the evidence should be disregarded.”

¶ 13 The jury found Collins guilty of possession of a controlled substance with intent to deliver. Collins filed a motion to vacate the verdict and enter a finding of not guilty, or, in the alternative, for a new trial. The written motion cited two pages from the trial transcript and alleged the State argued without evidentiary support that “defendant knew certain things, i.e., that the defendant knew if the police were coming he did not want drugs on his person.” The court denied Collins’s motion, finding that “the State’s argument [was] based on reasonable inferences from the testimony.” The court sentenced Collins to five years’ imprisonment.

¶ 14 Analysis

¶ 15 Collins first contends that he was denied a fair trial where no evidence supported the prosecutor’s remarks during closing argument and rebuttal argument that he hid proceeds from a drug sale because he knew that police were watching him. As the officers failed to investigate the whereabouts of the money involved in the transactions Gallagher had observed, Collins argues that it was unreasonable for the prosecutor to argue that Collins had hidden it. According to Collins, these remarks undermined his theory of the case, namely, that the officers mistakenly arrested him after observing a different individual engage in drug transactions, and caused prejudice where Gallagher’s identification testimony was unsatisfactory and no fingerprints or inculpatory statements connected Collins to the drugs. Collins acknowledges objecting only to the prosecutor’s remarks during closing argument and not during rebuttal argument, but contends that the trial court’s decision to overrule the first objection demonstrated

that further objections would be futile. Alternatively, Collins argues that the prosecutor's remarks during rebuttal argument may be reviewed as plain error because the evidence at trial was closely balanced.

¶ 16 In response, the State contends that defendant forfeited his challenge to both the prosecutor's closing argument and rebuttal argument, as Collins did not object during rebuttal and, in his posttrial motion, did not specifically mention the remarks he now raises on appeal. Additionally, the State argues that plain-error review is improper, as the prosecutor never argued that Collins "hid the money because he knew the police were watching him," but rather, properly responded to defense counsel's claim that Collins could not be found guilty because he did not possess money when he was arrested. Even if the challenged remarks were improper, the State argues that Collins was not prejudiced where the trial court admonished the jury and, moreover, Collins would not have been acquitted but for the challenged remarks.

¶ 17 Well-established precedent states that "[t]o 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." *People v. Wheeler*, 226 Ill. 2d 92, 122 (2007). A reviewing court considers unpreserved error under the plain-error doctrine when either the evidence at trial was so closely balanced that the guilty verdict may have resulted from the error, or the error was so serious that it deprived the defendant of a fair trial. *People v. McLaurin*, 235 Ill. 2d 478, 489 (2009). Regardless of whether an issue has been preserved or was forfeited but reviewable as plain error, the preliminary question in either analysis is whether error occurred. *People v. Eppinger*, 2013 IL 114121, ¶ 19 (absent error, there can be no plain error). For the following reasons, we find no error.

¶ 18 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 we review this issue *de novo*. Nonetheless, *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. We need not resolve the issue of the proper standard as the result would be the same under either standard. See *People v. Alvidrez*, 2014 IL App (1st) 121740, ¶ 26 (acknowledging that standard of review is unclear).

¶ 19 Prosecutors are afforded wide latitude in closing arguments. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). A prosecutor “may comment on the evidence and any fair, reasonable inference it yields,” even if the inferences “reflect negatively on the defendant.” *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). While prosecutors “may not argue assumptions or facts not contained in the record,” closing arguments must be viewed in their entirety and challenged remarks must be considered in context. *Glasper*, 234 Ill. 2d at 204. A prosecutor’s remarks “will not be held improper if they were provoked or invited by the defense counsel’s argument.” *Id.*

¶ 20 The prosecutor’s remarks during closing argument and rebuttal argument were fair comment on the evidence at trial and defense counsel’s arguments. Gallagher testified that he saw two men give Collins money, which he placed in his pocket before retrieving and tendering items from beneath a brick in a vacant lot. Afterwards, Gallagher broke surveillance and lost sight of Collins for several minutes. Collins did not have money on his person when he was arrested, but Gallagher recovered eight bags, stipulated to contain heroin, from beneath the brick Collins handled. Based on this evidence, the prosecutor reasonably argued that Collins had engaged in drug transactions and would not want police to find him with money or drugs. While

the prosecutor did not expressly argue that Collins had hidden the proceeds, such an inference is not improper in view of Gallagher's uncontroverted testimony. See *People v. Johnson*, 114 Ill. 2d 170, 201 (1986) (where evidence of guilt overwhelming, prosecutor properly raised the "fair inference" that "missing items associated with the offense were not recovered because defendant had disposed of them").

¶ 21 As to the prosecutor's rebuttal, it properly responded to defense counsel's closing argument. Defense counsel argued that the officers "grabbed the wrong guy" because proceeds from the drug transactions must have remained with the seller and Collins had no money when he was arrested. In rebuttal, the prosecutor submitted that the absence of money in Collins's possession did not establish his innocence, as Collins may have sought to "limit his exposure" by "put[ting] something over here so they don't see me with it; and then after [the] deals, *** put[ting] something over here." This remark suggested an alternate inference based on the same evidence defense counsel had discussed, and was not improper. *People v. McInnis*, 88 Ill. App. 3d 555, 574-75 (1980) (defendant's contention that "different, reasonable inference might be drawn from the same evidence does not make the inference which the State chose to argue improper or impossible"). Consequently, the prosecutor's remarks during closing argument and rebuttal argument were not improper and no error occurred.

¶ 22 Next, Collins contends, and the State correctly concedes, that the mittimus must be corrected to properly reflect the offense of which Collins was convicted. The record shows that Collins was charged and convicted of one count of possession of a controlled substance with intent to deliver in violation of section 401(c)(1) of the Illinois Controlled Substances Act (720 ILCS 570/401(c)(1) (West 2014)). The mittimus, however, incorrectly states that Collins was

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convicted of “MFG/DEL 1<15 GR HEROIN/ANALOG.” “Where the mittimus incorrectly reflects the jury’s verdict, the proper remedy is to amend the order to conform to the judgment entered by the court.” *People v. Pryor*, 372 Ill. App. 3d 422, 438 (2007). Remand is unnecessary, as we may directly order the clerk of the circuit court to correct the mittimus under Supreme Court Rule 615(b) (1) (eff. Jan. 1, 1967). *People v. McGee*, 2015 IL App (1st) 130367, ¶ 82. Accordingly, the mittimus shall be corrected to reflect Collins’s conviction of one count of possession of heroin with intent to deliver.

¶ 23 Affirmed as modified.