

2017 IL App (1st) 141589-U

No. 1-14-1589

Order filed June 20, 2017

Second Division

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 10 CR 17444
	)	
DEMARIO THOMAS,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge presiding.

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JUSTICE MASON delivered the judgment of the court.  
Presiding Justice Hyman and Justice Neville concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant's convictions reversed and matter remanded for a new trial where the State committed plain error in its opening statement by its repeated characterization of defendant as a "criminal."

¶ 2 Defendant Demario Thomas was convicted of three counts of attempted first-degree murder, three counts of aggravated battery with a firearm and unlawful use of a weapon by a felon. After the trial court merged Thomas's aggravated battery convictions into his attempted murder convictions, it sentenced him to 26 years' imprisonment for each attempted murder

conviction and 7 years' imprisonment for unlawful use of a weapon by a felon, all to be served concurrently. On appeal, Thomas contends that: (1) his trial counsel was ineffective for failing to request jury instructions on self-defense and the lesser-included offense of reckless conduct; (2) the State's comments during its opening statement were improper; and (3) the trial court denied him a fair sentencing hearing. For the reasons that follow, we reverse and remand for a new trial.

¶ 3 We have previously detailed the evidence in this case in our opinion involving Thomas's co-defendant, Antonio Jones:

"[O]n the night of September 1, 2010, a team of 14 to 16 police officers was executing a search warrant at 7701 South Hoyne Avenue in Chicago. The officers parked a short distance away from the home in marked and unmarked cars. While most officers were in plainclothes, they all wore raid vests emblazoned with "Chicago Police Department." The officers approached the back of the home in a single file line, with Officer James Gochee leading the group. Officer Gochee breached the back fence with a battering ram, and the officers then walked approximately 30 feet to the back door. At least three of the officers yelled "Chicago police, search warrant" as they stood outside the door. Officer Gochee banged on the door three times with a battering ram when a gunshot rang out and the glass security door exploded outwards. Officer Gochee, as well as Lieutenant Glen Evans and Officer Michael St. Clair were injured.

The remaining officers retreated and surrounded the perimeter. The officers eventually made phone contact with one of the occupants of the house and instructed those inside to exit. When the occupants complied, the officers took them into custody and commenced a search of the house, during which they recovered weapons, including an "SKS assault rifle," as well as heroin and marijuana.

Inside the house were Jones, Thomas, Paris Banks (Jones's cousin), Leslie Kitchen (Jones's girlfriend at the time), and Jones's grandparents, who owned the house. Both Kitchen and Banks testified to the events of that night, although their trial testimony differed from their statements to police taken immediately following the shooting and their testimony before the grand jury.

In pretrial statements, Kitchen and Banks stated that on the night of August 31, 2010, they were in the back room of the residence with Jones and Thomas watching TV and smoking marijuana. At some point during the evening, Banks brought a gun into the room; according to Banks, he did this at Jones's direction. Around midnight, there was a "boom" at the back door, and it sounded to Kitchen like someone was breaking into the back gate. Kitchen went to the kitchen and looked out of the window, at which point she heard banging at the back door and ran with Jones to the bedroom where Jones's grandparents were sleeping.

Banks told the assistant State's Attorney and the grand jury that as Jones was running to his grandparents' room, he ordered Thomas to "find out who the f\*\*\* that is." Thomas

grabbed the gun, looked out the kitchen window and informed Jones that it was the police. In response, Jones said “buck [or bust or f\*\*\*] that bitch,” meaning shoot at them. Kitchen also told the grand jury that she heard Jones give that order. Thomas pulled the trigger, but the gun would not fire. He tried a second time, pointing the gun at the back door, and the gun went off. Thomas and Banks then joined Jones and Kitchen in Jones’s grandparents’ room. Initially, Jones asked Kitchen to take the gun to the basement, but when Kitchen refused, Jones hid the gun in his grandparents’ closet, over his grandmother’s protests. Shortly thereafter, the police called and the group exited the house at the officers’ direction.

At trial, Kitchen admitted to being present at the house on the night of August 31, 2010, and further testified that before she ran to Jones’s grandparent’s room, she saw Thomas standing with a gun in his hand aimed at the back door. Thomas pulled the trigger, but the gun did not fire. It was not until Kitchen had entered Jones’s grandparents’ room, where Jones and his grandparents were “panicking,” that she heard a gunshot. Kitchen denied that she heard Jones tell Thomas to shoot. She claimed that her earlier testimony to the contrary was prompted by the police.

At trial, Banks, too, denied that a conversation between Jones and Thomas took place before he heard a gunshot. He did, however, admit that Jones asked him to retrieve a gun from under a bed earlier in the evening. *People v. Jones*. 2016 IL App (1st) 141008, ¶¶ 7-13.

¶ 4 Thomas and Jones were tried simultaneously with separate juries. Thomas was also tried by a simultaneous bench trial on the count of unlawful use of a weapon by a felon. The State made one combined opening statement for Thomas and Jones. The State began its opening statement by asserting “[t]he greatest danger that a police officer can face during his tour of duty is a gun and a criminal who’s willing to use that gun to shoot and kill that police officer. Ladies and gentlemen, each of your juries has sitting before you one such criminal. Defendant Jones and defendant Thomas.” The State continued: “[The police] learned that behind that door were two cold-blooded criminals who had reasons to keep those police out.” Jones’s defense counsel then objected to the State’s continued reference to “these defendants as criminals.” The trial court instructed both juries to “[d]isregard it—I’m ruling on your objection, [counsel]. Disregard the comment about cold, hard criminals, please. Go ahead.” Despite the sustained objection, the State continued to refer to both Thomas and Jones as criminals, later stating: “But you must

remember the criminal controls the crime scene. These two defendants were in that house for quite some time with that evidence before they ultimately came out.” And finally, the State concluded: “The law recognizes that what one criminal may not be brave enough to do alone, two criminals just might be. So it’s as if defendant Jones had his finger on that trigger as did defendant Thomas. Criminals work together and they are equally responsible for crimes they commit.”

¶ 5 Gunshot residue tests were performed on Banks, Jones, Thomas and Kitchen, but came back negative. Additionally, no latent fingerprint impressions suitable for comparison were found on a pistol, carbine or the assault rifle recovered from the residence.

¶ 6 After the State rested, Thomas moved for a directed finding on all of the counts against him. The trial court granted his motion with respect to a count of possession of a controlled substance with intent to deliver as there was no evidence connecting Thomas to the narcotics recovered from the residence. Thomas did not present any witnesses on his behalf.

¶ 7 During closing argument, Thomas’s defense counsel intimated that Banks was responsible for the shooting and only implicated Thomas in pretrial statements as a cover for himself. In addition, counsel argued that whoever fired the weapon did so without the intent to kill and the gunshot might have been a warning shot only or even accidental.

¶ 8 The jury found Thomas guilty of three counts of attempted first-degree murder and three counts of aggravated battery with a firearm but found him not guilty of attempted first-degree murder of a peace officer and aggravated battery with a firearm of a peace officer. The jury also did not find that, during the commission of the attempted murders, Thomas personally discharged a firearm that proximately caused great bodily harm to the victims.

¶ 9 In the bench trial, the State introduced into evidence a certified copy of conviction showing that Thomas had been convicted of robbery in case number 06 CR 11942. The trial court found him guilty of unlawful use of a weapon by a felon, and he unsuccessfully moved for a new trial.

¶ 10 After the trial court merged Thomas's convictions for aggravated battery into his attempted murder convictions, it sentenced him to concurrent sentences of 26 years' imprisonment on each of those convictions and 7 years' imprisonment for unlawful use of a weapon by a felon. Thomas's motion to reconsider his sentence was denied, and this appeal followed.

¶ 11 As we did in *Jones* (2014 IL App (1st) 141008, ¶ 20), we first address the error predicated on the State's repeated references to Thomas as a "criminal" in its opening statement, as we find that issue dispositive.

¶ 12 Initially, Thomas acknowledges that he did not preserve the claim of error for review in this court, as he neither objected to the comments at trial nor raised the issue in a posttrial motion. See *People v. Leach*, 2012 IL 111534, ¶ 60. We note that when Jones' counsel objected at one point, he objected to the State's characterization of "these defendants," an objection that on its face referred to both defendants, but was not joined by Thomas's counsel. We have no reason to believe that had Thomas's counsel likewise objected, the trial court's treatment of the comment—repeating it and then instructing the jury to disregard it—would have been any different. Nevertheless, given the failure of Thomas's counsel to raise any objection, we must consider whether we may still review the issue.

¶ 13 Thomas argues that we may review the claim of error under the plain-error doctrine, which allows us to bypass a party's forfeiture if the error is clear or obvious, and either (1) "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) “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). The defendant bears the burden of persuasion on both prongs of the doctrine. *People v. Herron*, 215 Ill. 2d 167, 187 (2005). In this case, Thomas asserts that he has met his burden to establish both first and second plain error.

¶ 14 We have previously concluded in *Jones* that the State's characterization of both defendants as "criminals" in its opening statement constituted error and we adhere to that determination and its underlying reasoning here. *Jones*, 2016 IL App (1st) 141008, ¶ 24. "This argument, which did not belong in an opening statement under any circumstances, conjured a powerful image calculated to invoke an emotional response." *Id.* And like his co-defendant, the State's pejorative reference to Thomas in its opening statement was particularly prejudicial given that it was the jury's first introduction to him. *Id.*, ¶ 25.

¶ 15 It matters not that, unlike Jones, Thomas did have a prior criminal conviction. The State was simply not justified under any circumstances in labeling Thomas a criminal in its opening. Indeed, Thomas's motion to sever the armed habitual criminal and UUWF charges from the remaining charges was granted precisely because informing the jury of his prior unrelated conviction could prejudice him. Yet, the State accomplished the same result with its description of him in the jury's first opportunity to hear about the facts of the case.

¶ 16 We further find that Thomas has met his burden to establish that this error was plain error under the first prong of the doctrine, as the evidence at trial was closely balanced. The State’s case against Thomas rested on the testimony of its eyewitnesses, Banks and Kitchen, as no

physical evidence connected Thomas to firing the weapon at the officers. In Banks's pretrial statements, he stated that Thomas shot the firearm at the individuals outside. But Banks disavowed this statement at trial. Kitchen testified at trial that she observed Thomas attempt to shoot the firearm at the back door, but the weapon did not fire. Kitchen ran away from the back door, leaving only Thomas and Banks in that area. She then heard a gunshot, but never saw who shot the firearm. In pretrial statements, she stated that she observed Thomas with the firearm after hearing the gunshot, but, at trial, she testified that she did not see the firearm immediately after the shooting. This evidence must be viewed in light of the State's characterization of Thomas as a criminal at the very beginning of his trial (*People v. Belknap*, 2014 IL 117094, ¶ 50), a description evoking a powerful image calculated to incite an emotional reaction in the jury that, because Thomas was a criminal, he was responsible for charged offenses. Given that the evidence against Thomas was closely balanced, the State's improper comments threatened to tip the scales of justice against him.

¶ 17 In light of our conclusion that the State's improper comments constituted first-prong plain error, we need not address Thomas's additional argument that the State also committed second-prong plain error, except to note that, as we stated in *Jones*, "the State's improper comments were intentional," wholly improper "under any circumstances" and "misconduct [that] require[d] us to do more than merely express our disapproval." *Jones*, 2016 IL App (1st) 141008, ¶¶ 24, 28-29. Accordingly, we reverse Thomas's convictions and remand for a new trial.

¶ 18 As we have found the State's comments constituted plain error, we need not determine whether Thomas's trial counsel was ineffective for failing to object to the comments at trial and failing to include this error in a posttrial motion. See *People v. Sykes*, 2012 IL App (4th) 111110, ¶ 59. Furthermore, given that Thomas is entitled to a new trial, we need not reach his contention

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that his trial counsel was ineffective for failing to request jury instructions on self-defense and the lesser-included offense of reckless conduct. Thomas's claim that he was denied a fair sentencing hearing is also moot in light of our disposition that he is entitled to a new trial.

¶ 19 However, upon remand, Thomas's new trial should take place before a different judge for the same reasons we articulated in *Jones*, 2016 IL App (1st) 141008, ¶ 37 (trial court's comments displayed "a categorical bias against defendants [ ] who apologize to their children after committing crimes and belittled Jones's (and Thomas's) concern for their children."). We held that the comments were "unwarranted and wholly inappropriate," mandating that, upon remand, Jones's new trial should take place before a different judge. *Id.* ¶¶ 37-38. The same result is warranted in this case.

¶ 20 For these reasons, we reverse and remand for a new trial. We further direct that Thomas's new trial shall take place before a judge other than the judge who presided over his first trial.

¶ 21 Reversed and remanded with directions.