2017 IL App (1st) 143630-U

SECOND DIVISION
November 7, 2017

No. 1-14-3630

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County, Illinois.
	)	
v.	)	No. 11 CR 16531
	)	
DONTE DANGERFIELD,	)	Honorable
	)	Domenica A. Stephenson,
Defendant-Appellant.	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: In defendant's prosecution for possession of a controlled substance with intent to deliver, (i) officers could properly testify that, during narcotics surveillance mission, they believed they saw defendant engaging in narcotics transactions; (ii) officer's expert testimony regarding narcotics packaging and distribution methods was relevant and admissible; (iii) alleged improper remarks during closing argument did not warrant reversal; and (iv) trial court's failure to ascertain whether defendant agreed with jury instruction on lesser-included offense of possession did not warrant reversal where defendant was not convicted of the lesser offense.

¶ 2 Defendant Donte Dangerfield was convicted of possession of a controlled substance with intent to deliver. On appeal, he raises several contentions of trial error: (i) the trial court erred in

permitting two officers to testify that they believed they saw Dangerfield engaging in narcotics transactions; (ii) the trial court erred in permitting a third officer to offer expert testimony about the drug operation in the area where Dangerfield was arrested; (iii) the prosecutor made improper remarks during closing arguments; and (iv) when Dangerfield's counsel tendered an instruction on the lesser-included offense of possession, the trial court gave the instruction without inquiring whether Dangerfield agreed with it. Finding no error, we affirm.

¶ 3 BACKGROUND

¶ 4 On September 10, 2011, around 12:35 a.m., a team of three officers was conducting a narcotics surveillance operation on the 2700 block of West Lexington Street. Officer John O'Keefe, the primary surveillance officer, was positioned in a nearby vacant lot, watching the target location through binoculars. His partners, Sergeant Frank Ramaglia and Officer Michael Laurie, were stationed a block away.

¶ 5 O'Keefe saw Dangerfield engage in two hand-to-hand transactions. First, a woman approached Dangerfield and spoke briefly to him. Dangerfield walked down a nearby gangway. He returned 15 seconds later, accepted money from the woman, and gave her a small item. A few minutes later, a man approached Dangerfield, and a similar transaction occurred.

¶ 6 Based on his experience on narcotics surveillance missions, O'Keefe believed that Dangerfield was engaging in narcotics transactions. O'Keefe decided to move so that he could see where Dangerfield was going in the gangway. He radioed Laurie to replace him at his initial location, and, after Laurie arrived, O'Keefe took up a new surveillance position on a second-floor catwalk at 2723 West Lexington Street.

¶ 7 Laurie saw two men approach Dangerfield and speak to him. Dangerfield walked down the gangway. From his position on the catwalk, O'Keefe saw Dangerfield reach into a hole in

the wall, pull out a plastic bag, and take out two golf ball-sized items. Dangerfield then returned the bag to its hiding place, walked back to the two men, and gave each of them one of the golf ball-sized items. The two men left without paying Dangerfield. Based on Laurie's experience, Laurie believed he had just seen narcotics transactions, though there was no exchange of money.

¶ 8 Laurie and Ramaglia detained Dangerfield. O'Keefe then directed Ramaglia to come and retrieve the plastic bag from the hole in the wall. Inside the plastic bag, Ramaglia found four golf-ball sized bags, each of which contained around 25 smaller ziplock baggies with rocks of crack cocaine inside. Each of the smaller ziplock baggies was marked with a black spade logo.

¶ 9 Based on his experience in narcotics investigations, Ramaglia was admitted as an expert in the field of narcotics packaging, distribution methods, and street value. He explained that the golf-ball sized bags are referred to as "bundles," and the smaller ziplock baggies are "jabs" or "packs." Typically, a supplier will distribute bundles to a street manager, who will distribute them to pack workers. The pack workers then sell the individual jabs. Street managers also commonly sell individual jabs while distributing bundles to pack workers. When pack workers receive bundles from a street manager, they do not pay up front; instead, once they have sold the jabs, they give the street manager the proceeds, deducting a small percentage for themselves. Regarding the black spade logos on the jabs, Ramaglia explained that drug dealers take pride in their product and will typically mark their jabs with logos so that their customers know where the product comes from.

¶ 10 After Ramaglia retrieved the bags from the hole in the wall, the officers placed Dangerfield under arrest and brought him to the police station. Laurie searched Dangerfield and found $245 in cash in his jeans pocket. The parties stipulated that a forensic chemist at the Illinois State Police Crime Lab tested the contents of the bags and found 15.4 grams of cocaine.

¶ 11 Dangerfield was the sole defense witness. He testified that early in the morning of September 10, 2011, he drove to West Lexington Street to pick up a friend. He was carrying $245 in cash because he was planning to eat at a restaurant and then go to a club. After exiting the car, he stopped to chat with some friends. Suddenly, the police drove up and arrested him. They also arrested seven others, handcuffing them all to a fence, though Dangerfield was the only one taken to jail. Dangerfield had no idea why he was arrested. He denied handing drugs to anyone or taking a bag of drugs from a hole in the wall.

¶ 12 The jury found Dangerfield guilty of possession of a controlled substance with intent to deliver. Dangerfield was sentenced to six years' imprisonment.

¶ 13 ANALYSIS

¶ 14 On appeal, Dangerfield raises four contentions of trial error: (i) the trial court erred in permitting O'Keefe and Laurie to testify as to their belief that Dangerfield was engaging in narcotics transactions; (ii) the trial court erred in admitting Ramaglia's expert testimony on drug distribution practices and hierarchy; (iii) the prosecutor made various improper remarks during closing arguments; and (iv) when Dangerfield's counsel tendered an instruction on the lesser-included offense of possession, the trial court gave the instruction without first inquiring whether Dangerfield agreed with it. Dangerfield also requests correction of the mittimus to reflect the crime for which he was convicted.

¶ 15 Initially, a common thread underlying many of Dangerfield's arguments is his assertion that the evidence at trial was closely balanced. We disagree with this characterization of the evidence. O'Keefe, Laurie, and Ramaglia gave testimony that was consistent and detailed, and nothing in the events they testified to was improbable or contrary to human experience. By contrast, Dangerfield's account of events was uncorroborated. In his briefs, Dangerfield

repeatedly claims that the trial was a "credibility contest" between the officers' version of events and the version testified to by Dangerfield and Jessica McCullough, one of the friends with whom he allegedly chatted on the night of his arrest. This misstates the evidence, since McCullough did not testify at trial. Dangerfield's opening brief, without citation to the record, represented that McCullough testified at trial. The State pointed out this error in its brief, but it is inexplicably repeated in Dangerfield's reply.

¶ 16 Thus, because the State's case was strong and the evidence was not close (see *People v. Mullins*, 242 Ill. 2d 1, 25 (2011) (State's case was "strong" where officer in narcotics surveillance operation testified that he saw defendant engaging in three hand-to-hand transactions during which he exchanged an item from inside a metal fence post for cash, and a second officer retrieved narcotics from inside the fence post, even though defendant denied wrongdoing and testified to a contrary version of events)), we note that plain error review is not available to address unpreserved errors regarding those issues for which Dangerfield does not argue structural error. See *People v. Piatkowski*, 225 Ill. 2d 551, 564-65 (2007) (plain-error doctrine bypasses normal forfeiture principles when there is plain error and either the evidence is closely balanced or the error is so serious that it challenges the integrity of the judicial process).

¶ 17 O'Keefe and Laurie's Testimony

¶ 18 Dangerfield's first contention is that the trial court erred in permitting O'Keefe and Laurie to testify that they believed they saw Dangerfield selling narcotics. He argues that this constituted impermissible opinion testimony from lay witnesses. The State contends that Dangerfield has forfeited this issue, the testimony was properly admitted in any event, and any prejudice was limited by the instructions given by the court and outweighed by the relevance of the testimony. It is within the trial court's discretion to determine whether to admit evidence,

and we will not overturn its decision unless it is arbitrary, fanciful, or unreasonable. *People v. Hanson*, 238 Ill. 2d 74, 101 (2010).

¶ 19 O'Keefe testified, over defense objection, that he had been on hundreds of narcotics surveillance missions. Based on his experience, when he saw the transactions Dangerfield engaged in, he believed them to be narcotics transactions. The trial court gave a contemporaneous limiting instruction telling the jury that it could only consider this testimony to explain the course of the investigation and on the issue of Dangerfield's intent. Similarly, Laurie testified over objection that he had been on hundreds of narcotics missions and believed at the time that he saw Dangerfield engaging in narcotics transactions. The trial court gave the same limiting instruction.

¶ 20 After Laurie's testimony concluded, the court gave another limiting instruction:

> "I had told you that you could consider [the officers' testimony] regarding intent. I am now telling you that the issue of intent is for you to determine and for you alone to determine, and it should not—and you should not make that determination based upon anyone else's beliefs.
>
> So when you consider that testimony that the officer believed he was witnessing narcotics transactions, it was purely admitted to explain why the officer took certain actions and to explain what he did next. It is only being admitted to show the course of the investigation. You should not consider it for the truth of the matter asserted or for any other purpose."

¶ 21 Initially, the State argues that Dangerfield has forfeited this issue by failing to raise it in his posttrial motion. To preserve an alleged trial error for review, a defendant must both object at trial and raise the issue in a posttrial motion. *People v. De La Hera*, 2011 IL App (3d)

100301, ¶ 4 (defendant forfeited issue where he objected to evidence at trial but failed to raise the issue in a posttrial motion). In his amended posttrial motion, Dangerfield stated, without elaboration, that "[t]he Court improperly allowed expert testimony regarding drug sales." The State argues that this referred only to Ramaglia's testimony, as neither O'Keefe nor Laurie were tendered as experts. Dangerfield argues that his argument encompassed all three officers, since, at trial, Dangerfield argued that O'Keefe and Laurie's testimony amounted to undisclosed expert testimony.

¶ 22 Although Dangerfield's motion was not a model of clarity, the hearing on his motion persuades us that Dangerfield properly preserved this issue for review. At the hearing, defense counsel argued that "an officer" (whom he did not name) was admitted as an expert without being properly disclosed to the defense in advance. He further argued:

> "Here we just got told on the eve of trial we're going to call this witness and he's going to testify that Mr. Dangerfield was selling drugs out there, which was another objection we raised to the expert witness, Judge, which was that he was giving an opinion on the ultimate issue and invading the province of the jury ***. *** [T]hat's not something that an expert should be allowed to testify to because that's the ultimate issue for the jury, to testify to what he saw and so forth. But here he said Mr. Dangerfield [was] giving drugs to these people ***."

It appears that defense counsel may have conflated Ramaglia with O'Keefe and Laurie and was referring to them all as a single officer. (Ramaglia did not see any of Dangerfield's transactions and never opined that he was selling drugs.) In any event, we find that counsel's argument, in combination with his posttrial motion, sufficiently preserved the issue of whether O'Keefe and Laurie could testify that they believed they saw Dangerfield engaging in narcotics transactions.

See *People v. Heider*, 231 Ill. 2d 1, 18 (2008) (no forfeiture where defendant is not asserting "a completely different objection from the one he raised below" and the trial court "had an opportunity to review the same essential claim").

¶ 23 Nevertheless, we find no error in admitting O'Keefe and Laurie's testimony. Although a lay witness generally may not testify regarding his opinions or interpretations of events (*People v. McCarter*, 385 Ill. App. 3d 919, 934 (2008)), this prohibition extends only to the witness's opinions at the time of trial. *Hanson*, 238 Ill. 2d at 101; *People v. Degorski*, 2013 IL App (1st) 100580, ¶ 84. A party may present evidence as to what a witness thought in the past, as long as that testimony is relevant—*e.g.*, to explain the course of an investigation—and otherwise admissible. As this court has explained, "[P]resent opinion testimony is improper; previous opinion testimony is permissible." *Degorski*, 2013 IL App (1st) 100580, ¶ 84.

¶ 24 *Hanson* and *Degorski* both illustrate this principle. In *Hanson*, Detective Nilles was investigating multiple murders. After speaking with defendant's sister Jennifer, Nilles confronted defendant with the statement, " 'Jennifer thinks you did this.' " *Hanson*, 238 Ill. 2d at 101. *Hanson* rejected defendant's argument that this constituted improper opinion testimony:

> "Detective Nilles did not testify that he believed defendant was guilty. Nor did Jennifer testify that she believed defendant was guilty. Rather, both Nilles and Jennifer testified to a statement which indicated, at the time the statement was made, that Jennifer thought defendant had caused the victims' deaths. At no time was any testimony offered as to Jennifer's present opinion of defendant's guilt or innocence." *Id.*

Hanson further found that the statement was relevant because it provided context for why the investigation was focusing on the defendant, and it was not unduly prejudicial, since no witnesses testified that they believed the defendant was guilty. *Id.* at 101-03.

¶ 25 In *Degorski*, defendant made a confession to McHale, an assistant State's Attorney. During cross-examination, McHale testified that "[defendant's] statement to me was reliable." *Degorski*, 2013 IL App (1st) 100580, ¶ 73. Following *Hanson*, *Degorski* held that McHale's statement did not constitute improper opinion testimony; although McHale expressed an opinion regarding defendant's guilt, it was not his present opinion but was framed in the past tense as his belief at the time of defendant's interrogation. *Id.* ¶ 78.

¶ 26 Similarly, O'Keefe and Laurie did not testify that they believed Dangerfield was guilty, nor did they tell the jury that it should believe a portion of the prosecution's case. Rather, O'Keefe and Laurie testified regarding their thoughts during the narcotics surveillance mission on September 10, 2011. These statements, like the challenged statement in *Hanson*, served to provide context for the actions the officers took during their investigation. Because O'Keefe believed he saw Dangerfield engaging in narcotics transactions, he changed his surveillance position to see where Dangerfield was going in the gangway. Laurie also believed he saw narcotics transactions; that is why, after radioing his observations to the rest of his team, he and Ramaglia moved to detain Dangerfield. Thus, what the officers believed at the time was relevant for interpreting their actions.

¶ 27 Dangerfield argues that this case is analogous to *People v. Crump*, 319 Ill. App. 3d 538, 540 (2001), where an officer testified that, during the course of his investigation, he had reason to believe that the defendant committed the offense. *Crump* held that this was impermissible lay opinion testimony, stating that "[i]t is immaterial whether the prosecutor was asking the officer about the basis of his current belief or the basis of his past belief." *Id.* at 543. As noted in *Degorski*, *Crump* predates our supreme court's decision in *Hanson*, and its continued vitality is questionable at best. *Degorski*, 2013 IL App (1st) 100580, ¶ 85; see also *People v. Martin*, 2017

IL App (4th) 150021, ¶¶ 29-32 (declining to follow *Crump* in light of *Hanson*). Accordingly, we do not find *Crump* to be persuasive here.

¶ 28 Nor do we find the officers' testimony to be unduly prejudicial. As noted, the State's case was strong and the evidence was not closely balanced. Officers on a narcotics surveillance mission observed Dangerfield engage in several hand-to-hand transactions and witnessed him retrieving from a hole in the wall bags containing 101 baggies of narcotics packaged for sale. In this context, O'Keefe and Laurie's testimony that they believed Dangerfield to be engaging in narcotics transactions was "not a great revelation to the jury" (*Degorski*, 2013 IL App (1st) 100580, ¶ 88), nor, in its absence, would a contrary verdict likely have been reached.

¶ 29 Dangerfield argues that prejudice could have resulted from the trial court's conflicting jury instructions, since the court told the jury that it both could and could not consider the complained-of testimony on the issue of Dangerfield's intent. In context, it is clear that the trial court overrode the first two instructions with the third instruction, in which the court stated: "I had told you that you could consider [the officers' testimony] regarding intent. *I am now telling you that the issue of intent is for you to determine and for you alone to determine*, and *** you should not make that determination based upon anyone else's beliefs." (Emphasis added.) *People v. Bush*, 157 Ill. 2d 248, 254 (1993) (issuance of conflicting jury instructions was not harmless error), is distinguishable because the trial court in that case *simultaneously* gave conflicting instructions to the jury, one of which misstated the law. Accordingly, under the circumstances, we find no prejudice resulted from the instructions issued by the trial court, where the third instruction properly limited the purpose for which the officers' testimony could be used. See *People v. Pulliam*, 206 Ill. 2d 218, 256 (2002) (jury is presumed to follow instructions).

¶ 30 Ramaglia's Expert Testimony

¶ 31 Dangerfield next argues that Ramaglia's expert testimony regarding narcotics packaging and distribution methods was both irrelevant and inflammatory. The State argues that Ramaglia's testimony was relevant to explain Dangerfield's behavior—most notably, the counterintuitive fact that he distributed suspected narcotics without receiving any payment.

¶ 32 We review the trial court's decision to admit evidence for an abuse of discretion, meaning that we will affirm unless the trial court's decision was arbitrary, fanciful, or unreasonable. *People v. Becker*, 239 Ill. 2d 215, 234 (2010). Under Rule 702 of the Illinois Rules of Evidence, a witness qualified as an expert may testify to specialized knowledge if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." Ill. R. Evid. 702 (eff. Jan. 1, 2011). Dangerfield does not dispute that Ramaglia was qualified to testify as an expert on the subjects of narcotics packaging and distribution methods, but he argues that Ramaglia's testimony provided no assistance to the trier of fact.

¶ 33 We disagree. Laurie saw Dangerfield participate in two hand-to-hand transactions where he gave an individual a golf-ball-sized item and received nothing in return. The State's theory of the case was that these were narcotics transactions, but a juror without specialized knowledge of the drug trade might reasonably be skeptical as to whether a drug dealer would give away narcotics without payment. Ramaglia offered an explanation: when street managers distribute bundles to pack workers, they typically do not get paid up front, but only after the contents of the bundles have been sold. This testimony bore directly on the issue of Dangerfield's intent to deliver, an element of the offense the State was required to prove beyond a reasonable doubt. *People v. Blakney*, 375 Ill. App. 3d 554, 557 (2007).

¶ 34 Dangerfield argues that Ramaglia's testimony was irrelevant because there was no evidence that Dangerfield was a street manager. On the contrary, the officers' testimony shows

that Dangerfield was acting in a manner entirely consistent with being a street manager. When Dangerfield was detained, police recovered four golf-ball-sized bags containing a total of 101 baggies of crack cocaine from the hiding place in the alley where O'Keefe observed Dangerfield going. The bags resembled the bundles distributed by street managers. Dangerfield was seen distributing two golf-ball-sized bags without receiving payment. He also exchanged two smaller items for cash, consistent with Ramaglia's testimony that street managers commonly sell individual jabs. Although Ramaglia did not specifically opine that Dangerfield was a street manager, the jury was free to draw its own inferences from the eyewitness testimony of the officers and the expert testimony of Ramaglia. *People v. Saxon*, 374 Ill. App. 3d 409, 416 (2007) (finder of fact has the discretion to draw reasonable inferences from the evidence); *People v. Fountain*, 2011 IL App (1st) 083459-B, ¶ 30 (it is the jury's province to determine what inferences to draw from ambiguous evidence).

¶ 35 *People v. Mason*, 274 Ill. App. 3d 715 (1995), cited by Dangerfield on this issue, is distinguishable. The defendant in *Mason* was charged with the first degree murder of Hayes. The State's theory of the case was that defendant and Hayes were both members of the Gangster Disciples street gang, and defendant killed Hayes on the orders of a higher-ranked gang member. At trial, the State put on extensive testimony about Chicago gangs, including such subjects as inter-gang alliances and rivalries and the ways gang members display their gang membership through hand symbols, clothes, catchphrases, and tattoos. *Id.* at 720-21. *Mason* held that this testimony should not have been admitted: since defendant and Hayes were allegedly members of the same gang, none of the evidence about inter-gang behavior had any relevance. *Id.* at 722. By contrast, Ramaglia's testimony was highly relevant to the State's theory of the case—namely, that Dangerfield was a street manager distributing narcotics to pack workers and also selling

smaller quantities to individual customers, and not, as he contended, someone who happened to be in the neighborhood and was arrested for no reason.

¶ 36 Dangerfield next argues that Ramaglia's testimony concerning the spade logos on the bags was irrelevant and prejudicial. On that subject, Ramaglia stated:

> "The significance [of the logos] is the location at 2700 block of Lexington sells spade logo bags. Drug dealers take pride in their product. They want their customers to know where that product comes from, and they do that by identifying their ziplock bags with certain insignias. In this instance, it's the spade bag."

Where drugs in a defendant's possession are packaged for sale, it is circumstantial evidence of intent to deliver. See *People v. Robinson*, 167 Ill. 2d 397, 414 (1995) ("[G]enerally, when a defendant is charged with possession of a controlled substance, *in appropriate circumstances*, packaging alone might be sufficient evidence of intent to deliver." (Emphasis in original.)). Ramaglia's testimony was relevant to the extent that it tended to establish the bags were packaged for distribution to customers.

¶ 37 Dangerfield nevertheless argues that the testimony was unduly prejudicial, insofar as it portrayed him (in Dangerfield's words) as a "prideful drug dealer" who was "working with others of similar ilk" to sell drugs on the 2700 block of West Lexington Street. We find no unfair prejudice here. Ramaglia's words would only have affected the jurors' perception of Dangerfield if they already believed him to be a drug dealer, *i.e.*, guilty. If, on the other hand, they believed Dangerfield's version of events, then Ramaglia's statements about prideful drug dealers would not apply to Dangerfield and no prejudice would result.

¶ 38 Finally, Dangerfield argues that the State used Ramaglia's testimony, in combination with O'Keefe and Laurie's testimony, to improperly portray Dangerfield as a gang member. We

find no such implication in the officers' testimony. In establishing Ramaglia's expertise, the State elicited testimony that Ramaglia was a gang officer from 2001 to 2004 and a tactical officer from 2004 to 2007. During those six years, Ramaglia conducted surveillance and enforcement for narcotics investigations "about one thousand times." In context, Ramaglia was clearly speaking about his own background and qualifications, not about the activities for which Dangerfield was arrested in 2011. At no point did Ramaglia imply that Dangerfield was a gang member or involved in gang activity. See *People v. Deramus*, 2014 IL App (1st) 130995, ¶ 42 (where defendant was charged with delivery of a controlled substance, it was not improper or prejudicial for State to elicit testimony that officers were investigating violence in the area, since "[n]either the prosecution nor the officers stated that defendant was involved in any of these violent acts or otherwise implied that defendant committed violent acts in the past").

¶ 39 As for O'Keefe and Laurie, they testified that they were part of an Area 4 Gun Team, which, according to Laurie, conducts both narcotics investigations and gang investigations. Because Dangerfield's counsel did not object to this testimony, any contention of error is forfeited. *De La Hera*, 2011 IL App (3d) 100301, ¶ 4 (citing *Enoch*, 122 Ill. 2d at 186). Moreover, as with Ramaglia, neither officer stated or implied that Dangerfield was a gang member or that his drug sales were gang-related.

¶ 40 Closing Arguments

¶ 41 Dangerfield next argues that the State made three improper remarks during closing arguments that warrant reversal of his conviction.

¶ 42 Prosecutors are afforded wide latitude in closing arguments, but they may not make arguments that serve no purpose but to inflame the emotions of the jury. *People v. Thompson*, 2013 IL App (1st) 113105, ¶ 80. Improper remarks in a prosecutor's closing argument will lead

to reversal only if they create " 'substantial prejudice' " to the defendant. *Id.* ¶ 79 (quoting *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007)); see *People v. Evans*, 209 Ill. 2d 194, 224-25 (2004) ("ill-advised" prosecutorial comments did not constitute reversible error where the State's case was strong and the evidence was not closely balanced). Although a split currently exists on the proper standard of review to apply to alleged errors in closing argument (see *People v. Johnson*, 2015 IL App (1st) 123249, ¶ 39 (discussing the current state of the conflicting authorities) (citing *Wheeler*, 226 Ill. 2d at 121 (employing *de novo* standard); *People v. Blue*, 189 Ill. 2d 99, 128 (2000) (employing abuse of discretion standard))), we need not resolve the issue, because we reach the same result under either standard.

¶ 43 First, Dangerfield argues that it was improper for the prosecutor, at the close of his rebuttal argument, to urge jurors to send a message to drug dealers with their verdict:

> "THE STATE: Ladies and gentlemen, when drug dealers like the defendant are out on the streets selling their drugs to whoever is coming up to buy them, somebody somewhere has to tell them no. That's not okay. That's enough. That somewhere is this courtroom—
>
> DEFENSE COUNSEL: Objection.
>
> THE STATE: That somebody is you.
>
> THE COURT: Sustained.
>
> DEFENSE COUNSEL: I would ask they be instructed that that's not their job.
>
> THE COURT: It's sustained."

Although we agree that this statement was improper (see *People v. Johnson*, 208 Ill. 2d 53, 79 (2003) (improper for prosecutor to engage in a "general denunciation of society's ills and *** challenge[] the jury to 'send a message' by its verdict")), any error was cured by the trial court's

prompt conduct in sustaining the objection and its instructions to the jury. *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 88 (potential prejudice from improper prosecutorial remarks is generally cured where the court promptly sustains an objection and properly instructs the jury).

¶ 44 Before closing arguments, the trial court instructed the jury that closing arguments are not evidence and told the jury to disregard any statement not based on the evidence or reasonable inferences to be drawn from the evidence. The trial court also promptly sustained the defense's objection to the improper statement. See *People v. Arman*, 131 Ill. 2d 115, 127 (1989) ("A trial judge's prompt action in sustaining an objection to improper argument is generally sufficient to cure the error."); *People v. Holloway*, 119 Ill. App. 3d 1014, 1021 (1983) (error from improper comments in closing argument "was obviated when the trial court properly sustained defendant's objections"). Moreover, this exchange came at the very end of the State's rebuttal argument, immediately after which the trial court instructed the jury to disregard anything to which objections were sustained. The court also reiterated its admonishment that closing arguments are not evidence and that any statement not based on the evidence was to be ignored. These prompt instructions by the trial court cured any potential prejudice from the State's comment. See *Deramus*, 2014 IL App (1st) 130995, ¶ 64 (prosecutor's improper "us-versus-them" comment did not warrant reversal where it was brief, surrounded by proper argument, and followed by a curative instruction that closing arguments do not constitute evidence).

¶ 45 Second, Dangerfield argues that it was improper for the prosecutor to refer to defense counsel as a "magician" utilizing "misdirection" to fool the jury. The defense, in closing argument, argued at length that the officers could be lying, since their testimony was not corroborated by photos, videos, or recordings of their radio conversations. In rebuttal, the State argued:

"THE STATE: Ladies and gentlemen, have you ever watched a magician perform a magic trick? It usually begins with them showing you something pretty ordinary. And then something else happens. They will start telling you a joke or maybe a story or fancy assistant walking across the stage. And before you know it, he tells you to look at the original object. *** It's either disappeared [or] changed somehow. It's the oldest magician trick in the book. It's called misdirection. And it's exactly what you saw happen here.

DEFENSE COUNSEL: Objection, Judge.

THE COURT: Overruled.

THE STATE: Counsel is left with something very ordinary. A drug dealer who was caught dealing drugs. ***

But, ladies and gentlemen, don't be distracted. [Defense counsel] wants you to look over here. There is no photos. There is no video. *** Just, whatever you do, don't look right here. Because when you do, the evidence, the credible evidence that we brought you, it shines a spotlight on defendant."

¶ 46 The State argues that these statements were invited by the defense's argument. See *People v. Thompson*, 2015 IL App (1st) 122265, ¶ 39 ("During rebuttal, the State may respond to statements made by defense counsel in closing argument that invite a response."). Although the State could properly redirect the jury's attention to the evidence presented by the State, it was improper to liken defense counsel to a magician using "the oldest magician trick in the book." "Unless predicated on evidence that defense counsel behaved unethically, it is improper for a prosecutor to accuse defense counsel of attempting to create reasonable doubt by confusion, misrepresentation, or deception." *Johnson*, 208 Ill. 2d at 82; see also *People v. Glasper*, 234 Ill.

2d 173, 207 (2009) (it is "well settled" that it is improper for a prosecutor to suggest that defense counsel used trickery or deception); *Holloway*, 119 Ill. App. 3d at 1021 (improper for prosecutor to label defendant's theory of the case as "the oldest trick in the book").

¶ 47 Nevertheless, given the strength of the State's case, we find no prejudice to Dangerfield resulted from this error. *People v. Wembley*, 342 Ill. App. 3d 129, 142-43 (2003) (reversal was not warranted for allegedly improper closing arguments where the evidence against defendant was overwhelming and the jury was instructed that closing arguments were not evidence); *People v. Schneider*, 375 Ill. App. 3d 734, 757 (2007) (same). In light of the detailed and consistent testimony of O'Keefe, Laurie, and Ramaglia, we cannot say that "real justice [was] denied or that the verdict of the jury may have resulted from the error" (*Evans*, 209 Ill. 2d at 225 (internal quotation marks omitted)).

¶ 48 Third, the prosecutor referred to Dangerfield as a "big fish," stating: "[The officers] didn't go up there and drive the small corner pushers that were working that night. They waited to grab the big fish. This guy, the defendant who was in charge of all of those guys out there that day." Because defense counsel made no objection to this testimony and also did not raise the issue in his posttrial motion, any claim of error is forfeited. *Cosmano*, 2011 IL App (1st) 101196, ¶ 54 (defendant forfeited certain claims of error regarding prosecutor's remarks during closing argument because he failed to object at trial and/or raise the issue in his posttrial motion, even though other of his claims regarding closing argument were preserved).

¶ 49 Additionally, the prosecutor's statement was both invited by defense counsel and a fair comment on the evidence. During cross-examination, the defense attempted to cast doubt on the officers' version of events by eliciting testimony that the officers did not detain any of the individuals with whom Dangerfield transacted. The defense also argued this as an indication that

the officers' story "doesn't add up." In response, the State properly referenced the evidence that Dangerfield, as a street manager, was higher up the distribution chain than a pack worker or an individual buying narcotics for personal use. In fact, the "big fish" comments were consistent with the defense's own characterization of the State's evidence: "[W]ho tells you that [Dangerfield] is a street manager? Who tells you he is this giant drug king out there? The same cops who want you to find that. *** They want you to think he is some big kingpin." Accordingly, the State's comments were not erroneous.

¶ 50 Lesser-Included Instruction on Possession

¶ 51 Dangerfield's final substantive argument concerns the trial court's decision to give a lesser-included offense instruction. During the jury instructions conference, Dangerfield's counsel tendered an instruction on the lesser-included offense of possession of a controlled substance, which the court later gave to the jury. Dangerfield argues that the trial court erred by failing to ascertain whether he personally understood and agreed with the giving of that instruction.

¶ 52 Dangerfield acknowledges that he has forfeited this issue by failing to include it in his posttrial motion (*De La Hera*, 2011 IL App (3d) 100301, ¶ 4), but he argues that we may review it under the plain-error doctrine, under which we may review unpreserved error if a clear or obvious error occurred and either (1) the evidence is closely balanced or (2) the error is so serious that it "affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Piatkowski*, 225 Ill. 2d at 565. The first step in plain-error review is determining whether an error occurred. *Id.*

¶ 53 A defendant has the exclusive right to decide whether to submit an instruction on a lesser-included offense, because, by doing so, the defendant is effectively stipulating that the

evidence is sufficient to convict on the lesser offense. *People v. Medina*, 221 Ill. 2d 394, 403-04 (2006) (citing *People v. Brocksmith*, 162 Ill. 2d 224, 229 (1994)). Thus, when the defense tenders a lesser-included instruction, "the trial court should conduct an inquiry of defense counsel, in defendant's presence, to determine whether counsel has advised defendant of the potential penalties associated with the lesser-included offense, and the court should thereafter ask defendant whether he agrees with the tender." *Id.* at 409. The record does not reflect that the trial court conducted the required inquiry in open court. See *Brocksmith*, 162 Ill. 2d at 229 (decision to submit an instruction on a lesser-included offense is analogous to the decision of what plea to enter and therefore "treated the same"); Ill. S. Ct. R. 402(a) (eff. July 1, 2012) (before a trial court can accept a plea of guilty, the court must address the defendant "in open court" and deliver certain admonitions).

¶ 54 Nevertheless, we find no error under *Medina* where Dangerfield was not convicted of the lesser-included offense of possession. *People v. Calderon*, 393 Ill. App. 3d 1, 11-12 (2009); see also *People v. Burton*, 2015 IL App (1st) 131600, ¶ 32 (trial court's failure to comply with *Medina* did not constitute plain error where defendant was not convicted of the lesser offense). As the *Calderon* court aptly stated: "The danger *Medina* seeks to avoid—a defendant being convicted of an uncharged offense to which he unknowingly concedes his criminal liability by way of a jury instruction he has not tacitly or expressly approved—while it may have been present here, did not harm the defendant." *Calderon*, 393 Ill. App. 3d at 12. Accordingly, since there is no error, there can be no plain error. *People v. Smith*, 372 Ill. App. 3d 179, 181 (2007).

¶ 55 Dangerfield also argues that his trial counsel was ineffective for failing to preserve this issue for review. To establish ineffective assistance of counsel, a defendant must prove that (i) counsel's performance was objectively unreasonable and (ii) but for counsel's errors, the

outcome of the proceeding would have been different. *People v. Patterson*, 2014 IL 115102, ¶ 81 (citing *Strickland v. Washington*, 466 U.S. 668, 692 (1984)). Because Dangerfield suffered no prejudice as he was not convicted of the lesser offense, his ineffective assistance claim fails. *Id.* ¶ 87 (rejecting ineffective assistance claim where defendant failed to establish the prejudice prong of the *Strickland* test).

¶ 56 Mittimus

¶ 57 Dangerfield requests that his mittimus be amended to reflect that he was convicted of possession of a controlled substance with intent to deliver. Dangerfield's mittimus states that he was convicted of "MFG/DEL 15<100 GR COCA/ANALOG" under section 401 of the Illinois Controlled Substances Act (720 ILCS 570/401 (West 2012)), which states that "it is unlawful for any person knowingly to manufacture or deliver, or *possess with intent to* manufacture or *deliver*, a controlled substance." (Emphasis added.) Thus, the mittimus is correct and no amendment is required.

¶ 58 CONCLUSION

¶ 59 We find that (i) the trial court did not err in allowing O'Keefe and Laurie to testify that, during the surveillance mission, they believed Dangerfield to be engaging in narcotics transactions; (ii) the trial court did not err in admitting Ramaglia's expert testimony where it was directly relevant to the State's theory of the case; (iii) Dangerfield's alleged errors in closing argument do not warrant reversal; and (iv) although the trial court failed to ascertain whether Dangerfield agreed with the giving of an instruction on the lesser-included offense of possession, no error occurred where Dangerfield was not convicted of the lesser offense. We therefore affirm the judgment of the trial court.

¶ 60 Affirmed.