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2017 IL App (3d) 150197-U

Order filed April 14, 2017

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-15-0197
)	Circuit No. 14-CF-314
DARRELL DEWAYNE BOOKER, JR.,)	Honorable
Defendant-Appellant.)	Kevin W. Lyons, Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Lytton and O'Brien concurred in the judgment.

ORDER

- ¶ 1 *Held:* The prosecutor's comments during closing arguments were not improper.
- ¶ 2 Defendant, Darrell Dewayne Booker, Jr., appeals his convictions arguing the prosecutor made improper comments during closing arguments. We affirm.

FACTS

¶ 3

¶ 4 The State charged defendant with robbery (720 ILCS 5/18-1(a) (West 2014)) and mob action (720 ILCS 5/25-1(a)(1) (West 2014)). The charges were based on the allegation defendant and two other men assaulted the victim and stole his shoes.

¶ 5 At the jury trial, the victim testified that on April 22, 2014, he was walking to the store when he was chased by approximately four individuals. He fled to a nearby porch where the individuals began hitting him with their fists. He fell to the ground and the individuals continued to hit him. The group took the victim's shoes and ran. The victim could not identify his attackers.

¶ 6 Mike Bornsheuer testified he was an investigator with the Peoria County State's Attorney's office. Bornsheuer had been employed by the State's Attorney's office for more than 10 years. Prior to that position, Bornsheuer had been a Peoria police officer for 28 years.

¶ 7 On the day of the attack, Bornsheuer was in his squad car and observed four men on the porch of a house. Three of the men appeared to be hitting the fourth man. Bornsheuer activated his squad car's red lights and siren and drove toward the scene. As he approached, two individuals ran from the porch directly in front of Bornsheuer's vehicle. Bornsheuer "got a good look" at one of the individuals, who he identified as defendant. Bornsheuer did not see if defendant was carrying a pair of shoes because he was focused on defendant's face.

¶ 8 Bornsheuer exited his vehicle and yelled at the third individual that remained on the porch, who then ran away. Bornsheuer approached the victim and observed blood on his hand and by his right eye. The victim would not talk to Bornsheuer. Bornsheuer did not notice whether the victim's shoes were missing.

¶ 9 Next, Bornsheuer observed the three individuals enter a silver vehicle parked nearby. Bornsheuer followed the vehicle to a Family Dollar store where it parked. The three men exited

the vehicle and ran. Bornsheuer approached the driver of the vehicle, who remained in the vehicle, and interviewed her briefly. The woman did not know the names of the men. Bornsheuer continued to patrol the area to find the attackers. Eventually, he observed defendant and another individual hiding behind a house. As Bornsheuer approached, the two men ran away in different directions.

¶ 10 When other police officers arrived on the scene, Bornsheuer was informed that one of the three individuals, Dowaun Smith, had been apprehended. Bornsheuer identified Smith as one of the three attackers. Bornsheuer then went to the police station and viewed photographs of Smith and his friends to determine if he could identify the other two individuals. He viewed 11 photographs and found a picture of defendant.

¶ 11 Kenya Petty testified she lived in the house where the attack occurred. While inside her living room she heard a commotion, looked out the window and observed three boys attacking another boy on her porch. The attackers took the victim's shoes and ran across the street. She was unable to identify any of the attackers because she did not recognize their faces.

¶ 12 During its closing argument, the prosecution told the jury,

“Ladies and gentlemen, you have heard the evidence in this case. You’ve heard the testimony. You heard from Mike Bornsheuer who just happened to be there on that day. He was working and just driving down the street, and this is what happened. And he saw it, and it’s just dumb luck for this defendant that he ends up doing this in front of a police officer. He does it right in front of a police officer, a veteran of how many years?

I mean, he was a Peoria police officer for over 20 years. Now, he is a State’s Attorney investigator now for at least six years. You heard his credentials

about what he did during the course of his tenure at the Peoria Police Department, and you heard him testify from that stand about what he saw that day.”

¶ 13 In response, the defense argued the evidence was insufficient because the victim and Petty could not identify defendant as one of the attackers. The defense told the jury,

“the State’s entire case boils down to the testimony of Mike Bornsheuer which [the State] went through thoroughly in his direct closing, and I submit to you Mr. Bornsheuer’s testimony was credible. I’m not disagreeing with his testimony. However, you have to consider what the State has besides Mr. Bornsheuer’s testimony, besides one eyewitnesses’ identification.”

¶ 14 The defense continued,

“[Bornsheuer] saw whom he thought was [defendant] a couple times later in that day and identified him as one of the suspects that was on the porch involved in this incident. But I submit to you that eyewitness testimony is not the most credible evidence in the world, and to say that the State has proven guilt beyond a reasonable doubt based on one eyewitness testimony, based on one eyewitness testimony, that’s not right.”

¶ 15 In rebuttal, the prosecution argued,

“Well, I guess I would agree with one thing that defense counsel said. Mike Bornsheuer’s testimony was credible. They admitted that. He was telling you what he saw as he saw it, and he recounted that for you in great detail here during the course of this trial. And, apparently, according to the defense, that’s not enough to prove our burden beyond a reasonable doubt. But if he’s credible and if he tells us what he saw, I submit to you that it is.”

“Mike Bornsheuer is the only person who can identify the people that did this because he saw it.

We’re talking about a veteran police officer, a veteran detective, a veteran investigator who just happens to be driving down the street that day. He’s smart enough to know that, well, they—when he looks over there, initially, he says, well, something could be going on but I’m not sure yet because, you know, first of all, he is a veteran, he has been around the block, he has seen things like this before, and that could just be a shadow boxing thing. It might not be a crime. It might be somebody horsing around. So he doesn’t jump to conclusions about what happens and what’s going on, but he watches it.

* * *

The defendant, the victim can’t identify him. Well, okay. Kenya Petty can’t identify him. Well, she’s not a police officer. She’s just watching this happen because she is—I would submit to you, ladies and gentleman, she’s probably the most shocked person about this at all from the whole thing because this is in her home right on her porch, and she just sees this happen. She can’t identify anybody. And, again, who does she—she has no horse in this race. She’s just telling you what she saw. She can’t identify anybody. But Mike Bornsheuer, who was there, sees the whole thing happen, and he identifies him.”

¶ 17 Ultimately, the jury found defendant guilty of robbery and mob action. Defendant received a seven-year sentence for robbery to run concurrently with a three-year sentence for mob action.

¶ 18 ANALYSIS

¶ 19 On appeal, defendant argues his right to a fair trial was violated when the prosecutor made several improper comments during closing arguments. Defendant concedes he failed to preserve this issue for review, but contends relief should be granted under either the plain-error doctrine or ineffective assistance of counsel. Because we find the prosecutor’s statements were proper, we do not address defendant’s plain error argument. See *People v. Hillier*, 237 Ill. 2d 539, 549 (2010) (defendant cannot meet burden of showing plain error where “the face of the record shows no error, let alone a clear and obvious one.”). For the same reason, we reject defendant’s ineffective assistance of counsel argument.

¶ 20 When reviewing claims of prosecutorial misconduct in closing argument, a reviewing court will consider the entire closing arguments of both the prosecutor and the defense attorney, in order to place the remarks in context. *People v. Wheeler*, 226 Ill. 2d 92, 122 (2007); *People v. Johnson*, 208 Ill. 2d 53, 113 (2003); *People v. Tolliver*, 347 Ill. App. 3d 203, 224 (2004). Prosecutors are afforded a great deal of latitude in closing argument. *Wheeler*, 226 Ill. 2d at 123; *People v. Blue*, 189 Ill. 2d 99, 127 (2000).

¶ 21 Defendant argues the prosecutor improperly bolstered Bornsheuer’s credibility by focusing on his status as a police officer. According to defendant, the prosecutor’s statements amounted to a personal vouch for the credibility of Bornsheuer. Defendant also maintains the State argued facts not in evidence by “implying the officer had special training in observing and identifying facial features.” Specifically, defendant points to the prosecutor’s comment that Petty

was unable to identify defendant because she was shocked to see the attack and did not possess Bornsheuer's experience as a police officer.

¶ 22 Generally, it is improper for a prosecutor to personally vouch for a witness' credibility. *People v. Adams*, 403 Ill. App. 3d 995, 1001 (2010), *overruled on other grounds by People v. Adams*, 2012 IL 111168 (2012). However, counsel "may comment on the credibility of witnesses if the comments are based on the evidence or inferences drawn from the evidence." *Id.* at 1002.

¶ 23 In the present case, the State's remarks were invited by defense counsel and were not misstatements of the facts. *People v. Glasper*, 234 Ill. 2d 173, 203 (2009). The prosecutor did not vouch for Bornsheuer's credibility. Instead, the prosecutor responded to the defense's concession that Bornsheuer was credible. The mere fact that the prosecutor referred to Bornsheuer's status as a veteran police officer does not amount to a personal vouch for the credibility of Bornsheuer. Further, the prosecutor did not imply that Bornsheuer had special training in observing and identifying facial features. The prosecutor's explanation for why Bornsheuer could identify defendant and Petty could not was made in the context of describing Bornsheuer's response to the occurrence. It is a fair inference that Petty was shocked by seeing the attack and was unable to focus on identifying the facial features of the individual attackers. It is also fair to infer that based on Bornsheuer's experience, he knew how to respond to the occurrence and would focus his attention on identifying the faces of the suspects. More importantly, the instant case is not one in which a credibility conflict existed between Bornsheuer and another witness as to defendant's identity. In other words, the prosecutor's statements were not made to argue Bornsheuer was a more credible witness than Petty because of his status as a police officer.

¶ 24 Alternatively, defendant contends counsel provided ineffective assistance for failing to object to the prosecutor's comments in closing arguments because doing so would have

preserved the present issue for appeal. However, having already found the prosecutor's comments were not improper, it follows that the issue would have been similarly meritless if defense counsel objected at trial. Counsel is not ineffective for failing to make a meritless objection. *E.g.*, *People v. Easley*, 192 Ill. 2d 307, 329 (2000) (“[I]t is not incompetence of counsel to refrain from raising issues which, in his or her judgment, are without merit, unless counsel’s appraisal of the merits is patently wrong.”); see also *People v. Ivory*, 217 Ill. App. 3d 619, 625 (1991) (finding no ineffective assistance of counsel because there was no error).

¶ 25

CONCLUSION

¶ 26

The judgment of the circuit court of Peoria County is affirmed.

¶ 27

Affirmed.