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FILED
August 1, 2017
Carla Bender
4th District Appellate
Court, IL

2017 IL App (4th) 150412-U

NO. 4-15-0412

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
TONY E. WILLIAMS,	)	No. 14CF840
Defendant-Appellant.	)	
	)	Honorable
	)	Leslie J. Graves,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Steigmann and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, finding that the prosecutor's rebuttal argument did not substantially prejudice defendant. Fines improperly imposed by the circuit clerk were vacated.

¶ 2 A jury found defendant, Tony E. Williams, guilty of residential burglary (720 ILCS 5/19-3(a) (West 2012)). Defendant appeals, arguing (1) the prosecutor's rebuttal argument was improper and violated his right to a fair trial; and (2) fines improperly imposed by the circuit clerk should be vacated. We affirm in part and vacate in part.

¶ 3 I. BACKGROUND

¶ 4 In August 2014, the State charged defendant with residential burglary (720 ILCS 5/19-3(a) (West 2012)) based upon allegations that defendant, knowingly and without authority, entered a neighbor's apartment and stole a television and a gaming console.

¶ 5 The following testimony was elicited at defendant's jury trial. David Phillips testified that around 9 p.m. on August 2, 2014, he heard suspicious noises coming from a neighbor's apartment. Phillips knew his neighbor, Adam Hull, was not at home because Hull "usually [worked] from 3:30 in the afternoon until midnight." Phillips observed that Hull's car was not present. Phillips further testified that he opened his front door and noticed a light on in Hull's living room. When Phillips went outside to investigate, he saw defendant's roommate, Tony Robertson, sitting on his back porch and facing Hull's apartment. According to Phillips, Robertson asked, "what's going on," and Phillips responded, "you tell me what's going on." Phillips testified that he "looked to [his] right" and observed defendant "carrying out a 16-inch TV" from Hull's apartment. After watching defendant for 15 or 20 seconds, Phillips returned to his apartment to call the police. Phillips explained that his "window was open" at the time, and he could overhear a "conversation going on downstairs, something about you need to get out, he's calling the police."

¶ 6 On cross-examination, Phillips acknowledged he had two prior felony convictions for sex-related offenses. According to the record, during pretrial proceedings, the trial court and the lawyers discussed that Phillips was in custody due to an alleged violation of the terms of his conditional release pursuant to the Sexually Violent Persons Commitment Act (725 ILCS 207/1 (West 2012)). Phillips confirmed during his testimony that there was a pending petition to revoke his conditional release. The following colloquy ensued between Phillips and defense counsel:

"Q. Did you talk to [the prosecutor] on Monday of this week?

A. Yes, ma'am.

* * *

Q. Did he have to persuade you to talk with him?

A. No. He asked me if the ordeal I was going through, if I had to be remanded, would stop me from testifying, and I said nope because I was doing the right thing.

Q. Did he have to give you any assurances to make you feel more comfortable about talking to him?

A. No, no, ma'am. Only thing he said was he would talk to the Judge and see if they can't do a transfer order to take me back to the treatment facility and have me come back Wednesday.

* * *

Q. You didn't want to be held here?

A. No, ma'am.

* * *

Q. And your hope is that you will not *** be detained?

A. True.

Q. It's also your hope that that pending legal matter will be dismissed this Friday?

A. That would be my hopes [*sic*]."

¶ 7 On redirect examination, Phillips confirmed the prosecutor "never made [him] any promises." He also acknowledged that he understood the prosecutor had "no power to do anything" in his pending case.

¶ 8 During re-cross-examination, defense counsel asked Phillips additional questions

about his conversation with the prosecutor:

> "MS. EVANS [(Defense counsel)]. [The prosecutor] did offer you, though, to not hold you here very long if you would be willing to talk to him?
>
> A. He said let him go up and talk to the Judge to see what he can do because this is his first time handling a DHS matter."

¶ 9 Adam Hull testified he left for work at about 3:45 p.m. on the afternoon of the burglary. Hull explained that he had a "set schedule" requiring him to leave for work at a "particular time every single day." He confirmed Phillips knew his work schedule. After Hull received a phone call from a police officer informing him that his apartment had been burglarized, Hull returned home and discovered his "TV and Playstation 4" outside. He testified that these items were on the television stand in his living room when he left for work and he never gave anyone permission to enter his apartment.

¶ 10 Officer Tammy Baehr testified that she was dispatched to Hull's apartment at approximately 9 p.m. in response to a "burglary in progress." Baehr explained that she parked her vehicle behind an alley near Hull's apartment because "the suspect was supposed to have *** run southbound from the apartment." After parking her vehicle, Baehr noticed Robertson walking away from the apartment. Baehr further testified that the door to Hull's apartment was ajar. She explained that a "flat screen TV and an electronic device [were] sitting on [a] chair" "next to the porch." The chair was "right underneath" a window "with a screen [that was] ripped." When Baehr entered Hull's living room, she stated that it "looked like *** the TV had been removed" from Hull's entertainment center.

¶ 11 Donald Bivens, a crime scene detective, testified that he was unable to obtain

fingerprints from either the television or the gaming console.

¶ 12 In closing argument, the prosecutor asserted defendant and Robertson "knew their neighbor was gone" on the night of the burglary. The prosecutor argued defendant stole Hull's electronic devices while Robertson sat "on the back porch facing the back of Mr. Hull's apartment" to "keep an eye out." The prosecutor also stressed Phillips's eyewitness account of the burglary, noting defendant was "actually seen in the house with a television in his hands."

¶ 13 In her closing argument, defense counsel described Phillips as a biased witness:

> "MS. EVANS. You get to decide whether the State's evidence is believable. We know that David Phillips is a two-time convicted felon, both sex related offenses. *** We also learned from his testimony today that he had something to gain by testifying in favor of the State's case.
>
> * * *
>
> MS. EVANS. You learned that he has a pending legal matter of his own that's currently ongoing. You learned that depending on how that matter is resolved that David Phillips could be detained as a result. You also learned that coincidentally he testifies before you on Wednesday and that it is his belief, his hope, that his pending case will be dismissed on Friday. *** You may consider his pending petition to revoke his release as you consider whether or not he is biased, whether or not he has something to gain by saying something that would make the State happy today.
>
> * * *

What they have done is dropped in front of you a weak case *** that relies on the words of a two-time convicted sex offender and not just a guy *** with [a] conviction but a guy who is hoping and praying after his testimony here that his case will be dismissed on Friday."

¶ 14 In his rebuttal argument, the prosecutor argued that Phillips was not biased:

"[Defense counsel] said [Phillips] is biased because he has a hearing on Friday that I know nothing about, that he told you we have not discussed. I've made him no promises, and you know why I can't? Even if I wanted to I can't because it's being prosecuted by a completely different part of the government. I work for the county of Sangamon. I represent you folks when bad things happen to good people in Sangamon County. That's what's [*sic*] the State's Attorney's Office does.

He's being prosecuted in a civil matter, not criminal, *** by the Attorney General's Office. That's Lisa Madigan. I don't work with Lisa Madigan. I have nothing to do with that. So to think he has any bias in that respect is ludicrous frankly. He gave straight up testimony. He answered his questions, and why? Because it is the right thing to do."

¶ 15 At the conclusion of defendant's trial, the jury found defendant guilty of residential burglary. In January 2015, defense counsel filed a "motion for acquittal or in the alternative motion for a new trial," which the trial court denied. On May 1, 2015, the trial court sentenced defendant to eight years in prison and "fines, fees, and costs." We note the trial court did not identify any specific fines to be imposed.

¶ 16 This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 Defendant argues on appeal that (1) the prosecutor's rebuttal argument was improper and violated his right to a fair trial; and (2) fines improperly imposed by the circuit clerk should be vacated.

¶ 19 A. Prosecutorial Misconduct

¶ 20 Defendant claims the prosecutor's rebuttal argument was improper because he "argued facts not in evidence in rebuttal, vouched for witness Phillips, and created an 'us versus them' relationship by aligning himself with the jury." Defendant concedes this issue was not preserved for appeal because defense counsel neither objected to the prosecutor's remarks nor raised the issue in a posttrial motion. Defendant claims, however, that we may review the issue under the plain-error doctrine.

¶ 21 A reviewing court may consider an unpreserved error if it was clear or obvious and (1) the evidence was closely balanced or (2) the error was so serious defendant was denied a fair hearing. Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967); *People v. Hillier*, 237 Ill. 2d 539, 545, 931 N.E.2d 1184, 1187 (2010). "The ultimate question of whether a forfeited claim is reviewable as plain error is a question of law that is reviewed *de novo.*" *People v. Johnson*, 238 Ill. 2d 478, 485, 939 N.E.2d 475, 480 (2010).

¶ 22 "Prosecutors are afforded wide latitude in closing argument." *People v. Wheeler*, 226 Ill. 2d 92, 123, 871 N.E.2d 728, 745 (2007). "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."

Id. "[E]ven improper remarks do not merit reversal unless they result in substantial prejudice to the defendant." *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 57, 964 N.E.2d 87. Further, "[r]eviewing courts will consider the closing argument as a whole, rather than focusing on selected phrases or remarks." *People v. Perry*, 224 Ill. 2d 312, 347, 864 N.E.2d 196, 218 (2007). "Indeed, trial courts and reviewing courts should step in only when it can truly be said that comments during closing arguments were so prejudicial that real justice was denied or that the verdict resulted from the error." (Internal quotation marks omitted.) *People v. Dunlap*, 2011 IL App (4th) 100595, ¶ 28, 963 N.E.2d 394.

¶ 23 Defendant argues the following portion of the prosecutor's rebuttal argument contained facts not in evidence and was improper:

> "[Defense counsel] said [Phillips] is biased because he has a hearing on Friday that I know nothing about, that he told you we have not discussed. I've made him no promises, and you know why I can't? Even if I wanted to I can't because it's being prosecuted by a completely different part of the government. I work for the county of Sangamon. I represent you folks when bad things happen to good people in Sangamon County. That's what's [*sic*] the State's Attorney's Office does.
>
> He's being prosecuted in a civil matter, not criminal, *** by the Attorney General's Office. That's Lisa Madigan. I don't work with Lisa Madigan. I have nothing to do with that."

¶ 24 Defendant claims the prosecutor's reference to facts not in evidence was improper. We agree. The prosecutor did not testify at trial. Most of the above quoted argument

refers to facts not in evidence and therefore was improper. *People v. Sykes*, 2012 IL App (4th) 111110, ¶ 47, 972 N.E.2d 1272 ("Challenging a witness's credibility may invite a prosecutor to respond, but it does not give the prosecutor *carte blanche* to make up evidence during closing argument.").

¶ 25 However, we further find no error occurred because there was evidence admitted at trial that did support the prosecutor's rebuttal argument that he made no promises to Phillips. During his redirect examination, Phillips testified as follows:

> "Q. [(Prosecutor:)] Mr. Phillips, did we talk on Monday?
>
> A. Yes.
>
> Q. And I think I told you I don't know a whole lot about your other matter?
>
> A. Yes.
>
> Q. Did I make you any promises?
>
> A. No.
>
> Q. Did you ever request anything from me?
>
> A. No.
>
> Q. Other than to go back to the other facility?
>
> A. Exactly.
>
> Q. You understand that I have no power to do anything over there?
>
> A. Exactly. I know that."

¶ 26 According to Phillips, he understood the prosecutor did not possess the authority to offer any incentive to Phillips in his pending case. Thus, we find that the complained-of comments by the prosecutor during rebuttal argument, while improper, were merely cumulative

of the evidence properly admitted at trial. See *People v. Hommerson*, 399 Ill. App. 3d 405, 927 N.E.2d 101 (2010).

¶ 27 In *Hommerson*, the court concluded that a prosecutor's improper comments during closing argument did not rise to the level of reversible error. *Id.* at 416, 927 N.E.2d at 113. There, a jury found the defendant guilty of two counts of first degree murder. *Id.* at 409, 927 N.E.2d at 107. During closing argument, the prosecutor erroneously argued that the defendant borrowed between $40,000 and $50,000 from his business partner and then used this incorrect information to exaggerate his dire financial situation at the time of the murders. *Id.* at 417, 927 N.E.2d at 114. On appeal, the State acknowledged the prosecutor's statement was not based on evidence admitted during trial. However, the court noted "similar evidence was admitted that defendant also borrowed $70,000 [from defendant's wife] that he never repaid." *Id.* The court thus concluded that the prosecutor's comments during closing argument "referred to evidence that was merely cumulative of properly admitted evidence." *Id.* Further, while acknowledging other improper closing remarks by the prosecutor, the court concluded, "[o]f the few remarks found to be improper, none rise to the level of reversible error on any individual basis." *Id.* at 419, 927 N.E.2d at 116. The court explained, "viewing *** all of the remarks found to be improper, we do not find that their cumulative effect cast doubt on the reliability of the jury's verdict." *Id.*

¶ 28 Here, like the closing remarks in *Hommerson*, the prosecutor's improper commentary about "a civil matter *** by the Attorney General's Office" and assertions that he "made [Phillips] no promises" was merely cumulative of properly admitted evidence and did not "cast doubt on the reliability of the jury's verdict." *Id.* Phillips testified that the prosecutor had

"no power to do anything" and "never made [him] any promises" regarding the dismissal of his pending legal matter.

¶ 29 Citing *People v. Smith*, 141 Ill. 2d 40, 565 N.E.2d 900 (1990), defendant argues that "[i]mproper remarks by the State will merit reversal if they result in prejudice to the defendant." However, the court in *Smith* actually stated, "[i]mproper remarks will not merit reversal unless they result in *substantial* prejudice to the defendant, considering the context of the language used, its relationship to the evidence, and its effect on the defendant's rights to a fair and impartial trial." (Emphasis added.) *Id.* at 60, 565 N.E.2d at 908; see also *People v. Nieves*, 193 Ill. 2d 513, 533, 739 N.E.2d 1277, 1286 (2000). Contrary to defendant's assertion, it is not enough to merely show prejudice; rather, the prejudice must be "substantial." *Smith*, 141 Ill. 2d at 60, 565 N.E.2d at 908. In this case, we do not find the prejudice from the prosecutor's improper remarks to be "substantial." *Id.* While the prosecutor's commentary should ordinarily be avoided, it did not amount to "clear or obvious" reversible error. *Hillier*, 237 Ill. 2d at 545, 931 N.E.2d at 1187. Because there is no reversible error, there is no plain error.

¶ 30 Additionally, defendant argues the prosecutor created an impermissible "us-versus-them" relationship with the jury when the prosecutor made the following statement during rebuttal argument: "I work for the county of Sangamon. I represent you folks when bad things happen to good people in Sangamon County. *** [Phillips is] being prosecuted *** by the Attorney General's Office. *** I have nothing to do with that." Defendant argues that this statement "improperly linked the jurors' interest in their own safety with the interest of the State in convicting [defendant]." We disagree. The prosecutor never mentioned the jurors' safety; rather, the prosecutor simply stated that a prosecutor in Sangamon County could not influence a

pending case being handled by the Attorney General. The comment was not designed to "arouse the fears and prejudices of the jurors." *People v. Threadgill*, 166 Ill. App. 3d 643, 651, 520 N.E.2d 86, 90 (1988). The prosecutor's comment was isolated and did not substantially prejudice defendant.

¶ 31 Further, we note that any claimed prejudice caused by the prosecutor's rebuttal argument was minimized by the trial court's instruction to the jury: "Neither opening statements nor closing arguments are evidence, and any statement or argument made by the attorneys which is not based on the evidence, should be disregarded." See *Hommerson*, 399 Ill. App. 3d at 419, 927 N.E.2d at 116 ("Even though [the prosecutor's improper comment] was error, we do not find that it rose to the level of reversible error, as it was an isolated comment and the jury was instructed properly[.]").

¶ 32 Because we conclude the prosecutor's comments did not substantially prejudice defendant, we also reject the argument that he was denied the effective assistance of counsel when his attorney failed to object during the prosecutor's rebuttal argument. See *Strickland v. Washington*, 466 U.S. 668 (1984) (defense counsel is ineffective only if counsel's performance fell below an objective standard of reasonableness and counsel's error substantially prejudiced defendant).

¶ 33 B. Fines and Fees

¶ 34 Finally, defendant argues—and the State concedes—the circuit clerk improperly imposed four fines against defendant. See *People v. Smith*, 2014 IL App (4th) 121118, ¶ 18, 18 N.E.3d 912 ("Although circuit clerks can have statutory authority to impose a fee, they lack authority to impose a fine, because the imposition of a fine is exclusively a judicial act."

(Emphases omitted.)). Specifically, defendant contends the following assessments should be vacated: (1) a $10 child advocacy assessment; (2) a $15 "ISP OP" assistance fund; (3) a $5 drug court fee; and (4) a $100 victims assistance fund. We accept the State's concession that all four assessments were improperly imposed by the circuit clerk. Accordingly, we vacate these assessments.

¶ 35 III. CONCLUSION

¶ 36 For the reasons stated, we vacate the following assessments imposed by the circuit clerk: the $10 child advocacy assessment, the $15 "ISP OP" assistance fund, the $5 drug court fee, and the $100 victims assistance fund. We otherwise affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2016).

¶ 37 Affirmed in part and vacated in part.