2017 IL App (1st) 151550-U

THIRD DIVISION
March 21, 2018

No. 1-15-1550

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. 2012 CR 02264
	)	
EARL COWAN,	)	The Honorable
	)	William G. Lacy
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Cobbs and Justice Howse concurred in the judgment.

¶ 1 *Held*: Defendant's waiver of counsel was effective where the trial court's admonishments substantially complied with Illinois Supreme Court Rule 401(a) (eff. July 1, 1984). Additionally, the prosecutor did not engage in any misconduct during opening statements or closing arguments that would substantially prejudice defendant.

¶ 2 Following a jury trial, defendant Earl Cowan was found guilty of the aggravated criminal sexual assault of S.F. and was sentenced to two consecutive natural-life prison terms. On appeal,

defendant asserts the trial court failed to admonish him as required by Illinois Supreme Court Rule 401(a) (eff. July 1, 1984) before permitting him to proceed *pro se*. Defendant further asserts that the State engaged in prosecutorial misconduct during opening statements and closing arguments. We affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 On December 30, 2011, 17-year-old S.F. was sexually assaulted on a Chicago Transit Authority (CTA) Blue Line train to O'Hare. The following month, defendant was charged with 24 counts of aggravated criminal sexual assault, 6 counts of attempted aggravated criminal sexual assault, and 4 counts of criminal sexual assault. Defendant was also charged with attempted criminal sexual assault, armed robbery, robbery, aggravated unlawful restraint, unlawful restraint and aggravated battery. Ultimately, the State proceeded to trial on only four counts of aggravated criminal sexual assault and two counts of criminal sexual assault. The charges were generally based on allegations that defendant digitally penetrated S.F.'s vagina and anus by use or threat of force. With respect to aggravated criminal sexual assault, each charge also alleged either that defendant struck S.F. or that he threatened her life.

¶ 5 A. Pretrial Proceedings

¶ 6 At defendant's arraignment on February 14, 2012, the court informed defendant that he was "charged with numerous counts of aggravated criminal sexual assault, attempt criminal sexual assault, unlawful restraint, [and] robbery." Defendant asked, "With numerous?" Several conversations subsequently occurred regarding defendant's speedy trial concerns and desire to represent himself.

¶ 7 At a hearing in March, defendant stated, "I don't want to agree to no continuances. That's what I'm saying. I'm demanding trial." The court explained that defendant could not demand trial

because his attorney was not present; rather, another attorney was standing in for counsel. Substitute counsel added that discovery was not complete. The same month, defendant filed a *pro se* habeas corpus petition, a *pro se* "demand for speedy trial and/or quash warrant," and a *pro se* motion to dismiss. At a hearing in April, defendant stated, “Your Honor, I don't want no continuances by agreement. I am ready for trial.” Although the court pointed out that defendant did not have all discovery materials, defendant stated, “I am demanding trial. I am ready."

¶ 8 In June 2012, the court observed that defendant had filed *pro se* documents. Defense counsel said she had explained to defendant that she was not ready to demand trial. Counsel added that she was still missing some discovery and believed the State would be filing a motion *in limine*. The court stated that defendant's demand for trial was of no legal effect. Despite indicating that he understood, defendant continued to file *pro se* motions. A different assistant public defender subsequently began representing defendant. In November 2013, defense counsel told the court that defendant asked him to inquire into some *pro se* motions. The court addressed defendant: "Sir, when you're represented by counsel, the attorney files the motions. There are no *pro se* motions."

¶ 9 At a hearing in April 2014, defense counsel said defendant was asking him to demand trial but counsel was not ready. Defendant stated, "I'm waiving my right to Sixth Amendment. I don't want no Counsel, I'm going to represent myself." Defendant also said, "I think I know what I'm doing. I'm waiving my right to my Sixth amendment." The following colloquy ensued:

> "DEFENDANT: I'm asking to be admonished right now.
>
> THE COURT: And then what happens after that?
>
> DEFENDANT: Well, I want my transcripts and stuff.
>
> THE COURT: Okay. Well, if you need - -what transcripts?

DEFENDANT: The discovery.

THE COURT: Okay. So, you wouldn't - - you're not - - so you're not ready for trial, then?

DEFENDANT: Yeah, I'm ready for trial.

THE COURT: How can you be ready for trial? You don't have a police report.

DEFENDANT: I'm here in front of you; ain't I?

THE COURT: Well, you haven't read anything.

DEFENDANT: Okay, well, I'm ready. You think I haven't read anything.

THE COURT: I don't think anything. You just asked me for police reports.

DEFENDANT: I'm waiving my Sixth Amendment right."

The court then ordered a behavioral clinical examination.

¶ 10 The next month, defense counsel informed the court that defendant was found fit to represent himself. The court's subsequent questions revealed that defendant was 58 years old, had completed some high school, had not been treated for a mental illness and had been involved in prior legal proceedings.

"THE COURT: Have you ever represented yourself before?

DEFENDANT: Yes, I did.

THE COURT: So then you know - - or should I ask you do you know presenting a defense is not a simple matter of telling your attorney.

And you're going to have require - - it's going to require you to abide by all the rules of the court; you understand that?

DEFENDANT: Yes, sir.

THE COURT: Okay. Now, a lawyer such as [defense counsel] has substantial experience and training in trial procedure, and the prosecution is going to be represented by an experienced attorney as well, probably two of them. And you're going to be going up against them; you understand that?

DEFENDANT: Yes, I do.

THE COURT: Okay. Now, you understand that by doing that, you're probably going to - - there's no doubt [about] it. You're going to give the prosecutor an advantage by failing to make objections to certain evidence, admissible evidence maybe.

Maybe take advantage of effective use of selecting the jury, making tactical decisions that might produce unintended consequences for you; do you understand that, sir?

DEFENDANT: Yes, I do."

¶ 11 The court continued to admonish defendant that he would receive no special treatment, could not change his mind in the middle of trial and would not be able to assert on appeal that he received ineffective representation. In addition, the court told defendant that his ability to defend himself may be diminished by virtue of also being the accused and that a lawyer could help him identify defenses and negotiate. Defendant stated that he understood the court's admonishments.

"THE COURT: And you understand you're charged with aggravated criminal sexual assault, and what is the sentencing range?

MS. MOJICA [Assistant State's Attorney]: Judge, he is eligible for natural life upon conviction with this case because of [a] 1974 criminal sexual assault conviction that he sustained.

THE COURT: Okay. You understand that, sir?

DEFENDANT: Yes, I do.

THE COURT: And if you lose, you'll spend the rest of your life in prison?

DEFENDANT: I understand.

THE COURT: And you still want to represent yourself.

DEFENDANT: Yes, I do."

The court then confirmed that no one had threatened defendant or promised him anything. Even after granting counsel leave to withdraw, the court admonished defendant that the Public Defender's Office had a specialized DNA unit whose assistance defendant would forgo.

¶ 12 At a hearing on May 30, 2014, the trial court and prosecutor discussed tendering defendant discovery. Defendant said he did not need to see the surveillance video and, upon the court's inquiry, confirmed that he wanted to represent himself. When the court told defendant he could not demand trial until he filed an answer, defendant stated, "I can answer that now. I don't need to see any papers, your Honor. I'm ready for trial." Defendant said he had no witnesses and would not assert an affirmative defense, although further discussion showed he would present a reasonable doubt defense. The court acknowledged that defendant was answering ready and was demanding trial. Defendant filed a speedy trial demand the same day.

¶ 13 On June 24, 2014, the court again questioned defendant regarding his representation. He confirmed that he understood the State would be introducing DNA evidence, that he had no training with regard to DNA, that he did not want to take advantage of the specialized unit within the Public Defender's Office, that he did not want to see the surveillance video and that he understood that the case was being tried by experienced prosecutors. Defendant further confirmed his understanding that the court would have no discretion to sentence him to less than natural life upon a guilty verdict, that he would be held to the same standards as an attorney and

that the court could not help him if he did not know a particular rule. During *voir dire*, in defendant's presence, the trial court read the charges that would be tendered to the jury.

¶ 14 B. The Trial

¶ 15 At trial, S.F. testified that before midnight on December 30, 2011, she was on the blue line heading downtown. She had a suitcase because she was going to New York with a friend and her mother early the next day. S.F. shared the last car with other passengers but, at the Cicero stop, an African-American man in his 40s got on the train. She estimated that he weighed 250 pounds and was just above six feet tall. Additionally, he was wearing a black cap and a red jacket that said "Coogi." In court, she identified him as defendant. According to S.F., defendant was aggressive toward the other passengers, telling them he "didn't mess around" or "play" and that he would "do it." The other passengers left the train.

¶ 16 Defendant approached S.F., leaned toward her and said, "if you scream, I'll kill you." He demanded her money but did not take the $5 in her wallet. Instead, he told her to stand up and lower her pants. When she refused, he punched her in the face, which hit the window. S.F. screamed and defendant said he would kill her. Accordingly, S.F. stood up and slowly lowered her pants, trying to stall. He bent her over and put his finger in her anus. He then put two fingers in her vagina. S.F. cried while continuing to say "no." Every time the train stopped, defendant looked out the door to make sure no one was coming.

¶ 17 At some point, defendant told her he had a knife. She was not able to see a blade or handle but she believed him. When he told her to "suck his dick," she repeatedly said "no" and again tried to stall. Before she was required to comply with his command, the train arrived at the UIC Halsted stop and he went to the door. S.F. testified, "I took my chances and hobbled to the other door and my pants were still on my ankles and I stood at the door and screamed."

¶ 18 Defendant exited the train and a couple of people went up the stairs after him. From a CTA surveillance video, S.F. identified herself screaming and defendant leaving the platform. We further note that the surveillance footage, which was published for the jury, showed defendant making his way toward the exit and picking up speed as other individuals moved toward him.

¶ 19 S.F. testified that shortly thereafter, she told two officers what happened and provided a physical description. While paramedics were tending to her, other police officers brought defendant to her location and she identified him as the man that attacked her. He was wearing the same clothing. After the incident, S.F. completed a physical exam and sexual assault kit.

¶ 20 Officer Billy Oliveros testified that he and his partner were responding to the criminal sexual assault call when they saw defendant, who matched the officer's description. When the officers detained defendant, he said, "Man, I'm just getting off of the train. I just came from seeing my girl. Why you guys messing with me?" They brought defendant to S.F.'s location where she identified him from within the ambulance. Dr. Meeta Shah testified that she examined S.F. and collected a sexual assault kit. S.F.'s most obvious external injury was a bruise along her clavicle on the left side.

¶ 21 Forensic scientist Ruben Ramos testified that he performed PCR-STR DNA analysis in this case. He would extract DNA, purify it, measure how much DNA was present and then make multiple copies of the target region. Once the DNA was amplified, a machine would generate a DNA profile. Having generated a sample's DNA profile, Ramos would then determine who could or could not be the donor of the evidence sample by visually comparing the sample's DNA profile to the reference DNA profile. Ramos identified reference DNA profiles from S.F.'s blood

sample and defendant's buccal swab. He also conducted DNA analysis on swabs from defendant's right hand.

¶ 22 Ramos explained that a full DNA profile consisted of 13 locations. Additionally, two separate reactions are performed to obtain a profile. While the first reaction involves 9 locations and the second reaction involves 6 locations, 2 locations overlap, for a total of 13. Because Ramos had insufficient DNA from defendant's right hand, he was unable to perform both reactions and, consequently, only obtained a profile for six locations. More specifically, he obtained a mixture of two DNA profiles. That being said, he could assume that defendant's DNA profile was on his right hand and, thus, was one of the two DNA profiles. Ramos essentially testified that after separating out defendant's profile, he determined that the second profile belonged to a female.

¶ 23 Ramos then compared the second profile to S.F.'s known profile. He testified that the DNA profile from "the swab from the right hand of Earl Cowan matched the DNA profile of [S.F.]." Ramos also calculated "the chance that a random person would have that female DNA." According to Ramos, about 1 in 36 million unrelated black individuals, 1 in 900 thousand unrelated white individuals, or 1 in 580 thousand unrelated Hispanic individuals would be expected to have that profile. Ramos further testified that this calculation spoke to the rarity of S.F.'s DNA on defendant's right hand. Moreover, intimate contact, or direct contact, was more likely to lead to recovery of DNA than a secondary contact. Ramos concluded that defendant's right hand was used in this incident.

¶ 24 As to the swab from defendant's left hand, Ramos found that the major DNA profile was male and "matched the DNA profile of Earl Cowan." Ramos was unable to determine the gender of the minor donor, however, as there were only three locations of DNA. After comparing the

minor DNA profile to S.F.'s known profile, Ramos could not exclude her as a donor. He also calculated that one in four blacks, one in four whites and one in two Hispanics could not be excluded as having contributed the partial minor DNA profile. Ramos was unable to generate a DNA profile from S.F.'s vaginal swabs. Following the State's case, defendant rested without presenting evidence.

¶ 25 In closing, the State argued that S.F.'s testimony, the surveillance video and DNA evidence supported a finding of guilt. Defendant argued it was not credible that S.F. would have stayed on the train after the perpetrator allegedly scared the other passengers away. He added, "I fled that train to get away from a situation, and I know what happens in those types of situations because I've been there and seen it." The trial court repeatedly sustained the State's objections when defendant made arguments not based on the evidence. Subsequently, the jury found defendant guilty of four counts of aggravated criminal sexual assault. The trial court sentenced defendant to two consecutive natural life sentences and found that the remaining counts merged into those convictions.

¶ 26 II. ANALYSIS

¶ 27 A. Admonishments under Illinois Supreme Court Rule 401(a)

¶ 28 On appeal, defendant first challenges his waiver of counsel, asserting that the trial court failed to admonish him as required by Illinois Supreme Court Rule 401(a) (eff. July 1, 1984).

¶ 29 Although defendant failed to raise this issue below, he asserts that we may review his contention for plain error. *People v. Jiles*, 364 Ill. App. 3d 320, 328 (2006) (reviewing a defendant’s waiver of counsel under the second prong of the plain error doctrine). To find plain error, however, there must be clear and obvious error. *People v. Reese*, 2017 IL 120011, ¶ 60. We find none.

¶ 30 A defendant has the right to waive counsel but the gravity of doing so requires a trial court to fully inform him of the nature of the right being abandoned and the consequences of his decision. *People v. Black*, 2011 IL App (5th) 080089, ¶ 11. A defendant may represent himself only if he knowingly, intelligently and voluntarily waives his right to counsel. *Id*. Furthermore, a court must honor a defendant's knowing and intelligent decision to represent himself, even if the court finds the decision is unwise. *People v. Wright*, 2017 IL 119561, ¶ 39.

¶ 31 When a trial court learns that the defendant has decided to waive counsel, the court must provide Rule 401(a) admonishments so that the defendant can consider the ramifications of his decision. *Jiles*, 364 Ill. App. 3d at 329. The purpose of the rule is to ensure that a defendant's waiver of counsel is intelligently and knowingly made. *People v. Campbell*, 224 Ill. 2d 80, 84 (2006). The rule states, in pertinent part, as follows:

> "The court shall not permit a waiver of counsel by a person accused of an offense punishable by imprisonment without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:
>
> (1) the nature of the charge;
>
> (2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences; and
>
> (3) that he has a right to counsel and, if he is indigent, to have counsel appointed for him by the court." Ill. S. Ct. R. 401(a) (eff. July 1, 1984).

¶ 32 Defendant argues that while the trial court told him he was charged with aggravated criminal sexual assault and would spend the rest of his life in prison if found guilty, the court did not admonish him regarding the other charges or applicable sentencing ranges. Defendant also

argues that the court failed to admonish him regarding the nature of the aggravated criminal sexual assault charge.

¶ 33 Rule 401(a) does not always require a court's strict, technical compliance. *Wright*, 2017 IL 119561, ¶ 41. Substantial compliance is sufficient where the record shows the waiver was knowing and voluntary, and the court's admonishment did not prejudice the defendant's rights. *Id*. Additionally, courts must assess each waiver of counsel on its own facts. *Reese*, 2017 IL 120011, ¶ 62. We review *de novo* whether the trial court substantially complied with Rule 401(a). *People v. Pike*, 2016 IL App (1st) 122626, ¶ 114. Here, we find substantial compliance.

¶ 34 Substantial compliance with Rule 401(a) does not require the court to recite every count charged; rather, the rule requires that the court admonish the defendant of "the nature of the charge." (Internal quotation marks omitted.) *Id*. ¶ 117 (quoting Ill. S. Ct. R. 401(a) July 1, 1984)). In addition, the trial court admonished defendant that he was charged with aggravated criminal sexual assault, the most serious of the charges against him. Furthermore, at defendant's arraignment, he expressly acknowledged the court's statement that he was charged with numerous counts. *People v. Garcia*, 2017 IL App (1st) 133398, ¶ 19 (observing that the record indicates the defendant was arraigned and made aware of the charges, although the arraignment transcript was not part of the record on appeal); but see *Jiles*, 364 Ill. App. 3d at 329-30 (finding the defendant could not be expected to rely on admonishments given at arraignment, which occurred three months before the defendant first inquired about waiving counsel). While the charges were numerous, it does not follow that they were necessarily complicated. *Cf. People v. Phillips*, 392 Ill. App. 3d 243, 263 (2009) (finding substantial compliance with Rule 401(a) where, among other things, nothing in the record indicated the defendant did not understand the charges, which were fairly simple). Moreover, the adequacy of the admonishments was not

negated merely because the court provided the jury with a more detailed recitation of the charges.

¶ 35 The trial court also admonished defendant that if he were found guilty of aggravated criminal sexual assault, he would spend the rest of his life in prison. This adequately apprised defendant of the stakes. If the possibility of life in prison did not make defendant doubt his decision, the specific sentencing ranges for lesser charges would not either. See *People v. Coleman*, 129 Ill. 2d 321, 334 (1989) ("Where a defendant knows the nature of the charges against him and understands that as a result of those charges he may receive the death penalty, his knowledge and understanding that he may be eligible to receive a lesser sentence pales in comparison."); see also *Reese*, 2017 IL 120011, ¶ 62 (finding the record did not indicate that the trial court's failure to admonish the defendant that his sentences would be consecutive to his existing natural-life sentence affected his decision to waive counsel); *People v. Haynes*, 174 Ill. 2d 204, 242-43 (1996) (finding that the omission of the minimum and maximum sentence available for the burglary charge did not invalidate a waiver of counsel where the defendant was aware of the sentencing range for the most serious charge: first degree murder). Thus, the trial court substantially, albeit not strictly, complied with Rule 401(a).[1]

¶ 36 The record also shows defendant knowingly, intelligently and voluntarily waived counsel. This was not defendant's first encounter with the legal system He had several prior convictions. See *People v. Johnson*, 119 Ill. 2d 119, 131-32 (1987) (observing that the defendant was "no stranger to criminal proceedings" in light of his prior convictions). Additionally, the court took great pains to emphasize several ways in which proceeding *pro se* could harm his

[1] Defendant suggests for the first time in his reply brief that waiver was ineffective because the court failed to admonish him that he had the right to appointed counsel. Because defendant failed to make that assertion in his opening brief, the assertion is forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017).

case. Like the defendant in *Wright*, defendant "repeatedly indicated to the trial court that his reason for not accepting the appointment of the public defender, and instead proceeding *pro se*, was due to speedy trial concerns." *Wright*, 2017 IL 119561,¶ 55. Similar to *Wright*, we find defendant's concern with having a speedy trial shows his waiver of counsel did not hinge on any of the omissions defendant now raises. *Id*. The court rightly honored defendant's decision to represent himself, however unwise.

¶ 37 B. Opening Statement and Closing Arguments

¶ 38 Next, defendant asserts that the State engaged in misconduct during opening statements and closing arguments. While defendant concedes he failed to preserve his objections to the alleged misconduct, he contends that the prosecutor's conduct, individually or collectively, resulted in plain error. We disagree.

¶ 39 Reviewing courts may excuse forfeiture where (1) the evidence was closely balanced or (2) an error was so serious that it impacted the fairness of the defendant's trial and challenged the judicial process's integrity. *People v. Staake*, 2017 IL 121755, ¶ 31; see also *People v. Johnson*, 208 Ill. 2d 53, 64 (2003) (stating that cumulative errors may result in second-prong plain error). As stated, however, there must be clear and obvious error in order to find plain error. *Reese*, 2017 IL 120011, ¶ 60.

¶ 40 The purpose of opening statements is to inform the jury of what each party expects the evidence and reasonable inferences therefrom to show. *People v. Crawford*, 2013 IL App (1st) 100310, ¶ 138. Opening statements should be brief, general and free from prejudicial material. *People v. Jones*, 2016 IL App (1st) 141008, ¶ 22. Conversely, they should not transform into an argument. *Id*. Comments suitable for closing arguments may be inappropriate in opening statements. *People v. Smith*, 2017 IL App (1st) 143728, ¶ 48. Furthermore, derisive

characterizations are inappropriate. See *Jones*, 2016 IL App (1st) 141008, ¶ 25. That being said, reversible error occurs only where the State's opening statement is attributable to deliberate misconduct and results in substantial prejudice. *Crawford*, 2013 IL App (1st) 100310, ¶138.

¶ 41 Moreover, courts must review a prosecutor's remarks in the context of her entire argument. prosecutors have wide latitude during closing arguments and may comment on the evidence and any fair and reasonable inferences the evidence yields, even where such inferences put the defendant in a negative light. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2006). *Young*, 2013 IL App (2d) 120167, ¶ 37. Similarly, a prosecutor is entitled to comment on a witness's credibility if the remarks constitute fair inferences (*People v. Young*, 2013 IL App (2d) 120167, ¶ 37) and to respond to arguments that invite a response (*People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 63). Conversely, an argument cannot be given solely for the purpose of inflaming the jury's emotions. *Nicholas*, 218 Ill. 2d at 121. Courts must review a prosecutor's remarks in the context of her entire argument, however. *Young*, 2013 IL App (2d) 120167, ¶ 37. Furthermore, the trial court has discretion to regulate its substance and style of closing arguments. *People v. Blue*, 189 Ill. 2d 99, 128 (2000). Improper remarks do not warrant reversal unless they substantially prejudice the defendant. *People v. Armstrong*, 183 Ill. 2d 130, 145 (1998). While a trial court's determination as to the propriety of remarks is reviewed for an abuse of discretion (*Blue*, 189 Ill. 2d at 128), we review *de novo* whether remarks were so egregious as to warrant a new trial (*People v. Wheeler*, 226 Ill. 2d 92, 121 (2007)).

¶ 42 A. Misleading DNA Arguments

¶ 43 First, defendant asserts that the prosecutor misled the jury as to the strength of the DNA evidence. At the heart of the matter is defendant's challenge to the reliability and credibility of DNA "matches" based on less than 13 locations and the propriety of expert testimony regarding

the significance of probability statistics. See *Pike*, 2016 IL App (1st) 122626, ¶¶ 61-62 (defining the prosecutor's fallacy as the mistaken assumption that the random match probability constitutes the probability that the defendant was not the DNA sample's source or the erroneous belief that the chance of a rare event happening equals the chance that the defendant is innocent).

¶ 44 Despite the essence of defendant's contention, he did not challenge the admissibility of DNA evidence in the trial court and has failed to develop an argument to that effect on appeal. See Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017*); Hall v. Naper Gold Hospitality, LLC*, 2012 IL App (2d) 111151, ¶ 12 (finding that the failure to comply with Rule 341 results in forfeiture). Additionally, defendant did not cross-examine Ramos or present any contrary evidence.

¶ 45 Generally, reviewing courts cannot consider on direct appeal evidence outside the record that was created in a particular case. *People v. Smith*, 406 Ill. App. 3d 879, 889 (2010); *cf. People v. Wright*, 2012 IL App (1st) 073106, ¶¶ 51, 103-14 (Where the State did not object to supplementing the record, the court considered evidence procured by defense counsel in another case, which showed that a search of the Illinois database revealed that "1,806 individuals had the same alleles at 9 loci" but did not match at additional loci.) While defendant relies on both legal and scientific authorities not presented below, there is disagreement in this court as to when, if ever, an appellate court can consider such matters on direct appeal. See *Crawford*, 2013 IL App (1st) 100310, ¶¶ 123-26 (in reviewing the defendant's claims of ineffective assistance of counsel and prosecutorial misconduct with respect to DNA evidence matching at only five loci, the reviewing court declined to consider evidence outside of the case and disagreed with *Wright*). We find it inappropriate to consider external scientific and statistical information in this appeal, particularly in light of apparent disagreement regarding the significance of such information. Compare *Crawford*, 2013 IL App (1st) 100310, ¶ 133, with *Wright*, 2012 IL App (1st) 073106, ¶

113. Accordingly, we take the evidence as we find it. In this case, Ramos testified that the DNA profile from "the swab from the right hand of Earl Cowan matched the DNA profile of [S.F.]."

¶ 46 In opening statement, the prosecutor remarked that defendant took physical evidence from the crime scene: S.F.'s DNA.

> "Her DNA from those intimate locations on her body that this defendant had the nerve to violate on a public train, her DNA was later determined by the Illinois State Police crime lab to be on this defendant's hands. Mostly on his right hand, but also on his left."

Defendant has not shown that these comments surpassed what the State expected the evidence and inferences there from to show. Nor has he shown that these remarks reflect a deliberate attempt to mislead the jury.

¶ 47 Defendant also challenges numerous closing remarks referring to the DNA evidence:

> "Let's make something absolutely a hundred percent crystal clear, ladies and gentlemen. This man had [S.F.'s] DNA on his hands. He sexually assaulted her. There is zero doubt to that whatsoever. Her DNA, without any explanation, her DNA that as Ruben Ramos told you yesterday, can only come from intimate contact, not secondary contact, intimate contact. His - - her DNA was on his hands. There is no explanation for that."

After acknowledging that the CTA did not have surveillance cameras on the train cars at the time of this offense, the State further argued, "[i]t was as if [S.F.] told you exactly - - and she was showing you on a video camera exactly everything that this man did to her. His DNA - - her DNA is on his hands. It's over. This trial ended there."

¶ 48 Moreover, the State argued:

> "An important question was asked of Ruben Ramos ***. Did you calculate the chance a random person would have had that female DNA profile on their hand. And we were talking about [S.F.]. What's the chance just a random person, you or me, would have that? Well, the profile would be expected to occur in approximately 1 in 36 million black, 1 in 900,000 white, or 1 in 580,000 Hispanic unrelated individuals.
>
> Ladies and gentlemen, that's lottery numbers. That just doesn't happen. DNA just doesn't fly through the air and land on people like that. This is intimate contact DNA that could have only occurred through what [S.F.] told you when he put his hands in her body, when he put his hands in her vagina, when he put his hands in her anus."

The State further urged the jury to hang their proverbial "hat on the fact that her DNA is on his hands."

¶ 49 In rebuttal, the State argued that S.F.'s submission to a medical examination "enabled her to have her blood sample to compare it to this guy's hands and to show that her DNA matched that intimate body fluid that was on his hands. That was [S.F.'s] intimate body fluid." The State further argued, "He got nailed for raping [S.F.], and the fact that her DNA is all over his right hand again corroborates what she told you. He used his right hand." Finally, the State suggested that the level of DNA on his left hand could have been low due to his activities after leaving the train.

¶ 50 We find the aforementioned remarks in closing argument constituted proper commentary on the evidence presented and inferences therefrom. S.F. testified that defendant assaulted her. Ramos testified that S.F.'s DNA profile "matched" one of two DNA profiles taken from defendant's right hand. See *Crawford*, 2013 IL App (1st) 100310, ¶¶140, 144 (finding the State's argument properly reflected testimony that the DNA recovered from the victims' swabs

"matched" defendant's DNA). At a minimum, that testimony supported an inference that S.F.'s DNA was on defendant's hand or hands. If defendant was capable of diminishing the credibility of such testimony, he should have taken the opportunity to do so below. We note that the court specifically admonished him that his lack of DNA expertise would be one disadvantage of proceeding *pro se*. Moreover, the court admonished the jury both before and after closing argument to disregard any argument not supported by the evidence. See *Id*. ¶141 (finding any error was cured by the court's admonishment). We find no error.

¶ 51 B. The Presumption of Innocence

¶ 52 Next, defendant challenges the prosecutor's closing argument that S.F.'s "DNA is on his hands. It's over. This trial ended there." He also challenges the prosecutor's comment that, "as I said before, this trial ended when Ruben Ramos testified yesterday."

¶ 53 As defendant observes, the State may not present arguments that diminish his presumption of innocence. *People v. Patterson*, 347 Ill. App. 3d 1044, 1055 (2004). Yet, the aforementioned remarks did not do so. Nor, as defendant suggests, did those remarks tell the jury its findings were superfluous. Instead, the remarks merely reflected the State's belief that it had proven its case. *Cf. People v. Thomas*, 146 Ill. App. 3d 1087, 1089 (1986) (finding that the prosecutor's argument misstated the jury's function and diminished the presumption of innocence by stating, "There's nobody here for the People, just you").

¶ 54 C. Vouching for the Witness's Credibility

¶ 55 Defendant further contends that during closing argument, the State improperly vouched for S.F.'s credibility when it argued, "Sign those forms that say guilty of aggravated criminal sexual assault. Not just because I say so but because the evidence says so, because [S.F.] told you what happened, because [S.F.] was telling the truth."

¶ 56 Defendant correctly asserts that it is improper for a prosecutor to vouch for a witness's credibility. *People v. Williams*, 2015 IL App (1st) 122745, ¶ 12. Prosecutors may not use the credibility of their office to bolster a witness's testimony. *Id*. Yet, we find no error.

¶ 57 The prosecutor did not rely on the authority of the State's Attorney's Office or suggest that the jury believe S.F. for reasons uniquely within the prosecutor's knowledge. *Cf. Williams*, 2015 IL App (1st) 122745, ¶¶ 17-19 (finding the prosecutor improperly vouched for the witness's credibility by stating, "[w]hen a gang member comes before us and is charged with an offense, we don't just take everything he says for truth immediately, we check it out"). On the contrary, the comment explicitly urged the jury to rely on the evidence, not the prosecutor's word. Moreover, the foregoing argument urged the jury to find S.F.'s account credible, as corroborated by DNA evidence. This was a fair comment on the evidence. We find no error.

¶ 58 D. Inflammatory Rhetoric

¶ 59 Finally, defendant challenges the State's characterization of him as a rapist. The prosecutor's opening statement remarked as follows:

> "If you scream, I will kill you. No one will hear you. Take your pants down. Those are the words of a rapist, ladies and gentlemen, but not just any rapist. They are the words of this rapist, Earl Lewis Cowan."

As stated, opening statements should not contain argument. *Jones*, 2016 IL App (1st) 141008, ¶ 22. Derisive characterizations are also inappropriate. *Id*. ¶ 25. We find, however, that the challenged remark does not constitute argument or an improper derisive characterization.

¶ 60 Defendant disregards that “rapist” is a colloquial word routinely used by the public to describe someone who has committed sexual assault. Additionally, the remarks merely reflect that the prosecutor expected the evidence to show that defendant sexually assaulted S.F.

Moreover, nothing about these comments suggested that defendant had committed sexual assault in the past. Consequently, we reject defendant's suggestion that the comments violated the trial court's determination that the jury should not hear of defendant's prior rape conviction. *Cf. Jones*, 2016 IL App (1st) 141008, ¶ 24 (finding that the State's characterization of the defendant as a "cold blooded criminal" was calculated to invoke an emotional response and had no basis in fact, as the defendant had no prior convictions).

¶ 61 That being said, the prosecutor's rebuttal closing argument went farther: "Could you tell by the shortness of her answers when I was showing her that video how hard it was to be this close to the man, the monster rapist who terrorized her that night?" We agree that referring to defendant as a *monster* rapist was improper, as it could serve no purpose but to inflame the passions of the jury. See also *Johnson*, 208 Ill. 2d at 80 (stating that prosecutors may not refer to the defendant as an animal in order to bolster a witness's testimony). Furthermore, the prosecutor used this term to describe defendant, not to negatively describe his actions. *Cf. Nicholas*, 218 Ill. 2d at 122 (finding that the prosecutor appropriately referred to the defendant's actions as "pure evil").

¶ 62 Notwithstanding this impropriety, reversal is not warranted, as the comment did not substantially prejudice defendant. We note that defendant’s other rejected challenges to prosecutorial misconduct, had they been meritorious, would not have substantially prejudiced defendant either.

¶ 63 S.F.'s testimony was in all material respects unimpeached. She testified that defendant, who was uniquely dressed, threatened her and digitally penetrated her anus and vagina. She identified him shortly after the incident. In addition, surveillance footage from the CTA partially

corroborated her account. DNA evidence was also consistent with her testimony. Given the strength of the evidence, defendant did not suffer substantial prejudice.

¶ 64 In light of our determination that the only impropriety demonstrated on this record was not substantial, we find that the challenged remarks, individually or cumulatively, did not constitute plain error or warrant reversal.

¶ 65 III. CONCLUSION

¶ 66 Here, defendant effectively waived counsel. Moreover, he has failed to demonstrate that any reversible error occurred during opening statements or closing arguments. Accordingly, we affirm the trial court's judgment.

¶ 67 Affirmed.