2018 IL App (1st) 153633-U

No. 1-15-3633

Order filed April 12, 2018

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 5268
	)	
DEANGELO WILLIAMS,	)	Honorable
	)	Mauricio Araujo,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices Gordon and Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for delivery of a controlled substance within 1000 feet of a public park is affirmed over his contentions that: (1) trial counsel was ineffective for pursuing a theory of the case which was unrelated to the charged crime and allowed the State to introduce evidence which prejudiced him; and (2) he was denied a fair trial as a result of prosecutorial misconduct during closing argument.

¶ 2 Following a jury trial, defendant Deangelo Williams was convicted of delivery of a controlled substance (heroin) within 1000 feet of a public park (720 ILCS 570/407(b)(2) (West

2014)) and sentenced to five years' imprisonment. Defendant appeals, claiming that his trial counsel was ineffective and that the State denied him a fair trial when it made improper comments during closing argument. For the reasons set forth herein, we affirm.

¶ 3 Defendant was charged by indictment with delivery of a controlled substance, delivery of a controlled substance within 1000 feet of a place of worship, and delivery of a controlled substance within 1000 feet of a public park. The State nol-prossed the delivery within 1000 feet of a place of worship count and the case proceeded to a jury trial.

¶ 4 Prior to trial, the State moved to preclude any evidence that defendant came into contact with a police car, arguing that the evidence was irrelevant to the charged offenses and that the "defense would seem to want to present that in a light in which it didn't occur to evoke sympathy from the jury." Trial counsel opposed the motion, stating that "[h]ow it came to be that [defendant] was arrested is certainly going to be relevant as to the State's characterization [that defendant] attacked the police." The trial court denied the motion.

¶ 5 The evidence at trial showed that, on March 4, 2014, Chicago police officers conducted an undercover drug surveillance near a bus shelter located on the northwest corner of the intersection of Homan Avenue and West Madison Street. Officer Lacz testified that, during the surveillance, he saw a man, whom he identified in-court as defendant, walk toward the bus shelter. Lacz observed that, as defendant approached the shelter, the "mood" of the people in the shelter changed, and they all looked toward defendant and started to retrieve money from their pockets. Lacz then saw defendant engage in multiple hand-to-hand transactions within the bus shelter. After witnessing the transactions, Lacz radioed a description of defendant's clothing,

which consisted of a black hooded sweatshirt, blue jeans, an "olive drab" belt, and white gym shoes with orange trim, to fellow officers of the surveillance team.

¶ 6 On cross examination, Lacz acknowledged that a police report he authored did not state that he saw defendant walk across the street toward the bus shelter or that the mood in the shelter changed as defendant approached. He also acknowledged that his team had access to video recording equipment, but that the team did not utilize the equipment during the surveillance. On redirect, Lacz testified that the police reports he authored were summaries of the events he observed during the surveillance

¶ 7 Officer Bady, who was working undercover in the bus shelter, testified that she saw defendant, who was wearing a black hooded sweatshirt, blue jeans, an olive green belt, and white gym shoes with orange trim, walk to the bus shelter from the south side of Madison. After witnessing defendant engage in four hand-to-hand transactions with people in the shelter, Bady approached defendant and gave him $20 of prerecorded 1505 funds in exchange for two bags of suspect narcotics. Bady testified that, during the transaction, she was one foot away from defendant and able to observe him for two minutes. After the transaction was complete, Bady returned to her covert vehicle and radioed a description of defendant to other officers of the narcotics unit. Ten minutes later, she drove to 3 North Homan and identified defendant as the man who had sold her the suspect narcotics. Bady kept the bags of suspect narcotics in her custody and control until she inventoried them at a police station approximately 30 minutes later.

¶ 8 On cross-examination, Bady testified that no one on her team had requested a video camera to record the investigation. She explained that she identified defendant while performing a "slow roll," during which she drove past defendant from 15 to 25 feet away at 15 miles per

hour. Bady acknowledged that the police report she authored did not mention that she observed defendant walk across the street to get to the bus shelter.

¶ 9 Officer Lee testified that he followed a man who matched Bady's description, and whom he identified in-court as defendant. Defendant left the bus shelter, walked south on Homan Avenue and entered an apartment building located at 16 South Homan. Five or six minutes later, defendant emerged from the building wearing the same clothing that he was wearing when he entered the building. Lee transmitted information regarding defendant's location to Officers Meagher and Padilano, who approached defendant. As the officers did so, defendant fled northbound on Homan. Padilano chased defendant on foot while Meagher followed defendant in his police vehicle. In an alley off of Madison Street, defendant changed course and began to run towards Meagher's unmarked police vehicle. Officer Meagher testified that he started to open the door of his vehicle when defendant tried to shut the door by pushing on the sideview mirror. Defendant attempted to run back out of the alley, but stumbled on the snow and ice on the ground. Meagher exited his vehicle and performed an emergency takedown of defendant. Shortly thereafter, Bady arrived on the scene and identified defendant as the person who sold her the suspect narcotics. Pursuant to a custodial search of defendant, Meagher found $37, which did not match the prerecorded 1505 funds.

¶ 10 During cross-examination, Meagher stated that defendant "violently attacked" the side mirror on his police vehicle. He explained that the police report which he approved did not mention that defendant attacked the mirror because the report was simply a summary of events, and that he detailed defendant's "violent attack" of the mirror in a more detailed supplemental report.

¶ 11 Lieutenant Ryle testified that he was not involved with, and had no personal knowledge of, the transaction that occurred in defendant's case. After learning that officers had used force while arresting defendant, Ryle interviewed defendant as part of a tactical response report to determine if the use of force was justified. During the March 4, 2014 interview, defendant, after receiving his *Miranda* warnings, told Ryle that he fled from police because he was scared and did not want to be arrested or taken to jail. He also told Ryle that he ran into the mirror on Meagher's vehicle and broke it.

¶ 12 Illinois State Police forensic chemist Klimek testified that the bags recovered by the officers during the narcotics surveillance tested positive for 0.7 grams of heroin. The parties then stipulated that, if called, State's Attorney investigator Erbacci would testify that he measured a distance of 14 feet between 3404 West Madison and the nearest property line of Garfield Park. The State then rested its case-in-chief. Defendant did not testify or present any evidence.

¶ 13 During closing arguments, defense counsel argued that the officers' poor opportunity to observe the suspect led the officers to arrest defendant, who happened to be in the wrong place at the wrong time. Counsel pointed to discrepancies between the officers' testimony and their initial police reports as evidence that the officers arrested the wrong man. Specifically, he argued that Officer Lacz testified that he saw defendant approach the bus shelter but that he failed to include this information in his police report because "he is also bolstering. He knows that it's a short amount of time. He never saw my client before." Counsel also argued that Officer Bady claimed:

> "to see [defendant] approaching her, though [it's] not encapsulated, written down or reduced in any report. She can see him coming towards her. Why is she saying this when it's not in the report[?] [B]ecause she knows she was there for such a small amount

> of time to observe somebody she had never seen before in winter clothing, she knows the opportunity to observe him is very short and subject to inaccuracy."

Counsel continued that the lack of audio or video recordings of the transaction raised a reasonable doubt of defendant's guilt given that the officers admitted that they had access to video cameras. Counsel also argued that Officer Meagher hit defendant with his vehicle and had to claim that defendant "violently attacked" the mirror because he could have been sued if he hit defendant with the vehicle.

¶ 14 In its rebuttal argument, the State pointed out that Officer Bady had an adequate opportunity to observe defendant's face while she was standing in front of defendant for one-and-a-half to two minutes. During the State's rebuttal, the following exchange took place:

> "[STATE'S ATTORNEY]: As for police reports, how important are the police reports that even if you ask for them, the Judge won't give them to you because they are not evidence. If they were evidence, I would have made 12 copies for you.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Hold on. All right. Again, ladies and gentlemen what the attorneys say is not evidence. It's purely what they believe the evidence will show or has shown.
>
> [STATE'S ATTORNEY]: If the police reports were so important, we would have made 12 copies and handed them out to you in the beginning of this trial –
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: If you can move on.
>
> [STATE'S ATTORNEY]: -- had you go back in the jury room and deliberate. That's not how the criminal justice system works.

[DEFENSE COUNSEL]: Objection.

THE COURT: That is sustained. That question will be stricken.

[STATE'S ATTORNEY]: This justice system -- this is a witness stand. A witness stand for witnesses to come and tell you what happened because you get to judge the credibility of them. Chicago police officers are cops. They are not actors. They are hired to serve and protect, not make movies. You don't need cameras because there is a witness stand. There's not a TV there."

¶ 15 After deliberation, the jury found defendant guilty of delivery of a controlled substance and delivery of a controlled substance within 1000 feet of a public park. The trial court merged the delivery count into the delivery within 1000 feet of a park count and sentenced defendant to five years' imprisonment. The same day, defendant pled guilty to an escape charge in case number 14 CR 11777 and the trial court sentenced defendant to two years' imprisonment to run consecutively with his five year sentence from the instant case.

¶ 16 On April 3, 2015, the trial court granted, in-part, defendant's motion to reconsider sentence. The court resentenced defendant to five years' imprisonment with a boot-camp recommendation in the instant case, to be served concurrently with a three year term of imprisonment and a recommendation for bootcamp on the escape charge. On May 14, 2015, the trial court granted defendant's motion to amend the sentencing order in the instant case to reflect a bootcamp recommendation. On June 23, 2015, defendant filed a second motion to reconsider sentence after the IDOC did not place him in bootcamp. On October 13, 2015, the trial court denied the motion to reconsider, stating that it lost jurisdiction to hear the motion after 30 days and lost "the power to reinvest itself with jurisdiction pursuant to Supreme Court Rule 183." See

Ill. Sup. R. 183 (effective Feb. 6, 2011) ("The court, for good cause shown on motion after notice to the opposite party, may extend the time for filing any pleading or the doing of any act which is required by the rules to be done within a limited period, either before or after the expiration of the time"). On November 9, 2015, defendant filed a notice of appeal.

¶ 17 On December 6, 2017, after the parties submitted their opening briefs and the State argued that this court did not have jurisdiction to hear the case because defendant did not file a timely notice of appeal, our supreme court allowed defendant's motion for a supervisory order and instructed this court to treat the November 9 notice of appeal as a properly perfected appeal from the trial court's April 3, 2015 judgment. *People v. Williams*, No. 122935 (2017) (supervisory order).

¶ 18 On appeal, defendant first contends that his trial counsel was ineffective for pursuing the defense theory that officers ran into him with their car, because that theory was unsupported by the evidence and allowed the State to elicit evidence that was detrimental to his case. Specifically, defendant contends that counsel's cross examination of Meagher about the breaking of the side mirror, during which he testified that defendant "violently attacked" the mirror, prejudiced the jury. Further, he contends that counsel's decision to pursue this theory allowed the State to present Lieutenant Ryle's testimony regarding defendant's interview statement which had no relevance to the charged offenses and was treated by the jury as an admission of guilt.

¶ 19 To prevail on a claim of ineffective assistance of counsel, "a defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *People v. Domagala*, 2013 IL 113688, ¶ 36

(quoting *Strickland v. Washington*, 466 U.S. 688, 694 (1984)). To establish deficient performance, "defendant must overcome a strong presumption that counsel's actions were the product of sound trial strategy." *People v. Moore*, 358 Ill. App. 3d 683, 689 (2005). Our supreme court has stated "that a reviewing court will be highly deferential to trial counsel on matters of trial strategy, making every effort to evaluate counsel's performance from his perspective at the time, rather than through the lens of hindsight." *People v. Perry*, 224 Ill. 2d 312, 344 (2007). "To establish prejudice, a defendant must show that but for counsel's deficiency, 'there is a reasonable probability that the result of the proceeding would have been different.' " *People v. Brown*, 2015 IL App (1st) 122940, ¶ 47 (quoting *People v. Houston*, 229 Ill. 2d 1, 11 (2008)). The failure to establish either prong of the *Strickland* test defeats a claim of ineffectiveness. *People v. Henderson*, 2013 IL 114040, ¶ 11. A claim of ineffective assistance claim may be disposed of on the grounds that the defendant was not prejudiced without deciding whether counsel's performance was deficient. *People v. Brown*, 2017 IL App (1st) 142877, ¶ 55.

¶ 20 Here, we find that counsel did not render ineffective assistance because defendant cannot show that he was prejudiced by counsel's decision to pursue the theory that the police struck him with their vehicle. Stated differently, defendant cannot show a reasonable probability that, absent counsel's decision to cross-examine Meagher about the chase, that he would have been acquitted. This is especially so where neither Meagher nor Ryle witnessed defendant engage in the narcotics transaction and, thus, were not the State's primary witnesses. Rather, both Meagher and Ryle testified about the police chase subsequent to the narcotics transaction, a matter tangential to the question of defendant's culpability for the charge of delivery of a controlled substance within 1000 feet of a public park. Meagher testified that defendant ran into his vehicle

and Ryle testified to defendant's statements regarding the chase. Therefore, even assuming, *arguendo*, that counsel was deficient for attempting to impeach Meagher and Ryle, defendant was not prejudiced by counsel's actions where the evidence directly related to defendant's guilt was overwhelming.

¶ 21 This evidence shows that Officer Lacz, after observing defendant engage in multiple hand-to-hand transactions in the bus shelter, radioed a description of defendant's clothing to other officers on the drug surveillance team. Officer Bady, who was in the bus shelter, saw defendant engage in a number of suspect narcotics transactions. Bady then approached defendant and bought $20 worth of heroin from him. She was able to observe defendant for two minutes, and was one foot away from him at the time of the transaction. She then relayed a description of defendant's clothing to other officers on her surveillance team. Defendant left the scene of the transaction, and police observed him enter a building. Less than ten minutes later, a man matching Bady's description of defendant exited the same building. After this man was apprehended, Bady identified him as defendant and the person who sold her the suspect narcotics. In light of this evidence, defendant cannot show that he was prejudiced by counsel's performance such that there exists a reasonable probability that the outcome of his trial would have been different had counsel not attempted to impeach the officers regarding the chase subsequent to the transaction.

¶ 22 Defendant next contends that the State denied him a fair trial as a result of prosecutorial misconduct during rebuttal closing argument.

¶ 23 In setting forth this argument, defendant acknowledges that he failed to raise this issue in a posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (both a trial objection and a

written posttrial motion raising the issue are required in order to preserve the issue for review on appeal). Nevertheless, he argues that we may review the issue as first-prong plain error. The first prong of the plain error doctrine allows a reviewing court to consider unpreserved error when a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant. *Nowells*, 2013 IL App (1st) 113209, ¶ 18. Under either prong of the plain error doctrine, the burden of persuasion remains on the defendant. *Id*. at ¶ 19. A reviewing court conducting plain error analysis must first determine whether an error occurred, as "[w]ithout reversible error, there can be no plain error." *People v. McGee*, 398 Ill. App. 3d 789, 794 (2010).

¶ 24 The parties disagree about the proper standard of review to apply to allegations of improper remarks during closing argument. As the State points out, there exists some confusion among Illinois courts regarding whether to apply a *de novo* or abuse of discretion standard. See *People v. Moody*, 2016 IL App (1st) 130071, ¶ 59 (describing the nature and origins of this confusion). However, we need not resolve this issue, as our holding in this case would be the same under either standard.

¶ 25 "Every defendant is entitled to fair trial free from prejudicial comments by the prosecution." *People v. Young*, 347 Ill. App. 3d 909, 924 (2004). However, a "defendant faces a substantial burden in attempting to achieve reversal based upon improper remarks made during closing argument." *Moore*, 358 Ill. App. 3d 683, 693 (2005). " 'Generally, prosecutors have wide latitude in the content of their closing arguments.' " *People v. James*, 2017 IL App (1st) 143036, ¶ 46 (quoting *People v. Evans*, 209 Ill. 2d 194, 225 (2005)). Prosecutors may comment on the evidence and reasonable inferences from the evidence, "including a defendant's credibility or the

credibility of the defense's theory of the case." *People v. Williams*, 2015 IL App (1st) 122745, ¶ 12. However, prosecutors may not vouch for the credibility of a government witness, nor are they permitted to use the credibility of the State's Attorney's office to bolster a witness's testimony. *Id*. A prosecutor's closing argument must be viewed in its entirety and any challenged remarks must be viewed in context. *People v. Thompson*, 2016 IL App (1st) 133648, ¶ 47. Moreover, "[s]tatements will not be held improper if they were provoked or invited by the defense counsel's argument." *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). Improper remarks by a prosecutor are only cause for reversal if they " 'engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from them.' " *James*, 2017 IL App (1st) 143036, ¶ 46 (quoting *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007)).

¶ 26 We first address defendant's argument that the prosecutor improperly bolstered the testimony of the officers and vouched for their credibility by stating: "This is a witness stand. A witness stand for witnesses to come and tell you what happened because you get to judge the credibility of them. Chicago police officers are cops. They are not actors. They are hired to serve and protect, not make movies. You don't need cameras because there is a witness stand."

¶ 27 After reviewing these comments in context, we find that the prosecutor's statements were not improper because they were invited by defense counsel's closing argument. In closing, counsel argued that the lack of audio or video recordings of the transaction raised a reasonable doubt of defendant's guilt because the officers admitted that they had access to video cameras but failed to utilize them and failed to recover video recordings from surveillance cameras from the buildings located near the bus shelter. In rebuttal, the State responded to counsel's argument by, essentially, pointing out that video evidence was not necessary where the officers testified, in

person, to their observations and it was the jury's responsibility to judge their credibility. Given that these comments were made in response to trial counsel's repeated reference to lack of video surveillance, we will not find them improper. *Glasper*, 234 Ill. 2d at 204 ("Statements will not be held improper if they were provoked or invited by the defense counsel's argument.").

¶ 28 Defendant also argues that the prosecutor improperly bolstered the testimony of the officers by suggesting to the jury that the police reports were not important and that the reports would weigh in favor of the State. Specifically, defendant points out that, despite multiple objections and instructions from the trial court to "move on," the State commented: "As for the police reports, how important are they? How important are the police reports that even if you ask for them, the judge won't give them to you because they are not in evidence. If they were in evidence, I would have made 12 copies for you" and "if the police reports were so important, we would have made 12 copies and handed them out to you in the beginning of this trial * * * [and] [h]ad you go back in the jury room and deliberate. That's not how the criminal justice system works."

¶ 29 In general, it is not improper for a prosecutor to downplay the importance of the substance of police report, especially in response to a defenses argument regarding discrepancies between an officer's testimony and the content of police reports. See *People v. Sutton*, 260 Ill. App. 3d 949, 961 (1994) (Finding that a prosecutor's remarks that police reports "are only summaries" and are inferior to physical evidence were not improper where they were invited by defense argument). However, it is improper for the prosecutor to comment on facts which are inadmissible or to suggest that evidence of guilt existed but which, because of its inadmissibility, cannot be heard by the jury. See *People v. Shief*, 312 Ill. App. 3d 673, 677-80 (2000) (reversing

defendant's convictions after the prosecutor argued that police reports were not evidence and that "if I had my way, I would hand you all these police reports and say you go back in there and say he's guilty").

¶ 30 Here, we need not determine if the prosecutor's comments were improper because, even if they were improper, we find that, in light of the evidence presented at trial, defendant was not substantially prejudiced by the comments such that it is impossible to say whether or not a verdict of guilt resulted from the comments. As mentioned, the evidence showed that both Officer Lacz and Officer Bady observed defendant participate in multiple hand-to-hand transactions and radioed a description of defendant's clothing to the rest of the surveillance team. Bady testified that she bought $20 of heroin from defendant. She testified that, during the transaction, she stood as close as one foot from him and was able to observe him for 2 minutes. Bady relayed a description of defendant's clothing to other officers on her surveillance team. After defendant left the scene and was apprehended by police, Bady identified defendant as the man who sold her the suspect narcotics. In light of this evidence, we can say that defendant's conviction was not a result of any improper comment made during the prosecutor's rebuttal argument. Further, the trial court promptly sustained counsel's objection, ordered the remarks stricken, and instructed the jury that the parties' statements during closing argument were not evidence. See *People v. Nielson*, 187 Ill. 2d 271, 297 (1999) ("As we frequently have noted, the prompt sustaining of an objection combined with a proper jury instruction usually is sufficient to cure any prejudice arising from an improper closing argument"). As such, we find no reversible error. See *James*, 2017 IL App (1st) 143036, ¶ 46.

¶ 31 Having found no reversible error in the prosecutor's comments, we find that defendant's claims are forfeited. See *McGee*, 398 Ill. App. 3d at 794 ("[w]ithout reversible error, there can be no plain error"). Defendant claims that his trial counsel was ineffective for failing to preserve this issue in a post-trial motion. However, because we have found that defendant was not substantially prejudiced by the prosecutor's remarks, defendant is unable to establish the prejudice prong of the *Strickland* test. See *Glasper*, 234 Ill. 2d at 216 (finding that the defendant could not satisfy the prejudice prong of the *Strickland* test where the prosecutor's remarks did not deprive him of a fair trial and did not amount to plain error); see also *People v. Stewart*, 365 Ill. App. 3d 744, 750 (2006) ("An attorney's performance will not deemed ineffective for failing to file a futile motion").

¶ 32 For the reasons set forth herein, we affirm the judgment of the circuit court of Cook County.

¶ 33 Affirmed.