2018 IL App (1st) 161422-U

No. 1-16-1422

Order filed December 11, 2018

Second 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. 15 CR 15012
	)	
MARCUS TOLBERT,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Mason and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm defendant's convictions for vehicular invasion and robbery where the evidence was sufficient to show defendant took money from another and the prosecutor did not make improper statements in rebuttal closing argument.

¶ 2 Following a bench trial, defendant Marcus Tolbert was found guilty of vehicular invasion (720 ILCS 5/18-6(a) (West 2014)) and robbery (720 ILCS 5/18-1(a) (West 2014)) and sentenced to concurrent terms of 66 months' imprisonment. On appeal, he argues the evidence was insufficient to show he took money or intended to take money as required to sustain his

convictions. Alternatively, he asserts the prosecutor misstated the law in rebuttal argument, requiring a new trial. We affirm.

¶ 3 Defendant was charged by information with vehicular invasion and robbery for allegedly reaching into a motor vehicle occupied by Loren Vasquez with the intent to commit a theft therein and taking money from Vasquez by the use of force or threat the use of force.

¶ 4 At trial, Vasquez testified that on August 21, 2015, he was working as a driver for a tow truck company that purchased "junk cars." He received a text message instructing him to purchase a Dodge Caravan for $230 and providing the contact information for the seller, an individual named "Marcus." Vasquez contacted Marcus, who told him to go to the 4600 block of West Madison Street. There Vasquez met a man he identified in court as defendant.

¶ 5 Defendant ran up to the tow truck, unlocked the passenger-side door through an open window, and "jumped in [Vasquez's] truck." Vasquez was "shocked" and "nervous" that defendant entered his truck. Defendant instructed Vasquez to drive one block to where the van was parked. Vasquez pulled up next to the van, and defendant exited the tow truck. Vasquez immediately rolled up the windows and locked the tow truck. He instructed defendant to put the van in neutral and saw him "fumbling around inside." Vasquez realized the van was not in neutral but continued to connect the tow truck to the van and began to lift the wheels off the ground.

¶ 6 Vasquez exited the tow truck with $230 in his hand and asked defendant for the van's title. Defendant "started stuttering and fumbling around," eventually telling Vasquez that he did not have the title. Vasquez told him he could still purchase the van as "junk" for $100 but would need to see defendant's identification card and registration. Defendant gave Vasquez his

identification card, which Vasquez then photographed with his phone. The name on the registration defendant retrieved from the van did not match the name on his identification card. Vasquez therefore could not purchase the van. When he told defendant why he could not buy the van, defendant explained he had purchased the van a month ago. But Vasquez observed a "temporary tag" on the van and told defendant he "should have had some kind of registration for it in your name." Vasquez told defendant, "I'm not going to take this because it is not your car," and defendant responded, "give me my money."

¶ 7 Vasquez began to lower the van and unhook the attachments when he observed another man on the other side of him. Defendant became angry and continued to try and persuade Vasquez to "take the car and give him his money." Vasquez began to back away and defendant came towards him in an "aggressive" manner. Vasquez entered his truck and defendant came at him like he was going to "attack." As Vasquez started to drive away, defendant "jumped on the truck and tried to gain control over [the] steering wheel as he was *** hitting me and we are just wrestling around with the steering wheel and everything else." At this point, Vasquez was holding the money and the registration in his left hand and trying to get the window up, but defendant was stopping it.

¶ 8 Vasquez testified that defendant "was able to yank the – everything that I had in my hand, the money and the registration. We fought some more. He was trying to run me into the telephone poles. I kept telling him, you know, you got what you want. Get off my truck, get off my truck." Defendant elbowed Vasquez in the head and continued to try to move the steering wheel. Vasquez drove for a quarter mile with defendant on the truck reaching into the window before Vasquez made a sharp turn and defendant "jumped off."

¶ 9 Vasquez called 911 and kept driving. After two more calls to 911, he met the police at a junkyard and provided them with the photo he had taken of defendant's identification. At the police station, Vasquez identified defendant in a photographic lineup. Vasquez denied telling a 911 dispatcher that the money "fell out of [his] hand with [defendant]."

¶ 10 Chicago police officer Abraham Lara testified that he responded to a 911 call of a traffic accident in the 4600 block of West Madison Street. When he arrived, a fire truck and an ambulance were already on scene and an individual, whom he identified in court as defendant, was laying on the ground bleeding from his right leg. Lara initially believed defendant was the victim of a traffic accident.

¶ 11 Defendant told Lara "vaguely what happened," that the accident occurred after a verbal altercation with a tow truck driver when the driver "panicked" and drove from the scene. Defendant explained to Lara that he hung onto the driver's side of the truck but fell after the truck made a turn. The truck then ran over him. Defendant told Lara he knew the tow truck driver's name and phone number, but did not provide that information to Lara. Lara spoke with defendant for about 10 minutes before he was taken to the hospital.

¶ 12 Chicago police detective Robert Goerlich testified that he investigated the robbery and received from Vasquez the photograph of defendant's identification. Goerlich later arrested defendant and provided him his *Miranda* warnings. Defendant waived his rights and told Goerlich that he had found an unlocked abandoned van on the street with the keys inside and a dead battery. Defendant believed the van belonged to him because it was abandoned and it was a "finders-keepers" situation. There was no title inside the van, but there was a registration.

Defendant believed that, because he had found the van, he could sell it for scrap for what he saw as "free money."

¶ 13 Defendant told Goerlich that he contacted two salvage companies, with one offering $50 for the van and the other offering $230. He contacted the company offering $230, and Vasquez came to pick up the van. Defendant did not meet Vasquez at the van, but instead told Vazquez to meet him in front of a nearby high school. Defendant admitted that he had his "partner" wait by the van. When Vasquez arrived, defendant entered the truck and they drove to the van. Defendant gave his identification and the van's registration to Vasquez, but stated he did not have the van's title.

¶ 14 Vasquez asked defendant what price Vasquez's boss offered defendant for the van. Defendant responded $230, and Vasquez stated he would call his boss to confirm. Vasquez returned and told defendant that he could only offer $100, to which defendant agreed. Vasquez then looked at the registration, decided not to take the van, and drove off in the tow truck.

¶ 15 Defendant believed that, because Vasquez still had the registration, Vasquez could come back later and steal the van. Defendant explained he wanted to get back the registration, so he jumped onto the tow truck. He told Goerlich that Vasquez gave him back the registration but would not stop the tow truck. Defendant explained that, when the tow truck was traveling about 40 miles per hour, he fell off and was run over by the back tires of the truck.

¶ 16 Defense witness Linda Ward, defendant's mother, testified that defendant broke his femur and ankle, among other injuries, after being hit by the tow truck. She contacted an attorney two weeks after the accident, but before defendant was arrested, to pursue damages for defendant's injuries.

¶ 17 After the parties agreed to the foundational requirements, the defense entered into evidence three 911 calls between Vasquez and the dispatcher. In the first call, Vasquez explains that he "got held up" with the offender "punching [him], punching [him], trying to rob [him]." In the second call, Vasquez explains that the offender jumped on the tow truck and grabbed the steering wheel. Vasquez "had some money in [his] hand," but when the offender fell off the truck, "the money went with him." The offender "didn't' get all the money" but "got a couple hundred." In the third call, Vasquez states that he was "robbed." He further states that he had money in his hand and, when the offender jumped off truck, the offender "had [Vasquez's] hand and money went with it." After hearing the calls, the trial court stated, "I heard the 911 tapes, which is [*sic*] essentially consistent with what Mr. Vasquez described in court."

¶ 18 In closing argument, the State asserted that defendant tried to use property that did not belong to him, the vehicle and registration, in order to make a "quick buck holding up tow truck drivers." The State argued that, when the "swindle" did not work, defendant went after Vasquez, used force by "striking him about his face or body," and "stole money from him." The State argued defendant was a robber and a liar, because he refused to give Lara the name and phone number he had for the tow truck driver, "anything that would tie him to the truth," and was guilty of both offenses.

¶ 19 Defense counsel responded by arguing that defendant was on the side of the tow truck in order to retrieve the registration from Vasquez. The court and defense counsel discussed whether defendant's attempt to recover the registration that did not belong to him constituted a theft, with counsel noting the registration did not belong to Vasquez. Counsel argued that defendant's assertion that he was trying to get the registration back so Vasquez would not return and take the

van was a "reasonable belief at that time." Counsel pointed out that, contrary to Vasquez's trial testimony that defendant took the money from his hand, he told the 911 dispatcher the money "may have fell out" when defendant fell off the truck. Counsel also claimed Vasquez had a motive to lie about the incident because his truck ran over defendant, and noted Vasquez took no photos corroborating his injuries. Counsel concluded that, at the time of the vehicular invasion and robbery, defendant lacked the requisite intent for either offense. He pointed out that defendant gave Vasquez his photo identification, which would be "counter intuitive" if he intended to rob Vasquez.

¶ 20 In rebuttal, the State argued defendant was guilty of both offenses. Noting vehicular invasion requires intent to commit a theft, the State argued that, "[b]y trying to exercise continued control even over just the registration," defendant committed "a theft by taking back that registration that never belonged to him in the first place, let alone the $230 that belonged to [Vasquez] that he also took." It further argued, "robbery requires the taking of property from the person. It has no specifics about whose property it is." Therefore, even if "all it was was the registration, [defendant] took that registration from the person of [Vasquez]. That is a robbery when he used force to do so."

¶ 21 The court found defendant guilty of both robbery and vehicular invasion. It noted that defendant "took it upon himself to sell somebody else's car for a profit for himself" where "there was no particular indicia indicating that [the van] was abandoned and for anybody to take whatever they wanted off of it." The court found defendant "reach[ed] in" the tow truck, started punching Vazquez, "making demands." Defendant then "tri[ed] to grab the steering wheel[]" in order to stop the truck by driving into a pole because he was "intent on taking whatever he can."

The court noted that after Vasquez turned, "[defendant] falls off. And falling off with him is not only the registration, but $200 in cash that Mr. Vasquez had in his hand." It further found that, "[b]y the time the dust settled, [defendant] had the money." The court told defendant he had no right to take a car that had not been driven in a long time, which was someone else's property, and sell it for scrap. It found Vasquez feared defendant was going to get violent and "[defendant] did indeed get violent with [Vasquez] trying to get away *** with property that did not belong to [defendant] or to Mr. Vasquez."

¶ 22 Defendant filed a written motion for a new trial, which the court denied. The court sentenced defendant to concurrent prison terms of 66 months. Defendant filed a timely notice of appeal.

¶ 23 On appeal, defendant first argues the State failed to prove him guilty of vehicular invasion and robbery because the evidence was insufficient to show he intended to take the money or took the money from Vasquez.

¶ 24 When addressing a challenge to the sufficiency of the evidence, the standard of review is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *People v. Baskerville*, 2012 IL 111056, ¶ 31. In a bench trial, the trial judge, as the trier of fact, determines the credibility of witnesses, weighs the evidence and any inferences derived therefrom, and resolves any conflicts in the evidence. *People v. Brown*, 2017 IL App (1st) 142877, ¶ 39. A conviction will not be overturned unless the evidence is so improbable, unsatisfactory, or inconclusive that a reasonable doubt of defendant's guilt exists. *People v. Belknap*, 2014 IL 117094, ¶ 67.

¶ 25 In order to sustain the conviction for vehicular invasion as charged, the State had to prove defendant knowingly, by force and without lawful justification, entered or reached into the interior of a motor vehicle, the tow truck, while it was occupied by another person, Vasquez, with the intent to commit therein a theft. 720 ILCS 5/18-6(a) (West 2014). Theft involves a person knowingly obtaining or exerting unauthorized control over property of the owner with the intent to deprive the owner permanently of the use and benefit of the property. 720 ILCS 5/16-1(a)(1)(A) (West 2014). To sustain the conviction for robbery, the State had to prove defendant knowingly took property, "to wit: United States currency," from the person or presence of Vasquez, through the use of force or threatening the imminent use of force. 720 ILCS 5/18-1(a) (West 2014). Defendant asserts that, because the evidence was insufficient to show he took or intended to take money from Vasquez, his convictions must be reversed. He does not contest the sufficiency of the evidence on the other elements of the offenses, such as the force element of robbery.

¶ 26 Viewing the evidence in the light most favorable to the State, a rational trier of fact could find defendant took money from Vasquez. The testimony of a single credible witness, even if contradicted by the defendant, is sufficient to sustain a conviction. *People v. Siguenza-Brita*, 235 Ill. 2d 213, 228 (2009). Vasquez's testimony showed that defendant initially intended to sell the van to Vasquez. However, when Vasquez refused to buy the van, defendant became angry and tried to persuade Vasquez to "take the car and give him his money." Afraid of the now "aggressive" defendant, Vasquez entered his truck and started to drive away. Defendant "jumped on the truck and tried to gain control over [the] steering wheel." Vasquez was holding the money and the registration in his left hand and was trying to get the window up, but defendant was

stopping it. Vasquez testified defendant was hitting him when defendant "was able to yank *** everything that I had in my hand, the money and the registration. We fought some more. He was trying to run me into the telephone poles. I kept telling him, you know, you got what you want. Get off my truck, get off my truck." Defendant elbowed Vasquez in the head and continued to try to move the steering wheel before Vasquez made a sharp turn and defendant fell off the truck.

¶ 27 Given this evidence, a rational trier of fact could find defendant not only reached into the occupied truck with the intention to take the money from Vasquez, but in fact did take the money from Vasquez by force, "yank[ing]" it from his hand while he was hitting Vasquez and trying to steer the truck into a pole in order to stop it. We find the evidence presented is not so improbable, unsatisfactory, or inconclusive that a reasonable doubt of defendant's guilt of both vehicular invasion and robbery exists. See *People v. Brown*, 2013 IL 114196, ¶ 48.

¶ 28 Defendant argues that the version of events he described to Goerlich was "plausible" while Vasquez's version was "incredible." Notwithstanding defendant's assertion to the contrary, Vasquez's description of the crime was not incredible on its face. See *People v. Cunningham*, 212 Ill. 2d 274, 284 (2004) (unless flaws in testimony are such that the only inference reasonably drawn is disbelief of the whole, a reviewing court must bear in mind that the trier of fact had the benefit of watching the witness' demeanor). The trial court found defendant guilty, necessarily finding Vasquez's version of events credible. See *People v. Moody*, 2016 IL App (1st) 130071, ¶ 52. As the trier of fact, the court was not obligated to accept defendant's claim that he was merely trying to recover the registration because he believed the "abandoned" van belonged to him and Vasquez intended to come back and steal it. See *People v. Ortiz*, 196 Ill. 2d 236, 267 (2001). It could accept as much or as little of defendant's version of events as told to Goerlich as

it found credible. *People v. Rivera*, 255 Ill. App. 3d 1015, 1023 (1993). We will not substitute our judgment for that of the trial court crediting Vasquez's version of events over defendant's. *Siguenza-Brita*, 235 Ill. 2d at 228-29.

¶ 29 The fact that Vasquez was impeached by what he told the 911 operators does not require a finding that he was not credible. As defendant points out, Vasquez testified defendant "yanked" the money from him but told the 911 operators variously that defendant "tried to rob" him, defendant fell off the truck and the money went with him, and the money "fell out" of Vasquez's hand with defendant when defendant fell. However, after hearing the 911 tapes defense counsel put forth, the trial court stated, "I heard the 911 tapes, which is [*sic*] essentially consistent with what Mr. Vasquez described in court."

¶ 30 Further, a conflict in the evidence, standing alone, does not establish a reasonable doubt. *People v. Harmon*, 2015 IL App (1st) 122345, ¶ 49. Defendant raised these same points below, and it was for the trial court to resolve the conflicts in the evidence and determine Vasquez's credibility. See *Brown*, 2017 IL App (1st) 142877, ¶ 39. We defer to that determination. Although the court's decision to accept Vasquez's testimony is neither conclusive nor binding (*Jonathon C.B.*, 2011 IL 107750, ¶ 60), we do not find its credibility determination so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt.

¶ 31 Defendant contends Vasquez had motive to lie at trial because if defendant's version of the events was true, he could face civil liability for running over defendant. However, the trial court was not required to search out all possible explanations consistent with defendant's innocence and raise those explanations to a level of reasonable doubt." *In re Jonathon C.B.*, 2011 IL 107750, ¶ 60. Further, defendant explored Vasquez's credibility on cross-examination, and

the trial court was able to consider any self-serving testimony he provided. It found defendant guilty on the basis of that testimony, and we will not reverse defendant's convictions merely because he asserts Vasquez was not credible. See *Jonathon C.B.*, 2011 IL 107750, ¶¶ 59-60.

¶ 32 Defendant claims the trial court erred in concluding "[b]y the time the dust settled, [defendant] had the money," pointing out no money was found at the scene or on defendant. Vasquez testified defendant yanked the money from his hand and the court found him credible. We defer to that credibility finding, and no corroborating physical evidence of a victim's credible testimony is required to convict. See *People v. Daheya*, 2013 IL App (1st) 122333, ¶ 76. Similarly, the lack of physical evidence that Vasquez suffered any injuries does not cast doubt on his credibility. Again, the court found Vasquez credible and no physical evidence corroborating his testimony is required. *Id.*

¶ 33 Defendant argues the trial court made it clear it believed defendant had to defend against not only the allegation that he took the money, but also the uncharged allegation raised in the State's rebuttal argument that he took the registration and was attempting to sell a van he did not own. Defendant asserts the State argued for the first time in rebuttal that defendant could be convicted of vehicular invasion and robbery even if he only intended to take the registration, not the money, from Vasquez. He contends the State misstated the law during rebuttal closing argument by stating that the robbery could be proven by defendant's taking of the registration from Vasquez, which was contrary to the information. Defendant claims the court accepted the State's improper argument, and its finding that he did not own the van or registration was not only irrelevant but reflected a mistake of law and improper amendment to the charges.

¶ 34 As the parties point out, defendant failed to preserve his argument regarding the State's improper rebuttal by objecting at trial and raising it in a posttrial motion. *People v. Glasper*, 234 Ill. 2d 173, 203 (2009). Therefore, the issue is forfeited. *Id.*

¶ 35 However, defendant asserts we may review the issue under the plain-error doctrine or, in the alternative, in the context of ineffective assistance of counsel. Under the plain-error doctrine, unpreserved claims of error can be reviewed when (1) the evidence at trial is closely balanced, or (2) the error is so serious it affected the fairness of the trial and challenged the integrity of the judicial process. *People v. Sebby*, 2017 IL 119445, ¶ 48. The first step under either prong of the plain-error doctrine is to determine whether there was a clear or obvious error. *Id.* ¶ 49. When a defendant fails to establish plain error, that procedural default must be honored. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008).

¶ 36 "A prosecutor has wide latitude in making a closing argument and is permitted to comment on the evidence and any fair, reasonable inferences it yields." *Glasper*, 234 Ill. 2d at 204. Statements must be considered in the context of the closing arguments as a whole, and the prosecutor may comment on a defendant's characterizations of the evidence or case. *People v. Evans*, 209 Ill. 2d 194, 225 (2004). When defense counsel raises an argument that provokes a response in rebuttal, the defendant cannot assert the prosecutor's response denied him a fair trial. *Id*. Even if a prosecutor makes an improper comment or remark, it is not a reversible error unless the comment or remark is a material factor in the conviction or it caused substantial prejudice to the defendant. *People v. Harris*, 2017 IL App (1st) 140777, ¶ 61; see also *People v. Hall*, 194 Ill. 2d 305, 347 (2000).

¶ 37 Defendant points to the State's rebuttal argument that "robbery requires the taking of property from the person. It has no specifics about whose property it is" and "all it was was the registration, he took that registration from the person of [Vasquez]. That is a robbery when he used force to do so." Viewing these statements in the context of the entire closing argument as we must, we do not believe that they were a material factor in the conviction or caused substantial prejudice to the defendant. *Harris*, 2017 IL App (1st) 140777, ¶ 61. First, the State made the rebuttal statements in direct response to defense counsel's argument that defendant was innocent of both charges because he was merely trying to get the registration back. Defendant therefore cannot assert the State's response denied him a fair trial. See *Evans*, 209 Ill. 2d at 225.

¶ 38 Second, our supreme court has explained that the elements of robbery are "taking property by force or threat of force. Nothing more is required to sustain the conviction." *People v. Lewis*, 165 Ill. 2d 305, 340 (1995). Thus, the State's argument was an accurate reflection of the robbery element. Additionally, even though the robbery charge explicitly mentions the taking of money rather than the registration, the naming of the specific property taken during the robbery was surplusage. See *People v. Lawler*, 23 Ill. 2d 38, 39 (1961) ("Under an indictment for robbery it is not necessary to prove the particular identity or value of the property taken, further than to show it was the property of the victim or in his care and had a value."); see also *People v. Reese*, 2015 IL App (1st) 120654, ¶ 96, *rev'd on other grounds People v. Reese*, 2017 IL 120011.

¶ 39 Lastly, it was never the State's sole contention that taking the registration satisfied the elements of both offenses. The State consistently argued in closing and rebuttal that defendant took not only the registration but the $230 from Vasquez and was, therefore, guilty of both

offenses. Only in rebutting defendant's argument that taking the registration was insufficient to prove the offenses did the State mention the registration in the context of the taking element of the offenses. In the context of vehicular invasion, it argued on rebuttal that "[t]he vehicular invasion requires entry with the intent to commit therein a theft. By trying to exercise continued control even over just the registration, [defendant] is committing a theft by taking back that registration that never belonged to him in the first place, let alone the $230 that belonged to [Vasquez] that he also took." The State did not abandon its assertion that taking the money satisfied the theft element of vehicular invasion.

¶ 40 Ultimately, we do not find, in the context of the entire closing argument, any allegedly improper remarks were an error of such magnitude, that defendant was denied a fair trial. See *Hall*, 194 Ill. 2d at 350. Forfeiture aside, "the challenged remarks were not so improper and so prejudicial that real justice was denied or that the verdict *** may have resulted from the alleged error." *Evans*, 209 Ill. 2d at 226.

¶ 41 Defendant claims the trial court improperly adopted the State's rebuttal reasoning and focused much of its decision on whether it was lawful for defendant to own the abandoned car and thus the registration. The State's argument was not improper, thus if the court had adopted it, there would be no error. Further, even if the State's argument was improper, the trial court is presumed to know the law and to apply it properly. See *People v. Joiner*, 2018 IL App (1st) 150343, ¶ 70.

¶ 42 Crucially, the court's guilty findings were not based on its determination that defendant owned neither the van nor the registration. The court's statements that defendant did not own the van or registration, read in context with its findings as a whole, show it was merely reciting the

evidence presented and the inferences it derived therefrom. It regarded defendant's attempt to sell the "abandoned" van as his initial scheme to obtain money from Vasquez and, when that plan failed, as the impetus to resort to force to obtain that money. The court's basis for its guilty findings was that defendant fell off the truck "[a]nd failing off with him [was] not only the registration, but $200 in cash that Mr. Vasquez had in his hand" and "[b]y the time the dust settled, [defendant] had the money." The taking of the money satisfied both the intent to commit theft element of vehicular invasion and the taking element of robbery. We find the trial court properly considered the evidence and made no improper findings or amendments to the charges, and any comment made by the prosecutor was not a material factor in the conviction and did not cause substantial prejudice to defendant.

¶ 43 In sum, we find that no clear or obvious error occurred and, therefore, defendant has failed to establish plain error. See *People v. Faria*, 402 Ill. App. 3d 475, 484 (2010). Defendant's argument regarding improper statements in rebuttal closing argument is forfeited. See *id.* Moreover, as no error occurred, defendant's claim of ineffective assistance of counsel for failing to object to the alleged errors at trial or present them in a posttrial motion likewise fails. See *People v. Johnson*, 218 Ill. 2d 125, 144 (2005); *People v. Easley*, 192 Ill. 2d 307, 332 (2000).

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

¶ 45 Affirmed.