NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2018 IL App (3d) 160705-U

Order filed July 11, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois.
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-16-0705 Circuit No. 15-CF-478
ANTONIO MABRY,	)	Honorable Stephen Kouri,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice Carter and Justice Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's conviction of mob action was affirmed because he was not deprived of a fair trial when the prosecutor responded to comments by defense counsel regarding reasonable doubt; the prosecutor did not attempt to define reasonable doubt and did not diminish the State's burden of proof.

¶ 2 The defendant, Antonio Mabry, appeals his conviction of mob action and three-year sentence.

¶ 3 FACTS

¶ 4 The defendant was arrested with five co-defendants and charged with mob action (720 ILCS 5/25-1(a)(1) (West 2014)) after Stanley Vervynch was beaten up on July 20, 2015. Earlier in the evening of July 20, Morgan Kolettis was having a gathering at her apartment and two strangers, identified as co-defendant Manual Miller and another, showed up. After they were asked to leave, they left in a silver Ford Escape and hit a parked car. That car belonged to Kolettis's upstairs neighbors, Amber and Stanley Vervynch. Stanley Vervynch was at work when the incident occurred, but came home soon after. The police were called, and witnesses gave statements to the police. About an hour later, five people showed up at Kolettis's apartment and tried to get in. Kolettis called 911. Kolettis's roommate, Michelle Bleichner, testified that the five people included Miller, along with two women. Stanley went outside and asked if it was the guy who hit his vehicle. One of the women swung a lanyard with keys at Stanley's head. Miller hit Stanley in the face. Bleichner saw the other guys approach Stanley, but did not see them hit him.

¶ 5 Stanley testified that he had returned home after his car was hit and later heard people saying that the men who did it were back. He went outside and encountered a group of men and a couple of women. A man with dreadlocks, who Kolettis and Bleichner identified as Miller, punched Stanley in the face, a woman swung her lanyard and hit him in the forehead, and then the rest of the group, except the other woman, started punching and shoving Stanley. Stanley identified the defendant in court as one of the men who punched him. Stanley provided the police with descriptions and went with the police to where they had stopped the silver SUV, still in the apartment parking lot. Stanley identified each occupant as being involved, except the one woman. There were five men and two women in the Ford Escape.

¶ 6 In closing argument, defense counsel stated: “When you have question marks, when you’re not sure, you have reasonable doubt.” In response, the prosecution said, “A question mark is reasonable doubt? Please. Read the instructions.” Defense counsel objected that the prosecutor was trying to define reasonable doubt, which the trial court overruled. Then, at the end of rebuttal, the prosecutor stated, "Ladies and gentlemen, I heard this the other day and I thought, wow, this really fits. Karma has no menu. You get served what you deserve." Defense counsel made an objection, and the court overruled it.

¶ 7 The jury returned a guilty verdict. The trial court sentenced the defendant to three years in prison and imposed fees and fines. The defendant appealed.

¶ 8 ANALYSIS

¶ 9 The defendant argues that the prosecutor deprived him of his right to a fair trial by trying to define reasonable doubt and by making a comment about karma that defendant argues deprived him of the presumption of innocence. The State argues that neither comment was error, and if the reasonable doubt comment was error, it was invited error.

¶ 10 A prosecutor has an ethical obligation to refrain from presenting improper and prejudicial evidence and arguments. *People v. Porter*, 372 Ill. App. 3d 973, 978-79 (2007). Also, neither the court nor counsel should attempt to define the reasonable doubt standard for the jury. *People v. Speight*, 153 Ill. 2d 365, 374 (1992). There is a dispute among the districts regarding the proper standard for reviewing comments made by prosecutors during closing arguments, but the Third District has applied the *de novo* standard of review. *People v. McCoy*, 378 Ill. App. 3d 954, 964 (2008). In any event, the defendant’s claim fails under either standard.

¶ 11 Like *Speight*, we do not find that the prosecutor's attempt to define reasonable doubt caused the defendant substantial prejudice. *Id.* at 374. The prosecutor did not suggest to the jury

that the State had no burden of proof or attempt to shift the burden to the defendant. In fact, the prosecutor was responding to a comment made by the defense attorney. The prosecutor's statements did not diminish the prosecutor's burden of proof. *People v. Moody*, 2016 IL App (1st) 130071, ¶ 64.

¶ 12 With respect to the reference to karma, the defendant argues that the use of that word implied that the defendant's guilt was a foregone conclusion. However, in context, it seems more like the prosecutor was asking for justice. The prosecutor did not argue facts not in evidence or commit any improper vouching. See *People v. Adams*, 2012 IL 111168, ¶ 20. A prosecutor can ask that justice be served. *People v. Johnson*, 208 Ill. 2d 53, 76 (2004). Thus, we find that neither comment was in error.

¶ 13 Next, the defendant argues that his conviction for mob action should be reversed and remanded because the jury instructions stated that he could be convicted if he inflicted injury to the person or property of another, while the indictment only charged injury to a person. The defendant acknowledges that he did not object to this error at trial, but seeks plain error review. The State argues that the defendant forfeited review by failing to object to the instruction, but, in any event, the instruction properly informed the jury. Generally, jury instructions are reviewed for abuse of discretion. *People v. Green*, 2017 IL App (1st) 152513, ¶ 61.

¶ 14 Jury instructions should provide the jury with correct legal principles that apply to the evidence. *People v. Jackson*, 331 Ill. App. 3d 279, 290 (2002). In criminal cases, the Illinois Pattern Jury Instructions (IPI), Criminal, should be given, unless the court determines that they do not accurately state the law. Ill. S. Ct. R. 451(a); *People v. Bannister*, 232 Ill. 2d 52, 81 (2008). The IPI instructions given to the jury, Illinois Pattern Jury Instruction, Criminal, Nos. 19.03 and 19.04 (4th ed. Supp. 2009), provide a choice between person and property, and the

Committee Notes state to choose the applicable bracketed material. The jury instructions in this case included both alternatives: injury to person or property. The State acknowledges this, but argues that the jury was not misled by the extraneous instruction.

¶ 15 The inclusion of the property portion of the instruction is a little troubling because there was no dispute that Stanley's property, his car, was damaged earlier the same evening. However, that was the only allegation of property damage, and there was no evidence that the defendant was present for that damage. The indictment charged the defendant with mob action on the basis of injury to the person of Stanley. In the State's closing argument, the prosecutor went through the elements of the offense, only arguing the evidence regarding injury to Stanley, never arguing injury to property. The jury was not misled by the extraneous part of the instruction. See *People v. Palmer*, 352 Ill. App. 3d 891, 894 (2004). Since there was no error, there was no plain error.

¶ 16 Lastly, the defendant argues that his fines and fees should be reduced by $242. The defendant acknowledges that the trial court indicated that he was to receive 150 days of in-custody credit, but the order did not specify the amount that the fines and fees were reduced. The State agrees that the defendant should receive credit against certain items. The propriety of the imposition of fines and fees is reviewed *de novo*. *People v. Caballero*, 228 Ill. 2d 79, 82 (2008).

¶ 17 The trial court imposed a total of $522 in fines, fees, and costs against the defendant, and gave the defendant $5-per-day credit against fines for 150 days of pretrial detention. According to the order, the credit was applied to all except those marked with an asterisk on the form, which means the defendant's fines and fees were reduced by $100.

¶ 18 A defendant is entitled to a $5 *per diem* credit against fines imposed for each day spent in pre-sentence custody on a bailable offense. 725 ILS 5/110-14(a) (West 2014). A fine is punitive and is imposed as part of the sentence, while a fee seeks to recoup expenses incurred by the state.

People v. Graves, 235 Ill. 2d 244, 250 (2009). The presentence custody credit applies to reduce fines, not fees. *People v. Jones*, 223 Ill. 2d 569, 599 (2006). The defendant argues that some of the assessments marked with asterisks were actually fines: $5 Drug Court Fund, $10 Drug Court Operation, $15 State Police Operations Assistance, and the $50 Court Usage Fee. Courts have held that each of these are fines, subject to the credit, which the State concedes. *People v. Graves*, 235 Ill. 2d 250, 255 (2009) (drug court assessments are fines); *People v. Williams*, 2013 IL App (4th) 120313, ¶28 (crime committed while on parole assessment is a fine); *People v. Millsap*, 2012 IL App (4th) 110668, ¶31(state police operation assistance assessment is a fine); P*eople v. Smith*, 2013 IL App (2d) 120691, ¶ 17 ($50 court fee imposed under 55 ILCS 5/5-1101(c) was a fine, not a fee). Thus, the defendant is entitled to an additional $80 credit.

¶ 19 The defendant argues that some of the other "fees" are actually fines subject to the credit: $25 Automation Fee, $25 Document Storage Fee, $25 Court Security Protection Fee, and the $2 States Attorney Automation Fund. Courts have concluded that the Automation Fee, Document Storage Fee, and States Attorney Automation Fund are fees, not fines. *People v. Tolliver*, 363 Ill. App. 3d 94, 97 (2006) (clerk's automation fee and document storage fee are fees, not fines, and are not subject to the credit); see also *People v. Heller*, 2017 IL App (4th) 140658, ¶ 74 (State's Attorney automation fee, circuit clerk's automation and document storage fee are all fees, not fines). As for the Court Security Protection fee, court security is a collateral consequence of the defendant's prosecution and is a fee not subject to the credit. *Tolliver*, 363 Ill. App. 3d at 97.

¶ 20 Thus, the defendant is entitled to an additional $80 in presentence custody credit toward the fines and fees ordered by the court, for a total credit of $180. We direct the clerk of the circuit court to correct the fines and fees order accordingly. The judgment of the trial court is affirmed in all other respects.

¶ 21 CONCLUSION

¶ 22 The judgment of the circuit court of Peoria County is affirmed as modified.

¶ 23 Affirmed as modified.