2019 IL App (1st) 160124-U

FOURTH DIVISION
March 14, 2019

No. 1-16-0124

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. 13 CR 3911
	)	
ROBERT CHEEKS,	)	
	)	Honorable
Defendant-Appellant.	)	Joan Margaret O'Brien,
	)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Gordon and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant was not denied a fair trial by the prosecutors' closing and rebuttal arguments; (2) Sergeant O'Connor's testimony about the contact card was admissible nonhearsay; and (3) the mittimus is corrected to vacate improperly imposed fees.

¶ 2 Following a jury trial, defendant Robert Cheeks was found guilty of unlawful possession of a weapon by a felon (UUWF). The trial court subsequently sentenced defendant to a term of four years in prison.

¶ 3 Defendant appeals, arguing that (1) the prosecution denied him a fair trial by improperly bolstering the credibility of its witnesses and referencing items not admitted in evidence during closing arguments; (2) the testimony from a police sergeant regarding a contact card for a defense witness was inadmissible hearsay because the sergeant lacked personal knowledge and the card does not fall within the business records exception to hearsay; and (3) the fines and fees order should be corrected to vacate improperly imposed assessments.

¶ 4 Defendant was charged by information with one count of UUWF and four counts of aggravated unlawful use of a weapon. The State proceeded to trial on the UUWF count. The following evidence was presented at defendant's September 2015 jury trial.

¶ 5 Sergeant Erich Rashan testified that he has been employed by the Chicago police department for 15 years with 3 years as a sergeant. On February 9, 2013, he was assigned as a patrol sergeant for the third district. At around 4:20 a.m., Sergeant Rashan was on patrol in a marked vehicle by himself in uniform. He received a communication from a 911 call of gunshots fired near East 65th Street and South St. Lawrence Avenue in Chicago. He responded to that location as did another sergeant, Sergeant Daniel O'Connor. Both sergeants exited their vehicles and looked around to determine what might have happened.

¶ 6 Sergeant Rashan did not observe anyone on the street at that time nor did he hear any gunshots. While at that location, he heard a man's voice call out from the apartment building at 613 East 65th Street that the shooters were in a black Toyota Camry. Sergeant O'Connor relayed that information over the radio. Sergeant Rashan did not observe a black Toyota Camry at that location. Both sergeants returned to their vehicles. Sergeant Rashan then drove around the block to East 64th Street and South St. Lawrence Avenue. He then pulled over to the side of the road to look at his computer and document information. While he was pulled over, Sergeant Rashan

observed a black Toyota Camry traveling east on 65th Street, crossing the intersection with St. Lawrence Avenue. He observed the vehicle park in front of the apartment building at 613 East 65th Street.

¶ 7 After the vehicle parked, Sergeant Rashan stopped the vehicle. He pulled behind the vehicle and initiated his blue lights. He exited his patrol car and approached the vehicle from the rear. He watched the two occupants of the vehicle through the rear windshield. He identified defendant as the passenger. He used a flashlight to illuminate the interior of the car. The street lights were also on and working that night.

¶ 8 Sergeant Rashan observed defendant "making furtive movements, which was multiple movement to what [he] believed was [defendant's] waistband area in the front passenger seat of the vehicle." Sergeant Rashan then observed defendant "reach out with his left hand to the glove compartment of the vehicle, and with his right hand put a chrome revolver into the glove compartment and then shut the glove compartment." He was standing at the rear bumper when making this observation. Sergeant Rashan radioed for assistance so he continued to wait for assist vehicles before continuing to approach the vehicle for "safety reasons."

¶ 9 Sergeant O'Connor arrived at the scene first. Sergeant Rashan did not alert Sergeant O'Connor to the presence of a gun because he did not want to alert defendant and cause him to run or grab the weapon. Once Sergeant O'Connor had arrived, Sergeant Rashan approached the passenger side, opened the door, and placed defendant into custody. Defendant was placed in the vehicle of another assisting unit and transported to the third district, located at 7040 South Cottage Grove Avenue, about a mile from the location. Sergeant Rashan returned to the vehicle and recovered the firearm from the glove compartment. After he recovered the firearm, he

unloaded the weapon and made it safe. The weapon was a 38-caliber Smith & Wesson revolver loaded with five live rounds.

¶ 10 Sergeant Rashan returned to the third district. He gave the firearm to another responding officer for processing and inventory. At approximately 4:50 a.m., Sergeant Rashan spoke to defendant with Sergeant O'Connor present. He gave defendant his *Miranda* warnings and defendant indicated he understood his rights. Defendant agreed to waive his rights and speak with the officers. Defendant told Sergeant Rashan that two carloads of people were looking for him, but when they could not find him, they fired a gun at his brother's vehicle. Defendant then retrieved a gun registered to his sister to use for protection.

¶ 11 On cross-examination, Sergeant Rashan testified that when he approached the vehicle he drew his weapon and waited near the driver's side of the rear bumper. He estimated that no more than a minute passed from when he called for assistance that Sergeant O'Connor arrived. It was within this time that Sergeant Rashan observed defendant with the firearm. Sergeant Rashan admitted that he did not write the reports for defendant's arrest. He did not document defendant's statement with contemporaneous notes or a recording. Sergeant Rashan testified it was not standard operating procedure to record statements. The recovered firearm was not tested for DNA or fingerprint analysis and no gunshot residue test was administered on defendant. On redirect, Sergeant Rashan stated that multiple officers responded to the scene with different assigned roles and responsibilities. One responding unit received the "paper car assignment," which means "the assignment given to a paper car to handle whether it's a case report or an arrest report, and they actually are the officers that actually proceed to fill out all the paperwork with respect to an arrest or an incident." Sergeant Rashan spoke with the paper car officers about

his observations and defendant's statement. Sergeant Rashan later reviewed the report. He testified that he was not having any trouble remembering defendant's statement.

¶ 12 Sergeant Daniel O'Connor testified that he has been employed by the Chicago police department for 13 years and has been a sergeant for 6 years. At approximately 4:20 a.m. on February 9, 2013, Sergeant O'Connor was on routine patrol by himself when he responded to a call of gunshots fired near East 65th Street and South St. Lawrence Avenue. He observed Sergeant Rashan at the scene. He conducted a preliminary investigation when he heard an individual shout from the apartment building that the offenders were in a black Toyota Camry and left the scene. He alerted other officers in a flash message over the police radio. He then returned to his vehicle and toured the area looking for the offender.

¶ 13 Shortly after he left, Sergeant O'Connor heard Sergeant Rashan report on the radio that a black Toyota Camry had returned to the scene. Sergeant O'Connor immediately returned to that location. He estimated that he was within a couple blocks from 613 East 65th Street. When he returned to the scene, he observed two occupants of the Camry and Sergeant Rashan standing behind the vehicle. Sergeant O'Connor parked his vehicle in front of the Camry and proceeded to the driver's door. The driver was a black female later identified as Rachel Cheeks. He also observed the individual in the passenger seat and identified defendant in court as that individual. He ordered Rachel out of the vehicle, handcuffed her, and brought her to the back of the Camry as the investigation occurred. Sergeant O'Connor observed Sergeant Rashan handcuff defendant, bring him to the rear of the Camry, and then remove an item from the glove compartment of the Camry. Sergeant Rashan showed Sergeant O'Connor a chrome 38-caliber revolver.

¶ 14 Sergeant O'Connor testified that Rachel was released at the scene while defendant was taken into custody. Sergeant O'Connor proceeded to the third district station. He was present

when defendant was given his *Miranda* rights and agreed to speak with Sergeant Rashan and himself. Sergeant O'Connor's testimony regarding defendant's statement was substantially similar to Sergeant Rashan's testimony.

¶ 15 On cross-examination, Sergeant O'Connor admitted that he never saw defendant with a firearm. He also admitted that defendant was not asked to sign a *Miranda* waiver form. Sergeant O'Connor did not write the report documenting the interview with defendant. He did not take any contemporaneous notes or any recording of the interview. He testified that he and Sergeant Rashan "insured that it was documented on the general offense case report." He stated that it was not policy to take audio or video recordings or handwritten statements. Sergeant O'Connor did not approve the case report, but he verbally told the officers who completed the report. He testified that recalled what was said during the interview. On redirect, Sergeant O'Connor stated that Sergeant Rashan approved the report.

¶ 16 Following Sergeant O'Connor's testimony, the State introduced a certified statement of conviction for defendant for possession of controlled substance. The State then rested. Defendant moved for a direct finding, which the trial court denied.

¶ 17 Rachel Cheeks testified for the defense. She stated that she was defendant's older sister and employed as a registered nurse. She lived at the apartment building at East 65th Street and her car was parked on the street in front of the building. At about 4:15 a.m. on February 9, 2013, she was asleep when she heard gunshots. Her sister was staying at her apartment. She looked outside and noticed glass on the back of her car. She noticed a blue sedan parked behind her car had a window "shot out." Rachel called her brothers and her father who lived in a building that was connected to her building. She asked if defendant could come with her to move her car and defendant agreed.

¶ 18 Rachel then went outside to her car with defendant. She drove around a few blocks due to one way streets. When she came to a stop sign, she noticed a marked police vehicle sitting in the middle of the street at the stop sign. She proceeded forward and parked behind another car on her block. After she parked, the police vehicle pulled behind her car and turned on its lights. Rachel testified that she sat there because she had not done anything wrong. She sat for a few minutes because the officer did not exit the car. Within a couple minutes, another police SUV arrived at the scene. The officer was in a regular uniform with a white shirt, which Rachel assumed meant he was a captain or a sergeant. Rachel was removed by the police from the car and taken to the front of the car. She testified that the officers took defendant and put in the back of their car. She stated that she asked why they were stopped, but the officers did not answer and started to search her car. During the search, the officers found a handgun in the glove compartment.

¶ 19 Rachel testified that on that date she had a valid firearm owner's identification (FOID) card and still had a valid FOID card on the day of trial. The gun belonged to her. She obtained it from her best friend's cousin, a man named Jeffrey. She explained that she obtained it because when she moved to the neighborhood, she found it was a "really bad neighborhood." She bought it for protection. Rachel denied taking the gun out of the glove compartment while moving the car. She also denied that defendant knew the gun was in glove compartment. She denied that defendant handled the gun at any time while moving the car. Rachel was not arrested that night. She testified that the police did not ask her name and she was released immediately. The police did not initially tell her why defendant was being arrested, but later informed her that they found a gun. She did not tell the police the gun was hers because they did not ask and she did not have a chance to tell them.

¶ 20 On cross-examination, Rachel testified that the blue sedan belonged to her brother Michael and her sister had driven the car from Iowa. Michael was not in Chicago at that time. Rachel did not call the police because a neighbor had already called the police. When she moved her car, Rachel parked about a half a block away from her original parking space. Rachel admitted that she purchased the gun illegally. Rachel stated that the police did not obtain her information at the scene, but a "lady officer might have asked" her if she lived there. She did not speak with the police about the gun and waited until defendant had a lawyer. She admitted that she never came forward to the police and told them the gun belonged to her. On redirect, Rachel explained that she had never been in trouble and was scared for her career as nurse and that she could be charged over the gun.

¶ 21 Defendant testified on his own behalf. At approximately 4 a.m. on February 9, 2013, he was asleep on the couch in his apartment, located at 613 East 65th Street. He was awakened by a "very disturbing phone call" from his sister. He woke his brother up, dressed, and went downstairs to meet Rachel. When he went outside, Rachel was "frantic" and glass was "everywhere." He tried to calm her down and asked her what was going on. She told him she heard gunshots. Defendant then noticed the window had been shot in his brother's car. Rachel asked him to come with her to move her car because she did not want anything to happen to her car. Defendant rode with her in the passenger seat. They drove a few blocks away to return to their street. On the way, defendant saw a police vehicle sitting in the middle of the street. He was at a stop sign and had the right of way, but let them go. He then made a left behind them. They drove approximately a block before parking in front of the apartment building. The officer then put his lights on.

¶ 22 Defendant and Rachel sat in the car and waited for the officer to approach the vehicle to see why they had been pulled over. After a couple minutes, another police pulled in front of their car. The sergeant then exited his vehicle, approached defendant's side, and "snatched" him from the vehicle. He was placed in handcuffs and taken to a third vehicle. The officer then searched the car. Defendant denied knowing that Rachel had a firearm, opening the glove compartment, or handling the firearm. Defendant asked the officer what he was being charged with, and was told "a gun." Defendant was taken to a police station and handcuffed to bench. He denied speaking with any officers.

¶ 23 On cross-examination, defendant denied talking with his sister about coming up with a story for the police. Defendant testified that he reached for his phone to call his brother to tell their father they were stopped by the police. He denied reaching toward his waistband, stating that his phone was in the cup holder in the car. Defendant testified that the gunshots woke him up. He stated that the gunshots happened at the same time as Rachel's phone call. He did not go downstairs until his phone call with Rachel. She told him her neighbor had called the police so he knew it would be safe since the police were on the way. During the phone call, Rachel was "frantic" and telling him she was concerned the glass would cause a flat tire on her car. He agreed to meet her downstairs. He tried to calm Rachel down. He stated they were gone no more than five to eight minutes. Defendant testified that during the search, the police officer did not go directly to the glove compartment, but instead searched under the seats and the back seats before going to the glove compartment. While at the police station, the officer said to defendant, "It was either you or your girlfriend," referring to Rachel.

¶ 24 The defense rested after defendant's testimony. In rebuttal, the State recalled Sergeant O'Connor. Sergeant O'Connor testified that the driver of the black Toyota Camry was Rachel

Cheeks. He stated that a contact card is created when other people are on scene and a contact card was created for Rachel. The information included in a contact card is name, date of birth, residence, reason for the contact, as well as boxes for various information. Sergeant O'Connor agreed that the contact cards are kept in files in the normal course of business with the police department. Sergeant O'Connor identified a contact card created for Rachel. Defense counsel objected as hearsay, but the trial court overruled the objection. Sergeant O'Connor testified that the card indicated Rachel's birth date as February 7, 1985, she was 28 years old, and a female. The card also listed a contact address as 613 East 65th Street with a date and time as February 9, 2013, at 4:24 a.m. Sergeant O'Connor also testified that when he removed Rachel from the vehicle, she did not tell him that she had a valid FOID card.

¶ 25 On cross-examination, Sergeant O'Connor admitted that he did not fill out the contact card for Rachel. When asked how the information was received, he stated he "was sure they got it on scene that evening" by a combination of both verbally from Rachel and looking at her driver's license. Sergeant O'Connor did not personally receive that information, but he "probably asked her her name and date of birth." When asked if he knew where the person that filled out the card obtained the information, Sergeant O'Connor responded that he was "sure they got it from" him or Rachel. He did not have personal knowledge. When asked if he knew who filled out the contact card, Sergeant O'Connor testified that it would have been one of the officers on the scene and it was listed on the contact card. The State then rested in rebuttal.

¶ 26 Following closing arguments, the jury began deliberations at 5:38 p.m. During deliberations, the jury sent out multiple notes. The first note was sent at 6:03 p.m. and asked, "Is it normal or standard police practice to have a third party, and then in parenthesis, officer, construct or document events of arrest? Specifically, is it unusual for the report to be written by

an officer other than the two who served as witnesses?" The trial court answered, "You have all the evidence in this case. Continue to deliberate." At 7:45 p.m., the jury sent a second note, "What occurs if we cannot reach a unanimous decision? We are deadlocked 9 to 3." The court, with the agreement of the parties, instructed the jury to continue to deliberate. At 8:15 p.m., the jury sent a third note, "Still deadlocked, 9 to 3. Do not see us reaching a unanimous decision." The jury was brought into court and released the jury for the night and instructed them to return the next day. The following day at 10:40 a.m., the jury sent another note stating, "We are still deadlocked at nine to three. The three people state there is nothing that would make them change their vote. The other nine feel the same." After discussing with the parties, the trial court gave the jury a *Prim* instruction and they returned to deliberations. At 1:35 p.m., they jury indicated they had reached a verdict. The jury found defendant guilty of UUWF.

¶ 27 Defendant subsequently filed a motion for a new trial, which the trial court denied. At the sentencing hearing, defendant presented testimony from his father in mitigation. The trial court sentenced defendant to four years in the Illinois Department of Corrections, with a recommendation for boot camp, awarded presentence credit for 36 days, and imposed a total of $542 in fines, fees, and costs. Defendant filed a motion to reconsider his sentence, which the trial court denied.

¶ 28 This appeal followed.

¶ 29 Defendant first argues that he was denied a fair trial when the prosecutors made improper remarks during closing argument. Specifically, defendant contends that the prosecutors (1) improperly bolstered the credibility of their witnesses by arguing that the police sergeants were credible by virtue of their employment and years of experience, and (2) concocted evidence during closing argument to bolster the credibility of their witnesses. Defendant concede that he

failed to preserve these claims of error by failing to object to the comments at trial, but asks this court to review the claims under the plain error doctrine.

¶ 30 To preserve an issue for review, defendant must object both at trial and in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Failure to do so operates as a forfeiture as to that issue on appeal. *People v. Ward*, 154 Ill. 2d 272, 293 (1992). Supreme Court Rule 615(a) states that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). The plain error rule "allows a reviewing court to consider unpreserved error when (1) 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, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (citing *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005)). However, the plain error rule "is not 'a general saving clause preserving for review all errors affecting substantial rights whether or not they have been brought to the attention of the trial court.' " *Herron*, 215 Ill. 2d at 177 (quoting *People v. Precup*, 73 Ill. 2d 7, 16 (1978)). Rather, the supreme court has held that the plain error rule is a narrow and limited exception to the general rules of forfeiture. *Id*.

¶ 31 Defendant carries the burden of persuasion under both prongs of the plain error rule. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). Defendant asserts that this alleged error would qualify as a plain error under both prongs. However, "[t]he initial analytical step under either prong of the plain error doctrine is determining whether there was a clear or obvious error at trial." *People*

v. Sebby, 2017 IL 119445, ¶ 49.

¶ 32 Generally, a prosecutor is given wide latitude in closing arguments, although his or her comments must be based on the facts in evidence or upon reasonable inferences drawn therefrom. *People v. Page*, 156 Ill. 2d 258, 276 (1993). "The prosecutor has the right to comment on the evidence and to draw all legitimate inferences deducible therefrom, even if they are unfavorable to the defendant." *People v. Simms*, 192 Ill. 2d 348, 396 (2000). "During closing argument, the prosecutor may properly comment on the evidence presented or reasonable inferences drawn from that evidence, respond to comments made by defense counsel which clearly invite response, and comment on the credibility of witnesses." *People v. McGee*, 2015 IL App (1st) 130367, ¶ 56. "In reviewing comments made at closing arguments, this court asks whether or not the comments engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from them." *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007). "Prosecutorial misconduct warrants reversal only if it 'caused substantial prejudice to the defendant, taking into account the content and context of the comment, its relationship to the evidence, and its effect on the defendant's right to a fair and impartial trial.' " *People v. Love*, 377 Ill. App. 3d 306, 313 (2007) (quoting *People v. Johnson*, 208 Ill. 2d 53, 115 (2004)). "If the jury could have reached a contrary verdict had the improper remarks not been made, or the reviewing court cannot say that the prosecutor's improper remarks did not contribute to the defendant's conviction, a new trial should be granted." *Wheeler*, 226 Ill. 2d at 123. "The trial court may cure errors by giving the jury proper instructions on the law to be applied; informing the jury that arguments are not themselves evidence and must be disregarded if not supported by the evidence at trial; or sustaining the defendant's objections and instructing the jury to disregard the inappropriate remark." *Simms*, 192 Ill. 2d at 396-97.

¶ 33 Defendant contends that the prosecutors' closing and rebuttal arguments "repeatedly lauded the merits" of its witnesses, Sergeants Rashan and O'Connor by "flaunting" their experience and "belittling the notion that such men would lie." Defendant correctly observes that it is improper for a prosecutor to argue that a police officer's testimony is more credible based on the status of being a police officer. *People v. Woods*, 2011 IL App (1st) 091959, ¶ 42. However, the credibility of witnesses is a proper subject for closing argument if it is based on facts in the record or inferences fairly drawn from the facts elicited. *People v. French*, 2017 IL App (1st) 141815, ¶ 48.

¶ 34 Defendant complains of the following statements by the prosecutor in the initial closing argument. During the prosecutor's opening recitation of the evidence, he stated, "You heard first from Sergeant Rashan. Now Sergeant Rashan has been an officer for quite a number of years. He's been an officer for 15 years with the Chicago Police Department. He was a sergeant on that date." Defendant also points to references by the prosecutor that Sergeant Rashan "is an experienced officer; he is a sergeant" and "He is a trained, experienced officer. 15 years on the job" while discussing Sergeant Rashan's observations in the stopped vehicle, waiting for backup to approach the occupants of the vehicle, and why Sergeant Rashan did not disclose that he had observed a firearm. At the end of the closing argument, the prosecutor stated:

> "So you have the officer's observations, Sergeant Rashan and what he saw. You have the fact that the gun is recovered in here now, and then you have his statement to the officers, to both those sergeants. Sergeant Rashan, an officer of 15 years; and Sergeant Dan O'Connor, an officer of 13 years, a sergeant for just over six years."

¶ 35 None of these comments were used to suggest the officers' testimony was worthy of belief simply by virtue of their status as police officers. Both officers testified about their years of service both as an officer and as a sergeant and their assignment the night of defendant's arrest. Rather, when viewed in context, the statements were made to explain the officers' actions based on their training and years of service. Specifically, the comments regarding Sergeant Rashan's years of service were to explain why Sergeant Rashan approached the vehicle, but did not engage with the occupants until backup arrived and why he did not tell Sergeant O'Connor of the firearm. The prosecutor stated:

> "And while he was at the rear of that vehicle having that vehicle illuminated, he made the observations of the passenger. The passenger, who is no doubt was this defendant, Robert Cheeks, and the movements that he is making towards the waistband and his observations of observing a chrome revolver, and that this defendant placing it in the glove box.
>
> While, he makes those observations, he is a police officer. He is an experienced officer; he is a sergeant. He waits for backup to come. And he testified why he did that. There's numerous reasons. Officer safety. Safety of the driver, the defendant's sister. Not only is he looking out for the safety of himself and any officers that arrive on scene, he is looking out for the defendant's sister.
>
> When Sergeant O'Connor comes, you heard his testimony. He arrived. He observed Sergeant Rashan in the back of that vehicle towards the driver's side. And then at that point once Sergeant O'Connor is there, what do they do? From their training, they both then go their respective sides. Sergeant O'Connor goes to the driver's side where the defendant' sister was in the driver's seat of that

> vehicle. Sergeant Rashan proceeds to the passenger seat of that vehicle. Gets this defendant out. Does not say anything at that point. And he testified to you why he doesn't say anything. He doesn't say anything for officer safety, for the safety of the defendant's sister. He is a trained, experienced officer. 15 years on the job."

¶ 36 We find no error in these statements referring to Sergeant Rashan's experience to explain his actions during defendant's arrest. The prosecutor never argued that the officers were more credible based on their years of experience and position as police officers. The comments were properly based on evidence presented at trial.

¶ 37 Defendant also argues that the prosecutor in rebuttal argument "repeatedly discussed the years of experience" of the police officers to make their version of events "seem implicitly truthful." The prosecutor argued:

> "Those officers aren't any more credible because they wear white shirts. They aren't any more credible because they wear badges and carry guns. They are credible because they came in here and they told you the truth. And there is plenty of corroboration in this case to illustrate to you that it is those officers in this courtroom who are telling the truth and not the defense. The officers are no more credible than a nurse, they are no less credible than nurse. They are no more credible than the defendant, and no less credible than the defendant. You are to judge each and every witness that came in here."

¶ 38 Defendant contends that this argument compounded improper comments in this argument by the prosecutor.

> "What is her motive, bias, and interest? This is her brother. Blood is thicker than water. I didn't make that saying up. You can take that into account.

> What reasons would those officers have? What bias or interest do they have of putting a gun on him? I don't want you to find them more credible because they have been on the job 15 years or 13 years. Between the two of them, they got 28 years on the job. Why is that important? Why in the world this little gun they are going to frame this guy with a conviction for a possession of a controlled substance? They are going to do creative report writing? Excuse me. That's called perjury in my book. What he is accusing them of is outright perjury. Planting evidence, making stuff up in court, lying under the oath. Those officers are going to jeopardize 28 years between the two of them for this? For this case?"

¶ 39 The State maintains that the comments were a proper comment on the credibility of the State's witnesses in response to defense counsel's closing argument. "A closing argument must be viewed in its entirety, and the challenged remarks must be viewed in their context." *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). "Statements will not be held improper if they were provoked or invited by the defense counsel's argument." *Id*.

¶ 40 During closing argument, defense counsel stated:

> "What did the State present to you? The State presented essentially one police officer. Now the State is going to say oh, he is a police officer. That doesn't make him any more trustworthy than anybody else. That doesn't mean he has more credibility than any of the other witnesses that you heard. Oh, he's a 15-year veteran. Again, that doesn't mean he is more credible or his word is better than anybody else. Nobody knows him. Nobody knows what his reputation is. His reputation and his experience in anything it has nothing to do with anything right

> now. What it has to do is whether the State proved their case beyond a reasonable doubt."

¶ 41 Defense counsel's closing argument repeatedly questioned the officers' credibility. Counsel argued that much of the officers' testimony was not believable, such as, that Sergeant Rashan would not tell Sergeant O'Connor he had observed a firearm and that the two officers would take defendant's statement but did not document it or write the report. Specifically, defense counsel stated, "The officers I would say they engaged in creative report writing, but they didn't bother. They didn't do anything to document their actions." Counsel also argued that both defendant and Rachel testified truthfully.

¶ 42 When the complained-of comments are viewed in context with defense counsel's closing argument, the prosecutor's statement were made in direct response. Moreover, the prosecutor did not assert that the officers were more credible because of their position, but in fact, argued that they were not more credible because of their job than the defense witnesses. She argued that the officers were credible because they were truthful. This is not an improper statement. We find the comments in this case were proper and related to the strength of the evidence and responded to the argument of defense counsel.

¶ 43 Defendant also argues that the prosecutor in rebuttal argument "concocted evidence" to bolster the State's witnesses. Specifically, defendant complains of the following statements by the prosecutor.

> "You want reports? I have a table full of them. You are not going to get any police reports in the back. The testimony and the evidence that came from the witness stand is what you are to judge this case on."

¶ 44 According to defendant, this comment implies that the State has evidence, *i.e.*, reports, that supports its officers. We disagree. As previously discussed, defense counsel argued extensively about the reports prepared in this case, referring to "creative report writing," and discussing the lack of documentation by the testifying officers.

> "15 years experience. Claims he took a statement. We got two sergeants, two of them with multiple years of experience. We took a statement, but we did nothing to document that. 'I didn't write a report.' They go to report writing classes. The reason they write reports is to document what happened, yet they didn't document it at all. ***
>
> But what do we have here? 'I read him *Miranda* warnings.' But there is no written waiver. Oh, he made this statement, but two statements in there, not one, but two. [*sic*.] Not one of them wrote a note, wrote a handwritten note that requires a piece of paper and a pen.
>
> ***
>
> I wouldn't want my fate depending on just one person's word, somebody who's supposedly highly trained but doesn't bother to document a single thing, didn't write a single report. O'Connor didn't write a single report. There is two of them and they don't bother to do anything to document it. Two. Two sergeants. Not a single person bothers to write a single thing that says this is what was said. Not even a single report to write down what the sergeant saw at the time. Nothing."

¶ 45 In response, the prosecutor refocused the jury's consideration of the case to the testimony heard in the case. Both Sergeants Rashan and O'Connor testified that neither of them prepared a

report in this case. Sergeant Rashan testified that he relayed the information to another officer who prepared the written report and reviewed it. The prosecutor's statement when viewed in context does not suggest a police report has been withheld, but instead argued that the jury was to consider the officers' testimony from the witness stand, not whether they prepared a report. Further, the prosecutor was commenting on the reports because defense counsel argued extensively about the fact that neither of the testifying officers prepared the police report. Defense counsel argued, "The only thing that the State has to say was made was two sergeants who didn't bother to document anything." Counsel also stated, "So what did they do? They look over somebody else's reports and essentially just parrot it to you." The prosecutor properly referred to the existence of the police reports, but argued to the jury to consider the evidence presented at trial. We note that immediately before the complained-of statement, the prosecutor commented, "This is about credibility and evidence in this courtroom today from this witness stand." Given defense counsel's extensive arguments about the police reports, we find this comment to be a proper invited response. "It is well established that 'when defense counsel provokes a response, the defendant cannot complain that the prosecutor's reply denied him a fair trial.' " *People v. Hensley*, 2014 IL App (1st) 120802, ¶ 68 (quoting *People v. Hudson*, 157 Ill. 2d 401, 445 (1993)).

¶ 46 Based on our analysis of the complained-of comments, we conclude that defendant has failed to establish a clear or obvious error in the prosecutor's statements during closing and rebuttal arguments to warrant reversal under the plain error doctrine.

¶ 47 Next, defendant asserts that Sergeant O'Connor's testimony about the contact card including its preparation and the card itself was inadmissible hearsay because the officer lacked personal knowledge and the card does not fall within the business records exception to the

hearsay rule. While defense counsel objected to this evidence at trial, the issue was not raised in defendant's posttrial motion. Defendant again asks us to review the issue for plain error under both prongs. As previously discussed, a defendant must both object at trial and raise the issue in a posttrial motion to preserve it for review on appeal. *Enoch*, 122 Ill. 2d at 186. Again, the plain error rule allows this court to review unpreserved errors, but first we must consider whether there was a clear or obvious error at trial. *Sebby*, 2017 IL 119445, ¶ 49.

¶ 48 The hearsay rule generally prohibits the introduction of an out-of-court statement used to prove the truth of the matter asserted. *People v. Spicer*, 379 Ill. App. 3d 441, 449 (2007). "Hearsay statements are excluded from evidence primarily because of the lack of an opportunity to cross-examine the declarant." *People v. Peoples*, 377 Ill. App. 3d 978, 983 (2007). "However, an out-of-court statement that is offered for a purpose other than to prove the matter asserted is not hearsay and does not implicate the confrontation clause." *People v. Whitfield*, 2014 IL App (1st) 123135, ¶ 25.

¶ 49 Defendant argues that the contact card as well as Sergeant O'Connor's testimony about the card was inadmissible hearsay because the evidence was used to prove the truth of the matter asserted, the contents of the card, and Sergeant O'Connor lacked personal knowledge about the card. The State responds that Sergeant O'Connor's testimony about the contact card was not used to prove the truth of the matter asserted, and thus, it was not hearsay.

¶ 50 During her testimony, Rachel testified that none of the police officers spoke to her and obtained her information the night of defendant's arrest. She did not have an opportunity to tell them the firearm belonged to her and she had a valid FOID card for the firearm. At most, Rachel recalled that a female officer may have asked Rachel if she lived there. In rebuttal, the State

presented Sergeant O'Connor's testimony to impeach Rachel by showing that a contact card was completed with Rachel's name, date of birth, and residence.

¶ 51 "[T]estimony about an out-of-court statement which is used for a purpose other than to prove the truth of the matter asserted in the statement is not 'hearsay.' " *People v. Williams*, 181 Ill. 2d 297, 313 (1998). "The determination of whether a statement constitutes inadmissible hearsay does not focus upon the substance of the statement, but rather the purpose for which the statement is being used." *Id*. Here, the purpose was not to prove that the information on the contact card was correct, *i.e.*, that it was Rachel's birth date and address, but to impeach her credibility based on her testimony that she did not give her information to any police officers. Sergeant O'Connor's testimony about the contact card was presented to show that Rachel did speak with an officer at the scene. The contact card was not used to establish that the information contained on it was correct. Since the testimony was not being used to prove the truth of the matter asserted, the testimony was not hearsay and we find no plain error occurred.

¶ 52 Defendant also asserted that his trial counsel's failure to preserve this claim in a posttrial motion constituted ineffective assistance. Claims of ineffective assistance of counsel are resolved under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court delineated a two-part test to use when evaluating whether a defendant was denied the effective assistance of counsel in violation of the sixth amendment. Under *Strickland*, a defendant must demonstrate that counsel's performance was deficient and that such deficient performance substantially prejudiced defendant. *Id*. at 687. To demonstrate performance deficiency, a defendant must establish that counsel's performance fell below an objective standard of reasonableness. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). In evaluating sufficient prejudice, "[t]he defendant must show that there is a reasonable probability that, but

for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

¶ 53 Because we have concluded that the testimony was admissible nonhearsay, defendant cannot establish either prong under *Strickland* and his claim of ineffective assistance fails.

¶ 54 Finally, defendant asks this court to vacate improperly imposed fees and fines and to correct the mittimus to reflect the reduction. At sentencing, the trial court imposed a total of $542 in fines, fees, and costs. On appeal, he challenges the imposition of the $5 electronic citation fee (705 ILCS 105/27.3e (West 2014)), the $5 court system fee (55 ILCS 5/5-1101(a) (West 2014)), the $25 court services fee (55 ILCS 5/5-1103 (West 2014), and a $20 miscellaneous assessment. The State agrees that all of the complained of assessments should be vacated except for the court services fee.

¶ 55 The $5 electronic citation fee "shall be paid by the defendant in any traffic, misdemeanor, municipal ordinance, or conservation case upon a judgment of guilty or grant of supervision." 705 ILCS 105/27.3e (West 2014). Since defendant was convicted of a felony, this fee is inapplicable. *People v. Moore*, 2014 IL App (1st) 112592-B, ¶ 46. Accordingly, we agree with the parties that this fee was improperly assessed and vacate its imposition.

¶ 56 We also agree with the parties that the $5 court system fee was improperly imposed. The $5 court system fee only applies to offenses under the Illinois Vehicle Code. *People v. Williams*, 394 Ill. App. 3d 480, 483 (2009); see also 55 ILCS 5/5-1101(a) (West 2014). Since defendant's conviction was not under the Illinois Vehicle Code, we vacate the imposition of this fee.

¶ 57 Defendant also contends that the trial court improperly assessed the $25 court services fee because UUWF is not included in the statute. The State maintains that the fee was properly imposed.

¶ 58 The statute provides, in relevant part:

> "In criminal, local ordinance, county ordinance, traffic and conservation cases, [the court services fee] shall be assessed against the defendant upon a plea of guilty, stipulation of facts or findings of guilty, resulting in a judgment of conviction, or order of supervision, or sentence of probation without entry of judgment pursuant to [certain enumerated criminal statutes]." 55 ILCS 5/5-1103 (West 2014).

¶ 59 "This court has considered the same argument defendant raises in this case and held that the 'the statute permits assessment of this fee upon any judgment of conviction.' " *People v. Anthony*, 2011 IL App (1st) 091528-B, ¶ 27 (quoting *People v. Williams*, 405 Ill. App. 3d 958, 965 (2010)). Illinois courts have consistently upheld the imposition of the court services fee under this reasoning. See *People v. Taylor*, 2016 IL App (1st) 141251, ¶ 32, *People v. Howard*, 2014 IL App (1st) 122958, ¶ 20, *People v. Williams*, 2011 IL App (1st) 091667-B, ¶ 18, *People v. Adair*, 406 Ill. App. 3d 133, 144-45 (2010). We continue to follow the holdings in these cases and find that the court services fee was properly assessed in this case, even though the offense for which defendant was convicted is not specifically listed in the statute.

¶ 60 Finally, we agree with the parties that the trial court improperly imposed a $20 assessment listed as "[o]ther as ordered by the court." This miscellaneous fee must be vacated because the trial court failed to indicate any basis for the imposition of the fee. See *People v. Hunter*, 358 Ill. App. 3d 1085, 1094 (2005) (court may not assess charges unless authorized to do

so by statute).

¶ 61 Pursuant to Supreme Court Rule 615(b)(1) (Ill. S. Ct. R. 615(b)(1) (eff. Jan. 1, 1967)) and our authority to correct a mittimus without remand (*People v. Bowen*, 2015 IL App (1st) 132046, ¶ 68), we direct the clerk of the circuit court to correct the mittimus to vacate the imposition of the $5 electronic citation fee, the $5 court system fee, and the $20 miscellaneous assessment, thus reflecting a total assessment of $512. We order the clerk of the circuit court to modify the fines and fees order accordingly.

¶ 62 Based on the foregoing reasons, we affirm defendant's conviction and mittimus is corrected as ordered.

¶ 63 Affirmed; mittimus corrected.