2019 IL App (1st) 171270-U

FIFTH DIVISION
Order filed: October 4, 2019

No. 1-17-1270

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. 16 CR 647
	)	
RONNIE ROGERS,	)	Honorable
	)	Mauricio Araujo,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Justices Rochford and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's conviction for delivery of a controlled substance is affirmed where any error committed by the State during closing argument did not rise to the level of plain error. The "best evidence" rule did not apply to evidence introduced to identify United States currency used to purchase narcotics.

¶ 2 Following a jury trial, the defendant, Ronnie Rogers, was found guilty of delivery of a controlled substance (heroin) (720 ILCS 570/401(d)(i) (West 2014)). The defendant was sentenced, as a Class X offender, to 8 years imprisonment. On appeal, the defendant contends

that (1) the State's arguments, during closing and rebuttal, regarding his credibility, constituted plain error and (2) the State's failure to produce the original United States currency that an undercover police officer allegedly used to purchase heroin from him violated the best evidence rule. For the reasons that follow we affirm.

¶ 3 The defendant was tried twice. The first trial resulted in a mistrial because of a deadlocked jury. The following statement of facts is based upon the evidence adduced during the defendant's second jury trial.

¶ 4 Chicago police officer Orlando Rodriguez testified that on December 16, 2015, he was working undercover as a "buy officer." He was dressed in "regular clothes" and driving an unmarked covert vehicle. Officer Rodriguez parked his car near the intersection of Ridgeway Avenue and Iowa Street in Chicago. He began walking along Iowa toward Ridgeway after Officer Shayon Harris informed him that a suspect was engaging in narcotics transactions. At the intersection of Ridgeway and Iowa, Officer Rodriguez saw the defendant wearing clothing that matched the description of the suspect that Officer Harris had given. Officer Rodriguez approached the defendant and asked him for "blows," a street term for heroin. The defendant asked "How many?" Officer Rodriguez responded "One." The defendant instructed Officer Rodriguez to follow him and they walked north on Ridgeway.

¶ 5 Officer Rodriguez further testified that, near 917 North Ridgeway, the defendant reached into his back pocket and removed a clear plastic bag. The defendant reached into the bag, and handed Officer Rodriquez a black Zip-loc bag. Based on his experience, Officer Rodriguez believed the Zip-loc bag contained heroin. In exchange, Officer Rodriguez gave the defendant two $5 bills. Officer Rodriguez testified that the $5 bills were "1505 funds," money used by

Chicago police officers to buy suspected narcotics. Officer Rodriguez received the funds from the bursar and recorded the serial numbers on a log sheet before using them for undercover purchases. Officer Rodriguez did not recall what the defendant did with the money and did not see what he did with the clear plastic bag. Officer Rodriguez continued walking North on Ridgeway, and eventually returned to his car.

¶ 6 When Officer Rodriguez returned to his car, approximately four minutes later, he contacted the other members of his team by radio. He informed them that he had purchased heroin and gave them a description of the defendant. Approximately three minutes later, Officer Rodriguez received a radio communication and drove to Thomas Street and Ridgeway. When he arrived, he saw the defendant engaged in conversation with Officer Arthur Carlson. He drove past and recognized the defendant by his face and clothing.

¶ 7 Officer Rodriguez kept the suspected heroin in his possession until he returned to the police station. There, he inventoried it in accordance with police department procedure. At the station, Officer Rodriguez was shown two $5 bills, which he identified as the bills he had given the defendant. Officer Rodriguez checked the serial numbers and they matched the numbers he had recorded on the 1505 funds sheet. He kept the money in his possession until the end of the month when "it gets returned to the bursar to be reused again." On cross-examination, Officer Rodriguez testified that he could not recall whether he turned the $5 bills back in to the bursar at the end of the month, and could not recall whether they were still in his possession at the end of the month. He did not photograph or photocopy the bills and did not know where they were at the time of trial.

¶ 8 A forensic scientist testified that the item inventoried by Officer Rodriguez tested positive for heroin and weighed 0.232 grams.

¶ 9 Officer Harris testified that, on December 16, 2015, he was working on a team with Officer Rodriguez as a "surveillance officer." Officer Harris drove a covert car, and parked near the intersection of Ridgeway and Iowa. He saw the defendant standing at the corner. The defendant engaged in two hand-to-hand transactions with individuals that approached him, but Officer Harris could not tell what was being exchanged. After ten minutes of observation, Officer Harris saw Officer Rodriguez approach the defendant. Officer Harris maintained surveillance of the defendant and Officer Rodriguez. His description of their encounter was consistent with Officer Rodriguez's testimony.

¶ 10 Detective Arthur Carlson testified that on December 16, 2015, he was assigned to the narcotics unit and worked as an "enforcement officer." Detective Carlson was driving an unmarked police car near the intersection of Iowa and Ridgeway. After receiving radio communications from Officer Rodriguez and Officer Harris, Detective Carlson drove to the intersection of Thomas and Ridgeway, where he saw the defendant. The defendant matched the description he had received, so he stopped his vehicle and engaged the defendant in conversation. Detective Carlson's partner radioed Officer Rodriguez. As a result of that communication, Detective Carlson and his partner arrested the defendant and conducted a custodial search. During the search, Detective Carlson recovered $18, including two $5 bills that he later determined were the 1505 funds used by Officer Rodriguez.

¶ 11 The State rested its case in chief. By earlier agreement with the court, the defendant elected to defer argument on a motion for a directed verdict until after all evidence was presented to the jury.

¶ 12 The defendant testified that on December 16, 2015, he was at a friend's house on the 700 block of North Ridgeway. He left her house, decided to purchase some heroin, and began walking north. Near 917 North Ridgeway, he met two men, Raymond Harris whose street name is "Main" and James Hall, whose street name is "Black." The defendant asked Main whether he had any heroin or "blows." Main "served" defendant two bags of heroin. The defendant paid $20 for the heroin and after the purchase had $8 left in his pocket. The defendant placed one bag in his pocket and "snorted" the other bag through a straw. He continued walking north, planning to stop at a store to buy cigarettes with his remaining cash.

¶ 13 The defendant further testified that, as he was walking, a police car "cut him off." Two officers spoke with him and then recovered the heroin from his pocket. They then placed him "in custody." The defendant recognized Detective Carlson as one of the officers that arrested him; however, he testified that he never saw Officer Harris or Officer Rodriguez, and never sold heroin to anyone.

¶ 14 On cross-examination, the defendant admitted that he testified at a prior proceeding that he bought heroin form Lane Harris.

¶ 15 In rebuttal, Detective Carlson testified that he never recovered a straw from the defendant and never saw the defendant speaking to anyone.

¶ 16 The parties stipulated that the defendant had two prior felony convictions for possession of a controlled substance.

¶ 17 Following the presentation of evidence, the trial court denied the defendant's motion for a directed verdict and the parties presented closing arguments. During rebuttal, the State addressed the issues of credibility and commented on the jury instructions as follows:

> "You will receive an instruction, an instruction that says that individuals who have felony convictions, in this case two right here, are more likely to lie. Did you hear any evidence about the three officers who testified in this case that have felony convictions? So who is the person more likely to lie in this case? The defendant who has something at stake, who has two felony convictions which the law tells you you should consider or the three officers who have no felony convictions and really are doing their jobs coming here under oath and testifying.
>
> Also, you're going to receive an instruction that says the believability of a witness may be challenged by evidence that on some former occasion, he made a statement that is not consistent with his testimony in this case. Evidence of this kind is ordinarily considered by you only for the purpose of impeachment. However, you may consider a witness' earlier inconsistent statement as evidence without this limitation when the statement was made under oath at a prior proceeding.
>
> Here is what that means. This defendant testified at a prior proceeding under oath. He swore to tell the truth. Then he came here today, and he testified again under oath. The things he said that contradicted his prior testimony are lies. That's what the law tells you.
>
> So when he says today that Raymond Harris sold him drugs, and he testified at a prior proceeding that it was someone named Lane Harris, that was a lie."

¶ 18 The jury found the defendant guilty of delivery of a controlled substance. The circuit court entered judgment on the verdict and sentenced the defendant to eight years' incarceration.

¶ 19 The defendant first contends that the State committed prosecutorial misconduct during its rebuttal argument when it misstated the law by telling the jury that it would be instructed that individuals with prior felony convictions were more likely to lie and that any contradictions between the defendant's prior testimony and his testimony at trial were lies. The defendant acknowledges that he failed to preserve this issue by failing to object when the arguments were made. See *People v. Nieves*, 193 Ill. 2d 513, 524 (2000) ("To preserve an issue for review, a defendant must both object at trial and specifically include the objection in a post-trial motion.") The defendant argues, however, that we should reach this error under the plain error doctrine. See *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 20 The State responds, acknowledging that the prosecutor's statements during closing argument were "poorly worded," "inartful", and "misstatements of the law." However, the State contends that, even if error, the challenged remarks do not rise to the level of plain error because the defendant cannot establish that the evidence was closely balanced or that any error was so fundamental that the defendant was denied a fair trial. See *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005).

¶ 21 "[T]he plain-error doctrine allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occured 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 occured 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." *Piatkowski*, 225 Ill. 2d at 565. Generally, the first step in a plain-error analysis is to determine whether an error was made. See *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). However, in this case, the State acknowledges that at least some of the prosecutor's comments were made in error. We turn, then, to the question of whether the evidence was closely balanced. See *Piatkowski*, 225 Ill. 2d at 565. We must evaluate the totality of the evidence and conduct a qualitative, commonsense assessment of it within the context of the case. *People v. Sebby*, 2017 IL 119445, ¶ 53. The burden of persuading this court that the evidence was closely balanced rests on the defendant. See *Thompson*, 238 Ill. 2d at 613.

¶ 22 Here, the defendant has not persuaded this court that the evidence was closely balanced. Officer Rodriguez's description of the narcotics transaction was clear and unimpeached in any significant way. His testimony was also corroborated by Officer Harris's testimony. Detective Carlson's description of the defendant's arrest and the recovery of the 1505 funds further corroborated Officer Rodriguez's account. Moreover, the defendant does not dispute that the inventoried packet tested positive for heroin. Considered as a whole, the evidence overwhelmingly establishes that the defendant delivered heroin to Officer Rodriguez.

¶ 23 The defendant argues that, like the *Sebby* case, the evidence in this case was closely balanced because it involves two opposing versions of events and no evidence to contradict either version. We disagree. The defendant was the sole witness to testify to his version of events. The defendant's account does not adequately explain how three experienced police officers confused him for Raymond Harris when the two men were dressed differently and Officer Harris testified that that he maintained continuous surveillance of the defendant from the time of the delivery until his arrest. A commonsense assessment of the evidence does not require

the conclusion that the evidence is closely balanced every time a defendant denies committing the offense. In this case, we conclude that the evidence overwhelmingly established the elements of the offense despite the defendant's contrary assertions. Therefore, any error during closing argument does not rise to the level of plain error based on the closeness of the evidence

¶ 24 The defendant also argues that we should consider the alleged errors here under the second prong of plain error. The defendant argues that the error was "serious" and, quoting *People v. Johnson*, 208 Ill. 2d 53, 64 (2003), notes, that " 'a pattern of intentional prosecutorial misconduct may so seriously undermine the integrity of judicial proceedings as to support reversal under the plain-error doctrine.' " We disagree.

¶ 25 Our supreme court has made clear that second-prong plain error is not limited to "structural error." See *People v. Clark*, 2016 IL 118845, ¶ 46. Instead, courts have found second-prong plain error where "(1) the error is structural or (2) as a result of the error the defendant suffers a total or near-total deprivation of a constitutional right." *People v. Garner*, 2016 IL App (1st) 141583, ¶ 32.

¶ 26 Here, we cannot conclude that the alleged errors amount to second-prong plain error. Although, the State concedes that the prosecutor's comments were poorly worded and inartful, we must nevertheless consider them in the context of the overall argument. See *People v. Meeks*, 382 Ill. App. 3d 81, 84 (2008). Viewed in context, the prosecutor's remarks are simply intended as comments on the evidence and the defendant's credibility, a proper subject for closing argument. See *People v. Williams*, 2015 IL App (1st) 122745, ¶ 12. Moreover, although the prosecutor was arguably incorrect in telling the jury that the instructions required them to find that the defendant was lying, the jury did ultimately receive the instructions from the judge. The

jury could determine for itself whether they were subject to the interpretation suggested during closing argument. Therefore, we conclude that any error during closing argument did not rise to the level of plain error, under the second prong of that doctrine.

¶ 27 The defendant next contends that allowing the police officers to testify regarding the 1505 funds they recovered from the defendant without presenting the bills themselves violated the "best evidence" rule and constituted inadmissible hearsay.

¶ 28 Under the Illinois rules of evidence, when a party wishes to prove the contents of a writing, recording, or photograph, it is generally required that the original writing, recording, or photograph be admitted. See Illinois Rule Evidence 1002 (eff. Jan. 1, 2011). This is commonly referred to as the "best evidence" rule. See *People v. Vassar*, 331 Ill. App. 3d 675, 685 (2002). The best evidence rule is not without exception, however, and other evidence is admissible when, for example, the writing is not closely related to a controlling issue. See Illinois Rule Evidence 1004(4) (eff. Jan 1, 2011). Moreover, the rule has no application when a party seeks to prove a fact that has an existence independent of documentary evidence. *Vassar*, 331 Ill. App. 3d at 685. We review decisions on the admissibility of evidence against an abuse of discretion standard. *People v. Wheeler*, 226 Ill. 2d 92, 132 (2007).

¶ 29 Here, the serial numbers of the 1505 funds used to purchase the heroin are not relevant to any material issue in the case except to the extent they corroborate the testimony of Officer Rodriguez. The receipt of cash is not a required element to convict a defendant of delivery of a controlled substance. See 720 ILCS 570/401 (West 2014). Although the recovery of the 1505 funds was strong evidence that the police had arrested the correct individual, the State was never required to prove that the defendant was in possession of the currency. See *People v. Trotter*, 293

Ill. App. 3d 617, 619 (1997). Similarly, the actual serial numbers of the bills are not controlling issues in the case. The testimony of Officer Rodriguez regarding the serial numbers simply added weight to his testimony that the bills recovered were the same bills that he tendered; it was not a controlling issue.

¶ 30 The material issue is whether the defendant knowingly possessed and delivered a controlled substance. The State would have been able to prove its case with the testimony of Officer Rodriguez regarding the transaction between himself and the defendant and Officer Rodriguez's identification of the defendant. Officer Rodriguez's testimony about the pre-recorded $5 bills and their serial numbers was simply additional evidence in support of that identification testimony. Because the State was not required to prove the bills' serial numbers in order to prove the elements of delivery of a controlled substance, the best-evidence rule is inapplicable.

¶ 31 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 32 Affirmed.