2019 IL App (4th) 170358-U

NO. 4-17-0358

FILED
September 26, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
DERIC D. ALFORD,	)	No. 17CF109
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

PRESIDING JUSTICE HOLDER WHITE delivered the judgment of the court. Justices Cavanagh and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court (1) reversed, concluding the State committed prosecutorial misconduct denying defendant a fair trial where the prosecutor improperly defined reasonable doubt during closing argument and the jury relied on the improper definition during deliberations and (2) remanded for a new trial.

¶ 2 In January 2017, the State charged defendant, Deric D. Alford, by information with one count of burglary (720 ILCS 5/19-1(a) (West 2016)), where defendant "knowingly and without authority entered a motor vehicle belonging to Nicholas Wipperfurth and located at 311 E. Clark St., Champaign, [Illinois,] with the intent to commit therein a theft." Following an April 2017 trial, a jury found defendant guilty of burglary. In May 2017, the trial court sentenced defendant to a 10-year prison sentence with credit for 100 days served. The court also imposed several fines and fees.

¶ 3 Defendant appeals, arguing (1) the State failed to prove him guilty beyond a reasonable doubt; (2) the trial court erred in admonishing the potential jurors under Illinois Supreme Court Rule 431(b) (eff. July 1, 2012), when it failed to ensure that the potential jurors understood and accepted the four principles enumerated in that rule; (3) the State committed prosecutorial misconduct denying him a fair trial where the State (i) improperly defined reasonable doubt during closing argument, (ii) disparaged defense counsel's integrity during closing argument, (iii) made closing arguments unsupported by the evidence, and (iv) relied on improper hearsay testimony; and (4) that defendant is entitled to *per diem* credit for the 100 days he spent in presentence custody. For the following reasons, we reverse and remand for a new trial.

¶ 4 I. BACKGROUND

¶ 5 In January 2017, the State charged defendant by information with one count of burglary (720 ILCS 5/19-1(a) (West 2016)), where defendant "knowingly and without authority entered a motor vehicle belonging to Nicholas Wipperfurth and located at 311 E. Clark St., Champaign, [Illinois,] with the intent to commit therein a theft."

¶ 6 A. Defendant's Jury Trial

¶ 7 In April 2017, defendant's jury trial commenced. We summarize only the facts necessary for the resolution of this appeal.

¶ 8 1. *Grayson Shouse*

¶ 9 Grayson Shouse, a student at the University of Illinois, testified that on January 23, 2017, he lived on the third floor of an apartment building located at 312 East White Street in Champaign. Shouse's bedroom window faced north, overlooking two parking lots, separated by

an alley. North of the parking lots and alley was another apartment building located at 311 East Clark Street, which had a covered parking lot open to the south, east, and west.

¶ 10 Around 2:25 a.m., Shouse approached his bedroom window to open the window when he noticed an African American male west of the apartment building at 311 East Clark Street. Shouse recounted the male being about 150 feet away from Shouse's apartment complex. From his window, Shouse watched the man enter the covered parking lot from the west. Shouse testified the covered parking lot displayed overhead lights, which were on at the time the man entered the lot. After entering the covered parking lot, the man unsuccessfully attempted to open the driver's side door of a tan Volkswagen sedan. The man then proceeded south to the driver's side door of a black Lincoln Navigator. Shouse observed the man enter the Lincoln Navigator and the illumination of the vehicle dome light. Leaning inside the vehicle for about 15 seconds, the man opened the vehicle's glove box and touched its center console before exiting the vehicle.

¶ 11 Shouse next observed the man walk south, where he unsuccessfully attempted to open doors to a white GMC Sierra truck and a blue Honda. Shouse described the Honda being approximately 50 feet from his window next to a streetlight. Unable to enter the Honda, the man continued walking south toward White Street. Shouse testified he called 911 when he witnessed the man enter the black Lincoln Navigator.

¶ 12 Shouse described the man as an African American male, in his twenties, wearing a black hoodie, "blackish" jeans, headphones, and a hat. Shouse failed to ascertain the man's height, weight, if the man had facial hair, if the man had any piercings or tattoos, or if the man wore gloves. On cross-examination, Shouse agreed with defense counsel that he was "about 75 to 80 percent" sure defendant was the man who entered the Lincoln Navigator.

¶ 13 Shouse testified police picked him up at his apartment about two and a half minutes after he called 911 and drove him to identify defendant. Shouse identified defendant as the male who entered the Lincoln Navigator.

¶ 14 2. *Sergeant Matthew Crane*

¶ 15 Matthew Crane, a sergeant with the Champaign police department, testified to being dispatched on January 23, 2017, around 2:25 a.m. to 312 East White Street in Champaign for a report of a suspicious person entering vehicles and that the suspect, an African American male, wore a blue or black sweatshirt and headphones. Crane arrived on the 300 block of White Street from the east within a couple minutes of receiving the dispatch call. Upon arrival, Crane saw defendant walking westbound on the sidewalk of East White Street. Crane observed defendant wearing a black hooded sweatshirt, jeans, and headphones. Crane testified he saw no one else in the area who matched the description of the suspect.

¶ 16 When Crane stopped defendant, defendant said he was on his way home from a nearby County Market. Crane testified that when he stopped defendant, defendant was heading west even though his house was north. Crane searched defendant but located no stolen items or loose change on him. Also absent on defendant was any money or a wallet. According to defendant, upon arriving at County Market he realized he had no money and left to return home. Crane testified defendant cooperated with his investigation but he did seem nervous. After Shouse identified defendant, Crane placed defendant under arrest.

¶ 17 3. *Officer Kristy Miller*

¶ 18 Kristy Miller, a patrol officer with the Champaign police department, testified to receiving a dispatch to 312 East White Street on January 23, 2017, around 2:25 a.m. Miller testified that dispatch relayed to her that a suspicious person, an African American male, in his

twenties, wearing either a blue or black hoodie and headphones, was entering vehicles. Miller testified she came from the west and it took her a little over two minutes to arrive on the 300 block of White Street. Upon arrival, Miller observed Sergeant Crane speaking with defendant, who had on blue jeans, a darker hoodie, and headphones. Miller testified she saw no one else in the area who matched the description given by dispatch.

¶ 19 Miller then went to speak with Shouse at his apartment and took Shouse to identify defendant. Shouse identified defendant as the man who entered the Lincoln Navigator by his clothing and headphones. Miller testified that as soon as Shouse and she pulled up to defendant, Shouse said, "That's him."

¶ 20 4. *Nicholas Wipperfurth*

¶ 21 Nicholas Wipperfurth, a University of Illinois student, testified that on January 23, 2017, he resided at 311 East Clark Street in Champaign. Wipperfurth testified he owned a 2001 black Lincoln Navigator that he parked in a designated parking spot in a covered parking lot at the back of his apartment building. On January 23, 2017, around 2:30 a.m., the Champaign police department contacted Wipperfurth to inform him someone entered his vehicle. Wipperfurth testified he did not give anyone permission to enter his vehicle that morning. When testifying, Wipperfurth failed to indicate that any items were missing from his vehicle.

¶ 22 5. *Jeff Creel*

¶ 23 Jeff Creel, a police officer with the Champaign police department, testified that he examined the Lincoln Navigator for fingerprints. Creel testified he found no usable fingerprints on the exterior door handle, the glove box, or the center console. Creel only examined the Lincoln Navigator.

¶ 24 6. *Closing Argument*s

¶ 25 During closing argument, the State asked the jury to find beyond a reasonable doubt that defendant entered the Lincoln Navigator to commit a theft therein. The State discussed reasonable doubt as follows:

> "Now beyond a reasonable doubt is kind of a tricky concept. It's not something that you really use much in your daily life. But there is an analogy. The analogy is perhaps with what's an unreasonable fear.
>
> Now there are meteors entering the earth's atmosphere all of the time and it's possible that a meteor could come through this ceiling and hit me in the head right now, but is it reasonable for me to live my life in fear of that happening? Would it be reasonable for me to wear a steel helmet at all times just in case that happens? No. That's an unreasonable fear. It could happen, but it's not reasonable to think that it would happen and for me to live my life in fear of that.
>
> So it's a similar thing with reasonable doubt. If I have a good reason to fear something, then that's a reasonable fear. If I don't have a good reason to fear something, that's an unreasonable fear. If I have a good reason to doubt that something happened, that's reasonable doubt. If there's no good reason to doubt that it happened, then there's no reasonable doubt. That's beyond a reasonable doubt."

The State ended its closing argument by stating:

"So that's the case, ladies and gentlemen. Could it have been someone other than this defendant? Yes, it's possible. It's also possible that a meteor could hit me right now. Is it likely that it was someone else? No, it's not. Because, as I said, the real criminal would have had to have gotten away in those two minutes and the defendant would have had to wander in there. The most likely thing and the thing that you can believe beyond a reasonable doubt is that this defendant was the one that got into that Navigator, was rummaging around, opened the glove box, entered that vehicle with the intent to commit a theft and without authority from the owner of the vehicle."

¶ 26 In turn, defense counsel stated that the real suspect would have left the scene within two minutes, criticized the vague descriptions given of the suspect, argued the lack of physical evidence, and emphasized Shouse's lack of confidence in his identification. Defense counsel also provided an analogy of reasonable doubt:

"Ladies and gentlemen, [the State] gave you an analogy about reasonable doubt that involved meteors. I'm going to give you a different one. A salesperson shows up at your doorstep and they tell you that they have a great investment opportunity for you. That salesperson is a stranger to you. You've never met them in your life. He tells you to go cash in your life savings and give it to him and he will complete this investment for you. He then tells you that there is a 75 to 80 percent chance that you'll get your

> money back and maybe a return on your money. Ask yourselves, do you run to the bank, cash in your life savings and hand it to that salesperson because you believe beyond a reasonable doubt that you're going to get your money back and that you're going to get a return? The answer to that, folks, is easy. No. Absolutely not."

¶ 27 In rebuttal, the State suggested it would have preferred Shouse descend his apartment stairs, tackle the suspect, and hold him for police. The State then remarked that "although, even if we had had that, we would probably still be hearing that he tackled the wrong guy." The State also asserted that the suspect remained at the scene to commit additional burglaries. Specifically, the State argued the following:

> "But what was [defendant] likely doing in those two minutes between the time [Shouse] last saw him and the time police arrived? Well, what was [he] doing in the two minutes before [Shouse] last saw him? He was checking vehicle doors to see if he could find an unlocked one that he could steal something from. And so what was he likely doing in those two minutes? Walking down White Street—."

Defense counsel objected alleging facts not in evidence**.** The court stated, "Circumstantial evidence is something you can argue. The objection is overruled." The State continued that defendant was "[w]alking down White Street checking door handles just like he had been doing in the two minutes before."

¶ 28 After closing arguments, the trial court instructed the jury to determine the facts and to determine them only from the evidence in the case. Specifically, the court admonished

the jury that "Closing arguments are made by the attorneys to discuss the facts and circumstances in the case and should be confined to the evidence and to reasonable inferences to be drawn from the evidence. Neither opening statements or closing arguments are evidence and any statement or argument made by the attorneys which is not based on the evidence should be disregarded."

¶ 29 The trial court further instructed the jury that defendant's presumption of innocence "remains with him throughout every stage of the trial and during your deliberations on the verdict and is not overcome unless from all the evidence in this case you are convinced beyond a reasonable doubt that he is guilty. The State has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden remains on the State throughout the case. The defendant is not required to prove his innocence."

¶ 30 7. *Jury Deliberations and Verdict*

¶ 31 About an hour after the parties submitted the case to the jury, the jury asked the trial court, "What do we do if we're deadlocked?" In turn, the trial court instructed the jury pursuant to *People v. Prim*, 53 Ill. 2d 62, 289 N.E.2d 601 (1972), as set forth in Illinois Pattern Jury Instructions, Criminal, No. 26.07 (4th ed. 2000). After further deliberations, the jury submitted another question to the court asking, "[W]hat is the definition of reasonable doubt that we should employ in our deliberations?" The court responded stating, "[Y]ou will not get a definition of reasonable doubt. That is for you to determine." Ultimately, the jury found defendant guilty of burglary.

¶ 32 B. Defendant's Posttrial Motion and Sentencing Hearing

¶ 33 Defendant filed a motion for acquittal or, in the alternative, a motion for a new trial. In the motion, defendant alleged in relevant part that (1) the evidence failed to prove him

guilty beyond a reasonable doubt and (2) that the trial court erred "in overruling the [d]efendant's objection during the State's closing argument." Subsequently, the court denied the motion.

¶ 34 In May 2017, the trial court sentenced defendant to a 10-year prison sentence with credit for 100 days served. Due to his prior convictions, the court sentenced defendant as a Class X offender. The court also imposed various fines and fees, including a $30 juvenile expungement fund assessment, $15 state police operations assessment, $5 drug court assessment, and $50 court finance fee.

¶ 35 This appeal followed.

¶ 36 II. ANALYSIS

¶ 37 On appeal, defendant argues (1) the State failed to prove him guilty beyond a reasonable doubt; (2) the trial court erred in admonishing the potential jurors under Illinois Supreme Court Rule 431(b) (eff. July 1, 2012), when it failed to ask the potential jurors if they both understood and accepted the four principles enumerated in that rule; (3) the State committed prosecutorial misconduct denying him a fair trial where the State (i) improperly defined beyond a reasonable doubt during closing argument, (ii) disparaged defense counsel's integrity during closing argument, (iii) made closing arguments unsupported by the evidence , and (iv) relied on improper hearsay testimony; and (4) that defendant is entitled to *per diem* credit for the 100 days he spent in presentence custody. We turn first to the sufficiency of the evidence.

¶ 38 A. Sufficiency of the Evidence

¶ 39 When considering a challenge to the sufficiency of the evidence, we must determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the required elements of the crime beyond a reasonable doubt. *People v. Bradford*, 2016 IL 118674, ¶ 12, 50 N.E.3d 1112. "It is the responsibility of

the trier of fact to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from the facts." *Id.* It is not our function to retry the defendant. *People v. Givens*, 237 Ill. 2d 311, 334, 934 N.E.2d 470, 484 (2010). We reverse a conviction only where the evidence is so unreasonable, improbable, or unsatisfactory that it raises a reasonable doubt of the defendant's guilt. *People v. Belknap*, 2014 IL 117094, ¶ 67, 23 N.E.3d 325.

¶ 40 "[A] single witness's identification of the accused is sufficient if the witness viewed the accused under circumstances permitting a positive identification." *People v. Standley*, 364 Ill. App. 3d 1008, 1014, 848 N.E.2d 195, 200 (2006). Contradiction by the defendant does not diminish the weight of the testimony. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228, 920 N.E.2d 233, 242 (2009). In evaluating the reliability of a witness's identification of a criminal defendant, courts are guided by the factors set forth in *Neil v. Biggers*, 409 U.S. 188 (1972). *People v. Slim*, 127 Ill. 2d 302, 307, 537 N.E.2d 317, 319 (1989). The factors include "(1) the opportunity the victim had to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the victim at the identification confrontation; and (5) the length of time between the crime and the identification confrontation." *Id.* at 308.

¶ 41 To prove defendant guilty of burglary, the State must prove beyond a reasonable doubt that he knowingly and without authority entered a motor vehicle belonging to Wipperfurth, with the intent to commit a theft. 720 ILCS 5/19-1(a) (West 2016).

¶ 42 Defendant argues the State failed to prove him guilty beyond a reasonable doubt where the only direct evidence linking him to the unauthorized entry of the Lincoln Navigator was Shouse's questionable identification of defendant as the suspect. Specifically, defendant argues Shouse was uncertain in his show-up identification, gave a vague description of the

suspect, and the State failed to corroborate Shouse's testimony with other evidence. We disagree with defendant and find Shouse's testimony reliable based on the *Neil v. Biggers* factors.

¶ 43 Shouse testified he observed defendant approach the covered parking lot and attempt to enter a tan Volkswagen sedan. Shouse testified to the covered parking lot having overhead lighting. After defendant was unsuccessful in entering the Volkswagen, defendant proceeded to Wipperfurth's Lincoln Navigator where he successfully entered the vehicle. Shouse observed the dome light turn on and watched defendant access the glove box inside the vehicle. Shouse then proceeded to call police while he observed defendant exit the Lincoln Navigator and try to enter other vehicles. While defendant calls into question Shouse's view of defendant entering vehicles because of Shouse's location in his apartment and it being dark outside, Shouse testified that the covered parking lot had overhead lighting and streetlights illuminated the parking lot behind his apartment.

¶ 44 While defendant walked from vehicle to vehicle, Shouse continued to watch him and described the man as an African American male, in his twenties, wearing a black hoodie, "blackish" jeans, headphones, and a hat. Sergeant Crane testified he saw no one else in the area who matched the description of the suspect. He also stated that defendant appeared nervous. Shouse testified police picked him up about two and a half minutes after he called 911 and drove him to defendant where he identified defendant as the person entering the vehicles.

¶ 45 Defendant argues that Shouse admitted he was only "about 75 to 80 percent" positive that defendant was the man that entered the Lincoln Navigator. However, during direct examination, Shouse confirmed the man in police custody that night was the same person he saw enter the Lincoln Navigator. Officer Miller testified that as soon as she and Shouse pulled up to defendant, Shouse said, "That's him."

¶ 46 Furthermore, Shouse's identification was mere minutes after he witnessed defendant enter the Lincoln Navigator. Specifically, Shouse testified to Officer Miller picking him up and taking him to defendant about two and a half minutes after he called 911. Sergeant Crane and Officer Miller both testified to arriving on scene within minutes. Based on the testimony, only a few minutes passed from the time Shouse called 911 to his identification of defendant.

¶ 47 In the end, the jury performed its role as fact finder and determiner of credibility. Accordingly, we conclude the State presented sufficient evidence for the jury to find defendant guilty beyond a reasonable doubt. Because we find the issue dispositive, we turn now to defendant's claim of prosecutorial misconduct where the prosecutor improperly defined reasonable doubt during closing argument.

¶ 48 B. Prosecutorial Misconduct

¶ 49 Defendant argues the State committed prosecutorial misconduct denying him a fair trial where the prosecutor improperly defined "reasonable doubt" during closing argument and the jury relied on the improper definition during deliberations. The State disagrees and argues the prosecutor's remarks on reasonable doubt were proper given that counsel has wide latitude during closing argument.

¶ 50 Defendant failed to raise this claim before the trial court, thus rendering the issue forfeited. *People v. Kitch*, 239 Ill. 2d 452, 460, 942 N.E.2d 1235, 1240 (2011). However, we may consider a forfeited claim where the defendant demonstrates a plain error occurred. Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1987). To prevail under the plain-error doctrine, a defendant must first demonstrate a clear or obvious error occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 411 (2007). "To determine whether error exists, each case must be decided on its

own facts." *People v. Rushing*, 192 Ill. App. 3d 444, 454, 548 N.E.2d 788, 794 (1989). If an error occurred, we will only reverse where (1) "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) the "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. The appellate court reviews *de novo* allegations that prosecutorial misconduct warrants a new trial. *People v. Wheeler*, 226 Ill. 2d 92, 121, 871 N.E.2d 728, 744 (2007).

¶ 51 Defendant argues the State improperly defined "reasonable doubt" where the prosecutor represented that reasonable doubt required a "good" reason to doubt that something happened and conversely defined no reasonable doubt as "no good" reason to doubt that it happened. The prosecutor stated as follows:

> "Now beyond a reasonable doubt is kind of a tricky concept. It's not something that you really use much in your daily life. But there is an analogy. The analogy is perhaps with what's an unreasonable fear.
>
> Now there are meteors entering the earth's atmosphere all of the time and it's possible that a meteor could come through this ceiling and hit me in the head right now, but is it reasonable for me to live my life in fear of that happening? Would it be reasonable for me to wear a steel helmet at all times just in case that happens? No. That's an unreasonable fear. It could happen, but it's not

reasonable to think that it would happen and for me to live my life in fear of that.

So it's a similar thing with reasonable doubt. If I have a good reason to fear something, then that's a reasonable fear. If I don't have a good reason to fear something, that's an unreasonable fear. If I have a *good reason* to doubt that something happened, that's reasonable doubt. If there's *no good reason* to doubt that it happened, then there's no reasonable doubt. That's beyond a reasonable doubt." (Emphases added.)

¶ 52 Our supreme court has long held that neither the trial court nor counsel should define reasonable doubt for the jury. *People v. Downs*, 2015 IL 117934, ¶ 19, 69 N.E.3d 784. "Generally, attempts by counsel to explain the reasonable doubt standard are disfavored because, 'no matter how well-intended, the attempt may distort the standard to the prejudice of the defendant.' " *People v. Laugharn*, 297 Ill. App. 3d 807, 811, 698 N.E.2d 219, 222 (1998) (quoting *People v. Keene*, 169 Ill. 2d 1, 24-25, 660 N.E.2d 901, 913 (1995)). "However, both the prosecutor and defense counsel are entitled to discuss reasonable doubt and to present his or her view of the evidence and to suggest whether the evidence supports reasonable doubt." *Id.* (citing *People v. Carroll*, 278 Ill. App. 3d 464, 467, 663 N.E.2d 458, 460-61 (1996)).

¶ 53 Here, during closing argument, the prosecutor discussed reasonable doubt stating, "If I have a *good reason* to doubt that something happened, that's reasonable doubt. If there's *no good reason* to doubt that it happened, then there's no reasonable doubt. That's beyond a reasonable doubt." (Emphases added.) Instead of merely showing that "reasonable" modifies "doubt," the State further included the word "good." Therefore, the prosecutor's comments not

only conveyed that doubt must be reasonable, but that the jurors must have a good reason to doubt defendant's guilt. Furthermore, the prosecutor attempted to analogize reasonable doubt to reasonable fear through the likelihood of a meteor striking.

¶ 54 The State argues the prosecutor's remarks were proper because the prosecutor may discuss reasonable doubt during closing argument. The State cites *People v. Burney*, 2011 IL App (4th) 100343, ¶ 66, 963 N.E.2d 430, *Carroll*, 278 Ill. App. 3d at 466, and *Laugharn*, 297 Ill. App. 3d at 810, to support its argument.

¶ 55 In *Burney*, this court held that the prosecutor's comments on reasonable doubt were not improper. *Id.* ¶ 68. Specifically, the court stated, "Here, the prosecutor sought to discuss the reasonable-doubt standard, but he did not diminish the State's burden of proof or shift the burden to defendant. 'A prosecutor may argue that the State does not have the burden of proving the guilt of the defendant beyond *any* doubt, that the doubt must be a reasonable one.' " (Emphasis in original.) *Id.* (quoting *Carroll*, 278 Ill. App. 3d at 467).

¶ 56 Likewise, in *Carroll*, this court held that it was not improper when the prosecutor during closing argument stated, "Now, we need to prove beyond a reasonable doubt that this Defendant committed the offenses of first degree murder. It's not beyond all doubt or any doubt, but beyond a reasonable doubt, a doubt that has reason behind it. That's not some mythical, unattainable standard that can't be met. That standard is met every day in courtrooms ***." 278 Ill. App. 3d at 466. Similar comments were deemed acceptable in *Laugharn*, 297 Ill. App. 3d at 810 ("Now, we must prove to you the elements of the offense of first degree murder and all of these elements beyond a reasonable doubt. *Now, that's not beyond all doubt or any doubt, but beyond a reasonable doubt. A doubt with some reason to it. Now, that's not some mythical,*

unattainable standard that can't be met. It's met in courtrooms throughout the country every day, and we've met [it] in here in this courtroom this week." (Emphasis added.)).

¶ 57 We find *Burney*, *Carroll*, and *Laugharn* distinguishable. In those three cases, prosecutors only represented to the jury what the reasonable-doubt standard was not; they did not provide an affirmative definition of the standard equating reasonable to good. While prosecutors are given wide latitude during closing argument (*People v. Glasper*, 234 Ill. 2d 173, 204, 917 N.E.2d 401, 419 (2009)), here, we find the prosecutor improperly defined reasonable doubt.

¶ 58 Moreover, defendant failed to object to the prosecutor's definition of reasonable doubt. Rather, defense counsel discussed reasonable doubt using a different analogy. Therefore, because defense counsel failed to object, the trial court lacked an opportunity to provide an immediate curative instruction regarding reasonable doubt. See *People v. Wielgos*, 220 Ill. App. 3d 812, 820-21, 581 N.E.2d 298, 303-04 (1991) (finding that the prosecutor's attempt to analogize unreasonable doubt with the refusal to believe that China exists was improper, but the error was cured through the giving of an appropriate instruction on reasonable doubt). While the court gave instructions on burden shifting and the fact that closing arguments are not evidence, neither instruction prevented the jury from considering and adopting the State's improper definition of reasonable doubt. Thus, we find a clear or obvious error occurred where the prosecutor improperly defined reasonable doubt.

¶ 59 Having determined clear error occurred, we must determine whether defendant can meet either prong of plain-error analysis. Regarding the second prong of plain-error analysis, we ask whether the prosecutor's erroneous reasonable doubt definition constitutes structural error. *People v. Thompson*, 238 Ill. 2d 598, 613-14, 939 N.E.2d 403, 413 (2010). Structural error is a systemic error that erodes the integrity of the judicial process and

undermines the fairness of the defendant's trial. *Id.* Ultimately, we find the error here so serious that it affected the fairness of defendant's trial. *Piatkowski*, 225 Ill. 2d at 565.

¶ 60 "Improper closing remarks require reversal only if they substantially prejudice a defendant, taking into account (1) the content and context of the comment, (2) its relationship to the evidence, and (3) its effect on the defendant's right to a fair and impartial trial." *People v. Walton*, 376 Ill. App. 3d 149, 160, 875 N.E.2d 197, 206 (2007). In addition, our supreme court has stated, "[a] reviewing court will find reversible error only if the defendant demonstrates that the improper remarks were so prejudicial that real justice was denied or that the verdict resulted from the error." *People v. Perry*, 224 Ill. 2d 312, 347, 864 N.E.2d 196, 218 (2007).

¶ 61 In this case, the record shows that during deliberations the jury was confused about what definition to use for reasonable doubt. First, the jury asked the trial court, "What do we do if we're deadlocked?" In turn, the court read to the jury a *Prim* instruction, advising the jury to continue deliberating. Then the jury submitted a question to the court asking, "[W]hat is the definition of reasonable doubt that we should employ in our deliberations?" The court responded stating, "[Y]ou will not get a definition of reasonable doubt. That is for you to determine." Although legally accurate, the court's response simply did not address the improper reasonable doubt definition provided by the State. Ultimately, at no point did the jury receive guidance regarding the State's improper definition of reasonable doubt.

¶ 62 The jury's confusion arose not only from competing discussions of reasonable doubt offered by the State and defense counsel during closing arguments but also because the prosecutor defined reasonable doubt. Specifically, the prosecutor's reasonable doubt definition not only conveyed to the jury that doubt must be reasonable, but also that the jurors must have a good reason to doubt defendant's guilt. The prosecutor's definition is exactly why courts have

long disfavored counsel defining reasonable doubt for a jury because an attempt to do so may distort the standard leading to prejudice, as was the case here. See *Laugharn*, 297 Ill. App. 3d at 811.

¶ 63 When we view the case in its totality, we find where the prosecutor defined reasonable doubt during closing argument, defendant suffered substantial prejudice. Buttressing our conclusion, we have a deadlocked jury requesting direction on "what" definition of reasonable doubt to use. We find substantial prejudice, "taking into account (1) the content and context of the comment, (2) its relationship to the evidence, and (3) its effect on the defendant's right to a fair and impartial trial." *Walton*, 376 Ill. App. 3d at 160. The prosecutor committed prosecutorial misconduct denying defendant a fair trial because the jury received and very likely relied on an improper definition of reasonable doubt during deliberations and in reaching their decision.

¶ 64 Accordingly, we hold that defendant demonstrated the existence of a plain error satisfying the second prong of plain-error analysis. We reverse defendant's conviction. Because we found the evidence sufficient to prove defendant guilty beyond a reasonable doubt, double jeopardy does not bar a retrial. *People v. Wilson*, 392 Ill. App. 3d 189, 202, 911 N.E.2d 413, 424 (2009). As defendant must receive a new trial, we decline to address defendant's other issues.

¶ 65 III. CONCLUSION

¶ 66 For the reasons stated, we reverse defendant's conviction and remand for a new trial.

¶ 67 Reversed; cause remanded.