2012 IL App (1st) 100170-U

No. 1-10-0170

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FIFTH DIVISION
June 29, 2012

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. 07 CR 17597 (01)
	)	
RUBIN BRANDON,	)	Honorable
	)	Marcus R. Salone,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Epstein and McBride concurred in the judgment.

O R D E R

¶ 1 *HELD:* Defendant failed to establish the trial court committed plain error when it allowed the State to present evidence that defendant fled to the State of Iowa following the murder of Marcus Travis.

¶ 2 Following a jury trial, defendant Rubin Brandon was

convicted of first degree murder and attempt first degree murder. He was sentenced to a 55-year prison term for the first degree murder conviction and a consecutive 40-year prison term for the attempt murder conviction. On appeal, defendant contends: (1) the trial court erred by allowing the State to present evidence of flight to show defendant's consciousness of guilt; and (2) the prosecutor's improper remarks during closing arguments denied defendant his right to a fair trial. For the reasons that follow, we affirm defendant's convictions and sentences.

¶ 3 I. BACKGROUND

¶ 4 Marcus Travis was shot to death in an alley near 1620 S. Millard in Chicago, Illinois, at around 2:47 a.m. on April 1, 2007. Terrence Hudson was also shot at the same time and location, but survived his injuries.

¶ 5 At defendant's trial, Hudson, who had a prior conviction for a 1999 armed robbery and was also serving a prison sentence in Wisconsin for aggravated battery, testified he was at a bar with Travis until they decided to leave at around midnight. After leaving the bar, Hudson saw a car pull up with defendant in the back seat. Defendant invited Hudson and Travis to a party at a friend's house. Hudson testified that when he and Travis entered the house party, Hudson saw eight to ten people were already there. Hudson recognized a person he knew as "Big Ride" and was

introduced to a person called "A-Train." Hudson started playing cards while Travis stood by the bar. Hudson said he then saw defendant go into the bathroom with A-Train.

¶ 6 Around 10 minutes later, defendant and A-Train came out of the bathroom and called for Hudson and Travis to come into the other room. When Hudson and Travis walked into the other room, A-Train showed them some guns. Defendant and A-Train then put the guns in Hudson's and Travis's hands. Hudson and Travis gave the guns back and walked into another room. Hudson admitted he had not told the police about holding the guns.

¶ 7 Hudson testified that at one point during the party, Travis walked across the room to talk to a young lady. When Travis walked back to the table he had been sitting at, he walked behind defendant. Defendant then asked, "Why you walking behind me with your hands in your pocket?" According to Hudson, Travis responded "I ain't know nothing, man." Around three minutes later, defendant told A-Train to "do what I told you to do." Hudson said A-Train then pulled out a gun and placed it against Hudson's right temple. A-Train told Hudson to get up and then walked both Hudson and Travis down a hallway towards the back door.

¶ 8 Hudson said both A-Train and defendant walked Hudson and Travis to an alley behind the house while A-Train still had the

gun pressed against Hudson's head. When they reached the middle of the alley, defendant told A-Train they had gone far enough and to "kill him now." Hudson said he grabbed A-Train's gun. While they were wrestling for control of the gun, Hudson heard gunshots being fired. Hudson used A-Train to shield himself from shots defendant was firing at him. Hudson said he eventually gained control of the gun and started to run down the alley, but soon fell to the ground because he had been shot. The gun then fell out of Hudson's hand. Hudson could not find the gun on the ground, so he stood up and started to run again. Hudson ran out of the alley and through a vacant lot. He said he passed out just as the police arrived to the scene of the shooting.

¶ 9 Hudson testified he had gunshot wounds to his upper left thigh and to his right calf. Another bullet grazed his arm. Hudson went to the police station and viewed a photo array on April 3, 2007. He identified A-Train from a photo in the group. Hudson went back to the police station to view a lineup on August 2, 2007. Hudson identified A-Train in the lineup.

¶ 10 Carlos Bradley, who had three prior drug convictions, testified he lived at 1620 S. Millard on March 31, 2007. Bradley dated defendant's cousin. Bradley said he was home that evening watching television when defendant arrived at the house with about 14 to 15 people, including A-Train. Bradley left the house

to get something to eat. When he came home, he heard defendant tell someone "Why you looking at me?" and "Why you looking at me all crazy?" to a man sitting down. Defendant repeated the question several times, but the man did not respond.

¶ 11 Bradley testified he did not remember what happened next. He admitted, however, that he spoke truthfully to an Assistant States's Attorney (ASA) on May 29, 2007, regarding what happened on March 31, 2007. Bradley also admitted that his statement was reduced to writing, and that he signed the statement after reviewing it. Bradley admitted telling the ASA that he saw defendant pull out a gun and place it against a guy's head. Bradley also saw A-Train pull out a gun and place it against another guy's head. Both A-Train and defendant then walked the two men to the back of the house. Although Bradley initially testified he did not see where defendant and the other men went after they walked towards the back of the house, he admitted he told the ASA in his statement that he saw all of them walk to the alley. Bradley testified a garage blocked his view of what was going on in the alley, but he was able to hear about seven gunshots. While looking out a window, he saw a man run through the alley. Bradley then saw defendant and A-Train run to the front of the house and jump into a car. Bradley said he did not see either defendant or A-Train again after that. Later on that

day, however, a man named Tank, who had been at the house during the shooting, came back for a suitcase defendant had left at the house.

¶ 12 Iredis Madison, also known as A-Train, testified he had been charged with home invasion and attempt murder in a case that occurred prior to the murder in this case. Madison pled guilty to home invasion in exchange for a ten-year sentence that he was currently serving in the Illinois Department of Corrections. Madison also had a 2000 juvenile conviction for armed robbery, a 2001 juvenile conviction for aggravated battery and a 2004 conviction for armed robbery. Madison also testified that he had been charged with murder in this case along with defendant. He admitted he was testifying at defendant's trial as part of a plea agreement with the State. In exchange for his testimony, he was to receive a 20-year sentence for conspiracy to commit murder, which was to run concurrent to his 10-year sentence for home invasion. Madison said his understanding was that he would not actually serve all 20 years of the sentence, but instead only 50% of it.

¶ 13 Madison testified that defendant was his cousin's uncle, and that he had known defendant his whole life. Madison said that on March 30, 2007, defendant, Tank, Hudson, Travis, himself, and five women went back to defendant's house after leaving a

nightclub. Madison said that at one point, defendant called him into one of the bedrooms. Defendant then handed Madison a gun and told him "When I up another dude, up another nigger." Madison said he believed defendant was talking about Hudson. When Madison asked defendant what was going on, defendant said "a mother-fucker could roll with it or get rolled over." Madison said he felt this was a threat that he either go along with what defendant was planning to do, or defendant would do to Madison what he was going to do to the other person.

¶ 14 Madison testified that when defendant walked back into the other room, he started talking to Travis. After defendant asked Travis what he was looking at, defendant called out to Madison five or six times. Madison said he guessed that was code for him to pull out his gun. Madison then pulled his gun from his waist and held it at his side. Tank then searched Hudson and Travis and found a gun on Travis. After defendant told Madison to take the men out back, defendant placed his gun against Hudson's neck and started walking him towards the back door. When Madison reached the alley behind the house, he heard two gunshots. Madison tripped in the alley and Hudson tried to grab the gun from his hand. Madison felt himself losing the battle for the gun and fired off one shot before the gun jammed. Hudson was able to take the gun. He stood over Madison trying to fire it.

Defendant then shot Hudson. Hudson began running down the alley while defendant chased after him. After Hudson got away, defendant came back to where Madison was lying on the ground. Madison said Travis was laying there dead beside him in the alley. Madison testified he and defendant then went back inside the house. Tank then took Madison home.

¶ 15 Walter Brandon testified defendant is his uncle. Brandon testified he was at the house party with defendant on March 31, 2007, but only stayed for around 30 minutes and then went to his home three blocks away. Brandon said he was at home in bed when he heard gunshots. Shortly after hearing the shots, defendant called Brandon and asked Brandon to come get him. Brandon said he refused.

¶ 16 Brandon testified that a few days later, he saw defendant, Tank and an individual named Ray outside the house on Millard. Ray was moving gym-like bags from the house's porch to a car. A few days later, defendant called Brandon and said "Some bullshit happened. I need some money." Brandon told defendant he did not have any money. Defendant called Brandon a second time about a week later and again asked for money. Brandon said around five to six weeks after he heard the gunshots, he saw a person named Lukie driving a moving truck. Brandon admitted that on June 4, 2007, he told police about the case and told them he saw Lukie

and defendant moving things from the house on Millard into the truck.

¶ 17 Anthony Ginns testified that he drove defendant to Coralville, Iowa, on April 2, 2007. Ginns said that when he returned to Chicago two days later, defendant did not drive with him.

¶ 18 Stanley Davis, owner of a Budget Truck rental location, testified he rented a truck to James Calhoun on May 10, 2007. Although Calhoun was suppose to return the truck to the Chicago location on May 11, the truck was not returned until May 23 at an out-of-state location. James Calhoun testified that on May 10, 2007, he was asked to rent the truck by Marolyn Bayman and another man who Brandon had identified at trial as Lukie. Calhoun filled out the rental agreement, but the man with Bayman was the person who paid the rental fee and drove away in the truck. Calhoun never saw the truck or the man again.

¶ 19 City of Coralville police detective Jeffery Barkhoff testified that at around 10 a.m. on May 22, 2007, he saw a suspicious vehicle. Detective Barkhoff approached the vehicle. He recognized the driver but did not recognize the passenger, whom Detective Barkhoff identified at trial as defendant. When Detective Barkhoff asked defendant for identification, defendant gave him an Illinois driver's license with the name Carlos

Bradley on it.

¶ 20 The jury found defendant guilty of first degree murder and attempt first degree murder. Following a sentencing hearing, the court sentenced defendant to a 55-year prison term for the first degree murder conviction and a consecutive 40-year prison term for the attempt murder conviction. Defendant appeals.

¶ 21 II. ANALYSIS

¶ 22 Defendant contends the trial court erred by allowing the State to present evidence of flight to show defendant's consciousness of guilt. Specifically, defendant contends the evidence was improperly admitted because nothing in the evidence established defendant had either known about the shooting or knew he was being sought as a suspect before he left Illinois for Iowa. Defendant contends the evidence presented regarding the rental truck and his trip to Iowa prejudiced him by unfairly suggesting to the jury that "he was a bad person with something to hide."

¶ 23 Initially, the State counters defendant forfeited review of the issue by failing to object at trial or raise the issue in his posttrial motion for a new trial. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defendant acknowledges his failure to preserve the issue but suggests that we should review the issue for plain error given the fact that the evidence presented against him was

closely balanced. See *People v. Wilcox*, 407 Ill. App. 3d 151, 170 (2010).

¶ 24 The plain-error doctrine allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurs 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 occurs 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. See *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). In conducting plain-error review, the first step is to determine whether an error occurred at all. *Wilcox*, 407 Ill. App. 3d at 170.

¶ 25 Generally, evidence is considered relevant " 'if it tends to prove a fact in controversy or render a matter in issue more or less probable.' " *Wilcox*, 407 Ill. App. 3d at 170 (quoting *People v. Nelson*, 235 Ill. 2d 386, 432 (2009)). It is within the trial court's discretion to exclude evidence, even when relevant, if its prejudicial effect substantially outweighs its probative value. *Wilcox*, 407 Ill. App. 3d at 170 (citing *People v. Walker*, 211 Ill. 2d 317, 337 (2004)).

¶ 26 Whether an inference of guilt may be properly drawn from

evidence of flight depends upon the evidence showing the defendant knew that the offense has been committed and that he is or may be a suspect. *People v. Lewis*, 165 Ill. 2d 305, 350 (1995). "While evidence that a defendant was aware that he was a suspect is essential to prove flight, actual knowledge of his possible arrest is not necessary to render such evidence admissible where there is evidence from which such fact may be inferred." *Lewis*, 165 Ill. 2d at 350. It is within the trial court's sound discretion to determine whether evidence of a defendant's flight should be allowed, and, accordingly, we will not reverse the court's decision absent an abuse of that discretion. *People v. Hillsman*, 362 Ill. App. 3d 623, 634 (2005).

¶ 27 Defendant relies on *Wilcox* to support his argument that it was plain error for the trial court to allow evidence of flight at his trial. In *Wilcox*, the defendant, Keith Wilcox, was convicted of first degree murder and aggravated unlawful restraint based on incidents that occurred in Harvey, Illinois, on November 23, 1997. Two eyewitnesses, including one of the intended victims who survived the attack, identified defendant as the shooter at his trial. One witness testified he had been good friends with defendant prior to the murder.

¶ 28 An FBI agent testified at the defendant's trial regarding

evidence of the defendant's flight from Illinois. The agent testified the defendant was arrested on March 11, 2004, more than six years after the offense, following a raid conducted on a house in Las Vegas, Nevada. When the agent took defendant into custody and asked if his name was Keith Wilcox, the defendant told the agent his name was "Dajuan Walker" and showed the agent an Ohio identification card and Cook County Hospital birth certificate to that effect. The agent testified the defendant finally identified himself as Keith Wilcox at the FBI office just before the agent fingerprinted him. *Wilcox*, 407 Ill. App. 3d at 156-57.

¶ 29 At trial, Defendant testified he moved from Robbins, Illinois, to Columbus, Ohio, on November 15, 1997, eight days before the shooting occurred. The defendant said he then moved to Las Vegas around May 2000. He testified he obtained the Ohio identification card under the name Dajuan Howard because he heard a rumor that the police wanted him for questioning. He believed the police sought to question him regarding a violation of his "I-Bond" in connection with his prior arrest for criminal trespass in Robbins, Illinois. *Id.* at 157.

¶ 30 On appeal, this court reversed defendant's conviction and remanded the case for a new trial after finding the trial judge coerced the verdict. We provided guidance to the trial court by

considering whether the evidence of defendant's flight should be admitted upon retrial of the case.

¶ 31 The defendant contended the admission of evidence of his flight was plain error because it was more prejudicial than probative. This court agreed, holding the evidence of the defendant's alleged flight had little to no probative value because the evidence did not show he was ever aware he was a suspect. *Id.* at 170. The court noted there was no evidence presented indicating anyone ever told defendant that the police were looking for him in connection with a murder. *Id.* While the court recognized the defendant testified Dajuan Walker, his girlfriend's brother, had informed him the police wanted to question him, the court noted he also testified that Walker did not know what the police wanted to question him about and that the defendant himself believed the police wanted to question him regarding his prior arrest for criminal trespass. *Id.*

¶ 32 We note in *Wilcox*, the State did not present any evidence regarding the date the defendant departed the State of Illinois. The evidence showed the fake identification card was issued in Ohio on June 18, 2002, about 4½ years after the shooting had occurred and defendant was arrested in Las Vegas nearly more than six years after the murder. *Id.* The defendant testified he moved to Ohio eight days before the murder. The court found that

if defendant had been fleeing from the murder, he most likely would not have waited so long to obtain fake identification. *Id.* The court also noted the record showed defendant had been arrested two weeks prior to the shooting for criminal trespass, supporting his testimony that he believed the police were seeking to question him in relation to that incident. *Id.* Because the evidence presented did not support an inference that the defendant had fled Illinois and used an alias to avoid arrest for the murder, the court determined the evidence had little to no probative value. *Id.* Accordingly, the court concluded the trial court abused its discretion by admitting the evidence. *Id.*

¶ 33 Although we recognize no direct evidence was presented here to suggest Brandon knew he was a suspect in the murder when he gave a fake Illinois driver's license to Detective Barkhoff, other evidence presented at trial provided a sufficient basis to support an inference that defendant fled to Iowa and used an alias in order to avoid arrest.

¶ 34 In contrast to *Wilcox*, the evidence here showed defendant left Illinois one day after the murder. The evidence established that on the day after the shooting, defendant actively pursued and secured a ride to Iowa with Anthony Ginns, a man he did not know. One of the eyewitnesses who testified to the shooting had known defendant for years and could identify him by name. One of

the witnesses was a victim who was shot by the defendant and survived by fleeing the scene on foot. Moreover, the evidence established that defendant repeatedly called his nephew and asked for money because "some bullshit happened," and that defendant's belongings were moved out-of-state in a rented truck a little over one month after the shooting. "While evidence that a defendant was aware that he was a suspect is essential to prove flight, actual knowledge of his possible arrest is not necessary to render such evidence admissible where there is evidence from which such fact may be inferred." *Lewis*, 165 Ill. 2d at 350. Evidence of defendant's flight was properly admitted where defendant left home the day after a murder carrying a duffel bag. *Id.*

¶ 35 We believe the evidence presented here could validly support the inference that defendant knew he was a suspect and that he left the State to avoid the police. Accordingly, we cannot say the trial court committed a clear or obvious error when it admitted evidence of defendant's alleged flight.

¶ 36 Assuming *arguendo*, that the admission of the flight evidence was error, the defendant still fails to satisfy the first prong of the plain error analysis because we cannot say the evidence in this case was closely balanced. In *Wilcox,* the court agreed with the defendant that the failure of the two

eyewitnesses to identify the defendant immediately after the shooting, the arguable conflicts in their testimony, the autopsy evidence and the inconsistencies between their own testimony clearly impacted credibility and the weight to be given their testimony. *Wilcox*, 407 Ill. App. 3d at 162. Moreover, the court also determined that a note the trial court sent to the jury interfered with the jury's deliberation and coerced a guilty verdict, and that the trial court erred in barring testimony regarding an out-of-court statement in which one of the eyewitnesses allegedly admitted to shooting the victim. *Id.* at 165-69. Accordingly, the court found the evidence presented against the defendant was closely balanced. As such, the court found the issue was reviewable under the first prong of the plain-error doctrine. *Id.* at 170.

¶ 37 In this case, by contrast, defendant cannot establish that the evidence presented against him was closely balanced. Although we recognize defendant attacks the witnesses' credibility because Hudson had an extensive prior felony criminal record and Madison was testifying against defendant as part of a plea deal regarding his own involvement in the case, we note the jury was made well aware of those credibility issues during defendant's trial. Both Hudson and Madison clearly identified defendant as the shooter. Unlike *Wilcox*, their testimony did not

conflict with the autopsy evidence regarding the shooting. Nor were there any major inconsistencies or contradictions between Hudson's and Madison's accounts of the April 2007 shooting. Hudson's and Madison's accounts of the shooting were also corroborated by Bradley, who admitted at defendant's trial that he told an ASA that he saw defendant pull out a gun and place it against a guy's head. Bradley admitted he told the ASA that he also saw A-Train pull out a gun and place it against the other guy's head. Bradley testified that both A-Train and defendant then walked the two men to the back of the house. Although Bradley initially testified he did not see where defendant and the other men went after they walked towards the back of the house, he admitted he told the ASA in his statement that he saw all of them walk to the alley.

¶ 38 Because we find the eyewitness testimony presented against defendant overwhelmingly established his guilt regardless of any evidence presented regarding defendant's alleged flight, we cannot say defendant has established the evidence presented against him was so closely balanced that the admission of flight evidence alone threatened to tip the scales against him. See *People v. Piatowski*, 225 Ill. 2d 551, 565 (2007). Accordingly, we find the issue is not reviewable under the first prong of the plain-error doctrine. Moreover, since this is not the type of

structural error that renders a criminal trial fundamentally unfair or unreliable, we find the issue is not reviewable under the second prong of the plain-error doctrine. See *People v. Averett*, 237 Ill. 2d 1, 12-13 (2010). Therefore, we find defendant forfeited the issue by not properly raising it below.

¶ 39 III. Prosecutorial Misconduct

¶ 40 Defendant contends he was denied a fair and impartial trial by the prosecutor's numerous improper remarks during closing arguments. Specifically, defendant contends the prosecutor misstated the law to the jury regarding a key eyewitness' plea agreement, indirectly commented on defendant's right not to testify and made "blatant ploys for the jury's sympathy."

¶ 41 Generally, a prosecutor is permitted wide latitude during closing argument. *People v. Burns*, 171 Ill. App. 3d 178, 187 (1988). Moreover, improper prosecutorial remarks during closing argument do not warrant reversal unless the complained-of remarks resulted in substantial prejudice to the defendant, meaning absent those remarks the verdict would have been different. *People v. Cisewski*, 118 Ill. 2d 163, 175 (1987).

¶ 42 A. Misstatement of the Law

¶ 43 At defendant's trial, Madison admitted he had agreed to testify against defendant in exchange for a negotiated plea agreement. Madison explained that under the terms of the

agreement, he would plead guilty to the lesser offense of conspiracy to commit murder and be sentenced to a 20-year prison term in exchange for his testimony at defendant's trial. Madison testified he would only serve 50% of the sentence, in other words slightly less than 10 years.

¶ 44 During closing argument, defense counsel highlighted the fact that Madison got an "unbelievably amazing deal" in exchange for his testimony against defendant. Defense counsel noted that in exchange for Madison's testimony, Madison got to plea to a lesser charge of conspiracy to commit murder and received a 20-year sentence, of which he only has to serve 10.

¶ 45 During rebuttal argument, the prosecutor argued: "Courts don't turn 20 year sentences into 10 years either. He is pleading and taking 20 years in prison. What they do in prison to give them good time is up to them." When defense counsel objected, the trial court responded, "noted."

¶ 46 The prosecutor again noted the sentence Madison received and did not say Madison would only serve 10 years of a 20-year sentence. Defense counsel objected for a second time on the basis that the prosecutor's argument misstated the law. The court responded, "noted," but then instructed the jury: "Ladies and gentlemen, I will provide you with the law that you will apply at arriving at your verdicts in this case." The record

indicates the trial court never instructed the jury with regard to how many years Madison would serve.

¶ 47 Defense counsel's argument suggested Madison had strong motivation to fabricate his testimony as a result of his expectation that he would only serve 10 years for his part in the murder and raised the issue of Madison's motive and bias. Madison's testimony clearly established he had a subjective belief that he would only serve 10 years of his 20-year sentence as a result of his agreement with prosecutors.

¶ 48 On appeal the State argues the prosecutor gave an accurate statement of the law. However that argument misses the point. Prosecutors failed to establish Madison's awareness of the possibility of his actually serving 20 years during their examination of Madison at trial and there is nothing in the record to suggest Madison believed there was a possibility he could be required to serve 20 years.

¶ 49 As a result of the prosecutor's argument, jurors evaluated the credibility of Madison's testimony believing Madison was aware he could serve a 20-year sentence. However, the evidence showed Madison was convinced he would only serve 10 years in exchange for his testimony. The jury's evaluation of Madison's testimony may well have been affected by the argument because jurors could reasonably conclude Madison's motive to fabricate

his testimony would be greater if Madison thought he had an agreement to serve only 10 years as opposed to 20 years as suggested by the prosecutor in his argument. Because of the misleading nature of the argument, we find it was improper.

¶ 50 However as we stated earlier, the evidence presented against the defendant overwhelmingly established his guilt. There were other eyewitnesses in addition to Madison. We cannot say defendant has established the evidence presented against him was so closely balanced that the improper argument threatened to tip the scales against him. See *People v. Piatowski*, 225 Ill. 2d 551, 565 (2007). Accordingly, we find the issue is not reviewable under the first prong of the plain-error doctrine.

¶ 51 B. Right not to Testify

¶ 52 During closing argument, defense counsel argued: "There is an old Italian proverb that says a liar is always ready to take an oath. I think that's pretty obvious in this case."

¶ 53 When the prosecutor began his rebuttal argument, he said:

> "At least when you tell an oath, you get up on the stand. You are subject to questions -- direct examination, cross examination. Maybe you hate the defendant. Maybe there was a vendetta. Maybe this. Maybe somebody told him what to say. Maybe he moved there.

> Maybe he went on a visit. Maybe he knew people. Folks this isn't about maybes. This is about evidence when witnesses come into court and testify. Not innuendo, not what attorneys wish the evidence was, but on evidence, on testimony, on direct examination, cross examination. Not on maybes. And that's a nice Italian proverb: A liar is always ready to take an oath. Every single witness in this case took an oath. *** Guess what, folks, you took an oath before you sat down and listened to my opening statement Tuesday. Because you took an oath, you're a liar? It is offensive."

¶ 54 Defendant contends the prosecutor's comment that "[a]t least when you tell an oath, you get up on the stand," was meant to improperly highlight defendant's decision not to testify. It is arguable this argument was intended to highlight defendant's decision not to testify, but we find the totality of the prosecutor's comments indicate he was simply responding to defense counsel's prior comment that liars are always willing to take an oath. However, we would caution prosecutors that this argument is perilously close to the line of comment about the

defendant's decision not to testify. Therefore, we hope not to see such arguments repeated. Accordingly, we see no reason to address defendant's contention in detail.

¶ 55 C. Evoking Blatant Sympathy

¶ 56 During rebuttal argument, the prosecutor argued:

> "Now, Marcus Travis can't be here to tell you what happened to him. The evidence speaks for him today. Follow the evidence because it directs these bullets right back to the killer. The evidence will tell you what Marcus Travis can't. Hear his voice now, loud, clear. The evidence will tell you what Marcus Travis can't, I was just murdered by [defendant]."

¶ 57 Defendant contends the prosecutors comments served no other purpose than to improperly inflame the passion of the jurors. See *People v. Harris*, 228 Ill. App. 3d 204, 209 (1992). "It is error for the State to say anything the only effect of which is to arouse the prejudice and passion of the jury without shedding any light on the paramount question presented to the jury." *Id.*

¶ 58 Even assuming the prosecutor's comments are improper, we cannot say the comments either substantially prejudiced defendant or constituted a material factor in his conviction. The

eyewitness testimony presented against defendant was overwhelming in this case. Accordingly, we cannot say the contested prosecutorial remarks during the State’s rebuttal argument constituted reversible error.

¶ 59 CONCLUSION

¶ 60 We affirm defendant's convictions and sentences.

¶ 61 Affirmed.