2014 IL App (1st) 112811-U

SIXTH DIVISION
December 5, 2014

No. 1-11-2811

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. 04 CR 13375
	)	
JUAN ORTIZ,	)	Honorable
	)	Clayton J. Crane,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Rochford concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant is not entitled to a new trial where the State's rebuttal closing arguments were not improper and the evidence presented at trial was overwhelming.

¶ 2 Following a jury trial, defendant Juan Ortiz was convicted of first degree murder and sentenced to natural life in prison. On appeal, defendant contends that he is entitled to a new trial where the State in rebuttal closing arguments improperly disparaged defense counsel, compared the defense to a nonsensical conspiracy on the level of the JFK assassination theories, leveled

sarcastic implications that for defendant to be acquitted the jury must believe that a dog killed the victim, and was allowed to engage in disrespectful argument despite counsel's objections. For the reasons that follow, we affirm.

¶ 3 Defendant's conviction arose from the May 8, 2004, murder of his downstairs neighbor, Sylvia Otero. Defendant's first trial resulted in a deadlocked jury and a mistrial.

¶ 4 At defendant's second trial, Otero's boyfriend, Alex Martinez, testified that on the day in question, he left their apartment for his construction job around 6:30 a.m. He did not hear from Otero that day, which was unusual. When Martinez returned home around 6 p.m., he noticed that the furniture had been moved around. He went into the bedroom and found Otero lying face-down on the floor in a pool of blood. Otero's hands were tied behind her back and her throat had been slashed from ear to ear. The couple's Chihuahua was also in the bedroom. Martinez testified that he got some blood on his hand when he tried to move Otero a little bit. Martinez went upstairs to defendant's apartment for help. After knocking on the door and trying to open it, he noticed some blood on defendant's door. When no one answered the door at defendant's, Martinez went outside, where he ran into two of Otero's friends, Blanca Torres and Maria Sanchez. Sanchez called the police.

¶ 5 Martinez testified that Otero sold marijuana and cocaine out of their home, said he had tried to get her to stop selling, and admitted that he did not initially tell the police about her business. Otero's supplier was a man known as "Smurf." Defendant was a repeat customer. According to Martinez, defendant began purchasing drugs after his girlfriend started cheating on him. On cross-examination, Martinez testified that the Chihuahua would bark if someone it did

not know would knock on the door, that the dog followed him outside, and that he took the dog to a neighbor's after the ambulance arrived.

¶ 6 Blanca Torres testified that on the day in question, she had tried to call Otero and had stopped by her apartment, but was unable to contact her. Around 6 p.m., she and Maria Sanchez returned to Otero's building and encountered Martinez outside. Martinez said that he thought Otero was dead. Torres ran into the apartment and found Otero lying face down, with her hands tied behind her back and blood coming from her neck and stomach. Martinez's home telephone was missing, so Sanchez called 911 from her cell phone.

¶ 7 Torres admitted that she had purchased drugs from Otero in the past. She stated that Otero's supplier was a man named Smurf, that she had seen defendant and Otero using drugs together, and she had seen defendant's girlfriend buy drugs from Otero. Torres further testified that she told the police defendant owed Otero over $1,000 for drugs.

¶ 8 Maria Sanchez testified that when she and Torres arrived at Otero's building on the day in question, Martinez looked distraught and upset. In Spanish, he said, "[T]hey killed her." Torres got out of the car, and after Sanchez parked, she went inside. There, she saw Otero lying face down in a pool of blood with her hands tied behind her. Sanchez called 911.

¶ 9 Sujeidy Montanez testified that she, defendant, and their children lived upstairs from Otero and Martinez. Montanez and defendant would buy drugs from Otero and use them with her. Defendant owed Otero money. He began using drugs when Montanez started cheating on him. Sometimes, Montanez would buy drugs directly from Otero's supplier, "Smurf."

¶ 10 Montanez testified that in the morning of the day in question, her mother came over. Montanez and her mother stopped by Otero's apartment to invite her to go with them to get

moving boxes. Otero declined, so Montanez and her mother left the children with defendant and went on their own. When Montanez returned from the errand, the children were home by themselves.

¶ 11 Montanez testified that after a while, defendant entered the apartment. He was carrying a newspaper and had a torn lip. Defendant told Montanez to take the children and go to the van. He joined them about 20 minutes later, wearing different clothing and carrying a black trash bag, and drove them to Montanez's mother's house. Montanez and the children went inside the house, but defendant stayed outside. When Montanez went outside to smoke a cigarette, she saw defendant walking out of the alley. Montanez and defendant then entered the house together. They stayed at Montanez's mother's house overnight. At some point, defendant told Montanez "not to say anything" and that if anyone asked where he was when she was out getting moving boxes, she should say he was with her or that he went to look for a newspaper and some gang-bangers hit him.

¶ 12 When Montanez, defendant, and the children went home the next day, there were police in front of their apartment building. Montanez went to the police station and talked with officers there. At first she told them that defendant went with her to get moving boxes, but eventually told them the truth. She also gave the police consent to search the apartment and accompanied them to the alley behind her mother's house. Montanez stated that in the alley, the police recovered a pair of shoes that she identified as belonging to defendant and that she had last seen him wearing on the day in question.

¶ 13 Chicago police sergeant Joseph Giambrone testified that he reported to the scene of the murder and found Martinez, Torres, and Sanchez distraught. Inside the apartment, he found

Otero lying face-down in a pool of blood with her hands bound behind her back. Sergeant Giambrone secured the scene and contacted his supervisor. On cross-examination, he stated that there was no dog inside the apartment, but recalled that a dog was yapping in a neighbor's yard. Upon further questioning as to the dog's location, he stated that he was not paying attention to the dog.

¶ 14 Chicago police sergeant David Deja testified that he and other detectives arrived at the scene after it had been secured. He spoke with Martinez while other officers interviewed Torres and Sanchez. Inside the building, he found a smear of blood across the door of a second-floor apartment, as well as a clump of hair on the carpet on the second-floor landing. After the evidence team arrived, Sergeant Deja and another detective entered Otero's apartment. They noted red stains on the inside and outside of the kitchen doorknob. On the kitchen floor, they found a tied up piece of rope with red stains on it. Otero was in the bedroom, lying face-down on the floor in a pool of blood. Her hands were bound behind her back with clothesline-type rope.

¶ 15 The next day, Sergeant Deja interviewed Sujeidy Montanez and obtained from her consent to search the apartment she shared with defendant. After Montanez supplied information about possible new evidence, she, Sergeant Deja, and several other officers went to an alley where the officers recovered a plastic bag from a garbage can.

¶ 16 Back at the station, Sergeant Deja *Mirandized* and interviewed defendant. At first, defendant denied having anything to do with Otero's murder. However, after being informed that Montanez had provided a statement, that hair samples had been collected from Otero's hands, and that the police had recovered the plastic bag from the garbage, defendant indicated that he wanted to tell the police what happened. Defendant related to Sergeant Deja that after Montanez

and her mother had left to get moving boxes, he went downstairs to Otero's apartment to talk to her about $450 that she owed him. Their conversation turned into a physical fight. Eventually, defendant picked up a knife from the floor, cut Otero's throat, and stabbed her. He then found some rope and tied her hands behind her back. Defendant told the police that when he went back upstairs, he found that Montanez and her mother had returned. He told them to collect the children and go outside to the van. He got a plastic bag from the kitchen and then joined the group in the van. They drove to Montanez's mother's house. After everyone else had gone inside, he discarded the bag in a garbage can in the alley. Defendant told the police that he could not remember what he did with the knife. On cross-examination, Sergeant Deja acknowledged that defendant's confession was not recorded and defendant was not asked to sign it.

¶ 17 Chicago police detective Gregory Jones testified that he was part of the investigative team that processed the crime scene. He was unable to obtain fingerprints in Otero's apartment. On cross-examination, Detective Jones testified that he did not see any evidence of a dog in the apartment. Specifically, he did not see a dog, find bloody paw prints, or hear a dog barking.

¶ 18 The parties stipulated that if called, Chicago police lieutenant Anthony Wojcik would have testified that after Montanez gave the police consent, he and other officers searched defendant's apartment. Among other things, they recovered a length of rope from the kitchen table, a bundle of rope and a folding knife from a kitchen cabinet, a bundle of brown plastic garbage bags from the cabinet under the kitchen sink, and several white gloves with black rubber grip dots in the freezer, on top of the toaster, on the China cabinet, and in the microwave oven.

¶ 19 The parties stipulated as to the results of the postmortem examination by the medical examiner. Otero's body was received at the morgue with a white woven cord wrapped twice and

tied tightly around her wrists, behind her back. Otero had ligature-related injuries to her hands, wrists, and forearms; multiple sharp force injuries to her neck; blunt force injuries to her head and neck; several sharp force injuries to her torso; and contusions and sharp force injuries on her left forearm, thumbs, and left ring finger. The sharp force injuries included both stab and incision wounds. The medical examiner determined that the cause of death was multiple stab and incision wounds and the manner of death was homicide.

¶ 20 The parties stipulated that numerous swabs were taken from the interior of Otero's apartment, including from the floors, walls, doorknobs, door hardware, furniture, and draperies, as well as from the red stains on the inside and outside of various doors in the building. Fibers and hairs were recovered from Otero's hands, numerous items were recovered from her bedroom, and a knotted rope was recovered from her kitchen floor. A cluster of hair and fibers was recovered from the landing outside defendant's apartment, and a sweatshirt was recovered from defendant's kitchen. Also submitted for forensic testing were the plastic garbage bag and the items in it, including pieces of a telephone, a jacket, a hat, two pieces of rope, a pair of white gloves with black dots, and a pair of shoes with a piece of rope and a hair on one sole. Forensic investigators also obtained DNA and hair samples from defendant and Montanez.

¶ 21 The State presented several witnesses who testified regarding the forensic evidence. As relevant here, forensic testing on the contents of the plastic garbage bag recovered from the alley revealed the following: the jacket contained defendant's DNA as well as a hair similar to Otero's, and fibers from the jacket were discovered on Otero's clothing and a piece of rope recovered from her kitchen; the hat contained defendant's DNA, and a fiber from the hat was found on Otero's clothing; the white gloves had red stains that contained DNA that matched Otero's; the

rope on the sole of the shoe had a similar construction to the other rope found in the bag and the rope found in Otero's kitchen; a hair similar to Otero's was found on another piece of rope in the bag; and the pieces of the cordless telephone had the same serial number as the base found in Otero's apartment. A fingerprint from the little finger of defendant's right hand was found on the garbage bag, which matched the dye striations of the plastic bags recovered from defendant's kitchen. The clump of hair recovered from the landing outside defendant's apartment contained hair similar to Otero's, and the rope around Otero's wrists was of similar construction as the rope found in her kitchen and in the garbage bag.

¶ 22 The defense called Miguel Madrigal and his step-son, Jorge Aguirre, who lived in another first-floor apartment in defendant's and Otero's building. Both men testified that Otero had visitors at all hours and that the rear door to the building was never locked. In response to questions from defense counsel, both men testified that Otero had a dog and that they would sometimes hear it barking. Defendant also presented the stipulated testimony of Montanez's mother, Daisy Ortiz. According to her testimony, when she and Montanez returned to the apartment with moving boxes, she did not see defendant right away. He came out to the van "a while later" with a cut by his lip. The group drove to Ortiz's house, but defendant did not come inside immediately.

¶ 23 Defendant did not testify.

¶ 24 In closing argument, the prosecutor reviewed the evidence presented at trial. In the course of doing so, the prosecutor noted Martinez's testimony that the Chihuahua he and Otero owned would bark if someone it did not know would knock on the door. The prosecutor stated, "So that means the dog didn't bark when he knew the person, which would explain why the dog wasn't

barking that day when the defendant went down there because *** he was around there all the time."

¶ 25 Defense counsel began his closing argument by asserting that defendant would not have had time to argue with, kill, and tie up Otero while Montanez was out getting moving boxes, and then reappear with nothing more than a cut on his lip. Counsel emphasized that defendant's "so-called statement" to the police was not recorded. Counsel also pointed out that no one heard the dog barking and discussed the dog as follows:

> "You know, the reason we asked those questions about the dog is because it makes no sense that no one would have heard it. Or it certainly doesn't make any more sense, if you want to believe [Martinez's] testimony. That the dog was actually there.
>
> [The prosecutor] pointed out, yeah, the dog wasn't barking, suddenly that the dog knows comes in [*sic*]. But certainly don't you think a dog would start barking if the master, their master had started -- is attacked? And also don't you think that there would be some evidence?
>
> This dog had been left in the apartment with this blood all over the place, you would have seen some evidence of bloody paw prints. I mean, certainly the dog is not going to attempt to not contaminate the scene.
>
> I asked the detective, the evidence technician who presented the video of the scene, and you saw the video of the

> scene, there is no evidence, well, did you see any evidence, bloody paw prints, anything like that there? No.
>
> Wouldn't someone have heard the dog barking about this? I mean, wouldn't we have seen some of the paw prints?"

Defense counsel continued his argument by asserting that various parts of the State's theory of the case did not make sense and suggesting that Montanez, "Smurf," one of his cohorts, or a combination of those people killed Otero and set defendant up by collecting physical evidence and placing it "so conveniently right on top in that Dumpster." Counsel suggested that it looked "staged" and like a set-up to have a piece of rope wedged in the sole of one of the shoes in the garbage bag. Counsel also suggested that the blood found on defendant's door could have been Montanez's, as it was only identified as having contained female DNA.

¶ 26 The prosecutor began his rebuttal closing argument by addressing the issue of the Chihuahua:

> "Well, I don't know about the rest of you, but I am very relieved that the dog escaped the false accusation.
>
> Throughout the entire trial I was waiting, waiting with bated breath for when Tippy was going to be accused of slitting [Otero's] throat. All the questions about the dog, 60, 70, 80 questions. Was the dog there, did the dog bark, did Tippy fall down a well? No. All the questions about the dog. You know what they are designed to do? They are to keep you away from things like this (indicating).

> If you're thinking about the dog, you're not thinking about how she was butchered and murdered on her own bedroom floor. If you're thinking about the dog, you're not wondering what makes a person do this.
>
> If you're thinking about the dog, then all the other irrelevant, unsubstantiated, unsupported wild theories that you have just been bombarded with for the past 40 minutes, you're not thinking about things like forty billion to one. [Otero's] profile, forty billion to one. And he gets up here and he says, oh, could have been [Montanez's]. No evidence of that. No evidence of that whatsoever that ever came in that [Montanez] had even a single allele that was the same as [Otero's]. But they come up and they say, oh, could have been [Montanez's], it was a female. It could have been the Queen of England's too. Just as much evidence of that. But there's not any evidence of that, that it was [Otero's]. But then it's that it was [Otero's]. That it matched her profile forty billion to one. And there is a reason why that --."

¶ 27 At this point, defense counsel made an objection "to the characterization," but the objection was overruled. The prosecutor continued:

> "You got to see some great litigating here. I will not deprecate that or say anything negative about [defense counsel], he

> is an outstanding attorney, and you got to see that. Okay. That's his job. It's not his first day at the rodeo."

Defense counsel's objection at this point was sustained, and the prosecutor continued:

> "It is for the most part yours. So when people say things like, well, did anyone test the dog, did you not test this shirt? And you say it in that sway [*sic*] and that tone, you might be led to believe that it actually means something. It doesn't. It doesn't. When lawyers get up and say things that's not substantiated by the evidence, it doesn't mean anything."

¶ 28 Shortly thereafter, the prosecutor made the following statements:

> "One of the opening theories the defendant had was that the police conspired against him. Okay. For several reasons I love a conspiracy theory. 1. I'm kind of a dork. 2. When you say that you have a conspiracy theory defense, what you are saying is the case is so strong against the person that you cannot rely on what the reasonable inferences are. You have to go beyond there. You have to go to X files. You need the cigarette smoking men, you need the lone gunman and things like that. You need to believe that there was a conspiracy against him (indicating).
>
> And every conspiracy, it needs a reason why. Like I said, [I'm] a little nerdy when it comes to that kind of stuff. I watch all

> those history channel things, the RFK conspiracies, JFK conspiracies, Martin Luther King conspiracies --."

Defense counsel objected, but the objection was overruled. The prosecutor talked briefly about these conspiracies and then made the following statements:

> "He wants us to believe that Sujeidy Montanez, criminal mastermind, did all this stuff. Sujeidy Montanez planted all the evidence, all the rope, all the DNA, the gloves, and did it so well that there's so much evidence against him that they have to do a conspiracy defense. And, and, and this is the important part, she inveigled the police.
>
> Over 120 years of police experience hit the stand in this courtroom on this case and Sujeidy Montanez got them all to put everything on the line so they could conspire against this guy (indicating). Does that make sense? Is that reasonable or is that beyond far-fetched, is that beyond overreaching? Is that just the desperate defense of a desperate defendant?"

¶ 29 Again, defendant objected, and again, the objection was overruled. The prosecutor continued his thought, concluding, "[T]hey want you to believe that these officers went in there and they conspired to put a case on [defendant], the unluckiest man in the world. That's not reasonable. That doesn't create a reasonable doubt. That is a desperate defense."

¶ 30 Later in the prosecutor's argument, he made the following comments about defendant's theory of defense:

> "[Montanez] framed [defendant] or the mysterious attackers came in and did it and the police all got together and conspired against him. We've already went over that, folks. I think that you understand what your common sense that the level of evidence here, we brought in expert witnesses to talk to you about DNA, to talk to you about fiber analysis, to talk to you about hair analysis, to talk to you about fingerprints. Criminal mastermind, Sujeidy Montanez, is going to know all that stuff and know to plant all that stuff there?"

¶ 31 The prosecutor then commented on defense counsel's argument:

> "Counsel says, well, fingerprints from the gloves. What difference -- the fingerprints from the gloves would show who was wearing the gloves. Okay. Actually, no. And you know how I know this is not true? Because you've already heard the convoluted story of where [defense counsel] buys his garbage bags and how important that is for the innocence of [defendant]. Because, folks, if I brought you a bloody glove with the victim's DNA and the defendant's DNA and his fingerprint in that glove, you know what he would say."

Defense counsel objected, and the trial court sustained the objection.

¶ 32 The prosecutor also made the following three statements, none of which were objected to by defense counsel:

"But it's not saying that some mysterious party, one of the Smurfettes who came in to go kill this lady. This could have been [Otero's] or [Martinez's] fingerprint on that phone because they cannot be excluded. The shoe looks like a set-up. The shoe is staged. Okay. All right. Again, by whom? Which one of the criminal masterminds in Smurf's crew knew enough about rope and fibers to stage that shoe there? And if [he] did, why is it in the garbage can behind [Montanez's] mother's house?"

"But when did [Montanez], the criminal mastermind and real killer, actually have the opportunity to commit the murder? Well, she didn't, which kind of pulls the rug out from under that whole conspirator theory, and it also means that the bag was actually carried by the real killer, who is the defendant. That's one of those devil [in] the details things that the defense talked about earlier. The devil is into details. And it's kind of an important detail when the person who you're trying to accuse of being the real murderer didn't have an opportunity to be the real murderer. But he (indicating) did, he had the opportunity and he took that opportunity."

"I don't know if any of you noticed this when you came in, but there's statutes up on front of this building, on top of this building above the seventh floor, and one of them is Lady Justice,

> and you've seen her a bunch of times in your life. You know what she looks like. She's got a scale in one hand, she's got a sword in the other hand, and she's got a blindfold across her eyes. And there is a reason why she wears a blindfold, because Lady Justice knows that even drug dealers don't deserve this, that when this does happen to them, they deserve justice. And I'm asking you to give justice in this case.
>
> And there's something else that's important about Lady Justice and what she wears and what she doesn't wear. She wears a blindfold, not a dunce cap, and the reason why is because like all of you, she's got common sense. And I am asking all of you to use that common sense and see through the nonsensical conspiracy theories, the fixation on dogs, the questions of why [Martinez] didn't call 911, and look at this case through the lenses of your common sense."

¶ 33 Following instruction and deliberations, the jury found defendant guilty of first degree murder and home invasion. The trial court entered judgment on the verdict. Defendant filed a motion for a new trial, arguing, among other things, that the prosecutor made prejudicial, inflammatory, and erroneous statements in rebuttal closing argument designed to arouse the prejudices and passions of the jury, thereby prejudicing defendant's right to a fair trial. Defendant asserted that these statements "include, but are not limited to" four remarks: (1) characterizing a DNA profile as a "match"; (2) commenting on defense attorney skills; (3) interjecting personal

opinion as to the defense theory of the case; and (4) characterizing the defense theory of the case as a "desperate" defense. Following argument, the trial court denied the motion. The court subsequently sentenced defendant to natural life in prison, based on evidence that defendant had been convicted of an earlier murder in 1988.

¶ 34 On appeal, defendant contends that he is entitled to a new trial where, in rebuttal closing arguments, the State improperly disparaged defense counsel, compared the defense to a nonsensical conspiracy on the level of the JFK assassination theories, leveled sarcastic implications that for defendant to be acquitted the jury must believe that a dog killed the victim, and was allowed to engage in disrespectful argument despite counsel's objections. The particular statements to which defendant now objects are detailed above. Defendant argues that the prosecutor's remarks contained a "substantial amount of misconduct" that conveyed to the jury that defendant carried the burden of proving the existence of a frame-up and proving that the State's witnesses lied. He asserts that the prosecutor's statements invited the jury to weigh the prosecution theory against the defense theory and base its verdict on which side was more persuasive, rather than determine whether the State has proved every essential element of the charge beyond a reasonable doubt. Defendant further argues that the State's characterization of the defense theory as "desperate" and "convoluted" improperly disparaged the defense and encouraged the jury to believe that counsel was involved in deception. Finally, defendant maintains that the prosecutor's use of sarcasm served no purpose other than to prejudice the jury, and parting comments about "justice" and putting on a "dunce cap" were improperly designed to arouse the jury's desire to protect society and vulnerable people.

¶ 35 Before reaching the substantive merits of defendant's appeal, we must address whether the alleged errors have been preserved. See *People v. Donahue*, 2014 IL App (1st) 120163, ¶ 111 (noting that because different burdens apply, preserved and unpreserved errors must be considered separately). In order to preserve an alleged error for review, a defendant must both specifically object at trial and raise the issue again in a posttrial motion. *Id*. ¶ 109; see also *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Forfeited claims may still be considered on appeal if they meet the standards of the plain error doctrine. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007), citing *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). However, before applying the plain error rule, it must be determined that error occurred. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 36 In the instant case, the State argues that defendant has forfeited the majority of his claims by failing to raise them in the trial court. As noted by the State, although defense counsel made a number of objections during the State's rebuttal closing argument, he failed to object to most of the remarks about which he now complains on appeal and, in addition, although the posttrial motion identified four remarks, only two of those were properly objected to at trial. Defendant counters in his reply brief that where some of the prosecutor's improper comments were properly preserved, the failure to preserve error for additional comments "is of little consequence" and, even if the issue is forfeited, plain error review is warranted.

¶ 37 Here, it is not necessary to determine which, if any, of defendant's claims of error have been preserved for appeal. This is because, as explained below, we cannot find that error occurred. Absent error, the plain error doctrine does not apply. See *Thompson*, 238 Ill. 2d at 613. In this case, any preserved claims fail, and the unpreserved claims do not constitute plain error.

¶ 38 Prosecutors are given wide latitude when making closing arguments. *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007). Reversal based on closing argument is warranted only if a prosecutor made improper remarks that engendered "substantial prejudice," that is, if the remarks constituted a material factor in the defendant's conviction. *Wheeler*, 226 Ill. 2d at 123. In closing, the State may comment on the evidence presented and draw reasonable inferences therefrom. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). The prosecution may attack a defendant's theory of defense (*People v. Doyle*, 328 Ill. App. 3d 1, 12 (2002)) and, during rebuttal, the State may respond to comments made by the defendant which invite a response (*People v. Kliner*, 185 Ill. 2d 81, 154 (1998)). On review, we consider challenged remarks in the context of the entire record as a whole, in particular the closing arguments of both sides. *People v. Williams*, 313 Ill. App. 3d 849, 863 (2000).

¶ 39 The appropriate standard of review for closing arguments is currently unclear. In *Wheeler*, 226 Ill. 2d at 121, our supreme court applied a *de novo* standard of review to the issue of prosecutorial statements during closing arguments. However, the *Wheeler* court cited with favor its decision in *People v. Blue*, 189 Ill. 2d 99, 128 (2000), which applied an abuse of discretion standard. We need not resolve the issue of the proper standard of review in the instant case, as our holding would be the same under either standard. See *People v. Thompson*, 2013 IL App (1st) 113105, ¶¶ 76-77 (acknowledging conflict regarding standard of review).

¶ 40 We turn to the merits of defendant's arguments, addressing them in turn.

¶ 41 Defendant first argues that the prosecutor improperly employed sarcasm by commenting that he was "waiting with bated breath" for the Chihuahua to be accused of killing Otero and was relieved the dog escaped false accusation; stating that the DNA of the unknown female could

have come from the Queen of England; calling defense counsel's comments describing how he personally purchases garbage bags a "convoluted story"; and referring to Montanez as a "criminal mastermind" and other possible killers as "Smurfettes."

¶ 42 Although we do not condone sarcasm (see *People v. Burton*, 338 Ill. App. 3d 406, 418 (2003)), "[t]he wide latitude extended to prosecutors during their closing remarks has been held to include some degree of both sarcasm and invective to express their points." *People v. Banks*, 237 Ill. 2d 154, 183 (2010). Here, it appears that the prosecutor made his comments about the Chihuahua in response to defense counsel's extensive questioning about the dog during trial, as well as defense counsel's somewhat lengthy discussion of the dog in his own closing argument. The comments about the Queen of England and "Smurfettes" were made in passing, and the use of the word "convoluted" was simply descriptive. The prosecutor's references to Montanez as a "criminal mastermind" occurred in the course of attacking the defense theory that she conspired to frame defendant for Otero's murder. Given the context of the entire record, including both sides' closing arguments, we cannot find the prosecutor's remarks improper.

¶ 43 Second, defendant argues that the prosecutor improperly maligned the defense and the integrity of defense counsel and engaged in a "smear campaign against the defense" when he stated that it was not defense counsel's "first day at the rodeo"; said that when lawyers say things not substantiated by the evidence, "it doesn't mean anything"; told the jury that the defense theory was a "conspiracy" along the lines of X files, RFK, JFK, MLK, and Branch Davidians conspiracies; and characterized the defense theory as "desperate." Defendant argues that through these comments, the prosecutor improperly encouraged the jury to believe that defense counsel was involved in deception and implied that in order for the jurors to find defendant not guilty, the

defense had to prove the existence of a conspiracy. He asserts that the prosecutor sent a message to the jurors that defendant bore the burden of proving the existence of a frame-up and improperly shifted their attention away from weighing the evidence.

¶ 44 As noted above, during rebuttal closing, the State may respond to comments made by the defendant which invite a response. *Kliner*, 185 Ill. 2d at 154. In our view, the prosecutor's comments regarding conspiracies were invited by defense counsel's closing argument, during which he suggested that Montanez, Smurf, one of Smurf's cohorts, or a combination of those people killed Otero and set defendant up by collecting physical evidence from his apartment, wedging rope in the sole of one of defendant's shoes, and staging the garbage bag "so conveniently right on top in that Dumpster." In making these comments, defense counsel introduced the idea that a group of people conspired to frame defendant for Otero's murder. In light of these comments, we find that it was reasonable for the State to refer to the theory of defense as a conspiracy theory and attack it. While we do not encourage the characterization of the defense theory as "desperate," we cannot find that it was improper for the prosecutor to refer to defendant's conspiracy theory in this way. We also cannot find that the prosecutor's comments attacking the idea of a conspiracy were an attempt to shift the burden of proof to defendant.

¶ 45 As for the comments about the trial not being defense counsel's "first day at the rodeo" and attorneys' non-substantiated statements not meaning anything, we do not find that these comments maligned the integrity of defense counsel. The first comment simply pointed out in a colloquial manner that defense counsel was an experienced litigator, and the second was a correct statement of the law, as juries are routinely instructed that neither opening statements nor closing arguments are evidence, and any statement or argument made by the attorneys which is

not based on the evidence should be disregarded. See *People v. Crawford*, 2013 IL App (1st) 100310, ¶ 94.

¶ 46 Finally, defendant argues that the prosecutor improperly issued a plea to the jurors to deliver "justice" and use their "common sense" when he discussed the statue of Lady Justice wearing a blindfold, but not a dunce cap. He asserts that these comments were improperly designed to arouse the jury's desire to protect society and vulnerable people.

¶ 47 Again, we disagree. Our supreme court has held that it is not misconduct for prosecutors to couch arguments in terms of "common sense" and make appeals thereto. *People v. Runge*, 234 Ill. 2d 68, 146 (2009). Similarly, it is not improper for a prosecutor to "urge the fearless administration of justice." *People v. Desantiago*, 365 Ill. App. 3d 855, 864 (2006), citing *People v. Harris*, 129 Ill. 2d 123, 159 (1989). In light of this authority, we cannot find that the prosecutor's comments were improper.

¶ 48 Moreover, even if we were to find error, the evidence supporting defendant's conviction was overwhelming. Montanez testified that when she and her mother went out to get moving boxes, she left her children at home with defendant. Both Montanez and her mother testified that when they returned, defendant was not at home, but he appeared some time later with a cut on his lip. According to Montanez, defendant directed her to go outside to the van. He joined them about 20 minutes later, wearing different clothing and carrying a trash bag. The group drove to Montanez's mother's house, but defendant did not go inside. When Montanez went outside to smoke a cigarette, she saw defendant walking out of the alley. The police later recovered a trash bag from that alley. The bag, which matched the striations on plastic bags found in defendant's kitchen and had defendant's fingerprint on it, contained several pieces of physical evidence: a

jacket with a hair similar to Otero's; a hat; gloves with Otero's DNA on them; shoes identified by Montanez as belonging to defendant; rope in the sole of one shoe that was of similar construction to rope found in Otero's kitchen; a separate piece of rope with a hair similar to Otero's; and pieces of a cordless phone, the serial numbers of which matched the phone base in Otero's apartment. In addition, fibers from the jacket and hat were found on Otero's clothing. Upon being confronted with Montanez's statement and the physical evidence, defendant confessed to killing Otero.

¶ 49 In light of the overwhelming evidence in this case, we cannot say that anything about the prosecutor's comments in rebuttal closing argument constituted a material factor in defendant's conviction. Accordingly, reversal based on closing argument is not warranted. See *Wheeler*, 226 Ill. 2d at 123.

¶ 50 For the reasons explained above, we affirm the judgment of the circuit court of Cook County.

¶ 51 Affirmed.