No. 126918

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Illinois Appellate Court, Third Judicial District, No. 3-17-0848
Plaintiff-Appellant,	)	There on Appeal from the Circuit Court of the Fourteenth Judicial Circuit, Henry County, Illinois, Nos. 16 CF 411 & 16 CF 412
v.	)	
TRAVIS J. WILLIAMS,	)	The Honorable Jeffrey W. O'Connor, Judge Presiding.
Defendant-Appellee.	)	

REPLY BRIEF OF PLAINTIFF-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS

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ORAL ARGUMENT REQUESTED

I. Defendant Cannot Excuse His Forfeiture of His "Hearsay" Claim as Plain Error.

As the appellate court held, and defendant does not dispute, defendant forfeited his argument that the prosecutor misstated the hearsay rule during rebuttal closing argument and therefore must demonstrate plain error. Defendant cannot excuse his forfeiture because he cannot show either that the comments were clearly and obviously improper and so prejudicial as to deny him a fair trial, or that the evidence was closely balanced.

A. The Prosecutor's Hearsay Remarks Were Not Clearly and Obviously Improper.

The prosecutor's remark that "[i]t's a rule we can't bring in hearsay," which "is something that's said outside of court," R488-89,[1] is at the very least consistent with the definition of hearsay, *see* Ill. R. Evid. 801(c); her further remark that defense counsel "knows" that the prosecution cannot present inadmissible hearsay is also consistent with Illinois evidence law, Ill. R. Evid. 802 (providing generally that hearsay "is not admissible"). On their face, then, the prosecutor's remarks thus cannot be said to be clearly and obviously improper. Peo. Br. 19.

Moreover, defense counsel invited the prosecutor's remarks when he argued that the prosecution should have called A.R. and K.W.'s wife to "corroborate" K.W.'s testimony and testify about what K.W. told them. Peo.

[1] "R_" refers to the report of proceedings; "Def. Br. _" refers to defendant's appellee's brief, and "Peo. Br. _" refers to the People's opening brief.

Br. 20. In response, the prosecutor correctly noted that such corroboration testimony would be hearsay, for "'[a] witness may not be corroborated on direct examination by proof of prior statements consistent with his testimony.'" Peo. Br. 21 (quoting *People v. Williams*, 147 Ill. 2d 173, 227 (1991)). Because they were invited by the defense counsel's argument, the prosecutor's comments were not improper. Peo. Br. 18 (citing *People v. Glasper*, 234 Ill. 2d 173, 204 (2009), and *People v. Kliner*, 185 Ill. 2d 81, 156 (1998)).

In any event, even if the prosecutor's remarks were improper, defendant cannot show that the prosecutor's remarks were "'so prejudicial that real justice was denied or the verdict resulted from the error.'" Peo. Br. 24 (quoting *People v. Jackson*, 2020 IL 124112, ¶ 83). Not only were the remarks invited by and directly addressed to a question posed by defense counsel, but they were made in the context of 18 pages of rebuttal closing argument, they did not urge the jury to rely on evidence that had not been presented or suggest that such evidence would establish defendant's guilt, and they were not of a nature that might inflame the jury's passions against defendant. *Id.* In light of the substantial evidence of defendant's guilt — the consistent and credible testimony of his two victims, and the credible expert testimony explaining delayed and tentative disclosure — the prosecutor's passing comment regarding the admissibility of out-of-court statements, even if improper, was not clearly and obviously "'so prejudicial that real justice

was denied or the verdict resulted from the error.'" Peo. Br. 25 (quoting *Jackson*, 2020 IL 124112, ¶ 83).

Defendant's contrary arguments are meritless. Defendant argues that the remarks were improper because testimony from A.R. and K.W.'s wife about K.W.'s prior consistent statements would have been admissible under one or more hearsay exceptions. Def. Br. 7-8. This argument is beside the point. The question is not the admissibility of this testimony, but whether, in response to defense counsel's statement in closing argument that the prosecutor should have called A.R. and K.W.'s wife to "corroborate" K.W.'s testimony and testify about what K.W. told them, the prosecutor's response — in which she correctly explained that mere corroboration testimony was inadmissible hearsay — was clear or obvious error. For the reasons explained here and in the People's opening brief, it was not.

In any event, defendant incorrectly contends that the testimony would have been admissible. Def. Br. 7-8. Relying on *People v. Cuadrado*, 214 Ill. 2d 79 (2005), defendant argues that A.R.'s testimony about K.W.'s 2009 outcry would have been admissible under Ill. R. Evid. 613(c), which provides a hearsay exception for prior consistent statements.[2] But this rule is

[2] Rule 613(c) provides that "a prior statement that is consistent with the declarant-witness's testimony is admissible, for rehabilitation purposes only and not substantively as a hearsay exception or exclusion, when the declarant testifies at the trial or hearing and is available to the opposing party for examination concerning the statement, and the statement is offered to rebut an express or implied charge that: (i) the witness acted from an improper influence or motive to testify falsely, if that influence or motive did

consistent with the common law rule, recited in *Cuadrado*, that "statements made prior to trial for the purpose of corroborating trial testimony are inadmissible," and the exception to that rule which "applies when it is suggested that the witness had recently fabricated the testimony or had a motive to testify falsely, and the prior statement was made before the motive to fabricate arose." *Cuadrado*, 214 Ill. 2d at 90. "For the admissibility of this type of evidence, there must be an express or implied attack on these grounds on the witness during cross-examination." *People v. Belknap*, 396 Ill. App. 3d 183, 211 (3d Dist. 2009).

As explained in the People's opening brief, Rule 613(c)(ii)'s hearsay exception for prior consistent statements offered to rebut a charge of recent fabrication would not have permitted the People to introduce A.R.'s testimony about K.W.'s 2009 outcry since defense counsel's cross-examination of K.W. did not suggest that her trial testimony was a recent fabrication. *See* Peo. Br. 20. Instead, the defense argued that the family must have collectively come up with the allegations, and that it was implausible that K.W. would continue to maintain a close relationship with defendant and welcome him into her home after suffering years of abuse at his hands. *Id.* Defendant's reliance on *Cuadrado*, where the witness was properly permitted to testify to

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not exist when the statement was made; or (ii) the witness's testimony was recently fabricated, if the statement was made before the alleged fabrication occurred."

a prior consistent statement because "on cross-examination, defendant suggested recent fabrication," 214 Ill. 2d at 90, is therefore misplaced.

Nor was A.R.'s testimony admissible under Rule 613(c)(i)'s exception permitting a prior consistent statement when it is suggested that the witness had a motive to testify falsely, and the prior statement was made before the motive to fabricate arose. For this exception to apply, there must be an allegation of a motive. *See People v. McDuffie*, 2021 IL App (3d) 180119, ¶ 55 (witness's prior consistent statement admissible to rebut defendant's charge, on cross-examination, that witness had motive to fabricate his testimony because he had been convicted of obstruction of justice in this case and he was awaiting trial on unrelated charges). Defense counsel's charges, on cross-examination, that the family collectively came up with the allegations, and that it was implausible that K.W. would continue to maintain a close relationship with defendant after years of abuse, suggested that she testified falsely, but they did not suggest any *motive* to testify falsely, or that, if she had such a motive, the 2009 statement was made before such a motive arose. Indeed, as a strategic matter, defense counsel likely studiously avoided any topic of cross-examination that would have opened the door to admission of K.W.'s prior consistent statement under Rule 613(c).

This Court should also reject defendant's speculation that K.W.'s identification of defendant as her attacker (to her wife and A.R.) "could also be admissible as a statement of identification," Def. Br. 9, because he fails to

demonstrate, through argument and citation to authority, that such testimony would have been admissible on that basis. *People v. Phillips*, 215 Ill. 2d 554, 565 (2005) (defendant's argument was "waived" where he failed to support his assertion with argument or citation to relevant authority); Ill. Sup. Ct. R. 341(h)(7). Moreover, even if K.W.'s identification of defendant would have been admissible under 725 ILCS 5/115-10, defendant does not argue that the *substance* of K.W.'s prior statement would have been admissible under this subsection.

Defendant's assertion that the prosecutor's comment "specially implied that A.R. and K.W.'s wife would have provided additional evidence of defendant's guilt but were precluded by the hearsay rule and that defense counsel knew this," Def. Br. 10, is belied by the record. The prosecutor said nothing about the substance of K.W.'s statements and merely stated that she could not call K.W.'s wife or A.R. "to come say what [K.W.] told [them]" because statements made out of court are hearsay. Peo. Br. 22 (citing R488-49). It was defense counsel who suggested that their testimony might "corroborate" K.W.'s trial testimony. Thus, as explained, Peo. Br. 21-23, the present case is unlike *People v. Emerson*, 97 Ill. 2d 487 (1983), and *People v. Shief*, 312 Ill. App. 3d 673 (1st Dist. 2000), where the prosecutor "suggest[ed] that evidence of guilt existed which, because of defendant's objection, cannot be brought before the jury," and invited the jury to speculate about the nature of that unpresented evidence. *Emerson*, 97 Ill. 2d at 497; *see Shief*,

312 Ill. App. 3d at 679-80. Nor did the prosecutor argue that the defense was "keeping this testimony from the jury by hiding behind the hearsay rules." Def. Br. 10. Instead, the prosecutor merely stated — in response to defense counsel's argument and consistent with Rule 613(c) and *Cuadrado* — that she could not call A.R. and K.W.'s wife merely to corroborate K.W.'s testimony, as defense counsel had argued.

In sum, given the substantial evidence of defendant's guilt, the prosecutor's passing comment regarding the admissibility of out-of-court statements, even if improper, was not clearly and obviously "'so prejudicial that real justice was denied or the verdict resulted from the error.'" Peo. Br. 25 (quoting *Jackson*, 2020 IL 124112, ¶ 83). Accordingly, the Court may enforce defendant's forfeiture on this basis, and need not consider whether the evidence was closely balanced. *People v. Birge*, 2021 IL 125644, ¶ 42 (because no clear or obvious error occurred, Court need not address whether evidence was closely balanced).

B. The Evidence Was Not Closely Balanced.

Even if defendant could show that the prosecutor's remarks were clearly and obviously reversible error, this Court should enforce his forfeiture because he cannot prove that "'the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him.'" Peo. Br. 25 (quoting *People v. Adams*, 2012 IL 111168, ¶ 21).

The People presented ample evidence on the elements of the charged offenses: predatory criminal sexual assault and aggravated criminal sexual assault. K.W. clearly, consistently, and credibly testified that beginning in the sixth grade, when she was 11 or 12 years old, and continuing until she was 17 years old, defendant — her father — had sexual intercourse with her on an "almost nightly" basis whenever she lived with him or visited on weekends and school holidays. R288-306. H.S. testified that, beginning in the seventh grade and continuing into the eighth grade, defendant (her stepfather) had her masturbate him to climax and penetrated her vagina with his finger. R351, R368-72; R378. Though they did not speak with one another about defendant's abuse, K.W.'s and H.S.'s descriptions of similar, escalating patterns of abuse lent additional credibility to their accounts. Both victims testified that defendant began offending against them around age 11 or 12, and that the abuse began with "backrubs" that quickly escalated to acts of penetration. *See* Peo. Br. 26-29.

K.W. and H.S. also explained why they had initially denied the abuse when questioned in 2009: K.W. explained that it was "very uncomfortable," and she did not want anything to happen to her father, R307, and H.S. testified that defendant threatened that if she confirmed the abuse, "he would get in trouble, [her] mom and him wouldn't be able to be together, and [her] mom would be very unhappy and very lonely," R373. These explanations were corroborated by Hager's expert testimony explaining that

it is not unusual for a child sexual abuse victim to deny abuse if the issue is raised by someone else and they are not ready to talk about it. Peo. Br. 28-29.

Nor did defense counsel's closing argument undermine the victims' credibility. Counsel's argument that the victims might have disclosed defendant's abuse in 2016 to help Patti gain an advantage in her divorce from defendant four years earlier bordered on nonsensical. Defense counsel's further suggestion that K.W. might have disclosed the abuse because defendant disapproved of her "lifestyle" is also unpersuasive, as K.W. testified that they enjoyed an improved relationship between 2011 and 2016, and even at the time of trial, she bore him no ill will. And this argument did nothing to impeach H.S.'s credibility. Peo. Br. 31-32.

Finally, because defendant did not testify, this case did not present a "swearing contest" between two equally credible versions of events, such that any error, no matter how minor, might have tipped the balance. Peo. Br. 27-28. Defendant chiefly parrots the appellate majority's unsound reasoning, Def. Br. 11-17, which the People addressed in their opening brief. There, the People explained that, contrary to the appellate majority's apparent belief, this case is unlike *People v. Naylor*, 229 Ill. 2d 584 (2008), or *People v. Vesey*, 2011 IL App (3d) 090570, because here, defendant neither testified nor presented any evidence; thus, the jury thus was not called upon to determine the relative credibility of two equally plausible competing accounts. Peo. Br.

27-28. Defendant's related assertion that the People rely on *Naylor* and *Vesey* to argue that "a defendant must testify or put in evidence to receive plain error review," Def. Br. 13, misstates the People's argument. Indeed, in the very next paragraph, defendant writes that "the State acknowledges that even if the defendant does not present a competing account that this is not 'fatal' to plain error review[.]" *Id.* (citing Peo. Br. 28). Nor have the People argued that the fact that "[i]n criminal sexual assault cases, the victim is typically the only witness (other than the perpetrator) to the crimes means that a defendant is not entitled to plain-error review." Def. Br. 14.

The People's opening brief also debunked the appellate court's reasoning, repeated in defendant's brief, Def. Br. 14-16, that the evidence was closely balanced because "[t]here was no physical evidence, no third party testimony even putting the defendant alone with K.W or H.S., and no evidence suggesting the defendant's consciousness of guilt," A7. Evidence is not closely balanced merely because the prosecution's case rests on eyewitness testimony rather than forensic evidence, and the absence of corroborating physical evidence is not uncommon in sex offense cases, especially in cases prosecuted under the extended limitations period. Peo. Br. 30. And because "the victim is typically the only witness (other than the perpetrator) to the crimes," *People v. Booker*, 224 Ill. App. 3d 542, 550 (4th Dist. 1992), it is not surprising that there would be no third party eyewitness testimony or physical evidence of defendant's offenses. Peo. Br. 30.

The appellate majority was simply wrong to characterize the evidence as closely balanced in the absence of third party testimony "putting the defendant alone with K.W or H.S.," A7, because such testimony would have undermined, not supported, the prosecution's case, as it would have conflicted with both K.W.'s testimony that defendant offended against her between 25 and 50 times while they shared a mattress with a sleeping A.R., R318, and H.S.'s testimony that on a typical evening, Camren was home but sleeping during defendant's offenses against her, R363-66. And defendant exhibited consciousness of guilt when he told K.W. "You're going to protect me, right?" R346, and when he told H.S. that if she confirmed the abuse to investigators, "he would get in trouble, [her] mom and him wouldn't be able to be together, and [her] mom would be very unhappy and very lonely," R373. In sum, under the majority's rationale, the evidence would be closely balanced in every sex offense case that does not involve physical evidence or third party testimony, regardless of the credibility of the witnesses and their testimony. Peo. Br. 30-31.

Finally, even assuming that the People *could have* presented additional witnesses, Def. Br. 14, 17, that would not render the evidence actually presented at trial closely balanced. *See Sebby*, 2017 IL 119445, ¶ 53 (determining "whether the evidence adduced at trial was close"); *People v. Belknap*, 2014 IL 117094, ¶ 50 ("a reviewing court must undertake a

commonsense analysis of all the evidence in context when reviewing a claim under the first prong of the plain error doctrine").

Accordingly, a "qualitative, commonsense assessment of the evidence within the context of the case," *Sebby*, 2017 IL 119445, ¶ 53, reveals that the evidence was not closely balanced and, therefore, that the prosecutor's remarks did not rise to the level of plain error.

II. The Prosecutor's Argument Did Not Shift the Burden of Proof.

There is no merit to defendant's contention, apparently asserted as an alternative basis for affirmance, that the prosecutor's argument shifted the burden of proof. Def. Br. 5-6. To be sure, it is "impermissible for the prosecution to attempt to shift the burden of proof to the defense." *People v. Phillips*, 127 Ill. 2d 499, 527 (1989). But a prosecutor's comments in closing argument "will not be held improper if they were provoked or invited by the defense counsel's argument." *Glasper*, 234 Ill. 2d at 204; *accord Kliner*, 185 Ill. 2d at 155. Although, "[o]rdinarily, the prosecution may not comment unfavorably upon a defendant's failure to produce a witness," such remarks are "permitted when made in response to defense counsel's own reference to the State's failure to call the witness to the stand." *People v. Holman*, 103 Ill. 2d 133, 151 (1984) (citing *People v. Wheeler*, 5 Ill. 2d 474, 485-86 (1955)); *see also People v. Jackson*, 399 Ill. App. 3d 314, 319 (1st Dist. 2010) ("[w]hile the prosecution is generally not permitted to comment on a defendant's failure to

produce evidence, such comments are not improper after a defendant with equal access to that evidence assails the prosecution's failure to produce it").

In closing argument, defense counsel argued that the prosecution should have called Patti, A.R., and K.W.'s wife. In response, the prosecutor stated, "why didn't [the People] call [A.R.] as a witness? Well, first of all, the defense has subpoena powers just like the government." R486. After the court denied defense counsel's objection, the prosecutor continued:

> The defendant has subpoena powers just like the State and I will note to you that I am not implying that the defendant has any kind of burden in this case. I fully accept the fact that we have the burden to prove this case beyond a reasonable doubt. But when the defendant stands here and tells you we could have subpoenaed and makes it sound like we are the only ones that can get people here, they have the right and the ability to subpoena anybody they choose to subpoena, also.

R488.

As the appellate court correctly held, A5, defendant's burden-shifting argument is defeated by *Kliner*. There, a "prosecutor's comments during rebuttal argument regarding defense counsel's ability to subpoena [a witness] were invited by defense counsel's argument that the State failed to call [the person] as a witness" and did not shift the burden of proof. 185 Ill. 2d at 155; *see also People v. Redd*, 173 Ill. 2d 1, 31 (1996) (prosecutor did not shift burden of proof with statement that defense had right to "subpoena each and every witness he may want to and put anybody at all on the witness stand").

There is no merit to defendant's argument that the remarks "were not invited because A.R., Patti, and K.W.'s wife were not equally accessible to the

defendant." Def. Br. 5. Whether remarks are invited turns on the content and substance of counsel's argument. *See*, *e.g.*, *Holman*, 103 Ill. 2d at 175 (noting that prosecutor's remarks "went far beyond what defense counsel may fairly be said to have invited" by references in his argument); *People v. Hudson*, 157 Ill. 2d 401, 445 (1993) (defense counsel's argument that doctor who testified for People was there "to be paid by the State" invited prosecutor's "line of argument concerning the payment of experts for their evaluation and testimony"). Defendant cites no case holding that the question turns instead on accessibility of witnesses. And though defendant notes that the witnesses were related to the complainants, the Sixth Amendment unquestionably conferred upon him the power to subpoena them. *Taylor v. Illinois*, 484 U.S. 400, 408 (1988).

Moreover, not only was the prosecutor's comment invited by the defense, but she acknowledged that the burden was on the People when she stated that she was "not implying that the defendant has any kind of burden" and "we have the burden to prove this case beyond a reasonable doubt," R488, and the jury was instructed that closing argument is not evidence, *see* C156, and on the People's burden of proof, *see* C160. Thus, the prosecutor's remarks did not have the effect of shifting the burden of proof. *E.g.*, *Jackson*, 2020 IL 124112, ¶ 87 (prejudice cured where jury is told that (1) the People must prove the defendant's guilt beyond a reasonable doubt and (2) closing arguments are not evidence and the jury should disregard statements not

supported by the evidence); *People v. Flores*, 128 Ill. 2d 66, 95 (1989) (any error "was cured when the jury was properly instructed by the trial court on the State's burden of proof").

Therefore, the appellate court properly denied relief on defendant's claim that the prosecutor's argument impermissibly shifted the burden of proof.

CONCLUSION

This Court should reverse the appellate court's judgment and remand the matter to the appellate court with instructions to consider defendant's unaddressed *Strickland* claim.

December 23, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and the certificate of service, is 16 pages.

/s/ Katherine M. Doersch

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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On December 23, 2021, the foregoing Reply Brief of Plaintiff-Appellant, People of the State of Illinois, was (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served by transmitting a copy via e-mail to the e-mail addresses listed below:

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