

No. 1-10-0713

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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. 09 CR 1055
)	
ROBERT TAYLOR,)	Honorable
)	Neil J. Linehan,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE EPSTEIN delivered the judgment of the court.
Justices McBride and Howse concurred in the judgment.

ORDER

¶ 1 *Held:* A prosecutor's closing remarks about the social dangers of cocaine were not inflammatory or prejudicial to criminal defendant's case. The trial court's admonition to the jury as to the *Zehr* principles does not merit reversal under the plain error doctrine. Imposing a 12-year sentence on a criminal defendant for possession of cocaine with intent to deliver was not an abuse of discretion where the offense was a class X felony.

¶ 2 Following a jury trial, defendant Robert Taylor was found guilty of possession of cocaine and sentenced to 12 years' imprisonment. On appeal, Taylor contends that his conviction should be reversed and his cause remanded for a new trial because (1) the prosecutor's closing argument contained comments that prejudiced the jury against Taylor, (2) the trial court's admonishments

failed to strictly comply with Illinois Supreme Court Rule 431(b) (eff. May 1, 2007), and (3) the trial judge abused his discretion by imposing a 12-year sentence on Taylor. For the reasons discussed below, we affirm.

¶ 3 BACKGROUND

¶ 4 Taylor was arrested on December 7, 2008 in Chicago, Illinois. Two officers saw Taylor engage in three hand-to-hand transactions on South Loomis between 56th and 57th streets, receiving money and giving an object he took from under a brick. Officers recovered 0.3 grams of cocaine in three small plastic bags from under the brick. The State charged Taylor with possession with intent to deliver less than one gram of cocaine. The case was tried to a jury.

¶ 5 *I. Admonition to Jury*

¶ 6 During *voir dire*, the trial judge spoke to the potential jurors about the general charges against Taylor and the instructions they must follow. The judge stated:

"I want everybody to listen to each and every one of these presumptions. If any of you has any problems with any of these basic principles of law, I want you . . . to raise your hand, stand up, and tell me your name so that I can talk to you further why you would have a problem with this basic principle of law."

The judge stated the following principles:

"Under the law, a defendant is presumed to be innocent of the charge against him or her. This presumption remains with him or her throughout every stage of the trial and during your deliberations on a verdict and is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty.

"Is there anyone that has a problem with that . . . basic principle of law? Let the record reflect that no one has indicated that they do.

"The State has the burden of proving the guilt of the defendant beyond a reasonable doubt and this burden remains on the State throughout the case. Anyone have a problem with that basic principle of law? Again, let the record reflect, no one has raised their hand.

"The defendant is not required to prove his or her innocence, nor is he or she required to present any evidence on his or her own behalf. The defendant will rely on a presumption of innocence.

"Again, let the record reflect that no one has raised their hand."

¶ 7 Later, the trial judge reiterated the above principles, again asking the venire members to raise their hand if they disagreed. The judge then added a further admonition:

"The defendant has the absolute right to remain silent and he may elect to sit there, not testify in his own defense and rely on the presumption of innocence. You may draw no inference from the fact that the defendant chose to remain silent, either in favor or against the defendant.

"Again, let the record reflect, no one has raised their hand."

¶ 8 The trial judge then questioned venire members individually about their backgrounds and whether each juror could be impartial. At that time, the judge again asked whether the juror had any disagreement or problem with the principles of law he had previously stated.

¶ 9 Counsel for Taylor never objected to the adequacy of the court's inquiries.

¶ 10 2. *Trial Testimony*

¶ 11 Officer Sopcak testified to patrolling the Englewood neighborhood at 10 p.m. on December 7, 2008 with a partner, Officer Garcia. The officers were in uniform, driving a marked police vehicle. Officer Sopcak said he was familiar with the area, a high narcotics location. Passing the intersection of 57th and Loomis, Officer Sopcak observed a person signaling to people, which indicated to him that there was "activity on the block." The officers decided to set up narcotics surveillance in a vacant two-flat building. He testified that his view from the second story window of the house was clear and the street was well-lit. Across the street, Officer Sopcak saw a man, whom he later identified as Taylor, slowly shuffling back and forth on the sidewalk. Officer Sopcak estimated the distance from his window to Taylor to be 45 to 50 feet.

¶ 12 After several minutes, Officer Sopcak saw an unknown male approach Taylor and engage in brief conversation. According to Officer Sopcak, the male handed Taylor cash, which Taylor accepted. Then, Taylor walked to the front yard of a vacant building at 5638 S. Loomis, lifted a brick from the yard, removed a small object, and replaced the brick. Taylor then handed the small object to the unidentified male, who left the scene. Officer Sopcak testified that his experience in narcotics surveillance led him to believe that he had just witnessed a narcotics transaction. As Officer Sopcak observed Taylor, he saw two more similar transactions. During each transaction, Taylor received cash and retrieved a small object from beneath the same brick.

¶ 13 Officer Sopcak testified that after witnessing the third transaction, he signaled his partner by radio to arrest Taylor. After Officer Garcia detained Taylor, Officer Sopcak left the surveillance window and went to the brick under which Taylor had retrieved the small objects. Officer Sopcak found three plastic bags containing suspected cocaine. Officer Sopcak also performed a custodial search of Taylor at the police station, where he recovered \$66 in cash.

¶ 14 On cross-examination, Officer Sopcak acknowledged that he and Officer Garcia did not attempt to detain the buyers and no comparison was made between the objects they purchased and the bagged substance found beneath the brick. Taylor's attorney confronted Officer Sopcak with his testimony at the preliminary hearing that he observed Taylor from 30 feet away, not 45 to 50 feet. Officer Sopcak also admitted that his estimate of the total weight of the substance was 1 gram, which was higher than the actual weight of 0.3 grams.

¶ 15 Next, Officer Garcia testified to his role in the arrest. Officer Garcia confirmed that he was waiting in a squad car as Officer Sopcak observed Taylor from a building. After Officer Sopcak called Officer Garcia to make the arrest, Officer Garcia turned the corner to see Taylor, the only person on the block, and whose clothing matched Officer Sopcak's description. On cross-examination, Officer Garcia confirmed that he made no arrests of the individuals buying the suspect narcotics from Taylor, nor did he call in assistance to do so.

¶ 16 State Police forensic chemist Kathy Regan testified as to her analysis of the substance in the plastic bags recovered from the brick that Taylor visited during the suspect narcotics transactions. Regan's tests confirmed that the total weight of the substance in the bags was 0.3 grams. Her tests of one of the bags confirmed that it contained 0.135 grams of cocaine.

¶ 17 The State rested and the defense called police dispatcher Jill Maderak. She testified that she received a dispatch about Taylor's arrest from Officers Sopcak and Garcia, who reported that the arrest occurred at 5653 S. Loomis.

¶ 18 The defense rested and in rebuttal the State recalled Officer Sopcak, who said that he did give the dispatcher the address of 5653 S. Loomis, but that was intended to be a generic address for the vicinity. He confirmed that his police report reflected an address of 5638 S. Loomis for the

vacant property used by Taylor in the transactions.

¶ 19 3. *Closing Arguments*

¶ 20 In closing argument, the State argued that the evidence demonstrated Taylor's intent to sell the remaining bags of cocaine. The defense attorney challenged Officer Sopcak's ability to observe the transactions from his vantage point across the street, as well as his mistake as to the building address. Taylor's attorney also questioned the officers' failure to arrest the three buyers:

"None of the buyers are arrested. None of 'em are even stopped. . . .

"But why not go to the buyers and stop them to at least get their name and make a contact card who they are? Or why not stop them to get the drugs that were sold to them?"

Taylor's attorney continued: "Come on . . . if nobody is going to K-Mart, what happens to K-Mart? Closes down. K-Mart is gone. If nobody is buying, then who - who is going to be the seller? Nobody. He's going to move and go away. So, yeah, the buyers are important."

¶ 21 In rebuttal, the prosecutor addressed the officers' decision not to arrest the individual buyers:

"The focus of this surveillance was on the seller. And in our common life experiences, it's just common sense, that sometimes you have to let the little fish go when your focus is to get the big fish. And in this case that defendant is the big fish.

. . .

". . . Although this comes in very small packages, cocaine is a powerful drug.

"Its sale and distribution in neighborhoods just like this one can cause its destruction."

Taylor's attorney's objections to these remarks were overruled.

¶ 22 4. Verdict and Sentencing

¶ 23 The jury returned a verdict finding Taylor guilty of possession with intent to deliver a controlled substance.

¶ 24 At sentencing, the defendant was found eligible for Class X sentencing based on his prior felony convictions for burglary and delivery of a controlled substance. In mitigation, the defense argued Taylor's service and honorable discharge from the United States Marine Corps, as well as his attainment of a GED. The defense attorney also noted that Taylor was abused by his mother and has struggled with addiction and depression for most of his life.

¶ 25 The trial judge stated that he took all mitigating factors into account and sentenced Taylor to 12 years in prison.

¶ 26 ANALYSIS

¶ 27 1. Whether the Prosecutor's Closing Remarks Were Improper

¶ 28 Taylor contends that he was denied a fair trial because the State's closing rebuttal argument contained inflammatory and prejudicial comments designed to arouse the passions and prejudices of the jury. The comments in question referred to the proliferation of drugs in neighborhoods and the potency of cocaine in particular. This issue is reviewed *de novo*. *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007) (citing *People v. Graham*, 206 Ill. 2d 465, 474 (2003)).

¶ 29 Every criminal defendant has federal and state constitutional rights to a fair trial. U.S. Const., amend. XIV; Ill. Const. 1970, art. I, § 2; *People v. Johnson*, 208 Ill. 2d 53, 64 (2003). The *Johnson* court noted an "intolerance of pervasive prosecutorial misconduct that deliberately undermines the process by which we determine a defendant's guilt or innocence." *Johnson*, 208 Ill. 2d at 66. Misconduct in closing argument is substantial and warrants reversal and a new trial if the improper

remarks constituted a material factor in a defendant's conviction. *People v. Linscott*, 142 Ill. 2d 22, 28 (1991).

¶ 30 "Prosecutors are afforded wide latitude in closing argument, and a prosecutor's comments will result in reversible error only when they engender substantial prejudice against a defendant to the extent that it is impossible to determine whether the jury's verdict was caused by the comments or the evidence." *People v. Caffey*, 205 Ill. 2d 52, 131 (2001); see also *People v. Nieves*, 193 Ill. 2d 513, 533 (2000). If the jury could have reached a contrary verdict had the improper remarks not been made, or the reviewing court cannot say that the prosecutor's improper remarks did not contribute to the defendant's conviction, a new trial should be granted. *Linscott*, 142 Ill. 2d at 28.

¶ 31 Illinois courts have held certain remarks improper. For example, one prosecutor told a jury "There's nobody here for the People, just you." *People v. Thomas*, 146 Ill. App. 3d 1087, 1089 (1986). The *Thomas* court considered the remark plain error because the insinuation of an "us-versus-them" mentality "was a perversion of the principle that a jury is composed of nonpartisans who function under the presumption that a defendant is innocent until proved otherwise." *Id.*; see also *People v. Patrick*, 298 Ill. App. 3d 16, 27 (1998) (granting new trial where prosecutor characterized defendants as "bad guys" while the police are "good guys"). Remarks that liken a defendant to an animal are also improper. *Johnson*, 208 Ill. 2d at 80 ("If you run with the pack, you share the kill."); *People v. Johnson*, 119 Ill. 2d 119, 139 (1987) ("Four of those people were butchered by an animal, and that animal is among us today, and he sits right there."); *People v. Ivory*, 333 Ill. App. 3d 505, 517 (2002) (the prosecutor stated that defendant was " 'just a wolf in sheep's clothing' " and was " 'part of a pack of predators' "). Evaluations of a defendant's soul are also improper, as are insinuations that a defendant "celebrated" the death of his alleged victims.

Johnson, 208 Ill. 2d at 81; see also *People v. Williams*, 295 Ill. App. 3d 456, 467 (1998) (where prosecutor characterized defendant as "evil").

¶ 32 Illinois courts have also elaborated on comments that do not exceed the prosecutor's latitude in making closing arguments. "Concerning the parameters of proper argument, the prosecutor may denounce the accused, reflect upon the credibility of the witnesses and urge the fearless administration of justice if based on facts in the record or inferences drawn fairly therefrom. He may in like manner dwell on the evils of crime." *People v. Thomas*, 172 Ill. App. 3d 172, 178-79 (1988) (citing *People v. Bryant*, 94 Ill. 2d 514 (1983) and *People v. Cukojevic*, 103 Ill. App. 3d 711 (1981)). "While prosecutors may not engage in argument calculated to inflame the passions of the jury, they may nonetheless if based on inferences raised by the evidence, comment on the evils of crime and urge the fearless administration of justice." *Thomas*, 172 Ill. App. 3d at 181 (citing *People v. Horne*, 129 Ill. App. 3d 1066 (1984)).

¶ 33 To properly assess whether the challenged remarks are improper, closing arguments must be viewed in context. *U.S. v. Young*, 470 U.S. 1, 11-12 (1985); *Caffey*, 205 Ill. 2d at 131 (citing *People v. Macri*, 185 Ill. 2d 1, 62 (1998) (and cases cited therein)). In *Young*, the U.S. Supreme Court noted that reviewing courts must consider "the probable effect the prosecutor's response would have on the jury's ability to judge the evidence fairly. In this context, defense counsel's conduct, as well as the nature of the prosecutor's response, is relevant." *Young*, 470 U.S. at 12. Remarks made in rebuttal will not be held improper if they appear to have been provoked or invited by defense counsel's argument. *People v. Williams*, 313 Ill. App. 3d 849, 863 (2000). The *Williams* court did not hold that any responsive remarks would be proper as a rule but took into account the nature of the remark, which was based on the evidence. *Id.*

¶ 34 In this case, the prosecutor's remarks were not improper. The prosecutor made no personal attacks on Taylor, nor did she misstate the evidence against him. During closing argument, Taylor's attorney attacked the evidence based on the officers' decision not to attempt to arrest the three buyers. In rebuttal, the prosecutor defended the decision, arguing that arresting sellers is a stronger strategy against crime than stopping individual buyers. This invited comment, touching on the impact of drug crime, did not, in the context of this case, deprive the defendant of a fair trial. See *Thomas*, 172 Ill. App. 3d at 181-82. The additional comments regarding the dangers of cocaine use were used to support the decision to focus on the seller.

¶ 35 2. *Whether a Trial Court's Admonition to Jurors*

Complied with Supreme Court Rule 431(b)

¶ 36 Taylor next asserts that the trial court failed to comply with Supreme Court Rule 431(b) in admonishing the venire members on key legal principles. According to Taylor, the judge's question to venire members as to whether they "ha[d] a problem" with the Rule 431(b) principles failed to ascertain whether the jurors understood and accepted the principles. The State contends that Taylor has forfeited this issue by failing to object during *voir dire* when the trial court read the admonishment to the venire members. While Taylor concedes forfeiture, he asks that we order a new trial under plain error review.

¶ 37 Plain error analysis allows a reviewing court to consider an unpreserved error if (1) the evidence was closely balanced or (2) the error was serious enough to have affected the fairness of the defendant's trial. *People v. McLaurin*, 235 Ill. 2d 478, 495 (2009); *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). Taylor argues that he is entitled to review under the first prong. To prevail, "the defendant must prove 'prejudicial error.' That is, the defendant must show both that there was plain

error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him." *Herron*, 215 Ill. 2d at 187. The first step under plain error review is "determining whether any error occurred." *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 38 Supreme Court Rule 431(b) imposes a duty to ask each potential juror whether he or she understands and accepts four fundamental rights of a criminal defendant. R. 431(b). Our Supreme Court first established this requirement in *People v. Zehr*:

"We are of the opinion that essential to the qualification of jurors in a criminal case is [1] that they know that a defendant is presumed innocent, [2] that he is not required to offer any evidence in his own behalf, [3] that he must be proved guilty beyond a reasonable doubt, and [4] that his failure to testify in his own behalf cannot be held against him. If a juror has a prejudice against any of these basic guarantees, an instruction given at the end of the trial will have little curative effect." *People v. Zehr*, 102 Ill. 2d 472, 477 (1984).

Our Supreme Court's most recent decision regarding the issue mandated a "specific question and response process" for admonishing jurors about Rule 431(b) principles. *Thompson*, 238 Ill. 2d at 607. In that case, the court found that the trial judge had erred by omitting the third principle and failing to ask whether the jurors understood the first principle. *Id.* at 607.

¶ 39 Prior to *Thompson*, a line of cases held "that Rule 431(b) does not dictate a particular methodology for establishing the venire's understanding or acceptance of those principles." *People v. Digby*, 405 Ill. App. 3d 544, 548 (2010) (citing *People v. Vargas*, 396 Ill. App. 3d 465, 472 (2009) *vacated*, 239 Ill. 2d 584 (2011)); see also *People v. Strickland*, 399 Ill. App. 3d 590, 603 (2010). After *Thompson*, the supreme court vacated and remanded *Vargas* and other cases that relied on the

above language. On remand, this court recognized the "specific question and answer process" prescribed by *Thompson*. *People v. Vargas*, 409 Ill. App. 3d 790, 795-96 (2011). While the statement in *Vargas* did not directly follow the "understand and accept" language of Rule 431(b), we explained that a question and answer process that ensures understanding and acceptance of the principles will be in substantial compliance with Rule 431(b). *Id.* at 796.

¶ 40 Since *Thompson*, this court has considered whether certain admonitions satisfy Rule 431(b). For example, asking whether a venire member "disagrees" with each principle has been found to comply with Rule 431(b). *People v. Magallanes*, 409 Ill. App. 3d 720, 730 (2011). Stating the *Zehr* principles and asking jurors "whether they 'had a problem' with the first principle, if they 'disagreed' with the second and third principles, and whether they would hold defendant's failure to testify against him" was held not to be error. *People v. Quinonez*, 2011 WL 3962901, at *13-14. *Quinonez* and *Magallanes* recognize that *Thompson* requires a meaningful question and answer process, but "there is no requirement that the specific language be used." *Id.* at *13 (citing *Strickland*, 399 Ill. App. 3d at 604). In *People v. Perry*, 2011 WL 1227844, it was held that a trial court did not satisfy Rule 431(b) when its inquiry was: "any juror who feels honestly and sincerely that they cannot follow any of the basic principles I just talked about, such as presumption of innocence, burden of proof[.] Any juror who feels a dispute and cannot follow one of these principles?" (Internal quotation marks omitted.) *Id.* at *18. *Thompson* held that the rule is not satisfied by "a broad statement of the applicable law followed by a general question concerning the juror's willingness to follow the law." (Internal quotation marks omitted.) *Thompson*, 238 Ill. 2d at 607 (quoting R. 431, Committee Comments (eff. May 1, 1997)).

¶ 41 Here, the trial court adequately admonished the venire members as to all four Rule 431(b)

principles. The judge fully stated each principle at least once, actually stating the first three principles twice. Prior to the admonishment, the judge told each potential juror to raise a hand if the juror "ha[d] any problems with any of these basic principles of law." This statement is substantially similar the procedure upheld in *Strickland*, *Quinonez*, and *Magallanes*. After each principle was read, the judge stated that no one raised a hand. This group questioning method is acceptable. *Thompson*, 238 Ill. 2d at 607 (stating that "the prospective jurors may be questioned individually or in a group"). Further, asking venire members to raise a hand if they disagree or "have a problem" with the Rule 431(b) principles is also acceptable. *Quinonez*, 2011 WL 3962901 at *14; *Strickland*, 399 Ill. App. 3d at 603. The trial judge later provided an opportunity for all venire members to respond individually if they "had a problem" with the principles he had stated earlier to the group. The trial judge's admonitions discussed each Rule 431(b) principle and questioned the venire members in a way that allowed each member to respond.

¶ 42 This analysis ends our inquiry. "Having found no error, there can be no plain error." *People v. Bannister*, 232 Ill. 2d 52, 79 (2008). Accordingly, we do not reach the issue of whether the evidence was closely balanced.

¶ 43 We therefore conclude that Taylor is not entitled to a new trial based on the judge's Rule 431(b) admonitions.

¶ 44 3. *Whether the 12-Year Sentence was an Abuse of Discretion*

¶ 45 Finally, we examine whether the trial court abused its discretion in imposing a 12-year sentence on Taylor for possession of a controlled substance with intent to deliver.

¶ 46 Our Supreme Court held, in *People v. Streit*, 142 Ill. 2d 13 (1991):

"A trial court's sentencing decisions are entitled to great deference and

weight. A trial judge is in a far better position than an appellate court to fashion an appropriate sentence, because such judge can make a reasoned judgment based upon firsthand consideration of such factors as 'the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age'; whereas the appellate court has to rely entirely on the record.

"Nonetheless, the discretion of a trial court in making sentencing decisions is not totally unbridled. Reviewing courts are empowered under our Rule 615(b)(4) to reduce sentences. The standard of review is whether a trial court has abused its discretion in imposing a sentence; if it has, the sentence may be altered upon review. When reviewing courts examine the propriety of sentences imposed by trial courts, they should proceed with great caution and care. A reviewing court must not substitute its judgment for that of a sentencing court merely because it would have weighed the factors differently. *Id.* at 18-19 (citations omitted).

¶ 47 Illinois law provides for enhanced sentencing for repeat offenders:

"When a defendant, over the age of 21 years, is convicted of a . . . Class 2 felony, after having twice been convicted in state or federal court of an offense that contains the same elements as an offense now classified in Illinois as a Class 2 or greater Class felony and such charges are separately brought and tried and arise out of different series of acts, that defendant shall be sentenced as a Class X offender." 730 ILCS 5/5-5-3(c)(8) (West 2008) (current version at 730 ILCS 5/5-4.5-95(b), effective July 1, 2009).

The sentencing range for Class X felonies is 6 to 30 years in prison. 730 ILCS 5/5-8-1-(a)(3)

(current version at 730 ILCS 5/5-4.5-25(a), effective July 1, 2009). An abuse of discretion may be found even where the sentence is within statutory limitations if that sentence is at odds with the purpose and spirit of the law. *People v. Steffens*, 131 Ill. App. 3d 141, 151 (1985).

¶ 48 In limited circumstances, Illinois courts have reduced sentences based upon the trial court's abuse of discretion. Our supreme court found that a trial court abused its discretion by "arbitrarily" refusing to consider a defendant's probation request based on a blanket refusal to grant probation for any defendant convicted of indecent liberties with a child. *People v. Bolyard*, 61 Ill. 2d 583, 587 (1975). In another case, this court reduced a sentence from 25 years to 10 years, finding that the trial court abused its discretion for several reasons: (1) emphasis on defendant's lack of remorse, despite his claim that he was innocent; (2) misstatements as to defendant's past criminal behavior; and (3) the fact that the amount of cocaine found "was only slightly in excess of the minimum required to make the offense a Class X felony as opposed to a Class 1 felony." *People v. Evans*, 143 Ill. App. 3d 236, 242 (1986).

¶ 49 In this case, Taylor was charged with a Class X felony and sentenced to 12 years in prison, which falls within the statutory range for Class X felonies. The trial court heard and considered arguments that Taylor's attorney made in mitigation. The trial court also considered Taylor's criminal history, including a drug conviction and a manslaughter conviction.

¶ 50 We find that the trial court did not abuse its discretion in imposing a 12-year sentence on Taylor for this offense.

¶ 51 CONCLUSION

¶ 52 Based on the foregoing, we affirm the judgment of the Circuit Court of Cook County.

¶ 53 Affirmed.