2011 IL App (2d) 100653-U
No. 2-10-0653
Order filed November 30, 2011

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of McHenry County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 08-DT-680
	)	
THOMAS G. KOTOVSKY,	)	Honorable Charles P. Weech,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices McLaren and Schostok concurred in the judgment.

ORDER

Held: The State's rebuttal argument was not improper, as the State commented on the uncontradicted nature of the evidence without pointing out defendant's failure to testify or his failure to raise certain matters on cross-examination.

¶ 1 At issue in this appeal is what effect, if any, the State's comments in rebuttal closing argument concerning the uncontradicted nature of the State's evidence had on defendant's right to a fair trial. We determine that such comments did not infringe upon defendant's right to a fair trial. Accordingly, we affirm.

¶ 2 The facts relevant to resolving this appeal are as follows. Defendant, Thomas G. Kotovsky, was charged with driving while under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(2) (West 2008)). At his jury trial, Officer JoAnn Kinter was the only witness who testified. Although Kinter could not remember all of the extrinsic details of defendant's arrest that occurred two years before defendant's trial, such as whether another officer arrived on the scene, Kinter was able to testify in great detail about the facts that supported her conclusion that defendant was DUI. For instance, Kinter testified in detail about how defendant exited his car and used the car door for support, how poorly defendant did on the walk-and-turn test, and the way in which defendant repeatedly and alternatively used offensive language and apologized to the officer for using that language after she arrested him for DUI.

¶ 3 In closing arguments, defense counsel highlighted the fact that Kinter could not remember all of the extraneous facts surrounding defendant's arrest for DUI. In rebuttal, the State commented five times about how its evidence was not contradicted. On the first occasion, the State asserted that "[t]here was no evidence at all presented in this case that anything [the officer] testified to was contradicted by anything in [the officer's] report." Defense counsel objected to that comment, and the trial judge sustained the objection, advising the jurors that they should disregard that comment. On the second occasion, the State asked, "Out of all the hype that's being made about [Officer] Kinter's testimony, where was it controverted that the [d]efendant's vehicle drove out of its lane?" Defense counsel objected, and the transcript reveals that the trial judge sustained the objection and then said something that was "(indiscernible)." On the third occasion, the State commented, "[i]t's uncontroverted that the [d]efendant was belligerent." Defense counsel did not object to that statement. On the fourth occasion, the State asserted that "[t]he only person who couldn't follow [Kinter's] instructions [for taking the field sobriety test] was [defendant], and that's uncontroverted."

Defense counsel made no objection to this statement. On the last occasion, the State, after commenting that "[d]efendant was totally, completely belligerent and out of control," stated, "[t]hat's uncontroverted and uncontradicted." Defense counsel objected, and the trial court sustained the objection, advising the jury to disregard the comment.

¶ 4 In instructing the jury, the court told the jurors that the State had to prove defendant's guilt beyond a reasonable doubt, that the jurors should disregard questions or exhibits to which objections were sustained, and that the jurors could not consider the fact that defendant did not testify in reaching their verdict. The jury found defendant guilty of DUI, and defendant filed a posttrial motion. In that motion, he argued, among other things, that he was denied a fair trial when the State commented on the uncontradicted or uncontroverted nature of its evidence. The court denied the motion, finding that, although the State overstepped at certain points, the jury listened to the court's admonishments and understood what to do if an objection was sustained. Accordingly, the court found that, although there were instances where objectionable comments were made, those comments, given the manner in which they were addressed by the court, did not deprive defendant of a fair trial.

¶ 5 Following the denial of his posttrial motion, defendant was sentenced to 18 months of conditional discharge and ordered to pay a $1,500 fine. This timely appeal followed.

¶ 6 At issue in this appeal is what effect, if any, the State's comments in rebuttal closing argument concerning the uncontradicted nature of the State's evidence had on defendant's right to a fair and impartial trial. Before considering the substance of defendant's argument on appeal, we observe that some of the statements of which defendant now complains were not objected to at trial. To preserve for review an allegedly improper statement that was made during closing argument, a defendant must object to the statement at trial and challenge the comment in a written posttrial

motion. *People v. Wheeler*, 226 Ill. 2d 92, 122 (2007). When a defendant fails to properly preserve allegedly improper statements, a court should focus on the statements to which proper objections were made. *Id.* This does not mean, however, that the alleged improper statements that were not properly preserved are not considered at all. *Id.* Rather, because the entirety of the closing argument must be considered in determining whether the comments were improper, "even statements not properly objected to may add to the context of a remark properly objected to." *Id.* at 123. Thus, we consider all five of the comments defendant brings to our attention in this appeal.

¶ 7 In cases that concern prosecutorial misconduct arising during closing argument, we have recognized that, in resolving such claims, our supreme court has employed both a *de novo* standard of review (*id.* at 121) and an abuse-of-discretion standard (*People v. Blue*, 189 Ill. 2d 99, 128 (2000)). *People v. Robinson*, 391 Ill. App. 3d 822, 840 (2009). Recognizing this disparity, we observed that our supreme court may very well have intended that we apply an abuse-of-discretion standard to the individual remarks and review *de novo* the cumulative effect that all of the remarks had on the defendant's case. *Id.* Resolution of whether that dual standard should be employed can wait for another day, because, under either a *de novo* standard or a more deferential one, we would reach the same result.

¶ 8 We now turn to the substance of defendant's claims on appeal. "Every defendant is entitled to [a] fair trial free from the prejudicial comments by the prosecution." *People v. Young*, 347 Ill. App. 3d 909, 924 (2004). In assessing whether a defendant's right to a fair trial has been infringed, courts employ the same test that they use whenever they apply the second prong of the plain-error test. *Blue*, 189 Ill. 2d at 138. That is, courts consider whether the defendant's right to a fair trial has been affected to such an extent that they cannot confidently assert that the defendant's trial was fundamentally fair. *Id.*

¶ 9 In making closing remarks, a prosecutor is given wide latitude. *Young*, 347 Ill. App. 3d at 924. This includes commenting on the evidence and drawing all legitimate inferences from the evidence, even if those inferences are unfavorable to the defendant. *Id.* This "wide latitude" does not allow a prosecutor to comment on a defendant's failure to testify. *People v. Connors*, 82 Ill. App. 3d 312, 321 (1980). However, the State can comment on the uncontradicted nature of the evidence, even when the defendant is the only person who could have contradicted the State's case. *Id.*

¶ 10 Illustrative of this distinction is *People v. Jones*, 337 Ill. App. 3d 546 (2003). There, in closing argument, the State made six references to the fact that evidence presented in the case was uncontradicted. *Id.* at 550. The defendant objected, arguing that the State was attempting to shift the burden of proof. *Id.* at 551. The trial court overruled the objection, noting that the jury knew the proper burden of proof. *Id.*

¶ 11 On appeal, the defendant argued that the State improperly drew attention to the fact that he did not testify when the State repeatedly indicated that the evidence was uncontroverted or uncontradicted. *Id.* at 553. We disagreed. *Id.* Because the State commented about "what" evidence was uncontradicted, not "who" could have contradicted the evidence, we found the State's comments proper. *Id.* at 553-54.

¶ 12 Here, as in *Jones*, defendant argues that the State's comments were improper because they drew attention to the fact that defendant did not testify. We disagree. All of the comments merely indicated that various aspects of the State's case were uncontradicted. More specifically, the three objected-to comments pointed out that no evidence suggested that anything to which Kinter testified was not detailed in her police report, that no evidence contradicted Kinter's testimony that defendant's car drove outside of the lanes of traffic, and that no evidence contradicted Kinter's

testimony concerning defendant acting belligerent. In none of these statements did the State comment on the fact that defendant did not testify. Given that the State was focusing on "what" evidence was uncontradicted, not "who" could have contradicted the evidence, we find nothing improper in the State's comments.

¶ 13 Even when we consider the two unobjected-to comments and the tenor of the entire rebuttal closing argument, we reach the same result. In the two unobjected-to comments, the State commented that it was uncontradicted that defendant acted belligerent and that defendant could not follow Kinter's instructions regarding the walk-and-turn test. Like the objected-to comments, these comments sought to draw attention to the fact that the State's evidence on these points was not contradicted. The State did not comment on the fact that defendant did not testify. Because the State did not refer to "who" could have contradicted the State's evidence, we find nothing improper in the State's rebuttal closing argument.

¶ 14 Likewise, we find unfounded defendant's ancillary claim that the State's comments were improper because they sought to draw attention to questions defense counsel should have asked on cross-examination. Although making such a reference is improper (see *People v. Edgecombe*, 317 Ill. App. 3d 615, 622 (2000)), the State here never even hinted that the evidence was uncontradicted because of questions defense counsel failed to ask Kinter on cross-examination.

¶ 15 Accordingly, given all of the above, we conclude that the State's comments in rebuttal closing argument did not deny defendant his right to a fair trial.

¶ 16 For these reasons, the judgment of the circuit court of McHenry County is affirmed.

¶ 17 Affirmed.