

2012 IL App (2d) 100718-U
No. 2-10-0718
Order filed January 12, 2012

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

| | | |
|-------------------------|---|-------------------------------|
| THE PEOPLE OF THE STATE |) | Appeal from the Circuit Court |
| OF ILLINOIS, |) | of Kane County. |
| |) | |
| Plaintiff-Appellee, |) | |
| |) | |
| v. |) | No. 06-CF-2716 |
| |) | |
| KIMBERLY A. PETITTI, |) | Honorable |
| |) | Allen M. Anderson, |
| Defendant-Appellant. |) | Judge, Presiding. |

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

ORDER

Held: The State's rebuttal argument was not improper, as the State's comments that the police used proper procedure in arresting defendant were reasonable inferences drawn from the evidence and were invited by defense counsel's suggestion to the contrary.

¶ 1 Following a jury trial, defendant, Kimberly A. Petitti, was found guilty of two counts of driving while under the influence of alcohol (625 ILCS 5/11-501(a)(2) (West 2006)), aggravated battery (720 ILCS 5/12-4(b)(18) (West 2006)), and resisting a peace officer (720 ILCS 5/31-1(a) (West 2006)). Defendant moved for a new trial, arguing that the court erred when it overruled

defense counsel's objection to the State's use of the term "proper police procedure" during the State's rebuttal closing argument. The court denied the motion and sentenced defendant to 24 months of probation, 8 days in jail, and 3 weekends of periodic imprisonment. At issue in this appeal is what effect, if any, the State's comments in rebuttal closing argument concerning the arresting officers following "proper police procedure" in effectuating defendant's arrest had on defendant's right to a fair and impartial 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. At around 7 p.m. on October 20, 2006, Sergeant Brett Wisnauski was dispatched to the parking lot of the On the Border restaurant in Algonquin. When Wisnauski arrived at the scene, he approached defendant, who was the subject of the dispatch. Defendant was sitting in her car with her head down. Wisnauski knocked on the door, and, eventually, defendant looked up and opened her car door.

¶ 3 During Wisnauski's subsequent investigation, defendant refused to stay at the scene, repeatedly yelled profanities at Wisnauski, and swung her purse in what Wisnauski believed was an attempt to hit him. Wisnauski pushed defendant against the front-left quarter panel of his police car and pulled defendant's right arm behind her back so that he could handcuff her. Given defendant's diminutive size and Wisnauski's failure to ratchet the handcuffs enough, defendant slipped out of the handcuffs and continued swinging her arm.

¶ 4 At that point, Wisnauski called for an expedited response from the backup units that were responding to the initial dispatch. Soon thereafter, Officer Misty Mariner arrived on the scene.¹

¹Although both parties refer to Mariner as Officer Misty Leschewski, as that was her name on October 20, 2006, she testified at trial that her name is Mariner. Thus, we will refer to her by that

With Mariner's help, Wisnauski again attempted to handcuff defendant while she was up against the front-left quarter panel of Wisnauski's police car. Because the officers could not gain control of defendant, Wisnauski told Mariner, " 'Let's go to the ground.' " Wisnauski explained that this meant "tak[ing] the suspect to the ground where [the officers would] have more control." Wisnauski decided that defendant needed to be taken to the ground because "[s]tanding up isn't accomplishing anything, we're at a stalemate and so the arrest has to be effected on the ground." Wisnauski explained that "[t]here's two of us, when we go to the ground, we would be on top and that is a commanding position." Wisnauski and Mariner took defendant to the ground, where she was placed in handcuffs. In doing so, Mariner injured her knee and defendant broke her tooth. The officers later saw that defendant's mouth was bleeding.

¶ 5 Mariner confirmed that Wisnauski wanted to take defendant to the ground when he was unable to handcuff defendant while she was standing up. As Wisnauski indicated numerous times during his testimony, Mariner testified that defendant was taken to the ground so that the officers could gain control over her.

¶ 6 In its closing argument, the State indicated that the officers made the decision to take defendant to the ground to arrest her because that was the only way that they could control her. In response, defense counsel argued that defendant was not merely taken to the ground. Rather, defense counsel claimed that defendant was "body slam[med]." Later in his closing argument, defense counsel observed that officers have batons, mace, and other equipment that they could use to control a person. Counsel posited that using these types of methods to control defendant would

name.

have been better than “body slam[ming defendant] on the ground, breaking [her] tooth, making [her] bleed to such an extent that [one is] somewhat concerned about a possible civil suit[.]”

¶ 7 In rebuttal, the State commented seven times about Wisnauski and Mariner following “proper police procedure.” The State first generally indicated that proper police procedure was followed. The State then commented that police follow proper police procedure when they respond to a call about a disturbance, investigate the source of that call when they arrive on the scene, detain a suspect at the scene, and do what they must to effectuate an arrest safely. On one occasion when that term was used, defense counsel objected, arguing that there was no testimony presented regarding what “proper police procedure” is. The trial court overruled the objection, instructing the members of the jury that they should recall the testimony and decide whether the evidence supported the State’s argument.

¶ 8 The jury found defendant guilty, and defendant moved for a new trial, arguing, among other things, that the court erred when it did not sustain defendant’s objection to the State’s use of the term “proper police procedure” during rebuttal closing argument. The trial court denied the motion, defendant was sentenced, and this timely appeal followed.

¶ 9 At issue in this appeal is whether defendant was denied her right to a fair and impartial trial when the State used the term “proper police procedure” during rebuttal closing argument in describing how the officers effectuated defendant’s arrest.² Before considering the substance of defendant’s argument on appeal, we address whether defendant forfeited review of her claim. To

²Although the State used that term to describe several things that Wisnauski and Mariner did, defendant claims on appeal only that it was improper to use that term in reference to describing what occurred when the officers arrested defendant.

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 an allegedly improper statement, a court should focus on the statements to which proper objections were made. *Id.* This does not mean, however, that the allegedly improper statement that was not properly preserved is not considered at all. *Id.* Rather, because the entirety of the closing argument must be considered in determining whether a comment was improper, even statements not properly objected to may be considered, as unobjected-to statements add to the context of a remark to which a proper objection was made. *Id.* at 123.

¶ 10 Here, defense counsel specifically objected at one point during the State’s rebuttal closing argument to the fact that no evidence had been presented at trial indicating what “proper police procedure” was. Because that objection was made, albeit to the use of that phrase in one context, the other times the phrase was used can be reviewed with regard to the context of the argument. See *People v. Beltran*, 2011 IL App (2d) 090856, ¶¶ 59-61. Thus, we consider whether the State’s use of the term “proper police procedure” in reference to the officers arresting defendant was improper.

¶ 11 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 (*Wheeler*, 226 Ill. 2d 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 individual remarks and review *de novo* the cumulative effect that the remarks had on the defendant’s case. *Id.* Resolution of whether that dual standard should be

employed here can wait for another day, because, under either a *de novo* standard or a deferential one, we would reach the same result.

¶ 12 In making closing remarks, a prosecutor is given wide latitude. *People v. Young*, 347 Ill. App. 3d 909, 924 (2004). “A prosecutor has the right to comment upon the evidence presented and upon reasonable inferences arising from that evidence, even if the inferences are unfavorable to the defendant, and may respond to comments made by defense counsel which clearly invite a response.” *People v. Anderson*, 407 Ill. App. 3d 662, 677 (2011). Conversely, the State is not permitted to argue assumptions or facts that are not based upon the evidence. *People v. Porter*, 372 Ill. App. 3d 973, 978 (2007). Improper remarks will not merit reversal unless they were so prejudicial that real justice was denied or that the verdict may have resulted from the error. *People v. Evans*, 209 Ill. 2d 194, 225 (2004).

¶ 13 Here, we determine that the State’s comments that the officers were following “proper police procedure” when they effectuated defendant’s arrest were not improper. First, Wisnauski described in detail how he attempted to detain defendant and put her in handcuffs. He was unable to do so because defendant was combative and belligerent. When Mariner arrived on the scene, Wisnauski, with Mariner’s help, again attempted to handcuff defendant. Because the officers were unsuccessful, Wisnauski decided that they should place defendant on the ground so that they could gain control of her. Wisnauski explained that, in taking defendant to the ground, the officers would be on top of her in a commanding position. Mariner confirmed that defendant was taken to the ground so that they could gain control over her. Given Wisnauski’s testimony, a reasonable inference to draw from the evidence was that, given the circumstances of this case, the officers followed proper police procedure when they took defendant to the ground in order to arrest her.

¶ 14 Second, on more than one occasion, defense counsel characterized the officers' action of taking defendant to the ground as body-slaming her. Defense counsel's statements invited the State's response, which, as noted, was a reasonable inference to draw from the evidence, that the officers were following proper police procedure when they took defendant to the ground to arrest her. Responding in this way was proper. See *People v. Glasper*, 234 Ill. 2d 173, 204-05 (2009).

¶ 15 As an aside, we find unfounded defendant's ancillary claim that using the term "proper police procedure" in describing how defendant's arrest was effectuated bolstered the officers' testimony. With this statement, the State was not implying that, given Wisnauski's and Mariner's status as police officers, they should be believed. Such a comment might indeed be improper. See *People v. Montgomery*, 254 Ill. App. 3d 782, 793 (1993) (court found that "the State unfairly bolstered its witnesses' credibility when it commented several times in closing arguments on their status as prosecutors and police officers and in stating that law enforcement did not work hard to convict the wrong people"). Rather, when the State used this term, it was commenting that, in contrast to defense counsel's assertion that defendant was body-slammed, the officers took defendant to the ground to arrest her because, given her belligerent and combative behavior, that was a proper course of action to take. This type of comment was proper. See *People v. Hammonds*, No. 1-08-0194, slip op. at 57, 63 (May 6, 2011) (in rebuttal, State did not bolster officers' credibility when it asserted that the police had no reason to risk their careers in order to arrest defendant; rather, State was responding to defense counsel's claim in closing argument that the police engaged in police fraud or misconduct).

¶ 16 Because we conclude that the State's comments regarding "proper police procedure" in reference to arresting defendant were not improper, we need not consider whether defendant was prejudiced by the remarks. See *Evans*, 209 Ill. 2d at 225; *People v. Jackson*, 357 Ill. App. 3d 313,

325 (2005) (court did not consider whether comments prejudiced the defendant, because court found that comments were proper in that they were based on the evidence or reasonable inferences to draw from the evidence).

¶ 17 For these reasons, the judgment of the circuit court of Kane County is affirmed.

¶ 18 Affirmed.