

No. 1-13-3194

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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. 12 CR 18335
)	
CORTILLAS HARRIS,)	Honorable
)	Mary Margaret Brosnahan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE JAMES FITZGERALD SMITH delivered the judgment of the court.
Justices Ellis and Cobbs concurred in the judgment.

O R D E R

¶ 1 *Held:* We affirm defendant's conviction for possession of cocaine where the State's remarks in rebuttal closing argument were invited by the defense and did not improperly bolster the credibility of its police officer witness.

¶ 2 Following a jury trial, defendant Cortillas Harris was convicted of possession of less than 15 grams of cocaine and sentenced to four years in prison. On appeal, defendant contends he was denied a fair trial where the State improperly remarked during rebuttal closing argument that a police officer witness would not jeopardize his career and future by testifying falsely. We affirm.

¶ 3 At trial, Officer David Appel testified that he and his partner were driving on Roosevelt Road in Chicago, in the lane nearest the sidewalk, at 2:30 p.m. on September 2, 2012. Appel, who was in the passenger seat, saw defendant outside a building at 3551 West Roosevelt and heard him say "rocks, rocks," which Appel understood as an attempt to sell crack cocaine. At that time, the squad car was 25 to 40 feet away, approaching at 15 miles per hour in heavy pedestrian and vehicular traffic. Appel's shoulder radio was on and his window was down but no loud music came from other vehicles. Nothing obstructed Appel's view of defendant, who was 10 feet from the nearest pedestrian. The officers waited for several pedestrians to pass before pulling into the apron of a parking lot. Defendant made eye contact and walked around the front of the car, where Appel arrested him and began a custodial search. Appel did not see any bulges in defendant's clothes. During the search, a group of people approached from the parking lot, which belonged to a church that housed the homeless and mentally ill. Appel had responded to disturbances there and recognized some of the individuals as possibly having mental illness. He did not feel safe, so the officers brought defendant to the police station, where Appel resumed the custodial search. In the right side lining of defendant's waistband, he found a potato chip bag containing 10 small zip baggies holding a white chunky substance. He also found \$158, which was returned to defendant. The money was not subjected to a canine sniff and the bags were not tested for fingerprints.

¶ 4 On cross-examination, Appel denied seeing defendant engage in hand-to-hand transactions, accept money from anyone, or have anything in his hands. Defense counsel introduced prior testimony where Appel stated that three people loitered near a store located between himself and defendant as the squad car approached. Defense counsel also challenged Appel regarding when his shift began, as Appel initially stated that he started working at 3:30

p.m., one hour after defendant was arrested. Appel explained that his start time rotates between 2 p.m., 3:30 p.m., and 5 p.m., so that he actually began work at 2 p.m. on the day of the arrest.

¶ 5 Penny Weinstein, a forensic scientist with the Illinois State Police, testified that the white rocky substance in the bags recovered by Appel was 1.09 grams of cocaine. The potato chip bag and zip baggies were entered into evidence, along with three photographs of the scene of the arrest and defendant's booking photograph.

¶ 6 Before closing arguments, the trial court instructed the jury that arguments are not evidence and that "if any of the lawyers misspeak or misrepresent any of the testimony that you heard with your own ears here on the witness stand, you simply disregard it." The court also said that "[o]nly you are the judges of the believability of the witnesses" and that closing arguments are "confined to the evidence, and to reasonable inferences to be drawn from the evidence."

¶ 7 During closing argument, the State reviewed Appel and Weinstein's testimony and argued the evidence established that defendant possessed cocaine. Defense counsel also reviewed Appel's testimony but argued that defendant's behavior was innocuous and the officers "made up a story" after taking him to the police station. Counsel questioned whether Appel could hear defendant when the officer was in a vehicle, surrounded by ambient noise, and contended it was implausible that defendant would solicit drugs near a marked squad car. Counsel asked why Appel did not find the drugs in defendant's waistband during the initial search, and noted that Appel contradicted himself regarding when his shift began, whether the scene of the arrest was crowded with pedestrians, and whether a store was situated between the officers and defendant. Counsel also remarked on the lack of forensic evidence and then stated:

"[T]he officer's testimony in and of itself was just not credible. You know we talked yesterday about how officers, their credibility is to be weighed the same as

any other witness. They don't get a pass on credibility just because they where [sic] a badge, they are human beings, they lie. And it's your job to judge his credibility based on your common sense and experience in the world.

What do liars do? They don't answer questions when they're asked. I asked a question at the very end of my cross-examination, I asked him: Were there people that approached you when Mr. Harris was in handcuffs when you patted him down? Yes, they were all mentally ill. These officers, they're not independent observers, they're not usual witnesses, they're bias [sic]. They have a side in this fight. They are against Mr. Harris. And they're testifying to things that aren't true so that you will convict Mr. Harris, even though he's innocent.

*** The officer is not neutral, he's trying to get a result in this case. And he's doing it by lying to you. But you were watching him[,] I know that you were able to judge his creditability and taking into account the things he said, and the things he didn't say. And the way he answered the questions.

The story the police is [sic] telling you doesn't make sense. It's not true, that's why it doesn't make sense. And we are asking you to please do the right thing, think about what you heard, judge the credibility of that witness like you would any other witness. He's lying to you ladies and gentlemen, don't let him get away with it. In life they're [sic] consequences, and they're [sic] rules that we follow in the world. When you take the oath and swear to tell the truth, you should tell the truth, if you don't they're [sic] consequences. And for that officer there should be consequences."

The State objected to this last statement, and the trial court sustained the objection.

¶ 8 In rebuttal closing argument, the State told the jury that defendant, not Appel, was on trial and that the evidence was uncontroverted. The following exchange then occurred:

"[Assistant State's Attorney]: Cortillas Harris, basically what they want you to believe was framed for this offense. They're asking you to believe that a Chicago police officer got on the stand and concocted this entire story.

[Assistant Public Defender]: Objection.

THE COURT: Overruled.

[Assistant State's Attorney]: And made up that planted evidence to convict—to get a result as you want to say—for Cortillas Harris. That's outrageous and that is insulting to the Chicago Police Department, and to the Chicago Police Officer David Appel. Officer Appel saw this defendant on that bright afternoon, and he saw him and he heard him."

The State then argued that defendant chose to solicit drugs in a busy area but that nothing prevented Appel from hearing defendant, who approached the officers in an attempt to appear casual. The following exchange then occurred:

"[Assistant State's Attorney]: So going back to this whole framing of Cortillas Harris—so this officer is going to jeopardize his career, his future—

[Assistant Public Defender]: Objection

THE COURT: Overruled.

[Assistant State's Attorney]: —over 1.09 grams of cocaine. Now if this officer had a grand plan to go pluck Cortillas Harris off the street—and I'm surprised they're even conceding he was out there, maybe that's a lie too, maybe Cortillas Harris wasn't even out there. But so they're going to go arrest him and

they're going to say: Let's not just get one bag, let's get ten bags, let's package ten small little bags of crack cocaine, put them in a chip bag, and we are going to plant these on Cortillas Harris, but we are going to wait until we get to the police station to do it, not on the scene. That is outrageous. These are the little truth detectors."

The State further argued that defense counsel attempted to confuse Appel while questioning him about the location of stores near the scene of the arrest, and contended that Appel's mistake regarding the time his shift started was inconsequential. The State also argued that forensic evidence was unnecessary because the drugs were found on defendant.

¶ 9 Defense counsel moved for a mistrial after closing arguments, claiming that the State improperly bolstered Appel's credibility by suggesting he would not risk his career for 1.09 grams of cocaine. The trial court denied the motion, finding the State's remark "was an invited comment" in view of defense counsel's claim that Appel had "lied and framed this defendant."

¶ 10 The jury found defendant guilty of possession of a controlled substance. Defendant filed a motion for a new trial, arguing that he was prejudiced by the State's rebuttal closing argument. The trial court denied the motion, finding that the State's rebuttal was appropriate in view of defense counsel's closing argument. The court stated:

"[T]he defense went so far as to say there should be consequences for the officer because of the lie, and basically the case is put on the defense so, basically, based upon that argument and how it went down, I think the State's rebuttal comments were appropriate insights and allowable under the case law and the facts of this particular case."

The court proceeded to impose a sentence of four years in prison.

¶ 11 On appeal, defendant contends that he was denied a fair trial where the State improperly bolstered the credibility of its primary witness during rebuttal closing argument by suggesting that Officer Appel would not risk his career or future over a small amount of narcotics, despite no evidence in the record to support this claim. Defendant argues that the prejudicial effect of this comment was amplified because it occurred in rebuttal and over the objection of defense counsel. Defendant urges that these comments prejudiced his case and require reversal.

¶ 12 Initially, we note that defendant preserved this issue for review by objecting at trial and filing a written posttrial motion. *People v. Johnson*, 218 Ill. 2d 125, 138 (2005). Therefore, the State has the burden of showing that an improper remark was harmless error. *Id.* at 141-42. However, we must first determine whether any remark by the State was actually improper, and only then consider whether the improper remark was harmless. *Id.* at 141. For the reasons that follow, we find that the State's remark was not improper and any error was harmless.

¶ 13 The standard of review for remarks made by the State during closing argument is unsettled. In *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007), our supreme court suggested that we review this issue *de novo*. However, *Wheeler* cited with approval other decisions suggesting that the standard is abuse of discretion. *Id.* at 123 (citing, *e.g.*, *People v. Caffey*, 205 Ill. 2d 52, 128 (2001)). Since *Wheeler*, appellate courts have been divided regarding the standard of review. The first and third divisions of the First District have applied an abuse of discretion standard, while the Third and Fourth Districts and the fifth division of the First District have applied a *de novo* standard. Compare *People v. Love*, 377 Ill. App. 3d 306, 313 (1st Dist., 1st Div. 2007), and *People v. Averett*, 381 Ill. App. 3d 1001, 1007 (1st Dist., 3d Div. 2008), with *People v. McCoy*, 378 Ill. App. 3d 954, 964 (3d Dist. 2008), *People v. Palmer*, 382 Ill. App. 3d 1151, 1160 (4th Dist. 2008), and *People v. Ramos*, 396 Ill. App. 3d 869, 874 (1st Dist., 5th Div. 2009). We need

not take a position, as defendant's claim fails under either standard. *People v. Daniel*, 2014 IL App (1st) 121171, ¶ 32.

¶ 14 Prosecutors are afforded wide latitude in closing arguments and may comment on the evidence and any fair, reasonable inferences it yields. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). Prosecutors may not argue assumptions or facts not contained in the record. *Id.* However, a closing argument must be viewed in its entirety and the challenged remarks must be viewed in their context. *Id.* Arguments by the State will not be held improper if they were provoked or invited by the defendant's argument. *Id.* The invited response doctrine only excuses an improper remark where the provoking statement was also improper. *People v. Gorosteata*, 374 Ill. App. 3d 203, 221-22 (2007). Further, the response must be proportionate to the initial error. *Id.* at 222.

¶ 15 In *People v. Adams*, 2012 IL 111168, ¶¶ 16, 20, our supreme court determined it was improper for a prosecutor to state, during closing arguments or rebuttal, that police officers should be believed because they would not risk their credibility, jobs, or freedom by lying under oath. As the court explained, the comments were impermissible speculation because no evidence was introduced at trial from which it could be inferred that the officers would risk their careers if they testified falsely. *Id.* at ¶ 20. Also, such comments constitute improper vouching and violate the principle that the State may not argue that a witness is more credible because of his status as an officer. *Id.*

¶ 16 Turning to the present case, we find that the State's remarks in rebuttal closing argument were not improper, but rather, were invited by defense counsel's accusation that Appel committed perjury. Defense counsel told the jury that Appel and his partner "made up a story" after taking defendant to the police station, and further stated that "[w]hen you take the oath and swear to tell the truth, you should tell the truth, if you don't they're [*sic*] consequences." These

comments were improper because nothing in the evidence supported the inference that the officers conspired against defendant or that Appel lied under oath. *People v. Hudson*, 157 Ill. 2d 401, 445 (1993) (closing arguments challenging witness credibility must be "based on the evidence or inferences drawn from it"). In direct response to defense counsel's accusation, the State asked during rebuttal closing argument whether Appel would jeopardize his career and future over 1.09 grams of cocaine. Unlike in *Adams*, however, this comment did not vouch for Appel's credibility based on his status as a policeman. *Adams*, 2012 IL 111168, ¶¶ 16. Rather, the State asked the jury to consider the plausibility of defense counsel's accusation, given that any witness would risk his future by testifying falsely and no evidence suggested that Appel actually committed perjury. *People v. Cloutier*, 156 Ill. 2d 483, 508-09 (1993) (proper for State to comment on implausibility of defendant's theory of the case); *People v. Watkins*, 220 Ill. App. 3d 201, 208 (1991) (defense counsel's theory that police planted drugs to frame defendant invited response from State). Viewing the closing arguments in their entirety, the State's remark was invited by defense counsel and proportionate to defense counsel's own improper comment. *Gorosteata*, 374 Ill. App. 3d at 221-22. Because the State's remark was not improper, no error occurred.

¶ 17 Even assuming, *arguendo*, we were to find the State's remark improper, any error was harmless and immaterial to the verdict. *Wheeler*, 226 Ill. 2d at 123. An improper remark is material if the jury could have reached a contrary verdict had the remark not been made. *Id.* The trial court may cure prejudicial remarks through proper instructions and by informing the jury that closing arguments are not evidence. *People v. Willis*, 409 Ill. App. 3d 804, 814 (2011). We evaluate the State's comments according to the language used, its relation to the evidence, the effect of the argument on the defendant's right to a fair trial, and whether the comments were

brief and isolated. *People v. Runge*, 234 Ill. 2d 68, 142 (2009); *People v. Simms*, 192 Ill. 2d 348, 396 (2000).

¶ 18 Viewed in the context of closing arguments as a whole, the challenged remark from the State did not materially contribute to defendant's conviction. Immediately before closing arguments, the trial court instructed the jury that arguments are not evidence and any statements not based on the evidence should be disregarded. *Willis*, 409 Ill. App. 3d at 814 (impact of improper rebuttal was “greatly diminished” by court's instructions, which carry more weight than counsel's arguments). Further, although the trial court overruled defense counsel's objection, the State did not make the improper remark a central or recurring theme in its argument. *Gorosteata*, 374 Ill. App. 3d at 210, 226 (State improperly suggested that police would not lie but comments were minor and transitory). Instead, the remark was brief and isolated in the context of a rebuttal argument that was otherwise lengthy and proper. *People v. Nicholas*, 218 Ill. 2d 104, 123 (2005) (improper remarks “did not add their weight to a cloud of prejudice formed by a wider array of prosecutorial misconduct”); *Johnson*, 218 Ill. 2d at 142-43 (no reversible error where improper comments amounted to only a few lines of the State's 15-page transcribed argument).

Additionally, our supreme court and this court have found that this particular challenged statement, though improper, is not of a sort likely to inflame the passions of the jury so as to constitute reversible error. *Adams*, 2012 IL 111168, ¶ 23; *People v. Davis*, 228 Ill. App. 3d 835, 841 (1992) (State's remark that officers would not risk careers to frame defendant “did not unfairly play upon the jury's sympathies” where defendant’s trial strategy was to make the credibility of the officers a dispositive issue). We also note that, although Appel was the State's only occurrence witness, the inconsistent testimony about the time he started his shift and the location of stores near the scene of his arrest did not destroy his credibility. *Gorosteata*, 374 Ill.

App. 3d at 225-26 (improper comments did not require reversal where no officers were effectively impeached and contradictions largely focused on secondary matters). On reviewing the closing arguments and rebuttal closing argument, we cannot say that defendant's verdict would have been different had the State not made the challenged remark.

¶ 19 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 20 Affirmed.