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2015 IL App (3d) 130283-U

Order filed June 3, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois.
Plaintiff-Appellee,)	
v.)	Appeal No. 3-13-0283
JONATHAN TAYLOR,)	Circuit No. 12-CF-440
Defendant-Appellant.)	Honorable Stephen Kouri, Judge, Presiding.
)	

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Lytton and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* A prosecutor's statements in rebuttal closing argument in reference to an exhibit admitted at trial, to the extent they were comments on facts not in evidence that related to the defendant's alibi defense, did not require a reversal of the defendant's aggravated robbery conviction because there was no prejudice where the trial court gave a cautionary instruction and the improper remarks did not constitute a material factor in the defendant's conviction. Also, the trial court's reference to the victim's status as a middle-aged woman was not a gender-based stereotype but a reference to the nature and circumstances of the offense. Remand for the proper imposition of mandatory fines and fees was necessary.

¶ 2 The defendant, Jonathan Taylor, was convicted of aggravated robbery (720 ILCS 5/18-5(a) (West 2012)) after a jury trial and sentenced to 15 years' imprisonment. The defendant appealed.

¶ 3 **FACTS**

¶ 4 The defendant was charged by indictment with armed robbery and aggravated robbery for allegedly taking money from the person or presence of Annie Sanders on April 8, 2012. During the jury trial, Sanders testified that she was the assistant manager for the Circle K gas station on April 8, 2012, and one of her jobs was to take the money from the previous day to the bank. Since it was Easter Sunday, Sanders was going to take the money to the bank on her way home and put it in the night deposit. On that day, Sanders was scheduled to work until noon, but she stayed a little later waiting for an employee, Jessica, to arrive. When Sanders left the Circle K, she put the money to be deposited, over \$8,000, in the sleeve of her jacket, which she had over one arm. She walked out to her car, which was parked by the dumpsters to the left of the building. While she was unlocking her car, two young men approached her from the dumpster area. Sanders testified that one of the young men, wearing a black hoodie, took a gun from the front of his waist and pointed it at her. Sanders tried to go back to the store, but the young man in the black hoodie threw her down on the ground and held her down, with the gun in her face. The other young man, wearing a gray hoodie, went through her purse and said, "It's not there." The young man in the black hoodie took Sanders' jacket, with the cash envelope, and both young men ran off. Sanders identified the defendant as the young man in the black hoodie.

¶ 5 Detective Steven Garner of the City of Peoria was assigned to investigate the incident. He arrived at the Circle K and spoke with Sanders. Through his investigation, Garner identified the defendant as a possible suspect. He put together a photo lineup and showed it to Sanders.

Sanders identified the defendant. The defendant was taken into custody, and Garner questioned him. The defendant told Garner that he had been the boyfriend of Jessica, the employee that arrived late to the Circle K.

¶ 6 Terrance Bradley testified for the defense. Bradley appeared in court in his jail uniform; he acknowledged several felony convictions. Bradley testified that he was related to the defendant through his step-father and had known him since 2003 or 2004. Bradley testified that on April 8, 2012, he was at his mother's house. His telephone had been lost, but his mother, Carol Bradley, had a telephone, with the number 232-0885. Bradley testified that he called the defendant from his mother's phone on April 8, sometime around 10 or 11 in the morning. The defendant's phone number was 621-1491. They were trying to get together that day, and the defendant called Bradley back around noon.

¶ 7 Amy Carroll, an employee of U.S. Cellular, also testified for the defense. She was delivering to court the subpoenaed records of Carol Bradley. She identified Bradley's U.S. Cellular number as 309-232-0885. Carroll testified that at 10:33.48 on April 8, 2012, Bradley's number dialed the defendant's number. On that same date, at 11:59.39, the defendant's number called Bradley's number. Again, at 12:14.53, the defendant's number called Bradley's number.

¶ 8 Jean Rodriguez testified for the defense. She also had a number of felony convictions. Rodriguez testified that she was friend of the defendant, and he came over to her house on Easter weekend 2012. He came to her house on Friday night and stayed until Sunday morning. She testified that the defendant got a telephone call on his cell phone between 11 and 11:30 on Sunday morning, and he left her home around 1:30 in the afternoon. She did not have a landline.

¶ 9 In rebuttal, Detective Garner testified that when he questioned the defendant, he asked the defendant what he did on the day of the robbery. The defendant told Garner that he was at

Angela Wilson's, his girlfriend's, house alone until around 3 p.m. The defendant never mentioned being at Rodriguez's home.

¶ 10 During closing, the prosecutor addressed the two key issues in the case: Sanders's identification of the defendant and whether the defendant actually had a firearm. Defense counsel then addressed those two issues, in addition to the alibi testimony. On rebuttal, the prosecutor started to argue regarding the column entitled "Call Type" in Bradley's telephone records. The prosecutor argued that the "M" and "L" designations in that column indicated mobile and landline. Defense counsel objected. The trial court overruled the objection, but instructed the jury that it was strictly argument and up to them to determine what the evidence was. The prosecutor went on to argue that the "L" by the defendant's number indicated landline, but that Rodriguez testified that she did not have a landline. At that point, the trial court reconsidered its ruling and decided not to allow the argument. The trial court told the jury that there was no evidence from the witness stand to support what the M and L mean, so the prosecutor was not allowed to argue it.

¶ 11 The jury found the defendant guilty of both armed robbery and aggravated robbery. However, the jury also found that the allegation that during the commission of the offense of armed robbery that the defendant was armed with a firearm was not proven. The defendant moved for a new trial, arguing, *inter alia*, that there was insufficient evidence to sustain the jury's finding of guilty of armed robbery because the use of firearm was not proven and the defendant was prejudiced by the prosecutor's argument regarding the telephone records. The trial court granted the motion as to the armed robbery count, and denied the remainder of the motion. The cause proceeded to sentencing on the aggravated robbery count.

¶ 12 At sentencing, the prosecutor argued that three factors in aggravation were applicable: the defendant's extensive prior criminal history, the nature of the aggravated robbery, and the need for deterrence. Defense counsel argued in mitigation that the defendant was mentally handicapped and he did not have a history of violent felonies as an adult. In sentencing the defendant to the maximum of 15 years, the trial court stated that it would have given the defendant at least 10 years even without his criminal history due to the nature of the offense. The victim was a middle-aged female working on Easter Sunday, who was thrown to the ground and the defendant pinned her down and robbed her. The trial court stated, "That's the weakest, one of the weakest classes in our society, and I don't understand." In denying the defendant's motion to reconsider his sentence, the trial court clarified that his reference to a middle-aged lady was just a reference to the defendant preying on those weaker than he. The trial court's order indicates that a judgment was entered against the defendant for costs, but did not specify the amount or type of any fines or fees. A later case payments sheet indicates monetary assessments in the amount of \$1,449.50. The defendant appealed.

¶ 13 ANALYSIS

¶ 14 The defendant argues that the prosecutor's statements in rebuttal closing argument were so prejudicial that a new trial was required. The State argues that the trial court's instructions were sufficient to cure any error. Whether improper statements made at closing argument are so egregious as to warrant a new trial is a legal issue that is subject to *de novo* review. *People v. Wheeler*, 226 Ill.2d 92, 121 (2007).

¶ 15 The prosecutor is afforded wide latitude in his closing argument and allowed to argue all reasonable inferences from the evidence. *People v. Nieves*, 193 Ill. 2d 513, 532-33 (2000); *People v. Wheeler*, 226 Ill. 2d at 123. However, it is improper for a prosecutor to argue

inferences or facts not based upon the evidence in the record. *People v. Johnson*, 208 Ill. 2d 53, 115 (2003). Typically, a timely objection and an instruction to the jury to disregard the improper evidence are sufficient to cure the error. *People v. Wolf*, 178 Ill. App. 3d 1064, 1067 (1989). However, sometimes the prejudicial effect of inadmissible evidence cannot be cured by the cautionary instruction. *Id.* But, even if there were improper remarks, misconduct in closing argument warrants a new trial only if the improper remarks constituted a material factor in a defendant's conviction. *Wheeler*, 226 Ill. 2d at 123. In reviewing a prosecutor's closing argument, the reviewing court asks "whether or not the comments engender substantial prejudice against a defendant such that it is impossible to say whether a verdict of guilt resulted from the comments." *People v. McCoy*, 378 Ill. App. 3d 954, 964 (2008) (citing *Wheeler*, 226 Ill.2d at 123).

¶ 16 The defendant argues that the prosecutor's rebuttal closing argument was not based upon the evidence admitted at trial nor reasonable inferences from such evidence. Since it struck at the heart of the defendant's alibi defense just before deliberations, the defendant argues that it cannot be said that it did not contribute to the defendant's conviction. The phone records were relevant to the defendant's alibi, in that the prosecutor argued that the L by the defendant's number indicated a landline, although Rodriguez, the defendant's alibi witness, had testified that she did not have a landline. However, the trial court instructed the jury to disregard any argument regarding M and L, and the prosecutor made no further argument on the issue after that.

¶ 17 The prosecutor argued an inference from the telephone records, which were properly admitted into evidence. However, there was no evidence offered regarding the call type or the M and L designations contained in the telephone records, so the trial court instructed the jury to

disregard the argument. A jury is presumed to follow the instructions that the trial court gives it. *People v. Taylor*, 166 Ill. 2d 414, 438 (1995). In any event, after reviewing the record, we find that any improper remarks by the prosecutor regarding the telephone records did not constitute a material factor in the defendant's conviction. The defendant's alibi defense was already weak, in that his alibi witnesses had been impeached with their felony convictions and Rodriguez's testimony directly contradicted the defendant's own alibi statements to the police. Thus, a new trial is not warranted, and we affirm the defendant's conviction.

¶ 18 The defendant argues that he is entitled to a new sentencing hearing because the trial court improperly relied on a gender-based stereotype, specifically, that middle-aged women are weak, as an aggravating factor when sentencing the defendant. The State argues that the trial court properly considered the nature and circumstances of the offense, so the sentence should be affirmed.

¶ 19 Generally, a sentencing judge has broad discretion in imposing a sentence within the applicable sentencing range. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). However, the question of whether the court relied on an improper factor in imposing the sentence is a question of law, which we review *de novo*. *People v. Mauricio*, 2014 IL App (2d) 121340, ¶ 15. In determining the appropriate sentence, a trial judge may consider the seriousness, nature, and circumstances of the offense. *People v. Dowding*, 388 Ill. App. 3d 936, 943 (2009). When determining whether the sentencing judge relied on improper aggravating and mitigating factors, this court must consider the record as a whole and must not merely focus upon a few words or statements that were made by the sentencing judge. *People v. Holman*, 2014 IL App (3d) 120905, ¶ 67. It is the defendant's burden to affirmatively establish that the sentence imposed was based upon improper considerations. *Id.*

¶ 20 When imposing the defendant's sentence, the trial court stated that it would give the defendant a sentence of 10 years just due to the nature of the offense, even without the defendant's extensive criminal history. The court described the nature of the offense as being an attack on a middle-aged woman on Easter Sunday, knocking her to the ground and robbing her. On reconsideration, in response to the argument that it relied on an improper factor, the trial court clarified that its comments referred to the defendant preying on someone weaker than himself. We find that the trial court's reference to the victim as a middle-aged woman was a proper reference to the nature and extent of the crime. See *People v. Andrews*, 2013 IL App (1st) 121623, ¶ 16 (a trial court's reference to a victim's handicap in sentencing a defendant for aggravated battery was not a reference to an improper aggravating factor but rather a reference to the nature and extent of the crime and the defendant's propensity to prey on vulnerable victims). Finding no improper aggravating factor, and no abuse of discretion, we affirm the defendant's sentence. Since there was no error, there are no grounds for ineffective assistance of counsel.

¶ 21 As a final matter, the defendant argues that we should vacate the monetary assessments imposed against him and remand for a proper entry of an order assessing the appropriate fines and fees, including the statutory \$5 *per diem* credit against creditable fines. The State agrees that remand is appropriate. Thus, we vacate the monetary assessments and remand the case to the trial court for the proper imposition of mandatory fines and fees, including the application of the \$5-per-day credit pursuant to section 110-14 of the Code of Criminal Procedure (725 ILCS 5/110-14 (West 2012)).

¶ 22 CONCLUSION

¶ 23 The judgment of the circuit court of Peoria County is affirmed in part, vacated in part, and remanded with directions.

¶ 24

Affirmed in part and vacated in part; cause remanded with directions.